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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2010/2037

IN THE MATTER OF MAIDEN CITY DEVELOPMENTS LIMITED

-and-

IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN

WINIFRED MOONEY

Petitioner;

-and-

DEREK KEYS, DERMOT FALLER AND MAIDEN CITY DEVELOPMENT LIMITED

Respondents.

_____

DEENY J

[1] This action relates to a private limited company which owns a block of flats in the City of Derry. The facts are complicated but of varying degrees of relevance and importance. The plaintiff is a medical practitioner in that city. By summons of 7 January 2010 she sought various reliefs including the winding up of the company, an order for purchase of "the shares of the petitioner in the company" or in the alternative an order that she be registered as the owner of shares in the company. I shall turn to the petition in more detail shortly.

[2] The case was originally listed to be heard in the High Court on 14 to 16 February 2011. There was an initial difficulty in that the petitioner herself was not available because of an apparent clash between the court dates and her duties as a

doctor at Altnagelvin Hospital. Subsequently the matter could not proceed because of illness in another quarter.

[3] The case was relisted for 25 to 27 January 2012 which were the earliest dates available in the Chancery Division, and it proceeded on 25 January and was heard by me on that date and on 26, 27, 30 and 31 January and 1 February 2012. I subsequently received helpful written closing submissions from the parties.

[4] On 18 January I received an application from Mr Kevin Downey of Downey Property, solicitors. Mr Ronan Lavery had been instructed for the earlier hearing but his instructions had been withdrawn by the petitioner. The circumstances were conveyed to the court in chambers and there is no reflection on Mr Lavery. However his fees had not been discharged and nor were they agreed and Mr Downey felt unable in the circumstances, after an adjournment of some hours, to obtain counsel to replace Mr Lavery. As the case had been in the list before and as both parties were anxious to proceed with it I gave Mr Downey leave to appear in the case, which he then conducted conscientiously and vigorously on behalf of the petitioner. Mr Alva Brangam QC appeared with Mr David Dunlop for the respondents. The first two respondents were or represented together the majority shareholders in the company and were directors of it.

[5] In her petition, signed by Mr Downey on behalf of his firm and dated 18 November 2009, the plaintiff recited that the company was incorporated on 14 February 1995 and had 300 fully paid up £1 shares. At paragraph 5 she said that: "By way of agreement dated 1 July 2005 the Petitioner purchased 100 £1 ordinary shares from Michael McCallion. The stock transfer form was stamped on 27 July 2005." Pausing there I have to say that that is not correct in one significant respect. The petitioner may have agreed to purchase the shares at the date indicated but such purchase did not proceed at that time.

At one point there was an agreement between Mr Martin McCallion who was one of the shareholders in the company to pledge some 15 of his shares in respect of a debt he owed to the company but that does not appear to have been registered. I therefore find that Mr McCallion was the registered shareholder of 100 shares in the company.

[6] The petitioner goes on as follows at paragraph 6. "By way of letter dated 21 September 2005 the First Respondent as Company Secretary wrote to Mr Michael McCallion in relation to the proposed transfer of 100 ordinary shares of £1 each to Dr Winifred Mooney declining to register the proposed transfer." The petition, inter alia, later goes on to contend that in April 2007 Mr McCallion exercised a power of attorney in favour of Dr Mooney. At about the same time a sum of money was paid through Messrs Harrisons to Mr McCallion or to a Mr Ryan on his behalf. It may be necessary to return to this later.

[7] The petitioner claims that she is entitled, on foot of this payment, to be registered as a shareholder in the company. Quite remarkably, even in the closing

submissions of the petitioner the precise character of her claim is left in the alternative but includes putting herself forward as a nominee of JSDKE Limited, another private limited company, which provided the funds that were paid over by Messrs Harrison, solicitors in 2007. It is said that Dr Mooney is a director of JSDKE Limited. It was her evidence that throughout this matter she has been acting on the advice of Mr Daniel McAteer, an accountant in the City of Derry. It appears that the voting shares in JSDKE Limited were originally registered to his late father and later to his mother. The Companies Office was informed on 2 April 2005 that Dr Mooney had become a director of the company and Mr McAteer then resigned as a director on 5 April 2005. A Mr R D Lusty and a Mr Boyle have at various times advanced money to or through JSDKE it would appear but Dr Mooney has not. Mr Tony Nicholl drew attention to the 2007 payment which he says is not properly recorded in the accounts of JSDKE Ltd.

