SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 14

EDI-B17-22

JUDGMENT OF SHERIFF JOHN K MUNDY

in the petition of

PAUL JAMES DUNCAN CURRAN

Petitioner

against

(FIRST) B&P SCAFFOLDING LIMITED AND (SECOND) WILLIAM DAVID PAXTON

Respondents

Application: Under section 994 of the Companies Act 2006

Petitioner: Cheyne, Advocate, instructed by Bannerman Burke Law, Hawick
Respondents: McMeeken, Solicitor, Morton Fraser, LLP, Edinburgh

Edinburgh, 19 August 2022

The sheriff, having resumed consideration of the cause, finds as follows:

FINDINGS IN FACT

1. The petitioner is Paul James Duncan Curran born 5 August 1985 and he resides in Edinburgh. He is a scaffolder.

2. The first respondent is B&P Scaffolding Limited, a company incorporated under the Companies Act having a registered office in Currie ("B&P").

3. The second respondent is William David Paxton who resides in Currie.

4. The petitioner began working as a scaffolder straight from school when he began working for a company named Double Grip Scaffolding Ltd ("Double Grip") owned and run by Michael Larkin who held 51% of the shares and the second respondent's father the

now deceased William Walker Paxton ("Mr Paxton, Senior"). Both were directors of that company. By around 1999/2000, the Mr Paxton, Senior had stepped back from the day-to-day running of that business. His son, the second petitioner had from around that time, become involved in that business and was the person primarily responsible for its day-to-day running.

5. In about 2004, Mr Paxton, Senior and Mr Larkin decided to end their business relationship, at which point a new company, B&P was established. The initial investment in the company was made by the late Mr Paxton, Senior and the second respondent who each invested £10,000 into the company, Mr Paxton, Senior also putting in his share of the scaffolding stock of Double Grip. The plan was that the business of B&P would be operated jointly by the Mr Paxton, Senior and his son, the second respondent.

6. B&P was incorporated on 4 March 2004 as a private limited company. The company has an authorised share capital of £100 of which four shares have been issued and are fully paid. Two of the shares are registered in the name of Mr Paxton, Senior who died on 24 July 2017. The remaining two shares are registered in the name of his son, the second respondent. Mr Paxton, Senior and his son, the second respondent, were the directors of B&P. Since Mr Paxton Senior's death the second respondent has been the sole director of the company.

7. From the inception of B&P, the second respondent and his wife Caroline Paxton would look after the day-to-day running of the business and after his wife ceased to be involved, it was the second petitioner who was primarily responsible for its day-to-day running. Mr Paxton Senior's involvement reduced over the years.

8. The business was and continues to be profitable. Mr Paxton, Senior and the second respondent each earned around £250-£300 as a basic wage together with a monthly

"dividend" of £3,000 each. Mr Paxton Senior and the second respondent worked well together. Their relationship however deteriorated in about 2017, following which they did not speak. The second petitioner arranged that the dividend payments of £3,000 per month would cease to be paid to Mr Paxton Senior. Further, the weekly sum ceased to be paid in about June 2017.

9. The petitioner had, in addition to being employed by Double Grip had also regularly worked as a scaffolder with B&P apart from a short break in 2010 or 2011, when he worked for other scaffolding businesses. He had a good relationship with both Mr Paxton Senior and the second respondent. He was actively involved in the business and took on additional responsibility when Mr Paxton Senior and the second respondent were absent. By May 2017, as a charge-hand, he would effectively oversee operations when the second respondent was on holiday.

10. In 2015, Mr Paxton Senior consulted his solicitor and executed a Will dated 2 February 2015, in terms of which he bequeathed the residue of his estate to his wife Sheila Paxton, including his shareholding in B&P. In 2017, Mr Paxton Senior was diagnosed with terminal cancer and by May of that year he knew that he would not have long to live. He had by then fallen out with his son the second petitioner. In about May 2017, he asked to meet with the petitioner and indicated at the meeting that he wanted him to be part of the business of B&P and that he wanted to hand over to the petitioner his share in the business. He also wished that the petitioner would become a director in the company. Mr Paxton Senior's wife Sheila Paxton did not wish to become involved in the company. Mr Paxton Senior wished that the petitioner and the second respondent would work together in the business.

11. Mr Paxton Senior arranged a meeting with his solicitor Mr Clancy of Clancy Hendrie Legal Limited and the petitioner at in Edinburgh on 1 June 2017, at which time certain documents were completed, including a stock transfer form by virtue of which Mr Paxton Senior transferred his shareholding in B&P to the petitioner. In addition, a form was completed but purportedly appointing the petitioner as a director in the company.

12. The solicitor Mr Clancy wrote to Carrick Kerr & Co, Accountants, on 22 June 2017, who acted for B&P with the stock transfer form enclosed in order that it may be registered. Carrick Kerr & Co on behalf of the company did not acknowledge the intimation of transfer and correspondence was subsequently exchanged between said Clancy Hendrie Legal and Morton Fraser Solicitors, who acted on behalf of the company.

13. Mr Paxton Senior died on 24 July 2017.

14. By letter of 23 August 2017, Morton Fraser indicated to Clancy Hendrie Legal that the second respondent as sole remained director of the company was exercising his discretion to decline to register the share transfer and that in terms of Article 9 of the Articles of Association of B&P. The second respondent, as sole director, continues to refuse to register the shares. The letter also intimated that the second respondent declined the petitioner's request to be appointed a director. Further, doubt was cast on the validity of the stock transfer given unspecified "anomalies" in the form and the mental capacity of Mr Paxton Senior at the time of signing. A copy of the latter is produced on process.

15. Article 9 of the Articles of Association of the company provides:

> "The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share whether or not it is a fully paid share. Clause 24 of Table A shall not apply to the Company".

16. There was no consideration given by the petitioner to Mr Paxton Senior for the transfer of shares as is recorded in the stock transfer form. Mr Paxton Senior intended to and did gift the shares to the petitioner.

17. On the day following the petitioner's meeting with Mr Paxton Senior at which the latter indicated he wished to gift the shares to the petitioner, the petitioner told the second respondent what had occurred. The second respondent indicated that he would not agree to this unless the petitioner himself put money into the company. The second respondent's suggestion was that the petitioner should pay for the value of the shares by putting money into the company.

