THE HIGH COURT

[2014 No. 494 COS]

BETWEEN

ANNEMARIE O'CONNOR

PETITIONER

AND

ATLANTIS SEAFOOD WEXFORD LIMITED

AND

JOHN KENNY AND MARK O'CONNOR

RESPONDENTS

JUDGMENT of Mr. Justice Keane delivered on the 12th October 2017

Introduction
1. The respondents move to strike out certain pleadings in the petitioner's points of claim in these proceedings, in which the petitioner ('Mrs O'Connor') seeks a declaration, pursuant to s. 205 of the Companies Act 1963 (since replaced by s. 212 of the Companies Act 2014), that the affairs of the first respondent, Atlantis Seafood Wexford Limited ('the company'), are being conducted by the second and third respondents ('Mr Kenny' and 'Mr O'Connor'), as its directors and majority shareholders, in a manner oppressive to her as a shareholder, or member, of the company.

Procedural history
2. Mrs O'Connor first presented her petition on 3 November 2014, and issued a motion seeking directions on the same date. The petition is grounded on an affidavit that Mrs O'Connor swore on 24 October 2014. Mr O'Connor, who is her son, swore a replying affidavit on 9 December 2014 on behalf of all three respondents. Mrs O'Connor swore a further affidavit in response on 18 February 2015.

3. While I have not been shown any directions order, the following additional papers are before the court: (i) Mrs O'Connor's points of claim, dated 13 March 2015; (ii) the respondents' notice for particulars, dated 18 March 2015; (iii) Mrs O'Connor's reply to that notice, dated 30 March 2015; (iv) the respondents' points of defence, dated 14 April 2015; (v) and a notice of change of solicitors on behalf of the respondents, dated 9 June 2015.

Background
4. From the pleadings exchanged between the parties, the following facts are not in dispute. The company was incorporated on 27 January 1993 to engage in the processing, distribution and sale of fish based products. Its original equal shareholders and directors were James Doyle, Vincent Doyle and John O'Connor ('Mr O'Connor Senior'), who is the husband of Mrs O'Connor and the father of Mr O'Connor.

5. In 1997, the Doyles relinquished their interest in the company and Mr Kenny commenced employment with it, becoming a director and 40% shareholder, with Mr O'Connor Senior holding the remaining 60% of its shares. Mr Kenny is the brother-in-law of the petitioner and Mr O'Connor Senior. In the same year, the company moved to larger premises.

6. The company expanded in subsequent years. Mrs O'Connor had various roles with the company in administration, operations and sales. Her son, Mr O'Connor joined the company as a full-time employee in 2001, becoming a director in 2002.

7. An audit of the company by the Revenue Commissioners led to a settlement in 2005 in the amount of €462,000.

8. The company re-financed in 2006 by entering into a sale and leaseback of its premises to a partnership or consortium comprising in equal shares its three directors; Mr O'Connor Senior, Mr Kenny and Mr O'Connor or, according to the respondents, through the outright sale of those premises to that consortium. The partnership or consortium obtained a 'pension-backed' loan facility from which it drew down funds of €1.2 million to finance the transaction, secured against certain pension arrangements. The company applied those funds to repay borrowings and as working capital.

9. In 2006, Mr O'Connor Senior ceased working for the company on a day-to-day basis, although he remained a director and shareholder until, in February 2007, he transferred one-third of his 60% shareholding in the company to his wife, Mrs O'Connor, and two-thirds of that shareholding to his son, Mr O'Connor. From that point onwards, the shareholders in the company have been Mr Kenny (40%), Mr O'Connor (40%) and Mrs O'Connor (20%). The petitioner resigned her position as credit controller with the company in 2011. It would appear that Mr O'Connor Senior was dismissed as a director of the company in February 2011. Although that claim is formally denied by the respondents in their points of defence, they seem to have accepted it – at least, for the purpose of the present application.

