Neutral Citation No: [2020] NICh 8 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McF11263** ***Delivered:*** **24/04/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2017 No 122509

IN THE MATTER OF CAMDEN GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

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BETWEEN:

BRIAN LAVERY

PETITIONER

-and-

KIERAN LAVERY

RESPONDENT

_____

His Honour Judge McFarland
Recorder of Belfast
Sitting as a High Court Judge

Background

[1] This case concerns a family run business – Camden Group Limited ("Camden"). Brian Lavery ("the Petitioner") and Kieran Lavery ("the Respondent") are brothers and each hold 50% of the issued share capital of Camden, a limited liability company registered in Northern Ireland. Camden is primarily involved in the manufacture of polyvinyl chloride windows and doors. Its full business interests, and the interests of associated companies and the partnership interests of the Petitioner and the Respondent are set out in paragraphs [5]–[10] below. The case was heard over a number of days towards the end of 2019, and at the conclusion of the evidence, written submissions were received from both parties. A preliminary decision on the issue of publicity was given at the early stages of the hearing, and that is set out in the Annex to this judgment. I would like to place on record my

appreciation and thanks to all the legal representatives, Mr Nicolas Hanna QC and Mr Jonathan Park instructed by Carson & McDowell for the Petitioner, Mr David Casement QC and Mr Rory Donaghy instructed by Cleaver Fulton & Rankin for the Respondent. Without their collective diligence and industry, which included the daily provision of a transcript of the previous day's proceedings, this case would have been much more difficult to manage and determine.

[2] Camden had been incorporated by the father of the Petitioner and the Respondent in 1983. The Respondent later went into the business after leaving school and in due course his father gifted a minority shareholding to him. The Petitioner attended third level education studying accountancy and then joined the business. In 1999 the father gifted his shareholding to his sons so that each ended up with a 50% share of the issued share capital. After he had handed over control of Camden, the father remained connected to Camden, worked there and provided advice and guidance up until his death in 2013. Two other brothers are employed by Camden and it was, and remains, very much a family business.

[3] There was rapid expansion during the economic boom of the early 2000s and Camden moved from producing 300 windows and doors per week to producing in excess of 10,000 per week. These were heady days, everyone was busy making windows and the money flowed in. Credit facilities were not really required but when sought were readily available. Like many family companies caught up in the same environment the Camden structure was not adapted to meet the rapidly changing scene. It remained a two shareholder company with the same two directors, the Respondent the managing director and the Petitioner the finance director. No formal board of director meetings appear to have been ever convened and there were never any formal general meetings of Camden. Decisions were made on the spur of the moment. Problems, when they arose, were quickly solved by one of the brothers sometimes after consultation with the other. When the world eventually woke up to the realities of the true economic situation towards the end of the 2000s and the Celtic Tiger, which had fuelled the massive building boom on this island, was slain, Camden, as a supplier to the building industry, was particularly badly hit. When money had been plentiful, there had been several ill-advised ventures, some related to the core business and others not. The Ulster Bank had made some very questionable loans to fund some of these ventures, and Camden was saddled with significant debt. The Petitioner and the Respondent had also accumulated personal debt on loans, and had entered into personal commitments to Ulster Bank, guaranteeing Camden's debt.

[4] With the dawn of the new decade, Camden and the associated ventures were not in a very good financial state.

[5] It would be useful, at this stage, to set out in detail the full extent of the Camden structure as well as the associated company and family undertakings. Camden operates the principle business of manufacture of doors and windows. Its share capital is owned jointly by the Petitioner and the Respondent in equal shares.

Camden has a 100% holding in Camden Glass Limited, which in turn owns K McAnallen (Safety Glass) Limited and K McAnallen (Aluminium) Limited, although no assets are held by these companies, and each is dormant.

[6] The Petitioner and the Respondent also each have a 50% shareholding in a number of associated companies – Sedanmore Limited, LM Innov8s Limited, Ingleford Developments Limited, and Marble Insurance Limited. LM Innov8s Limited was a research vehicle in relation to Camden products and has no direct relevance to this case. Sedanmore Limited ran the business of hoteliers out of the White River Hotel in Toomebridge. Ingleford Developments Limited owned land at Steeple Road in Antrim (known as Factories 2 and 3) and it leased the factories to Camden. Marble Insurance Limited is an insurance company registered in Guernsey, and it provides insurance cover for the Camden operation. It was set up primarily to allow Camden to influence the approach to be taken in relation to dealing with claims against it.

[7] There were also two other related legal entities – a land owning partnership and a pension fund. The Petitioner and the Respondent were in partnership on a 50% basis in the ownership of land, some of which was leased to Camden. For convenience I will call this partnership the "Partnership". The Partnership owned a number of properties - Land at Steeple Road, Antrim (known as factories 1, 4 and 5); land in Antrim known as the Daewha Factory; land in Antrim known as the Daewoo Factory; a factory site in Northampton; and agricultural land at Moneymore (County Derry) and Moneynick (Randalstown, County Antrim). Factories 1, 4 and 5 Steeple Road, Antrim, the Daewha factory, the Daewoo Factory and the Northampton site were all leased by the Partnership to Camden.

[8] The Petitioner and the Respondent also have a pension fund (not connected to their employment in Camden Group Limited) organised under a SSAS (small self-administered scheme), the trustees of which were the Petitioner, the Respondent and a professional pension trustee company. The SSAS owns the land at the White River Hotel in Toomebridge, and rented the land to Sedanmore Limited.

[9] Camden at one stage purchased the McAnallen companies (referred to in [5] above) in Benburb, County Tyrone, and integrated their business into Camden, with Camden acquiring direct ownership of the factory site in Benburb.

[10] In summary, Camden operated its business from various sites. Camden owned the Benburb site. Ingleford Developments Limited owned two factory sites at Steeple Road. The Partnership owned the remaining three factory sites at Steeple Road, the Daewha site, the Daewoo site and the Northampton site.

[11] The Petitioner seeks relief under section 994 of the Companies Act 2006. He claims that by virtue of the Respondent's conduct, the affairs of Camden are being conducted in a manner that is unfairly prejudicial to his interests as a member of Camden. In broad terms he alleges that the Respondent has refused to attend

meetings, has absented himself from the business, when he has attended the business he has caused disruption and has delayed and in some cases refused to sign documents. The Petitioner further claims relief from the court, primarily a direction to the Respondent that he sell his shareholding to the Petitioner.

The Law

[12] The protection of a member, or members, of a company was initially provided by section 201 of the Companies Act (NI) 1960. That section permitted the court to make an order should it be shown that the affairs of the company were being "exercised in a manner oppressive to him … or in disregard of his proper interests as a member". The court's jurisdiction was refined by Article 452 of the Companies (NI) Order 1986, which has now been re-enacted into section 994 of the Companies Act 2006. That section provides for the intervention by the court if it is shown, either:

> *"(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*
>
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."*

(In this judgment a reference to a section relates to a section of the Companies Act 2006).

[13] The remedy has often been referred to as a protection of minority rights although it is not necessary for any petitioner to have a minority holding. However, a majority shareholder is more likely to be able to exercise a degree of control of a company so as to avoid prejudice to his, her or its interests. The court is also unlikely to grant relief if it is within the power of a petitioner to remove any prejudice that the petitioner is suffering.

Pleadings

[14] Before dealing with the law as it applies to section 994, it is necessary to consider a preliminary point raised by the Respondent, namely the lack of particularity and actual pleading in the case. The Petitioner's case is contained in the Petition and various affidavits filed in the matter. In *Re Unisoft Group Limited (No 3)* [1984] 1BCLC 609 Harman J made some general observations about the pleadings in cases of this type. He said that the Petition is not a formal pleading, but in the English practice the 'Points of Claim' document (and a 'Points of Defence' document in response) were to be regarded as pleadings. At that time, the practice in England had largely been adapted from the Commercial Court. The rules appear to have been then formalised in the Companies (Unfair Prejudice Applications) Proceedings

Rules 1986, which were replaced by similar Rules bearing the same title in 2009. Northern Ireland does not have any Rules or procedure dealing with cases of this type and we rely on Practice Directions and individual directions given by judges in case management decisions.

[15] In *Unisoft Group* Harman J at 615i stated:

> *"The point of pleadings is not, of course, to win a game of skill … The point of pleadings is to give warning to the other side of what is to be said against them, so that they may prepare themselves with documents and evidence to deal with those allegations. If parties to proceedings do not know the precise and detailed charges they are going to meet, they cannot fully and properly defend themselves. That can lead to grave and serious injustice"*

I am prepared to take a reasonably relaxed view of this issue. Northern Ireland does not have a focussed regime with regard to the required documentation. What is essential is that the parties are clearly aware of the specific nature of any allegation and any response to that allegation, and have sufficient time to deal with the allegations should they be disputed. Exchange of 'Points of Claim' and 'Points of Defence' documents could be adopted, but it is a matter for appropriate case management decisions in individual cases. If, the allegations and counter-allegations, and responses to such allegations, are clearly set out in the Petition, and supporting affidavits and replying affidavits, that should be sufficient as far as I am concerned. In the circumstances, I am satisfied that the case against the Respondent has been properly 'pleaded', not in its technical sense, but in a practical sense.