18. Up to the point of this discussion, the petitioner and second respondent had a good working relationship. Following this discussion, their relationship cooled. However, their working relationship continued and the petitioner continued working for B&P until around February 2018, by which time he had set up his own separate business Kayem Scaffolding Limited.

19. The reason the second respondent declined to agree to the transfer of shares from his father, Mr Paxton Senior, to the petitioner was not connected with what he, the second respondent, considered to be in the best interests of the company, but for personal reasons. It was because the shares had been gifted to the petitioner by his late father, Mr Paxton Senior with whom his relationship had irretrievably broken down, rather than paid for.

FINDINGS IN FACT AND LAW

20. The decision of the second respondent on behalf of B&P Scaffolding to decline to register the transfer of shares form Mr Paxton Senior to the second respondent was not *bona fide* in the sense that it was not motived by what he perceived to be in the best interests of

the company. Rather, the decision was motivated by the fact that the shares were gifted to the petitioner by his late father with whom his relationship had irretrievably broken down. The decision was therefore a personal one rather than one made in the interests of the company.

21. The decision not to register the petitioners' shareholding had the effect of excluding the petitioner from any involvement in the business including participation in profits and assets and was therefore unfairly prejudicial to the interests of the petitioner.

FINDING IN LAW

22. The affairs of B&P Scaffolding Limited having been conducted in a manner, which is unfairly prejudicial to the interests of the petitioner, he is entitled to relief under Section 996 of the Companies Act 2006.

Interlocutor

THEREFORE sustains the first plea in law for the pursuer (petitioner); repels the first, second and third pleas in law for the defender (second respondent); appoints a procedural hearing on a date to be fixed to discuss further procedure in relation to the question of relief under section 996 of the Companies Act 2006; sanctions the cause as suitable for the employment of junior counsel; *quoad ultra* reserves all questions of expenses.

NOTE

Introduction and background

[1] This is a petition at the instance of the petitioner, Mr Curran, for relief under Part 30 of the Companies Act 2006, on the ground that the affairs of B&P Scaffolding Limited have been conducted in a manner that is unfairly prejudicial to his interests. The first respondent is the company B&P Scaffolding Limited ("B&P") and the second respondent is William David Paxton, son of the late William Walker Paxton ("Mr Paxton Senior").

[2] The essential facts are rehearsed in my findings in fact and I do not intend to rehearse those details. In summary, B&P were the company of Mr Paxton Senior and his son the second respondent. They were equal shareholders and they worked well together each having a "monthly dividend" of up to £3,000 with a salary each of around £250-£300 per month. Unfortunately, there came a time when father and son ceased to get on and their relationship broke down irretrievably. They did not speak. It seems that as the years went on the second respondent was the one who was running the business assisted by his wife as company secretary with Mr Paxton Senior increasingly spending time away. It is not I think necessary to go to the reasons why the relationship between father and son deteriorated. Certain matters are mentioned in the second respondent's affidavit suffice it to say that the second respondent was concerned about various transactions on the company's bank account and there appears to have been a disagreement between the two. Clearly, Mr Paxton Senior was not here to give his side of the story in that regard.

[3] The petitioner was a scaffolder who worked with the company and also a previous company involving Mr Paxton Senior – Double Grip Scaffolding Limited ("Double Grip"). He worked for the first respondent's company over the years apart from a period in around 2010 and 2011. It seems that he had a good relationship both with Mr Paxton Senior and the

second respondent. He worked as a charge-hand who effectively oversaw operations when either the second respondent or Mr Paxton Senior were absent from business for any reason.

[4] Mr Paxton Senior left a Will in 2015 leaving the residue of his estate including his interest in B&P to his wife Sheila Paxton. It appears however, that Mrs Paxton really did not wish anything to do with the company. In 2017, Mr Paxton Senior was diagnosed with terminal cancer and he knew that he did not have long to live. Given his wife's attitude to the company and given by that time the breakdown of his relationship with the second respondent he decided to gift his shares in the company to the petitioner. A stock transfer form was completed in the presence of a solicitor (as well as a form appointing the petitioner a director). When the second respondent was appraised of this he was not happy and did not agree that the petitioner should come into the business. His solicitor subsequently confirmed that he did not agree to the share transfer being registered and founded on the terms of Article 9 of the Articles of Association of B&P which confer on directors a discretion to decline to register a share transfer without assigning any reason. In the letter from B&P's solicitor no reason was stated although questions were raised as to Mr Paxton Senior's capacity at the time of completing the transfer. The letter also declined the request that the petitioner be made a director. It seems that the relations between the petitioner and the second respondent cooled and the net result was the present litigation.

[5] Following the lodging of the petition, and after sundry procedure, a two day proof was allowed, restricted to the preliminary issue of whether there has been unfair prejudice within the meaning of Section 994 of the 2006 Act, the question of remedy, if it arose, being dealt with thereafter. The remedy sought by the petitioner is for the second respondent to purchase the shareholding of the petitioner in the sum of £57,500 or for "such other order as it (the court) thinks fit for giving relief in respect of the matters complained of". Affidavits

were appointed and by a subsequent interlocutor of 30 May 2022, those were to form the principal part of the evidence in chief of the witnesses, there being a live in-person proof on 13 and 14 June 2022. The proof called before me. The petitioner was represented by Mr Cheyne, Advocate and the second respondent by Mr McMeeken, Solicitor. The petitioner's proof consisted of evidence from the petitioner himself (Mr Curran) and Sheila Paxton the widow of Mr Paxton Senior. There was also an inventory of productions lodged on behalf of the petitioner containing various documents including the Articles of Association of B&P. The second respondent's proof consisted of the evidence of the second respondent himself. An affidavit was lodged from each of the witnesses. In supplement, both the petitioner and the second respondent gave evidence orally. The petitioner was content to rely on the affidavit of Sheila Paxton subject to a passage in paragraph 2 thereof which, by agreement, I was not to take into account. After the evidence, submissions were made on behalf of both the petitioner and the second respondent following which I made avizandum.

The pleadings

[6] In statement of fact 4, the petitioner avers:

> "In the circumstances condescended upon, the Petitioner legitimately expected that he would be registered as a member of B&P Scaffolding Limited and would enjoy all the rights of membership including participation in profits and assets. *Separatim*, in the circumstances condescended upon the Petitioner further legitimately expected that as an equal half owner of B&P Scaffolding Limited, he would be appointed as director of B&P Scaffolding Limited to allow him affectively to participate in the management and control of B&P Scaffolding Limited".

