THE HIGH COURT
COMMERCIAL

[2021] IEHC 473
[2021 No. 90 COS.]

IN THE MATTER OF OVIEDO LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS, 2014-2020

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 212 OF THE COMPANIES ACT, 2014

BETWEEN

FULMAN HOLDINGS SARL
APPLICANT

AND

BRENDAN HICKEY, HUGH LYNN, JAMES BRIAN DAVY, KYRAN MCLAUGHLIN, MARTIN NAUGHTON, DAVYCREST NOMINEES, LUSARO MANAGEMENT LIMITED, NEIL NAUGHTON, FIONA NAUGHTON AND CLAIRE HICKEY

RESPONDENTS

AND

OVIEDO LIMITED AND DHP (IOM) LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 2nd July, 2021

The application before the court

1. In these proceedings brought by the applicant under s. 212 of the Companies Act, 2014 ("*the 2014 Act*"), the applicant seeks an injunction, pending the determination of these proceedings, restraining Oviedo Limited ("*the company*") from disposing of any of its assets (or taking any steps towards the disposal of its assets) including, but not restricted to, a development site known as Mountview at Citywest, County Dublin (advertised for sale in the Irish Times on 28th April, 2021) and a 16.5-acre site at Citywest Avenue (known as the "*Northern Quarter*") which was advertised for sale in the Irish Times on 26th May, 2021. In addition, the applicant seeks an order restraining each of the members of the board of the company from taking any of these steps.

2. The applicant (which is a Luxembourg registered company) is the holder of 33.63% of the shares in the company. It contends that there has been a failure by the company and its board to ensure that maximum value is obtained for the shareholders of the company from its business and assets. In particular, the applicant contends that the board has neither properly considered nor sought advice as to whether best value would be obtained by selling the business of the company as a going concern rather than disposing of its undeveloped assets on a piecemeal basis. The applicant complains that the board has failed to ensure that any independent expert reports and valuations of the business and assets have been carried out and been made available to the shareholders.

3. The application for the injunction is made against both the company and directors (who are the first five respondents named in the title of the proceedings). Curiously, although the company is a respondent to the injunction application, it has not been named as a respondent in the substantive proceedings brought by the applicant under s. 212 of the 2014 Act.

4. In the written submissions delivered in support of the present application, the applicant has suggested that, as an alternative to the relief claimed in the notice of motion (as summarised in para. 1 above), more limited relief could, instead, be granted, restraining the company from realising assets without first procuring and making available to the members' independent expert advice of the kind described in para. 2 of the originating notice of motion in which, as part of the substantive relief claimed by the applicant in these proceedings, the applicant seeks an order that, prior to realisation of any of the assets of the company, the board be directed to procure and make available to the members, independent expert advice on the following matters:-

   (a) Whether maximum value is obtained by the sale of the business as a going concern or by the sale of the assets on a break-up basis;

   (b) A valuation of the company on a going concern basis and an alternative valuation of each of the individual assets.

5. According to the written submissions delivered on behalf of the applicant, the more limited form of relief would be capable of implementation in a relatively short timeframe and at relatively little cost. It was suggested in the affidavits delivered on behalf of the applicant that the advice could be procured within a period of two months. The applicant concedes that, once such advice has been taken, it will be for the board, in consultation with the members *"using the usual means of communication in accordance with good corporate governance"* to determine what course the company should take thereafter. The applicant contends that, if an injunction is not granted, the proceedings will become moot in that assets will have been sold in the period between now and the trial such that it will be impossible to restore what the applicant contends is the *status quo ante*.

6. The application for an injunction is strongly resisted by the company and by each of the director respondents who maintain that the claim of oppression made in these proceedings is unstateable such that the plaintiff cannot be said to have established a fair question to be tried (if that is the appropriate test on an application of this kind). They also maintain that the claim made by the applicant in these proceedings falls foul of the rule in *Foss v. Harbottle* (1843) 2 Hare 461 as applied by the Supreme Court in *Re Via Net Works (Ireland) Ltd* [2002] 2 I.R. 47 at p. 56. In the alternative, they contend that, even if the rule in *Foss v. Harbottle* does not bar the claim made by the applicant, the applicant's claim is fatally undermined by reason of the fact that a number of shareholders who form the majority in favour of a disposal of the assets on an individual basis have not been joined as respondents to the proceedings. The case is also made that the proposed programme of disposals has been done on foot of advice and that, as the case law (discussed below) demonstrates, management decisions of the kind in issue here are ordinarily not capable of being characterised as oppression for the purposes of s. 212. The application is also opposed on the basis that damages would be an adequate remedy and that the balance of convenience lies against the grant of the relief sought. Reliance is also placed on what is said to be delay on the part of the applicant in seeking relief of this kind.

7. In the time available, it would not be feasible for me to attempt to summarise all of the evidence in this case. A very large number of affidavits have been exchanged between the parties in connection with the present application and there is considerable controversy between the parties about a number of matters not all of which are relevant at this stage of the proceedings. Given the urgency of the matter, I do not believe that it is feasible to attempt to address all of the evidential issues which have been ventilated. I will, therefore, confine myself, in this judgment, to a consideration of what I believe are the essential matters that must be borne in mind on this application. Before going further, it may, however, be helpful to outline the relevant background in so far as it is necessary to do so in order to put this application in context.

Background

8. It is important to note that, although the company was only established in the last quarter of 2020, its business is, in substance, a continuation of a previous business operated by a separate company involving the same shareholders and the same board. The company acquired its current business and assets in furtherance of a pre-existing programme of asset disposal by an Isle of Man company called DHP (IOM) Ltd (the second named notice party to these proceedings) ("*DHP*"). DHP is a property holding company. This programme of asset disposal was put in place after the DHP shareholders had earlier rejected a different proposal made by the DHP board which the applicant had strongly opposed. In this context, in March, 2018, the board of DHP (which was, at that time, identical in makeup to the current board of the company) proposed that the business of DHP be wound down. This proposal envisaged (a) that the assets would be realised over time rather than being reinvested in the business and (b) that the shareholders would be bought out by the first named respondent, Mr. Hickey. This was put forward to the shareholders of DHP in a document entitled Shareholder Liquidity Proposal (the "*SLP*"). This proposal was strongly opposed by a number of DHP shareholders who, in April, 2018, came together to form the applicant and to resist the SLP. These shareholders considered that the SLP unfairly promoted the interests of Mr. Hickey at the expense of other shareholders. Their resistance to the SLP was successful and the SLP was rejected by a majority of the DHP shareholders.

9. Subsequently, an extraordinary general meeting of DHP was held, at the behest of the applicant, on 29th October, 2020 at which a number of resolutions proposed by the applicant were put forward. Of particular relevance for present purposes was resolution no. 2 which proposed that the directors should: *"…forthwith retain an external advisor, of appropriate experience, expertise and independence, for the purpose of carrying out an independent valuation of the Company's assets on a Capital Markets Value (CMV) basis and furnishing a detailed written report of such valuation to the Company no later than 15 December 2020 which report shall be distributed by the Directors within fourteen days of receipt, to all Shareholders…".* As several of the respondents to the present application have observed, this resolution is remarkably similar to the relief now sought by the applicant in its originating notice of motion in these proceedings.

10. In advance of the extraordinary general meeting, the chairman of the board of DHP, Mr. Brian Davy (now the third named respondent to these proceedings) sent a letter to shareholders urging them to vote against the applicant's proposals. In Mr. Davy's letter, it was suggested that shareholders should wait to see what alternative proposals the board might put before the shareholders at the annual general meeting of DHP which was to take place a little later in 2020. In response to the letter from Mr. Davy, the applicant, on 19th October, 2020, sent a detailed letter to all shareholder suggesting that there were "*very powerful reasons why our proposed resolutions are so important*" and that all shareholders "*should be given full disclosure of the Company's assets (including its cash balances) and proper, independent valuations thereof made not on a red book piecemeal basis but on a capital market value basis for the business as a whole"*. Notwithstanding these letters outlining the rationale for the applicant's resolutions (including resolution 2), the shareholders of DHP voted, by a majority, against the resolutions proposed by the applicant. The votes in favour of the resolution represented 37.81% of the votes cast while the votes against represented 62.19%.

11. Subsequently, on 11th November, 2020, the board of DHP wrote to shareholders proposing a restructuring which involved the transfer of the operating business of DHP and associated assets and liabilities (excluding most of the cash and existing intercompany receivables) to the company in exchange for which the company would issue new ordinary shares to the shareholders of DHP proportionate to their shareholdings in DHP. The letter stated that the expected value of the company (based on the value of its assets net of liabilities) would be approximately €40 million which would equate, on a net asset value basis, to €310 per share. The letter explained the reasons for the proposed restructuring. It explained, in particular, that the asset disposal programme of DHP was already well advanced with in excess of €200 million of asset disposals to date. It was stated that the board planned to complete that programme and to accomplish a realisation of the assets over a period of twelve to fifteen months. However, having regard to the COVID-19 pandemic, it was indicated that this task was significantly more difficult and that it might potentially take of the order of two years to sell all remaining assets. The letter continued in the following terms:-

> *"The board has determined that delivering substantial value to shareholders can be best achieved by hiving-off the Transferred Undertaking into a separate ownership structure… and retaining in [DHP] the cash received from asset disposals to date and existing intercompany receivables.*
>
> *If the proposed restructuring is approved and implemented…* [the company] *will adopt and pursue the current asset disposal programme with respect to the assets comprised in the Transferred Undertaking with a view to maximizing value and achieving liquidity for shareholders of* [the company] *as soon as possible in light of current market conditions…*
>
> *As noted above the board of* [the company*] will seek to realise the assets of [the company] predominantly on an undeveloped basis, where not already developed…*"

12. It should be noted that, prior to the events described above, Mr. John Moran, the chief executive officer and head of investment of Jones Lang LaSalle Ireland ("JLL") (who has been in practice as a charted valuation surveyor for 35 years) provided advice to the board of DHP in relation to the mode of disposal of assets. His advice was that assets should be sold as individual lots. He advised against what he described as a "*portfolio disposal*". In his letter of advice of 31st August, 2020, he stated:-

> *"Due to the mixed nature of the assets comprising investments, WIP residential, residential land, commercial land, I do not believe there will be an appetite (or at least I do not believe pricing will be maximised) if a sale of the entire was considered as a single lot. Therefore I believe the best route is individual sales and/or lotting of certain assets. I have set out below my initial thoughts on the various assets and the sequencing for their disposal."*

13. The respondents to the present application have highlighted this advice from Mr. Moran which they submit belies the contention advanced on behalf of the applicant that advice was not available in relation to the mode of sale. However, counsel for the applicant stressed that this advice was given prior to the creation of the company and that, once the company was created, the directors (according to counsel) had an independent obligation to take advice as directors of that company. I was not, however, referred to any authority for this proposition. Counsel also submitted that there is nothing in Mr. Moran's letter of 31st August, 2020 to suggest that any consideration was given to a sale of the company on a going concern basis. It was also submitted that, in any event, Mr. Moran would not have been in a position, having regard to his background and expertise in property transactions, to provide corporate finance advice in relation to sale of a company which would require different expertise and skill sets.