The oppression alleged
10. In her points of claim, Mrs O'Connor alleges that Mr Kenny and her son Mr O'Connor, are exercising their powers as directors, or conducting the affairs of the company, oppressively or in disregard of her interests in the following five adumbrated circumstances:

> '(A) There has been a lack of information provided to the petitioner as a member of the company by the second and third named respondents;
>
> (B) The pension contributions made by the company in respect of the petitioner have been suspended by the second and third named respondents;
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> (C) There has been a cessation by the second and third named respondents of payments and benefits, including health insurance in respect of the petitioner and [Mr O'Connor Senior], made by the company to the petitioner's husband [Mr

O'Connor Senior];

(D) The second and third named respondents have established a competing business to the company unbeknownst to the petitioner;

(E) The second and third named respondents have rewarded themselves with excessive remuneration packages in recent years.'

11. The respondents deny each of these claims.

The present application
12. The respondents have brought the present motion by notice dated 1 July 2015. In it, they seek orders, pursuant to O. 19, r. 27 of the Rules of the Superior Courts ('the RSC') or the inherent jurisdiction of the court, striking out those paragraphs of the petitioner's points of claim that address grounds of alleged oppression at (B) and (C) as just described, on the basis that they comprise material that is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action. In the alternative, the respondents seek an order, pursuant to O. 19, r. 28 of the RSC or the inherent jurisdiction of the court, striking out the petitioner's claim as frivolous or vexatious, in the accepted sense of one that is bound to fail, or as disclosing no reasonable cause of action, or as an abuse of process. In the course of the hearing before me, the respondents acknowledged (correctly, in my view) that the arguments they advance engage rule 27, rather than rule 28, under Order 19 of the RSC.

Other interlocutory reliefs sought
13. The petitioner brought a motion by notice, dated 26 June 2015, seeking an order for discovery of various categories of documentation against the respondents. The parties agree that the discovery application should abide the outcome of this one, since the respondents' principal objection to discovery is that they should not have to discover any documentation relevant only to a ground of alleged oppression not properly before the court.

14. The respondents' strike out motion seeks, in addition or as an alternative, an order staying the proceedings to allow the appointment of an independent third party expert to value the petitioner's shareholding in the company. However, acknowledging that the petitioner cannot be compelled to accept any such valuation and that the court cannot be satisfied at this stage in the proceedings that the remedy offered (the purchase of the petitioner's shareholding at a fair value) is the appropriate relief for the oppression claimed (see *Horgan v Murray* [1997] 3 I.R. 23 at 40; *In re Martialone Ltd*; *Hennessy v Griffin* [2009] IEHC 570 (Unreported, Laffoy J, 23 December 2009)), counsel for the respondents indicated that, sensibly, they are no longer pursuing that relief.

The pleadings objected to
15. The first portion of the petition to which the respondents object is that found under the heading '**(C) Cessation of payments and benefits, including health insurance in respect of the petitioner and [Mr O'Connor Senior], made by the company to [Mr O'Connor Senior]**'. It reads as follows:

> '44. Subsequent to an unsuccessful settlement meeting on 15 February 2012 between the petitioner and [Mr O'Connor Senior] on one hand, and [the second and third named respondents] on the other hand, [the second and third named respondents] ceased payments and benefits, including health insurance in respect of the petitioner and [Mr O'Connor Senior], made by the company to [Mr O'Connor Senior] unlawfully and without any notice and in contravention of a previous agreement between [Mr O'Connor Senior] and [the second and third named respondents] in connection [with] the transfer of 14,400 ordinary shares in the company by [Mr O'Connor Senior] to [Mr O'Connor] on or about 27 February 2007.
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> 45. The said cessation of such payments and benefits was oppressive to the petitioner and in disregard of her interests in circumstances where the petitioner and her husband were reliant on the receipt of such funds in order to exist and on the continuation of the appropriate health insurance and in circumstances where the company has declared no dividends in respect of the ordinary shareholders of the company, including the petitioner. Despite repeated requests, the payments have not been resumed and this is a matter involving separate legal proceedings between [Mr O'Connor Senior] and the company, [Mr Kenny] and [Mr O'Connor], namely: **John O'Connor v Atlantis Seafood Wexford Limited, John Kenny and Mark O'Connor – The High Court [2015 No. 1904P].**'

