Neutral Citation [2008] IEHC 277

IN THE MATTER OF INTENDED PROCEEDINGS
THE HIGH COURT
COMMERCIAL

2008 No. 30 IA

BETWEEN

OISIN FANNING

PLAINTIFF

AND
BRENDAN MURTAGH, ALAN MURTAGH, FERGAL MURTAGH, SMART TELECOM PLC AND SMART YUROE BROADBAND LTD

DEFENDANTS

Judgment of Ms. Justice Irvine delivered the 30th day of July, 2008

1. The plaintiff is a member of Smart Telecom PLC, the fourth named defendant, hereinafter referred to as "the company", and is seeking leave pursuant to a notice of motion dated 26th May, 2008, to issue a derivative action on behalf of the company on the grounds that, *inter alia*, the first, second and third named defendants in October, 2006 perpetrated a fraud on the minority by procuring the purchase of the assets and undertaking of the company at an undervalue. The first named defendant is alleged to have been a *de facto* director or alternatively a shadow director of the company at the time of the transaction which the plaintiff seeks to impugn in the present proceedings. The second and third named defendants are sons of the first named defendant and were at the time of the said transaction non-executive directors of the company. The fifth named defendant is a limited liability company which became the transferee of the assets and undertaking of the company under the said agreement ("the Business Purchase Agreement").

2. The within application is grounded upon the affidavit of the plaintiff dated 7th May, 2008, wherein he exhibits the intended Plenary Summons and Statement of Claim. As can be seen from these pleadings, the focus of the intended proceedings is the Business Purchase Agreement entered into on 6th October, 2006, whereby the assets and undertaking of the company were transferred to a corporate vehicle, Callaly Ltd. ("Callaly") now renamed Smart Yuroe Broadband Ltd., for a sum of €1 in return for the issue to the company of 10% of its shares.

The nature of the claim brought on behalf of the Company in the intended proceedings

3. The General Endorsement of Claim on the Plenary Summons seeks, *inter alia*, a declaration that the Business Purchase Agreement of 6th October, 2006, is null, void and of no legal effect and claims the Agreement should be set aside as having being procured by the undue influence, misrepresentation, negligent statement and conspiracy on the part of the first, second and third named defendants. The Court is further asked to grant an injunction restraining the first, second, third and fifth named defendants from disposing of or otherwise dealing with the business, assets, undertaking and subsidiaries of the fourth named defendant other than by restoring them to that defendant. In addition, as an alternative, damages are sought in lieu of restitution.

4. The proposed pleadings reveal that the plaintiff will, even if he is unsuccessful in this application, pursue in his personal capacity a number of other claims against the defendants including:

> (1) A declaration that a severance agreement entered into with the fourth named defendant on 8th September, 2006, whereby the plaintiff stepped down as C.E.O. of the company, was procured by undue influence and/or misrepresentation on the part of the first and/or fourth named defendants;
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> (2) A declaration that a deed of irrevocable proxy signed by the plaintiff in favour of a resolution to approve of the Business Purchase Agreement was procured in like fashion by the first and fourth named defendants;
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> (3) Damages for breach of contract against the fourth named defendant;
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> (4) A declaration that the plaintiff is entitled an indemnity from the first named defendant in respect of borrowings of some €5m from Anglo Irish Bank; and
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> (5) Other ancillary relief.

5. Before considering the principles that the Court should apply on an application such as the present one, it is perhaps helpful to set out a résumé of the more relevant facts in the affidavits and exhibits albeit that some of these facts are disputed in the manner outlined. It further should be noted that the within application was heard at the same time as an application brought by the first, second and third named defendants in proceedings issued by the plaintiff under the provisions of s. 205 of the Companies Acts 1963 to 2006 [Record No. 2008 No. 143 COS] to strike out those proceedings under O. 19 r. 28 of the Rules of the Superior Courts or alternatively under the court's inherent jurisdiction as an abuse of process. Consequently, the parties in the present application relied upon the totality of the affidavits and exhibits filed in both motions and the Court accepted the documents so exhibited as evidence for the purposes of the hearings. None of the parties asked the Court to hear a preliminary issue or any oral evidence. Neither did the parties to this motion serve notices to cross-examine the relevant deponents on their respective affidavits.

6. The principal affidavits relied upon by the plaintiff were those sworn by him on 7th May, 2008 and 11th June, 2008. The first, second and third named defendants in opposing the motion relied upon the affidavit of the first named defendant sworn on 30th May, 2008 and the affidavit of the third named defendant sworn on 9th May, 2008. The company, who is the fourth named defendant to the proceedings appeared as a notice party to the present motion for the purposes of advising the Court that the company's position was neutral in relation to the application. However, the company, through its chairman Mr. Kyran Michael O'Dwyer filed an affidavit in the present application and also in the s. 205 proceedings for the purposes of disputing many of the facts relied upon by the plaintiff in relation to the company's management, its liquidity and the circumstances in which it entered into the Business Purchase Agreement which is at the core of both sets of proceedings.

The Facts

7. The company was incorporated in 1989 and from the year 2000 carried on business as a provider of telecommunications services. In 2004, the company commenced trading on the Alternative Investment Market which market is part of the London Stock Exchange. The nominal share capital of the company was €32,500m divided into 650 million ordinary shares of which €380,174,284 where fully paid up. At the relevant time to these proceedings the company had 1,400 shareholders between private investors and institutional share holders.

8. The plaintiff is a former director and C.E.O. of the company, a position which he held from 22nd November, 2000, until 6th September, 2006. On that date the plaintiff resigned and a severance package was agreed with the company. The plaintiff is also the holder of some 17,427,250 shares in the company.

9. The first named defendant is a businessman and according to his own affidavit, at the time relevant to these proceedings, was the beneficial owner of no more than 98,935,197 shares in the company. The plaintiff contends that the first named defendant had control over a larger number of shares, namely 110,555,141.

10. The second and third named defendants were both non-executive directors of the company at the time material to these proceedings and each was the holder of some 1,599 shares.

11. It is common case that up to September, 2006 the first named defendant provided substantial financial assistance to the company and that by September, 2005, he had lent the company approximately €8m. In November, 2005 the company made a bid for the remaining Irish Third Generation Mobile Phone Licence which it did with the assistance of its Chinese partner Huawei. Having won the licence, the company was required to lodge a bond of €100m with the Communications Regulator ("Comreg") within 30 days. Unfortunately, Huawei reneged on its agreement with the company at the last minute and notwithstanding it's efforts to meet its requirements, Comreg withdrew the offer of the licence. The company issued proceedings against Comreg which it lost and became liable for its own legal costs as well as those of Comreg.

12. The half year results for the company in 2006 showed a deficit before exceptional items of €17.9m and allowing for such items a much greater deficit of €31.9m in the face of which the first named defendant provided the company with a further loan of €2.4m. The company had, according to the defendant's evidence on affidavit, as of June, 2006 fallen short of its financial projections for each of the three preceding years.

13. The documentation exhibited in the affidavits, and about which there is no contest, shows that the company's financial position was becoming bleaker each month particularly over the period from June to September, 2006. The minutes of the relevant board meetings record the concerns of its directors that the company was facing impending liquidation and to this end the company appears to have been investigating its options for raising additional funding to meet its trading requirements. The options considered included the possibility of finding a strategic partner or obtaining new investors.

14. By September, 2006 the company, according to the affidavit of the first named defendant "was haemorrhaging cash and was without doubt hopelessly insolvent". It had liabilities in the region of €50m and was losing €5m per month. The plaintiff does not contest the existence of such liabilities or the rate of the company's decline as deposed by the third named defendant at para.6 of his affidavit sworn on 9th May, 2008, in the s. 205 proceedings.

15. The plaintiff claims that in response to these financial difficulties the board gave the green light to the idea of a management buyout in August, 2006 which buyout would have involved the plaintiff, the first, second and third named defendants, the plaintiff's partner Ms. Maria Pearl Roche and a Mr. Brian Timmons, one of the company's directors. In this respect the plaintiff contends that the first named defendant requested the plaintiff to investigate the possibility of a management buyout. He also refers to the advice obtained from Davy's Stockbrokers that the lowest price payable on a management buyout for the shares of the company would be 18 pence sterling. The plaintiff maintains that the first named defendant was unhappy with Davy's advice and was surprised that the purchase price for the shares on a management buyout would be so high. The plaintiff contends that as a consequence the first named defendant deliberately held off providing further finance to the company so as to run it into further financial difficulties in the hope of convincing the potential takeover panel to agree to a management buyout at a much reduced share price.