[7] In answer (Ans.4) the second respondent mentions Article 9 of the Articles of Association and goes on:

"The second respondent, a sole director of the first respondent, accordingly had a right to refuse to register the Transfer. He refused to register it in good faith and acting in the best interests of the first respondent as a whole. Had the second respondent registered the transfer of share the business of the first respondent would have been damaged due to the inability of the petitioner and the second respondent to work together. In light of the terms of Article 9 of the Articles of Association, the petitioner could have had no legitimate expectation to have his name entered in the Register of Members. In light of this, he has admitted liability to run the business together with the second respondent he could have no such expectation. *Separatim*, the second respondent could not responsibly have brought on the petitioner as a director of the Company and the petitioner could not have accepted such appointment. As condescended upon by the petitioner, the petitioner owns and operates a competing business, Kayem Scaffolding Limited… The petitioner could not fulfil his duties as a director of the Company while simultaneously fulfilling his duties as a director of a competitor. It is believed and averred that if the petitioner had any control over the management of the Company, he would prioritise the interests of Kayem to the detriment and damage of the Company resulting in the Company winding up".

[8] In response to that the petitioner avers (SF 4):

"Denied that the petitioner cannot fulfil his duties as a director of the Company whilst a director of Kayem Scaffolding Limited. Said company was set up after it was clear to the petitioner that the registration of the transfer of shares to him was opposed. Kayem Scaffolding Limited was incorporated on 17 September 2017 and began to trade in April 2018. Had the respondent not opposed the transfer said company would never have been incorporated. Further and in any event, the present action is concerned with the transfer of shares to the petitioner, and is not in relation to his appointment to the board of directors, B&P Scaffolding Limited".

[9] It is asserted on behalf of the petitioner at Statement of Fact 5:

"In the foregoing circumstances the declining by B & P Scaffolding Limited under the sole directorship of the Respondent to register the Petitioner as a member of [B&P] et *separatim* to appoint him as a director of {B&P] was unfairly prejudicial to the interests of the Petitioner. [B&P] directed by the Respondent blatantly, and without any specified basis in fact, sought to deny the Petitioner the interest in [B&P] to which he was entitled pursuant to the wishes of the deceased [Mr Paxton Senior] as reflected in the Transfer…by declining to register the Transfer and thereby denying the Petitioner any meaningful interest in [B&P] the Respondent has unfairly attempted to appropriate for himself full ownership and control of [B&P] and deny the Petitioner his legitimate interest, contrary to the express wishes of his father."

[10] In answer, it is averred (in Answer 5):

"Explained and averred that the wishes of the deceased are not determinative of the matters complained of in the present petition…there is nothing unfair about the

> conduct or decisions of the respondents. It was in the interests of the Company to refuse to register the transfer of the shares and consistent with the commercial purpose of article 9 of the articles of association. It would have been inconsistent with the nature of the business (as a family business) to have brought in a non-family member as a shareholder. It would have been damaging to the Company for the second respondent to have registered the transfer where the shareholders had a poor relationship and could not have agreed on matters crucial to the running of the business. It would have resulted in deadlock, which would have likely led to the Company being wound up. *Esto*, if the Company was wound up the Company's 10 employees (5 of whom had been with the company since incorporation) would have lost their jobs. Given the petitioners controlling interest in Kayem, it is in his interests to have the Company wound up. *Separatim* it would damage the Company irreparably for the petitioner to be appointed as a director of the Company or have anything to do with its management and control. The petitioner owns and operates Kayem and would prioritise its interests over those of the Company. His competing interests in Kayem and the Company would be irreconcilable and his dual-offices as a director would be a conflict of interest in breach of his fiduciary obligations to the Company under the Companies Act 2006. Accordingly, in these circumstances, there is nothing unfair about the failure to appoint the petitioner as a director of the Company."

Evidence

Paul Curran

[11] In his evidence, the petitioner adopted his affidavit. In the affidavit he deponed that he is a scaffolder. He started working from school when he was around 14 years old and subsequently joined the business known as Double Grip run by Mr Paxton Senior and a Mr Michael Larkin. He got to know Mr Paxton Senior well and also his wife Sheila Paxton. They became close. He also developed a good relationship with the second respondent. He spent most of his time working with the Paxtons, which would include the said business of Double Grip and also the business of B&P, apart from a time in 2010 or 2011 when he worked elsewhere. Latterly, Mr Paxton Senior spent part of the year away in Tenerife so was not as involved with the business as previously but when the second respondent would go on holiday then Mr Paxton Senior would call in to look at the jobs and make sure

everything was going okay. However, it was the second respondent who took the reins of the business with Mr Paxton Senior having a more limited involvement in the company. According to Mr Curran the issue of the shares being transferred by Mr Paxton Senior to him came out of the blue. Mr Paxton Senior asked to see him and when they met in Mr Paxton Senior's house he was told by the latter that he wished to hand things over to Mr Curran. He wanted Mr Curran to take on his part of the business and make sure that his wife Sheila Paxton was okay as by this point he knew that he did not have long to live. Mr Paxton Senior still had his wits about him in spite of his medical situation. Mr Curran indicated that he was happy to go along with this. According to Mr Curran, the second respondent could not accept that the shares had been gifted to him. The day following the meeting with Mr Paxton Senior he told the second respondent what had happened and the latter's immediate reaction was to indicate that there was no chance that he would allow this to happen. He indicated that the shares were not worth anything, even £1. Mr Curran then offered to buy the shares for £2 if that was the case. This remark was explained in cross-examination as being a joke. It had not been a serious proposition. It was a difficult discussion and his position then subsequently was that the petitioner would never have anything to do with the company in terms of being a shareholder, this in spite of Mr Curran explaining that he just wanted to do what Mr Paxton Senior wanted. The second respondent was in charge of the company at this point and the petitioner continued to work as a foreman. The matter was discussed from time to time and things could become heated but at no point did it really impact upon the work of the business. The conversation about the shares was in June or July 2017 and it was not until February (2018) that the petitioner left the employment of B&P. As foreman, the petitioner had been the most senior member of the employees. The petitioner did not want to be paid anything more but the idea was for him

to just run the business along with the second respondent. Prior to the transfer of the shares from Mr Paxton Senior to the petitioner the relationship between the petitioner and the second respondent was good. Even after the problems started they still worked together five days a week. When it became clear to the petitioner that the second respondent was going to stop him from being a shareholder or to run the business with him he took the decision to start another scaffolding company. That was Kayem Scaffolding Ltd, which was set up in September 2017 and began trading in about April 2018. The business was set up about a month after the letter from Morton Fraser of 23 August 2017 to Clancy Hendrie Legal Limited indicating that the company on the instructions of the second respondent declined to register the share transfer. The petitioner explained that had he been registered as a shareholder of B&P he would not have started trading in a new business. He states in his affidavit that the likelihood is that B&P would now be significantly larger and more profitable than it currently is. His efforts and loyalties would have been directed to achieving success with B&P.