16. The second portion of the petition to which the respondents object is that comprising paragraphs 46 to 55, under the heading: **'(D) Establishment of a competing business to the company by [Mr Kenny] and [Mr O'Connor]**. Rather than set out those paragraphs in full here, it will suffice to summarise their contents. The petitioner pleads that, on or about 8 May 2012 and unbeknownst to her, Mr Kenny and Mr O'Connor set up another company named Kilmore Quay Fine Foods Limited ('Kilmore Quay'), which shortly afterwards began to trade in the same products as the company from the same premises as the company, using fish sourced by the company; and processing that fish - and marketing, selling and delivering the resulting product - using the company's staff (including directors), premises, equipment and vehicles and benefitting from the company's expenditure on research and development and from its customer accreditation. The petitioner further pleads that Mr Kenny and Mr O'Connor are operating Kilmore Quay to the detriment of the company's own business, including its reputation and goodwill, and, hence, that they are operating that company 'ultimately to the detriment of the [p]etitioner.'

17. For convenience, I will refer to the two portions of the petition just described as the 'cessation of payments' and 'competing business' pleas, respectively.

18. Though not strictly relevant in the context of the present application, it is fair to note that each of these two grounds of oppression is denied by the respondents (along with all of the others). On the cessation of payments plea, the respondents admit that the company stopped making payments to Mr O'Connor Senior but deny that this was done either unlawfully, without notice, or in breach of any agreement. On the competing business plea, the respondents admit that they established Kilmore Quay but plead that they did so to sell 'value added' seafood to large retailers, whereas the company sells fresh fish to the food service sector, so that there is no overlap between the two businesses; the company is fully and properly remunerated for the services that it provides to Kilmore Quay; and, overall, the former is benefitting, rather than suffering, financially from the existence and operations of the latter.

19. The respondents' points of defence commence with three separate preliminary objections. The first is that the proceedings should be struck out as bound to fail, in particular because the respondents have made an open offer, which the petitioner has rebuffed, to purchase her shareholding at market value. That is not a plea that the respondents have pursued in the context of the present

application. However, the second and third preliminary objections advanced by the respondents are those now squarely at issue – *i.e.* that the cessation of payments and competing business pleas are unnecessary, scandalous or prejudicial and, accordingly, should be struck out.

The relevant test

20. The respondents move under both rule 27 and rule 28 of Order 19 of the RSC. In Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd edn, Round Hall, 2012 at para 5-232), citing the decision of Finlay Geoghegan J in *Keaney v Sullivan* [2007] IEHC 8 (Unreported, High Court, 16 January 2007) as an example, the authors note that, in many of the cases, applications to strike out have been brought on the basis of both rules, so that there is an overlap in the approach that the courts take to them.

21. The power conferred by rule 28 is that of striking out a pleading in its entirety; *Aer Rianta cpt v Ryanair Ltd* [2004] 1 IR 506. The rule is thus a blunt instrument, to be used with caution. Rule 27, in contrast, is a precision instrument, permitting the court, where appropriate, to direct the excision or alteration of those parts of any pleading that are unnecessary, scandalous or prejudicial to a fair trial.

22. In *Doherty v Minister for Justice* [2009] IEHC 246 (Unreported, High Court, 15 May 2009) McGovern J explained that there are instances where the extent of the scandalous or vexatious material in a pleading is sufficiently gross or offensive to warrant striking out that pleading in its entirety, without sifting through it to see if any claim in proper form can be identified and maintained. However, I am satisfied that, this cannot be considered such a case on any view. In her points of claim, the petitioner advances five separate grounds of alleged oppression and, though each is denied, only two have been impugned as comprising unnecessary, scandalous or prejudicial material. In essence, the objection in each case is that the pleadings concerned are unnecessary, in that they comprise grounds of complaint that the petitioner has no standing to advance within the rubric of her oppression claim, so that those grounds are irrelevant to that claim and, accordingly, the pleadings containing them should be struck out. In that sense, the application is properly, narrowly focussed on the excision of the relevant paragraphs from the petitioner's points of claim.

23. The test for the application of rule 27 to unnecessary or scandalous pleadings finds its most authoritative recent restatement in *Ryanair Ltd v Bravofly* [2009] IEHC 41 (Unreported, High Court, 29 January 2009) where Clarke J stated (at para. 4.5):

> 'The primary test used in judging whether a pleading contains unnecessary or scandalous matters is the relevancy of the matter pleaded to the proceedings between the parties; whether the pleadings concerned seek to introduce extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief claimed.'