14. Subsequent to Mr. Davy's letter of 11th November, 2020, the annual general meeting of DHP took place on 7th December, 2020. That meeting was chaired by Mr. Davy. The minutes record that, at Mr. Davy's invitation, the second named respondent, Mr. Hugh Lynn (who is also a director of DHP), made a presentation on the proposed restructuring. The minutes record that Mr. Lynn addressed the progress made to date on the asset disposal programme and how the proposed restructuring would work and how it was intended to deliver value to shareholders. After Mr. Lynn's presentation, Mr. David Shubotham of the applicant spoke to the meeting and outlined the applicant's opposition to the resolution. He stated that the applicant was prepared to make an offer for the assets and business proposed to be transferred to the company for the equivalent of a minimum of €620 per share subject to due diligence. Although the minutes record that Mr. Shubotham clarified that the offer would be for the assets rather than for the company, this aspect of the minutes is not accepted by the applicant and my attention has been drawn to the letter sent by the applicant to Mr. Davy on the following day (8th December, 2020) in which it was stated that, during the course of the general meeting, the applicant *"made it clear that it wished to see all of the Assets and Business of the Company retained and developed out, and the business of the Company continued, for the benefit of all shareholders".* The letter went on to indicate that the applicant wished to

make an offer for all of the assets and business of the company and requested permission for the applicant to carry out due diligence of the assets and business. The letter indicated that it proposed to complete due diligence as quickly as possible and, thereafter, finalise an offer.

15. According to the minutes of the general meeting on 7th December, 2020, the proposal for the transfer of assets to the company was supported by 61.62% of the shareholders who attended the meeting with 37.66% voting against and 1.12% abstaining. While that calculation appears to be out by 0.4, it was not in dispute that more than 60% of the votes cast were in favour of the asset disposal programme.

16. On 17th December, 2020, Mr. Lynn responded to the letter of 8th December, 2020 from the applicant in which he noted that, notwithstanding the applicant's indication of an intent to make an offer, the resolution put to the general meeting was passed:-

> *"by a comprehensive majority of the shareholders… In addition to authorising the proposed restructuring, mandated the Board of* [the company] *to pursue the strategies outlined to shareholders which would include continuing the asset disposal programme following the establishment of* [the company]...
>
> *Please note that, as the board has a direct and fresh mandate, it shall (and is obliged) to proceed with implementing the resolution and the strategies outlined in the chairman's letter dated 11 November 2020. These strategies are a continuation of the strategies that have been implemented over the last three years which have been communicated to you and the shareholders generally on numerous occasions."*

Subsequently, on 22nd December, 2020 the property assets were transferred from DHP to the company and shares were issued in the company to each of the shareholders of DHP proportionate to their shareholding in the latter. It should be noted that this also involved the transfer to the company of a number of DHP subsidiary companies.

17. A meeting of the board of the Company subsequently took place on 20th January, 2021. As noted in the detailed minutes of the meeting of the board of that date, the main purpose of the meeting was to consider the applicant's letter of 8th December, 2020 (described in para. 14 above). The minutes note that, while the letter lacked detail and required clarification, it merited further consideration by the board and engagement with the applicant. The minutes contain a summary of the matters raised by Mr. Lynn for consideration by the other members of the board. These included:-

    (a) the definition of assets;

    (b) the potential for significant adjustment to the offer price as a consequence of due diligence. The minutes record that this possibility arose in circumstances where the proposed offer price appeared to be simply twice the net asset value;

    (c) a proposal to *"hive-off the Leeson Street Assets";* and

(d) the need of a future EGM to approve any possible deal with the applicant and the need to bring the proposed offer to a conclusion.

18. Mr. Lynn indicated that any potential offer would need to be for assets only and not the subsidiaries or not the Leeson Street assets and what was described as the *"Campus Freehold"* which I understand relates to the freehold of the relevant properties at Citywest. The reason recorded for not including those assets was that they "*would be separately hived-off and not part of any offer, no indemnities or warranties by Directors or Shareholders would be given and Unit 4075 Kingswood should be excluded and its proposed sale to a third party completed for commercial reasons in the interests of the shareholders"*. The minutes also record Mr. Lynn's explanation as to why an offer for the purchase of the subsidiaries would not be acceptable. These included:-

> *"Additional taxation, longer and more complicated due diligence given the number of subsidiaries and long history of trading, control over the settlement of intercompany liabilities with DHP… and the preference for a simple transaction that could be brought to a speedy conclusion having regard to risk factors arising from the nature of previous correspondence with [the applicant], their opposition to the strategy approved by shareholders and completion risk (noting that a promised offer in Feb 2020 never materialised)."*

19. The minutes record that there followed a detailed discussion of the applicant's proposal of 8th December, 2020 and, in particular, that the board discussed the appropriate response to be sent to the applicant, the assets to be the subject of any potential offer from the applicant, the level of due diligence required, the advice from Deloitte on the hive-off of the Leeson Street assets and Campus Freehold and *"Shareholder approval for any hive-off or a possible sale of the assets to"* the applicant. It is also recorded that the board agreed that a due diligence exercise would be facilitated for the applicant (in relation to such of the company's assets as the board was prepared to accept could be the subject of an offer from the applicant) and that Mr. Lynn would write to the applicant on behalf of the board setting out the basis on which a due diligence would be agreed. In addition, it was proposed that a letter should also be sent to shareholders setting out the board's proposals for the Leeson Street assets and the Campus Freehold together with a copy of the letter of December, 2020 from the applicant.

20. It should be noted, at this point, that the hive-off of the Leeson Street assets and the Campus Freehold was not something that had been intimated at the annual general meeting of DHP of 7th December, 2020. The directors were clearly conscious of this because the minutes record that any such hive-off should be subject to shareholder approval at an extraordinary general meeting. Following the board meeting on 20th January, Mr. Lynn wrote to the applicant on 25th January, 2021 explaining that it was proposed that the Lesson Street assets together with the Campus Freehold would be hived-off to a special purpose vehicle with all shareholders in the company holding the same shareholding in the hived-off entity as they currently hold in the company. On that basis, the applicant was informed that those assets would not be available for sale and

the letter recorded that Deloitte had advised that this could be achieved in a tax efficient manner. The letter also explained that the views expressed by some shareholders of DHP at the December 2020 meeting had been instrumental in this change of direction. The letter recorded, in particular, that some shareholders had voiced the view that these assets would have potential future added value (if developed). The letter also indicated that any transaction would be a sale of the assets and no warranties or indemnities would be given by the shareholders or by the board. The letter confirmed that the board would facilitate due diligence of the group assets. However, that did not extend to a full due diligence exercise of the kind that would be required in the case of a sale of the business as a going concern.

The complaint made by the applicant arising from the position taken by the Board at the meeting of 20th January, 2021

21. In his affidavit grounding the originating notice of motion under s. 212 of the 2014 Act, the applicant suggested that the approach taken by the board was "*a complete about turn from the position in which the Board of DHP had adopted since March 2018 and was a recognition that* [the applicant*] had been correct in their criticism of the DHP Board's willingness to dispose* [of] *these assets to Mr. Hickey all along*". Furthermore, in a letter dated 4th February, 2021, the applicant's solicitors stated that it was reasonable to conclude that the board and Mr. Hickey were determined to persist in their attempts to have Mr. Hickey acquire those assets "*almost certainly at an undervalue*". The suggestion that the proposed hive-off is intended to benefit Mr. Hickey appears to be misplaced. As explained further in paras. 24 to 25 below, the respondents to the application have made clear that no member of the board is seeking to acquire any of the assets of the company.

22. However, in the course of his oral argument at the hearing of this application, counsel for the applicant made a different point in relation to the proposed hive-off. He suggested that the approach taken by the board (as evidenced by the minutes of the meeting of 20th January, 2021 and the subsequent letter of 25th January, 2021) constituted a "*thwarting*" of the due diligence exercise that would be required if the company was to be sold on a going concern basis. Counsel submitted that the proposed hive-off means that there could never be due diligence in respect of a sale of the company on a going concern basis with all of its assets and business intact. It should be noted that an allegation in those terms is not made in the draft points of claim that were delivered by the applicant on 9th June, 2021. Nor is any case made in the draft points of claim that the proposal of the board to hive-off the Leeson Street assets and the Campus Freehold was intended to repeat the 2018 SLP. Instead, the draft points of claim make the following points:-

    (a) In para. 73, the case is made that, despite numerous requests for transparency on information on the part of the applicant, the board has failed to take such steps as are necessary to furnish information and to ensure that information pertinent to the assets has been secured for the company. That case seems to me to be different to the case made in the grounding affidavit about due diligence and does not go so far as to allege (as counsel suggested in the course of his oral argument) that there had been a "*thwarting*" of the due diligence sought by the applicant;

(b) At para. 74, it is contended that the board has neither properly considered nor sought advice as to whether best value was obtained by selling the business as a going concern, continuing it as a going concern or disposing of the undeveloped assets on a piecemeal basis;

(c) At para. 75, the draft points of claim, in similar vein, contend that the board has determined to proceed to sell undeveloped assets in a manner which is damaging the interests and value of the company whilst also completely undermining the value of the business as a going concern. This seems to me to be the kernel of the case made by the applicant. This was confirmed by counsel for the applicant, who, in the course of his reply, emphasised that the most important allegation made by the applicant is that a share sale will capture the value of the business while an asset sale will not;

(d) In para. 76, it is alleged that the board has failed to take steps that are required to ensure that maximum value is obtained for members and it has, instead, taken steps which are destructive to shareholder value. This is essentially a repetition of the case made in para. 75.

(e) In para. 77, it is contended that "*in the premises*", the conduct of the first to fifth named respondents (who are the members of the board) is burdensome, harsh and wrongful and constitutes oppression within the meaning of s. 212 of the 2014 Act. In the alternative, the case is made in para. 78 that the first to fifth named respondents are acting in disregard of the interests of the members within the meaning of s. 212.

23. I should explain that, although the document is described as "*draft points of claim*", it was delivered on 9th June, 2021 with a view to forming the points of claim in the event that the court directs that there should be an exchange of pleadings in these proceedings. The applicant has suggested that such an exchange is unnecessary and that the proceedings should go forward to trial on the basis of the affidavits exchanged between the parties and subject to a certain level of discovery.