16. The first named defendant denies that there was ever any realistic prospect of a management buyout irrespective of the price of the company's shares and advised the Court that the plaintiff has failed to address the fact that any such management buyout would have necessitated the proposed purchasers raising sufficient funding to discharge the €50m owed to the company's creditors, something that was simply not achievable. The position adopted by the first named defendant on this issue was supported by Mr. Kyran Michael O'Dwyer in his affidavit wherein he confirmed that there was no active discussion at board level of a management buyout not only because of the extent of the monies required to purchase the equity from existing shareholders but also because of the extensive funding that would have been required to discharge creditors and meet the company's ongoing losses. The first named defendant deposed to the fact that the only prospect for the company avoiding liquidation as of September, 2006 was the creation of the new corporate vehicle that might purchase the company's assets and liabilities and which proposal, if it met with shareholder approval, would at least give the shareholders some prospect for a return on their investment.

17. The financial position of the company clearly generated great concern for the board, shareholders and creditors. The plaintiff was asked to resign from his position as C.E.O. On 8th September, 2006, he duly executed a severance agreement which provided, *inter alia*, for the payment to him of a tax free sum of €650,000. The plaintiff in his intended plenary summons for his personal claim maintains that this agreement was procured by undue influence, breach of duty, misrepresentation and negligent misrepresentation on the part of the first named defendant, and/or the company and that it is voidable at his option. It is perhaps noteworthy that this agreement and the circumstances in which it was executed are not relied upon by the plaintiff in his s. 205 proceedings where actions such as forced resignations are commonly relied upon as evidence of oppression.

18. At a board meeting held on 18th September, 2006, the board resolved to cut staff numbers by 76 and also considered a range of issues in relation to the company's liquidity including the possibility of examinership or a potential sale of the assets and liabilities of the company to new investors. The company's situation worsened when Eircom, on 3rd October, 2006, terminated its service to the company as a result of which approximately 40,000 voice customers and 17,000 broadband customers of the company were left without their respective services.

19. In early October, 2006 the first named defendant informed the board that a corporate vehicle to be controlled by him and other investors would be willing to acquire the assets and liabilities of the company for a nominal consideration in return for which the corporate vehicle on purchasing the company's assets and liabilities would issue some 10% of its shares to the company. The first named defendant and other proposed investors were, according to the third named defendant, only prepared to invest on the basis that all of the directors would resign in recognition of the changed circumstances facing the company and the projected change in control. The proposed new investors further required the directors to forfeit any claims against the company under their employment contracts and a number of directors' protested at this requirement. Nonetheless, according to Mr. Kyran Michael O'Dwyer, all of the directors' voted in favour of the proposed Business Purchase Agreement despite their personal financial concerns due to the fact that the agreement was seen to be in the best interest of the creditors and the shareholders alike.

20. The second and third named defendants did not vote upon the resolution approving of the proposed Business Purchase Agreement

at the board meeting of 5th October, 2006. Advice received at that time suggested that the A.I.M. rules of the London Stock Exchange would consider the intended purchase to constitute a "related party transaction" thus requiring their abstention from the voting process.

21. Following the resolution of the board, Callaly immediately provided a sum of €5m to allow the company to trade pending the convening of the required Emergency General Meeting (EGM). Thereafter, the Business Purchase Agreement was concluded on 6th October, 2006, pursuant to which, subject to shareholder approval, the company agreed to transfer its assets and liabilities to Callaly which in due course changed its named to Smart Yuroe Broadband Limited.

22. In advance of the proposed EGM, the plaintiff, as demonstrated in the documents exhibited, signed a deed of irrevocable proxy and undertaking on 5th October 2006, in favour of the proposed transaction. In the plaintiff's intended personal proceedings, he maintains that this proxy was procured by undue influence and/or misrepresentation on the part of the first and/or fourth named defendants. The defendants in their affidavits express surprise at this allegation as is not relied upon by the plaintiff in his s. 205 proceedings and also because his solicitor, David M. Turner, in a letter dated 14th April, 2008, denied that his client had executed any such document. The first, second and third named defendants also deem suspicious the fact that the plaintiff has given no explanation as to how, on the face of the proxy, the plaintiff's signature appears to have been witnessed by his partner's son. The defendants further assert that the plaintiff's partner, Ms. Pearl Roche, also signed a similar proxy. Whilst the plaintiff in his own affidavit denies that Ms. Roche signed the proxy, the respondents refer to the plaintiff's failure to explain how, on the face of such proxy, his signature appears as a witness to that of Ms. Roche.

23. The EGM of the company was convened for 31st October, 2006, at which meeting shareholder approval was secured for the disposal of the business, assets and liabilities of the company to Callaly. Details of how the shareholders voted are set out at para. 6 of the affidavit of the first named defendant sworn on 30th May, 2008. These facts are not disputed. Of the company's 380,200,000 shares some 210,000,000 shares were voted by proxy; 97% of these, accounting for 51.2% of the entire share capital of the company were voted in favour of the transaction with only 1.5% of the share capital of the company being voted by proxy against the relevant resolution.

24. Following the resolution passed at the EGM of the company, the acquisition was duly completed as of 22nd June, 2007. At the present time the first named defendant holds 50% of the shares in Smart Yuroe Broadband, 40% of the shares are held by other investors with the remaining 10% having been issued to the company. The first named defendant has advised the Court that new investors have provided funding of €60m to the fifth named defendant by way of subscription for new shares and by way of loan finance which he alleges will be lost if the Business Purchase Agreement were to be cancelled. He also deposes to the fact that the fifth named defendant has successfully recruited a new management team and has a myriad of significant customers including hospitals, educational institutions, banks etc. all of whom would be prejudiced in the event of the Court interfering with the Agreement in the manner sought by the plaintiff in these proceedings. The company, on the other hand, according to him, now appears to enjoy a dormant status with no staff or management available to it and would consequently be unable to carry on business if the Agreement was cancelled.

25. On 6th April, 2008, an article authored by Shane Ross in the Sunday Independent advised that O2 was in advanced discussions with Smart Telecom with a view to a takeover of its business. A similar article referring to a potential takeover of Smart Telecom by O2 was published in the Irish Times on 8th April, 2008. The following day, by letter dated 9th April, 2008, the plaintiff's solicitor, David M. Turner, wrote a letter on behalf of his client indicating the potential issue of proceedings by way of a derivative action and also proceedings under s. 205 of the Companies Act 1963 to 2006. In that letter the plaintiff advised through his solicitors that the defendants should not dispose of or deal with the assets of the company or its subsidiaries by reason of impending proceedings.

26. The plaintiff presented his petition to the High Court under s. 205 of the Companies Act 1963 to 2006 on 11th April, 2008. By notice of motion dated 23rd April, 2008, the first, second and third named respondents to those proceedings issued a notice of motion seeking to admit the petition proceedings to the Commercial Court and also seeking the court's directions regarding a number of matters including a proposed application to seek to dismiss the petition, in whole or in part, under the provisions of O. 19 r. 28 of the Rules of the Superior Courts or alternatively pursuant to the court's inherent jurisdiction. Following upon the hearing of the aforementioned application by notice of motion dated 9th May, 2006, the first, second and third named respondents in the petition proceedings brought forward their motion seeking to dismiss the petition on the grounds set out above. By notice of motion dated 7th May, 2008, the plaintiff in the present proceedings issued the within notice of motion seeking the court's liberty to issue and serve derivative proceedings in his capacity as a member of the fourth named defendant. As already advised earlier in this judgment, both of these motions were heard together before this Court over a period of two days in the course of which the Court was greatly assisted by the oral and written submissions of the respective parties.

The Nature of the Intended Proceedings: the Derivative Action

27. Given that the present application is one which seeks leave of the court to issue derivative proceedings, it is necessary to look firstly at the nature of the derivative action and thereafter to assess the validity of the leave application against the backdrop of the principles to be applied. There are two cases which give the Court particular guidance in relation to the nature of derivative proceedings and which also assist it in formulating its approach to the present application. These are the decisions of Lord Denning M.R. in *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373 and the decision of Gibson L.J. in *Barrett v. Duckett* [1995] 1 B.C.L.C. 243, CA.

