THE HIGH COURT

[2016 No. 2 COS]

IN THE MATTER PARK MAGIC MOBILE SOLUTIONS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

AND IN THE MATTER OF SECTION 173 OF THE COMPANIES ACT 2014

ON THE APPLICATION OF FERGAL BRADLEY, FIDELMA RUSSO

AND (BY ORDER) SARA JANE HOLMES WOODHEAD

BETWEEN

FERGAL BRADLEY, FIDELMA RUSSO

AND (BY ORDER)

SARA JANE HOLMES WOODHEAD

APPLICANTS

AND

PARK MAGIC MOBILE SOLUTIONS LIMITED

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 9th day of May, 2017.

1. The applicants seek a declaration that they were at all material times shareholders in the respondent company, Park Magic Mobile Solutions Limited ("the Company"), a limited liability company incorporated in the State on 8th March, 2005, with registered offices at Riverfront, Howley's Quay, Cork. The applicants also seek consequential orders that the Company take all steps to rectify the share register to show their respective shareholdings and otherwise rectify the register.

2. The originating motion also sought a direction that all decisions made at an Extraordinary General Meeting of the Company on 15th June, 2012, be declared invalid or set aside, but it is accepted that such order may not be made on the motion.

The statutory context

3. A company is obliged by law to keep a register of its members, on which is entered the names and addresses of those members, the number and type of shares held by each, and the date on which the person was entered in the register as a member and on which any person ceased to be a member: section 169(1).

4. A company is required to keep the register up to date, and to enter the relevant amendments within 28 days after the date a member" "ceased to be a member": section 169(4).

5. The primary relief sought is pursuant to s. 173 of the Companies Act 2014 ("the Act"), subs. (1) of which provides as follows:

> "(1) If—
>
> (a) the name of any person is, without sufficient cause, entered in the register of members or omitted from it, in contravention of subsections (1) and (3) of section 169, or
>
> (b) default is made in entering on the register, within the period fixed by subsection (4) of section 169, the fact of any person's having ceased to be a member,
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register."

Relevant facts

6. Fergal Bradley, the first applicant, was, until the matters to which this application relates, a shareholder in the Company holding a mixture of "A" shares, "B" cumulative preference shares and "A" preference shares.

7. The second applicant, Fidelma Russo, held "A" ordinary shares and "A" preference shares.

8. The third applicant is the executrix in the estate of her deceased husband, David Fitzgerald, who held "A" ordinary shares and "A" preference shares. She was substituted as applicant by my order of 29th November, 2016.

9. The application the subject matter of this judgment relates to agreements entered into on 2nd September, 2011 and 22nd November, 2011 in the form of a share purchase agreement with E-Code Innovation Limited ("E-Code") for the transfer by the first and second applicants and by David Fitzgerald of their entire shareholding in the Company for a combined purchase price of €1,350,000.

10. The transaction for the sale of the shares did not complete and the consideration was not paid.

11. The share register of the Company was amended to reflect E-Code as the owner of the relevant shares agreed to be sold by the agreements made in September and November, 2011. The applicants claim that the amendment to the register was done in error and without sufficient cause, and seek rectification of the register.

12. E-Code is not registered as owner of the shares in the Companies Registration Office ("CRO") and has not executed the necessary documents to complete registration in the State Register.

13. E-Code has confirmed in writing that it does not consider that it has any interest in the shareholding of the Company, and it does not "consider itself" to be a shareholder in the Company.

14. The Company denies that any error is contained in the register of a type capable of rectification under s. 173 of the Act.

The law
15. It is convenient to examine the legal principles behind the operation of s. 173 before dealing with the factual basis of the application.

16. Section 173 of the Act provides for the rectification of the share register where errors have arisen. An application to effect such rectification may be made to the court by any aggrieved person, members of the company, or by the company itself.

17. Laffoy J. considered the provisions of s. 122 of the Act of 1963 in Re Olde Court Holiday Hostel Limited: *Trehy v. Murtagh & Ors.* [2006] IEHC 424, where she said:

> "In broad terms, the jurisdiction to rectify is a discretionary remedy, which empowers the court to rectify particulars which have been entered in the Register 'without sufficient cause'."