24. Notably, no case is made in the draft points of claim to the effect that the *"hive-off"* of assets proposed at the board meeting of 20th January, 2021 is intended to benefit Mr. Hickey personally. This element of the case made may well have fallen away as a consequence of the letter written by the board of the company on 13th May, 2021 in which, following the institution of these proceedings, all shareholders were informed of the following:-

> "*Extensive efforts have been made to resolve matters with* [the applicant] *including direct discussions with Paul Coulson and offers of mediation but no agreement could be reached. In relation to the asset disposal programme****, please note that no assets have been acquired by any board member and the board members do not intend acquiring assets****."* (emphasis added)

25. This was also confirmed on affidavit by Mr. Hickey. In para. 56 of his affidavit sworn on 9th June, 2021, he stated that he did not believe that any members of the board intend to seek to acquire any of the balance of the assets of the company which remain to be sold. In the course of affidavits sworn by other members of the board, the point was also made that none of them has any incentive or motive to prefer Mr. Hickey. The point is succinctly made in para. 43 of the affidavit sworn by Mr. Martin Naughton on 9th June, 2021 that:-

> *"I have no incentive or motive to prefer Mr. Hickey as to do so would be contrary to my own interests qua shareholder, which are identical to those of [the applicant] qua shareholder."*

The correspondence between the parties prior to the making of this application

26. In view of the allegation made by the company and the remaining respondents that the applicant has unduly delayed in making this application, it is necessary to briefly summarise the correspondence between the parties which preceded the application. In this context, it should be noted that a number of letters of complaint were written to the director respondents on behalf of the applicant by its solicitors on 4th February, 2021. In those letters, the applicant's solicitors suggested that the only appropriate response from the board to the offer made by the applicant would have been to promptly accommodate what the letter characterised as full and proper due diligence. The letter suggested that the board's response of 25th January, 2021 was "*patently designed to undermine, if not sabotage altogether, Fulman's efforts to finalise an offer that would create far greater value for shareholders than that anticipated by the Board*". The letter went on to maintain that the stripping out of assets in the manner proposed by the board would materially adversely affect an offer and the board was warned that, absent a reconsideration of the matter, the applicant's solicitors had been instructed *"to investigate the commencement of appropriate legal proceedings to address the wrongs being done to the company…*". A letter was also sent directly by the applicant to the company.

27. This correspondence was addressed in detail by the solicitors for the company in their letter of 18th February, 2021. It was also addressed in a letter sent by Mr. Lynn to the applicant on 11th February, 2021 in which he outlined that the proposed hiving-off of assets was clearly subject to shareholders' approval at an extraordinary general meeting and that, in any event, this "*variation"* was minor in circumstances where the assets in question represent less than 5% of the total assets of the company. It was explained that the proposed hive-off would allow these assets to be retained and developed out for the benefit of all the shareholders including the applicant.

28. There were some discussions between the parties during the course of March, 2021. In addition, there was correspondence between the parties' solicitors during this time, in the course of which, the solicitors acting on behalf of the company proposed mediation for the purposes of agreeing on the ambit of a due diligence exercise in relation to the company and its subsidiaries.

29. On 15th March, 2021, the solicitors acting on behalf of the applicant wrote to the solicitors for the company indicating that they were instructed that, unless the applicant was given full access immediately to all of the information outlined in their previous letter of 11th March, 2021, legal proceedings would be served without further notice.

30. In a subsequent letter of 19th March, 2021 from the solicitors for the company, it was indicated that, if the applicant had a broader claim which extended beyond the due diligence issue, it should be set out immediately by return. The letter indicated that, unless the applicant's solicitors confirmed that the applicant wished to proceed with an offer for the assets in sale or, alternatively, the applicant's agreement to mediation by 5:00pm on 25th March, the company would press on with "*the strategy approved by the shareholders at the recent AGM to dispose of assets on the open market*". In response, the solicitors acting on behalf of the applicant indicated that the applicant would agree to mediation on the basis set out in their letter of 24th March, 2021 which included a requirement that the sales of assets of the company and of DHP and another entity should not proceed in the meantime. In a further letter of the same date, solicitors for the applicant indicated that the applicant was ready to commence legal proceedings but that they had been instructed to temporarily delay the commencement of proceedings in view of the mediation proposal. In their response of 26th March, 2021, the solicitors acting on behalf of the company indicated that no sale of any assets of the company would proceed (other than those where contracts had issued prior to that time) pending mediation subject to the timing of the mediation which was addressed in detail in the same letter. A draft originating notice of motion was subsequently furnished on 29th March, 2021 which indicated a significant number of parties would be joined as respondents to the proposed proceedings. This provoked a response dated 7th April, 2021 from the solicitors for the company who sought further information in relation to the allegations made. The letter suggested that the company remained willing to go to mediation in relation to the due diligence exercise but that if persons other than the board of the company were proposed to be respondents, all of the proposed respondents would be required to participate.

31. On 16th April, 2021, the solicitors for the applicant wrote to each of the members of the board of the company (and to certain other parties) indicating that the applicant had been "*left with no choice but to issue Section 212 proceedings*". The letter indicated that there had been a refusal to engage in any meaningful mediation by the company and that, in the proceedings, the applicant:-

> *"will seek such remedies as it sees fit against you personally for the consequences of* [oppressive] *behaviour. Included in such remedies will be applications for damages or other orders relating to the disposal of the companies' assets and particularly undeveloped assets. In the event that any undeveloped assets are disposed of, our clients will seek to recover damages for lost opportunities and lost profits. It may well be that damages will not provide an adequate remedy for our client in which case it reserves the right to seek other appropriate relief."*

32. The letter called upon each of the recipients to nominate a solicitor to accept service of proceedings. It is noteworthy that, while the letter does intimate in broad brush terms that damages might not be an adequate remedy for the applicant, the primary focus of the letter is to warn that damages would be sought in the event that undeveloped assets are sold by the company.

33. On 27th April, 2021, Mr. Lynn emailed a representative of the applicant to inform the applicant that the marketing of the Mountview site would be launched in the Irish Times on the following day and that if the applicant was interested in acquiring the site, it should make contact with the company's agents, Messrs Cushman & Wakefield.

34. Subsequently, on 28th April, 2021, Cushman & Wakefield wrote to the shareholders in relation to the proposed sale of the Mountview site at Citywest enclosing their brochure in relation to the proposed sale. On the same day, an advertisement in relation to the sale appeared in the Irish Times.

35. These proceedings were commenced on 10th May, 2021. On the same day, a motion was filed seeking entry of the proceedings to the Commercial List which was made returnable to Monday, 17th May, 2021. In the meantime, on 15th May, 2021, the solicitors for the applicant wrote to each of the first to fifth named respondents, drawing attention to the relief sought in the originating notice of motion which included an order that, prior to the realisation of any of the assets of the company, the board should be directed by the court to procure and make available to the members independent expert advice on the matters summarised in para. 4 (a) and (b) above.

36. The letter indicated that, if required, the applicant would seek interim and/or interlocutory relief for the purposes of protecting its interests pending the determination of the proceedings. The letter drew attention to the advertisement of the Mountview lands which appeared on 28th April, 2021 and stated that it *"is apparent that the Respondents are determined to wind down the business and sell the assets of the Company notwithstanding the objections raised by our clients…".* The letter called on each of the respondents in question to undertake immediately that they would withdraw Mountview from sale pending the outcome of the proceedings and that they would not sell other assets or take any steps to wind down the business and operations of the company.

37. On 17th May, 2021, the solicitors for the company made clear to the applicant's solicitors that no undertaking would be provided. On the same day, the application for entry of the proceedings into the Commercial List was heard. All of the respondents consented to the entry of the proceedings into the list. No intimation was given on behalf of the applicant during the course of that hearing that any application would be made for an interlocutory injunction. It is important to bear in mind in this context that, ordinarily, on an application to enter proceedings in the Commercial List, the parties will inform the court of any applications that are intended to be made so that any necessary directions can be given to ensure that such applications can be factored into the case management directions to be given.

38. On 18th May, 2021, Mr. Moran of JLL sent a letter of advice to Mr. Lynn in relation to the sale of the Northern Quarter lands. In that letter, Mr. Moran recommended that the company should proceed with an immediate disposal of the Northern Quarter lands. The letter stated:-

> *"We are aware that you have another residential site for sale at Citywest presently, where there appears to be strong levels of interest, and we will attempt to capitalise on frustrated under-bidder demand in this sale…*
>
> *…We think you should take advantage of the limited opportunities that exist in the Dublin residential market for ready to go sites. In addition, with the significant negative publicity that has been created by the Roundhill acquisition in Maynooth, the political climate for residential development is likely to disimprove.*
>
> *We are hearing rumours of increased stamp duty levels, potential changes to VAT and amendments to the planning system which could be disadvantageous to the value of the land.*
>
> *We would recommend a full open market campaign with public advertising to ensure that we cover the widest possible purchase or market. We would recommend going to market on 26 May with advertising in the Irish Times…"*

39. On 24th May, 2021, the applicant's solicitors sent a further letter requesting an undertaking not to proceed with the sale of Mountview pending the determination of these proceedings. In that letter, it was stated that the applicant:-

> *"will seek to recover from your clients, compensation for all losses that will be incurred if the sale is proceeded with including the loss of development profits and losses to the value of the overall business of the Company.*
>
> *In addition, it would be wholly inappropriate for any further steps to be taken to dispose of assets or wind down the business of the Company pending the outcome of the proceedings. In fact, any attempt to do so would necessarily amount to depriving the Court of the opportunity to properly address these proceedings."*

40. There was no immediate response to that letter. On 26th May, 2021, the Northern Quarter site was advertised for sale in the Irish Times. On 31st May, 2021, an *ex parte* application was made on behalf of the applicant for *"short service"* of the present motion for an interlocutory injunction. On the same day, the company's solicitors responded to the letter of 24th May indicating that no undertaking would be given.

The case made by the applicant for an injunction pending trial

41. In the grounding affidavit sworn on behalf of the applicant by its solicitor Mr. Gerald Moloney (which has since been supported by an affidavit sworn by Mr. Shubotham), the case is made that the applicant will suffer irreparable harm if the undeveloped assets are sold before these proceedings have been heard and determined. The case is made that, if the company proceeds to sell assets in advance of the hearing, this will render the

applicant's proceedings moot. It is suggested that damages could not be an adequate remedy in circumstances where, once development assets have been sold and the operations of the business further wound down, it would not be possible to recover the potential value lost to the company and Mr. Moloney said that-

> *"…it is very difficult to quantify what this loss might be. The more assets that are disposed of before proper advice and valuations are obtained (particularly of the company as a going concern) the more damage will potentially be done that cannot be quantified or rectified. Moreover, Citywest Campus is a vast development with interconnected services and interconnected legal rights and obligations. It is impossible to identify or value the impact of the sale of individual sites on the services, rights and obligations and these matters should be the subject of independent advice and valuations before being sold."*

42. The application was also supported by an affidavit sworn by Mr. Roger Keogh of Avison Young (formerly GVA Donal O'Buachalla). In his affidavit, Mr. Keogh maintained that the disposal of individual development assets "*could*" materially damage the overall value of the company as a going concern. He expressed the firm view that the "*piecemeal disposal*" of the assets of the company was damaging to the interests and value of the company and that it would undermine the value of the company as a going concern. In para. 13, he stated that he had a "*real concern*" that irreparable damage will be done if the assets are sold pending trial and that it would be impossible to reconstruct what is being "*deconstructed*" and that the real consequences and losses incurred would be impossible to quantify. He provided a more detailed explanation for this view in para. 9 of his affidavit where he said:-

> *"…in preparing a report and valuation on a property such as the commercial properties in this case, it is necessary to interview key executives in order to establish all of the facts of the business and assets that could affect asset value. Such executives would have key information relating to services, title, restrictive covenants, easements, planning nuances and many other issues that could affect how the property should be valued and also the potential impact a sale may have on retained lands. Valuers such as myself will often work from certain assumptions that need to be verified and tested as far as possible and to the best of our ability. Without such detailed information from within the Company and from executives themselves it can be very difficult to produce accurate valuations. These challenges… will be faced by anyone trying to assess the value of the consequences of winding down the business… which is what is being done by selling off assets as the Company is currently doing. Also, the financial and commercial impact on what remains in the Company after key assets are disposed of will be impossible to reconstruct."*

43. At this point, it should be noted that, although the company and each of the respondents have, in their submissions to the court, made the case that damages should be readily capable of computation, in the event that an injunction is refused, this element of Mr.

