SHAREHOLDER OPPRESSION AND EMPLOYMENT LAW

1. Private limited companies occupy a position of special prominence in Irish commercial life. A very high number of small and medium size businesses in Ireland trade through small and medium sized owner operated private limited companies. This arrangement often involves a relatively small number of individuals who are shareholders in the company and are directors on the board of the company.

2. When these relationships breakdown there is no easy or straightforward way in which to disentangle the existing relationships and, absent a specific agreement for the sale of shares, there is no entitlement on the part of the shareholders to be bought out of their interest in the company. Commenting on the types of situations in which excluded shareholders are frequently compelled to invoke the remedies provided for by section 212 of the Companies Act 2014, formerly section 205 of the Companies Act 1963, Keane\(^1\) has noted that:

“The typical Irish company is the small private company in which there is frequently only a handful of shareholders. It is quite common to find that all of the shareholders are actively involved in the management of the company and that they are also directors. If disputes break out they frequently come to a head with the attempted exclusion of one of the directors or shareholders from further participation in the affairs of the company, beginning with his removal from office as a director. At that point the shareholder will have no means of finding out how the company’s day to day affairs are being conducted, other than by convening an extraordinary general meeting of the company. This may be, and frequently is, part of the strategy by the other shareholders to run the company to their own advantage without regard to the excluded member’s interests.”

3. Speaking from an employment law perspective, it might be added that the pattern described by Keane - of shareholder directors operating small or medium sized business - is one in which the shareholder/directors are very often employees of the company. In many cases the primary financial reward obtained by the parties for their investment in the business is likely to be derived from salary, bonus and/or commission payments, received in their capacity as employees of the company, rather than via dividends or directors fees. In addition, the way in which the company may be managed is often defined as much by

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\(^1\) Company Law, Fourth Edition, Paragraph 26.46
the parties respective employment positions as it is by their involvement in decision making via by the board of directors. Disputes of this kind tend to arise from a perception on the part of the majority shareholders that the minority member is either surplus to requirements or is costing the company more than he or she is contributing to the business.

4. In these types of situations a strategy designed to impose the will of the majority at the expense of a minority shareholder will often involve an attack on the shareholder's position *qua* employee. The approach taken may involve suspension from employment duties, thereby removing the shareholder from day to day involvement in the affairs of the company. In more extreme cases it may involve termination of the employment relationship altogether, thereby removing the employee from daily operational activity *and* depriving him or her of income at a time when potentially expensive litigation is about to be commenced.

5. The purpose of this paper is to consider some aspects of the law relating to shareholder oppression and to look at the way in which these types of cases tend to intersect with the practice of employment law.

**SECTION 212 OF THE COMPANIES ACT 2014**

6. Section 212 of the Companies Act 2014, replaces section 205 of the Companies Act 1963. Until the enactment of section 205 the only remedy available to an oppressed shareholder (unless he or she fell within one of the exceptions to the rule in *Foss v Harbottle*) was to petition for the winding up of the company on the grounds that it was “just and equitable” to do so. As this is a remedy which, by definition, guarantees the destruction of the company, and will typically result in the sale of the company’s business at an undervalue, section 205 was enacted in order to place a more flexible suite of remedies at the disposal of the Court.

7. Relief may be granted pursuant to section 212 in a potentially broad range of circumstances, which are not necessarily confined to acts of illegality on the part of the majority. One of the reasons for the enactment of section 205 was to provide a remedy in
a situation where a minority had been unfairly disadvantaged, but nothing specifically unlawful had taken place. In *McGilligan v O’Grady*\(^2\) Keane CJ noted that:

“It is important to bear in mind the object of s. 205 of the Companies Act, 1963. Until its enactment, a majority of the shareholders in the company could, perfectly lawfully, use their powers in a manner which was harsh and unfair to the minority and had no regard to their interests. Unless the aggrieved shareholders could point to some illegality, whether flowing from a breach of the company’s constitution or the general statutory or common law applicable to companies, the law could afford them no relief.”

8. Section 212 provides as follows:

212. (1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised:

(a) in a manner oppressive to him or her or any of the members (including himself or herself), or
(b) in disregard of his or her or their interests as members, may apply to the court for an order under this section.