18. Laffoy J. approved the resume of the law in the then current edition of Courtney's The Law of Private Companies [2nd Ed] at para. 15.023 *et seq*. The third edition of Courtney's text now contains the relevant statement of the law, and is dealt with in chapter 8, paras. 8.022ff.

19. Laffoy J. directed the rectification of the register in respect of one entry, but not the other because she regarded the affidavit evidence as conflicting and unclear.

20. Laffoy J. also considered the jurisdiction in *Banfi Limited v. Moran & Ors.* [2006] IEHC 257 where her focus was the power of directors to refuse registration.

21. Because the jurisdiction engaged by the court under the relevant provisions of the Act of 2014, are broadly similar to those under the provisions of s. 122 of the Act of 1963, I consider the judgments of Laffoy J. to be authoritative.

22. The court's jurisdiction is wide, and it may determine questions of title in the course of an application under section 173. At para. 9.066 of the third edition of his text Courtney states in broad terms that "the court may decide any question of title" on an application under the then relevant provisions of section 122(1). The Court of Appeal of England and Wales in *Re Hoicrest Ltd.* [2000] 1 W.L.R 414 considered the nature of the jurisdiction and emphasised the wide powers of the court under the English equivalent of s. 173, by which a court may:

> "… decide any question in relation to the title of a person who is a party to the application to have his named entered in or omitted from the register…and generally may decide any question necessary or expedient to be decided for rectification of the register."

23. Mummery L.J. noted a limitation in that summary proceedings may not always be suitable for the determination of disputes of fact. That observation was also made by Laffoy J. in *Banfi Limited v. Moran & Ors*.

24. The power to determine questions of title seems to me to include the power to determine the question of whether the legal title has transferred, or if appropriate, where the beneficial interest lies.

The agreements to sell
25. I turn first to deal with the agreements to sell the shares and the extent to which it can be said that the agreements did not have the effect for which the applicants contend, and that the shares have not been transferred.

26. Three agreements were made, on 2nd September, 2011, and two made on 22nd November, 2011, by which the applicants agreed to sell their shareholding in the Company to E-Code. Whether these agreements, and the events that happened consequent upon the making of the agreements, amount to an agreement to transfer shares which remains executory and whether it had the effect that the shareholding was transferred as a matter of law is the first question to be determined.

27. By agreement made in writing on 2nd September, 2011, between E-Code of the one part and Fergal Bradley of the other part, there was recited an agreement on the part of E-Code to purchase from Mr. Bradley all of his shares in the Company as set out in the Schedule. Agreements in identical form were made in writing on 22nd November, 2011, between E-Code of the one part and Fidelma Russo of the other part and between E-Code and Mr. Fitzgerald.

28. The operative part provided as follows:

> "Sale and Purchase
>
> The Vendor agrees as owner to sell and the Purchaser agrees to purchase the Shares with effect from the date hereof free from all liens charges and encumbrances and with the benefit of all rights and advantages thereto belonging or accruing for the consideration hereinafter specified."

29. The consideration was identified in the Schedule to be the aggregate amount therein set out, payment to be made of the first moiety on or before 8th December, 2011 and the balance on or before 8th March, 2012. The agreements with Fidelma Russo and David Fitzgerald were in identical terms, save that the entire consideration was to be paid on or before 8th March, 2012.

30. Clause 3 provided for completion as follows:

> "Completion of the sale and purchase of the Shares shall take place at any time within 6 months of the execution hereof and on signing the stock transfer forms, subject to the purchaser remitting the consideration as stated in the Schedule, whereupon the Purchaser may direct, the execution of the stock transfer forms in respect of all the shares, and the vendor shall hand the purchaser the relevant Share certificates." [Punctuation in the original]

31. The agreements with Fidelma Russo and David Fitzgerald provided for completion to take place in the same manner within three months from the date of each agreement.

32. The agreements contained a standard provision for the execution by the vendor of all further assurance necessary to give effect to the terms of the agreement. Such is implied as a matter of law: In *Skinner v. City of London Marine Insurance Corporation* [1885] 14 QBD 882, Brett M.R. identified an implicit obligation on the part of a transferor to do all that is necessary to enable the transferee to be registered as a member.

33. The agreements were signed by the vendors in the presence of their respective solicitors and by a person duly authorised to sign on behalf of E-Code.