Keogh's affidavit has not been challenged by Mr. Moran, the valuer who has sworn affidavits on behalf of the company.

44. Mr. Moran has, however, strongly refuted the suggestion that the proposed sales of individual assets is an inappropriate way to realise maximum value for the shareholders of the company. In his first affidavit sworn on 9th June, 2021, Mr. Moran has expressed the view that the "*maximisation of value*" would be achieved by individual sales or grouping of certain assets. He has suggested that the best way to do this is to ensure that sales of individual properties should be targeted to the correct "*buyer pools*" with a view to generating "*competitive tension amongst that buyer pool*". Mr. Moran explained that in the course of his 35-year career, he had been involved with a number of publicly quoted property companies and numerous private companies. His evidence was that, in his experience, sales of companies are generally not necessary to derive value from the underlying assets. He stated that there are *"normally significant issues with the sale of corporates such as representations and warranties, latent tax issues, employment issues and debt structures which create barriers to a wide variety of purchasers and therefore limiting the potential pool of buyers".* In para. 23 of his first affidavit, he explained that the assets of the company are so diverse that they are unlikely to appeal to a single buyer whether as a going concern or on the basis of an asset sale. In the same affidavit, he expressed the view that disposing of the assets on a piecemeal basis over a period of twelve to eighteen months represents the best way to maximise value for the company.

45. In a second affidavit sworn on 15th June, 2021, Mr. Moran said that, if he had believed, based on his experience and knowledge of the business and assets of the company and from his engagement with the company's "principals" for over 25 years, that greater value could have been achieved by selling the business as a going concern, he would have so advised. He also said that, in his experience, he could not recall any cases of a property company with such a diverse mix of assets being sold as a going concern.

46. It is also relevant to note, in the context of the dispute between the parties as to the mode of sale that the value of the assets transferred by DHP to the company has increased significantly over the last number of years. This is explained in para. 22 of the affidavit sworn by Mr. Lynn on 9th June, 2021:-

> *"22. In June 2011, the Net Asset Value of DHP was minus €211 per share (a deficit of €27 million). Subsequently, there was a grey market sale of shares at €125 per share in November 2012 and a number of the Fulman beneficial shareholders acquired additional shares at this time. The most recent Net Asset Value of DHP, as of 30 June 2020, was €1,253 per share or €160 million. This is expected to be realised in full for shareholders. This represents growth of over 900% in the Net Asset Value of DHP under my stewardship over an eight year period since the November 2012 shares sale… This level of growth is multiples of the returns made by investors in listed Irish property peers over a similar period. As can be seen from this, DHP has been extraordinarily successful and has yielded very significant returns for the investors, including Fulman."*

47. In addition to relying on the evidence of Mr. Keogh, the applicant also relies on the evidence of Mr. David Tynan of PricewaterhouseCoopers ("*PWC*"). Mr. Tynan is an expert in the area of corporate finance. In the course of his submissions, counsel for the applicant stressed that there was no equivalent evidence available from an expert on behalf of the company or any of the respondents. However, that overlooks the fact that several of the director respondents are themselves very experienced corporate finance experts. It should also be noted that Mr. Tynan has been involved previously with the applicant in its negotiations to acquire the business and assets of the company and to oversee the due diligence process which the applicant sought to put in place. For that reason, Mr. Tynan's independence has been called into question by the respondents and by the company. They have also raised a similar issue in relation to Mr. Keogh.

48. In his affidavit sworn on 10th May, 2021 in support of the originating notice of motion, Mr. Tynan stressed that any bidder for the operating business assets and liabilities of the company would require information in relation to each of its subsidiaries. He also contended that it is "*incumbent"* on the board of the company to procure an independent valuation of the company to be conducted on a going concern basis and to have the assets independently valued before any sale. The purpose of this exercise is to demonstrate whether or not it is more beneficial to the shareholders for the assets to be sold on a going concern basis or for them to be sold on a piecemeal basis. Mr. Tynan swore a further affidavit on 12th June, 2021 in support of the present application. In para. 4 of that affidavit, Mr. Tynan said that settling on a disposal strategy based on the sale of individual property assets "*without appropriate advice… remains very unusual*". In para. 7 of the same affidavit, Mr. Tynan said that the value of a property development investment company is comprised not only of the tangible value of the individual pieces of property but also the intangible value which represents the knowhow and expertise built up in a company which can increase the value of development land. His evidence was that valuing a business purely on the basis of the tangible net asset value does not capture the value of knowhow built up in a company or the profits to be derived from developing the assets. He suggested that:-

> *"It is not unreasonable to assume that the overall value of* [the company] *as a going concern could exceed the value… on a tangible net asset basis."*

49. Mr. Tynan also said that, in situations where a board is contemplating exiting a business, a paper setting out the various options available to maximise return for shareholders (including the tax consequences of each option) would typically be prepared. Once the net proceeds under each option have been estimated, a board would then make a decision as to which option it might pursue. In para. 9, Mr. Tynan said that the tax implications for each option are quite complex and require careful consideration; the sale of individual assets by the corporate entity is likely to give rise to tax in the entity while the ultimate distribution of the proceeds to an individual shareholder is likely to result in a capital gains tax liability. On that basis, the net proceeds received by the shareholders could be lower under the asset disposal programme than what might be achieved by selling the corporate entity as a going concern. Similarly, different rates of stamp duty apply with a

1% rate on the sale of shares while the rate for the sale of non-residential properties is 7.5%. Mr. Tynan suggested that none of this analysis appears to have been undertaken by the respondents here. Mr. Tynan also stated that it was unusual that no appropriate corporate finance advice was obtained to see what an alternative sale approach might have yielded.

50. With regard to the point made by Mr. Moran that sales of companies involve complexities (such as warranties, indemnities, tax issues, employment issues and debt structures) which might deter certain purchasers, Mr. Tynan expressed the view, in para. 12 of his second affidavit, that he was:-

> *"absolutely satisfied that professional investors are used to dealing with these matters on a daily basis and products such as Vendor Due Diligence reports and warranty insurance facilitate corporate transactions all the time. A well-managed corporate sales process can result in significant competitive tension resulting in premium prices being achieved, notwithstanding the issues mentioned by Mr. Moran."*

51. The issue of knowhow raised by Mr. Tynan was addressed by Mr. Moran in his second affidavit at para. 7. In the case of the company, Mr. Moran explained that the main source of valuable knowhow and expertise is its senior management and board of directors. He stated that the directors of the company here do not wish to continue with the business and would not wish to continue with the company if it was sold as a going concern. On that basis, Mr. Moran suggested that the potential intangible value referred to by Mr. Tynan would not be available in any sale of the company as a going concern. While this suggestion on the part of Mr. Moran appears to have significant force, counsel for the applicant has highlighted that, quite apart from the lack of any expert corporate finance evidence tendered on behalf of the company, there is one aspect of Mr. Tynan's affidavit that has not been addressed in any of the affidavits sworn in response; counsel said that no one on the part of the respondents or the company has addressed the tax issues raised in Mr. Tynan's affidavit.

52. Counsel for the applicant submitted that, given the decision of the shareholders to cease trading and realise value in a short period of time, there was only one decision facing the board and that is how best to maximise the value of the company. Counsel characterised this as a "*hugely significant decision"* and he submitted that it was apparent on the evidence that no consideration had been given to a sale of the shares in the company as opposed to a piecemeal sale of its assets. Given the scale of what is involved with a value of at least €40 million, counsel submitted that this is *"mismanagement of such a seriousness that it amounts to an oppressive act"*. In making the case that the board of the company had given no consideration to a sale of the shares, counsel drew attention to the affidavit of Mr. Lynn sworn on 9th June, 2021 where, with reference to Mr. Moran's affidavit, he said in para. 32:-

> *"In recommending that the assets be sold on an individual basis, it is clear that Mr. Moran is* ***implicitly advising*** *that the Company not be sold as a going concern.*

Had Mr. Moran considered that shareholders could achieve greater value through the sale of the Company as a going concern, I would have expected him to so advise." (emphasis added)

53. Counsel submitted that, in reality, this averment by Mr. Lynn is an acknowledgement that the board did not seek or receive advice in relation to a sale of shares. Counsel submitted that there is a real difference of substance between a share sale, on the one hand, and a piecemeal sale of assets, on the other. Counsel stressed that, in the letter of 11th November, 2020 to the shareholders of DHP, setting out the proposed restructuring involving the company, the shareholders were specifically informed that, under the proposed restructuring, DHP would transfer, by way of reconstruction, "*all of its* ***operating business*** *and associated assets and liabilities*" (emphasis added) excluding certain cash and intercompany receivables. Thus, what was transferred to the company was not simply assets but operating businesses. Counsel also highlighted the evidence given by Mr. Tynan where, in para. 5 of his affidavit sworn on 12th June, 2021, he explained that the business of DHP had been described in his annual report as being a *"development and investment holding company, whose subsidiaries are involved in the business of property investment, management, dealing and land ownership"* and also explained that there were 30 subsidiary companies operating the business of the company.

54. Counsel submitted that, in these circumstances, there is a real difference of substance between a share sale on the one hand (which he argued will capture the value of the operating businesses) and an asset sale, on the other, which he suggested would not capture the value of the operating company. Counsel for the applicant rejected the suggestion made by the company and by some of the respondents that the minutes of the board meeting of 20th January, 2021 showed that the board had turned its mind to the possibility of a share sale and was leaving open the possibility of seeking advice on that issue. The minutes of that meeting record that the board approved appointing independent advisors to advise the board *"if considered necessary on any offer received from Fulman"*. Counsel for the applicant emphasised that this was solely with regard to advice in respect of the form of offer previously discussed in the minutes which the board insisted would not include the Leeson Street or Campus assets or the subsidiaries. Thus, counsel argued that the reference to taking advice was not advice of the kind which the applicant contends the board has an obligation to obtain in relation to the value of the company on a going concern basis with all of its existing assets intact.