[8] The prayer in the petition reads as follows:

> "1. That the company be wound up on the grounds that it is just and equitable so to do.
>
> 2. In the alternative the respondents may be ordered to purchase the shares of the Petitioner in the Company at a fair price by share to be determined.
>
> 3. Further and/or in the alternative that the Respondents be ordered to register the transfer of the shares formerly belonging to Mr Michael McCallion to the Petitioner in accordance with the stock transfer form dated 27 July 2005.
>
> 4. An order pursuant to Section 717 requiring the Respondents to provide information about the reasons for the refusal of the transfer as requested by the Petitioner.
>
> 5. Further and/or in the alternative an order that the Respondents be required to provide to the Petitioner such information sought by her relating to the business and financial affairs of the Company.
>
> 6. An order pursuant to Section 125 of the Companies Act 2006 that the company's register be rectified in accordance with the Petitioner's interest in shareholding.
>
> 7. Damages caused to the Petitioner as a result of the actions of the directors of the company.

8. Such further or other relief pursuant to Section 996 of the Companies Act 2006.

9. That the respondents be ordered to pay the costs of and incidental to this Petition."

[9] The twin thrusts of the petitioner's case are therefore that she has locus standi either because she is entitled to be registered as a shareholder in respect of Mr McCallion's holding or because she holds a power of attorney for him. If she establishes locus standi she then contends that she or Mr McCallion has been the victim of unfair prejudice. It is important to bear in mind that it is necessary for her to establish such unfair prejudice and not enough merely to establish either of her prior claims.

[10] It is convenient to deal with a subsidiary matter raised in the petition and in the submissions on behalf of the petitioner. Paragraph 4 of the prayer complains that the respondents did not provide reasons for the refusal of the transfer requested by the petitioner contrary to Section 771 of the Companies Act 2006 (which applies in Northern Ireland). However Section 771, which at sub-section 2 does require a company to give reasons for the refusal to transfer "as the transferee may reasonably request" was not in force in 2005 or even 2007. It came into force by virtue of the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495. The section is not said to be retrospective. The earlier equivalent provision at Article 193 of the Companies (NI) Order 1996 did not impose a duty on a company to give reasons but merely to send to the transferee notice of the refusal within two months of the date in which the transfer application was lodged, which the petitioner acknowledges was done here.

[11] The parties or their representatives have put in written submissions on three separate occasions. I am obliged for these submissions which I have taken into account even if I do not make express reference to the submissions in their very extensive entirety.

[12] It is right to deal with one factual matter at this stage. In written submissions for the hearing on 25 January 2012 the petitioner submitted that the respondents had "tried to raise a totally speculative point about the involvement of Daniel McAteer". It was contended that it was the respondents, not Dr Mooney who had placed Mr McAteer at the centre of matters. That might be consistent with her petition which makes no reference to Mr McAteer or to JSDKE; likewise her affidavit of 28 May 2010 which refers to her giving the money for the shares. However these matters were put in a very different light by Dr Mooney herself when she gave evidence. Her evidence has been subject to strictures by the respondents in their closing argument which may well be justified. My finding is that she was basically an honest woman but that she was right to volunteer in her evidence in chief as she did that she was naïve in business and legal matters. She said that Mr McAteer has a

continuing involvement with JSDKE as financial advisor and accountant and looking out for deals. He is paid in that capacity. It was he who advised her about the agreement of 1 July 2005 having presented the opportunity to her as she put it. When Mr McAteer came to give evidence himself Mr Brangam QC put to him that she had said that he was the architect of this matter and her advisor. He accepted that that was fair comment. If therefore a ground for refusing to register the petitioner is the involvement in her affairs of Mr McAteer I find as a fact that that was a ground which the respondents could rely on as reasonably apprehending that he was indeed involved and was likely to continue to be involved on behalf of or advising Dr Mooney.