(2) If, on an application under subsection (1), the court is of opinion that the company’s affairs are being conducted or the directors’ powers are being exercised in a manner that is mentioned in subsection (1)(a) or(b), the court may, with a view to bringing to an end the matters complained of, make such order or orders as it thinks fit.

(3) The orders which a court may so make include an order—

(a) directing or prohibiting any act or cancelling or varying any transaction;
(b) for regulating the conduct of the company’s affairs in future;
(c) for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company’s capital; and
(d) for the payment of compensation

(4) Where an order under this section makes any amendment of any company’s constitution, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the court, to make any further amendment of the constitution, inconsistent with the provisions of the order.

(5) However, subject to the foregoing subsection, the amendment made by the order shall be of the same effect as if duly made by resolution of the company, and the provisions of this Act shall apply to the constitution as so amended accordingly.

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\(^2\) McGilligan v O’Grady [1999] 1 ILRM 303 at page 361
(6) A certified copy of any order under this section amending or giving leave to amend a company's constitution shall, within 21 days after the date of the making of the order, be delivered by the company to the Registrar.

(7) If a company fails to comply with subsection (6), the company and any officer of it who is in default shall be guilty of a category 4 offence.

(8) Each of the following—

(a) the personal representative of a person who, at the date of his or her death, was a member of a company, or

(b) any trustee of, or person beneficially interested in, the shares of a company by virtue of the will or intestacy of any such person,

may apply to the court under subsection (1) for an order under this section and, accordingly, any reference in that subsection to a member of a company shall be read as including a reference to any such personal representative, trustee or person beneficially interested as mentioned in paragraph (a) or (b) or to all of them.

(9) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part of them shall be in camera.

9. Section 212 is identical to section 205, save in one respect, the addition at section 212(3)(d) of the power to award compensation to a member.

10. In order to avail of the protection afforded by section 212 one must be registered as a member\(^3\) and maintain the beneficial interest in the relevant shares\(^4\) at the time that the application for relief is heard. However, in *Emerald Group Holdings Ltd & Banfi Ltd v Moran et al*\(^5\), the Court held that a member is entitled to maintain oppression proceedings based on conduct that happened when he or she was not a registered member provided he or she became a registered member by the time the proceedings are initiated.

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3 Keaney v Sullivan & Ors [2015] IESC 75
4 Re Via Net Works Ireland Ltd [2002] 2 I.R. 47
5 Emerald Group Holdings Ltd & Banfi Ltd v Moran et al [2009 IEHC 440]
11. It is also relevant to note that while section 212 appears under the hearing “Protection for minorities”. Notwithstanding this heading, an applicant does not have to be a minority shareholder. In *Re Westwinds Holding Company Ltd*⁶ Kenny J noted at page 19 that:

“The word ‘minority’ does not appear in any part of the section and the heading is merely a convenient way of describing the majority of cases in which the section will apply.”

**THE MEANING OF OPPRESSIVE CONDUCT**

12. The generally accepted test applicable in respect of of what constitutes oppressive conduct within the meaning of section 212 is whether the powers of the company, or its directors, have been exercised in a manner that is burdensome, harsh and wrongful. This definition was accepted by Keane J (as he then was) in *Re Greenore Trading Company Ltd* [1980] ILRM 94 and, more recently, by Laffoy J in *Re Charles Kelly Ltd: Kelly v. Kelly & Kelly (No. 2)* [2011] IEHC 349.

13. An isolated act of oppression may, in appropriate circumstances, suffice to meet the requirements of the section. In *Re West Winds Holding Company Ltd.*, (21 May 1974, unreported, High Court) Kenny J, held that the sale of company lands at an undervalue was, in itself, sufficient to justify an order under section 205. In *Re Williams Group Tullamore Ltd.*[1985] IR 613 Barrington J held that a resolution passed in general meeting which had the effect of altering the rights attaching to classes of shares to the detriment of the ordinary shareholders (which resolution was passed at a meeting at which the ordinary shareholders could not vote) was in objective disregard to the ordinary shareholders interests, as well as being an act of oppression.

14. In *Emerald Group Holdings Limited v Moran and Others* 2009 IEHC 440 Finlay Geoghegan J noted, at paragraph 33 of her judgment, that:

“it is not necessary for the Court to make any finding of wrongdoing in order to uphold the complaint made under section 205(1).”