55. Insofar as legal authority is concerned, counsel for the applicant did not (as has been highlighted by counsel for certain of the respondents) identify any authority directly in point to support the proposition that a company board, seeking to maximise shareholder value, has an obligation to benchmark any decision in relation to the mode of realisation of assets to ensure that it is correct and supported by the views of independent experts. Counsel for the applicant acknowledged that management decisions in relation to the disposal of assets or the taking of advice do not, ordinarily, provide a basis for an allegation of oppression. Counsel, however, argued that serious mismanagement is

capable of constituting oppression. He referred, in this context, to a very helpful extract from *Joffe "Minority Shareholders"*, at para. 6.172 where *Joffe* makes clear that, while mismanagement of the business of a company will not usually amount to unfairly prejudicial conduct (which is the relevant test in the United Kingdom), serious mismanagement may do so. For completeness, I set out below what is said by *Joffe* (by reference to relevant U.K. case law) at paras. 6.169 to 6.172:-

"6.169 Even where the petitioner is able to adduce evidence to the effect that the decisions taken by those in control of the company's affairs have been commercially disadvantageous, the court is very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. The court will not intervene in matters of commercial judgment or decisions within the bounds of ordinary management and activity. There are essentially two reasons for this reluctance. First, where the petitioner's real complaint is that he disagrees with management decisions taken by the board in good faith, the judge is "ill-qualified" to resolve such disagreements… In these circumstances, the court will not hold that there has been unfairness… if those in control of the company's business take a different view from [the petitioner] on matters of commercial judgment, or "second guess" legitimate business decisions taken on reasonable grounds at the time, even if those decisions turn out to have been wrong. Generally a breach of duty would need to be established for the court to intervene in such decisions and mala fides may be required. Neglect to carry out basic management tasks that any management should (as opposed to a disagreement between shareholders as to the best commercial course) may be sufficient.

6.170 Secondly, it is an essential part of the bargain under which a shareholder acquires shares in the company that he takes the risk that the management will be less than sound. As was held by Warner J. in Re Elgindata Ltd:

> *"…A shareholder acquires shares in a company knowing that the value will depend in some measure on the competence of the management. He takes the risk that the management may prove not to be of the highest quality. Short of a breach by a director of his duty of skill and care… there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor… One example of a case where the court might nonetheless find that there was unfair prejudice to minority shareholders will be one where the majority shareholders… persisted in retaining in charge of the management of the… business a member of their family who was demonstrably incompetent. That of course would be a very different case from this…"*

6.171 Warner J. concluded that there had been occasions when the respondent had neglected the management of the company's business, and that there were instances of bad management on his part. However, such shortcomings did not constitute conduct that was unfairly prejudicial to the petitioner's interests:

"Prejudicial to those interests they were, but not unfairly so. They were, in my judgment, of a kind of which [the petitioner] took the risk when he invested in the company."

6.172 However, Warner J. made it clear that serious mismanagement would constitute conduct which was unfairly prejudicial to the interests of minority shareholders. His judgment on this point was echoed by Arden J. in Re Macro (Ipswich) Ltd."

56. Counsel also referred to the decision in *Fisher v. Cadman* [2006] 1 BCLC 499 where, although the unfair prejudice case failed on the facts, the judge nonetheless acknowledged that serious mismanagement could, in certain circumstances, constitute unfairly prejudicial conduct. This is clear from the following paragraphs of the judgment of the deputy judge in that case, where he said:-

"104. [Counsel] sought to rely upon the decision of Arden J in Re Macro (Ipswich) Ltd [1994] 2 BCLC 354. That was a case where unfairly prejudicial conduct was established on the basis of, inter alia, serious mismanagement consisting of a failure to manage a property portfolio sufficiently actively to generate rental returns and profit through sales. However, it was a case in which the judge's findings of mismanagement were based upon detailed consideration of evidence about the properties in question and expert evidence adduced by the claimants to establish that decisions had been taken which were outside the ambit of what could be regarded as reasonable decisions in the light of the circumstances presented to the management at the time.

By contrast, in the present case, the evidence of Cedric and Rodney Cadman, which I accept, was that all the properties were at least by 1996 in a state of serious disrepair and could not, in that condition, have been let… This was not surprising, since the properties had been held by CDL for very many years under James Cadman with nothing being done to them. There was no expert evidence in this case to suggest that Cedric and Rodney had acted imprudently or mishandled the property portfolio. They had continued a policy which originated with their father. I find that Cedric and Rodney did keep under review whether at any stage it would have been commercially advantageous for CDL to expend the uncertain and significant sums necessary to put any of the properties into a good state of repair, and then to sell or let them. I find that their decision not to do so, but simply to hold on to the properties in the hope of realising significant capital appreciation upon a sale at some point (and without expending large sums of money without any certain return which would justify the expenditure), was within the band of reasonable decisions available to them to take as managers of the company. It did not qualify as mismanagement for the purposes of the test set out in Re Macro (Ipswich) Ltd to which I have referred…"

57. Counsel for the applicant submitted that, in contrast, in this case, there is expert evidence from Mr. Tynan and Mr. Keogh. It should, however, be recalled that, as noted previously, the company has strongly argued that neither Mr. Tynan nor Mr. Keogh can be regarded

as independent experts and that, accordingly, very little weight can be given to their evidence insofar as they purport to provide an expert view. It also has to be said that the facts of the *Macro (Ipswich)* case are far removed from the present case. While the judgment of Arden J. (as she then was) in that case was not opened to me by any of the parties, I have considered it and it appears to me to be distinctly different to the present case, on its facts. In that case, the company held a large number of residential properties and garages which were let to tenants. The properties were managed by an estate agency called Thompsons which was controlled by the sole director of *Macro.* At p. 404, Arden J. summarised her findings of fact which identified a long list of shortcomings, as a consequence of which, Thompsons had profited at the expense of Macro. These are summarised at p. 404 as follows:-

> *"… I am satisfied that the companies suffered prejudice in consequence of the failure to have a planned maintenance programme, the failure to supervise repairs, the failure to inspect properties regularly, the failure to let on protected shorthold tenancies, the taking of commissions from builders doing work for the companies by employees of Thompsons, the charging of excessive management charges and secretarial salary and the mismanagement of litigation. The absence of an effective system to prevent excessive amounts being retained on Thompsons' client account instead of paying it over to the companies is also in my judgment likely to cause loss to the companies in the future. All of these matters are within the responsibility of Thompsons as the companies' managing agent but they are attributable to the lack of effective supervision by Mr Thompson on behalf of the companies. It is this conduct of the companies' affairs by Mr Thompson which, in my judgment, is prejudicial in the respects I have mentioned."*

58. In that case, having considered the judgment of Warner J. in *Re Elgindata Ltd* [1991] BCLC 959 at pp. 993-994 (which was also cited by *Joffe* in the passage quoted above), Arden J. came to the conclusion that there was unfair prejudice within the meaning of s. 459 of the UK Companies Act. At p. 406, Arden J. continued:-

> *"…this is not a case where what happened was merely that quality of management turned out to be poor… This is a case where there were specific acts of mismanagement by Thompsons, which Mr Thompson failed to prevent or rectify. Moreover, several of the acts of mismanagement which the plaintiffs have identified were repeated over many years, as for example in relation to the failure to inspect repairs. In my judgment, viewed overall, those acts (and Mr Thompson's failures to prevent or rectify them) are sufficiently significant and serious to justify intervention by the court…"*

The main arguments advanced by the company and the director respondents

59. The company and the director respondents forcefully argue that, even at its height, the claim made by the applicant falls far short of anything that could properly be characterised as oppression for the purpose of s. 212. The company and the respondents argue that the issues in this case relate to the commercial judgment of the directors of the company and that this is not a matter which they suggest could conceivably fall within

the ambit of s. 212. On the contrary, they argue that the proposition advanced by the applicant would render corporate decision-making impossible. They stress that the board has been appointed by the shareholders in general meeting and that the board is mandated to manage the assets of the company in the manner which best serves the interests of the company and the members as a whole and not one particular cohort of members. They argue that this is corporate democracy at work and that it is the price that a shareholder pays for becoming a member of an Irish company. Individual shareholders (or cohorts of shareholders) do not have the ability to micro-manage the board in the latter's management of the company's assets.

60. The company and the director respondents also stressed that, in this case, the implementation of the commercial strategy by the board was the very reason for the incorporation of the company and the transfer of the business and non-cash assets of DHP to the company. On that basis, it was argued that the commercial strategy which the board is implementing forms the very substratum of the company. While counsel for the applicant had sought to distinguish the decision of the shareholders on the basis that it represented the view of the shareholders of DHP, counsel for Mr. Hickey, the first named respondent, drew attention to the well-known principle applied in *Re Duomatic Ltd* [1969] 2 Ch 365. It was held in that case that, where it can be shown that all the shareholders with the right to attend and vote at a general meeting of a company have assented to some matter which a general meeting of the company could carry into effect, the assent will be as binding as a resolution passed by the shareholders in general meeting. As Courtney, in *"The Law of Companies",* 4th Ed., 2016, at para. 14.114, identifies, that principle predates the decision in *Duomatic* and was recognised by the Irish Courts some fifteen years previously in *Buchanan v. McVey* [1954] I.R. 89, where Kingsmill Moore J. said at p. 96:-

> *"There was no formal meeting of the Company to authorise the disposal of its property to the defendant, no resolution, however informal, to that effect. It is now settled law that neither meeting nor resolution is necessary. If all the corporators agree to a certain course then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two pre-requisites…*
>
> *The two necessary pre-requisites are 1, that the transaction to which the corporators agree should be intra vires the Company; 2, that the transaction should be honest…"*

61. In light of the principle established in *Buchanan*, it is argued on behalf of the first named respondent that it is immaterial that the decision as to the mode of realisation of the assets was taken at a general meeting of DHP rather than the company. The shareholders of both companies are identical. That said, I do not believe that the *Buchanan* principle has any direct application here. As noted above, the decision made at the annual general meeting of DHP to approve the realisation of assets through the vehicle of the company was made by majority vote. It was not assented to by all of the corporators. Accordingly,

the principle cannot be called in aid. Nonetheless, there is considerable force in the submission that the realisation programme forms the substratum of the company. It is the very reason for which the company was established. Furthermore, the decision to approve the programme was preceded by the rejection at the earlier EGM of the applicant's resolution 2. Although these events took place in the context of a different corporate entity, it would be unreal to disregard them given that the company is the successor in title to that entity and involves the same corporators and the same board. It is also relevant that, although not all of the shareholders are before the court, it is apparent that the majority of shareholders of the company continue to support the decision taken at the general meeting of DHP in December, 2020. No other shareholder has come forward to support the applicant in its complaints.

62. The company and the respondents also make the case that, in circumstances where the named respondents do not, between them, constitute the majority of shareholders and, where the applicant has not made any allegations against those shareholders who have not been named as respondents, there is no basis upon which the applicant can allege that the affairs of the company are being conducted in a manner oppressive to it or in disregard of its interests. There are a further 28.61% of the shareholders who, together with the named respondents, form the majority who voted in favour of the asset disposal programme. Citing *Courtney* (op. cit.) at para. 11.035, they argue that the affairs of the company in this context refer to the conduct of the members as corporators. In those circumstances, the only form of oppression which the applicant could conceivably assert is that the powers of the directors are being exercised in a manner oppressive to the applicant and/or in disregard of its interests as a member of the company. In circumstances where the steps taken by the board (of which the applicant now complains) were taken in order to implement the wishes of the majority of the shareholders of the company, it is submitted that this could not conceivably amount to oppression within the meaning of s. 212 of the 2014 Act.

