[NOTE: the previous prohibition on publication of this judgment, made during the 'in camera' phase of these proceedings, was removed by the court on 19/12/11.]

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2008 No. 76500

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

IN THE MATTER OF THE COMPANIES ACT 2006

_____

AND IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

_____

IN THE MATTER OF LAGAN HOLDINGS LIMITED,
LAGAN CEMENT GROUP LIMITED,
LAGAN DEVELOPMENTS (HOLDINGS) LIMITED,
KINGSCOURT BRICKS LIMITED
and
LAGAN HOMES LIMITED

_____

McCLOSKEY J

I INTRODUCTION

[1] This judgment concerns an interlocutory application brought at an early stage of these proceedings. By Notice of Motion dated 27th August 2008 (as amended), the first-named Respondent (Kevin Lagan) seeks the following relief:

> "*An order pursuant to Order 18, Rule 19(1)(d) of the Rules of the Supreme Court (Northern Ireland) 1980, Article 105 of the Insolvency (Northern Ireland) 1989 and/or in the inherent jurisdiction of the court striking out:*

(a) *Paragraphs 31(ii) and (iii) of the Petition; and*

(b) *Prayer (i) of the Petition which seeks an order pursuant to Articles 102(g) and 105(2) of the Insolvency (NI) Order 1989 that the companies be wound up*

on the ground that the same constitutes an abuse of the process of this honourable court".

The sole question to be determined at this stage is whether the first-named Respondent is entitled to this relief.

[2] This motion comes before the court in the following way. There are six Respondents to the Petition. Five of the Respondents are described as the holding companies in respect of all the companies within the Lagan Group. I shall describe these five Respondents as "*the holding companies*". The Petitioner is described as the owner of a minority shareholding (42.5%) and director of each of the holding companies. The first-named Respondent is said to own the majority shareholding (54.8%) in the holding companies. Individually, the divisions are said to be engaged in different commercial and trading activities. For example, as appears from the diagram appended to the Petition, the first-named Respondent (Lagan Holdings Limited), which heads the first of the five divisions, is constituted by a total of some fifty individual companies which engage in businesses such as construction, quarrying, bitumen production and waste disposal. The Lagan Group is described as a long established family business. This business has flourished and expanded exponentially during recent decades. The Group turnover is stated to be more than £400,000,000 gross per annum.

[3] The Petitioner and the first-named Respondent are brothers. This litigation arises out of a major dispute between them concerning the operation of the Group, which has been in gestation for some considerable time and which, despite efforts, the parties have been unable to resolve consensually. Increasing and unresolved differences between the brothers culminated in the initiation of these proceedings, in July 2008. The court has been actively seised of the litigation since then and has made certain interim orders, none of which is germane for present purposes.

II <u>THE PETITIONER'S CASE</u>

[4] In brief compass, the Petitioner makes the case that the Group has operated for several years under the guise of what he describes as a "*quasi partnership*", entailing a relationship of trust and confidence between the brothers. According to the Petition, by agreement between the parties the management of the Lagan Holdings subsidiaries mainly "*reported*" to the

Petitioner, while the management of the subsidiaries of the other four divisions did likewise vis-à-vis the first-named Respondent. It is claimed that, under these arrangements, the Petitioner reposed substantial trust and confidence in the first-named Respondent with regard to the affairs of the four divisions under his superintendence. At the hearing, it was confirmed on behalf of the Petitioner by his counsel (Mr. Shaw QC) that his case is that these arrangements originate in an informal "demerger" dating from around 2004. [I would observe that amendment of the Petition will probably be required in order to make this matter, and any related matters, clear].

[5] Since August 2001, there have been efforts by the two principal parties to reach agreement on the re-organisation and succession of the Group. Regrettably, the brothers found themselves in serious conflict with each other, a conflict of increasing proportions. The Petition avers that it was agreed that a single valuer would value the whole of the Group business, with a view to formulating a consensual "exit strategy". The Petitioner complains that the first-named Respondent frustrated the agreed sale of the building materials and clay business in 2005. It is asserted that around September 2006, the brothers agreed on a "partition" of the various businesses, with exclusive ownership of certain businesses being vested in each brother. The Petitioner contrasts this with a reorganisation and disposal option. This would appear to have been, at most, an agreement in principle. The Petitioner complains that the first-named Respondent reneged on this soon afterwards, with a view to pressurising the Petitioner's disposal of his shareholdings below value. Valuation differences also seem to have arisen. The agreed position of the two principal parties at the hearing was that the continuing dispute between them is a matter of some complexity and not simply a matter of valuation differences.

[6] The burden of the Petitioner's case is that the first-named Respondent has seriously undermined the relationship of trust and confidence between the brothers. This is particularised under three headings:

(a) An alleged tactical manoeuvre by the first-named Respondent designed to pressurise the Petitioner, whereby the first-named Respondent, in July 2007, pressed the Petitioner to invest some £9,000,000 of his own money in Lagan Homes Limited.

(b) It is further alleged that the first-named Respondent took certain steps, such as the orchestrated appointment of certain officeholders, designed to exclude the Petitioner from management of the businesses.

(c) Thirdly, the Petitioner complains that the first-named Respondent has reneged on agreements between them

concerning long term re-organisation and restructuring of the Group businesses: see paragraph [5] above.

