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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

JAMES MONAGHAN

Plaintiff

and

(1) PAUL CUNNINGHAM
(2) THOMAS MULDOON
(3) SEAN SLANE
(4) MARK KELLY
(5) TRAVEL IRELAND COACH TOURS LIMITED
(6) IRISH TOUR TICKETS LIMITED

Defendants

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Gerald Simpson QC and Anna Rowan (instructed by A&L Goodbody) for the plaintiff
Wayne Atchison (instructed by Davidson McDonnell) for the first to fourth defendants
David Dunlop QC (instructed by Elliott Duffy Garrett) for the sixth defendant

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HUMPHREYS J

Introduction

[1] The plaintiff in this action is a shareholder in the fifth defendant company, Travel Ireland Coach Tours Limited ('the Company') and seeks the leave of the court to pursue a derivative action against the first to fourth named defendants ('the directors') for alleged breach of the fiduciary duties which they owe to the Company.

[2] In particular, the plaintiff alleges that the directors diverted business opportunities from the Company to the sixth defendant, Irish Tour Tickets Limited ('ITT'), a limited company incorporated by them.

[3] 'Stage 1' permission was granted by Huddleston J on 9 May 2019 pursuant to section 261(3) of the Companies Act 2006 ('the 2006 Act'). The court is now considering whether to grant Stage 2 permission under section 261(4).

The Company

[4] The Company was incorporated on 22 April 2008. There are currently 15 shareholders and the plaintiff holds 3 shares out of the total of 72 issued ordinary shares. The Articles of Association of the Company provide that the authorised share capital is £110,000, divided into 110 ordinary shares of £1 each. Each member, regardless of the number of shares held, only has one vote and the maximum shareholding for any member is 20%. Each member was required to provide voluntary labour or 'sweat equity' in the vernacular as a qualification for continued membership.

[5] The Articles also provided for rights of pre-emption on the disposal of shares by any member.

[6] The Company was incorporated by a number of individuals who had been involved in black taxi tours in Belfast and who identified an opportunity to move into bus tours.

[7] The Company is also registered as a 25% shareholder in Belfast City Sightseeing Limited ('BCS').

The Plaintiff's Case

[8] In a draft Statement of Claim exhibited to the application for leave to pursue a derivative action, the plaintiff alleges that the directors incorporated ITT on 20 February 2015 and since that time have diverted business opportunities away from the Company and BCS to ITT. Each of the directors is also a director and shareholder of ITT.

[9] In particular, it is stated that in April 2018 when a client went to the website of the Company to purchase a ticket for a tour, this was redirected to the ITT website and any ticket bought was purchased from it.

[10] It is also alleged that there have been numerous transfers of shares carried out between members which have been in breach of the Company's Articles of Association and which have served to benefit the directors.

[11] It is claimed that the directors have acted in breach of the various duties imposed upon them by ss. 171 to 175 of the 2006 Act. The various forms of relief sought include damages against the directors and an account of the profits made by ITT.

[12] The section 261 application is supported by two affidavits sworn by the plaintiff and two from Michael Rock, another shareholder in the Company. The evidence reveals that the plaintiff was involved in the management of the Company's business for about 6 months following incorporation. In or around 2010 he returned to the Company and although the precise dates are unclear, he continued to be involved until around 2014/2015.

[13] The plaintiff avers that it had always been envisaged the Company would build up a fleet of buses and itself provide tours. He also deposes to his belief that ITT had been set up for this purpose and for the benefit of the Company. However, it transpired, according to the plaintiff that:

> *"Irish Tour Tickets proceeded to take all the business that should have eventually been the Company's business, and indeed the existing business of Belfast City Sightseeing, in which the Company is named as a 25% shareholder."*

[14] None of the income of ITT goes to the Company despite the fact that traffic from the Company's website was diverted to ITT. It is claimed that this diversion ceased following the service of pre-action correspondence by the plaintiff's solicitors.