63. The company and the respondents also highlight the nature of the substantive claim made by the applicant as disclosed in the "*draft*" points of claim. The essence of the claim is that the board has allegedly failed to take the steps required to ensure that maximum value was obtained for members and has, instead, taken steps which are "*destructive*" of shareholder value. The company and the applicant submit that this cannot give rise to a claim under s. 212. They maintain that any such claim is caught by the rule in *Foss v. Harbottle* (1843) 2 Hare 461 under which, subject to certain exceptions, the only party who can maintain a claim in respect of such an alleged wrong by the directors is the company itself. The principle, which reflects the fact that a company has a separate personality from its members is succinctly described by Ussher, in the specific context of directors' duties, in "*Company Law in Ireland*", 1986, at p. 202 as follows:-

> *"It is well established law that the director owes the duties arising out of his office to the company itself… and to no one else. Accordingly, as a necessary corollary, and as the central core of the rule in Foss v. Harbottle, the company exclusively will be the proper plaintiff in the event of the breach of any such duty. This*

fundamental proposition is not altered by the fact that the directors in exercising their functions owe a duty to the company to take into account the interest of the members, nor by the fact that the members in certain circumstances may for the company's benefit and on its behalf invoke the company's cause of action against wrongdoing directors…"

64. While Ussher (writing in 1986) later suggests, at p. 202, that s. 205 of the Companies Act, 1963 (now s. 212 of the 2014 Act) represents a "*weakening of the fundamental proposition"* described in the passage quoted above, the company and the respondents rely on the decision of the Supreme Court in *Re Via Net Works (Ireland) Ltd* [2002] 2 I.R. 47, where the Supreme Court applied the rule in *Foss v. Harbottle* in the context of an oppression claim where the claimants had alleged that the value of their shares in the company had been significantly impaired by the activities of the respondent and the manner in which the respondent was conducting the affairs of the company. The Supreme Court held that the claimants did not have *locus standi* to pursue the claim in circumstances where the claimants were contractually bound to transfer their shares and, accordingly, did not have standing to pursue proceedings under s. 205 of the 1963 Act. However, in addition, Keane C.J. addressed the rule in *Foss v. Harbottle* in the following terms, at p. 56:-

"In any event, it is difficult to see how the allegations made by the petitioners, even if they were established, could constitute a case of oppression or disregard of their interests within the meaning of s. 205(1). They are, in the main, claims that the appellants are running the company in a manner which is damaging to the interests of the shareholders. It has been the law, however, since the venerable decision in Foss v. Harbottle… that only the company can maintain proceedings in respect of wrongs done to it and that neither the individual shareholder nor any group of shareholders has any right of action in such circumstances. That rule was emphatically re-affirmed by the decision of both the High Court and the Supreme Court in O'Neill v. Ryan (No.3) [1992] 1 I.R. 166. There are undoubtedly well-established exceptions to the rule, but it is clear that this case does not come within any of them."

65. In the circumstances described above, the company and the director respondents maintain that, even if the court is to conclude that the present application is to be addressed by reference to the classic "*fair issue to be tried"* test, it is manifestly clear that the applicant has no basis to make such a case. In this context, it should be noted that several of the director respondents have sought to suggest that, in substance, the relief now sought by the applicant in these proceedings is in the nature of mandatory relief such that the applicant, if it is to pursue this application, must establish that it has a strong case that it is likely to succeed at the hearing of the action in accordance with the principles laid down by the Supreme Court in *Maha Lingam v. HSE* [2005] IESC 89. On behalf of Mr. Naughton, the fifth named respondent, this argument is put in the following terms:-

> *"Although framed in prohibitory terms, what the Applicant is actually seeking in this case is an Order compelling the Company and the Board to abandon the shareholder-approved asset disposal strategy pending the outcome of the underlying section 212 proceedings. The Company is already implementing that strategy and the marketing/sales process is at an advanced stage in respect of certain properties. The injunction sought by the Applicant would cause that process to be reversed and, as such, ought to be treated as being essentially mandatory in nature."*

66. Those respondents contend that, in the event that the court is satisfied that the applicant has established a fair issue to be tried (which they all contend has not been done), there is no conceivable basis upon which the court could conclude that the applicant had established a strong case and that, accordingly, the injunction sought must be refused.

67. The company and the respondents also strongly argue that, at its heart, the claim made by the applicant in these proceedings is a money claim which is well capable of being satisfied by an award of damages. They argue that, in those circumstances, the balance of convenience plainly lies against the grant of the relief sought. They also suggest that the applicant has been guilty of delay in bringing the present application. The respondents and the company point to the fact that the process of disposing of the assets of the company and of DHP has, in reality, been ongoing for a number of years. Even if one were to look solely at the lifetime of the company, they submit that there has been delay. They draw attention to the fact that the application for an interlocutory injunction was moved approximately three weeks after the proceedings commenced, notwithstanding that the applicant was on notice of the proposed sale of Mountview for a period of almost two weeks prior to the commencement of the proceedings. Moreover, when the application for entry into the Commercial List was heard on 17th May, 2021, no intimation was given that any interlocutory injunction would be sought. They point to the fact that the applicant was aware from the outset that the company was set up to dispose of assets in a pre-ordained way and they contend that no sufficient explanation has been given as to why it waited until assets had already been put up for sale before it moved for an injunction, filing its application on 31st May, 2021.

68. They rely in this context on the observations made by Keane J. (as he then was) in *Nolan Transport (Oaklands) Ltd v. Halligan* (High Court, Unreported, 22nd March, 1994), where he said:-

> *"…In all cases, where interlocutory relief is sought, the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief, because it is of the essence of such relief that if it turns out that it has been wrongly granted, one party has suffered an injustice. It is, therefore, a remedy which should not be lightly invoked; and if invoked, it should be invoked rapidly, and where a party simply awaits events as they unfold, they cannot expect to find the court amenable to the granting of this relief as it would where a party moves expeditiously to protect his rights."*

The test to be applied by the court on this application

69. With due respect to the arguments made on behalf of some of the director respondents, I am not persuaded that the relief which is sought by the plaintiff is mandatory in nature. It seems to me that the relief claimed is classically a prohibitory injunction which seeks to restrain the company from pursuing the sale of individual assets. While an order in those terms (if made) will have significant consequences for the company and its shareholders, it is nonetheless a prohibitory order. I fully appreciate that a prohibitory order of this nature can often profoundly affect the ability of a defendant to pursue a particular course of action. However, the severity of the impact on the defendant does not alter the nature of the relief sought or the test to be applied. The severity of the impact of the proposed order on the defendant is a matter which will have to be addressed as part of the balance of convenience.

70. I do not believe that this conclusion is altered as a consequence of what counsel for the applicant described as the more limited form of relief proposed in the applicant's written submissions namely a prohibitory order that would cease if and when the board obtains the advice which the applicant contends should be sought. While it can be argued that this is, in substance, an order requiring the board to obtain such advice, I am not persuaded that this alters the prohibitory nature of the relief sought which remains, both by reference to its terms and in substance, an order restraining the proposed sales of assets. The "*more limited*" form of relief suggested in the applicant's written submissions simply provides a mechanism whereby that prohibitory order can come to an end at an earlier point than the trial.

71. In the circumstances, it seems to me that the principles to be applied on this application are those set out by the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 rather than in *Maha Lingam v. HSE.* In *Merck Sharp*, O'Donnell J. summarised the relevant principles at pp. 46-47 of his judgment as follows:-

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it ***may*** *be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.*

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined." (emphasis in original)

72. To the extent to which it is necessary to do so, I now address each of these issues in turn.

If the applicant were to succeed at trial, might a permanent injunction be granted?

73. The first issue to be determined is whether, if the applicant succeeded at trial, a permanent injunction might be granted. I have to say that I believe that it is doubtful that a permanent injunction would be granted even if the applicant were to succeed at trial. In this context, I am very conscious that, in oppression cases, an order for the purchase of the applicant's shares at a value to be fixed by the court is, as *Courtney* (*op. cit.* at para. 11.083) confirms, the most common remedy granted in these cases. Alternatively, where a successful applicant persuades the court that it should have the right to acquire the offending majority's shares, such an order can also be made (as illustrated by the decision of Barron J. in *Irish Press plc v. Ingersoll Irish Publications Ltd.* (High Court, unreported, 15 December, 1993)). In its originating notice of motion, both of these reliefs have been sought (albeit that the former is sought solely as an alternative to the latter which seems to be the preferred option for the applicant).

74. Nonetheless, on the assumption that the applicant might be in a position to establish at trial that there was serious mismanagement of the company (and I fully appreciate that

this is a matter which is strongly contested by the company and the respondents) and if the applicant is in a position to establish that a sale of the company as a going concern will achieve a significantly better outcome for the shareholders (and again I appreciate that this is strongly refuted by the company and the respondents), I do not think that one could, at this point, form the view that a permanent injunction would definitely not be granted. In those circumstances, notwithstanding the doubts expressed in para. 73 above, I will assume for the purposes of this application, that this element of the *Merck Sharp* test has been satisfied.

Has the applicant established a fair issue to be tried?

75. The next issue to be considered is whether the applicant has established a fair question to be tried. The first issue to be addressed in this context is whether, as has been submitted by the company and the director respondents, the applicant's case is caught by the rule in *Foss v. Harbottle* as applied by the Supreme Court in *Via Net Works.* The decision in the latter is clearly binding on me. If it is clear that the applicant's case is caught by the rule, that is the end of the enquiry and the application for an injunction must fail.

76. In response to the *Via Net Works* point, counsel for the applicant submitted that the observations of the Supreme Court on the application of the rule in *Foss v. Harbottle* to an oppression case based on damage to the value of a company are clearly *obiter* and that, accordingly, the applicant remains free to make a contrary case in these proceedings. Counsel also referred, in this context, to *dicta* in other decisions of the Supreme Court which he suggested evidenced a different approach. He referred in particular to the description of previous successful oppression proceedings which is recorded in the judgment of Keane J. in *Crindle Investments v. Wymes* [1998] 4 I.R. 567. In the course of his judgment in that case, Keane J., at p. 582, described an earlier decision of Murphy J. in oppression proceedings between the same parties (which had been upheld by the Supreme Court) where it was found that the action of a board in rejecting offers of compromise of a major piece of litigation was "*an improvident gamble*" and was oppressive on that basis. Although the facts were different, counsel submitted that there was a clear parallel to be drawn with the nature of the case made by the applicant here. Counsel for the applicant also referred to a subsequent observation made by O'Donnell J. in *Glynn v. Owen* [2012] 4 I.R. 560 at pp. 597-598 to the effect that the development of a specific statutory remedy for oppression has reduced the need for more wide-ranging exceptions to the rule in *Foss v. Harbottle* than currently exist. Counsel suggested that this represented a different view to that expressed by Keane J. in *Via Net Works.*

77. These submissions were strongly contested by counsel for the company and the director respondents. Counsel for the company submitted that there is no warrant to characterise the finding by the Supreme Court in *Via Net Works* (quoted in para. 64 above) as *obiter.* Counsel argued that the *Foss v. Harbottle* point was fully argued before the Supreme Court and that the court reached a conclusion on the issue. He submitted that this was as much a part of the *ratio* of the decision as the finding that the applicants there lacked standing to mount an oppression case. He referred to the observation of Budd J. in

Brendan Dunne Ltd. v. Fitzpatrick [1958] I.R. 29 at p. 45 to the effect that, where a judge gives two or more reasons for a decision any one of which could have formed the sole reason for the decision, *"the fact that one precedes or follows the other does not alter the fact that both reasons form part of his ratio decidendi".*