[12] In cross-examination, the petitioner reiterated that the shares were gifted to him and, as indicated, explained that the reference to offering £2 was a joke and not to be taken seriously. This was in response to the second respondent indicating that the shares were worth nothing. He indicated that he did not know of the restriction in the Articles of Association on the transfer of shares. He was asked whether getting half the business for nothing was fair and that was, quite rightly, objected to. He explained that Mr Paxton Senior did not want any money for the shares. In relation to the new business of Kayem Scaffolding, he said that it was doing well but he would be quite happy to go back to B&P. He confirmed that B&P were a competitor to his business. He confirmed that a firm called Advanced Roofing run by Scott Fyfe was a customer of his new business and was formerly a

customer of B&P. It was suggested that Mr Paxton Senior had told the second respondent that unless the latter took on the petitioner as a director and shareholder that he would get Mr Fyfe to send his instructions to a new company owned by the petitioner rather than B&P. The suggestion was that this was a scheme "cooked up" by Mr Paxton Senior, Mr Fyfe and the petitioner. This was not a suggestion that was accepted by the petitioner**.** In re-examination he indicated that there was never any such threat.

Sheila Paxton

[13] The petitioner's proof was concluded with the evidence of Sheila Paxton by affidavit. She is the widow of Mr Paxton Senior who died on 24 July 2017. She confirmed that the relationship between her husband the second respondent deteriorated. The second respondent was the son of Mr Paxton Senior of a previous marriage. There being a suggestion in the affidavit of the second respondent that the reason the relationship between father and son severed was when in around 2016/2017 Mr Paxton Senior made withdrawals from the company's account without discussion with the second respondent, Mrs Paxton indicated that she did not know of any such withdrawals nor indeed how it could be done as it was the second respondent and his wife that ran the business and dealt with all the banking. She indicates in her affidavit that her husband discussed the idea of transferring his shares to the petitioner with her a few times to give the petitioner a better chance in life. He had mentioned the potential transfer before he became seriously ill. Her husband had known the petitioner from a very young age and he had known the petitioner's father. The idea was to give the petitioner help but also to give some good input into the business and make sure that it was run well and then some of the benefit could come back to Mrs Paxton as her husband's widow. Originally, her husband had left the shares to her in his Will but

then because she was not interested in getting involved with the business she did not want that. He then had a cancer diagnosis in March 2017, and in April when he was told that he had four to six months to live. He had then started speaking more about transferring the shares. Her husband had his faculties until the day he died. Her understanding was that the petitioner and the second respondent had a very good relationship and friendship and worked very well together operating the business. She was not present at the meeting when her husband told the petitioner what he wished to do with the shares but after the meeting her husband had told her about it.

[14] Before mentioning the evidence of the second respondent, I should pause to observe that there has been a suggestion in this case as to whether or not at the time Mr Paxton Senior executed the stock transfer form he had the "requisite mental capacity". This arises from the said letter from Morton Fraser containing the following passage:

> "The stock transfer form contains anomalies which casts doubt on its validity. Questions have been also been raised in relation to whether William Walker Paxton had the requisite mental capacity to sign the stock transfer form at the time when it was signed by him".

No particulars of "anomalies" are given in the latter or record. The question as to mental capacity is taken up in the explanation of events on behalf of the petitioner on record at statement of fact 2.7 and calls are placed upon the second respondent to specify the factual basis for the assertions. In response in answer 2.7 it is simply averred "not known and not admitted that the deceased remained in full possession of his mental faculties until his death".

[15] This is why there is reference in the affidavits to the late Mr Paxton's mental capacity. However, it was made clear to me at the proof on behalf of the second respondent

that no issue was being taken as to the mental capacity of the late Mr Paxton at the time he signed the stock transfer form, nor were any "anomalies" relied upon.

William David Paxton

[16] The second respondent William Paxton adopted his affidavit. In supplementary questions he was asked about the circumstances of the petitioner leaving the employment of B&P in 2010 or 2011. He explained that he had been paid off as he had been telling customers of Advanced Roofing that the latter had not done a good job. This was denied by the petitioner in cross-examination. Whatever the situation, the petitioner was back working with B&P about a year later.

[17] In his affidavit Mr Paxton explains the background of the company having its registered office at his home address in Currie. He is the sole director. Initially the company was incorporated on 4 March 2004 and to begin with he and his then wife Caroline Paxton were shareholders each holding one ordinary share of £1 each. By around January 2007, the late Mr Paxton the second respondent's father was also a shareholder in the company. The shareholding remained the same until 2015 when Caroline relinquished her shareholding. From that date on the late Mr Paxton and the second respondent were equal shareholders in the company holding two ordinary shares of £1 each and that remained the position until his father's death on 24 July 2017. His father had initially been a shareholder in the said business of Double Grip along with Michael Larkin. Mr Larkin had held 51% of the shares and his father 49%. They were directors of that company. By around 1999/2000, Mr Paxton Senior had effectively retired from the day to day running of that business and Mr Larkin was only coming to the office around one day a week. The second respondent had been involved in that business and from around the time his father had stopped working until the

time B&P were established he was the person primarily responsible for the day-to-day running of the business. In about 2004, Mr Paxton Senior and Mr Larkin decided to end their business relationship and at that point B&P was established. The initial investment in the company was made by he and his father each investing £10,000 to get started. His father and he were the directors of the company and initially Caroline was the company secretary. It was a family business and the people responsible for the day-to-day running of the company were the second respondent and his ex-wife. Once the latter's involvement ended, around the time she relinquished her shareholding, the second respondent was running the business on his own. He depones that while people outside the family were employed in the business, such as the petitioner, the only people who ever had control of the business were family. The business was profitable, Mr Paxton Senior and he earning each around £250-£300 per week with a monthly dividend each of around £3,000. It was ensured that they both took the same wage and got the same dividend every month. Mr Paxton indicates that they had a "great relationship". They used to play golf on a regular basis and were a close family.