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⁶ Re Westwinds Holding Company Ltd [1974] IEHC 052502
15. In doing so the Court quoted with approval from Visiting Motorists’ Bureau Limited (Unreported, the High Court, 7th February, 1972), where Kenny J. at p. 33, stated, in respect of section 205 that:

"The affairs of a company may be conducted or the powers of the directors may be exercised in a manner oppressive to any of the members although those in charge of the company are acting honestly and in good faith. If one defines oppression as harsh conduct or depriving a person of rights to which he is entitled, the person whose conduct is in question may believe that he is exercising his rights in doing what he does. One of the most terrifying aspects of human history is that many of those who we now regard as having been oppressors had a fanatical belief in the rightness of what they were doing. The question then when deciding whether the conduct of the affairs of a company or the passing of a resolution is oppressive is whether, judged by objective standards, it is."

16. Accordingly, the test to be applied in assessing the relevant behaviour is an objective standard.

17. It has also been held that mere incompetence or mismanagement of a company’s affairs will not per se amount to oppression where there is no malign intention in doing so. In Re Clubman Shirts Ltd O’Hanlon J held that negligence or carelessness in the conduct of the affairs of a company did not necessarily amount to oppression in circumstances where:

“The evidence does not suggest that these defaults or any of them formed part of a deliberate scheme to deprive the petitioner of his rights or to cause him loss or damage.”

18. Notwithstanding this conclusion O’Hanlon J held that the petitioner had “genuine grounds for complaint” and therefore made an Order for the purchase of the petitioner’s shares pursuant to section 205.

**IN WHAT CAPACITY MUST THE OPPRESSION COMPLAINED OF BE SUFFERED?**

19. Section 212(1)(a) provides that the affairs of the company or the powers of its directors may not be exercised “in a manner oppressive to him or her or any of the members

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7 Re Clubman Shirts Ltd [1983] IRLM 323
In contrast, section 212(1) (b) provides that the wrong complained of by the member shall consist of the “disregard of his or her or their interests as members.” Accordingly, as a matter of statutory construction, it would appear that where acts of oppression are complained of those acts need not necessarily be suffered by the applicant in their capacity as a shareholder of the company. This is an important distinction and is one which differentiates the section from the equivalent provision of English law which has been narrowly interpreted as meaning that oppression complained of must be suffered qua member. At paragraph 26.47 of Company Law Keane notes that:

“It is noteworthy that that the draftsman uses the word ‘as members’ only in the second limb of the sub-section dealing with a disregard of the interests of the member. These words are not used in the first limb dealing with the conduct of the affairs in a manner oppressive to the members. If the draftsman found it necessary to use those words in the second limb and deliberately omitted them in the first limb, it would seem to follow logically that it is only where a case is being made under the second limb that the offending conduct must relate to the applicant’s position as a member”

20. It is, by now, relatively well accepted that oppression within the meaning of section 212 may include oppressive conduct towards a shareholder in his or her capacity as a company director. However, having regard to the statutory language employed there would not appear to be any specific reason why, in appropriate cases, the oppression complained of pursuant to section 212 might not also include oppressive action taken against a member in their capacity as an employee.

21. An example of a case in which a finding of oppression was upheld in circumstances where the matters complained of spanned the petitioner’s status as employee, director and shareholder is Re Charles Kelly Ltd: Kelly v. Kelly & Kelly (No. 2) [2011] IEHC 349, where an allegation of oppression was upheld made in respect of the exercise of a director’s powers in purporting to suspend the petitioner from duty.

22. In that case the petitioner and respondent were brothers, both of whom were qualified accountants and who had worked exclusively for the company, which was engaged in the provision of builders supplies, for most of their working life from the 1980’s onwards. Each has had three distinct roles in relation to the company. They were both treated and remunerated as employees of the company, although an issue had arisen as to their
proper classification for the purposes of PPRSI, which had not been finally resolved when the matter came on for hearing. In addition, they were shareholders of the company, jointly owning 99.975% of the issued share capital of the company and were also the only directors of the company.