[15] The evidence of Mr Rock concerned an annual general meeting in February 2018 at which shareholders were offered £3,500 to purchase their shares, a figure said to be in excess of market value. At the same time the first defendant was discussing issues faced by the Company and the need for further investment. This gave rise to certain concerns and a shareholders' meeting took place in April 2018. On this occasion, the shareholders were informed that ITT was a separate company, which had nothing to do with the Company, albeit that it was a significant customer.

[16] Following the service of pre-action correspondence, a shareholder dispute meeting took place in December 2018, the minutes of which were taken by a solicitor from the firm representing the plaintiff. When asked about competition between the Company and ITT, the first defendant is recorded as saying:

> *"Well, no, because we've said we're going more down the executive, golf and private hire direction. [The Company] can't provide all the tours."*

[17] The plaintiff also relied upon an affidavit from John Kennedy, the Chairman of the Company from incorporation until 2012. His evidence is that the Company's aim was always to carry out its own tours as this was the *"best and most lucrative work."* In his view, ITT is doing business which the Company *"intended to and should be doing."*

The Defendants' Case

[18] Some 14 affidavits were filed on behalf of the defendants in opposition to the plaintiff's application for leave. Three of the affidavits, those sworn by Brendan Mulvenna, Kathleen Cahill and Martin McCarthy are identical, word for word. Each of them asserts that, had their opinion been sought, they would have endorsed entirely the choices of the directors. They also depose to their belief that the action brought has the collateral purpose of trying to damage the Company to the advantage of the plaintiff. The affidavits fail to state the grounds for this belief, in breach of the requirements of Order 41 rule 5 of the Rules of the Court of Judicature (NI) 1980. Such assertions therefore carry little weight.

[19] The first defendant's evidence confirms that the Company intended to target both corporate/executive work and tours. At the outset it owned two coaches and set up its own 'Kingdom of Mourne Tour'. However, it proved difficult to compete with the established tour operators and, as a result, the Company conducted its last tour in September 2010. Since that time, according to the first defendant, the focus of the Company's business has been on private hire work.

[20] In light of this, the defendants' case is that there is no competition nor any diversion of business between the Company and ITT. The Company provides vehicles for hire whilst ITT sells tickets for other operators' tours (on a commission basis) and organises its own tours. ITT itself does not own any vehicles but hires them from other businesses, including the Company.

[21] The first defendant makes the case that the relationship between the Company and ITT is a mutually beneficial one and it would be damaging and disruptive to that relationship for this derivative action to be given leave to proceed. He also states that if the Company attempted to operate coach tours then its existing customers would no longer hire coaches from it.

[22] The claim that the Company's website redirected clients to the website of ITT is flatly denied. However, the Company's website includes a section called 'Travel Ireland Coach Tours' despite the specific claim by the first defendant that the Company has not operated a coach tour since 2010. If one clicks on any of the tours listed, Belfast City Sightseeing, Game of Thrones or Giants Causeway Tours, one is redirected to the ITT website to complete the sale and purchase of tickets.

[23] The first defendant also makes a specific allegation that the plaintiff is acting in bad faith in that his evidence lacked the necessary quality of candour, his is pursuing a personal vendetta and is attempting to harm the commercial interests of ITT to his own benefit.

[24] It is common case that the plaintiff has his own tour business, Odyssey Coach Tours, which operates tours from cruise ships and to the Giants Causeway. It is suggested that litigation against ITT by the Company would confer a benefit on the Odyssey business.

[25] The evidence of the other directors is similar in terms of content and form. Each of them asserts that there were personal issues between the plaintiff and the others involved in the Company.

[26] There is one director of the Company who is not a defendant to these proceedings, Gerard Slane. He has sworn an affidavit in which he expresses the opinion that the action, which has been instigated, is detrimental to the Company's well-being, and that it has suffered no loss because of the actions impugned by the plaintiff.

[27] The plaintiff is criticised, in particular, for failing to pursue the instruction of an independent forensic accountant to prepare a report into the contentious issues. The correspondence, which has been seen by the court on this question, which may be incomplete, indicates that there was a failure by the parties to agree the terms upon which the accountant would be instructed.