[16] It may be desirable that petitioners consider the regime suggested in the 2009 Rules (SI 2009 No 2469), with the petition following the form set out in the Schedule to the Rules with such variations as the circumstances require, and specifying the grounds on which it is presented and the nature of the relief which is sought.

The parties should then be in a position to prepare for any case management issues and these could generally follow the areas referred to in Rule 5:

> ***"5.*** *On the return day, or at any time after it, the court shall give such directions as it thinks appropriate with respect to the following matters –*
>
> *(a) service of the petition on any person, whether in connection with the time, date and place of a further hearing, or for any other purpose;*
>
> *(b) whether points of claim and defence are to be delivered;*

(c) *whether, and if so by what means, the petition is to be advertised;*

(d) *the manner in which any evidence is to be adduced at any hearing before the judge and in particular (but without prejudice to the generality of the above) as to –*

(i) *the taking of evidence wholly or in part by witness statement or orally;*

(ii) *the cross-examination of any persons making a witness statement;*

(iii) *the matters to be dealt with in evidence;*

(e) *any other matter affecting the procedure on the petition or in connection with the hearing and disposal of the petition; and*

(f) *such orders, if any, including a stay for any period, as the court thinks fit, with a view to mediation or other alternative dispute resolution."*

Ultimately, it will be a matter for judicial direction in any case management hearing.

Unfair Prejudice

[17] The starting point for the consideration of section 994 is the speech of Lord Hoffman in the House of Lords decision in *O'Neill v Phillips* [1999] 1 WLR 1092. (Although this case pre-dates the 2006 Act, it, and other authorities from that period, were dealing with identical provisions in earlier legislation.) Hoffman LJ in the earlier case of *Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17a described the phrase 'unfairly prejudicial' as deliberately imprecise language chosen by Parliament. Neill LJ at 30f said that the words should be applied flexibly to meet the circumstances of the particular case, although he cautioned at 31a that the very width of the jurisdiction meant that unless carefully controlled it could become a means of oppression (adopting the words of Hoffman J in *Re a Company (005685 of 1988)* [1989] BCLC 427).

[18] In *O'Neill* Lord Hoffman said although the discretion available to the court was wide, the concept of unfairness must be applied judicially and the context which it is given by the courts must be based on rational principles. He added that it would be expected that unfairness be established by some breach of the terms on which it has been agreed that the affairs of the company should be conducted such as the Memorandum and Articles of Association and shareholder agreements (at 1098h). In addition there will be cases when the court could take into account what Lord Hoffman referred to as 'equitable considerations'.

[19] Patten J in *Grace v Biagioli* [2005] EWCA Civ 1222 at [61] set out six principles that can be derived from Lord Hoffman's speech:

> *"(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;*
>
> *(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith": see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;*
>
> *(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;*
>
> *(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948;*
>
> *(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;*
>
> *(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however,*

different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

Quasi-Partnership

[20] When it comes to consideration of an agreement or understanding, it is important to take into account the concept of a quasi-partnership in the organisation of a company. Companies come in all shapes and sizes. Some, although taking the form of a company, maintain many of the characteristics of a partnership. Lord Wilberforce in the House of Lords decision of *Ebrahimi v Westbourne* Galleries Limited [1973] AC 360 gave some guidance as to how courts should treat such a company. It was an action to wind up the company on just and equitable grounds but Lord Hoffman in *O'Neill* at 1099f, when commenting on the case, was of the view that the same principles should apply to a section 994 action. At 379b Lord Wilberforce said:

"a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal

> *relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.*
>
> *It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."*

[21] Hoffman LJ had spoken of "legitimate expectations" in *Saul D Harrison & Sons plc*, suggesting some parallel to the use of the phrase in administrative law. (Lord Diplock in the *CGHQ case* [1985] AC 374 at 408 had said that for a legitimate expectation to arise the impugned decision must affect the other person by depriving him of some benefit or advantage which either he had in the past been permitted to enjoy and which he could have legitimately have expected to continue; or he had received an assurance that it would not be withdrawn without giving him an opportunity to advance reasons as to why it should not be withdrawn.) But in *O'Neill*, Lord Hoffman recognised that the phrase was misleading and preferred to use 'equitable considerations' as a more appropriate description of what should be the focus of the court's determination. At 1101g he added that these considerations:

> *"in a quasi-partnership company, […] will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member*

> *to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract"*

[22] Further guidance has been given in later cases which indicate a degree of limitation on the reliance on equitable considerations. Parker J in *Re Guidezone* [2002] 2 BCLC 321 at [175] stated:

> *"In such a case [an agreement, promise or understanding not enforceable in law] the majority will not as a general rule be regarded in equity as having acted contrary to good faith unless and until it has allowed the minority to act in reliance on such agreement, promise or understanding."*

HHJ Cooke in *Khoshkhou v Cooper* [2014] EWHC 1087 at [24] was of the view that not every assurance however vague could be treated as sufficient. The members of the company must have reached a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it. One further example is the decision of Smith J in *VB Football Assets v Blackpool Football Club* [2017] EWHC 2767 where it was held that a 'gentleman's agreement' designed it would appear to mitigate tax consequences should be taken into account despite not being incorporated into the legally enforceable agreements between the parties, because it did gave rise to a legitimate expectation on the part of the wronged party (see [92]-[94] and [320]–[322]).

Prejudice

[23] Whilst there is a necessity to show prejudice, Lord Hoffman in *O'Neill* stated that the requirement that prejudice must be suffered should not be too narrowly or technically construed (at 1105g), but, as was suggested by Harman J in *Unisoft Group*, the prejudice must have been suffered as a result of the way in which the affairs of company have been organised and further that the harm caused should be commercial harm as opposed to emotional harm (at 611g).

[24] In *Re Coroin Ltd* (No. 2) [2012] EWHC 2343 at [630] David Richards J. stated:

> *"Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to*

> *prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of the member as such, without any financial consequences, may amount to prejudice falling within the section."*

Deadlock

[25] The courts have, however, been very clear in not allowing the section 994 procedure to be used in situations where the affairs of the company have become deadlocked. Lord Hoffman expressed the view that there was no such thing as "no fault divorce" in this regard (see *O'Neill*). As Proudman J stated in *Re Phoenix Contracts* [2010] EWHC 2375 at [108] there is no stark right of unilateral withdrawal. Deadlock may be a ground for a winding up petition, but it would only be a relevant consideration if it can be shown that the deadlock has been brought about by independent unfairly prejudicial conduct on the part of a respondent.

The Company's Affairs

[26] The statutory language refers to the need for the affairs of the company to have been organised in an unfairly prejudicial manner. Difficulties can arise when the court is being asked to consider the conduct of an individual as there is a need to distinguish between the acts of that individual, albeit in the context of corporate affairs, and the acts of the company itself. In simple terms how a member votes in a meeting of a company is his or her personal act and is not subject to scrutiny, but the decision made by that meeting of a company is a corporate act, and would be subject to scrutiny.

[27] In cases of quasi-partnerships it can be very difficult to separate the two concepts. Nourse LJ in *Rackind v Gross* [2005] 1 WLR 3505 at [16] approved the approach taken by the first instance judge when he said

> *"It seems to me at least arguable that causing an irrevocable breakdown in the relationship of trust and confidence is capable of being considered conduct of the company's affairs against the background of a quasi-partnership and an agreement that both should cooperate in the conduct of the affairs."*

[28] One example of this can be seen in the case of *Re Phoneer* [2002] 2 BCLC 241. This involved a winding up petition, with an unfair prejudice cross-petition. The company was formed and operated on an equal shareholding and equal remuneration. The petitioner demanded an alternative remuneration method (commission based) causing a rift and then deadlock. The petitioner refused to manage the business which ceased trading. It has held that the attempt to amend the remuneration and the engineering of the deadlock were affairs of the company in the context of this quasi-partnership.

[29] However, when the acts have been more personal to the individual concerned, there have been a number of potentially conflicting decisions. Harman J in *Re Co. 001761 of 1986* [1987] BCLC 41 dismissed a petition as disclosing no cause of action, with some of the allegations involving rude and aggressive behaviour towards customers and staff. Harman J also indicated that, for example, the theft of company money from a company safe by a director, could not be said to be an act of the company. In *Re Abbington Hotel Limited* [2011] EWHC 635 Richards J at [113] did distinguish this example from the falsification of a minute of a meeting. The minute was created as part of the duty of a director as was its subsequent use to seek an agreement for the sale of the company.

[30] One final case is worthy of mention given its particularly unusual set of facts. *Re Home & Office Fire Extinguishers Ltd* [2012] EWHC 917 shares a number of similarities with the present case with regard to the history and structure of the company. A father had gifted 50% shareholdings to his two sons and each was employed by the company undertaking different roles. One brother became distracted and was spending a longer time away from the business. There then followed an incident when that brother attacked the other with a hammer on the company premises. Mr Strauss QC (sitting as a High Court Judge) held (at [72]) that he had no doubt the brother's conduct related to the affairs of the company (noting that counsel for that brother did not argue otherwise). The conduct was breach of an implied understanding that he and his brother would act properly in good faith towards each other. Further, the single event was such that it made it impossible for them to continue their association as directors and shareholders in the company. The brother's conduct was also considered to relate to the company's affairs in that it was essentially a reaction to a decision taken by the other brother concerning the company's finances.