And later (at para. 5.2):

> 'A court should not lightly exclude matters from pleadings where there is at least some reasonable possibility that the material pleaded could be relevant. Matters should only be excluded where it is clear that such pleading is irrelevant.'

24. The respondents acknowledge, correctly I believe, that in considering whether to strike out part of a pleading in an application under s. 205 of the 1963 Act (or s. 212 of the 2014 Act), either under o. 19, r. 27 of the RSC or in exercise of the court's inherent jurisdiction the test to be applied is that identified by Keane CJ in *Re Via Net Works (Ireland) Ltd* [2002] 2 IR 47 (at 52) in the separate but related context of an application to strike out a petition for relief under s. 205 of the 1963 Act as an abuse of process, namely, whether, assuming the petitioner were to succeed at trial in establishing the particular facts pleaded, those findings would entitle her (or contribute to her entitlement) to relief under s. 205 of the 1963 Act (or s. 212 of the 2014 Act, as the case may be).

The arguments

25. On the cessation of payments plea, the respondents advance the following arguments. First, they submit that the petitioner does not have standing to raise issues on behalf of her husband. Second, they point to the text of s. 205 of the 1963 Act which confers standing to apply on a member only where the affairs of the company are being conducted, or the powers of its directors exercised, in a manner oppressive to, or in disregard of the interests of, any of its members. In that regard they argue that, while standing may extend beyond a member claiming oppression or breach of any member's interests *qua* member to one claiming oppression *qua* director (*Re Murph's Restaurants Ltd* [1979] ILRM 141), it extends no further; see, *e.g.*, Courtney, *The Law of Companies* 4th edn (Dublin, 2016) at [11-033].

26. The respondents' argument on the competing business plea is that it amounts to a claim against them by the petitioner that they have damaged the company's interests, which claim is not actionable at the suit of the petitioner as an individual shareholder but only at the suit of the company itself. They point out that it has been the law since the establishment of the rule in *Foss v Harbottle* [1847] 2 Hare 461, which stipulates that, where the company has been wronged, the company, and not any of its shareholders, is the proper person to institute proceedings.

27. The respondents argue that the said plea amounts to an allegation of the kind at issue before the Supreme Court in *Re Via Net Works Ireland Ltd* [2002] I.R. 47 and which Keane CJ dealt with in the following way (at 56)

> 'In any event, it is difficult to see how the allegations made by the petitioners, even if they were established, could constitute a case of oppression or disregard of their interests within the meaning of s. 205(1). They are, in the main, claims that the respondents are running the company in a manner which is damaging to the interests of the shareholders. It has been the law, however, since the venerable decision in *Foss v. Harbottle* (1843) 2 Hare 461 that only the company can maintain proceedings in relation to wrongs done to it and that neither the individual shareholder nor any group of shareholders has any right of action in such circumstances. That rule was emphatically re-affirmed by the decisions of both the High Court and Supreme Court in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166. There are undoubtedly well established exceptions to the rule, but it is clear that this case does not come within the meaning of any of them.'

28. The dictum just cited was subsequently applied by the High Court in *Flanagan v Kelly* [1999] IEHC 116 (Unreported, O'Sullivan J, 26 February 1999) and *Re Martialone Ltd; Hennessy v Griffin*, already cited.

29. While the respondents acknowledge that there are exceptions to the rule in *Foss v Harbottle*, such as the entitlement of a member to bring an action to vindicate his or her personal rights (subject to the rule against claims for reflective loss) or, in appropriate circumstances, to bring a derivative action, they submit that no such exception arises here. Thus, the respondents contend, the plea concerned relates to a cause of action that the petitioner cannot bring and, as such, is one that should be struck out as unnecessary - that is to say, irrelevant - to the determination of the petition, or one that it would be an abuse of process to

permit the petitioner to maintain.

A Quasi-partnership company?
30. In response to these arguments, the petitioner asserts that the company is, in reality, a quasi-partnership to which different principles must apply. A quasi-partnership may be found to exist where a relationship of equality, mutuality, trust and confidence, based on a personal relationship, subsists in a private company; *Re Murph's Restaurants Ltd* [1979] ILRM 141 (per Gannon J at 150).