[28] George Grimley, the deponent on behalf of the sixth defendant, also makes the case that there is no competition between the Company and ITT. He asserts that the relationship between the Company and ITT is a symbiotic one and the Company had not organised any of its own tours since 2010. He expresses his main concern as the lack of good faith on the part of the plaintiff and his motivation in seeking to harm the business of ITT to the benefit of his own Odyssey Coach Tours.

The Legal Principles

[29] The old common law 'fraud on the minority' exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 whereby a shareholder could bring a claim for the benefit of the company in respect of wrongdoing by its directors has been swept away by section 260 of the 2006 Act. It provides that a derivative claim may only be brought pursuant to the new statutory provisions. Such a claim may only arise out of an act or omission involving negligence, default, breach of duty or breach of trust of a director of the company. The cause of action may be against the director or another person, or both.

[30] At Stage 2 of the application for leave, the court is specifically directed by section 263(2) of the 2006 Act to refuse leave if any of the following criteria exist:

> "*(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or*
>
> *(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or*

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission –

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred."

[31] In considering whether to grant leave, the court is directed by section 263(3) to take into account the following factors in particular:

"(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be –

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company."

[32] Section 263(4) of the 2006 Act requires the court to have particular regard to any evidence before it as to the views of members of the Company who have no personal interest, direct or indirect, in the matter.

[33] The new statutory procedure requires something more than the *prima facie* case which sufficed under the common law regime. In *Fanmailuk.com v Cooper* [2008] EWHC 2198 (Ch.) Robert Englehart QC commented:

"The court will have to form a view on the strength of the claim in order properly to consider the requirements of section 263(2) (a) and 263(3) (b). Of course any view can only be provisional

where the action has yet to be tried; but the court must, I think, do the best it can on the material before it"

[34] In *Stainer v Lee* [2010] EWHC 1539 (Ch.), Roth J analysed the task of the court:

> *"27. As several judges have pointed out, there are many cases in which some directors, acting in accordance with section 172, would consider it worthwhile to continue a claim, at least for the time being, whereas others, also acting in accordance with section 172, would take the opposite view: see Warren J in Airey v Cordell [2007] BCC 785, 800; Mr William Trower QC in Franbar Holdings Ltd v Patel [2009] 1 BCLC 1, 11; and Lewison J in Iesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch) at [85]. In Iesini, Lewison J noted some of the factors which a director, acting in accordance with section 172, would take into account in reaching his or her decision (at [85]):*
>
> > *'They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.'*
>
> *28. Lewison J held (at [86]), following Warren J and Mr Trower QC, that the mandatory bar in section 263(2)(a) will apply "only where the court is satisfied that no director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263(3)(b). Many of the same considerations would apply to that paragraph too." I respectfully agree, and shall apply that test."*

Consideration

[35] Having considered the evidence filed on behalf of all the parties, and the submissions of Counsel, I am not satisfied that the threshold of section 263(2)(a) has been met, namely that no director acting in accordance with section 172 would seek

to continue the claim. The other pathways to mandatory refusal of leave, contained in section 263(2) (b) and (c) have no application in the instant case. I therefore move on to the question of discretionary leave, and will consider the non-exhaustive list of factors in section 263(3) accordingly.

[36] The first question is whether the plaintiff is acting in good faith, an issue which the defendants have raised throughout their evidence. Given that derivative actions exist for the benefit of companies which have been harmed by miscreant directors, it is entirely appropriate that the person seeking the court's leave to proceed is doing so in the company's interest and not for personal gain. However, as Lewison J stated in *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch.):

> *"In my judgment if the claimant brings a derivative claim for the benefit of the company, he will not be disqualified from doing so if there are other benefits which he will derive from the claim."*

[37] The affidavit evidence in this application reveals a multitude of factual disputes, the resolution of which is not possible in the context of this type of application. They do, however, illustrate the difficulty a court has at this stage in reaching a finding that a litigant is acting dishonestly in pursuing a cause of action. I fully concur with the view of Lord Glennie in *Wishart –v- Castlecroft Securities* [2010] BCC 161:

> *"It seems to me that it will be a rare case, requiring precise averments and cogent evidence, where an application for leave is refused on the grounds that the petitioner is not acting in good faith."*

[38] I accept that these proceedings may result in certain collateral advantages to the plaintiff but I do not find that these are sufficient to give rise to a finding that the plaintiff is acting otherwise than in good faith.