[31] I would consider that this decision would appear to stretch the elasticity of the court's wide discretion to its limit and is very much focussed on the extreme and peculiar set of facts relating to the *Re Home & Office Fire Extinguishers Ltd* case. When set beside Harman J's thieving director it is difficult to rationalise the decision, particularly when the ascribed motive for the attack is said to be one of the determinative factors as to making the brother's assault on the other brother part of the company's affairs.

Mismanagement

[32] *Re Home & Office Fire Extinguishers Ltd* also involved allegations of mismanagement and failure on the part of the brother to apply his full time and efforts to Camden. This alleged conduct, ultimately, appears to have had no bearing on the final judgment in the case, but it raises the important question of how far the court can become involved in assessing managerial style and decisions. At one level the court is ill-equipped to make such decisions. Different decision makers will take different views when making commercial decisions, and there will always be a wide

range of what could be regarded as reasonable and appropriate decisions. A court should be wary of passing judgment of such decisions, particularly when it will often be blessed with the benefit of hindsight.

[33] If, however, there has been a clear breach of duty on the part of a director then the issue would become much easier for the court. Chapter 2 of Part 10 of the Companies Act 2006 sets out in some detail the extent of a director's duties – to act within the constitution of the company (section 171), to promote the success of the company (section 172), to exercise independent judgment (section 173), to exercise reasonable care, skill and diligence (section 174), to avoid conflicts of interest (section 175), not to accept benefits from third parties (section 176) and to declare interest in proposed transactions or arrangements (section 177).

[34] However, when it comes down to the correctness or otherwise of straightforward managerial decisions, Warner J in *Re Elgindata* [1991] BCLC 959 at 993 stated that there was little authority on the extent to which negligent or incompetent management of a company's business may constitute conduct which is unfairly prejudicial to the interests of the members and later (also at 993) expressed the view that:

> *"I do not doubt that in an appropriate case it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But I share Peter Gibson J's view that the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. Two considerations seem to me to be relevant. First, there will be cases where there is disagreement between petitioners and respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company's business is commercially sound….. In my view, it is not for the court to resolve such disagreements on a petition under s 459. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of company's affairs taking a different view from theirs on such matters."*

Warner J did acknowledge that there could be situations which could justify interference by the court when a majority of shareholders, for reasons of their own, persisted in retaining within the management of the company's business, a member of their family who was demonstrably incompetent.

[35] Arden J was supportive of that view in *Re Macro* [1994] 2 BCLC 354 when she held that there were acts of mismanagement which the respondent failed to prevent or rectify, and further that several of the acts of mismanagement which the plaintiffs have identified were repeated over many years. Viewed overall, those acts (and the

failure to prevent or rectify them) were sufficiently significant and serious to justify intervention.

Petitioner's conduct

[36] The court is also entitled to take into account a petitioner's own conduct. Proudman J in *Phoenix Contracts* at [109] said that there is no requirement that a petitioner should come to the court with clean hands (a reference to one of the maxims of equity – see *Jones v Lenthal* (1669) 1 CH Cas 154 – *"he who has committed iniquity …. shall not have equity"*), however a petitioner's conduct may mean that the harm inflicted on him was not unfair or that the relief granted should not be restricted.

[37] One further aspect concerning the petitioner's conduct relates to how the Petitioner has run and allowed a company to be run. A company's Memorandum and Articles of Association and the Companies Act 2006 set out how a company must conduct its affairs. Should a petitioner conduct the affairs of a company, and permit others to do so, in breach of the Memorandum and Articles and the Act, then the petitioner cannot really complain about the conduct of another who does likewise. HHJ Cooke in *Croly v Good* [2010] EWHC 1 at [94] rejected a complaint in relation to excessive drawings by Good. He stated:

> "*I have no doubt that these payments were made in breach of the Companies Acts and without the company taking the proper internal steps to authorise them. However, in circumstances where the shareholders have in effect established a regime in which the company's affairs are conducted with a wholesale disregard to such obligations none of them is in my judgment in a position to complain that such conduct by another shareholder is unfair on that ground alone*"

Delay and acquiescence

[38] There is no statutory time limit for any action of this type and the equitable doctrine of laches or delay – 'delay defeats equity' – does not apply. However, the longer a petitioner delays bringing a complaint, may have an impact on the assessment of unfairness. In *Southern Counties Fresh Foods Ltd* [2008] EWHC 2810, Warren J, stated that:

> *"If a course of conduct starting in the remote past has continued to the present time, I see no reason why the entire history of the conduct should not be brought into account in assessing whether the conduct as a whole has been unfairly prejudicial. Of course, the fact that it may have continued without protest for a long period may show there has been acquiescence and no unfair prejudice; but if the conduct met with regular objection, or even resignation but with clear*

> *non-acceptance, it is not to be rejected a proiri as incapable of being entertained by the court as part of the basis for a petition."*

In *Waldron v Waldron* [2019] EWHC 115 it was held that delay in bringing forward the complaints was a relevant factor, although more in the context of evidencing acquiescence which in turn impacts on the unfairness of any prejudice. However, in *Routledge v Skerritt* [2019] EWHC 573 a complaint concerning a dividend policy started in 2005 which paid dividends only to A shareholders and not to B shareholders, was held to be still relevant despite the petition being issued 11 years after the policy was adopted, particularly since the policy was still continuing.

The Evidence

[39] I propose to deal with the evidence as it relates to the allegations made by the Petitioner as are set out in the closing submission filed on his behalf:

a) Breakdown in trust and confidence;
b) The Respondent's accusation of dishonesty against the Petitioner;
c) The Respondent's mismanagement of the Northampton factory;
d) The Respondent's disengagement from full participation in the management of Camden;
e) The Respondent's failure to bear an equal share with the Petitioner of the burden of managing Camden in breach of the mutual understanding;
f) The Respondent's frequent attendance on company premises and interactions with employees while under the influence of alcohol;
g) The Respondent's failure to engage in discussions with the Ulster Bank and his failure to engage in financial and accounting affairs of Camden;
h) The Respondent's failure to execute important documents on time;
i) The Respondent's current and ongoing failure to sign a facility letter to the First Trust Bank;
j) The Respondent's continuing failure (despite his agreement) to enable partnership properties to be transferred to Camden exposing Camden to substantial tax liability and causing Camden to lose its Construction Industry Status ("CIS");
k) The Respondent's abusive behaviour towards senior members of staff driving some of them to leave Camden.

For convenience I intend to group these allegations into five different categories:

- the breakdown in trust between the brothers (a) and (b);
- disengagement in management of Camden (d) (e) and (g);
- mismanagement of the Northampton factory (c);
- inappropriate interaction with employees of Camden (f) and (k);
- failure to execute documents on time (h) (i) and (j).

Some of the evidence will overlap between these categories.

The terms of the quasi-partnership

[40] The Petitioner and Respondent both accept that Camden was run as a quasi-partnership. There are no shareholder agreements so the only documents setting out the relationship are the Memorandum and Articles of Association. Camden was not set up by the brothers as a joint venture. It was an existing company, and both inherited their shareholdings from their father and through those shareholdings, their directorships. The Memorandum and Articles of Association pre-dated their involvement in Camden's affairs. The Respondent assumed the title – 'Managing Director' and the Petitioner the title – 'Finance Director', but the titles meant little in practice save that the Petitioner appeared to have been engaged directly in all major financial decisions.

[41] The Board of Directors does not appear to have ever been formally convened, nor does it appear that there were any shareholder meetings of Camden. As a two member company, with the two members both being the only directors, such informality is understandable. The practice may have an impact on the obligation of a director to sign a document on behalf of Camden, if Camden has never formally agreed by its directors or its members to enter into an agreement or contract. The provisions of Article 37(1) allow for resolutions to be passed, notwithstanding there being no formal meeting, if the evidence of the resolution is a document signed by both directors. As a consequence, in the absence of any formal directors' or members' resolutions, until such time as both directors signed a document as evidence of such a resolution, no such resolution could be said to exist. Oral agreements by the brothers although not having full standing as resolutions appear to have been implemented as company policy. In addition unilateral decisions made by one brother, without reference to the other, appear to have been implemented as company decisions. Difficulties could however arise when there is a statutory requirement for resolutions, for example the approval of annual accounts by the directors (section 414), annual appointment of auditors (section 485) and the approval of loans to directors (section 197), but this is not a matter of direct relevance to this case.

[42] No evidence has been placed before me, except in the most general terms, as to any additional terms of the quasi-partnership beyond the Articles of Association.

It is difficult to discern from the conduct of the brothers in their interaction with each other and in their running of Camden, if there is any established pattern that could allow a court to determine if there were any implied terms of the quasi-partnership.

[43] I now turn to the allegations made by the Petitioner against his brother.

The breakdown in trust

[44] It is not really in dispute that there has been a breakdown in trust between the two brothers. They appear to operate separately within Camden, having their own cohorts of employees and with no real attempt by either brother to engage with the other in connection with the running of Camden or in the making of decisions.