34. The agreements for the sale of the shares both preference and ordinary were ratified at a meeting of the Board of the Company on 28th November, 2011, by majority of those present and voting.

Transfer of shares: Table A

35. The applicants argue that the legal requirements for the transfer of the shares were not met, as the instruments were not signed by them, nor stamped. This argument engages a consideration of the means which the Company has provided in its articles of association for the effective transfer of a shareholding.

36. The governance of the Company is regulated by Table A of the Companies Act 1963, with some variations. Article 5.7.4.3 makes provision for the sale of ordinary shares and created a pre-emption right in the other holders of ordinary shares by which the shares were to be offered to existing holders of ordinary shares pro rata to their respective shareholders.

37. Article 10 of the articles of association [Table A with variations] provides that an instrument of transfer of a share "need not be executed on behalf of the transferee and need not be attested". Therefore, the transfer of the shares was capable of being effected by the execution by a transferor of an instrument of transfer not under seal. This displaces the standard Article 22 of Table A.

38. Section 2 of the Stock Transfer Act 1963 provides that a transfer of shares requires to be executed by the transferor only and does not need to be attested.

39. Courtney says at para 9.013 that as a matter of general law, upon the execution of a share transfer, the transferor is obliged to give the transferee the share certificates, and that unless the share transfer agreement provides otherwise the general rule "is that a transferor is not obliged to procure the registration of the share in the name of the transferee".

40. In the present case the instruments were not executed by E-Code.

41. For the reasons stated, the transfer of shares may be effected by an instrument executed by the transferor and no requirement exists, as a matter of general law or under the articles of the Company that the instrument be executed by the transferee.

42. Section 79 of the Companies Act 1963 and s. 66 of the Act of 2014, make it clear that a share in a company is an interest in the nature of personalty, "and shall not be of the nature of real estate". A share is a choses in action, an intangible interest, but not one the transfer of which requires to be made in writing. However, the articles of the Company do require that a share transfer be effected by instrument in writing, and this derives from s. 81 of the Act of 1963, by which a "proper instrument of transfer" is to be delivered to the Company to reflect a transfer of shareholding. Article 23 of the model Table A provides:

> "Any member may transfer all or any of his shares by instrument in writing in any usual or common form which the directors may approve.

43. The transfer to E-Code was done by instrument in writing.

44. Stamping is a Revenue requirement, with stamp duty being payable on a share purchase: *Re Motor Racing Circuit Limited* (Unreported, Supreme Court, Blayney J., 31st January, 1997). Requirements under the Stamp Duties Consolidation Act 1999, may have the effect that the company or an officer of the company can be liable for a penalty for registering an instrument of transfer which has not been stamped.

45. In *Re Charles Kelly Limited: Kelly v. Kelly & Anor* [2010] IEHC 38, Laffoy J. quoted with approval the decision of the Court of Appeal of England and Wales in *Nisbet v. Shepherd* [1994] 1 BCLC 300, to the effect that a stock transfer form which omitted to state the consideration for the transaction was capable of being validly registered. While the instrument was chargeable with stamp duty, no obligation arose that the company would require stamping before it would accept to register an instrument. No legal requirement exists that the instrument be stamped for an effective transfer.

The requirement for Board/Company approval

46. The Board of the Company was given the share transfer forms, dated 22nd November, 2011 and executed by the applicants/transferors. In each case, the transfer form contained the following attestation clause:

> "I/we hereby transfer the above security out of the name(s) aforesaid to the person (as named below)."

47. In each case, E-Code was identified as the transferee.

48. As was required by the articles of association, the agreement for the sale of the shares was approved by the Board of Directors of the Company on 28th November, 2011.

49. The relationship between the applicants and the founding shareholders of the Company, Philip Hayes and Paul Fitzgerald, had become strained since the Company was first incorporated in 2005, and the applicants became shareholders as a result of a dilution of shareholdings following investments in the Company since its foundation. The matter is further complicated by the fact that the first applicant is married to a sister of Philip Hayes, and the second applicant is a sister of Mr. Hayes.