[7] Secondly, the Petitioner alleges that the first-named Respondent has acted in breach of his fiduciary duties to the companies. The main complaint advanced under this heading is that the first-named Respondent acted inappropriately in acquiring the entity "Welsh Slate" through the medium of a limited company, "Rigcycle Limited", in which the first-named Respondent is the majority shareholder and the first-named Respondent's son, Peter, is a director. This acquisition cost £31,000,000 and it appears to be alleged that Rigcycle Limited was incorporated as a special purpose company, to this end. It would further appear that this acquisition was the impetus for a major rift between the brothers. When considered in conjunction with the parties' affidavits, this is evidently, by some distance, the main complaint advanced in the Petition.

[8] According to the Petition, during the ensuing months the parties' efforts were concentrated on securing a long term resolution of their differences, predominantly via the purchase by the first-named Respondent of the Petitioner's shares in each of the five holding companies. The Petitioner complains that the first-named Respondent's proposals were not fair and reasonable and were rejected accordingly. The Prayer in the Petition seeks the following relief:

(a) An order winding up the companies on the ground that this would be just and equitable, pursuant to Article 102(g) of the Insolvency (Northern Ireland) Order 1989.

(b) Alternatively, an order requiring the first-named Respondent to purchase the Petitioner's shares in each of the companies "*without any discount for the fact that these shares are a minority holding*".

(c) Further, or alternatively, an order permitting the Petitioner to purchase the first-named Respondent's shares in each of the companies.

(d) An order requiring the first-named Respondent to account for all profits made by Rigcycle Limited in the acquisition of Welsh Slate and any profits made in any like transactions.

(e) Interest on the share purchase price.

(f) Payment to the Petitioner of all dividends allegedly due to him pursuant to an agreed dividend policy.

According to the Petitioner, the Petition was issued by him as a last resort. He claims that he is the innocent party in the affair.

III RESPONSE TO THE PETITION

[9] The Petition has generated two affidavits sworn by the first-named Respondent. The first of these was sworn predominantly for the purpose of supporting the present motion. The first-named Respondent places considerable emphasis on the following passages in a letter dated 21st May 2008 written by the Petitioner's solicitors:

> "*3.4 As a consequence of this unfairly prejudicial conduct our client has been advised that he is entitled to petition the court seeking the purchase of the entirety of his shareholding in the Lagan Group (which includes his shares in all five holding companies) for fair value without any discount for a minority shareholding.*
>
> *3.5 He has been advised that any order for the purchase of his shares will include a requirement that he receives payment of the consideration for his shares without delay.*
>
> *3.6* ***We state clearly and unequivocally for the avoidance of any doubt that a share purchase is the primary and preferred relief our client has instructed us to seek.***
>
> *3.7 In the event your client is either unwilling or unable to purchase our client's shares at fair value without delay our client will seek an order for the winding up of the five holding companies in the alternative …*
>
> *In the event your client is either unwilling or unable to purchase our client's shares in all the five holding companies* ***the purpose of the winding up of the holding companies will be to enable the trading subsidiaries to be sold on the open market as going concerns and we see no objection to the court making an order for the winding up of the companies in these circumstances***".

[My emphasis].

This letter having been thus highlighted, the Petitioner rejoined subsequently, by an affidavit sworn on 8th September 2008. I shall return to the contents of this affidavit below. At this juncture, I merely observe that both share purchase **and** winding up were identified as possible remedies in this letter.

[10] In the course of two affidavits, the first-named Respondent focuses predominantly on his claim that the Petition has been the cause of substantial damage to the group and is likely to give rise to still further adverse consequences. These are duly particularised. In particular, he asserts that the complex and extensive banking arrangements whereby the companies are financed are jeopardised. It is suggested further that the uncertainty stimulated by the Petition has brought about a moratorium on the bonding facilities previously available from a major provider. The possible shadow of the companies having to provide cash deposits in order to secure bonds is canvassed. In addition, an adverse impact on the companies' ability to tender for new projects is asserted. Additional actual, or potential, adverse impacts in the realms of liability insurance arrangements, participation in lucrative PFI contracts in Ireland and continued involvement in other major contracts are canvassed. In summary, it is asserted that the presentation of the Petition constitutes a default event under the structure of various prevailing contractual arrangements. This requires notifications to be made, which will inevitably damage the Group's reputation, thereby reducing its future profitability and could stimulate repayment demands.

[11] In succinct terms, the first-named Respondent claims that the Petition threatens the continued ability of some of the Group elements to trade, while fundamentally altering its trading relationships with key actors such as banks, business partners, finance and bond providers and insurers. According to the first-named Respondent, certain matters are not in dispute between the parties. These are:

(a) The Petition has brought about an 86% increase in the demand debt owed by the companies.

(b) At least one of the companies has become insolvent in consequence.

(c) Securing bonds has been made more difficult.

(d) Under the Lagan Group PFI contracts, the Petition constitutes an event of default, thereby giving rise to the spectre of repayment demands.