23. The petitioner complained of "persistent, inappropriate and bullying behaviour" on the part of the first respondent towards the petitioner and other staff members in the company. As a result, the petitioner requested that the first respondent agree "to let a suitable third party come into the company to help us address and resolve" the alleged "inappropriate behaviour", a person appointed by the Labour Relations Commission (LRC) being suggested. In April 2008 the petitioner sought to involve the workplace mediation service of the LRC in resolving the issue of the alleged bullying and harassment by the first respondent of the petitioner and other members of staff. Ultimately, by letter dated 15 May, 2008, the LRC indicated that it would not assist in the absence of the consent of the first respondent to its involvement, which had not been forthcoming.

24. On 22 April 2008 the first respondent presented his brother with a letter which concluded that, in the interests of health and safety and to prevent other staff members being injured, the petitioner "should be immediately removed from all operational responsibilities" in the company. The respondent asserted that it was necessary that the company should take action "to ensure that this dangerous situation" was immediately corrected. The letter continued: "In consequence and with immediate effect, you are suspended from all your responsibilities within [the company]." It was stated that the company would continue to pay the petitioner pending an investigation of his conduct and a decision on what action should be taken and that the action might include his "dismissal from [the company]". Additional allegations were also made against the petitioner, including his alleged failure to complete the company's financial statements on time, to file the annual returns in the CRO in time and to maintain an up to date tax clearance certificate.

25. When the petitioner's solicitor complained in correspondence of the campaign of oppression waged against him the respondent rejected those complaints on the basis that the petitioner's suspension was concerned with his role as an employee. Numerous other serious grounds of oppression were advanced by the petitioner, including the respondent's refusal to engage in relation to the management of the company, financial impropriety and physical assault, the majority of which were accepted by the Court.
26. At paragraph 11.5 of her judgment Laffoy J held that:

“Objectively assessing the evidence in support of the petitioner's allegations of oppression, which has been comprehensively outlined above, must lead to the conclusion that the "burdensome, harsh and wrongful" test has been met in this case. The first respondent's conduct in purporting to suspend the petitioner, in whatever capacity, from the company, on its own, meets the test. Taking an overall view of the evidence, and having regard to the combination of factors relied on by the petitioner as constituting oppression, in my view, the test is met. While, as I have indicated, the petitioner's conduct, to put it mildly, has been reprehensible on occasion, I have come to the conclusion that, to some extent, but not totally, that conduct is excusable because the petitioner was provoked by the first respondent.”

27. This conclusion is an interesting one as Laffoy J found that the petitioner's purported suspension was, in and of itself, sufficient to meet the statutory definition of oppression within the meaning of the section 205. In addition, it is instructive to note that the Court does not seek to parse or differentiate whether the suspension complained of were suffered by the petitioner in his capacity as a shareholder, director or employee. Rather, the Court took a broader view of the effect of the suspension in concluding that it was oppressive irrespective of what guise or capacity in was imposed in.

Suspension of Employees

28. In assessing the legality of a suspension the recent judgment of Noonan J in Bank of Ireland v Reilly 2015 IEHC 251 is to be noted. That case concerned the suspension and dismissal of a relatively junior bank employee for breach of a company email policy. At paragraphs 40 and 41 of his Judgment Noonan J held that:

“The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in Morgan v. Trinity College Dublin, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. In Mr. Reilly's case, his evidence was that
rumours and reports circulated about him ranging from possibly being involved in fraud to participation in a tiger kidnapping.

Thus, even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer’s own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process.”

29. It is submitted that these comments apply a fortiori in the case of an employee who is a company shareholder/director and accordingly a suspension which may have the effect of “sidelining” such an employee from involvement in the business may be open to attack in those circumstances.

QUASI PARTNERSHIPS

30. The paradigm case in which exclusion from the management and operation of a company’s affairs may constitute oppression is that of a quasi partnership. The concept of a quasi partnership has been described by Lord Millett in the following terms:

“Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as ‘quasi-partnership companies’. Their essential feature is that the legal, corporate and employment relationships do not tell the whole story; and that behind them there is a relationship of trust and confidence similar to that obtaining between partners which makes it unjust or inequitable for the majority to insist on its strict legal rights. The typical characteristics of such a company are that there should be (i) a business association formed or continued on the basis of a personal relationship of mutual trust and confidence, (ii) an understanding or agreement that all or some of the shareholders should participate in the management of the business and (iii) restrictions on the transfer of shares so that a

8 Opportunity Equity Partners v Demario Almeida [2002] 5 LRC 632
member cannot realise his stake if he is excluded from the business. These elements are
typical, but the list is not exhaustive.”