50. In September, 2011, the applicants, and another shareholder who ultimately opted not to sell his shares, notified the existing shareholders of their intention to sell and, while some argument arose in the course of the hearing as to observation of the pre-emption obligations, I am not concerned with that question in this application. The uncontroverted evidence points to the existing shareholders agreeing to the share purchase agreement, albeit it seems that some of them were reluctant to agree. Mr. Hayes at para. 48 of his affidavit sworn on 1st February, 2016, confirms that he and Mr. Fitzgerald "reluctantly signalled our agreement" to the share purchase agreement, and the minutes of the meeting on 28th November, 2011, are clear that the shareholders agreed and the Board of Directors raised no objection.

51. I am satisfied that the necessary proofs to deal with the pre-emption rights were met, and that therefore there was no impediment arising from the Company's articles of association to the sale of the shares

52. It cannot be said in those circumstances that the registration of E-Code as shareholder of the Company was done without cause. The instruments in writing were signed by the transferors and handed over to the transferees. The requirement of Board approval was satisfied.

53. The EGM on 28th November, 2011, agreed to a resolution that Liam Foy and Myles Standish, both of whom had an interest in E-Code be appointed directors and that two other directors including the first applicant, Fergal Bradley, resigned as directors. The Company argues that it understood the agreement for the transfer of the shares to be unconditional and to have been effected by those events and agreements. At the meeting it is said "everybody proceeded on the basis that E-Code replaced the applicants as shareholders". At para. 64 of his affidavit, Mr. Hayes says that "there was nothing conditional about the transaction".

54. For several years too, it seems that the applicants asserted that the shares had been transferred, and although the agreements were not completed by the payment of the consideration, the effective transfer of the shares occurred as a matter of private and company law by the execution of the relevant document, by the combination of the agreements and the provisions of Table A.

55. Mr. Hayes says that from the beginning of December, 2011, immediately after the EGM and up to April 2012, E-Code took over and controlled the business of the Company, engaged and communicated with third parties and customers and State bodies. This was done because E-Code, which operated primarily through Mr. Foy, had by then become the majority shareholder of the Company.

56. However, the form B10, the statutory form to register a change in directors was not lodged with the CRO, and the reason for this took on some importance in the course of the affidavit evidence. Mr. Hayes says that he and the other minority shareholder were given "the run-around" and that a deliberate choice was made by Paschal Bergin, who had been appointed company secretary and who had an interest or investment in E-Code, not to lodge the B10 because it soon became clear to him that a difficulty had emerged with Mr. Bradley and the other two applicants and that it was possible in those circumstances that "they may not close as the sale of the shares after all".

Consideration not paid

57. E-Code has not paid the applicants for their shares. The primary reason for which the applicants contend that the application under s. 173 is appropriate is that the consideration was not paid, that therefore E-Code is not beneficially entitled to the shares and is wrongfully registered as owner.

58. On the affidavit evidence, there seems to have been a number of motives or reasons why E-Code did not pay the agreed consideration for the transfer of the shares. These are irrelevant to the consideration before me. In proceedings bearing record number 2012 No. 7939, the applicants sought specific performance of the agreement to purchase their shareholdings. The grounding affidavit of Mr. Bradley sworn on 5th January, 2016, on his own behalf and on behalf of the original third applicant, confirms that the litigation did commence but that it "was not successful from the applicants' point of view". No further evidence is available as to the result of that litigation. No court order has been exhibited.

59. The applicants argue the agreements were conditional upon the payment of consideration, and while the agreements were executory, there was no clear provision by which it was agreed that title would not pass until the consideration was paid. Clause 3 of the agreement provided that completion of the sale would take place within six months, *and* "on signing the stock transfer forms". The agreement has the appearance of being conditional upon the purchaser remitting the consideration, but for reasons which are not clear, the applicants executed a share transfer form, handed it to the Company, represented E-Code as being the owner of the shares and thereby acted to waive the requirement of the payment of consideration before the transfer of legal title.

The suitability of the present process

60. Under s. 173 a court can determine questions of the legal and beneficial ownership of the shares. It is within the competence of a court hearing an application under s. 173 to direct the rectification of the share register to reflect as legal owners the persons who have a beneficial interest in the shareholding. The application by its nature is by originating motion and grounded on affidavit or affidavits. As with any application on affidavit a court cannot resolve disputed issues of fact in the absence of cross-examination, but it is easy to envisage difficulties that might arise even were cross-examination to take place as the application by its nature is summary in form, and would admit of the type of application where a court might have to construe documents or resolve legal argument.