[45] Of significance, is the fact that the Petitioner, given his accountancy background, has assumed the role of Financial Director and the Respondent has not taken any issue with that situation. The Petitioner was making all the significant decisions pertaining to the financial affairs of Camden. The Petitioner's management style was that he did not involve the Respondent at all in those decisions. To a degree, the Respondent acquiesced in that situation, but the Petitioner made no real attempt to inform the Respondent of any major decisions, and in certain circumstances deliberately withheld information from him. There is little evidence that the Respondent made any significant issue about this.

[46] The Petitioner's stated excuse for withholding information was a concern about sensitive company data becoming available to a wider audience, for example by the Respondent's casual approach to the safe custody of his mobile telephone. The Respondent was a director, and was styled as the Managing Director of Camden. He was therefore entitled to receive significant data. The fact that he may well have ignored the data, or may not have been able to comprehend the data, is not an excuse. He was entitled to see it. As a shareholder he was entitled to see the annual accounts. Camden is, of course, entitled to ensure the security of sensitive material, but this cannot be used as an excuse to fail to inform a shareholder, and a director, of information he is entitled to receive. Security issues need to be dealt with in accordance with an appropriate structure of meetings and accountability. The Petitioner made no attempt to establish such a structure.

[47] There was a breakdown in trust, but this was a mutual breakdown with as much fault on the part of the Petitioner as with the Respondent.

[48] The Petitioner raised the specific issue concerning the Respondent's conduct relating to insurance monies received resulting from damage to the property at the Daewoo factory. This property was on land owned by the Partnership, and Camden operated from the factory which was situated on the land. It is understood a rent was paid to the Partnership by Camden, but no formal lease or licence agreement has been produced. In September 2008 a fire damaged the factory and it was not fully repaired until 2009. An insurance claim, which I assume was made by Camden as opposed to the Partnership, was settled in the sum of £10.9 million. The Respondent had concerns as to how that money had been used by Camden and unilaterally instructed a firm of accountants to carry out an investigation. In due course the report from the accountants of 3rd May 2012 found nothing of note, and it was able to identify how the money had been expended. All disbursements could be regarded as legitimate payments insofar as they had been directed towards Camden

business, or related business interests of Camden or the brothers. There was no evidence that any money had been misappropriated by the Petitioner, or by someone on his behalf.

[49] Some of the payments were, however, directed towards, and for the benefit of, other parties, albeit ones connected to the Petitioner and the Respondent.

- £1.95m was paid to buy the Northampton factory in the names of the Partnership, and therefore represented a transfer of assets from Camden to the Petitioner and the Respondent.
- £237,000 was paid to settle a corporation tax liability of Ingleford Developments Limited, a company jointly owned by the Petitioner and Respondent.
- £541,000 was transferred to accounts controlled by the Petitioner and the Respondent to settle personal debts owed by the brothers to Ulster Bank Limited.
- A pre-Christmas bonus was paid to each on the 24th December 2008 of £100,025.

How these payments were identified in Camden's accounts is unclear, but there is no evidence put before the court to show that they were properly approved by Camden by virtue of directors' and members' resolutions. The clean bill of health from the accountant retained by the Respondent, solely related to any potential dissipation of assets beyond Camden, and the wider loose association of Camden's and the individual shareholders' interest. A creditor, particularly an unsecured one, may have taken a different view, but that is not the immediate concern of the court.

[50] It is clear that there was, to a degree, a breakdown in the trust that the Respondent had in the Petitioner. The seeds for this distrust were sown by the exclusion of the Respondent from financial information and decision making. He would have been aware that the Northampton factory had been purchased and the fact that cash was made available for that purpose. He clearly would have been aware of his Christmas bonus in 2008. However, the Petitioner's response to a particular question from Mr Casement QC is telling:

> *Q.* *"What information was he receiving, at that time, in order to explain to him what had become of those monies?"*
>
> *A.* *"He wouldn't have received specific information, to my memory he wouldn't have received specific information but, I suppose, like me and I wasn't receiving it either but he would have both, you know, where the bulk of the money was going, or where it went. But there was no specific information to clarify where the money went. There was no written record of where the money went."*

(Day 3 Page 182 Lines 7 – 17)

[51] The Petitioner relies on two pieces of evidence that an accusation of dishonesty had been made, or implied. Firstly, the involvement of the accountants in the first place, and secondly, what is said to have transpired at a subsequent meeting of the wider family. The accountants had been retained by the Respondent. The Petitioner became aware of it, but in his evidence he said that the gist of any conversation with the Respondent at that time was that his brother wanted to know where the money had gone. I reject the Petitioner's evidence that there was a direct accusation of dishonesty made at that time. In evidence, the Petitioner said that it was made by the Respondent against him and Michael McAllister an accountant responsible for auditing Camden's accounts. In the Petition, and in his grounding affidavit, there was no reference to any allegation against Michael McAllister and this became an addition to his case during the trial. The involvement of the accountants would have been annoying to the Petitioner, and one of the motivations for the involvement, could have been a suspicion on the part of the Respondent. I consider that this annoyance, and frustration stemming from it, has inflated the position in the Petitioner's mind and has coloured his memory of the various conversations that he had with his brother at the time. Now, many years later, he is attempting to remember things, which in my view did not happen, and were not said. He has focussed his case on one inference that could be drawn from the Respondent's conduct, and has rejected other, more innocent, explanations. This has distorted his memory of the events. There is no acceptable evidence of any direct accusation of dishonesty, or one that could be reasonably implied by the Respondent's conduct. In fact, in the absence of any written record of where £10.9 million of company assets had gone, it might be prudent for the managing director of any company to commission a report to discover the answer, in the absence of any internal document.

[52] After the accountant's report there was never any direct acceptance by the Respondent that everything was in order, or any acknowledgment to the Petitioner that the Respondent considered everything to be in order. The Petitioner's evidence was that a family meeting took place later. This involved all the siblings and both parents. The Petitioner said in evidence that he brought up the fact that the Respondent had accused him of misappropriating or stealing funds. On cross-examination he accepted that no direct accusation was made by the Respondent, and it was the Petitioner that raised the subject and the Respondent, when the matter was raised said nothing. This was confirmed by Seamus Lavery, a brother who was in attendance at the meeting. Seamus Lavery also said in his evidence that his father had told him previously that the Respondent was accusing the Petitioner of stealing money from Camden, with the father estimating the sum to be in the region of five to six million pounds.

[53] My interpretation of this evidence is that the Petitioner was still annoyed by his brother instructing the accountants in the first place, and then having received the full explanation in the report, had refused to acknowledge that the insurance

claim had all been properly accounted for. This annoyance continued to fester and the Petitioner had drawn an inference from the Respondent's conduct that he was accusing him of stealing. The Petitioner told this specifically to his father, and again to his siblings and parents at the family meeting. It is understandable how this issue was gaining a momentum of its own, however the reality is that the Respondent never actually accused the Petitioner of anything. In the absence of any company information he wanted to know where the money had gone. On receipt of that confirmation, he could have acted in a more conciliatory fashion, although he never actually made any accusation subsequent to the report, and just remained silent. The Petitioner clearly misinformed his father that there was an allegation of theft made by the Respondent, and that would have inflated the issue even further given the role the father held within the family. At that time he was, in more ways than one, the patriarchal character in relation to the family business at Camden.

[54] In conclusion, I consider that whilst there was a breakdown in the mutual trust that each brother held in the other, this could not be put down specifically to the conduct of the Respondent, either in relation to this specific misappropriation allegation, or by his general course of conduct. It is evidence of deadlock within the management of Camden, but the deadlock has not been brought about by the independent conduct of the Respondent.

Disengagement in management of Camden

[55] This covers three specific allegations, the Respondent's disengagement from full participation in the management of Camden; a failure to bear an equal share with the Petitioner of the burden of managing Camden in breach of the mutual understanding; and the Respondent's failure to engage in discussions with the Ulster Bank and his failure to engage in financial and accounting affairs of Camden.

[56] The difficulty in trying to assess the level of any disengagement is that there was no real discernible structure to Camden's management. Even after hearing all the evidence and considering the documentation, it is a very unclear picture. There is no management structure. There are clearly a variety of company functions – manufacture, sales, administration, credit control and so on. Within some of these functions there will be a sub-division for geographic areas – Ireland, north and south, and Great Britain. As Camden does not convene directors' meetings and has no published structure of who is in charge of each of these divisions, all that is left is an ad hoc dividing up of functions, with the Petitioner and Respondent sometimes agreeing and sometimes unilaterally assuming a function. There were no apparent targets to be achieved in any function, so there is no base level to assess success or failure against. There was no cross reporting between functions and no overall assessment by a board of directors. There are no contracts of employment for either director so the terms of either director's engagement are not set out.

[57] It has long been recognised in the affairs of manufacture, as with other areas of commercial business, that different people have different attributes and styles of working. Some need to work long hours, on site, others less so.

[58] In assessing the evidence given during the hearing of the employees and former employees it was difficult to sometimes differentiate between hard accurate evidence and what could be termed as shop floor gossip. This applies to all the allegations and cross-allegations. Sometimes there will be a kernel of truth to which has been added, consciously or sub-consciously, several layers of embellishment and exaggeration.