Locus Standi

[13] The petitioner seeks relief on foot of the provisions of Section 994 of the Companies Act 2006. I set this out:

> "**Petition by company member**
>
> (1) A member of a company may apply to the court by petition for an order under this Part on the ground—
>
> (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.
>
> (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.
>
> (3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, 'company' means—
>
> (a) a company within the meaning of this Act, or
>
> (b) a company that is not such a company but is a statutory water company within the meaning

> of the Statutory Water Companies Act 1991 (c. 58)."

[14] The petitioner, if she has locus standi, then relies on Section 996 which provides that if "the court is satisfied that a petition under this part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of". As is evident from the quotation already the earlier test of minority oppression is now replaced by unfair prejudice. The court is given wide powers under Section 996 if it finds that a member of a company, as defined, has suffered unfair prejudice.

[15] What is meant in Section 994(2) by the phrase "by operation of law"? Does it refer to a situation where the shares have been transferred or transmitted by operation of law in the sense of an involuntary act e.g. the shareholder has died and the shares are held by a personal representative or the shareholder is bankrupt and the shares are held by a trustee in bankruptcy? North J uses the expression in that sense in New Ormond Cycle Company Limited [1896] LJCH 520. Article 193(1) of the Companies (NI) Order 1986 requires a company to have a "proper instrument of transfer" delivered to it before it can register a transfer of shares. Article 193(2) provides that:

> "(1) does not prejudice any power of the company to register a shareholder or debenture holder at present to whom the right to any shares in or debentures of the company has been transmitted by operation of law."

That might be taken to imply an involuntary transfer of some kind by operation of law where the transferor has not signed a proper instrument of transfer e.g. a deceased or a bankrupt. Neither Palmer's Company Law Annotated Guide to the Companies Act 2006 2nd Edition nor Companies Act 2006: A Guide to the New Law by Scanlon and Others seem to think that there has been a change in the substantive law by virtue of Section 994.

[16] Mr Downey in his closing submissions relies on the decision of Hoffman J in Re A Company [1986] BCLC 391. He was dealing with Section 459 of the Companies Act 1985 echoing the provisions of Section 183, which are the equivalent of Article 193. It seems to me that Hoffman J draws a distinction between the requirement for a transfer to have been executed and a transmission by operation of law. This finds an echo in Section 994(2). As it appears to be the case that a stock transfer form had been executed (although consideration had not then passed) in 2005 the petitioner contends that she can rely on Section 994(2). The respondent argues that as she had not paid money at that time and as the money that was subsequently paid in 2007 was not hers that she lacks the necessary locus standi. They say that I should not follow the dictum in the strike out application in Re Brightview Limited [2004] BCC a decision of Mr Crowe sitting as a Deputy High Court Judge. These are interesting

points but the view I have taken is that without reaching any final conclusion on them I shall treat the petitioner as having locus standi under this provision.

[17] A somewhat similar position operates in relation to the power of attorney. One can well see that a person holding a power of attorney on behalf of a person who no longer had the mental facilities to manage their affairs would be entitled to bring a petition for unfair prejudice in respect of a minority shareholding held by the person under the disability. The facts here are clearly very different. But again, without reaching any final decision on the matter I am going to give the petitioner the benefit of the doubt and conclude that that also gives her a right to bring these proceedings.

Unfair prejudice

[18] The point that must next be borne in mind is that there is a distinction between a person in the capacity of the plaintiff as the transferee of shares and somebody who has been accepted as a member. The petitioner has tended to gloss over that. One of her claims for unfair prejudice is the refusal of the respondents to register as a shareholder. This is obviously not applicable to her claim as the attorney of Martin McCallion. I propose to deal with it first as it appears first in chronological order. It is appropriate to consider the genesis of the company at this stage. It was formed to develop the Star factory site in Londonderry keeping the shell of the buildings and converting the interior into apartments for sale. It was formed between the first two respondents and Michael McCallion and each had 100 shares. Mr McCallion was the initial managing director with the second respondent as Finance Director.