[18] In paragraph 6 of his affidavit, the second respondent indicates that the relationship soured in around 2016/2017, when Mr Paxton Senior had returned from holiday in Tenerife and made several withdrawals from the company's bank account without discussing this with the second respondent. The second respondent indicates that he was quite concerned and challenged him about it. Unfortunately, the parties' fell out and from this point on never spoke to each other again. The second respondent arranged that the monthly dividend ceased to be paid to Mr Paxton and it seems that in around 2017, he no longer received his weekly wage either, although by that time he had not been actively working in the business for a number of years.

[19] In paragraph 7 of the affidavit, the second respondent indicates that the petitioner was a good scaffolder and that the company had employed him "from time to time over the last 20-25 years". In cross-examination, it was clarified by the second respondent that he had been employed most of the time. Indeed my understanding from the evidence is that the petitioner had been employed continuously with the exception of that period in 2010/2011, until he left in 2018. He indicates that when his father was first diagnosed with cancer in around 2017, the petitioner approached him to indicate that the late Mr Paxton was going to give him his shares in the company. The second respondent told the petitioner that if he wanted to be a shareholder in the company he would have to buy into it and that the petitioner was not willing to do that. No figures were discussed but he asked him to go away and think about it and if he came back with an appropriate offer he would look at it. The petitioner never came back with a proposal. He further states that the late Mr Paxton had a very good relationship with Scott Fyfe of Advanced Roofing which was one of the company's biggest customers. He states that the threat that his father was making through the petitioner was that he would get Mr Fyfe to send instructions to a new company owned and operated by the petitioner rather than B&P Scaffolding unless he took the petitioner on as a director and shareholder. When he refused his father made good on that threat and helped the petitioner to set up his own business Kayem Scaffolding which is a direct competitor of the company. He persuaded Mr Fyfe to give Kayem all his work. He mentioned that he spoke to one of the other "senior people" at Advanced Roofing about it but this was an arrangement that the petitioner, Mr Paxton Senior and Mr Fyfe had come up with and he was staying out of it. No further detail of this supposed arrangement was forthcoming.

[20] It is suggested in paragraph 8 of the affidavit that when Mr Paxton Senior became seriously ill he was taking a lot of morphine and cannabis oil which probably affected his judgement. He went to see his father around five or six weeks before he died but his wife refused to let him see him saying that his father did not want to see him. There is a suggestion in the correspondence we have seen from Morton Fraser dated 23 August 2017, that Mr Paxton Senior might not have the requisite mental capacity at the time he signed the stock transfer form. As indicated, it was not suggested at the proof that Mr Paxton Senior lacked mental capacity at the time he signed the stock transfer form. Following the said passage in his affidavit the second respondent goes on to say that "I would not be surprised if he (his father) did not want his shares to be transferred to me as our relationship was latterly non-existent**".** If that is correct, it would seem to suggest that Mr Paxton Senior knew precisely what he was doing when he signed the stock transfer form in favour of the petitioner. The second respondent goes on to say that when the company started he and his father had an agreement that if either of them decided to sell their shareholding they would offer it to the other person first, in other words a pre-emption. There was no written agreement and I note that this is not something which is repeated in the averments on behalf of the second respondent. The second respondent goes on to suggest as a possibility that his father wanted to push the petitioner's interests and damage his. The second respondent also states that the petitioner had displayed threatening behaviour to him and that he had sacked him from a job as a result but hired him back a couple of weeks later**.** The second respondent states that his focus is on doing the best for the company and he could not see how the company could operate with the petitioner as an equal shareholder nor as a co-director. He thinks that they would have a difficult relationship such that they would not be able to work together meaning the end of the company. When he was presented with the

stock transfer form from the firm of Carrick Kerr & Co he took advice from Morton Fraser and instructed them to write back refusing to register the transfer of shares hence the letter of 23 August 2017. In the final paragraph of his affidavit he explains as follows:

> "I appreciate that the accusation will be I am just thinking of myself in all this but that it's not the case at all. On the contrary, Paul is the one who is in it for himself. He just expected to walk into the business as a shareholder without investing in it. I have worked really hard in developing the Company into the business that it is today and… my intention has always been to keep it in the family and pass it on to my son. The Company also had ten employees five of whom have been there right from the start, who would lose their jobs if I did anything, which damaged the company or brought on a shareholder or director who was going to prioritise in interests of a competing business. So while I am happy to accept that my father wanted to favour Paul, I just can't see how giving him shares or by making him a director is a good thing for the Company. On the contrary, it is likely to spell the end of the Company and that would be damaging to a lot of people other than me".

[21] In cross-examination, Mr Paxton explained, in relation to his refusal to agree to register the share transfer, that he was "expecting a shareholder to put money in". His position was, in effect, that the petitioner should pay for the value of his father's shares. He did not, in other words recognise the gift of shares to the petitioner.

Submissions

[22] At the outset it is a matter of concession that in terms of Section 994(2) of the 2006 Act an application for an order under this Part of the Act is open to the petitioner as "a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company".

[23] Section 994(1) provides *inter alia*:

> "A member of a company may apply to the court by petition for an order under this Part on the ground –
>
> (a) That the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or of some part of its members (including at least himself)…"