[12] An affidavit has also been sworn by one Patrick Shortall, a qualified chartered accountant and a director of each of the five companies concerned. He is, further, chairman of four of them. He suggests that the presentation of the

Petition has serious implications for the companies. He points out that the companies continue to trade and dispose of properties only by virtue of the interim orders of the court, dated 1st August 2008. He suggests that the mere fact of dissemination of the Petition in certain quarters would significantly disadvantage the group vis-à-vis its competitors in the Republic of Ireland. He claims that the consequences would be "*catastrophic*", without dilating much on this. He expresses concern that the presentation of the Petition has the effect of converting term loans to demand loans. He highlights that the Lagan Cement Group Limited has long term debts totalling £52.4 million. He also adverts to the duties of the companies' directors under Section 172 of the Companies Act 2006.

[13] In the familiar trading of punch and counter-punch which habitually takes place in the context of trial by affidavit (the present context), the Petitioner accuses the first-named Respondent and Mr. Shortall of over-reaction and hyperbole, while they, in turn, allege substantial understatement on the part of the Petitioner. The most that the Petitioner is prepared to concede is that the Prayer for winding up in the Petition *could* have adverse consequences for the Lagan Group [cf. paragraphs 11 and 13 of his main affidavit]. The Petitioner also attempts to justify his pursuit of a winding up order.

IV THE PRESENT APPLICATION: ISSUES AND ARGUMENTS

[14] The first-named Respondent seeks an order striking out the Prayer for winding up in the Petition on the ground that this is an abuse of process. His central contention is that other remedies are available to the Petitioner and that he is acting unreasonably in seeking the remedy of winding up. It is argued that the Petitioner can secure an adequate remedy under Section 996 of the Companies Act 2006, which provides:

> "*(1) 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.*
>
> *(2) Without prejudice to the generality of subsection (1) the court's order may –*
>
> *(a) regulate the conduct of the company's affairs in the future;*
>
> *(b) require the company –*
>
> *(i) to refrain from doing or continuing an act complained of; or*
>
> *(ii) to do an act that the petitioner has complained it has omitted to do;*

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

Section 996 is to be considered in conjunction with Section 994, which provides, in material part:

"*(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."

[15] It is further contended, in support of the application, that the Petitioner is acting unreasonably within the meaning of Article 105(2) Insolvency (Northern Ireland) Order 1989 ("*the 1989 Order*"). It is necessary to consider firstly Article 102, which provides, so far as material for present purposes:

"*A company may be wound up by the High Court if …*

(g) the court is of the opinion that it is just and equitable that the company should be wound up".

Where a Petition is presented under Article 102, the relief which may be granted by the court is contained in Article 105, which provides:

"*(1) On hearing a winding up petition the High Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit; but the court shall not refuse to make a winding up order on the ground only that the*

company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the High Court, if it is of the opinion-

(a) that the petitioners are entitled to relief either by winding up the company or by some other means, and

(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,

shall make a winding up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the Petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that of a remedy".

[16] The arguments of Mr Todd QC (appearing with Mr. McLaughlin) on behalf of the moving party further emphasize that the winding up order sought by the Petitioner is a remedy of last resort, particularly in circumstances where the company is solvent and it is opposed by the majority shareholder. If the Petitioner is seriously pursuing the remedy conveniently labelled "partition", it is contended that this is available under Section 996 of the 2006 Act, particularly if an order for the sale/purchase of the majority/minority shareholdings is for some reason considered inappropriate. The moving party's argument relies also on what it labels a "*concession*" by the Petitioner in his main affidavit, at paragraph 48:

"*… I wish to make plain that if the court were to decide that all of the relief sought (including affording me the opportunity to acquire some or all of the businesses) lies within the statutory provisions of the 2006 Act … then I can see no good reason to pursue the claim for winding up.*"

This is to be considered in conjunction with the solicitors' letter dated 21st May 2008: see paragraph [9] *supra.* I should also mention the subsequent letter dated 24th July 2008, which states:

"*Please note that the Petition seeks winding up of the holding companies and a share purchase in the alternative. As the negotiations for a share purchase have been*

> *singularly unsuccessful* ***the preferred form of relief our client now seeks is a winding up order as that will not only achieve a 'clean break' but will also enable each of our clients to bid for the businesses on the open market where they can be sold as going concerns.***"
>
> [Emphasis added].

[17] The moving party also directs attention to the shifting position of the Petitioner, as evidenced (it is contended) by the pre-litigation correspondence. Building on the "concession" attributed to the Petitioner, it is contended that even if his Petition is ultimately successful, it is plain and obvious that there is no possibility that he will obtain a winding up order. I would observe that the formulation of this central submission, in paragraph 68 of the first-named Respondent's skeleton argument, is a salutary reminder of the onus assumed by him and the threshold to be traversed in seeking the interlocutory relief which he pursues by this application.

[18] Responding on behalf of the Petitioner, his counsel (Mr. Shaw QC and Mr. Humphreys) adopt the stance that a winding up order is their client's preferred remedy, as this will permit him an opportunity to purchase some or all of the Lagan Group businesses on the open market. It is contended that a remedy by way of partition is an unlikely outcome. Counsel argues that the selection of remedy, if any, should be a matter for the trial judge having heard all the evidence. All parties appear to be agreed that there is no reported instance of a "partition" or "division of assets" order having been made in this type of litigation context.