[19] Much of the material that has passed between the parties here does not seem to me to be relevant to the resolution of the essential issues in the case. There have been, not surprisingly, various dealings and negotiations over the years. Indeed it is regrettable that no resolution was arrived at. As indicated I heard from Dr Mooney and from Mr Daniel McAteer. The latter was a fluent witness but listening to him being cross-examined by Mr Brangam I was reminded of the remark made about a 20th century Irish leader "that dealing with him was like picking up mercury with a fork". One illustration of his elusiveness is that as late as his evidence in this case in January 2012 he would not or could not say how he viewed Dr Mooney's role in this matter, although her adviser. At one point he said that in the accounts she was a trustee for the company but he said this was not a final position. The money that had been forwarded to Mr McCallion or others on his behalf was furnished by Mr Boyle who apparently is a shareholder in JSDKE Limited. No reference of course to JSDKE Limited is to be found in the original petition nor in the early affidavits of Dr Mooney, at a time when I find that Mr McAteer was advising her and the "architect" of the arrangement being pursued. Even now the court and the respondents do not know whether if admitted as a member, she would do so in her own right or as agent for JSDKE LTD or Mr Boyle or, conceivably, Mr McAteer.

[20] In contrast I found Mr Derek Wray Keys an entirely satisfactory witness. I had the opportunity, as I had with the other witnesses, of studying his demeanour in court. He seemed to me a candid gentleman. He had had a retail business in the past with two outlets and this venture was by way of a retirement fund for him which had not turned out well. He was 69 at the time of giving evidence. I considered him a clearly honest witness. He was cross-examined at length and closely by Mr Downey but that did not shake the court's faith in the reliability of his evidence. Mr Dermott Michael Faller came from a different background but again a wholly respectable one. Again from his demeanour and giving of his evidence I am satisfied that he was an honest and competent man telling the truth to the court. Although a subpoena had been issued in respect of Mr Michael McCallion he was not ultimately called. I accept the evidence of Mr Keys and Mr Faller about their relationship with Mr McCallion. That was to the effect that in the early years they left to him the principal conduct of the company including the important task of carrying out the building works to convert it from a disused factory into a block of apartments. I accept their evidence and find that after a period of years, partly from other persons approaching them with complaints, they concluded that Mr McCallion had in fact been conducting matters in a most unsatisfactory way. Indeed at one point they reported him to the police who searched his premises but no prosecution followed. I accept that a sum of money of about £71,000 was owed by Mr McCallion to the company in respect of his acts or omissions or defalcations. This is borne out not only by the palpable honesty of his two co-directors but by the fact that it was carefully recorded in the minutes of the company and that McCallion had agreed to sign over shares. These minutes were sent to Mr McCallion but no letter of protest dissenting from them was forthcoming. Mr McCallion has had an unhappy history of various forms of insolvency over the last decade. Mr Keyes' affidavits are available for a full account of the dealings with Mr McCallion.

[21] The Articles of Association of Maiden City Developments Limited deal with shares from Clause 4 on. Clause 9 reads:

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

This is what the parties agreed when acquiring shares in this company (registered in 1995). It may be that "the" should read "their" but in any event it is clear the directors have an absolute discretion. The court has no power to water that down in my view. Popely v Planarrive Limited [1997]1 BCLC 8 is a modern example of a refusal to rectify the register where the directors of a company have bona fide exercised an absolute discretion to refuse to register a transfer of shares. I am entirely satisfied that Mr Keyes and Mr Fowler here were acting in good faith at all material times.

[22] On 11 July 2005 Daniel McAteer wrote to the company saying that Mr McCallion was going to sell his shares to a client of Mr McAteer's. The latter was then on the edge of an IVA. On 28 July 2005 Mr McCallion himself wrote to say that he had sold his shares to a client of Daniel McAteer. A stock transfer form was then received from Harrisons, solicitors on 2 August 2005. The directors wrote saying that they would not agree to the transfer of shares until outstanding matters between him and the company was resolved. The existence of the IVA was likely to be a problem.