[39] The second statutory factor is the importance a person acting under the statutory duty to promote the interests of the Company would attach to continuing the action. This gives rise to the task which the court is *"ill-equipped to take"* in the words of Lewison J in *Iesini*. It is quite one thing for the court to refuse leave in clear cases, in light of the section 172 duty, under the section 263(2)(a) threshold. It is quite another to expect the court to engage in the multi-faceted decision making process embarked upon by a prudent board of directors in respect of significant commercial litigation.

[40] On the evidence before me, it is difficult to arrive at anything approaching a definite position on the various factors alluded to by Lewison J in *Iesini*. A credible case has been advanced that the Company did previously engage in the business of organising and offering tours and that this was something it wished to engage

further in. This is supported by the evidence of Mr Kennedy and, to some extent, by the minutes of the December 2018 meeting. Section 175 of the 2006 Act imposes upon directors an express obligation to avoid a conflict of interest and:

> *"This applies in particular to the exploitation of any property, information or opportunity" (and it is immaterial whether the company could take advantage of the property, information or opportunity)."*

[41] The submission that any attempt by the Company to operate its own tours would have caused a loss of its core business of coach hire to other operators does not strike me as compelling. The Company did previously operate its own tours and there is nothing inherently implausible in a business having both income streams. I have therefore concluded that a director, properly considering his obligations under section 172, may consider that an opportunity which ought to have been presented to the Company for its exploitation was improperly diverted elsewhere. This is, of course, only a provisional determination since the court does not have the benefit of pleadings, discovery and expert evidence nor has any of the evidence available to date been the subject of challenge by way of cross-examination.

[42] The sixth defendant also advances the case that there is an absence of profit within ITT which would justify the commencement of proceedings against it. However, at this stage, the court does not have the benefit of any accountancy evidence which would demonstrate the level of profit made by ITT in respect of the tour business or the value which may attach to this company. These are issues upon which a prudent director would seek expert advice.

[43] The next statutory factors concern ratification of the act or omission in question and these do not arise on the facts of the instant case.

[44] Section 263(3)(e) concerns the question of whether the company has itself decided not to pursue the claim. This presents as a rather odd factor in circumstances where the directors who are alleged to have been in breach of duty are themselves in control of the company and consequently the decision to bring legal proceedings. One would not expect, in the normal course of events, such directors to mandate the bringing of an action against themselves. This factor may be of significance where there has been some change in the control of the company since the acts or omissions complained of but not in the circumstances which prevail in this case.

[45] The final factor under s. 263(3) concerns the availability to the plaintiff of another remedy in his own right. If a shareholder enjoys a right to relief for unfair prejudice under section 994 of the 2006 Act, or can seek to have the company wound up on the just and equitable ground, this may be sufficient reason to refuse leave to pursue a derivative action. In the present proceedings, the draft Statement of Claim posits a cause of action based on the unlawful transfer of shares from members of

the Company to the directors, acts said to be in breach of the Articles of Association. Such a claim could not possibly fall within the proper ambit of a derivative action brought for the benefit of the Company. This issue gives rise to claims for interference with the rights of shareholders as individuals rather than harm to the Company's interests. The same cannot be said of the claims in relation to the diversion of business opportunities – these are properly the subject of derivative proceedings.

[46] Section 263(4) invites the court to consider the views of members of the Company who have no interest, direct or indirect, in the matter. This is problematic for three reasons. Firstly, the members who are also directors have a clear interest in the outcome of the application. Secondly, the evidence from members who are not directors does not establish that they have no direct or indirect interest in the outcome. Thirdly, much of that evidence is contained in affidavits which are repetitious and formulaic and upon which it is difficult to place a significant degree of reliance at this stage.