31. In *Re Murph’s Restaurant* Gannon J acknowledged, for the first time as matter of Irish
law, the existence of a quasi partnership corporate entity, where the nature of the
relationship between three shareholder directors was in substance, though not in form,
that of a partnership, based on mutual confidence. In this context, Gannon J noted that
the financial affairs of the parties were organised on the following terms:

“The directors received no fees, the shareholders received no dividends, and all three
directors/shareholders received by mutual agreement exactly the same income from the
earnings of the company adjusted according to profitability in the form of drawings
recorded as salary, drawings from cash unrecorded, credit deposits of cash in building
societies’ accounts, perquisites of meals and cars, and various expenses for purely
personal purposes in respect of all of which strict equality was always maintained. This
was achieved, and could be achieved, only by a relationship of mutual confidence and
trust and active open participation in the management and conduct of the affairs of the
company particularly in the irregularity or informality of its corporate quality of existence.”

32. In breach of that relationship of mutual confidence 2 of the director/shareholders resolved
to remove their “partner”, Brian, from the business of the company. On 3 February 1979 a
meeting was convened by the majority director/shareholders at which Brian was advised
of an EGM at which it was proposed to remove him as a director of the company, and at
which he was advised of their intention to terminate his employment on notice, citing their
concern that he had ceased to do his job satisfactorily.

33. Gannon J held that the essential basis of upon which the parties had agreed to carry on
business had been fundamentally undermined:

“I have no doubt that prior to the 3rd February, 1979 Kevin and Murph had decided that
they should, were entitled to, and would, dismiss Brian from the employment of the
company and that in respect of his salary and term of notice he was in the position of an
employee of the company whose services could be dispensed with peremptorily but
legally by giving him three months salary in lieu of notice.”

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9 1979 1 ILRM 1
34. The Court concluded that:

“He is being and has been treated by his two co-directors as if he was an employee of their liable to be and purported to have been dismissed by them peremptorily and not under any colour of regular exercise by directors of their powers under the articles of association of the company. The action of Kevin and Murph on the 3rd February, 1979 was entirely irregular, and no attempt has been made to make or confirm this action in regular manner on behalf of the company. The action of Kevin and Murph on the 3rd February was not and could not be accepted in law as an action of the company. The action of Kevin and Murph on the 3rd February was a deliberate and calculated repudiation by both of them of that relationship of equality, mutuality, trust and confidence between the three of them which constituted the very essence of the existence of the company. The action of Kevin and Murph on the 3rd February, 1979 deprived Brian of a livelihood, and not simply of an investment, which he was induced by their representations to take and in so doing to abandon to his irretrievable loss a secure means of livelihood in a career for which, judging by his progress, he must have had some considerable aptitude.”

35. While Murph’s Restaurant was a case brought pursuant to section 213 (rather than 205) of the Companies Act 1963, and usually cited as authority for the proposition that the exclusion of a director from the management of a company may amount to oppression, it is clear that the judgment of Gannon J is also concerned with the fact that the minority shareholder had been removed from his employment.

36. In Crindle Investments v Wymes Murphy J noted that where the parties elect to have their relationship governed by a corporate structure, rather than a partnership, it would require “reasonably clear evidence” to impose obligations going beyond those imposed by company law. Accordingly the existence of a quasi partnership is not to be lightly inferred. More recently the phenomenon of the quasi partnership was acknowledged by the Supreme Court in McGilligan v O’Grady at page 359:

“It is undoubtedly the case that, if there is a relationship between shareholders in a company indicating a degree of mutual confidence and trust, the court may order the winding up of the company on the just and equitable ground where one or more of the

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11 [1998] 4 IR 567 at 576
shareholders and/or directors exercise their powers in a manner which is inconsistent with that relationship. Specifically, this may arise where the right of the shareholders to participate in the management of the company is infringed, as, for example, by the removal of a director.”

37. In such a situation it is submitted that where the dismissal of an employee/member breaches an understanding, based upon mutual trust and confidence, that the member would continued to benefit from employment and the payment of salary, such a dismissal may constitute oppressive conduct within the meaning of section 212.