[23] On 19 August 2005 Messrs Harrisons wrote asking for the registration of the shares in Dr Mooney's name but also noting that the claim against Mr McCallion was in the sum of £71,533 and that that might be paid directly to the company secretary. I observe that on a careful reading of that letter it is somewhat conditional in tone. But in any event it was further undermined by Mr Daniel McAteer's letter of 25 August which expressly said that if it transpired that Mr McCallion does not owe the company money the balance of £71,533 would be released to him. This was of no attraction to the directors who already had Mr McCallion's admission that he owed this sum of money to them. The directors in due course declined to register Dr Mooney as a shareholder. Quite a lot of time was spent on this correspondence which is set out very fairly in the affidavit of Mr Keys. But I observe that it is not for the court to exceed its role. It is enough for the court to be satisfied that these gentlemen did consider the application (which arguably they were obliged to do) and in good faith rejected it. That is not in the least surprising given the difficulties that they had had with Mr McCallion and given that they did not know Dr Mooney.

[24] Of course events have proven them right in as much as she did not disclose to them, nor had her solicitors nor Mr McAteer that she was merely some kind of nominee for JSDKE Limited or perhaps for one of its shareholders in all probability. I will return to this in a moment.

[25] They were also clear in their view that they did not want to become involved with Mr Daniel McAteer. He and the petitioner rely on the fact that he did have a meeting with the first two respondents which was amicable. He also relies on an e-mail eschewing any criticism of himself from the respondents. But the former is something that one would expect from respectable men of business meeting an accountant there on behalf of a client. The latter is also something that one would expect from cautious men of business who did not want to be sued for defamation. Neither undermines my conclusion that in good faith they did not wish to become involved with Mr McAteer. Both of them were active in the city where Mr McAteer practised. They were reluctant, even with the immunity of the witness box, to say too much but it was clear that when they enquired about him they were not reassured by his reputation. Counsel also point out and the respondents to some degree bear out that he had begun by July 2005 the prolonged course of litigation with which he became involved. Without going into the rights and wrongs of the various cases it cannot be disputed that Mr McAteer appeared to be prone to such disputes and to those disputes ending in litigation. In those circumstances it is not

in the least surprising that the directors should refuse to register Dr Mooney. In my view they were perfectly entitled to do so.

[26] In the alternative the subsequent events seem to me, if it were needed, to show that this application for registration was not made in good faith. Dr Mooney did not disclose that she was an agent for another principal. As discussed in Chitty on Contracts Volume 2 27th Edition paragraph 31.061 the personality of an undisclosed principal can be important. This was a small limited company with three, or at times four or five shareholders, and it seems to be that the directors of the company were entitled to know whether they were taking on board as a shareholder another private limited company or this medical practitioner in her own right. They were not so told. Therefore if it were necessary I would refuse relief on that ground to the petitioner in any event.

[27] Mr Downey relies on the fact that the directors did not sue Mr McCallion as evidence that there was not a true debt. But it is clear from the evidence of his clients and others that this man was plagued with issues of insolvency throughout the relevant period and one can entirely understand why the directors would not want to throw good money after bad by suing a party who was not a mark; they knew he had shares in the company; if they survived the insolvency processes they were there and if they did not there was nothing else to justify the issuance of civil proceedings. Nor do I think that the willingness of Mr Keys and Mr Faller to negotiate at times for the purchase of the shares invalidates their evidence; again that is what one might reasonably expect of men of business. In some ways it is surprising how much time has been spent on this issue of the loan, although no declaration was sought as Mr McCallion's attorney that it was not owing nor did he trouble to come to the court to prove its absence. Mr Faller and Mr Keys dealt convincingly with Mr McCallion's debt and in a way that was consistent with the documentation e.g. the e-mail from Mr Faller to Mr Keyes of 17 December 2004.