[19] Counsel confirmed that the relief sought in the Prayer of the Petition appears in hierarchical sequence. The primary relief pursued is a winding up order, pursuant to Article 105 of the 1989 Order. The remaining forms of relief fall within Section 996 of the 2006 Act. It was contended that there is no real dispute, at present, about the "quasi partnership" assertion in the Petition. It was highlighted that the principal parties agreed, in principle, some two years ago that the various businesses should be divided. It was argued that the first-named Respondent's proposal is novel, unclear and impractical. There is no instance of a court ever having granted relief in these terms. Such judicial utterances as exist are orientated against, rather than for, this kind of solution. On the affidavits, there are differences between the principal parties about the extent to which the companies comprising the Lagan Group operate collectively: while collectivity is asserted strongly by the first-named Respondent, I interpret the Petitioner's main affidavit as underplaying this consideration. Mr. Shaw also highlighted the differences between the principal parties on the issue of damage, suggesting that the court should be reluctant to make firm findings about issues of this kind and contending that the first-named Respondent's disputed

averments to this effect should not disentitle the Petitioner from pursuing a winding up order. The "core question", it was argued, in the present context is whether it is unreasonable for the Petitioner to pursue this relief, within the compass of Article 105(2) of the 1989 Order. In summary, the legislation permits the Petitioner to pursue relief under two separate regimes: Part 30 of the 2006 Act and Chapter VI of the 1989 Order.

[20] On behalf of the holding companies argument was also presented to the court by Mr. Mark Orr QC on behalf of the companies, in support of the motion. His submissions highlighted the breadth of the discretion available to the court regarding the relief to be granted, while acknowledging the absence of any example in the reported cases of an "asset split" order by the court. These submissions placed some emphasis on the affidavit of Mr. Shortall. Mr. Orr also helpfully drew the court's attention to the corresponding legislation in the Republic of Ireland (Sections 203 and 205 of the Companies Act 1963), the commentary in ***The Law of Private Companies*** (Courtney, 2nd Edition, pp. 1089-1092 and 1121-1128) and the decision of the Irish Supreme Court in ***Irish Press plc –v- Ingersoll Irish Publications*** [1995] 1 ILRM 270, in particular the following passage in the judgment of Blayney J:

> "*The relief which may be given under* [Section 205] *is that the court may make such order as it thinks fit 'with a view to bringing to an end the matters complained of'. The court is not at large as to what it may do. Whatever order it makes must have this object.*"

The analogy here is with Section 996(1) of the 2006 Act, which provides that the court "*… may make such order as it thinks fit* ***for giving relief in respect of the matters complained of***" [my emphasis], which in turn relates back to the unfair prejudice provisions of Section 994(1).

V GOVERNING PRINCIPLES AND CONTEXT

[21] Order 18, Rule 19 of the Rules of the Supreme Court provides:

> "*(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any Writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is **otherwise** an abuse of the process of the court,*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be …

(3) This Rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading".

[Emphasis added].

In the present case, the application is moved under the catch all provision of Rule 19(1)(d).

[22] The principles governing the exercise of the court's power under Order 18, Rule 19 are well settled. I gratefully adopt the lucid summary contained in the judgment of Girvan J in ***In the Matter of James McCabe Limited*** [unreported, 14th April 2000] at pp. 8-9:

"*An application to strike out a pleading raises separate and distinct questions from those that arise in an application for leave to bring a claim …*

cases such as the present must be decided on abuse of process principles. Winding up petitions present special problems including adverse publicity to a company often exacerbated by public misunderstandings as to the effect and the retrospective effect of a winding up order when made unless transactions are validated under Article 107 of the 1986 Order. There is, however, no difference in principle as to the test to be applied by the court in deciding whether to strike out such proceedings. ***Before the court will strike out proceedings it must be satisfied that there is no real possibility of the court granting the relief sought***".

[My emphasis].

As appears from the balance of this passage, it has been said that it must be "*perfectly clear that the claim which is to be struck out cannot succeed*": per Dillon LJ in ***Copeland –v- Copeland and Craddock Limited*** [1997] BCC 294, [Lexis transcript, p. 4]. In the same case, Bingham LJ stated, in uncompromising language [Lexis transcript, p. 6]:

"*It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or*

> *a claimant or a petitioner is to be exercised very sparingly and only when the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the claimant is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim that the court is satisfied cannot succeed. In this case the learned judge clearly regarded the Plaintiff's claim to wind up this company as one which was unlikely to succeed, but he did not feel that the claim was so manifestly unarguable as to justify him in striking it out …*
>
> *I share the judge's view that this claim is unlikely to succeed. I am indeed persuaded that the case is very close to the borderline where striking out would be appropriate.* ***But I am not quite persuaded that the claim is unarguable whatever comes out relevant to the Petition on discovery and in the course of oral evidence***".
>
> [My emphasis].

Similarly, in ***Virdi –v- Abbey Leisure Centre*** [1990] BCLC 342, Balcombe LJ stated that the jurisdiction should not be exercised unless it is "*perfectly clear that the claim cannot succeed*" [Lexis transcript, p. 5].