28. Regarding the derivative action, Lord Denning M.R. at p. 390 of Wallersteiner advised as follows:-

> "2. The Derivative Action
>
> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle* (1843) 2 Hare 461.
>
> The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

29. In *Barrett*, Gibson L.J. set out the general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs in the following manner, at pp. 249 and 250 of his judgment:-

> "1. The proper plaintiff is prima facie the company.
>
> 2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.
>
> 3 There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
>
> 4 When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
>
> 5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
>
> 6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

30. Morse, *Charlesworth's Company Law*, 17th Ed., (London, 2005) is also of assistance in relation to the extent of the court's discretion when considering whether to allow a derivative action to proceed. The text refers to a number of factors to which the court may have regard when considering an application such as the present one. The derivative action is summarised in the following way, commencing at p. 344:-

> "The nature of the derivative action is that it is a 'procedural device for enabling the court to do justice to a company controlled by miscreant Directors or shareholders.' It follows that the court is entitled to examine the conduct of whoever intends to start such proceedings – the person must be doing so for the benefit of the company and not for some other purpose; i.e. he or she must be a proper person to bring a derivative action. A particular person might not be a proper person because his or her conduct is tainted in some way which under the rules of equity may bar relief; e.g. he or she might not come with 'clean hands' (e.g. having participated in the wrong), or have been guilty of delay, or be motivated by purely personal motives which are not bona fide for the benefit of the company… There is therefore no right to bring a derivative action, the court has a discretion whether to allow an action to be brought. Thus an action has been dismissed where there was another viable remedy, and where an independent group of shareholders were opposed to the action."

31. It is clear from the aforementioned authorities that the court is accordingly precluded from interfering in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company's affairs by the majority or the board of directors. The minority shareholder will only be permitted to assert a claim on behalf of the company if he can bring himself within one of the four recognised exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461.

32. There are four recognised exceptions to the rule in *Foss v. Harbottle* which may permit an individual shareholder as a minority to sue on behalf of the other shareholders. These exceptions, briefly stated, comprise the following categories of wrongdoing namely:

> (a) An act which is illegal or *ultra vires* to the company.
>
> (b) An irregularity in the passing of a resolution which requires a qualified majority.
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> (c) An act purporting to abridge or abolish the individual rights of a member.
>
> (d) An act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company.

33. The plaintiff in the present action principally casts his right to maintain a derivative action on behalf of the company under the "fraud against the minority" exception to the rule in *Foss v. Harbottle*. As an alternative submission, the plaintiff contends that there is a fifth exception to the rule which would also justify the Court in granting him leave to maintain a derivative action. The plaintiff relies upon the decision the Supreme Court of Western Australia in *Biala PTY v. Mallina Holdings Ltd.* [1993] A.C.F.R. 785 where the court concluded:-

> "(ix) The courts should not shrink from determining whether the justice of the case should allow a shareholder to proceed with a derivative action. Equity is concerned with substance and not form, and it was contrary to principle to require round minority shareholders to bring themselves within the boundaries of well recognised exceptions and to deny jurisdiction even where an unjust or unconscionable result may otherwise ensue. It was desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demanded that such a claim be brought, irrespective of whether the claim falls within the confines."

34. In relation to support for the existence of such a fifth exception in this jurisdiction the Court's attention has been drawn to the decision of Hamilton J. in *Moylan v. Irish Whiting Manufacturers Limited* (Unreported, High Court, Hamilton J., 14th April, 1980) and also the decision of Finlay Geoghegan J. in *Glynn and anor. v. Owen and ors.* [2007] I.E.H.C. 328. In the latter case the trial judge, when dealing with the exceptions to the rule in *Foss v. Harbottle*, gave brief consideration to the existence of such a fifth exception when she referred to the judgments of Templeman J. in *Daniels v. Daniels* [1978] Ch. 406 and Keane J. in *Crindle Investments v. Wymes* [1998] 4 I.R. 567 before referring to the extra-judicial writing of Keane C.J. in his textbook Company Law, 4th Ed., (Dublin, 2007) where, in relation to the exceptions to the rule in *Foss v. Harbottle*, he stated, at para. [26.20]:-

> "While the view was advanced in earlier editions of this book that the Irish courts might be reluctant to extend the exceptions to the rule, that is probably to err on the side of caution. While it is true that the wide import of the term 'fraud' enables most deserving cases to avail of the third exception where the other two are not available, there is probably no good reason why the courts should not carve out further exceptions if justice so requires. Not only should the judicial comments in support of that view already cited be borne in mind; it is also worth noting that in the two seminal

cases of *Foss v. Harbottle* itself and *Edwards v. Halliwell*, Wigram V-C and Jenkins LJ both observed that the rule should not be applied in so rigorous a fashion in any case as to lead to injustice."

35. Having considered the judgment of Finlay Geoghegan J. in *Glynn*, I remain to be convinced that the learned trial judge's decision is, as is submitted by the plaintiff, definitive authority for her acceptance of a fifth category of exception to the rule *in Foss v. Harbottle*. I read her judgment as accepting the view of Templeman J. in *Daniels v. Daniels* that wrongdoing that does not amount to fraud or gross negligence, but which nonetheless causes harm to the company whilst benefiting the directors, should be considered an exception to the rule in *Foss v. Harbottle*, either under a broad interpretation of the existing "fraud against a minority" exception, or failing that, as an exception permitted outside that category if the wrongdoing falls foul of that exception because of a narrow interpretation of the word "fraud". The learned trial judge agreed that actions such as those described by Templeman J. "may come within the class of action" where the court should permit the minority to sue. She nevertheless made it clear that the plaintiff had to establish, in respect of an alleged wrong that might be considered as a further exception to the rule, that the majority benefited therefrom. In addition the trial judge advised that no authority had been opened to her where the exception to the rule in *Foss v. Harbottle* was extended to an allegation of wrongdoing by a majority where it was not also alleged that that wrongdoing had benefited the wrongdoers at the expense of the company. She concluded as follows:-

> "I respectfully agree that the formulation of the rule in the earlier cases makes clear that it [the rule in *Foss v. Harbottle*] should not be applied in such a way as to lead to injustice. Nevertheless, the entitlement of a shareholder to pursue by way of derivative action a claim for and on behalf of a company is an exception to an 'elementary principle'... As such it should not be broadly or liberally applied. A very strong case would have to be made out. It would also have to be consistent with the principles underlying the rule in *Foss v. Harbottle* and the exceptions to it. These include the reluctance of the courts to interfere in the internal management of a company."

36. The danger of accepting the plaintiff's submission that there is a fifth exception to the rule in *Foss v. Harbottle* i.e. one which permits a minority shareholder to sue on behalf of the company where the "justice of the case so requires it", is that recognition of such an exception visits upon the proceedings the very mischief that the rule sets out to eliminate. The rule is intended to ensure that minority shareholders, unhappy with the management of a company, are not in a position to engage in litigation unless they can, at the outset of the proceedings, establish their *locus standi* as an exception to the rule. If such exceptions include "where the justice of a case so requires" the court, where such a plea is advanced, will end up hearing possibly all of the facts of the action, in what has been described in many of the authorities as a full dress rehearsal on a preliminary issue, before it can decide whether the plaintiff has the locus standi to maintain the action at all. I will return to this issue in the context of the present proceedings at the conclusion of this judgment.

Summary of Issues to be Considered by the Court.
37. The authorities suggest that where an application is made for leave to maintain a derivative action, the court should first engage in considering whether or not the plaintiff can establish that he has the requisite *locus standi* to maintain the intended proceedings on behalf of the company as an exception to the rule in *Foss v. Harbottle*.

38. Even if the intended derivative action can be shown to potentially fall within one of the exceptions to the rule in *Foss v. Harbottle*, the court may nonetheless, in exercising its discretion, refuse a plaintiff leave to issue proceedings where it considers that by reason of the existence of other factors it would be unjust so to do. The court may consider*, inter alia*, the following matters namely:

> (i) Any delay in the institution of the proceedings;
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> (ii) Whether the plaintiff is an appropriate party to maintain the action on behalf of the company. In this respect the court may conclude that a plaintiff is precluded by reason of his own actions, including approbation by him of the wrong complained of, from being considered a suitable person to maintain the proceedings;
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> (iii) The possible damage that might be done to the company in the course of such proceedings;
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> (iv)Whether the plaintiff has an ulterior motive for the maintenance of the action; and
>
> (v) Whether there is any other remedy available.