[28] For the avoidance of doubt the respondents were in my view entitled to stand in 2007 on their earlier decision and not to admit Dr Mooney as a member of the company in place of Mr McCallion. It is notable that it was Mr Daniel McAteer who on 14 March 2007 e-mailed to Mr Keyes asking that the shares of Mr McCallion be registered and the books of the company for Dr Mooney. "As you are probably aware, Mr McCallion has sold his shares in the above named company to our client Dr W Mooney." It is notable that even then there is no reference to JSDKE. Dr Mooney's power of attorney only extends to Mr McCallion's shareholding in the company. As she has it I shall proceed to consider whether there has been any unfair prejudice, even though I conclude that the directors were entitled not to enter her as a member on the register. Regarding this issue of registration it is worthwhile to note that Mr Downey in his oral opening of the action accepted that the nature of the company was a quasi partnership. I find he is correct in that and it reinforces the appropriateness of the directors having an absolute discretion as to who to take onboard in place of Mr McCallion.

[29] The petitioner's written legal argument for the hearing of 25 January 2012 referred to my decision of 19 January 2006 in Daniel McAteer v John Joseph Mullan. I had referred there to the absolute discretion of directors not to register an unwanted purchaser of shares. The skeleton argument says that that decision was appealed successfully and a retrial resulted. No doubt Mr Downey was acting on instructions when he wrote this but it is rather typical of the selective disclosure of facts which is a feature of this case. A retrial was ordered when the Mullans assented to the same, appearing in person, for some unknown reason. There was a retrial before Lord Justice Campbell who came to the same result as myself i.e. against Mr McAteer in a judgment of 23 July 2008 ([2008] NICh 12). The point is against the petitioner as showing that Mr McAteer himself should have been well aware in 2005 and 2007 that where the articles, as here, gave the directors an absolute discretion, as is typical, the courts would uphold that. It makes it all the more extraordinary that he advised anyone, to pay £150,000 for Mr McCallion's shares when he knew that the directors had already refused to register Dr Mooney as a shareholder.

Unfair prejudice? Non-selling of apartments

[30] At paragraph 17 of the petitioner's closing submissions there was criticism of the fall in the value of the shares. "Had the directors acted fairly and not tried to prejudice the owner of the 'McCallion shares' then all the shareholders could have done very well in 2007 by either taking apartments or cash in a distribution". This is a remarkable contention. Mr McAteer attended the annual general meeting of the company on 3 September 2007. He did so ostensibly on behalf of Dr Mooney but, in reality and covertly on behalf of JSDKE Limited (or perhaps Mr Boyle). He did not at that time propose that each shareholder should take apartments or cash in for a distribution. He was told of a plan to sell a number of apartments each year so that the profits would remain below a level of £300,000 to avoid increased corporation tax. His response is noted as follows. "A discussion then ensued with D McA[teer] wondering why we wish to sell any further apartments with prices likely to increase over five years". So the attitude of Mr McAteer on behalf of the petitioner ostensibly at that time was querying selling at a time when the market was turning rather than the reverse now contended for in closing submissions.

[31] In his opening of the action on behalf of the petitioner Mr Downey drew attention, as the report of Messrs Goldblatt McGuigan had done, to the cessation of sales of the apartments following April 2007. Mr Downey alleged that the sales were stopped in 2007 with the intention of devaluing Mr McCallion's shares which Dr Mooney or JSKDE Limited or Mr Boyle had just paid for. "They cut off their nose to spite her face"as he put it. I completely reject that contention. I do so not only because I accept the honesty and accuracy of the evidence of Mr Keys and Mr Faller that they did nothing of the sort i.e. stop sales. They wished sales to continue but sales simply dried up. In this respect their evidence was corroborated and reinforced in two significant respects. First of all, as I have had to advert to in several previous judgments and is a matter of public knowledge, the building boom experienced in Northern Ireland was based on rising prices for houses, apartments

and land. This turned at some point in 2007. The precise date may vary from place to place within Northern Ireland. The obvious explanation for the cessation of sales therefore is the change in market conditions at that time.

[32] Furthermore the respondents called their agent Mr Peter A Grant of Londonderry. He was an experienced letting and estate agent and he managed the property for the company. He was asked whether he had been instructed to stop sales in 2007 and he answered absolutely not. He explained how they had been selling the apartments floor by floor with those without a view first and had the bulk of them sold by 2007. However due to the interest rate increase in 2007, in his view, the market dried up. Until then most of the buyers had been for "buy to let" purposes. All the apartments had remained for sale as they currently were for sale also. He still had viewings but there had been no offer for a year.