[23] Self-evidently, the context in which a strike out application is mounted is a matter of obvious importance. The present context involves consideration of the well-established principle that a winding up order is a remedy of last resort. This principle is expressed with particular clarity by Mummery J in ***Re a Company*** [1991] BCLC 154, at p. 161:

> "*Is it just and equitable that the company should be wound up? In other words, the court is asked to decide whether to pass a death sentence on the company on the ground that it is just and equitable to do so.* ***That is a drastic decision to take against the wishes of the majority of the shareholders in a solvent company***".
>
> [Emphasis added].

As Mr. Todd QC pointed out, a winding up order extinguishes the company, whereas orders fashioned by way of relief under the Part 30 regime of the 2006 Act are *curative* in nature.

[24] I acknowledge the principle that a winding up order is a remedy of last resort. This was highlighted by Girvan J in ***Re McCabe*** [at p. 8] who adverted to the court's disapproval of "*ill considered winding up petitions presented with little thought to the consequences*" and the existence of a 1990 Practice Direction in England and Wales (which does not appear to have any counterpart in the jurisdiction of Northern Ireland).

[25] I must also take into account that there are instances of a winding up order being made to be found in the reported cases. A notable example is provided by ***Ebrahimi –v- Westbourne Galleries*** [1973] AC 360, where Lord Wilberforce stated, at p. 375:

> "*The winding up order was made following a doctrine which has developed in the courts since the beginning of this century. As presented by the Appellant, and in substance accepted by the learned judge, this was that in a case such as this the members of the company are in substance partners, or quasi-partners, and that a winding up may be ordered if such facts are shown as could justify a dissolution of partnership between them. The common use of the words 'just and equitable' in the company and partnership law supports this approach.*"

While the whole of the passages which follow repay careful reading, I would highlight in particular the following excerpt, at pp. 380-381:

> "*I come to the facts of this case. It is apparent enough that a potential basis for a winding up order under the just and equitable clause existed. The Appellant after a long association in partnership, during which he had an equal share in the management, joined in the formation of the company. The inference must be indisputable that he, and Mr. Nazar, did so on the basis that the character of the association would, as a matter of personal relation and good faith, remain the same. He was removed from his directorship under a power valid in law …*
>
> *I take it as a finding that the Respondents were not entitled, in justice and equity, to make use of their legal powers of expulsion and that … the only just and equitable course was to dissolve the association.*"

Lord Cross, for his part, laid some emphasis on the fractured relations between the parties (at pp 386-387):

> "*It was not suggested that Mr. Ebrahimi had been guilty of any misconduct such as would justify one partner in*

> *expelling another under an expulsion clause contained in partnership articles. All that happened was that without one being more to blame than the other the two could no longer work together in harmony. Had no company been formed Mr. Ebrahimi could have had the partnership wound up and though Mr. Nazar and his son were entitled in law to oust him from his directorship and deprive him of his income they could only do so subject to Mr. Ebrahami's right to obtain equitable relief in the form of a winding up order …* "

I refer also to the judgment of Neuberger J in ***Re Worldham's Park Golf Course*** [1998] 1 BCLC 554, at p. 556 especially and the decision in ***Maine –v- Chelia*** [2005] NSWSC 860.

[26] A third significant feature of the context in which the present application is brought is Article 105(2) of the 1989 Order: see paragraph [15], *supra*. In summary, this provides that a winding up order is not to be made where two conditions are satisfied. The first is that the court is of the opinion that some other remedy is available to the Petitioner. The second is that the court is of the opinion that the Petitioner is acting unreasonably in pursuing the remedy of winding up in lieu of such other remedy.

[27] The next consideration which should properly inform the court's determination of this application is the Petitioner's prospects of securing from the court, following the substantive trial, a "partition" order of the kind mooted on behalf of the moving party under Section 996 of the 2006 Act. This aspect of the moving party's argument rests heavily on the breadth of the language of subsection (1):

> "*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* ".
>
> [My emphasis].

The combined researches of the parties have not uncovered any reported case in which a "partition" order has been made. While it is correct that the *possibility* of making such an order has been canvassed in some cases, judicial attitudes to doing so have been strikingly negative.

[28] This is exemplified in ***Fexuto –v- Bosnjak Holdings*** [2001] 37 ACSR 672, which concerned a release from oppression petition. One of the issues which the New South Wales Court of Appeal had to consider was whether there should be a division of the company's assets between its shareholders. By a majority of 2/1, the court held that this would be inappropriate. Spigelman CJ stated:

> "*[210] The basic rule in the case of dissolution of partnership, in the absence of agreement to the contrary, has always been that the assets should be sold for cash unless the court, perhaps after inquiry about the mode of sale, finds some other mode of settlement preferable …*
>
> *The equivalent in a corporate context is winding up …*
>
> *[212] In my opinion, this court should not embark on the course of attempting to divide the assets in this case. Indeed, save in a situation of a limited range of assets with little interconnection between them, I doubt if it would ever be appropriate for a court to attempt such a task. The court should not be placed in a position where:*
>
> > *(i) it may have to make commercial judgments;*
> >
> > *(ii) it runs the risk of being dependent on commercial or political negotiations; and*
> >
> > *(iii) it may have to make contingent or alternative orders, subject to the outcome of commercial or political negotiations …*
>
> *[213] … the 'process of dividing the assets' … is not [one] which can readily be conducted by means of judicial findings on the basis of evidence. It is not, in my opinion, an appropriate task for a court.*"

The dissenting view is expressed in the judgment of Priestley JA, at paragraphs [573] – [576].