78. I acknowledge the force of the submission made by counsel for the company. However, I believe that there is a basis on which it would be open to the applicant at trial to argue that the finding of the Supreme Court in *Via Net Works* in relation to the application of the rule in *Foss v. Harbottle* is *obiter*. I have formed that view for two reasons. In the first place, I think it is arguable that the opening words of the relevant paragraph of the judgment (quoted in para. 64 above) suggest that the court was expressing an opinion that was not necessary for its decision. It will be recalled that the paragraph opens with the words that "*In any event, it is difficult to see …*". Those words arguably suggest that the court was not intending to lay down a definitive ruling. Moreover, the court had already in the preceding paragraph held that the petitioners did not have the necessary standing to maintain the claim. Once, it was found that the petitioner's lacked standing, that was sufficient to dispose of the appeal and the Supreme Court did not have to go further. It is therefore arguable that the observations made in relation to *Foss v. Harbottle* were not necessary to the decision to uphold the respondent's appeal and to dismiss the petition and, hence, could arguably be said to be *obiter.*

79. In addition, it is arguable (and I put it no higher than this) that there are conflicting *dicta* in *Crindle Investments* and in *Glynn v. Owen* which suggest that there is less scope for the application of the *Foss v. Harbottle* rule to a case of this kind than the judgment *in Via New Works* might suggest. The case made by the applicant also finds some support from *Courtney* who, at para. 11.096 (albeit not with specific reference to *Via Net Works*) characterises s. 212 as overriding the rule in *Foss v. Harbottle*. Courtney's view echoes a similar suggestion made by Ussher at p. 202 (as recorded in para. 64 above). Thus, there appears to be some scope for argument at the trial that *Via Net Works* may not bar the claim made by the applicant in these proceedings. In theses circumstances, I do not believe that it would be right to hold, at this point in the proceedings, that *Via Net Works* provides an insurmountable obstacle to the applicant in pursuing its claim.

80. The applicant must nonetheless demonstrate that it has established a fair case to be tried that the powers of the directors are being exercised in a manner that is oppressive to it or in disregard of its interests as a member. In this context, I have concluded that, at this interlocutory stage, the applicant, in the absence of a claim against all of the shareholders in the majority, has not established that it has a fair case to be tried by reference to the alternative limb of s.212 (i.e. that the affairs of the company are being conducted in an oppressive manner or in disregard of the applicant's interest as a member). In this regard, no sufficient answer has been put forward on behalf of the applicant to the argument of the company and the director respondents on the latter issue (as summarised in para. 62 above). In circumstances where the applicant has chosen not to pursue a claim against all of the shareholders in the majority, I cannot see how a claim based on the alternative limb of s. 212 can be said to arise. The applicant has failed to

explain how such a claim can plausibly be made. I therefore do not propose to consider the latter issue any further and will confine myself to the oppression case made by the applicant in respect of the powers of the directors.

81. In my view, the applicant faces a formidable hurdle in establishing that there has been serious mismanagement on the part of the board sufficient to constitute oppression or disregard of interests within the meaning of. S. 212. The case law shows that, ordinarily, management decisions of this kind will not provide a basis for an allegation of oppression. While the courts have been prepared to intervene in cases of prolonged and stark failures on the part of a company board, the facts of the present case are very far removed from those considered, for example, by Arden J. in *Macro (Ipswich),* as summarised in paras. 57 and 58 above. Given the remarkable increase in value of the assets held by the company as described by Mr. Lynn and given the extent of the experience and expertise of the members of the board of the company, it is difficult to see how the decision taken by the board in relation to the sale of assets could be said to constitute serious mismanagement. This is especially so in circumstances where the board, in proceeding with asset sales, is simply giving effect to a decision previously taken by a sizeable majority of the persons who are now shareholders of the company and in circumstances where a very similar majority previously rejected resolution 2 proposed by the applicant at the EGM of DHP (which was to require the board to take advice of the kind now the subject of this application). The applicant had an opportunity to persuade its fellow corporators to pursue that option and its arguments were rejected by a majority not just at the EGM of DHP but also at the subsequent AGM. Given those facts, it is difficult to see how the board can be criticised for pursuing a policy which a majority of the participants in the company support.

82. However, I am conscious that, at this stage of the proceedings, my only task is to consider whether the applicant has established a fair case to be tried. I have already held that the *Maha Lingam* standard does not apply such that it is unnecessary for the applicant to establish a strong case. As summarised in paras. 47 to 50 above, there is evidence before the court from Mr. Tynan of PWC that settling on a disposal strategy based on the sale of individual property assets without "*appropriate advice*" is very unusual and that there could be adverse tax consequences for shareholders by proceeding with a sale of such assets rather than a sale of the company on a going concern basis. He has also said that a sale on a going concern basis will capture intangible assets such as knowhow which would not be realised on a piecemeal sale of assets. While (a) that evidence is quite general and lacking in detail, (b) Mr. Tynan could not be said to be an independent expert and (c) Mr. Tynan's evidence about knowhow does not address the fact that the directors would not be prepared to stay with the company in the event of a sale of the business, I cannot conclude, on the basis of the evidence available at this point in the proceedings, that the claim made by the applicant is doomed to fail. On the basis of the evidence before the court as of now, it does appear that no specific advice was ever sought or obtained by the board as to whether a sale as a going concern would yield a better outcome for the shareholders. Advice was given by Mr. Moran that a sale of the assets as a single lot was not the best means of realising value but there is no evidence

that any consideration was given by him or by any outside advisor to the possibility of a sale of the company as a going concern. To my mind, this is confirmed by Mr. Lynn's averment (recorded in para. 52 above) that, in his letter of 31st August, 2020, Mr. Moran had implicitly advised that the company not be sold as a going concern. In my view, there is nothing in that letter which suggests that Mr. Moran turned his mind to the possibility of a sale as a going concern. At this point in the proceedings, I cannot therefore exclude the possibility that the applicant will be able to persuade the court at trial that the board had an obligation to seek such advice and that, against the backdrop of the very significant value of the company, the failure to do so constituted serious mismanagement sufficient to constitute oppressive conduct. While such a conclusion would represent a significant extension of the jurisdiction recognised and applied in *Macro (Ipswich)* and in *Elgindata*, I cannot safely conclude that the applicant will not be able to succeed in making such a case. In expressing this view, I wish to make very clear that there are powerful factors which may well persuade the court at trial to dismiss the applicants' case. Some of those have been summarised in para. 81 above. In addition, the board includes members with very extensive expertise and experience in relation to corporate finance and corporate sales and acquisitions. They are better equipped than many external advisors to assess whether it made sense to consider a sale of the company as a going concern. Furthermore, as shareholders themselves, they had every incentive to pursue a strategy that would maximise the return to all shareholders and it is frankly difficult to imagine, given their background, that they would not seek (subject to shareholder approval) to pursue a sale as a going concern if there was any realistic prospect that such a sale would generate better value for the shareholders. There is also the very obvious point that such a sale seems to lack reality in circumstances where the directors would not wish to remain with the company even if it was sold as a going concern. However, these are all points to be debated at the trial and it would not be appropriate to reach any concluded view on any of these issues at this interlocutory stage.

83. Nor can I conclude that the outcome of the present application will determine the proceedings. Given the strength of feeling on both sides and the apparent financial strength of all of the parties before the court, there is every reason to suppose that this case will probably go to trial.

84. For the reasons outlined in paras. 82 to 83 above I am prepared to proceed on the basis that the applicant has established a fair issue to be tried. I must therefore now consider where the balance of convenience lies. This necessarily involves a consideration of the adequacy of damages.

The balance of convenience

85. The company and the director respondents say that the claim made by the applicant is, at heart, a money claim and that, accordingly, damages will adequately compensate the applicant. On that basis, they submit that the balance of convenience is firmly tilted against the grant of an interlocutory injunction. Some reliance is placed in this context on the decision of the Supreme Court in *Curust Financial Services v. Loewe-Lack-Werk*

[1994] 1 I.R. 450 where Finlay C.J. suggested at p. 471 that, in a commercial case, difficulty as distinct from complete impossibility in assessing damages should *"not be a ground for characterising the awarding of damages as an inadequate remedy*". In light of the more recent decision of the Supreme Court in Merck Sharp, that observation now requires to be treated with some caution. In *Merck Sharp*, O'Donnell J., at para. 47 of his judgment, expressed the view that difficulty in the calculation of damages may be relevant at the interlocutory stage "*because the more complex the calculation and the greater the number of variables involved, the more likely it is that a court at trial would be forced to make an estimate or indeed to compound one hypothesis with another to arrive at its best assessment of damages to do justice in the case*". He added that this *"necessarily increases the risk that the award of damages, although the best the court can do, may be something less than the doing of justice to either the plaintiff or indeed the defendant. In such a case, it may be more convenient not to leave one or other party to the possibility of an assessment which is theoretically possible, but highly imprecise, speculative and therefore inconvenient."* He went on to observe that the fact that *"it is not completely impossible to assess damages should not preclude the grant of an injunction to the plaintiff in an appropriate case"*. In my view, those observations represent a significant qualification on the previous position taken by the Supreme Court in *Curust* and are particularly relevant here in light of the evidence given by Mr. Keogh on behalf of the applicant in para. 9 of his affidavit sworn on 31st May, 2021 (quoted in para. 42 above). In that paragraph, Mr. Keogh outlines a number of significant challenges which will face an expert at trial in attempting to assess the value of the consequences of winding down the business of the company in the event that an injunction to restrain that wind down is not granted pending trial. As noted in para. 43 above, this element of Mr. Keogh's evidence has not been challenged by Mr. Moran, the valuer who has sworn affidavits on behalf of the company. While I cannot accept the suggestion made in para. 13 of the Mr. Keogh's affidavit that it would be impossible to estimate damages, his evidence in para. 9 of the affidavit seems to me demonstrate that there will be significant difficulties in precisely estimating the alleged loss of value of the company as a going concern in the event that a sale of assets on a piecemeal basis proceeds in the meantime. Once assets have been sold, it becomes increasingly difficult to put a value on the company on a going concern basis. Any expert called on behalf of the applicant at trial would have to make a retrospective estimate of what the value of the company would have been if the assets in question had not been disposed of in the meantime. While O'Donnell J., in *Merck Sharp,* stressed that a court, in a commercial case, should be robustly sceptical of a claim that damages are not an adequate remedy, I can see some force in the points made by Mr. Keogh about the practical difficulties in carrying out a precise estimate of the loss that will allegedly be suffered. For that reason, it seems to me that the case made by the applicant comes within the class of case described by O'Donnell J. in para. 47 of his judgment where, although the court will be able to make a reasonable estimate of the loss alleged, that estimation will necessarily involve a degree of speculation and theoretical analysis such that it cannot be said that damages are a wholly adequate remedy for the applicant. That said, the court should be able to make a reasonable estimate of the loss claimed by the applicant. As discussed further below,

valuation evidence is a regular feature of court hearings. Courts frequently have to grapple with competing theories or estimates of value put forward by different valuation experts retained by the parties. I have not been persuaded that the difficulties identified by Mr. Keogh will altogether prevent the court from arriving at a retrospective valuation of the business, on a going concern basis, in the event that the asset disposal programme proceeds, as planned, between now and the trial. This is a relevant factor in assessing where the balance of convenience and the balance of justice lies. It will therefore be necessary to consider this factor further below.