[24] Mr Cheyne submitted that the affairs of the company had been conducted in a manner unfairly prejudicial to the petitioner's, and that by the second respondent, as the sole director of the company, refusing to register the shares gifted to the petitioner by Mr Paxton Senior on the basis that the petitioner required to make an investment in the company before he would consent to the transfer. It was submitted that the power given to the second respondent as director to decline to register the transfer of shares was not absolute in circumstances where the exercise of that decision was unfair and prejudicial to the interests of the petitioner. He made reference to *Otello Corporation ASA* v *Moore Freres and Company LLC, Last Lion Holdings Ltd* [2018] EWHC 2347 (Ch) at paragraph 129 of the judgment of Mr M H Rosen QC, which in turn made reference to *In re Smith and Fawcett* [1942] Ch 304 and in particular the judgment of Lord Greene MR to the effect that where there is a discretion conferred by the articles of a company with regard to the acceptance of transfers of shares, the directors must exercise their discretion *bona fide* in what they consider to be the interests of the company and not for any collateral purpose. It was submitted that there was no evidence that the transfer would not be in the company's best interests. The second respondent simply refused to agree to the transfer of shares as he resented the idea that they had been gifted to the petitioner and he attached a condition that there should be investment in the business. This was a decision reached without proper consideration of what might be in the company's interests. This resulted in unfair prejudice and effectively negated the value of the petitioner's shareholding. He must have been acting in bad faith with a collateral purpose of depriving the protégé of his estranged father of any interest in the company. If the petition were not to be granted affording the petitioner a remedy (ordering the second respondent to purchase the petitioner's shareholding) then there

would be nothing that the petitioner could do to vindicate his rights and there would be no value to his shareholding. Counsel moved me to find that there had been unfair prejudice in this particular case in order that the remedy may then be considered.

[25] On behalf of the second respondent Mr McMeeken submitted that the remedy sought was not to have the shares registered but was a claim for money for the shares. That was to be contrasted with the remedy sought in the case of *In re Smith and Fawcett Limited* where the application to the court was to rectify the Register of Members to insert the name of the plaintiff as the holder of shares. The onus was on the petitioner to prove unfairness and prejudice. What happened to the shareholding of the petitioner if an order was not granted was not something about which the court ought to speculate?

[26] He made reference to the judgment of Lord Tyre in *Gray* v *Braid Group (Holdings) Ltd* [2015] CSOH 146 and in particular paragraphs 22-25 on the meaning of "unfairly prejudicial conduct" under reference to various authorities, including the observations of Lord Hoffmann in *O'Neill* v *Phillips* [1999] 1WLR 1092 at 1098; *Re Saul D Harrison and Sons Plc* [1995] 1 BCLC 14 at pages 17-18; the judgment of Lord Wilberforce in *Ebrahimi* v *Westbourne Galleries Ltd* [1973] AC 360 at page 379; and *Re Neath Rugby Ltd* [2008] BCC 390, per Lewison J at paragraph 202.

[27] It was submitted that the petitioner had to establish both prejudice and unfairness (*Re Neath Rugby Ltd*). A member of a company who would not ordinarily be entitled to complain of unfairness unless there had been some breach of the terms on which he agreed that the affairs of the company should be conducted but there could be cases where equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner in which equity would regard as contrary to good faith (*O'Neill*

v *Phillips*). In considering fairness, the starting point was whether the conduct was in accordance with the articles of association. In relation to fiduciary powers, they must be exercised for the benefit of the company as a whole and not for some ulterior purpose (*Re Saul D Harrison & Sons Plc*). In determining whether there is unfair prejudice it was relevant to consider whether the company was a type commonly described as a quasi-partnership with the three features described by Lord Wilberforce in *Ebrahimi:* An association formed or continued on the basis of a personal relationship, involving mutual confidence; an agreement or understanding that all shareholders shall participate in the conduct of the business; and restriction upon the transfer of members interests in the company. In such cases, a court will be more ready to find unfairness in excluding a shareholder from the management of the company even if there has been no breach of the terms of the articles of association. Reference was made to certain passages of Lord Hoffmann in *O'Neill v Phillips* from which it was clear that, while there was an equitable jurisdiction to restrain the exercise of strict legal rights if contrary to good faith, a balance had to be struck between the breadth of the discretion given to the court under Section 459 of the Companies Act 1985 (the predecessor of section 994 of the 2006 Act) and legal certainty. There were principles which governed the operation of equitable considerations and it would be wrong to abandon them in favour of some "wholly indefinite notion of fairness" (page 1099H). The assertion that something unfair had happened was not enough. Lord Hoffmann (at page 1101D) referred to the approach of Jonathan Parker J when he said *In re Astec [BSR] Plc* [1992] 2 BCLC 556 at 588:

> "… in order to give rise to an equitable constraint based on "legitimate expectation" what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former".

[28] In this case it was submitted that it was the restraint of the petitioner that was sought not the late Mr Paxton. The petitioner had no legitimate expectation based on his dealings with the second respondent that shares would be registered or that he would be a director.

[29] *In re Smith and Fawcett* concerned provisions restricting the transfer of shares in the articles of association very similar to those in the present case. The judgment of Lord Greene MR recognised the legitimacy of such terms of restriction in the articles of private companies and that there may be good business reasons giving directors powers of the widest description. The question was whether on the construction of the particular article that the directors were limited by anything except their *bona fide* view as to the interests of the company. He held that there was no such limitation in that case giving the directors, in the absence of bad faith, an absolute and uncontrolled discretion. Reference was also made to the *Last Lion Holdings Limited* case at paragraphs 110-115 dealing with the power to restrict share transfers and also paragraphs 116-120 in relation to the application of Sections 171-173 of the Companies Act 2006, providing for the general duties of directors as also paragraph 124 referring to the essential principle under Section 172(1) that it is for the directors to make their own decisions in good faith as to how to promote the success of the company for the members as a whole. The point made was that this was a subjective view that was required, not an objective one. There must be an honestly held belief that the decision is in the interests of the company.

[30] In this particular case it was submitted that the restriction in the articles was unambiguous. As regards the powers of the directors, this was a family business were each of the family members concerned namely the second respondent and Mr Paxton Senior had put capital in with the second respondent's ex-wife also being involved in running the company. The exercise of the power in terms of the articles was in accordance with the

purposes for which it was conferred (Section 171(b)) of the 2006 Act). The context of the business – a family business, was relevant. There was *delectus personae* as between the shareholders. There had also been an agreement between the second respondent and his father as to what would happen to the shares if they were given up. Further, the discretion was exercised in the interests of the company. The onus was on the petitioner to establish that the decision was in bath faith and contrary to the company's interests. In this regard reference was made to *Village Cay Martin Ltd* v *Acland [*1998] BCC 417 per Lord Hoffmann, delivering the judgment of the Privy Council, at paragraph 424D-E under reference to *In re Smith and Fawcett Ltd*, *sup. cit*. and *Charles Forte Investments Ltd* v *Amanda* [1984] Ch 240 to the effect that the directors are *prima facia* assumed to have been acting in good faith and the onus of proving the contrary is upon the person who challenges their decision. In this case the onus had not been discharged.