[29] A similar reluctance to make an "asset split" order under Sections 459 and 461 of the Companies Act 1985 (the predecessors of Sections 994 and 996 of the 2006 Act) was expressed in ***Bhular –v- Bhular*** [unreported, Case No. 2852 of 2000]: see paragraphs [295] – [300]. There, the learned judge was satisfied that the court has jurisdiction to make such an order, but declined to do so, for the series of reasons articulated in paragraph [299], which bear some similarity to the majority's reasoning in ***Fexuto***. Similarly, in ***Maine –v- Chelia*** [2005] NSWSC 860, which concerned an oppression suit, the New South Wales Supreme Court declined to make a "demerger" order. Young CJ stated:

> "*[46] It is true that, so far as everyone's researches are concerned, no case where a demerger order has been made in an oppression suit has been found. The fact that this is so does not necessarily mean that such an order cannot be*

> *made, it is just that it makes one pause when one can see that the present case may very well not be unique …*
>
> *[62] Winding up is an order of last resort under Section 233, particularly the winding up of a solvent company. However, the authorities show that it may well be the appropriate remedy particularly in a case where there is animosity between the principal shareholders …*
>
> *[63] Although both parties resist a winding up, it seems to me that it is probably the appropriate order in this case. A liquidator can be appointed, and like a receiver in a partnership can sell the assets of the company to the highest bidder and then can distribute the proceeds after the costs of administration are met*".

[30] Finally, on this discrete topic, I was referred to the decision in ***Re Guidezone Limited*** [2000] 2 BCLC 321, which concerned an unfair prejudice petition whereby the Petitioners sought relief under Sections 459(1) and 461 of the 1985 Act. The relief claimed was share purchase orders and, in the alternative, a compulsory winding up order. Lewison J, having acknowledged the breadth of the court's discretion to fashion an order rectifying and curing the unfair prejudice established by the Petitioner, continued:

> "*[248] One solution … proposed was what was effectively called a demerger. In essence, this would leave Mr. Hawkes with complete control of Neath on the basis that he secured the Cuddy share. On the other hand, Neath would give up its share in the Ospreys so that the corporate connection between them would be severed. This would amount to a dismemberment of Neath and stripping it of what the experts agree is its only asset of real value.*
>
> *[250] Although such an order is probably theoretically possible on a Petition under Section 994 it is one that should rarely be made. It may be that if, for instance, a company was trading in two comparable but physically separate locations, each one of which was managed day to day by one of two directors, it might be right to allow each of the directors to continue trading in one of the two locations.* ***But in general a court should not compel a company to distribute its assets in specie to its members***".
>
> [Emphasis added].

In thus concluding, the learned judge concurred with the reservations expressed by the majority in ***Fexuto*** and added a further reservation, to the effect that "… *the position of creditors would have to be safeguarded*".

VI CONCLUSIONS

[31] To summarise, in determining this application, I propose to apply the established test, as set out in paragraph [22] above, taking into account (a) the "remedy of last resort" principle, (b) Article 105(2) of the 1989 Order and (c) judicial reluctance (thus far) to make a "partition" order under Section 996 of the 2006 Act. In doing so, I have also taken into account the totality of the affidavit evidence and those documentary exhibits, consisting principally of letters, which are particularly germane in the context of this application. I have further considered the parties' very helpful and thorough skeleton arguments and the oral submissions of counsel, which focussed and refined their respective clients' central contentions.

[32] I am of the opinion that in determining the present application it is appropriate to balance the following considerations:

(a) The present application is to be determined by the court on the basis of affidavit evidence alone.

(b) The evidence which the court will ultimately consider will probably be by the established mode of *viva voce* testimony, which will be duly probed and tested by cross-examination and appropriate questions from the court itself.

(c) No discovery directions or orders have been made by the court to date and discovery of documents has not taken place voluntarily.

(d) The affidavits and correspondence expressly make clear that certain issues are still being explored by the parties and, further, that their contents are not to be treated as comprehensive of the evidence which will ultimately be adduced. Thus the evidence before the court is incomplete.

[33] It is clear that, as his claim is currently formulated, the Petitioner's primary aim is to secure from the court a remedy which will give him the opportunity to acquire some or all of the businesses belonging to the Lagan Group: see paragraph 48 of his main affidavit, coupled with the letter dated 24th July 2008 from his solicitors. I accept that Section 996 of the 2006 Act is framed in sufficiently broad and flexible terms to accommodate the grant of relief to this effect. At the same time, I must take into account that there is no reported example of this kind of relief having been granted under either Section 996 or its

statutory predecessor, Section 461 of the 1985 Act. I note further that in those cases where this issue has been considered, judges have consistently cautioned against making an order of this kind. I take into account that the present case has its own unique features and may be distinguished factually from those cases. I further take into account that, applying the doctrine of precedent, none of those decisions is binding on me.