[33] Mr Grant was cross-examined. In the course of that he said he was the premier letting agent in the City of Derry. He described the steps taken to market the properties which were done in a way recommended by him. There was never a suggestion that he should stop selling.

[34] His evidence also touched on the next issue with which I have to deal i.e. that although he had his own maintenance people instructions had to come from the landlord for work on the property. He would not agree with Mr Downey's contention that there was nothing else to be done by the directors of the company. They were responsible for the block of flats not him. They had to make decisions about purchases and the prices and their viability. He denied that the advertising boards had been taken down although a few had been "lost" over the years. Newspaper advertising had not been engaged in because it was very costly and unrewarding. The property was advertised on his own website which had 80,000 hits. The directors looked after the service charge paid by the owners and tenants of the property and not him.

[35] I found Mr Grant another convincing witness for the respondents. To conclude therefore I consider this an untenable contention that the majority were guilty of unfair prejudice against the minority by deliberately stopping sales in 2007. That was not the case.

Excessive remuneration for directors

[36] The petitioner obtained a report from Mr Tony Nicholl of Messrs Goldblatt McGuigan. He gave evidence on a number of aspects and I have taken his evidence into account. It was of particular relevance in regard to the fees which he said were excessive, in his experience, for a small private company. He pointed out that there were no invoices from the directors and asked what work had been done. He pointed that there was an equal amount for both directors and that they appeared to be agreed in advance. They were paid in expectation of sales of apartments. He thought that given that there was a management agent there would be very little

work to be done. The total directors' fees over a period of seven years from 2003 to 2010 were apparently £265,000. If these were excessive they could indeed, I find, constitute an unfair prejudice because they were going to the two directors rather than being paid as dividends to the three shareholders.

[37] Mr Nicholl was cross-examined by Mr Brangam. He admitted that he was not aware that between 1999 and 2002 that Mr McCallion had received £37,000 in fees whereas Mr Keys and Mr Faller had received no fees. His attention was drawn to evidence of Mr McCallion's admission of the first £23,000 of the debt the directors have satisfied me he owed. He accepted that after Mr McCallion had been dismissed more work would need to be done by the directors. He accepted that although the fees were stated to be £265,000 the amount which they had actually drawn was only £122,000. The fees actually paid therefore were slightly under the £10,000 per annum which he had thought fair. He found this approach on their part illogical as they were liable to and had apparently paid tax on the higher amount. He accepted that the need for Mr Keys and Mr Faller to give personal guarantees to keep the project afloat would justify more fees; he had not seen that before Mr Brangam drew it to his attention. He accepted there was no evidence in the documents which he had seen of sales being stopped by the directors.

[38] I have adverted previously to the general evidence of Mr Keys. On this topic he swore and I accept that when Mr McAteer was told of the level of fees at the 30 September 2007 AGM i.e. £30,000 per annum he said: "That's seems to be very reasonable". I accept Mr Keys's evidence that Mr McCallion left the project in considerable disarray and that he and Mr Faller had to work hard and energetically to put the project through to completion and indeed to manage it thereafter. The fees increased as the years went on because more money was available from sales, at least in part. I have reread my note of Mr Downey's cross-examination and confirm what I noted at the time that this was a clearly honest witness. Some of the matters which Mr Downey was instructed to put to him were explanations from Mr McCallion which seemed most unlikely indeed and as indicated before I reject them. He was questioned about the e-mail of 26 June 2006 in which he had described his dealings with Mr McAteer as "honourable and amicable" but I accept his answer that it "would have been very stupid to attack him when I had only met him once or twice, although I had formed a poor view of him". I note that on the same page 156 of the trial bundle he, Mr Keys, had made a comment about the untoward nature of the offer for shares. I am satisfied that the management of this building with its yard and car park did involve and does involve Mr Keys in doing work over and above the work done by the agent.