[31] In relation to questions of expenses, Mr Cheyne for the petitioner moved for certification that the cause was suitable for this sanction of counsel. There was no opposition to that. That apart, there appeared to be a common position that expenses be reserved in the meantime.

Discussion

[32] The issue for the purposes of the present stage of proceedings is solely whether or not the affairs of B&P have been conducted in a manner that is unfairly prejudicial to the interests of the petitioner, being a ground under Section 994 of the Companies Act 2006 to apply to the court for relief under the provisions of section 996. It is accepted that the petitioner has by virtue of Section 994(2) the right to apply for relief as a person who is not a

member of the company but whose shares in the company have been transferred by operation of law, just that a member of a company has a right to apply for relief.

[33] It is for the petitioner to prove that the statutory ground is made out. In other words, the onus of proof is upon the petitioner.

[34] The petitioner requires to prove both prejudice and unfairness (*Re Neath Rugby Ltd*).

[35] The concept of fairness in this context has been discussed by Lord Hoffmann in *O'Neill* v *Phillips* and *Re Saul De Harrison and Sons Plc, sup cit*. It seems to boil down to this. The starting point is to consider whether the conduct of which the shareholder complains was in accordance with the articles of association. If it was, then a shareholder is not ordinarily entitled to complain of unfairness. However, given that the powers entrusted to directors are of a fiduciary nature, they must be exercised for the benefit of the company and not for some ulterior purpose. This is reflected in the provisions as to the general duties of directors in Chapter 2 of the Companies Act 2006 (sections 170 *et seq.*) which are to be interpreted having regard to the common law rules and equitable principles. In the context of the acceptance or otherwise of the transfers of shares, those principles apply. The director or directors must exercise their discretion *bona fide* in what they consider – not what a court may consider, is in the interests of the company, and not for any collateral purpose (*In re Smith and Fawcett*, per Lord Greene MR at 306) - in other words a subjective view. It is of note that where there is a refusal to register a transfer the company has a statutory duty, in terms of section 771 of the 2006 Act, to provide the transferee with reasons, presumably notwithstanding any contrary provision in the articles of association.

[36] The circumstances which may constitute unfairly prejudicial conduct cannot be listed exhaustively but might potentially include the refusal to register a transfer of shares.

[37] It is relevant to consider the context, for example whether or not the company is of a type commonly described as a quasi-partnership such being a company with the features described by Lord Wilberforce in *Ebrahimi*. In such cases the court will more readily find unfairness in the exclusion of a shareholder from the management of the company even if there has been no breach of the terms of the articles of association. However, I don't think either side in this case were predicating an argument on that basis.

[38] In the context of refusal to register shares there is a *prima facie* assumption that directors have been acting in good faith and the onus of proving the contrary is upon the person who challenges their decision (*Village Cay Martina Ltd, sup cit* at page 424E and *Charles Forte Investments Ltd* v *Amanda sup cit*).

[39] As noted, the petitioner's averments in statement of fact 4 refer to the petitioner having a legitimate expectation that he would be registered as a member of B&P and would enjoy all the rights of membership including participation in profits and assets. There is a separate case that he further legitimately expected that as an equal half owner of the company he would be appointed as a director to allow him to effectively participate in the management and control of the company. The substance of a complaint of unfairness is set out in the subsequent statement of fact 5 where it is averred that the second respondent:

> "blatantly, and without any specified basis on fact, sought to deny the Petitioner the interest in B&P Scaffolding Ltd to which he was entitled pursuant to the wishes of the deceased (Mr Paxton Senior) as reflected in the Transfer. It is respectfully submitted that by declining to register the Transfer and thereby denying the Petitioner any meaningful interest in B&P Scaffolding Ltd, the Respondent has unfairly attempted to appropriate for himself full ownership and control of B&P Scaffolding Ltd and deny the Petitioner his legitimate interest, contrary to the express wishes of his father".

[40] The concept of "legitimate expectation", borrowed from the public law, exists only when, on equitable principles, it would be unfair for a party to exercise rights under the articles (see Lord Hoffmann in *O'Neill* v *Phillips sup cit* at 1102).

[41] As noted, the opposition as expressed in the second respondent's pleadings indicates that the wishes of Mr Paxton Senior are not determinative, that it was in the interests of the company to refuse to register the transfer of the shares and consistent with the commercial purpose of article 9 of the articles of association. It is said that it would have been inconsistent for the nature of the business (as a family business) to have brought a non-family member in as a shareholder. It would have been damaging for the company where the petitioner and the second respondent had a poor relationship and could not have agreed on crucial matters as to the running of the business. It would have resulted in deadlock and have led to the company being wound up and the consequent loss of employees' jobs. It is further said it would be in the petitioner's interest in view of his other business to have the company wound up. It is averred that the company would be damaged if the petitioner were to be appointed a director in light of his competing interests.

[42] In answer 4, as indicated, the second respondent contends that he refused to register the transfer in good faith acting in the best interests of the company, and that had the transfer been registered the business would have been damaged due to the inability of the petitioner and second respondent to work together. Further, in light of the terms of article 9 of the articles of association, the petitioner could have no legitimate expectation to have his name entered in the Register of Members.

[43] Thus, the issue of good faith, while not referred to, in terms, in the petitioner's averments, is raised expressly on behalf of the second respondent, and given the terms of

the petitioner's averments and the submission on behalf of the petitioner, it cannot be doubted that the question of *bona fides* was central to the dispute in this case.

[44] In relation to the evidence, this was, as indicated, given in large part by way of affidavits. Where there are factual disputes and where the resolution of those requires at least to some extent to be based on the issues of credibility or reliability, the court is at a disadvantage when faced with affidavit evidence, particularly where that is the sole evidence (*In re Smith & Fawcett*). However, there were supplementary questions and each of the main protagonists was subject to cross-examination. That greatly assisted in the task of assessing the witnesses. I found the petitioner to be a very straightforward witness and I had no reason to doubt his credibility or reliability. It seemed to me that he was doing his best to tell the truth, and there was nothing in what he said, or in any of the other evidence, which gave me cause to doubt his reliability. As for the second respondent, I gained a less favourable impression of credibility, particularly when he spoke of the reasons for his not agreeing to the share transfer.