[34] I accept that the Petitioner's position has shifted throughout the period under scrutiny. However, this is the kind of issue which should properly be explored in depth at the substantive trial. The evidence assembled before the court at this stage is not complete and it has not been subjected to the kind of microscopic probing which may be expected at the substantive trial. The same observation applies to other disputed factual issues. These include the issue of damage to the Lagan Group, afflicted by the presentation of the winding up Prayer, together with the issue of how the many components of the Lagan Group operate in practice: Do they have the close cohesion asserted by the first-named Respondent [cf. paragraphs 2-4 of his first affidavit in particular]? Or do they have the greater separateness which the Petitioner appears to assert in paragraph 4 of his main affidavit? Moreover, was there some forensic shift in the Petitioner's position on this discrete issue in the course of the hearing before me? I consider that, while it would be inappropriate for the court to shut its eyes to obvious realities or place its head in the sand, these are all issues unsuited to concluded findings at this stage. There is plainly substantial scope for further scrutiny and exploration of the affidavit evidence assembled to date.

[35] I consider that in an application of this kind the hurdle to be surmounted is a high one. Its character has been correctly acknowledged by Mr. Todd QC, both in oral argument and in paragraph 68 of his skeleton argument. In all the circumstances, I find it impossible to conclude that the Prayer for a winding up order is, in the language of Bingham LJ in ***Copeland*** [*supra*], "*… unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence*". I consider that, in most cases, the exercise to be carried out under Article 105 of the 1989 Order will probably be better suited for the court of trial than the interlocutory judge. I hold that this applies to the present case. I am unable to conclude that, at this juncture, the Petitioner is acting unreasonably in pursuing the winding up order, rather than pursuing (in the main) a "partition" order under Section 995 of the 2006 Act. It is *possible* that Section 996 will ultimately prove to be the appropriate vehicle for the benefit which the Petitioner fundamentally seeks viz. the opportunity to acquire some or all of the businesses operating under the aegis of the Lagan Group. However, at this stage, the court can go no further than to recognise this possibility. Moreover, while a winding up order is a remedy of last resort, instances of this relief being granted can be found in the reported cases. In summary, I simply do not have the necessary clarity or confidence to hold, at this stage, that (per Girvan J) "*… there is no real possibility of the court granting the relief sought*". The self-evidently elevated hurdle which an application under Order 18, Rule 19 entails has not been overcome.

[36] Accordingly, for the reasons elaborated above, I refuse the application. While I am provisionally of the view that the parties' costs of this application should be costs in the cause, bearing in mind the breadth of the court's discretion as regards relief following the substantive trial, there will be an opportunity to address argument to the court on this discrete issue.

[37] I shall deal with the ancillary matter of making further directions for the continued conduct of this litigation following delivery of judgment. Finally, I record my gratitude to all counsel for their lucid and focussed submissions, both written and oral.

VII IN CAMERA ORDER

[38] The hearing of this interlocutory application was conducted in camera, in the following circumstances.

[39] Following the initiation of these proceedings, on 22nd July 2008, the second to sixth-named Respondents applied to the court for an order pursuant to Article 107 of the 1989 Order authorising the companies to continue to dispose of property in the ordinary course of their business, to carry out their respective businesses and to make payments into and out of their bank accounts. This authorisation was necessary, since Article 107 provides that unless the court makes an order of this kind, such activities are, by virtue of the winding up Petition, void. On 1st August 2008, Gillen J made an order accordingly. At the same time, he ordered that the proceedings herein should be conducted in camera, until further order of the court. At the commencement of the hearing before me, I considered it appropriate to revisit the in camera order, for three main reasons. Firstly, it had been made by consent of the parties, without argument. Secondly, it was expressed to take effect only "*until further order of this court*". Thirdly, I was exercised by the potency of the well established principle of open justice. An adjournment followed and full argument was subsequently addressed to the court by all parties.

[40] In the event, I was content to extend the in camera order of Gillen J, again *until further order of the court*. In thus ordering, I took into account the leading authorities on this topic, which are ***Scott –v- Scott*** [1913] AC 417 and ***Attorney General –v- The Leveller Magazine*** [1979] AC 440. These authorities clearly establish a strong general rule that court proceedings should be conducted in public. In ***The Leveller***, Lord Scarman formulated the principle in these terms:

> "*In **Scott –v- Scott**… Your Lordships' House affirmed the general rule of the common law that justice must be administered in public. Certain exceptions were, however, recognised …*

> *The House was divided as to whether protection of the administration of justice from interference was an exception. A majority held that it was – though their respective formulations of the exception differed markedly in emphasis.*"

Lord Scarman considered it "*… plain that the basis of the modern law is as Viscount Haldane LC declared it was*". The Lord Chancellor had stated [at p. 439]:

> "*To justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made*".

[Pp. 470-471]. Continuing, Lord Scarman observed that "*… there must be material (not necessarily formally adduced evidence) made known to the court on which it can reasonably reach its conclusion*".

[41] The decisions helpfully brought to my attention by counsel indicate that in the application of the general principle of open justice to winding up proceedings, special considerations arise. In ***A. F. Noonan –v- Bournemouth and Boscombe Athletic Community Football Club*** [2006] EWHC 2113 (Ch), Richards J stated:

> "*[5] It is commonplace for applications by companies to restrain either the presentation of a winding up petition or the advertisement of a winding up petition to be heard in private on the usual ground that if the hearing is in public then the very damage, which the company is seeking to avoid by restraining presentation or advertisement, is likely to follow simply as a result of the hearing being in public and the world at large learning of the actual or the material presentation of the winding up petition*".