61. The Company argues that the statutory mechanism provided by s. 173 may not be availed of to now "revisit" the matter of the share transfer. The Company places particular emphasis on an email sent on 9th of March, 2012 at 5:45 in which the first applicant directed the second applicant to disregard any further correspondence from Mr. Bergin "as he appears not to realise that the shares were transferred in November and payment is now due. It is as simple as that". The Company agrees that the matter is simple: the transfer was agreed and effective.

62. The Company proceeded on the basis that E-Code was a shareholder, as certain members of E-Code came to take on a central role in the Company. It argues that if an issue arises it is to be resolved between the applicants and E-Code, and is not an issue for the Company.

Summary and conclusion

63. The facts of the present case are complex, although much of the affidavit evidence is irrelevant to the issues at hand. The jurisdiction of the court is to correct an error in the register or to direct correction by the Company of that error. Rectification can be ordered if the name of a person appears without sufficient cause.

64. It bears comment that E-Code is not a respondent or notice party to these proceedings. The applicants say that it would be unnecessary and burdensome to require E-Code to take part in the proceedings, as it, by its letter of 13th June, 2012, has confirmed that it did not execute a stock transfer form or apply for registration in the CRO in respect of the transfer of shares, and has accepted that it had no right to vote at an AGM. That letter was signed by Liam Foy on behalf of E-Code and contains an implicit, but not express, acknowledgment that E-Code does not regard itself as having a beneficial ownership in the Company. It is at best an acknowledgement that insofar as E-Code is registered as a member of the Company, that it considers registration is not now correct. It does not determine the issue of whether registration was done without sufficient cause, but may resolve the issue between the applicants and E-Code, and mean that E-Code must now take steps to effect a transfer of the shares back to the applicants, and that it is a bare trustee of the shares.

65. An application under s. 173 is an attractive and cost effective way of determining questions of title, and in general it would seem that the legislation does not envisage a court refusing to exercise its jurisdiction save in circumstances where it found itself unable to resolve the matter by summary application. This application is one such. The complexity of the evidence highlights what I believe to be the true dispute between the parties. Leaving aside the role that E-Code might take as a member or a putative member, there is a significant and ongoing dispute between the current members of the Company, and those claiming to be members. That dispute cannot be resolved in this application. The question of the beneficial ownership of the shares is one between these applicants and E-Code.

66. It is unsatisfactory that it was not put before me on affidavit more complete details of the result of the litigation commenced by these applicants against Mr. Foy, and all I have been told is that the application was not successful. It seems that I can fairly extrapolate that the proceedings were for specific performance, presumably for an order that Mr. Foy and/or E-Code should discharge the consideration agreed to be paid or the shares.

67. E-Code has accepted, albeit not in the clearest possible terms, that it has no beneficial interest in the shares, and that the relevant legal documents were not executed. It has not confirmed that it was not entitled to be registered.

68. In simple terms the applicants have failed to obtain an order that E-Code or Mr. Foy or other persons involved in E-Code should pay the consideration agreed to be paid for the shareholding. The beneficial interests therefore would seem to remain with the three applicants, and insofar as it can be said that the beneficial interest in the shares must never have passed, E-Code holds any interests that it has in the shares on trust for the three applicants. I do not however have before me the two parties to that trust, the person holding the legal title and the beneficial owners. If the applicants are correct in their factual assertions they remain the beneficial owners, but I do not believe the application as presently constituted permits me to make an order that the legal owner should execute any documents to properly effect a transfer back to the three applicants of its shareholding.

69. The fact remains that E-Code is registered as owner of the shares because the share register does not reflect beneficial title, and the current registration was done with cause, on the delivery of all necessary instruments sufficiently executed for that purpose.

70. The beneficial interest may not have passed, but I am not satisfied on the facts before me that the Company has wrongly or without cause registered E-Code as owner of the shares. I am therefore not satisfied to make an order under section 173. Even were I so minded, I consider that the factual differences between the parties is of such a degree that it would be impossible to resolve the matter on affidavit.

71. If E-Code holds the shares on trust, I have no power in this application to make a direction that it should execute a transfer of the shares so held on trust to the persons who are entitled.

72. I refuse to make the relief sought.