38. Finally, in this regard, it is notable that in similar circumstances the Courts in other common law jurisdictions the Courts have recognised such a possibility. In Ontario v Platinum Wood Finishing\textsuperscript{12} the Ontario Superior Court of Justice held, on appeal, that

“Although generally wrongful dismissal of an employee is not to be intermingled under the umbrella of a claim for oppression, in limited circumstances, such as in this case, when there is an intimate connection between the employment contract and the shareholders’ agreement, a wrongful dismissal may ground a finding of oppression.”

EXCLUSION FROM MANAGEMENT AND INJUNCTIONS TO RESTRAIN THE REMOVAL OF A DIRECTOR

39. In Feighery v Feighery\textsuperscript{13} the petitioner was a 10% shareholder, director and employee of the company. The balance being held by the first, second, third, fourth and fifth respondents, all of whom were members of the petitioner's family. In October 1995 the petitioner was removed, at the behest of the managing director, from the position of “financial director”. At page 328 of the report the judgment of Laffoy J notes that:

“The petitioner's contention is that his removal was instigated by the managing director acting in bad faith and with a view to penalising the petitioner for highlighting matters which the petitioner alleges constituted mismanagement on the part of the managing director. These allegations are particularised in the petition and are pleaded as rendering the managing director unfit to be the managing director of the company. In fact, if they are true, they go beyond mere mismanagement. However, the managing director categorically

\textsuperscript{12} 2009 Can LII 14394, paragraph 42
\textsuperscript{13} 1999 1 IR 321
denies any impropriety in relation to these matters. Moreover, the managing director contends that there is no link between the petitioner's "whistle blowing" and his demotion and that the demotion was necessitated by the inadequacy of the petitioner's performance as financial director and his inability to inspire the confidence of the board of the company and the company's bankers in his performance of that function."

40. Subsequently notice was given of an extraordinary general meeting to be held pursuant to section 182 of the Companies Act 1963 (now section 146 of the Companies Act 2014) for the purpose of passing a resolution that the petitioner be removed from his office as a director of the company. The petitioner then initiated proceedings pursuant to section 205, in which he sought interlocutory relief restraining his removal as a director. He also initiated plenary proceedings in which he sought interlocutory relief restraining his apprehended removal as an employee of the company. Both applications were listed to be heard together, however, the application to restrain the termination of the petitioner's employment did not proceed after assurances were provided under oath that his employment would not be terminated.

41. The petitioner relied upon Re Murph’s Restaurant in support of an argument that his removal as a director was oppressive and ought to be enjoined pending the trial of the action. However, Laffoy J refused to restrain the petitioner's removal as a director, holding at page 343 there was no power to restrain the exercise of the company's statutory rights under section 182:

"In my view, even assuming that the petitioner has an arguable case for relief under s. 205 and an arguable case that the respondents, as shareholders and directors, owe him fiduciary duties and are in breach of those duties, I must nonetheless be satisfied that I have jurisdiction to override the shareholders' statutory power under s. 182 to remove the petitioner from the board. I am not satisfied that I have such jurisdiction and none of the cases cited by counsel for the petitioner support a contrary conclusion."

42. Shortly after the judgment in Feighery v Feghery the Supreme Court considered the question of whether power existed to restrain the removal of a director pending the determination of proceeding brought pursuant to section 2015. In McGilligan and Bowen
v O’Grady\textsuperscript{14} the Supreme Court declined to follow the decision of of Laffoy J in Feighery, holding at page 362 that

“If it is desirable, in accordance with the principles laid down in the American Cyanamid v Ethicon Ltd [1975] A.C. 396 and Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88, to preserve the plaintiff's rights pending the hearing of the s. 205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason why interlocutory relief should not be granted. To cite but one example, the relief granted in many Mareva cases is very often not the relief which is sought in the substantive proceedings. I am satisfied that, to the extent that Bentley-Stevens v. Jones and Feighery v. Feighery [1999] 1 I.R. 321, suggest a different view of the law, they should not be followed.”