31. As Courtney explains, in his text already cited (at para. [11-040]), in a quasi-partnership private company, each quasi-partner member is entitled to: (a) participate in its management (*Re Murph's Restaurants Ltd*); (b) expect his or her fellow quasi-partner members to act in good faith (*Irish Press plc v Ingersoll Irish Publications Ltd* (Unreported, High Court, Barron J, 15 December 1993); and (c) object to any fundamental change in the direction of the company's business activities (*Re Tivoli Freeholds* [1972] VR 445). A breach of any of these possible entitlements can result in either a petition to wind up the company on the just and equitable ground or an oppression petition. In Courtney's words:

> '[s]uch a finding may result in members and directors being found to be restrained on equitable grounds from enforcing rights found in the "black letter of the law". In such companies, acts or omissions may be found to amount to oppression or disregard of members' interests, by reasons of equitable considerations; formal rights may be forced to give way to equitable principles implied from the law of partnership.'

32. The respondents counter that the petitioner had neither pleaded nor directly averred that the company is a quasi-partnership until that argument was canvassed for the first time in her written and oral submissions on the present application. They point out that they do not accept that it is and add that, even if it were, that would not negative the application of the rule in *Foss v Harbottle*.

Conclusion
33. The petition contains no express plea that the company is a quasi-partnership, although it might be said that this is an argument of law, which does not require to be pleaded, rather than a material fact, which does. At paragraph 15 of the petition, the petitioner pleads that company was run as a family business and that a relationship of trust and confidence existed between the relevant family members in that regard. The petitioner's grounding affidavit contains an averment to the same effect at paragraph 22. Paragraph 31 of the petitioner's points of claim, delivered on 13 March 2015, contains essentially the same plea, couched in the present tense. The assertion of such a relationship might otherwise arise as an inference from the material circumstances that are pleaded and averred to (*i.e.* the role of the petitioner's husband as a founder of the company, and the status of the second and third named respondents as the petitioner's brother-in-law and son, respectively *etc*.). I do not purport to rule on any such argument. I merely acknowledge that it is, in my view, at least a tenable one.

34. That being so, then it is equally tenable that both the 'cessation of payments' and the 'competing business' pleas may speak to issues of exclusion from participation in the company's management; bad faith on the part of the company's directors; or non-consultation on a fundamental change in the direction of the company's business activities. Again, I do not purport to adjudicate on the existence, much less the merits, of any such issue. I simply acknowledge that there is a tenable argument that one or more of them does arise.

35. Contrary to the respondents' submission, it does not seem to me to be a question of whether the principles applicable to a quasi-partnership company represent a newly proposed derogation from (or the negation of) the rule in *Foss v Harbottle*. In my view, those principles and that rule address two different things. The former relate to the circumstances in which formal rights may be forced to give way to equitable principles implied from the law of partnership where oppression or disregard of members' interests is alleged. The latter identifies the company, rather than any of its shareholders, as the proper person to institute proceedings where a wrong has been done to it. Hence, the former principles operate independently of, rather than as a qualification upon, the latter rule.

36. Applying the test identified by Clarke J in *Ryanair Ltd v Bravofly*, already cited, since the allegations concerned could, therefore, be material to the relief claimed, and since there is at least some reasonable possibility that the material pleaded could be relevant to those issues, the pleas at issue are not clearly irrelevant and, having met that relatively low bar, cannot be excluded.

37. In the course of the hearing of the motion, I asked the parties to address me on the implications of the apparent overlap between the petitioner's 'cessation of payments' plea and the acknowledged existence of separate proceedings in which it appears – although I have not seen the papers – that the petitioner's husband seeks damages for breach of contract arising out of substantially the same facts. I was concerned about the extent to which it might be suggested that an adjudication upon the same facts in two separate sets of proceedings could give rise to irreconcilable judgments or, as a slightly different matter, the extent to which the proceedings tried second in time might perhaps be viewed as amounting to an impermissible collateral attack upon the relevant finding of fact in the proceedings determined first. While I am grateful for the parties' very helpful submissions on the point, on reflection it seems to me that this is first a question of case management and, second, a matter for legal argument at the appropriate stage should any such issue actually arise. I therefore conclude that the question is irrelevant to the determination of the present motion and to the conclusion I have reached upon it.

38. For these reasons, the respondents' application to strike out the relevant parts of the petition is refused. I will hear the parties on the appropriate consequential orders.