[59] In general terms, I do consider that the Respondent during the first part of the 2010 decade did start to disengage to a degree from Camden, but it is impossible to be exact about the degree of disengagement. The Petitioner was unclear as to when this disengagement actually started. The Petition refers to a period after 2012 and specifically after 2014. At paragraph 6 it states:

> "Before approximately 2012 the Respondent would have shouldered an equal share of responsibility in Camden but increasingly removed himself. In 2014 he devoted very little time to Camden …"

The date of the allegation at 2014 is also uncertain as the grounding affidavit states 2012 ("Between 2012 and 2016 Kieran spent very little time on Camden premises at work"), and an earlier letter before action in March 2015 sent on behalf of the Petitioner referred to the Respondent attending work for 50% of the time in 2009.

Clearly there was confusion on the part of the Petitioner by stating by that letter in 2015 - 50% engagement by the Respondent in 2009 and then in the Petition in 2017 stating 100% engagement in 2012.

[60] This vagueness about actual dates and amount of time being devoted can be explained from the lack of any record keeping, which is understandable, and the passage of time. However, the Petitioner did make a concession when being cross-examined about the Petitioner's engagement in or about 2015, when he was responsible at that time for Irish sales, acknowledged to be the bulk of the business (Day 4, Page 97 Lines 5 – 9, Lines 28 – 30) and then to a question – "You make no complaint about Kieran's work over the years in respect of sales" his reply is "No" (Page 98 Lines 21 – 24). This is not a concession specifically on time keeping and engagement, but it is a concession on the Respondent's contribution to the business of Camden.

[61] On this particular area of complaint which encompasses the first two allegations mentioned in [55] above, whilst there may be issues about attendance on certain days and times, there appears to be a sufficient engagement on the part of the Respondent so that he was undertaking the areas of work within his managerial

control to a sufficient standard. Sales will often require engagement on and off site with customers, and strict time keeping with regard to periods on site may not be a particularly good yardstick to measure effectiveness.

[62] The final allegation in this part of the claim relates to a failure to engage with Ulster Bank and to engage in financial and accounting affairs of Camden. Care needs to be taken in dealing with this particular allegation. It encompasses two different aspects, one specific to Ulster Bank and the other to financial matters generally.

[63] The allegations in relation to general non-engagement in financial and accounting matters is not really borne out by the evidence. No meetings were ever formally convened to discuss finances or to approve, for instance, annual accounts. There is no evidence of draft accounts ever being formally presented to the Respondent as a director for his approval or as a shareholder for his approval. It is accepted that he had a general disinterest in the financial affairs of Camden and, in any event, may well have not had a full grasp of detail from the accounts. However, a failure on the part of the Petitioner, in his assumed function as Finance Director, to follow basic corporate governance procedures, does not stand well against his allegation that the Respondent was failing to engage.

[64] The problem with the Ulster Bank has to be seen in a different light. The debt due to the bank was at the time a serious existential threat to Camden, the associated companies and personal solvency of both brothers. The total debt figure was significant. The debt had been assigned to the Global Restructuring Group ("GRG") and Camden's financial affairs were coming under increased scrutiny. Overdraft and other loans were for very short periods and GRG was micro-managing the credit availability. It was a very difficult time and the burden fell on the Petitioner and Brian Kearns, the financial controller. On some days this involved negotiating over whether or not a particular cheque or electronic transmission would clear the bank.

[65] Intense negotiations were going on with GRG. Strictly speaking as meetings relating to these negotiations were finance related, the Respondent would, in normal circumstances, not be required to attend such meetings. However, such was the relationship with GRG and the threat to Camden, I would consider that the Respondent's attendance at these meetings was important. It was not just a public relations exercise but an expression of solidarity and collective purpose, particularly when CRG were either requesting, or anticipating, his attendance. In all twenty two meetings had been arranged and the Respondent attended not more than four. (There is an issue of his attendance at a fourth meeting and on balance I will accept that he attended that meeting.) His failure to attend put extra pressure on Camden, throwing extra pressure on the Petitioner and Mr Kearns, and threatening the existence of Camden. His inability to understand financial details is accepted, but it is not an excuse for his non-attendance. His attendance was necessary not really to

allow him to contribute in relation to the financial discussions, but to show solidarity and commitment to the future of Camden.

[66] On this specific allegation I consider that the failure to attend the meetings with GRG was unfairly prejudicial to the interests of Camden. It was clearly his duty to promote the success of Camden (section 172). Mutual confidence was a feature of the arrangements of the quasi-partnership, as was an understanding that each quasi-partner would engage, when necessary, with important third parties. Unlike the more generalised complaint about contribution to the management of Camden, and the weight to be afforded to such a contribution, the need for engagement with Ulster Bank was fundamental to the future of the company at that time. Ulster Bank was a major creditor and any 'calling in' of the loan in all likelihood would had resulted in the end of the business conducted by Camden, and was an obvious unfair prejudice to the interests of the company. The quasi-partnership would have included an understanding that an engagement with such an important party as Ulster Bank, was expected and this would have included attendance at meetings arranged with the bank during this period.

Northampton

[67] A further allegation relates to Camden's business dealings out of the factory in Northampton. This was a business venture in 2010. A potential sales opportunity for the manufacture and sale of Camden products was identified with an intention to purchase a factory in England, set up a manufacturing base there and then supply the manufactured product to the English market.

[68] The plan involved the Respondent taking over the entire operation, including sales. It turned out to be a failure and in due course was closed down with the property sold. The Petitioner's allegation is that the Respondent, having taken over management did not devote enough time or commitment to the business. There were issues about attendance at the factory and quality control of the manufactured product.

[69] There was hard evidence of the failure of this venture, but the evidence in relation to the Respondent's commitment and competence was generalised and little more than a repetition of what could be categorised as shop floor gossip. I accept that there was a kernel of accuracy at its core, but little else.

[70] A witness, Roy Harrison, called on behalf of the Petitioner, gave evidence that there was a particular problem with the quality of product supplied to a company Camel Glass and Joinery Limited ("Camel"), a business operating in Devon and Cornwall. He gave evidence that Camel had a large account with Camden, buying about 250 to 300 frames a week and had stopped buying (Day 6 Page 12 Line 24 – Page 13 Line 2). He gave evidence that he had visited the Camel premises and the staff had even refused to engage with him. They indicated that Camel would place no further orders due to faulty products being supplied. The clear inference from

his evidence in chief was that the Northampton factory was not producing windows and doors of sufficient quality, and was failing to follow up on the complaints. During cross-examination, Harrison accepted he did not know if the product supplied to Camel was a 60 millimetre window, as opposed to a 70 millimetre window. Notwithstanding this he stated (Page 62 Lines 6 – 7) that he took it that the windows had been produced in Northampton. His entire analysis of the cause of the problem was therefore based on a fundamental erroneous fact, as the product supplied to Camel had been produced in Antrim. It is disturbing that the Petitioner who was present with Harrison at the Camel premises did not disabuse Harrison of the idea that the defective product was an Antrim problem (therefore the Petitioner's problem) and not a Northampton problem, thus allowing the blame in Harrison's mind, to attach to the Respondent. The court's unease is enhanced by the Petitioner calling Harrison as a witness for the purpose of giving this evidence, which the Petitioner must have known had the potential to give the court an unclear picture of the problems that persisted in England at that time.

[71] The reality is that the Petitioner has a fixed and focussed mind about the Northampton venture. He is clear in his mind as to why it failed, and who was to blame for the failure. The following transcript of part of his cross examination is illuminating:

> *"Q The loss of £100,000 a month was not Kieran's fault. You're not suggesting that?*
>
> *A Oh absolutely I am; yes.*
>
> *Q How was he responsible for the loss of the £100,000 a month?*
>
> *A Well, whenever the stories came back that he spent most of his time in public houses in England."*

(Day 4 Page 138 Lines 16 – 22)

Like a significant amount of the evidence called against the Respondent, it was little more than shop floor second hand gossip.

[72] Clearly, Northampton was a bad venture for Camden. The decision to set up the venture was a joint decision. There is no real evidence of mismanagement on the part of the Respondent. There were some issues with regard to quality control, but any problem or failure ultimately resulted from managerial decisions by both brothers, and following the authority set out in the *Elgindata* case, it cannot be considered to fall into the category of unfair prejudice. I therefore reject the allegation concerning the Respondent's conduct in relation to the Northampton venture.

Inappropriate interaction with the employees of Camden

[73] This covers two categories of complaint - the Respondent's frequent attendance on company premises and interactions with employees while under the influence of alcohol and his abusive behaviour towards senior members of staff driving some of them to leave Camden.

[74] The Respondent denied that he had ever been intoxicated on Camden premises. Evidence was given to the court by a number of witnesses concerning their observations of the Respondent on occasions. I do not propose to catalogue these in any detail. The evidence was given by Craig Phillips, Roy Harrison, Amy Irvine, Irene Wilson, Caroline Heagney and Brian Kearns. This evidence was in addition to evidence given by the Petitioner and Seamus Lavery. I consider that the thrust of this evidence was accurate. It involved the Respondent attending the premises, including being on the factory floor, smelling of alcohol, having slurred speech and exhibiting difficulty in reading documents. Despite his denials, I am of the view that he has a problem with alcohol. He will only know the full extent of that problem, and it is not for the court to speculate.