43. In upholding the decision to grant the interlocutory relief sought Keane J emphasised the underlying reason for the enactment of section 205, namely the absence of any appropriate remedy for an aggrieved shareholder unless a specific illegality could be identified. In this context Keane J noted at page 361 that:

“Section 205 was enacted primarily in order to remedy that defect in company law. Consequently, the fact that, in a case such as the present, the shareholders are perfectly entitled as a matter of law - s. 205 apart - to remove a director even when that is in breach of a contract between him and them is not a material factor in considering whether that action, either taken in isolation or as part of a general course of conduct intended to exclude a particular body of shareholders from participation in the company, is a ground for relief under that section. Neither is it a relevant consideration in determining whether, in an appropriate case, that conduct should lead to the winding up of a company on the just and equitable ground: that is the effect of the decisions in In re Westbourne Galleries Ltd. [1973] A.C. 360 and In re Murph’s Restaurants Ltd. [1979] I.L.R.M. 141. Why then should the court, on an application for an interlocutory injunction, be unable to restrain the company from removing a director pending the hearing of a petition under s. 205 where he has established that there is a serious question to be tried as to whether his exclusion from the affairs of the company constitutes conduct which would entitle shareholders to relief under section 205?”

\textsuperscript{14} McGilligan and Bowen v O’Grady [1999] IR 346,
44. It is now settled that interlocutory injunctive relief may be granted to restrain the removal of a director, together with such other relief as may be necessary to preserve the status quo pending the determination of section 2015 proceedings. In Ancorde v Horgan 2013 IEHC 235 Laffoy J granted interlocutory injunctions restraining the defendants from removing the second named plaintiff from his position as director or from impeding him from carrying out his director duties, together with orders restraining the disposal of company shares pending the determination of a dispute as to their true ownership.

45. A different conclusion was reached by Clarke J in Re Avoca Capital Holdings Limited\(^{15}\) in relation to the entitlement of a shareholder director to participate in company decision making at board level. The petitioner complained that he was being excluded from the affairs of the company and sought to restrain an EGM convened for the purpose of removing him as a director. While the Court was satisfied that the petitioner had demonstrated that there was a fair issue to be tried, Clarke J held that the balance of convenience favoured the refusal of the relief sought. Noting the provisions of a shareholder’s agreement (paragraph 4.1.1) which entitled the Petitioner to particular company information as a member, Clarke J held that:

“\textit{In this regard it seems to me that clause 4.1.1 is key. The Petitioner is and remains a shareholder. He is, therefore, entitled to full information. The only added entitlement which he would have as a director is to participate in decision making. Given the fraught relations between the parties, I am not satisfied, on the evidence before me, that requiring the Petitioner to be involved in decision making would be in the overall interests of the company. In saying that, I am not suggesting that the Petitioner would deliberately obstruct. It is merely that the relations between the parties necessarily will lead to significant difficulties. Unless there was a countervailing prejudice to the Petitioner, the balance of convenience would, therefore, necessarily favour the company.”}\

46. This case illustrates the importance of considering the totality of the legal relationship between the parties in advising on a litigation strategy including, the company’s constitutional documentation, any relevant shareholder’s agreement and any contract of employment.

\(^{15}\) 2005 IEHC 302
SOME PRACTICAL CONSIDERATIONS

Termination of Employment

47. At common law, an employer may terminate employment for any reason or no reason provided adequate notice of such termination is given\(^{16}\). Where an employer is anxious to avoid the possibility of injunctive relief being granted to restrain the termination of a contract of employment the approach taken will often be to terminate on a “no fault” basis. In these cases the employer will terminate on notice without stating any reason for its decision. In such a situation the employee may well have a good claim under the Unfair Dismissals Acts but will have little scope to seek relief from the High Court.

48. However, where such a dismissal takes place in the context of a potential oppression claim pursuant to section 212 a decision to terminate without stating any reason justifying dismissal may well be characterised as a form of oppression in its own right. The fact that the termination may be contractually permissible does not necessarily mean that it is not also oppressive and in the case of a quasi partnership arrangement it is thought that this form of dismissal may give rise to difficulties for the employer company. Depending on the individual circumstances it may be open to the member to maintain a claim that the action taken against them qua-employee is in fact an instrument of oppression by reason of their unexplained exclusion from the management of the company’s business.

Multiple and/or Related Proceedings

49. The procedure provided for in respect of section 212 applications under the Companies Act 2014, and by Order 74, Appendix N of the Rules of the Superior Courts, is that proceedings shall be initiated by originating notice of motion. Previously, section 205 proceedings were presented by petition, and it was not uncommon – as in the case of In Re Murph’s Restaurant - to see claims advanced in the same proceedings pursuant to section 205 and, in the alternative, for winding up pursuant to section 213 of the 1963 Act.