[45] The articles of association are clear in their terms. They are I think of a fairly standard type in a company of this sort. The directors have, in their absolute discretion and without assigning any reason (subject to section 771), power to decline to register any transfer of any share whether or not it is fully paid. It is similar in terms to the provision in the articles in the case of *In re Smith and Fawcett Ltd*. On the authorities, the court has no power to interfere in the exercise of that discretion, except where it is found that the discretion was not exercised *bona fide* in the sense of what the second respondent considered, not what a court may consider, was in the interests of the company, but for a collateral purpose. The onus is on the petitioner to establish this.

[46] In considering whether or not the second respondent has acted in good faith, or otherwise, it is of course necessary to examine the reasons put forward as to why the decision was made to decline to register the shares transferred to the petitioner. The second respondent contends that the decision was in good faith and acting in the best interests of the company, and a number of different arguments have been put forward in support of that position, some foreshadowed in the averments and some not.

[47] One of the arguments appears to be that the business would have been damaged due to the inability of the petitioner and the second respondent to work together. That is averred. In evidence, this was expanded upon with reference to certain alleged behaviour on the part of the petitioner, including criticising another contractor, Advanced Roofing, and certain (unspecified) threatening behaviour on a different occasion, in spite of which he was continuously employed by the company apart from a period of around a year in 2010 or 2011 following his criticism of the contractor. This appeared to be allied to an attempt to minimise the period of his contribution as an employee of the business, the second respondent asserting in his affidavit that the petitioner had been employed "from time to time over the last 20-25 years" which he corrected in cross-examination. On the evidence, the argument that the petitioner and the second respondent would not get on in the business seemed to me to be one with little or no foundation. It was not until the discussion between them when the petitioner disclosed Mr Paxton Senior's intention to gift the shares that their relationship cooled. At the time the decision was made not to register the shares the petitioner was still working for the company and it is also apparent that the petitioner kept working for the company for some six months. It is clear, that in spite of the attempts to portray the relationship as a difficult one, the petitioner and second respondent worked well together.

[48] There was also no evidence to substantiate the notion that the business of B&P would be damaged by the actions of the petitioner on the basis that his business was in competition with B&P. I accept the petitioner's evidence that had his shareholding been registered then he would not have formed the new company which he currently operates. I do not accept the suggestion of the second respondent, without any supporting evidence, that the petitioner was out to damage the business of B&P or that the petitioner, Mr Fyfe of Advanced Roofing and Mr Paxton Senior had come to some sort of arrangement whereby work would be diverted to a new business of the petitioner or that this was a threat to force the second respondent to take the petitioner on as a shareholder and director. I believed the petitioner in his denial of this. Of course, such a notion is only relevant in so far as it impacted on the decision at the time not to register the shares. At that time the petitioner's company Kayem had not been set up.

[49] As we have seen, there is also the contention that it would have been inconsistent with the nature of the business, as a family business, to have a non-family member brought in as a shareholder. There is a bare averment in relation to this which, as we have seen, is expanded upon in the final paragraph of the second respondent's affidavit. He says there that his intention was to pass the business onto his son. I have a problem with this argument because of the evidence of the substantial involvement of the petitioner in the business over the years as a non-family member, but more importantly because of the evidence of the second respondent, mentioned in his affidavit, that there was that there was some discussion about the petitioner putting money into the business. In cross-examination, the second respondent expanded on this a little to the effect that he expected that a shareholder would put money into the company. He was suggesting in effect that he should put money into the company to reflect the value of his father's shares. It is fairly clear from

his evidence that he was not prepared to accept the petitioner as a shareholder without money being put in to the business and therefore would not accept a transfer where the shareholding had been gifted by his father with whom, regrettably, he had fallen out. The idea that the petitioner – not a member of the family – could have his shareholding registered if he had paid money for the shares contradicts and undermines the argument that the reason for refusal to register the shares was in some way connected to the nature of the business being a family business.

[50] I have concluded that the reason the second respondent made the decision as a director not to register the transfer of shares was because they had been gifted by his late father with whom his relationship had irretrievably broken down. The decision was not one made in the interests of the company as a whole. My view is fortified by the fact that there is no trace of the reasons now put forward for the refusal to register the shares in the letter from Morton Fraser on the company's behalf dated 23 August 2017. While I accept that the statutory requirement to give reasons as required by section 771 does not mean that the second respondent is bound by the terms of the letter, the terms are relevant in assessing the evidential value of reasons subsequently given in evidence as to a director's belief that he has acted properly (*Palmer's Company Law* Vol 2 at para. 6.464). It will be recalled that the letter referred to unspecified "anomalies" and questioned Mr Paxton Senior's mental capacity at the time of signing the stock transfer form, matters not further elucidated or founded upon. Where, as here, the reasons subsequently adduced are unsupported by evidence, it is indicative of reasons constructed *post facto* in order to obscure the real reason for the decision, a personal one, rather than one arrived at in what the second respondent perceived to be in the best interests of the company. It is indicative of *male fides*. Another example of the second respondent's approach is the assertion made in the second

respondent's affidavit that there was in effect an agreement between Mr Paxton Senior and the second respondent of something amounting to a right of pre-emption, again unsupported by any other evidence. It will be evident from what has been observed thus far, that this is not an isolated example in this case of material adduced in affidavit form which is not the subject of averment and is indicative of the rather scatter-gun approach of the second respondent in adducing reasons after the fact for declining to register the share transfer.

[51] I have accordingly concluded that the petitioner has succeeded in discharging the onus upon him of showing that decision of the second respondent to decline to register the shares was in breach of the second respondent's fiduciary duties as director and was unfair. I further conclude that the decision was clearly prejudicial to the interests of the petitioner as a shareholder as it excluded the petitioner from any involvement in the affairs of the company in the sense of being able to participate, as a shareholder, in its profits and assets.

[52] That is sufficient for decision in this case. There was, as noted, a separate argument that the conduct was unfair in excluding the petitioner as a director. It is not necessary to address that in the circumstances and I offer no view upon it, suffice it to say that such a conclusion does not follow from my findings.

[53] In light of my conclusions on unfair prejudice, it will now be necessary to move to the next stage of these proceedings and consider the question of remedy under Section 996 of the 2006 Act. The case will be put out for a hearing on the question of further procedure and expenses which I have reserved aside from the issue of sanction of counsel. I am prepared to sanction the cause as suitable of the employment of junior counsel, there being no opposition to that motion.