[75] I accept Seamus Lavery's evidence that the Respondent's ability to consume alcohol and maintain his business acumen had been reduced over the years.

[76] What is clear is that Camden had in place a very strict zero-tolerance with regard to alcohol consumption. This was enforced against employees particularly in relation to factory floor activity. There is no evidence that any steps were taken by anyone, including the Petitioner, to enforce this policy through disciplinary action. I fully understand the emotional and practical issues that this would raise for the Petitioner to instigate disciplinary proceedings against a senior member of Camden and his brother. It would also involve a public dimension to this issue. However, as a director, the Respondent was an employee of Camden and if his conduct was in breach of any Company guideline or health and safety direction, Camden had the power to instigate disciplinary proceedings with a view to protecting fellow employees and preventing further problems.

[77] There is no evidence that the Petitioner ever attempted to take such a course of action. The fact that he did not take such action, would tend to support the idea that he was accepting of the Respondent's alcohol consumption, and if not tolerating it, certainly acquiescing in his attendance on Company premises in that state.

[78] The other part to this allegation is the Respondent's interaction with senior employees. To understand the background to this allegation it must be borne in mind that the climate within this company, for which both the Petitioner and the Respondent must bear equal responsibility, is that the staff had very quickly assumed a position of either being on the Petitioner's 'team' or the Respondent's 'team'. Some brave employees attempted to ride both horses but like all such ventures this came at a price.

[79] The Petitioner had taken steps to exclude the Respondent from some decision making and meetings. Staff were instructed, directly, not to engage with the Respondent. This may have been with the best of intentions, but it did show evidence of an entirely dysfunctional style of management when the person styled as the Managing Director was being deliberately excluded from the decision making process. Subordinate staff were therefore forced to adopt this position by the Petitioner.

[80] Of further relevance is the conduct of the Petitioner. I accept the accuracy of two reported instances which, on my assessment, reflect the Petitioner's personality. One incident was at the factory gate when the Petitioner had a heated argument with a lorry driver, which included throwing a cheque into the face of the driver, and the second was him standing on the shop floor and very publically humiliating a junior employee by timing his work in progress. These are extreme examples, but reflect the current of tension that must have been running through the business.

[81] I accept that the Respondent, by his conduct, did force certain employees to leave Camden due to his overbearing attitude. The reality was that this was the culture within Camden as displayed by both directors. It may well have achieved commercial results as there are many management styles, and it is not for the court to make a choice as to the better ones.

[82] My conclusion is that both directors were equally capable of being abusive towards staff. They both maintained and tolerated that atmosphere within Camden. Individual conduct by both could well have contributed to a detriment to Camden's affairs generally, but it would be entirely wrong to isolate the conduct of one and to over-analyse that as a contributing factor, and ignore the conduct of the other. That was just the way Camden was run. Applying the principles set out in the *Phoenix Contracts* case and in the *Southern Counties Fresh Foods* case, I am satisfied that there is no unfair prejudice flowing from the Respondent's conduct.

Failure to execute documents

[83] This final category of complaint deals with an alleged failure to attend to the execution of documents, either delaying to execute or neglecting to do so. This allegation relates to Ulster Bank and First Trust Bank security documentation. The consequence of this delay and failure, it is alleged, caused, and continues to cause, ongoing problems for Camden in relation to its borrowing and relationship with its bank, its tax liability and its CIS. There was a further allegation concerning the delay in executing a sale deed in relation to the factory in Benburb, but as there was no evidence that there had been a company decision to sell this land, any failure on the part of a director to sign a deed for that purpose, could never be a valid complaint. In any event, that deed was executed and the property was sold.

[84] The allegation concerning the bank security documentation must be set in its proper context, particularly in light of these proceedings. This petition only applies to the management of Camden. It does not apply to any other company, or any other asset held by, or on behalf of, the Respondent, no matter how closely linked those other companies or assets may be. There is no evidence that the Petitioner has made any attempt to initiate proceedings in relation to the associated companies or the Partnership.

[85] The Ulster Bank documentation was additional security documentation. The general situation in relation to the indebtedness to Ulster Bank is set out above and Camden was coming under increasing pressure to sign additional security documents. The Respondent had been asked by Brian Kearns and the Petitioner to sign this documentation and there was a significant delay on the part of the Respondent in doing so, although eventually he did. The exact nature of the documents that were required to be signed has not been specified. In particular, it is not clear whether the signature was to be as a director of Camden, or as a director of another company or as an individual in respect of any other property. I have approached this issue by drawing an inference that the security documentation included security over non-Camden assets.

[86] The Respondent could never be required to organise his own personal business and private interests in such a way as to be required to provide security, to transfer personal assets or to jeopardise personal assets for the benefit of Camden. The Petitioner was party to, and in all likelihood, had a dominant hand in creating the intricate structure weaved around this enterprise. The reasons were probably based on sound commercial and taxation factors. Having created the structure, the Petitioner cannot complain about the conduct of the Respondent in this regard.

[87] The delay would well have damaged Camden's interests given the approach being taken by Ulster Bank, and this would have impacted on supplier and customer relations, and would have been extremely stressful for staff involved in dealing with the problems. I have made a finding in relation to non-engagement with Ulster Bank generally. That was in relation to the Respondent's function as a director of Camden. However, as I have already indicated, some, if not all, of the documentation he was being asked to sign, would have related to non-Camden assets. There was no side agreement between Camden, the Petitioner and the Respondent requiring either to apply non-Camden assets for the benefit of Camden. That was a personal decision that the Respondent had to make. It did not relate directly to the management of Camden's business.

[88] The fact that ultimately the Respondent signed the documents does not in any way enhance the Petitioner's case. It just indicates that at that point in time the Respondent had decided to place his personal shareholdings in other companies and his other personal assets into a pool of security available to Ulster Bank to secure Camden's debts.

[89] In the circumstances the delay in signing this documentation did not relate to conduct on the part of the Respondent which related to Camden's affairs. It related to his personal affairs.

[90] Brian Kearns explained in his evidence about two additional problems for Camden at this time. Whether these were the result of the Respondent's conduct through a failure to transfer assets into Camden's ownership is questionable. Camden had acquired a corporation tax liability of approximately £1.3 million. This arose because of the way it had dealt with directors' loan accounts showing a debt of £4.4 million to Camden by the directors. This tax liability could have been avoided, or mitigated, by the Respondent transferring his interest in the Partnership's land across to the Camden. This has a parallel with the matters discussed in relation to the Ulster bank documentation. The tax liability arose because of the way Camden organised its financial arrangements and in particular its treatment of loans to the directors (i.e. the Petitioner and the Respondent) in its accounts. At the same time, the liability remained unpaid as Camden had no available money for that purpose. When making the loans to the directors, no attempt was made by Camden to obtain binding enforceable obligations from the directors to provide security for the loans or to transfer personal assets to Camden, if required by Camden to do so. It was the Petitioner who was clearly making the significant decisions in relation to financial matters and the designation of certain transactions in the Camden accounts and he has to take primary responsibility for this state of affairs.

[91] The tax liability ultimately arose because Camden lacked the funds to pay the amount due. The tax liability could have been avoided or reduced by a number of methods. The tax could have been paid had cash been available to pay it. Another way would have been for the Respondent (and the Petitioner) organising their personal assets in a certain way. That would have nothing to do with their roles as directors or as shareholders of Camden. Nor could it be said that there was ever a mutual understanding that there was a requirement that either brother would ever be required to take certain steps to transfer his personal assets to the company.

[92] For the removal of doubt, the evidence also included mention of another tax liability, a liability due by the Partnership relating to the Partnership's 2009/2010 tax return. This liability has nothing to do with Camden and whatever the liability was, or could have been, has no relevance to these proceedings.

[93] Another issue was Camden's CIS status. Companies given this status were permitted to trade and receive gross payments without deduction. Without the status, trade creditors were required to deduct 20% off any labour element and account direct to HMRC for this deduction. Loss of CIS could impact on Camden's reputation within the trade generally and it could impact on having Camden placed on preferred contractors' lists. CIS status would also assist in Camden's cash flow. No evidence of actual loss to Camden was placed before the court, but I accept the general reputational damage that could be caused in such a situation.

[94] The loss of the CIS status arose because of a delayed tax return for 2016. Evidence was given that the delay was a result of the delay of transfer of property from the Respondent into Camden, a feature caused by the treatment of directors' loans. The tax return could have been submitted, but there was a potential financial benefit from it not being submitted. The decision to delay was therefore tactical in nature, probably for the best of motives.

[95] This has certain similarities to the taxation issue. The Respondent was under no obligation to transfer his personal assets into Camden. The question of how Camden's accounts were presented, and the timing of any signing off and filing, was a matter primarily for the Petitioner, as no board meetings were ever convened to discuss them. I accept that a higher tax liability may have attached to Camden because of a different presentation of certain items in the accounts, but that did not arise because of the Respondent's conduct as a director or shareholder. It arose because of the way the company was being run, and with the Respondent, as an investor, not being prepared to commit to investing personal assets into Camden.