Procedural Matters
39. In addition to the matters to which the Court must have regard and which are set out in the summary above, there are a number of practical procedural matters which have influenced the Court's judgment and to which I will now refer. These may conveniently be summarised under the following headings namely:

> (1) The consequences of granting leave to a plaintiff to issue derivative proceedings in terms of the effect of that order on the issue of legal costs in the action;
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> (2) The absence of any rules of court regulating the procedure to be adopted by a plaintiff who wishes to maintain a derivative action on behalf of a company; and
>
> (3) The procedural consequences of a court granting leave to a plaintiff to maintain a derivative action when compared with the procedural consequences which flow from the trial of a preliminary issue as to the *locus standi* of a plaintiff who seeks to maintain a derivative action on behalf of the company.

(I) The Plaintiff's Costs/Potential Indemnity
40. One of the difficulties faced by a litigant who wishes to pursue a derivative action is the potential cost of maintaining such proceedings which are allegedly being pursued for the benefit of the company.

41. Prior to the Civil Procedure (Amendment) Rules 2000 (S.I. No. 221 of 2000) in the United Kingdom, the courts had for some time been guided as to the approach to be taken to derivative proceedings by the decision of Lord Denning M.R. in *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373. In that case the problems faced by a plaintiff in relation to the costs of maintaining a derivative action were

fully explored. In his judgment, Lord Denning M.R. determined that if the minority shareholder was permitted to bring derivative proceedings then such a shareholder, being an agent acting on behalf of the company, should be entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the bringing of the action. In the course of his judgment, he stated as follows, at pp. 391and 392:-

> "Now that the principle is recognised, it has important consequences which have hitherto not been perceived. The first is that the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity. It is analogous to the indemnity to which a trustee is entitled from his *cestui que* trust who is *sui juris*: see *Hardoon v. Belilios* [1901] A.C. 118 and In *re Richardson, Ex parte Governors of St. Thomas's Hospital* [1911] 2 K.B. 705. Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him they should be paid by the company… But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action – that it was a reasonable and prudent course to take in the interest of the company - he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails. *Qui sentit commodum sentire debet et onus*. This indemnity should extend to his own costs taxed on a common fund basis.
>
> In order to be entitled to this indemnity, the minority shareholder soon after issuing should apply for the sanction of the court in somewhat the same way as a trustee does: see In *re Beddoe, Downes v. Cottam* [1893] 1 Ch. 547, 557 – 558. In a derivative action, I would suggest this procedure: the minority shareholder should apply *ex parte* to the master for directions, supported by an opinion of counsel as to whether there is a reasonable case or not. The master may then, if he thinks fit, straight away approve the continuance of the proceedings until close of pleadings, or until after discovery or until trial (rather as a legal aid committee does). The master need not, however, decide it *ex parte*. He can, if he thinks fit, require notice to be given to one or two of the other minority shareholders - as representatives of the rest – so as to see if there is any reasonable objection. (In this very case another minority shareholder took this very point in letters to us.) But this preliminary application should be simple and inexpensive. It should not be allowed to escalate into a minor trial. The master should simply ask himself: is there a reasonable case for the minority shareholder to bring at the expense (eventually) of the company? If there is, let it go ahead."

42. Lord Denning M.R. appears to have envisaged the Master carrying out a balancing exercise in the course of which he would weigh up the strength of the case, the likelihood of its success and the extent of the benefit to accrue to the company if the action were to be successful against the real possibility that the costs of the action might ultimately have to be borne by the company. The exercise seems to presuppose that the company would be required to indemnify the plaintiff in respect of his costs of the action, if unsuccessful, on the basis that in maintaining such proceedings the plaintiff was *de facto* acting as agent on the company's behalf.

43. It is noteworthy that the screening process advocated by Lord Denning M.R. proposed that the application for court approval would be supported by the opinion of counsel as to whether or not there was a reasonable case to be made on behalf of the company and that the views of other minority shareholders might also be canvassed in certain circumstances. Thereafter, the decision for the court was whether it appeared that the bringing of the action was a reasonable and prudent course to take in the interests of the company.

44. It is easy to see the attraction of the type of screening procedure advised by Lord Denning M.R. in *Wallersteiner* and it is this screening procedure that the plaintiff is engaged with on this present application. The practice previously had been that defendants who were met with proceedings of a derivative nature invariably sought the trial of a preliminary issue as to the plaintiff's *locus standi* to maintain the proceedings as an exception to the rule in *Foss v. Harbottle*. In a number of the cases cited to this Court, those preliminary issues lasted several weeks and involved the parties in significant legal costs simply for the purposes of establishing the plaintiff's *locus standi*.

45. The first, second and third named defendants on this application submit that if the Court grants the plaintiff liberty to proceed with the intended derivative action, he will thereby automatically be entitled to a full indemnity in respect of his costs on a solicitor/client basis even if he is ultimately unsuccessful in the action.

46. In response, counsel on behalf of the plaintiff contends that the Court will have complete discretion in relation to the issue of costs if the plaintiff's action fails and that the Court must ignore the potential issue of the costs of the proceedings on this application once the plaintiff establishes to the Court that he has a *prima facie* case to make on the company's behalf.

47. Having considered the respective submissions of the parties, I reject the submissions made by the plaintiff on this issue. Whilst the plaintiff may technically be correct that the Court may retain a discretion to refuse to indemnify a plaintiff in respect of his legal costs if he is unsuccessful in the derivative proceedings, the high likelihood is that the plaintiff will obtain such an order. Lord Denning M.R. in *Wallersteiner* makes it clear that the derivative action is maintained not for the benefit of the plaintiff but for the company. If the court answers the question posed by Lord Denning M.R. in Wallersteiner i.e. "is there a reasonable case for the minority shareholder to bring at the expense (eventually) of the company?" in the positive, it is hard to see how at the end of the trial the Court could refuse the unsuccessful plaintiff an indemnity for any costs incurred in the proceedings. The Court by granting leave effectively; (i) confirms the plaintiff's *locus standi* , (ii) accepts that the plaintiff is acting bona fide for the benefit of the company, (iii) that he has a statable case, (iv) that the case is one which it is reasonable and prudent for the plaintiff to pursue on the company's behalf; and (v) having heard the intended defendants, has concluded that the plaintiff is a suitable person to maintain the action as agent of the company. How then on the authorities, in the absence of some extraordinary occurrence at trial, could the Court refuse the plaintiff an indemnity in respect of his costs at the end of an unsuccessful action? In the present case, such an indemnity would not only be in respect of the plaintiff's own costs but would extend to the costs of the first, second, third and fifth named defendants who would undoubtedly, if the action failed, be awarded their costs against the plaintiff.

48. The plaintiff's submission as to the consequences of the leave application to the issue of the legal costs of the action is supported to some extent by the decision of Finlay Geoghegan J. in *Glynn v. Owen* [2007] I.E.H.C. 452.

49. In Glynn proceedings were maintained initially by the plaintiff's against the first, second and third named defendants who were each 20% shareholders in the fourth and fifth named defendant companies. Proceedings were maintained by the plaintiffs against the first, second and third named defendants on behalf of the fourth and fifth named defendant's by way of exception to the rule in *Foss*

v. Harbottle. Following the commencement of the proceedings, the third named defendant made an application to the court for the hearing of a preliminary issue as to whether or not the plaintiffs were entitled to maintain the proceedings as a derivative claim on behalf of the fourth and fifth named defendants by way of exception to the rule in *Foss v. Harbottle*. The plaintiffs failed to establish that their action could be maintained as an exception to the rule in *Foss v. Harbottle*. This being so, the trial judge awarded the first, second and third named defendants their costs as against the plaintiff and then went on to consider the plaintiff's application for an indemnity in respect of those costs as against the fourth and fifth named defendants.

50. In dealing with the issue of the costs of the unsuccessful plaintiffs, the learned trial judge stated as follows:-

> "Counsel for the plaintiffs also sought an order that the fourth and fifth named defendants ('the Companies') indemnify the plaintiffs against the orders for costs made against them in these proceedings. He does so in reliance upon the approach taken by Lord Denning the (sic) Court of Appeal in *Wallersteiner v. Moir (No. 2)* [1975] 2 W.L.R. 389."