[39] Similarly the court heard from Mr Dermott Faller. Again I have commented generally on his evidence. More precisely I accept his evidence about the state of the company when they had to dismiss Mr McCallion as the managing director and they themselves became managing and finance directors respectively. Mr Fowler set out his own qualifications as a graduate and a consultant with LEDU for ten years and later as a chartered engineer specialising in information technology. He

suggested that the figure Mr Brangam had put to Mr Nicholl for Mr McCallion's fees was understated at £37,000 and was more accurately £59,000. He described in a persuasive way how they realised that Mr McCallion was in fact lining his own pockets from monies that should have gone into the development but how he Mr McCallion then realised he could not pull the wool over their eyes any further. I think I need not go into that in further detail.

[40] On the excessive fees issue Mr Faller maintained the company records, he supervised the budget and he met with the project manager and bankers and others in connection with the completion of the developments. He had to pursue a claim through the courts on behalf of the company. He had to consult lawyers on other issues relating to the company. He had to do considerable work on the debt of Mr McCallion. He confirmed that he had indeed paid tax on directors' fees. Between him and Mr Keys they paid tax of £142,874 of tax on fees which they had not in fact drawn. This is further evidence of the honesty of these men.

[41] Mr Fowler was cross-examined by Mr Downey. He put to him that the sales were stopped to depress the value of the company which he rejected. He pointed out that the apartments had cost £60,000 each to build and that they had in fact sold one fairly recently for £58,000 because they were under pressure from the bank. It is recalled that these men have given guarantees to the bank. Apparently the bank received 75% of the sales of proceeds. He answered convincingly about the disarray in which he found the company when he and Mr Keys had to take over the running of it from Mr McCallion. The paying of the tax on fees was because he wanted to spread out the fees to avoid moving into a higher tax band by taking all the fees in one particular year. It also protected his entitlement to the fees in case there was any change of ownership in the company e.g. if Mr Keys chose to go.

[42] The respondents also called Mr Jeremy Harbinson of Harbinson Mulholland. He also provided a report, which is a very helpful report with much of value on a number of the issues in this case. He considered the fees to be proper and reasonable fees in the circumstances. It was the opinion of his firm based on various earnings surveys that the average executive director remuneration during this period in Northern Ireland was around £70,000. Fees of £30,000 each therefore for part-time posts were not in his view manifestly excessive. As he pointed out not only had they not taken some of the fees but they had introduced capital of some £59,974 themselves between 2005 and 2008 to cover a shortfall in funding. He was taken over the figures for fees in detail both by counsel for the respondents and by Mr Downey and I noted his evidence carefully. I am satisfied that the fees, even on the higher level of fees marked but not drawn were justified by the involvement of these two the first and second respondents in the management of the third respondent. The ownership of property is not the same as the ownership of shares in a public limited company. The ownership of property, even where a letting agent is employed, still frequently involves a real input from the owner. In this case we heard from the letting agent whose evidence showed that there were still quite a lot of things for the two directors to do in regard to the management of this building.

Furthermore there is no doubt that they had to do far in excess of what a non-executive director would do for some years to keep this project afloat.

[43] At one stage it seems to have been suggested that a refusal to provide information to Dr Mooney constituted unfair prejudice. I am satisfied that as accepted by Mr Downey in his written opening any information was eventually given and that nothing has been proven before me which would justify any relief being granted under that heading. Page 13 of the written opening for the hearing lists a series of alleged instances of unfair prejudice. Some of these could not ground such a finding and of the others that could I find they have not been made out. Therefore even if the petitioner has a right to claim as the attorney for these purposes of Mr McCallion or, contrary to my findings, as the purchaser of the shares as a nominee, no unfair prejudice has been shown. I therefore refuse the petitioner any relief.

[44] At paragraph 23 of their closing submissions counsel for the respondents suggest that I should make an order requiring the petitioner as acting for Mr McCallion to sell the shares to the respondents at a price to be fixed by expert determination from which the 2004 loan (sic) would have to be deducted before payment. I do not see a response from Mr Downey to that point. In any event it does not appear to me that Section 996 of the Act empowers me to take that course. Section 996(1) deals with the situation where the court is satisfied that a petition under this part is "well founded". That is the opposite of what I have found here. Section 996 (2) relates to an order under s. 996 (1) and does not widen it. There is no cross-petition.