I therefore reject this particular allegation as the Respondent's conduct does not relate to the affairs of the company.

[96] The final matter relates to First Trust Bank. Camden was in a position to repay the debt of £12.76 million due to Ulster Bank in February 2015. It could do so because of a loan facility provided by First Trust Bank. The Court was not provided with any Facility Letter from First Trust Bank from that date, but certain security documentation has been placed in evidence:

- Personal guarantee from the Petitioner and the Respondent jointly and severally guaranteeing Camden's debts up to the lesser of £12 million or the value of the land assets held by the Partnership dated 12th February 2015
- An indemnity by the Petitioner and the Respondent jointly and severally indemnifying First Trust Bank against any loss arising under a Debt Purchase Agreement with Camden dated 12th February 2015
- Charge by Camden of an apartment in Dublin dated 13th February 2015

No other documents signed by either the Petitioner or the Respondent, or executed by Camden, have been produced from 2015. Security documentation has been referred to in a Facility Letter of 20th December 2018. I infer that identical, or very similar, and perhaps the actual documentation, would have been in place in 2015 to allow for the release of the funds by First Trust Bank.

[97] The Facility Letter of 20th December 2018 provides for four separate facilities. A renewal of a working capital facility (£1.25 million), a temporary overdraft facility (£1.95 million), a bridging loan for short term working capital requirements (£2.9 million) and a continuance of an existing loan facility in relation to the Ulster Bank refinancing (£3.36 million). The security was stated to be already held and was as follows:

- Debenture, including a Fixed and Floating charge over Camden's assets;
- Charge over an apartment in Dublin owned by Camden;
- Unlimited Guarantees from Camden Glass Limited and Ingleford Developments Limited with debentures, including a fixed and floating charge over those company's assets;
- Charge over Factories 2 and 3 Steeple Road owned by Ingleford Developments Limited;
- Letter of Guarantee from the Petitioner and the Respondent for £12 million. The guarantee was stated to be supported by charges over the various properties held by the Partnership.

There was an additional personal guarantee to be provided by the Petitioner of £1 million. No evidence was given about this specifically, so I am not considering it to be relevant.

[98] The significance of this facility is that it was virtually identical to the security that had been in place with Ulster Bank, save that the Petitioner and the Respondent had obtained an advantage with a capping of their personal liability on the guarantees to the value of the Partnership's land holdings.

[99] The Facility Letter also contained a number of covenants on the part of Camden. One covenant was that Camden would procure into its ownership the land assets of the Partnership no later than the 20th April 2019.

[100] Camden accepted the terms of the Facility Letter, by virtue of the recorded minutes of a board meeting held on the 21st December 2018. The form of the documentation would suggest that standard banking procedure was being followed. There is an acceptance form endorsed on the Facility Letter signed by both directors on behalf of Camden, and three identical extracts of minutes of board meetings of Camden, Camden Glass Limited and Ingleford Developments Limited.

[101] The Facility Letter made a provision for reviews and in particular on the 30th April 2019. No specific evidence was given about such reviews, although because of an unfortunate line of credit given to a customer (about which no complaint is raised against the Respondent) Camden is again under financial pressure, not least with First Trust Bank.

[102] First Trust Bank issued a new Facility Letter on 18th July 2019 which followed the same, or similar terms to the previous one of December 2018.

[103] It would appear that Camden had entered into the covenants with First Trust Bank in December 2018 to procure the execution of deeds transferring the land assets of the Partnership into Camden's name, without first procuring from either the Petitioner or the Respondent a legally binding commitment from them to Camden, to execute such deeds. This therefore exposed Camden to a risk of the consequences of a breach of covenant, without any ability to take legal action to protect itself.

[104] The Petitioner's case is that the Respondent has declined to sign the necessary documentation to put in place all the required security to First Trust Bank, and further he has failed to sign an acceptance of the new Facility Letter of July 2018. Several items of correspondence passing between Camden's solicitors and the Respondent's solicitors (in Belfast and in Manchester) requesting the Respondent to do this have been placed before the court.

[105] The explanation on 28th August 2019 for not signing was given by the Respondent's solicitors in the following terms – "Neither has [the Respondent] been included in any of the conversations with the bank or given any information about the dealings with the bank so that, once again, he is being asked to sign a facility letter completely in a vacuum."

[106] In his evidence in court, the Respondent, less articulately perhaps, but with a degree of more force, explained his failure to sign documents in answer to a question from his counsel:

> *"Q. Now, we also know that Brian Kearns gave evidence, as did Brian [Lavery], about asking you to sign bank documentation, and there was a delay in signing at times. Can you just explain to the court why there were delays in signing documentation?*
>
> *A. Well, first and foremost, any … document that I had to sign, it was just shoved underneath my nose. There was no explanation to say what the document was, or where it was going,… who it was for. And it would just appear and "sign that". And I was in limbo as regards what I was signing. So I kind of smelt kind of a rat that if I sign this, God knows I could be signing my life away. Because I hadn't a notion of what I was signing, and it wasn't explained to me."*

(Day 8 Page 10 Lines 15 – 28)

[107] Although there is evidence of a degree of pressure being asserted by First Trust Bank, this has not manifested itself, to date, in any tangible threat or restriction to the credit available.

[108] The latest draft accounts (to year ended 31st March 2019) show on a gross turnover of £55 million, a gross profit of £9 million with a largely break even situation after taking into account operating expenses and depreciation. The stated loss of £2million can be explained by interest payments (£655,000) and an extraordinary bad debt write off of £2.9 million, referred to in paragraph [101] above. The Balance Sheet shows net current liabilities of £7.7 million, and although fixed assets total £19 million and creditors and provisions total £5.6 million, leading to net asset worth of £5.7 million, the situation of Camden is difficult as the balance sheet is

reliant on the net book value of fixed assets, particular plant and machinery. Although no evidence concerning the actual value of the land held by the Partnership has been given, some value can be inferred from the attitude of First Trust Bank towards the overall value of the guarantee in place. It is unlikely to be worth much less than the £12 million figure as First Trust Bank would not have made such a significant concession during negotiations over the original advance. It has to be borne in mind that the Petitioner and the Respondent achieved a degree of release from their personal indebtedness at that time, as prior to discharging the Ulster Bank debts, they were both committed to guaranteeing the entire Camden debt, without a cap.

[109] Setting aside the issue of the delay in signing, there is now in place an agreement between Camden and First Trust Bank. That is evidenced by the Facility Letter, the acceptance of the terms by Camden on 21st December 2018. That agreement contains a covenant to procure the transfer of land owned by the Partnership. The Facility Letter also indicates that a significant number of security documents have already been executed. Three from 2015 were produced in evidence, and I can infer that the remaining documents had been executed at or about the same time.

[110] At the present time, First Trust Bank has the security of charges of all land, and fixed and floating charges over all assets owned by Camden, Camden Glass Limited and Ingleford Developments Limited. It holds personal joint and several guarantees from the Petitioner and the Respondent guaranteeing the Camden debt, and charges by them of all the land in the Partnership. Should the Respondent transfer his share of the land in the partnership to Camden, and the Petitioner does likewise, and then presumably with Camden executing charges over the land transferred into its name, there will be very little difference to the nature of the overall security held by First Trust Bank. It will still hold charges over all available land assets, but just in an adjusted form. There is no reason whatsoever that the Respondent could offer as to his failure to execute these documents. He has already personally guaranteed Camden's debt to First Trust Bank (up to the permitted cap) and that guarantee is secured by charges over his interest in the Partnership's land. It could even be argued that he could benefit from the execution of the documents as his personal guarantee to First Trust Bank would no longer have any effective purpose and may well be released.

[111] The transfer of the land will have two potential benefits to Camden. Firstly, it will improve relationships with the First Trust Bank. The bank are requesting the execution of the documents, and the failure to do so may undermine the confidence that the bank may have in Camden to fulfil simple and straightforward commitments. The extraordinary loss attributed to the business failure of a customer to whom a large line of credit had been extended, has placed Camden under current financial pressures. Secondly, it will enhance the balance sheet of Camden with added value and solidity to the fixed assets and cancellation of the directors' loan accounts.

[112] As previously stated, care needs to be taken to differentiate between the Respondent acting as an individual shareholder and as a director. The quasi-partnership did not contain any express or implied terms that would have required the Respondent to invest or transfer assets into the name of Camden. This situation changed when he signed the acceptance of the Facility Letters in 2015 (as I have inferred) and again in 2018. He would have signed in the capacity of a director, and by accepting the terms he was binding Camden to a covenant to procure his signature to transfer deeds of the land in the Partnership. In this context, it would be wrong to enable him to hide behind some form of wall between the various functions he was performing. Up until he had signed, Camden were not committed to anything. Once he (and the Petitioner) signed they bound Camden to a certain course of action, which included procurement of the execution of further documents. It is reasonable for the Petitioner to expect and require the Respondent, after he signed, to follow that up with further signature(s) to transfer his interest in the Partnership's land to Camden. The Respondent has failed to do that. I consider that this is in breach of the implied mutual understanding of the quasi-partnership, and as a result the affairs of the quasi-partnership have been, and are continuing to be, conducted in a manner unfairly prejudicial to its interests.