51. Having quoted extensively from the decision in Wallersteiner, the learned trial judge concluded as follows:-

> "I would respectfully agree with the principles as stated by Lord Denning, including the possibility of a minority shareholder in certain circumstances obtaining an indemnity against a company for the costs of bringing a derivative action which fails. However, as pointed out by Lord Denning, such an order would only be made where the minority shareholder had reasonable grounds for bringing the action 'that it was a reasonable and prudent course to take in the interests of the company' and probably only where a filter procedure such as envisaged in the final paragraph referred to above had taken place at an earlier stage in the proceedings."

52. The learned trial judge, having considered the plaintiff's application, rejected the plaintiff's arguments that they should be entitled to an indemnity in respect of their costs and did so in the following manner:-

> "On the facts of these proceedings it does not appear to me that the plaintiffs are entitled to an indemnity. The plaintiffs did not seek any order entitling them to proceed by way of derivative claim. In the absence of rules in this jurisdiction they might not be criticised for so failing."

53. The decision of Finlay Geoghegan J. is, I conclude, authority for the proposition that notwithstanding the fact that there are no rules in this jurisdiction which require a minority shareholder who wishes to bring a derivative action on behalf of the company to apply to the court for its sanction, that it may choose to do so, and indeed this has been the approach adopted by the plaintiff on this application. It is also to be inferred from her judgment that if a minority shareholder brings such an application to the court, the court must be satisfied that there are reasonable grounds for permitting the action to proceed and the intended plaintiff must demonstrate that those proceedings are prudent and in the interest of the company. It seems to follow that once a court sanctions a plaintiff to maintain derivative proceedings, then, even if those proceedings are ultimately unsuccessful, there is a high likelihood that the plaintiff will obtain an indemnity in respect of his costs from the company.

54. For all of the aforementioned reasons, this Court concludes that on an application such as the present one the Court must, as part of its considerations, have regard to the plaintiff's potential right to an indemnity from the company in respect of his own legal costs on a solicitor/client basis and also those costs that may be awarded against him in favour of the successful defendants.

(2) No Mandatory Procedure in the Rules of the Superior Courts Regarding Derivate Proceedings

55. The Rules of the Superior Courts in this jurisdiction do not set out any mandatory procedure to be adopted where a plaintiff wishes to maintain an action on behalf of a company as an exception to the rule in *Foss v. Harbottle*. The Civil Procedure (Amendment) Rules 2000 (S.I. No. 221 of 2000) in the United Kingdom provide such a mandatory procedure in that jurisdiction. These Rules now replace the unhappy practice that had developed prior to the decision of Lord Denning M.R. in *Wallersteiner v. Moir (No. 2)* whereby the court, once derivative proceedings were issued, ended up becoming embroiled in hearing a preliminary issue involving substantial oral evidence with great expenditure merely to establish whether or not a plaintiff had the *locus standi* to maintain the proceedings.

56. Given that the plaintiff has adopted a procedure on the present application akin to that which would be brought by an equivalent plaintiff in the United Kingdom under the Civil Procedure (Amendment) Rules 2000, the Court believes that such Rules provide further guidance as to how the Court should approach the present application. The rules in Part 19, Schedule 2 provide as follows:-

"19.9 Derivative Claims

> 19.9 - (1) This rule applies where a company, other incorporated body or trade union is alleged to be entitled to claim a remedy and a claim is made by one or more members of the company, body or trade union for it to be given that remedy (a 'derivative claim').
>
> (2) The company, body or trade union for whose benefit a remedy is sought must be a defendant to the claim.
>
> (3) After the claim has been issued the claimant must apply to the court for permission to continue the claim and may not take any other step in the proceedings except –
>
> (a) as provide by paragraph (5); or
>
> (b) where the court gives permission.
>
> (4) An application in accordance with paragraph (3) must be supported by written evidence.
>
> (5) The -
>
> (a) claim form;
>
> (b) application notice; and

(c) written evidence in support of the application

must be served on the defendant within the period within which the claim form must be served and, in any event, at least 14 days before the court has to deal with the application.

(6) If the court gives the claimant permission to continue the claim, the time within which the defence must be filed is 14 days after the date in which the permission is given or such period as the courts may specify.

(7) The court may order the company, body or trade union to indemnify the claimant against any liability in respect of costs incurred in the claim."

57. Having regard to the potential costs implications to the company of permitting the action to proceed, I conclude that there is a great deal of logic behind a rule that requires a prospective plaintiff to produce adequate written evidence to the court in support of his application. Whilst there are no rules in this jurisdiction rendering such an approach mandatory, I nonetheless believe that there is an onus on the plaintiff on an application such as the present one to set out for the court and the proposed defendants, the nature and extent of the evidence available to support the intended proceedings, subject of course to the plaintiff's right to supplement that evidence at trial. In particular, where the case to be made on behalf of the company is likely to depend on expertise beyond that held by the plaintiff then the court should, unless there are special circumstances to justify its absence, expect to be furnished with the substance of that evidence on the leave application. Whilst such proofs cannot be stated to be mandatory absent rules of court governing such applications, the court is firmly convinced that the plaintiff's prospects of succeeding on such an application should depend on the nature and extent of the evidence which he chooses to place before the court.

58. Whilst no analogy is perfect, the plaintiff in the present application is in a position not dissimilar to that of a liquidator who applies for leave of the court to institute proceedings on behalf of a company in liquidation under s. 231 of the Companies Act 1963 as amended by s.124 of the Companies Act 1990. The court on such an application knows well that if the proceedings are sanctioned by the court but prove unsuccessful, the company's creditors will be adversely affected whilst the liquidator's costs are effectively secured at their expense. Consequently on any such application the court expects the liquidator to make available to it a significant amount of factual and legal information depending upon the nature of the proposed proceedings. The application to the court will normally be supported by the liquidator's affidavit and the information available to the court will usually include:

(i) The nature of the claim which the liquidator wishes to maintain;

(ii) The extent of the evidence available to the liquidator in support of the intended proceedings;

(iii) Where the proceedings are to be based upon the opinion of expert testimony, a copy of the report to be relied upon;

(iv) Counsel's opinion on the basis of the material set out at (i), (ii) and (iii) above;

(v) The likely duration of the proposed action having regard to the consequences to the company's creditors if the action is lost; and

(vi) The likely benefit to the company's creditors in the event of the action being successful.

59. The court on such an application is engaged in an assessment of the risks of the litigation when balanced against the likely reward should that litigation prove successful. Similar assessments are made by the court in cases maintained on behalf of infants or wards of court where if liability is in issue and an offer is made, the court will engage in considering whether it is reasonable and in the interest of a plaintiff to proceed having regard to the risks of the litigation when compared to the likely reward if the proceedings prove to be successful. In both of these scenarios where the potential success of the proceedings is likely to depend upon the expertise of one or a number of witnesses with particular qualifications or skills, the substance of their evidence in the form of a report exhibited in the grounding affidavit is an expected proof.

60. In a similar way, having regard to the significant consequences which flow from an order of the court granting leave to a plaintiff to issue derivative proceedings, the court should expect no less in terms of proofs than it would expect in the type of applications referred to above.

61. For the aforementioned reasons the Court concludes that, in the event of a minority shareholder wishing to rely upon the fourth exception to the rule in *Foss .v. Harbottle* i.e. "fraud against the minority", the Court should be furnished with the nature and extent of the evidence available to the plaintiff so at to demonstrate that he can reasonably argue; (i) the occurrence of the wrongdoing contended for, (ii) the control of the majority (in this case by the first, second and third named defendants) and (iii) that those in control benefited from the wrong at the company's expense. Furthermore, where proof of the claim requires the support of expertise beyond that held by the plaintiff then the substance of that evidence, insofar as it relates to these issues, should also be exhibited. Whilst it is understandable that an intended plaintiff may not wish to bring all of the potential difficulties of his proposed proceedings to the attention of his proposed adversaries by producing a detailed opinion of counsel at the time of the leave application, I nonetheless conclude that the plaintiff's application should be supported by a brief opinion from counsel which should at least certify, on the basis of the evidence to be furnished to the court on the application, that the plaintiff has a realistic prospect of success if the action is permitted to proceed.