86. Having considered the position of the applicant in the event that an injunction is refused, I must now address the consequences for the company and the director respondents in the event that the court were persuaded to grant an injunction pending trial. In considering the position of the company, I must also bear in mind the interests of the other shareholders of the company, not all of whom are before the court and a majority of whom have approved the proposed piecemeal realisation of assets. In my view, very similar considerations arise for them as arise for the applicant. If the proposed programme of sales is restrained, sales will be lost and no assets could be put on the market between now and the trial. That seems to me to raise (albeit in mirror image form) the same kind of difficulties for the other shareholders as Mr. Keogh outlined would face the applicant in estimating losses. While, of course, valuers could give evidence as to their expert opinion at trial, any such evidence would be, at least in part, theoretical or speculative in so far as the experts would seek to estimate what value those assets would likely have attained if they had been sold in 2021 rather than 2022 or subsequent years. While the applicant has submitted that the more limited form of relief proposed by it would lead to no more than a two month delay to any sales process, there can be no guarantee that this would be so. Moreover, there are already two substantial properties on the market and if they were withdrawn from sale at this point, the evidence before the court suggests that this could give rise to significant reputational damage to the company which may affect the market's confidence in the company in relation to future disposals. In the circumstances, it seems to me that damages would not be an adequate remedy for the company or its shareholders in the event that an injunction is granted now and it subsequently transpires that the applicant's case fails at trial.

87. It is next necessary to consider where the balance of justice lies. In my view, the fact that an estimation of lost value can be made, albeit with difficulty and with some degree of imprecision, is very relevant in this context. This is particularly relevant in circumstances where, as s. 212 (3) (d) illustrates, one of the remedies for oppression envisaged by the legislature is the award of compensation. It must be borne in mind that valuation evidence is regularly and routinely heard and applied by courts in estimating damages in a whole range of cases running from civil fraud to specific performance suits. It must also be kept in mind that it is a common feature of the remedy granted by the court in successful oppression proceedings that the court will direct one side to buy out the other at a value to be made on a specified theoretical basis. Thus, for example, the remedy granted will frequently be that the claimant's shares should be purchased by the oppressor at a value fixed on the basis that the acts of oppression in question had never

taken place. Such a remedy necessarily requires that experts will have to address the particular theoretical position stipulated in the court judgment. While that may result in a significant level of estimation, the court can nonetheless fashion a remedy on that basis which the court can be satisfied will do justice between the parties. As Hoffmann J. (as he then was) observed in *Re: Postgate & Denby (Agencies)* [1987] BCLC 8 at p. 16, "*the quantification of … undervalue, difficult as it might be, is a familiar problem faced by the courts in many different contexts. It does not prevent financial compensation from being an adequate remedy"*. Thus, although the valuation issues facing the applicant may be difficult, I cannot accept that they are insuperable or that they will necessarily result in appreciable injustice to the applicant. I must also bear in mind that, prior to any hearing, the applicant will be entitled to seek discovery from the company and to obtain access to documents which may assist, for example, in revealing the extent to which, as the applicant's experts suggest, there is valuable knowhow within the company such as to make a going concern sale more favourable than the current programme of asset disposal.

88. On the other hand, if an injunction is granted now, the shareholders (including those against whom the applicant has made no allegation of wrongdoing) will not obtain the early release of value from their shareholding which is what a majority of them supported when they rejected the applicant's resolution 2 at the EGM of DHP and when they subsequently voted at the AGM of DHP in favour of the asset disposal programme taking place through the vehicle of the company. In my view, the court must have regard to the significant implications for the shareholders if that programme (which envisaged the early realisation of value) is restrained pending a trial. Contrary to the suggestion made by the applicant, that programme reflects the *status quo*. It is precisely what the company was established to do. What the applicant seeks to do is to subvert the decisions made by a majority at those meetings and to reverse the process pending trial. While I accept that this is only for the period between now and the trial, early realisation of value is a key element of the current programme and the reality is that the trial of these proceedings is many months away. Given the extent of the expert evidence required, the likely length of a hearing of a case of this kind and the fact that discovery of documents is inevitable, there is no prospect of a trial of these proceedings before the second quarter of 2022 at the very earliest. In reality, by the time the case is properly pleaded, it is more likely that it will be this time next year before there can be a trial. While it has been suggested by counsel for the applicant that the case should go forward for trial on the basis solely of the case made on affidavit on both sides, I find it difficult to accept that this would be appropriate in a case of this magnitude. While I am prepared to hear further argument from the parties on the pleadings issue, it is my provisional view that it will be important that the case is properly and precisely pleaded on both sides so that there can be no doubt about the issues that will require to be tried. The plethora of issues raised on affidavit (some of which appear to be of no more than marginal relevance) means that, if the case proceeded solely on the basis of the affidavits, there would be little certainty at trial as to what is (and what is not) at issue between the parties in the case. To my mind, that would be a recipe for unnecessary disputes at trial. For these reasons, I do not believe that it is plausible to suggest that this case could be brought forward for an early

trial. Moreover, to do so would inevitably displace other cases in the list and the court must have regard to the needs of other litigants awaiting trial in the Commercial List.

89. The reality is that no one can predict, with any degree of certainty, what may happen to property prices or the demand for property of the kind held by the company in the period between now and the trial. For example, in the case of the Northern Quarter, Mr Moran's letter of advice of 18 May, 2021 (quoted in para. 38 above) carries with it a number of warnings that suggest an immediate disposal of assets will secure the best price for that asset. To grant the relief claimed by the applicant would mean that the remaining shareholders would be required to bear the risk that, to use the well-worn warning, property prices may fall as well as rise. While an undertaking as to damages has, of course, been offered by the applicant, the process of enforcement of that undertaking would not begin until after there has been a trial on the issue of liability and a decision by the court on that issue. The effect of the grant of relief sought could therefore very significantly delay the early realisation of value for the shareholders envisaged by the resolution passed at the AGM of DHP and would defeat the purpose of the resolution. The undertaking as to damages would, thus, be a very imperfect (and very slow) means of remedying the consequences of that delay.

90. A further factor which weighs against the grant of the interlocutory relief sought is that the applicant has not moved with the level of dispatch that one would expect where a party genuinely fears that it will be exposed to irreparable harm if a particular course of action is not restrained by the court. The applicant has known of the proposed asset disposal programme from the outset of the company's existence. It also knew of the decisions previously taken by the shareholders at the EGM and AGM of DHP. While it is true that there were dealings between the parties between January and May 2021, it was clear by at least April 2021 that proceedings would have to be commenced by the applicant if it wished to challenge the disposal programme. As early as March 2021, proceedings were threatened by the applicant. However, at that point, there may have been some basis to hope that compromise could be reached. That certainly changed in April when the applicant's solicitors in their letter of 16th April intimated that the applicant had "*no choice*" but to issue s. 212 proceedings. However, those proceedings were not issued until 10th May, some 3.5 weeks after the April warning letter. That timescale may not, at fist sight, seem significant. However, if there was concern that asset disposals would expose the applicant to irreparable harm that could not be sufficiently compensated by a money award, it is difficult to understand why, given the sheer scale and value of the assets concerned, the applicant did not move with alacrity. It is all the more difficult to understand why an injunction application was not filed at the same time as the originating notice of motion on 10th May especially in circumstances where Mountview had been put up for sale some two weeks previously. The absence of even the hint of an injunction application becomes even more stark when one considers that no intimation was given to the court on 17th May, 2021 (when the application to admit the proceedings into the Commercial List was heard) that the applicant had any intention to seek such relief. This is underlined even further by the fact that, on that date, the company's solicitors made clear that no undertaking would be forthcoming in response to the demand for such an

undertaking made in the applicant's solicitors' letter of 15th May. The application for the injunction was not filed until 30th May which is some six weeks after the letter of 16th April, 2021 to the effect that the applicant had no option but to bring s. 212 proceedings. In the particular circumstances of this case, that delay is impossible to reconcile with the case now made by the applicant as to the alleged urgent necessity for an injunction. At the very least, the delay required to be fully explained. In my view, no satisfactory explanation has been provided. I therefore believe that it is appropriate, as part of the weighing exercise, to take account of this period of insufficiently explained delay on the part of the applicant.

91. I have not lost sight of the argument made on behalf of the applicant that, if an injunction is not granted, its claim will become moot. That is an issue that arises in many applications for an interlocutory injunction. I do not believe that this argument alters the balance. One of the purposes of the balance of convenience test is to determine whether, on the basis of the evidence before the court at the interlocutory stage, justice requires that the claimant should be left to a remedy in damages, in which case the failure to grant the injunction may result in an irreversible step being taken, or whether the balance of justice lies in favour of prohibiting the taking of that step pending trial. In every case, the court has to weigh where the balance lies. If, having considered the respective positions of the parties, the court determines that justice requires that the claimant is left to a remedy in damages, that may make it impossible at trial to reverse the steps taken by the unrestrained respondent in the meantime. But the claimant will still be entitled to pursue a remedy in damages.

92. In this case, I have come to the conclusion that, while damages may not be a perfect remedy for the applicant, the difficulties in assessing the loss to which the applicant may be exposed, in the event that its application is refused, are not so significant as to make it impossible for the court to make a reasonable assessment of any value lost as a consequence of a piecemeal realisation of the assets. On the other hand, the grant of an injunction would, for the reasons outlined in para. 88 above have very serious consequences for the shareholders including those against whom no allegation of wrongdoing is made and would, in substance, reverse a course of conduct which has been endorsed on at least two occasions by a majority of shareholders who have, in voting against the applicant's resolution 2 at the EGM of DHP, expressly rejected the approach advocated by the applicant on this application. In my view, the imperfect nature of a remedy in damages for the applicant is not sufficient to outweigh the serious consequences for the shareholders and, on that ground alone, I believe that the balance of justice lies against the grant of an injunction. When one adds the lack of urgency shown by the applicant in bringing this application, that reinforces the conclusion that the balance lies firmly against the grant of an injunction. Even if it could be said that the matter is finely balanced (and I do not believe that it is), the court would be entitled in those circumstances, as the judgment of O'Donnell J. in Merck Sharp demonstrates, to have regard to the relative strength of the respective cases made by the parties. For the reasons previously outlined, while I cannot exclude the possibility that the applicant may be able to persuade the court at trial to extend the principles applied in *Elgindata* and in

Macro (Ipswich), it could not be said that this is a strong case. Thus, even if it were less obvious where the balance lies, I am of the view that the court would decline to grant the injunction sought.

Decision

93. In the circumstances, it is unnecessary to consider the remaining aspects of the *Merck Sharp* principles. For all of the reasons outlined above, I have come to the conclusion that the application for an injunction must be refused.

94. I will list the matter for remote mention at 2.00 p.m. on Monday 12 July, 2021 to deal with any consequential orders that may be necessary including any orders in relation to costs.

High Court practice direction HC 101

95. Finally, in accordance with the above practice direction, I will direct all of the parties to this application to file their respective written submissions (subject to any redactions that may be required or permitted under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.