[47] The court enjoys wide powers when determining the most appropriate way to deal with a Stage 2 leave application. Section 261(4) of the 2006 Act gives the court power to:

(i) Grant leave on terms;

(ii) Refuse leave and dismiss the action; or

(iii) Adjourn the application and give directions.

[48] I concur with the views of Lightman J in *Fraser v Oystertec plc* [2004] EWHC (Ch.) 2224, albeit that this was a decision under the old common law regime:

> *"What is contemplated is not a single authorisation of proceedings entitling the claimant indefinitely to pursue the original further claim without further authority, let alone pursue any further or other claim. Nor is it contemplated (save in the exceptional case when this might be appropriate) that the authority given when the action is begun is to continue without any review until trial. Continued supervision by the court is called for at successive stages in the action (e.g. after closure of pleadings and disclosure) and most particularly if there is a material change of circumstances."*

[49] This approach is consonant with that which would be taken by any prudent director, cognisant of his fiduciary duties, when considering how to approach complex, time consuming and expensive litigation.

Leave to Continue

[50] Having carefully scrutinised the evidence, I have concluded at this stage that there is a case which is sufficiently strong, and is worth pursuing, so that leave should be granted to continue the derivative action.

[51] Such leave only extends to the claims of breach of duty advanced against the directors in respect of the diversion of business opportunities from the Company.

[52] Leave in respect of any claim of unlawful share transfers is refused and that part of the plaintiff's action is dismissed on the basis that it does not properly form part of a derivative action on the part of the Company.

[53] I propose to grant leave on terms and to continue to exercise the supervision alluded to by Lightman J in *Oystertech*. The stages for which leave is hereby granted are:

(i) The service of pleadings;

(ii) The exchange of lists of documents, the inspection of documents and any application for specific discovery;

(iii) The instruction of an independent forensic accountant on behalf of the plaintiff and the completion of this expert report.

[54] I do not propose at this stage to require the defendants to engage any accountancy evidence. Of course, I do not prohibit them from so doing but I am concerned to maintain a level of supervision of the costs of these proceedings. In the event that the expert retained on behalf of the plaintiff does not support the plaintiff's claims then leave to continue further is likely to be refused and any costs incurred by the defendants in the preparation of expert evidence may prove unnecessary.

Wallersteiner Order

[55] The application before the court included relief in the form of a *Wallersteiner* costs indemnity order. The jurisdiction to make an order granting an indemnity in respect of costs from the company derives from *Wallersteiner v Moir (no. 2)* [1975] QB 373. The principle to be considered is whether an honest, independent and impartial board would determine to pursue the action in the interests of the company.

[56] Morgan J reviewed the relevant authorities since *Wallersteiner* in *Bhullar v Bhullar* [2015] EWHC 1943 (Ch.) and commented:

> *"The later authorities show that the court should exercise considerable care when deciding whether to order a pre-emptive*

> *indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim."*

[57] I have already found that a director, exercising his section 172 duty, would find that there was a case worth pursuing, on a staged and structured approach. As Lewison J said in *Iesini*:

> *"Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs."*

Similarly, per Lord Reed in *Wishart*:

> *"Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities."*

[58] Accordingly, I propose to make an order that the plaintiff be indemnified out of the assets of the Company in respect of the costs of this application and in respect of the costs which will be incurred in the litigation steps outlined above. I do not propose to place any cap on this indemnity but will give the parties liberty to apply in respect of any dispute which may arise in relation to the incidence or quantum of such future costs.

Conclusion

[59] I order that the plaintiff be granted leave pursuant to section 261 of the 2006 Act to continue the claim, up to and including the completion of discovery and the preparation of expert evidence at which stage the question of leave to continue further will be the considered. I refuse leave in respect of any claim in relation to the transfer of shares. I order that the Company indemnify the plaintiff in respect of his costs of this application and prospectively in relation to the stages for which leave has been granted. I will hear the parties as to the timetable for the litigation and the issue of costs more generally.