50. The successor to section 213 of the 1963 Act is section 569 of the Companies Act 2014. Winding up proceedings pursuant to section 569 continue to be brought by way of petition in the form specified by Order 74, Appendix M of the Rules of the Superior Courts.

\(^{16}\) Orr v Zomax [2004] 1 IR 486
51. Due to fact that the relevant procedures are now different and, in particular, the fact that a winding up petition must be advertised whereas an originating notice of motion does not, it is now procedurally challenging to maintain these claims are alternative options. As a matter of practicality it is thought that an applicant/petitioner is now required to make their election as to the preferred course of action at the commencement of their proceedings.

52. Where employment issues arise in the context of section 212 proceedings applications for interlocutory relief should be sought in independent proceedings by way of plenary summons and notice of motion. Where appropriate, application may be made to have the proceedings linked, however, this will not be possible where section 212 proceedings have been admitted to the Commercial List. Employment claims are excluded from the remit of the Commercial List as Order 63A, rule 1A(viii) specifies that the definition of commercial proceedings is “the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment) where the value of the claim or counterclaim is not less than €1,000,000”

**Mediation**

53. Shareholder oppression proceedings are, by reputation, notoriously drawn out and expensive. Due to the broad range of issues which are potentially relevant to the existence of oppressive behaviour it is not uncommon to see a litany of allegations and counter allegations being made between the parties. Consequently, section 212 proceedings have the potential, irrespective of outcome, to be ruinously damaging and expensive for all involved. In this context it is also relevant to bear in mind that where oppression proceedings are unsuccessful the applicant will, of course, remain a minority shareholder in the company. Therefore the issues in the proceedings have the potential to “rumble on” between the parties even where the proceedings have concluded and for this reason there is a particularly strong incentive for the parties to compromise differences rather than litigate them.

54. As a result there is an understandable preference on the part of the Courts that section 212 disputes should not proceed without first exhausting the possibility of settlement through mediation. In the context of Judge managed litigation, such as the commercial list, mediation is typically suggested at an early stage of the proceedings.
A developing area of employment practice is the law relating to protected disclosures under the Protected Disclosures Act 2014. Section 5(1) of the 2014 Act defines a protected disclosure as:

“a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in Section 6, 7, 8, 9 or 10”.

Section 5(2) provides that information is deemed to be “relevant information” if:

(a) “in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and

(b) it came to the attention of the worker in connection with the worker’s employment”.

Accordingly, the existence of “relevant information” is determined by reference to the belief of the worker that it tends to show the existence of relevant wrongdoing.

No comprehensive definition is provided in the 2014 Act of the meaning of “disclosure”, save that Section 3(1) provides as follows:

“‘disclosure’, in a case in which information disclosed is information of which the person receiving the information is already aware, means bringing to the person’s attention”.

A protected disclosure may concern new information or, in the alternative, drawing to the attention of the recipient information in respect to which they may previously have been aware. Where an employee shareholder makes a protected disclosure, for example in relation to corporate governance or the failure to discharge a director’s duties under section 228 of the Companies Act 2014, it is possible that penalisation or dismissal relating to that disclosure may also be characterised as a form oppressive conduct. I would hasten to add that this area is very much under development and that there is certainly no specific authority to support this proposition. However, a similar type of allegation was advanced in Feighery v Feighery before the advent of the whistleblowing legislation and in such a case the option of bringing proceedings for interim relief pursuant to section 11 of the Protected Disclosures Act 2014 may be an option in a suitable case.

In Camera Applications
60. Section 212 proceedings may be heard in camera, where:

(a) the hearing of the proceedings in public would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company; and

(b) the hearing in public of the whole or that part of the proceedings which it is sought to have heard in camera would fall short of doing justice.

61. Applications to have proceedings heard in camera may be made pursuant to section 212(9). In light of the constitutional presumption that justice is to be administered in public the Court's have construed section 212(9) strictly and applications of this kind are not ordinarily successful.

CONCLUSION

62. In the context of owner operated companies of the type described in this paper the potential for interaction between shareholder oppression proceedings and employment law is readily apparent. Where claims of this kind co-exist practitioners will be required to advise on appropriate litigation strategies and in a recovering economy it might be expected that shareholder disputes of this kind may become more frequent.

PADRAIC LYONS