[113] The fifth part of the test suggested by Patten J in *Grace v Biagoli* was consideration of whether the Respondent's actions, or lack of actions;

> *"would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore"*

In answering that question, I am of the view that the Respondent's failure to execute the transfers is a breach of an understanding between the parties, and it would be unfair to allow it to be ignored. What eventually transpired in relation to the execution of the existing documentation relating to the First Trust Bank loan to Camden could clearly be categorised as what had been identified in *Khoshkhou v Cooper* as a sufficient degree of agreement, and with the Respondent failing to fulfil all the parts of that agreement, is a breach of good faith on his part.

Conclusion

[114] I find that by virtue of the Respondent's conduct Camden's affairs have been conducted in a manner that is unfairly prejudicial to the interests of the members generally. This only arises because of his failure to engage with Ulster Bank by attending meetings called to discuss Camden's indebtedness to the bank, and his ongoing failure to execute the legal documents that would transfer his interest in the land owned by the Partnership to Camden.

[115] As previously stated the other allegations concerning the Respondent's conduct have not been made out. I come to that conclusion taking into account each

of the separate allegations and my findings in respect of each, and looking at them cumulatively. The evidence relating to these other matters reflects what could be described as a classic deadlock situation.

Remedy

[116] The case had been listed before the court for a determination on the issue of unfair prejudice, and in the event of such a finding, the matter would stand adjourned for further consideration, and in default of agreement as to remedy, for a final ruling by the court.

[117] I have identified two areas of unfair prejudice. The one relating to non-attendance at meetings with Ulster Bank is no longer relevant as the bank were repaid in February 2015, and a remedy is no longer required. The other matter relating to the ongoing failure to execute the legal transfers can be remedied very quickly and without much effort by the Respondent. He can sign and execute the necessary documents. That would leave a relatively straightforward task of valuing the assets being transferred and then determining how that value is to be fixed or calculated and how that is to be reflected in the Camden accounts. That would conclude the matter. Should the Respondent decline to take such steps voluntarily the court could facilitate the transfer of the land and the valuation to be attributed to the transfer. Ultimately, the treatment of the transaction in the Camden accounts will be a matter for Camden.

[118] I will hear counsel on the issue of a future review hearing and on the issue of costs.

[119] I appreciate that the parties have made endeavours prior to and after the issue of the Petition to resolve the ongoing difficulties relating to the management of Camden. I would strongly urge them to make one last effort to come to some agreement, either as to how Camden should be operated in the future. If that is not possible then an amicable parting of the ways with suitable compensation for any shares that are sold, should be agreed. Such a resolution could be achieved in the context of this litigation, even at this very late stage, perhaps with the assistance of a mediator.

[120] Harper Lee in To Kill a Mockingbird attributes Jem Finch with the words that:

> "*you can choose your friends, but you sho' can't choose your family an' they're still kin to you no matter whether you acknowledge 'em or not, and it makes you look right silly when you don't.*"

Both the Petitioner and the Respondent may wish to reflect on this.

ANNEX

2017 No 122509

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

IN THE MATTER OF CAMDEN GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN

BRIAN LAVERY

PETITIONER

-and-

KIERAN LAVERY

RESPONDENT

_____

His Honour Judge McFarland

10 October 2019

[1] The Petitioner is a 50% shareholder in a limited liability company. He issued a petition on 28 November 2017 under section 994 of the Companies Act 2006 alleging that Camden's affairs were being conducted in a manner that is unfairly prejudicial to his interests and seeks an order from the court directing his brother, the Respondent to the proceedings, to sell the remaining 50% shareholding to him.

[2] At the commencement of the proceedings the court made an order that until further order the title of the proceedings should be anonymised and that the proceedings be heard in camera. The order was made with the consent of both parties.

[3] After the case was opened before me and the Petitioner had given some evidence, I indicated to counsel that I intended to review this order and I heard further argument on the issue with the Petitioner seeking a continuation of the order and the Respondent now remaining neutral on the issue, although his counsel submitted that the continuance of the order would run contrary to established precedent.

[4] The starting point for any consideration of applications of this type is the statement of Lord Hewart CJ in *R v Sussex Magistrates* [1924] KB 256 at 259:

> *"It is not merely of some importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done"*

This quotation is frequently used although in abbreviated form but the inclusion of the two adverbs 'manifestly and undoubtedly' reflects the emphasis that Lord Hewart placed on the fundamental importance of the principle that justice should be seen to be done.

[5] Lady Hale in *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38 explained that the purpose of the open justice principle was two-fold. Firstly to hold the judges to account for the decisions they make and secondly to enable the public to have confidence that they are doing their job properly. In explaining the second limb she stated at [42] that it:

> *"goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are made. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases."*

[6] The correct test, identified by Lady Hale, had been set out in the earlier Supreme Court cases of *Kennedy v Charity Commission* [2014] UKSC 20 at [41] and *A v BBC* [2014] UKSC 25 at [85]:

> *"The court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and conversely any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."*

[7] In a very recent consideration of the issue, Mr Beltrani QC sitting as a Deputy High Court Judge in *ABC v Shulmans LLP* [2019] EWHC 2458, in my view, correctly summarised the approach to be taken by stating that the open justice principle is not simply a gateway to the balancing exercise, but is a fundamental aspect of the judicial system. Legitimate countervailing rights may be tested against this principle in order to determine whether there should be derogation. It does not require a court to assess, even if that were possible, the 'interest' that a member of the public might have in any particular fact.

[8] I do not consider it to be necessary for the court to identify any public interest as such that would require members of the public to have the opportunity in

attending the court proceedings. McCloskey J did carry out such an exercise in *Re Lagan Holdings Limited* [2008] NICh 23 but the absence of any public interest is just one of the factors to be weighed in the balancing exercise.

[9] The basis of the Petitioner's application is his assertion that if the dispute were to be aired in public there was a real risk of significant commercial harm being caused to Camden as a whole and, as a consequence, to the value of his (and his brother's) shareholding. He specifically referred to four categories of relevant groups – customers, competitors, suppliers and employees.

[10] Camden manufactures polyvinyl chloride windows and doors. His case is that as Camden's customers are primarily trade customers, should the allegations the Petitioner makes concerning the differences he has with his brother and his brother's alleged abuse of alcohol reach the public domain this could lead to unwarranted gossip and speculation within the trade and damage customer confidence in Camden's products and its ability to supply them. This undermining of confidence could be exploited by rival manufacturers in what is a very competitive trade and could also make it difficult for Camden to agree favourable credit terms from its suppliers. Finally, as a major employer in the Antrim area with 600 employees, public exposure of managerial disputes could impact on workforce confidence and damage perceptions of job security.

[11] I accept that these are potentially legitimate matters that could support the argument that this case should be heard in private and Camden's name anonymised, however I consider the potential for reputational damage as suggested by the Petitioner is not as significant as he suggests. I have heard his evidence, and at this stage I am taking it at its height. It shows a very difficult managerial atmosphere within Camden and this is clearly being acted out in a public forum within Camden. It is obvious from the evidence given by the Petitioner and three members of staff in the proceedings to date, and from the existence of emails circulating among the staff of Camden that most of the aspects of the dispute are well within the knowledge of the staff. This would include staff in all sections of Camden - administration, production, sales and distribution. The notion that the dysfunctional relationship between the brothers is continuing in a vacuum does not bear any serious scrutiny. One employee now works for another company, a competitor within the same trade. One witness spoke of her recent return to employment with Camden and about gossip, in her words "round the town", and warnings she received from members in her general work team. Another witness spoke of a rather dramatic incident involving a delivery driver from a supplier played out in the delivery yard which was the subject of much gossip among the employees.

[12] I have no doubt that most of the employees of Camden and the wider trade generally are conversant with the problems within Camden. They may not be aware of some of the exact details and allegations, but they will be aware of the existence of a dispute, the outworking of that dispute and the main players to that dispute.

[13] In all the circumstances I do not consider that the impact that any further public exposure of the dispute will have will be significant, and certainly not to such an extent as to damage the viability of Camden, its overall profitability, or the value of any shareholding.

[14] This is not a case which requires a court order to protect a patent, a trade secret or other confidential matters. It is also not a case such as *Noonan v Bournemouth and Boscombe ACFC* [2007] EWCA Civ 848 where Buxton LJ observed at [4] that it is

> *"very common for such winding up petitions to be heard in private because damage would be done to the company if allegations were made that thereafter were not substantiated"*

[15] The evidence given to date in the hearing would indicate that certain aspects of the administration of Camden may not be strictly in accordance with the provisions of its Articles of Association and the Companies Act 2006. In light of this I consider that there would be a public interest in affording the public the opportunity to attend court proceedings.

[16] In all the circumstances, having conducted the balancing exercise, I am not of the view that there is sufficient evidence to support a departure from the open justice principle. The anonymisation of the title of the proceedings shall be removed and the proceedings shall continue without any restriction as to public access.

[17] I will reserve the issue of the costs relating to this application to later.