To like effect is the statement of Buxton LJ in the same case: see [2007] EWCA.Civ 848, paragraph [4], where he observed 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*".

[42] It may be that decisions belonging to this realm have not been formulated by express reference to the common law principle of open justice. However, I consider them consistent with the proposition that the general principle can be displaced in circumstances where a public hearing could frustrate the administration of justice. In litigation of this kind, it is clearly in the interests of justice that the assets of the companies concerned be protected and preserved as fully as possible, pending final judgment. At this latter stage, the court should have available to it the widest possible range of remedies. As the litigation progresses, preservation of the status quo serves the interests of justice. It is clear

that these considerations will not necessarily apply in every case of this *genre*. However, the unique flavour and circumstances of the present litigation, as exposed in detail in the parties' respective affidavits and in the Petition itself, require no elaboration. Furthermore, I am satisfied that to extend the in camera order will not be prejudicial to the interests of any third parties, such as, for example, creditors, given that the evidence establishes that the companies are solvent going concerns.

[43] I also considered whether an in camera order would be compatible with the court's duty as a public authority under Section 6(1) of the Human Rights Act 1998. The only Convention right potentially engaged in the present circumstances is Article 6(1), which provides, so far as material:

> "*In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial … where the … protection of the private life of the parties so requires,* ***or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice***".
>
> [My emphasis].

All of the parties urged the court to extend the in camera order and to make a non-advertisement direction under Rule 4.025 (see paragraph [45], *infra*). Accordingly, none of the parties was asserting a right to a public hearing under Article 6 of the Convention. In these circumstances, I doubted whether any Convention right was actually in play. However, to the extent that this view might have been in any way incorrect, I was satisfied that the "*interests of justice*" exception applied. This exception seems to me to equate broadly with the recognised exceptions to the common law principle of open justice and, in this respect, I refer to my views and reasoning set out above.

[44] I would add that in ***Hakansson –v- Sweden*** [1990] 13 EHRR 1 the European Court held that a public hearing is not required where the litigants waive their right to such a hearing, provided that the waiver is unequivocal and there is no important public interest consideration rendering desirable the opportunity for the public to be present: see especially paragraph [66] of the judgment. More recently, in ***Pauger –v- Austria*** [1997] 25 EHRR 105, the Court stated:

> "*[58] The court recalls that the public character of court hearings constitutes a fundamental principle enshrined in Article 6(1), but that neither the letter nor the spirit of that provision prevents a person from waiving of his own free*

> *will, either expressly or tacitly, the entitlement to have his case heard in public. Any such waiver must be made in an unequivocal manner and must not run counter to any public interest*".

In the present case, I am satisfied that an express and unequivocal waiver has been made by all of the parties. I am further satisfied that, at this stage of the litigation, there is no identifiable public interest requiring members of the public to have the opportunity to attend the hearings. This is a bilateral dispute between a majority shareholder and a minority shareholder. Other important interests are, of course, in play. However, the balance of such interests as are engaged, in particular the interests of justice, inclines in favour of these proceedings continuing to be conducted in camera, until further order of the court.

[45] There is an inter-related issue. Rule 4.025 of the Insolvency Rules (Northern Ireland) provides:

> "*(1) On the return day, or at any time after it, the court shall give such directions as it thinks fit with respect to the following matters –*
>
> > *(a) service of the petition, whether in connection with the venue for a further hearing, or for any other purpose;*
> >
> > *(b) whether particulars of claim and defence are to be delivered, and generally as to the procedure on the petition;*
> >
> > *(c)* ***whether, and if so by what means, the petition is to be advertised ...***".
>
> [My emphasis].

In ***Joffe on Minority Shareholders,*** it is stated [paragraph 4.107]:

> "*Unlike the position regarding creditors' petitions, there is no provision in the rules for a contributories' petition to be publicly advertised in The Gazette or a newspaper. The time and manner of any advertisement is left entirely to the discretion of the court. As a matter of practice, it is usual for the court at the directions hearing to order that there be no advertisement of the petition until after further order. This is a sensible precaution because of the potential damage to the company's business which may be occasioned by premature publicity of the petition*".

It has been held that the word "*advertise*", in this context, is to be construed as "*notify*". In other words, any form of notification comes within the ambit of the Rule. See ***Re A Company No. 00687 of 1991*** [1992] BCLC 133, per Harman J at p. 135. I concur with this approach.

[46] In the result, I made an *ex tempore* ruling that the in camera order of Gillen J be extended. Having had my attention drawn to Rule 4.025, and given that the court has not yet performed its function under this provision, I now further order (in the terms of the draft helpfully submitted to me by the parties) that the Petition shall not be advertised, save to the extent that advertisement is made to a party or parties on foot of a resolution of the Board of the company in question which (a) identifies the party to whom it is proposed to advertise the Petition and (b) confirms the view of the Board that advertisement to that party is in the interests of the company. Given the potential for future conflict in this sphere, the parties will have liberty to apply, should a real need arise.

POSTSCRIPT

The substantive litigation was, ultimately, settled, without adjudication by the court.