(3) The Plaintiff's Application for Leave to Issue Proceedings v. the Trial of a Preliminary Issue at a Defendant's Request to Determine the Validity of the Plaintiff's *Locus Standi*

62. As an alternative to the procedure adopted by the plaintiff on this application, given the absence of guidance in the Rules of the Superior Courts, the plaintiff might well have chosen to take the risk of issuing proceedings as a minority shareholder on behalf of the company as an alleged exception to the to rule in *Foss v. Harbottle*. In response, it is likely that the first, second and third named defendants would then have brought an application to the court seeking the trial of a preliminary issue as to whether or not the plaintiff was entitled to maintain the proceedings as an exception to the rule in *Foss v. Harbottle*, as happened in *Glynn*.

63. If the plaintiff had proceeded in such fashion, he would have had to bear the risks of the legal costs on that issue, which costs would have been significantly greater than those on the present application. Those risks are well demonstrated in the second decision of Finlay Geoghegan J. in *Glynn v. Owen* [2007] I.E.H.C. 452, where the plaintiffs, having lost the preliminary issue, were directed to pay the defendants costs in circumstances where they had not taken the precaution of seeking the leave of the court to commence the proceedings.

64. It may therefore be safely concluded that the true purpose of the within application is to protect the plaintiff in respect of his costs if he proves to be unsuccessful in the present litigation. Further, in deciding to adopt the present procedure the plaintiff has effectively protected himself against an exposure to the costs of a preliminary issue to determine his *locus standi* to maintain the proceedings.

Summary
65. Having regard to the implications which flow from an order of the court granting leave to a plaintiff to pursue derivative proceedings, particularly in respect of the issue of legal costs and having regard to the fact that such an application is likely to replace the trial of a preliminary issue regarding the plaintiff's *locus standi*, the Court concludes that a plaintiff seeking leave to issue such proceedings should present the following proofs to the court namely:

> (i) An affidavit in which the plaintiff will set out the nature and extent of the evidence available to support his claim to *locus standi* and also to his right to the relief claimed on behalf of the company;
>
> (ii) Where the claim is dependent upon expertise beyond that of the plaintiff, the substance of that evidence should be provided to the court in a suitable form; and
>
> (iii) A brief opinion of counsel certifying that, based upon the evidence set out at (i) and (ii) above, the plaintiff has a realistic prospect of success in the action.

66. If the court concludes, on the basis of the evidence and material referred to above, that the plaintiff has discharged the appropriate burden of proof, it should then proceed to consider whether there are any discretionary matters which would, nonetheless, justify the refusal of the relief sought.

Burden of Proof
67. The plaintiff advocates that the court should be guided by former Chief Justice Keane where, in Keane, *Company Law*, 4th Ed., (Dublin, 2007), he discusses the appropriate test to be applied by a court when deciding whether or not it should grant leave to a plaintiff to embark upon a derivative action. He suggested that the appropriate test to be applied might be the same as that applied in an interlocutory injunction and wherein he indicated that he could see at para. [26.26]:-

> "no good reason why in derivative actions of the nature under discussion the court should depart from its customary approach of permitting the action to proceed on the assumption that the plaintiff had not alleged such conduct in the pleadings without at least being in a position to present an arguable case. The plaintiff, after all, is the person who is likely to suffer in costs if the plea is unsustainable."

68. For the reasons already stated, I cannot accept that it would be appropriate for a court to approach an application such as the present one based upon the assumption that the plaintiff has an arguable case to make in support of the conduct alleged in the pleadings. This is particularly so in a case such as the present one where the plaintiff wishes to unravel a transaction approved of by a public limited company of 1,400 shareholders at an Extraordinary General Meeting some 18 months prior to the issue of proceedings and where he has failed to demonstrate to the Court that there is even one other shareholder who wishes the proceedings to be maintained on their behalf.

69. Notwithstanding the learned advices of former Chief Justice Keane set out above, the Court is not convinced, on the authorities already discussed in this judgment, that the plaintiff is the person likely to suffer the costs of the action if it is unsuccessful. In this regard, the Court notes that at no stage in the course of the present application did the plaintiff indicate to the Court that he was willing to personally bear the costs of the derivative proceedings if that claim was unsuccessful. Nor did he volunteer any undertaking to the Court that he would not seek an indemnity from the company in respect of his costs or any costs awarded against him in such circumstances.

70. For the aforementioned reasons the Court concludes that the appropriate burden of proof is for the plaintiff to establish to the Court that he has a realistic prospect of success, not based upon any assumption that he has an arguable case in support of the conduct alleged, but based upon the extent of the evidence laid before the Court on the leave application and preferably supported by counsel's opinion in the form already discussed.

71. Notwithstanding the fact that the plaintiff has not furnished the Court with any real guidance as to the nature and extent of the evidence, expert or otherwise, that may be available to him at the trial, nor with any satisfactory evidence that his legal advisors believe the intended proceedings are sustainable, the Court will nonetheless consider the extent of the evidence produced to the Court which is relevant to the derivative proceedings prior to deciding whether or not it would be reasonable and prudent for the court to grant the plaintiff leave to pursue these proceedings on behalf of the Company.

Has the Plaintiff Discharged the Onus of Proof Upon Him to Show that the Intended Claim is Maintainable by Him as an Exception to the Rule in *Foss v. Harbottle*?
72. As Finlay Geoghegan J. emphasised in her judgment in *Glynn v. Owen*, the onus is on the plaintiff where he seeks to rely upon the fourth exception to the rule to establish:

> (i) that a wrong was done to the company;
>
> (ii) that it was done at a time when the company was controlled by the alleged wrongdoers; and
>
> (iii) that those wrongdoers benefited from their alleged wrongdoing.

73. On this screening application, the Court must consider whether or not the plaintiff has put forward sufficient evidence to justify the Court granting the leave sought. Having considered the evidence submitted, the Court does not accept that the plaintiff has discharged the requisite burden of proof in relation to any of the three elements referred to above in support of his claim to *locus standi*.

(I) Evidence of a Wrong having been done to the Company
74. The wrong the subject matter of the plaintiff's claim is an alleged fraud on the minority. It is alleged that the first, second and third named defendants caused the company's business to be sold at an undervalue. In support of this claim, the plaintiff relies upon the fact that the company's business was sold for €1 at a time when the first named defendant allegedly owed the company €7.6m and at a time when the company had the option to purchase 90% of Broadband Communications Ltd (BBCL), a company which the

plaintiff estimates would have been worth in excess of €95m. The plaintiff further relies upon the value which Davy's Stockbrokers stated would have to have been paid for the shares in the company if a management buyout had been undertaken as evidence that the company's business was sold at a gross undervalue. In addition, the Court was asked to infer from the fact that some €60m had been invested in the fifth named defendant company so soon after it took over the assets and undertaking of the company, that it should conclude that it obtained the company's business at a gross undervalue. Similarly, the Court was asked to assume that in circumstances where there appears to be an impending transaction which places a significant value on the business of the fifth named defendant so soon after it acquired the assets and undertaking of the company that it should again conclude that the company's business was transferred at a gross undervalue.

75. The Court is not satisfied that the plaintiff has adduced any sustainable evidence in support of his assertion that the company's business and undertaking were sold at an undervalue. The plaintiff, in contending for the sale of the company's business at a gross undervalue, has chosen to ignore in his affidavits the undisputed fact that the sale was on terms that the purchaser would take over the liabilities of the company, which were in the region of €50m, at a time when the company was facing liquidation with no prospect of the creditors being paid.

76. Insofar as the plaintiff relies upon the possibility of a management buyout as a bona fide more beneficial alternative to the Business Purchase Agreement, the plaintiff has produced no evidence to show that he or any of the other members of the management team were in a position to conclude a management buyout on foot of the advices of Davy's Stockbrokers. No evidence was put before the Court to show that the funds required for such a management buyout were available. Neither did the plaintiff produce evidence from any of the other parties to the proposed management buyout such as Mr. Brian Timmons or Ms. Pearl Roche to the effect that they had the requisite funding available or were willing to participate in the buyout.

77. The plaintiff produced no evidence to demonstrate that the company could have found the necessary funding to permit it to trade out of its difficulties and there was no denial of the assertions made on behalf of the first, second and third named defendants, which assertions appear to be validated by the minutes of the relevant board meetings, that the company actively pursued all of the potential options available to it to avoid potential liquidation. Further, the plaintiff adduced no evidence to show that there were any other investors willing to take over the business of the company on better terms than those proposed by Callaly.

78. In the course of his submissions, counsel on behalf of the plaintiff claimed that there were "other shows in town" rather than the Business Purchase Agreement such as examinership. However, this submission was not supported by the production of evidence to establish that as of October, 2006 there was any option available to the company which would have proved more beneficial to it than the terms of the Business Purchase Agreement whereby its creditors were to be paid and it was to receive 10% of the shareholding in the transferee company.

79. The greatest deficiency in terms of evidence on the present application is the plaintiff's failure to adduce any evidence as to the value to the company of its option to purchase 90% of Broadband Communications Ltd (BBCL). The plaintiff, through bald assertion, has valued BBCL at €95m at the relevant date. The Court was not furnished with the opinion of any corporate finance expert or valuer to support the value of BBCL at €95m or indeed at any sum. The lack of such evidence is unsatisfactory given that it is the major plinth upon which it is contended the company's assets and undertaking were sold for a gross undervalue. This is particularly so in light of the letter from the plaintiff's solicitor David Turner dated 3rd December, 2007. In that letter, which was written some 15 months after the board resolved to recommend the proposed Business Purchase Agreement, Mr. Turner for the first time raised a query regarding the consideration for the purchase of the company's assets and undertaking. In his letter, he initially stated the value of BBCL as being in excess of €25m but in the same letter he refers to the business as being worth €121m. In addition, the plaintiff in his affidavits simply chooses to ignore the fact that the option to purchase 90% of BBCL was dependent upon payment of €10m which, depending upon the value of BBCL and the extent of the company's liabilities at the time was a very significant sum. In circumstances where the Court, as part of its assessment as to the plaintiff's prospects of success in this action, must look at the potential value of BBCL against the backdrop of the company's liabilities, the absence of any expert testimony on this issue undermines substantially both the credibility and the sustainability of the present application. The absence of such evidence is all the more damning for the fact that BBCL was for sale in December, 2006 for €7.6m.

80. Not only does the plaintiff not place any expert valuation before the Court to support his assertion that there was a disposal of the company's assets and undertaking at a gross undervalue but neither does he seek to garner any support for this assertion from any of the other 1,400 shareholders. Furthermore, the plaintiff produces no corroboration for this assertion from any of the other directors of the company whom he states were forced to resign in advance of the Extraordinary General Meeting of the Company on 31st October, 2006. Those directors would well have been familiar with the financial position of the company and the value of its assets. In this respect the Court notes with some interest the economy of the contents of the affidavit sworn by Paul Sullivan, a former director of the company, on 12th June, 2008. Mr. Sullivan, whilst raising many matters of complaint regarding the circumstances in which his resignation was sought and how he came to sign a proxy in favour of the resolution put to the Extraordinary General Meeting, makes no complaint in his affidavit that the company's assets were transferred at an undervalue. Neither does he refer to any discussion having occurred at board level regarding a proposed management buyout nor does his affidavit offer any opinion as to the value of BBCL. In circumstances where Mr. Sullivan's affidavit was clearly sworn at the plaintiff's request it is difficult to believe that he was not canvassed on these issues.

81. For these reasons the Court concludes that the simple averments made by the plaintiff in his affidavit regarding the wrong alleged perpetrated upon the company are not sufficient to enable the Court to determine that it would be reasonable or prudent in the interests of the company to permit the claim to proceed.

82. Given that a *prima facie* case in relation to the wrong complained of is an essential component of the plaintiff's case when seeking to establish that the intended claim comes within the exception to the rule in *Foss v. Harbottle*, it is technically not necessary for the Court to consider the application further. However, lest the Court has erred either in relation to the burden of proof applicable or in relation to the sufficiency of the plaintiff's evidence on this issue, the Court will briefly consider the evidence available referable to the other elements of the fourth exception to the rule, namely the issues of; (i) control and (ii) proof of benefit to the wrongdoers arising from their alleged wrongdoing.

(II) Control

83. In *Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2)* [1982] Ch. 204 at p. 219, the Court of Appeal referred to control as embracing:-

> "…a broad spectrum extending from an overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy."

84. The Business Purchase Agreement which is at the core of these proceedings was approved by the board of the company who voted unanimously in favour of the transaction. Further, the Business Purchase Agreement was then approved by the company's shareholders in the Extraordinary General Meeting. This being so the plaintiff must be in a position to establish that he has evidence to produce at the trial of the action such that he might reasonably be expected to convince the Court that the first, second and third named defendants controlled the board and also a majority of the company's shareholders at the relevant time.

85. The Court is not satisfied that the plaintiff has discharged the onus upon him in this regard. There were eleven directors on the board of the company, all of whom voted in favour of the Business Purchase Agreement. Whilst the directors subsequently resigned in acrimonious circumstances, the only additional evidence adduced by the plaintiff in respect of the issue of control over the board is to be found in Mr. Sullivan's affidavit. Mr. Sullivan makes it clear that at time of the board's decision as to whether or not it would approve of the Business Purchase Agreement, the only options available to the company, according to the first named defendant, were liquidation or the proposed agreement. Acceptance of the Business Purchase Agreement offered the prospect of ;(i) the payment of the company's creditors, (ii) the payment of severance packages to the directors and (iii) a 10% interest for the company in the proposed transferee.

86. It is difficult to assess the extent to which the Court could view the pressure which Mr. Sullivan asserts he was under to elect in favour of the Business Purchase Agreement as evidence or proof of control by the first, second and third named defendants over the Board's members. Clearly he felt that the Business Purchase Agreement offered a substantially better outcome from his own perspective than the alternative of liquidation allegedly threatened by the first named defendant particularly in circumstances where he does not assert that there were any other options available to save the company's business. There is certainly nothing in his affidavit to suggest that the Business Purchase Agreement was not in the best interests of the company and its creditors.

87. Whatever be the extent of the plaintiff's evidence in relation to the control of the board at the time it resolved to recommend the Business Purchase Agreement to the shareholders, the plaintiff has failed to produce any evidence to convince the Court that he has a realistic prospect of proving that the first, second and third named defendants had control over the company's shareholders at the time they passed the resolution authorising the sale of the company's assets under the Agreement.

88. The plaintiff submits that the overwhelming control exercised by the first, second and third named defendants over the company's shareholders, is demonstrated and established through the averments of Mr. Kyran Michael O'Dwyer in his affidavit where he deposed to the following facts:-

> "It should be noted that at the Extraordinary General Meeting of shareholders held on the 31st October, 2006, the resolution authorising the sales of the Company's assets and liabilities was passed by an overwhelming majority of the members in the following circumstances. I as chairman of the meeting held 186,520,457 proxies in favour plus an additional 15,737,590 proxies in favour which were held at my discretion. An additional 49,431 proxies in favour were held by other holders. 5,532,543 proxies held by 28 persons were against the motion. The petitioner's proxies represented less that 10% of the majority vote."

89. The first named defendant, according to his own affidavit, had no more than 98,935,197 shares. On the plaintiff's affidavit he is alleged to have had control of 110,555,141 shares. There were some 380 million shares with voting rights. Against these facts the plaintiff has maintained that in circumstances where the chairman of the company in advance of the meeting, had proxies in favour of the resolution to the extent set out above, that this proves that the first named defendant controlled the shareholders. The Court does not accept the logic of this submission. There is simply no evidence to demonstrate that the proxies held by the chairman, which resulted in a majority approving of the proposed resolution, were procured as a result of any control or influence exercised by the first named defendant. The fact that the chairman had sufficient proxies in favour of the resolution prior to the Extraordinary General Meeting merely establishes that the overwhelming majority of the shareholders favoured the proposed resolution and does nothing to advance the assertion that those shareholders were under the control of the relevant defendants.

90. In relation to the issue of control of the shareholders, the statistics in relation to the votes are comprehensively set out in the affidavit of the first named defendant sworn on 30th May, 2008. In his affidavit, he refers to the fact that the 1,400 shareholders who range from private investors to institutional shareholders had between them some 380 million shares eligible to be cast at the EGM. He further advised the Court that some 201 million of those shares voted by proxy and that of those votes cast approximately 97%, being 51.2% of the entire share capital of the company, voted in favour of the Business Purchase Agreement. Only 1.5% of the share capital of the company voted by proxy against the resolution.

91. For these reasons the Court is not satisfied that the plaintiff has established that he has a realistic prospect of proving at the trial of the action that the first, second and third named defendant had the requisite control over the company's shareholders so as to have manipulated them into voting in favour of a transaction to his benefit and that of the second and third named defendants to the detriment of the company.

(III) Did the Defendants Benefit from the Wrong Alleged at the Expense of the Company?

92. The plaintiff has failed to demonstrate how it is that he intends to prove at the trial of the action that the first, second and third named defendants benefited from the alleged wrong at the expense of the company. From the evidence adduced to the Court on the present application the plaintiff has failed to show that he has a realistic prospect proving that the company would have avoided liquidation otherwise than by entering into the Business Purchase Agreement. If the company had been liquidated the creditors would have remained unpaid and the shareholders of the company would have been left without a return for their investment. As it stands, the undisputed evidence on this application is that the Business Purchase Agreement has brought with it significant investment in the fifth named defendant company whose business continues to expand thus substantially, benefiting the shareholders of the company in that the company holds 10% of the fifth named defendant's shares. If, as anticipated by the plaintiff and not denied by the first, second and third named defendants, there is any impending transaction between the fifth named defendant and a third party whereby any significant sum is paid to the fifth named defendant for any part of its business, then the shareholders of the company will be beneficiaries of any such transaction.

93. For these reasons, the Court concludes that the plaintiff has failed to discharge the onus of proof upon him to establish that the intended proceedings could reasonably be maintained within the fourth exception to the rule in *Foss v. Harbottle*.

94. Insofar as the plaintiff has sought to rely upon the existence of a fifth exception to the rule in *Foss v. Harbottle*, namely "if the justice of the case so requires it", I must conclude that the plaintiff has failed to set out any valid circumstances which might justify the Court in considering the proposed claim under this exception, assuming that such an exception exists. Counsel's principal argument centred on impressing upon the Court the difficulty of proving the control held by alleged wrongdoers over a large body of shareholders in a PLC when those shareholders are exercising their voting rights. Absent such proof, there was, according to counsel

a real difficulty in maintaining proceedings on behalf of the company to challenge the validity of a transaction approved at an EGM even if there was potential proof that the transaction was to the wrongdoers benefit at the company's expense. Without proof of such control the claim cannot be maintained under the fourth exception to the rule in *Foss .v. Harbottle* and hence his submission that the potential claim should be one which would be permissible under the alleged fifth exception to the rule.

95. In relation to these arguments, the plaintiff has produced no authority to the Court to support his proposition that the alleged fifth exception to the rule in *Foss v. Harbottle* can be used as a kind of safety net to embrace a derivative action which should, on its facts, fall within the fourth exception to the rule but where the plaintiff is not in a position to establish the requisite element of control required to permit the claim be considered within that exception.

96. Even if there is a fifth exception to the rule in *Foss v. Harbottle* the Court is mindful of the decision of Finlay Geoghegan J. in *Glynn* where she advised that any party seeking to rely upon such an alleged fifth exception would have to establish that they had "a very strong case" to support their entitlement to *locus standi* on such a basis. The Court is not satisfied that any such case has been made out in the course of the present application.

Discretionary Matters
97. Given that the plaintiff has not convinced the Court that it should sanction the within derivative proceedings, it is not necessary for the Court to consider in any detail other matters which might in any event have adversely impacted upon its discretion had the plaintiff discharged the requisite burden of proof. Nonetheless, for the sake of completeness, the court will briefly refer to these matters in turn:

(i) Delay
98. The Court views sceptically the delay between the resolution of the board in favour of the proposed Business Purchase Agreement in October, 2006, the terms of which were well known to the plaintiff, and the commencement by him of his petition proceedings in April, 2008, some 18 months later. This scepticism appears to be fortified by the evidence which establishes that from as early as November, 2006 the plaintiff through his solicitors was in ongoing communication with the company and its solicitors and despite this fact no complaint was made until 2008 regarding the Agreement. Further, over this period the new corporate entity, without notice of any complaint regarding the validity of the Agreement, proceeded to set about running its business, obtaining new investment and expanding its customer base. According to the defendants some €60m has since been invested in the fifth named defendant and that company has built up a customer base comprising both institutional and personal clients who would be significantly prejudiced if the Court were to consider reversing or cancelling the transaction.

99. For these reasons, had the plaintiff been in a position to convince the Court that it was in the interest of the company to permit this action to proceed the Court would have restricted the claim in the proceedings to relief which excluded any right to reverse or cancel the transaction.

(ii) Timing of Claim
100. The Court views with some suspicion the temporal association between the issue of these proceedings and the publication of a number of prominent articles in newspapers reporting the intended disposal of a portion of the fifth named defendant's business for a significant sum. Certainly these facts are consistent with the possibility of the plaintiff having an ulterior motive for seeking to pursue the derivative action, particularly having regard to the nature of the relief sought which included relief by way of restitution and/or injunction. However, if the plaintiff had established the burden of proof so as to satisfy the Court that he had a realistic prospect of maintaining the claim on behalf of the company, the temporal association between the issue of the within proceedings and the aforementioned publications would not, on its own, justify refusing the leave sought.

(iii) Approbation of the Alleged Wrongdoing by Execution of a Proxy in Favour of the Transaction
101. If the Court was satisfied that the plaintiff had voluntarily executed an irrevocable deed of proxy in favour of the Business Purchase Agreement which he now seeks to impugn on behalf of the company, the Court would have been forced to conclude that the plaintiff was not an appropriate party to maintain the proposed proceeding on behalf of the company.

102. The Court notes that in his intended personal claim, which is particularised in the draft Plenary Summons and Statement of Claim exhibited, the Plaintiff will contend that the irrevocable deed of proxy executed by him on the 5th October, 2006, was procured by the undue influence, breach of duty, misrepresentation and negligent misstatement on the part of the first and/or fourth defendants. This being so and having regard to the Court's decision in any event not to sanction the intended derivative proceedings, the Court believes that it should distance itself from any further consideration of the circumstances in which such proxy was executed.

(iv) Alternative Remedies
103. The defendants submit that any benefit which the plaintiff may personally obtain as a result of the derivative proceedings is in any event available to him in his personal proceedings including those maintained by him under s.205 of the Companies Acts 1963 to 2006 and that this is yet another factor to be considered by the Court when exercising its discretion.

104. In response, the plaintiff submits that derivative proceedings are maintained on behalf of the company and therefore on behalf of all of the shareholders. It follows from the plaintiff's submission that any personal remedy that may be available to the plaintiff cannot be material to the court's decision on a leave application.

105. Whilst in principle there appears to be substantial merit in the plaintiff's submission, the Court believes that in relation to this issue that each case must be considered on its own facts. In this regard, the plaintiff in his s. 205 proceedings, relies upon the transaction which he wishes to impugn in the derivative action as the basis for his claim that he was oppressed as a director and shareholder of the company. If successful in that claim he will have an entitlement to have his shares purchased at the value that those shares would have had were it not for the alleged fraudulent transfer of the company's assets at an undervalue. If the derivative proceedings proved successful the plaintiff personally would obtain nothing more in terms of compensation. When these facts are placed alongside the absence of proof from the plaintiff that he has support from even one other shareholder out of the company's 1400 shareholders, the Court believes that one of the facts it is entitled to take into account is the benefit that he can hope to achieve on litigating the same wrongdoing in his own action.

106. Finally, in relation to this issue, I note that in *Glynn* the plaintiffs withdrew their personal claim at the time of the hearing of the preliminary issue as to their *locus standi*. The reason for the withdrawal by the plaintiffs of that claim was, according to the judgment of Finlay Geoghegan J., the fact that the defendants had persistently relied upon the existence of the personal claim as a reason why the plaintiffs should not be permitted to maintain the derivative proceedings.

Conclusion

107. For all of the aforementioned reasons the Court concludes that the plaintiff, having adopted a procedure whereby he seeks leave on behalf of the company to issue to derivative proceedings, has not established to the satisfaction of the Court that it would be prudent or in the interests of the company for the Court to permit him to maintain the intended action on its behalf.

108. Having regard to the nature of the issues in other proceedings pending before the Court between the same parties I believe that the Court should refrain from conclusively determining whether or not, had the plaintiff discharged the burden of proof on the present application, there were sufficient reasons to justify the Court declining the relief sought.

109. The Court will accordingly refuse the plaintiff's application.