THE HIGH COURT

[2018 No. 9980 P]

BETWEEN

SAGGART MOTORS LIMITED

PLAINTIFF

AND

NG MOTORS LIMITED AND NIKOLAI FRITSCH

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 29th day of May, 2019.

1. There are two notices of motion before the court. The first in time is a notice of motion dated 16 November 2018 (the same date as the issue of the plenary summons) on behalf of the plaintiff seeking that the defendants deliver up certain motor vehicles and in the alternative, prohibiting the defendants from taking any steps to sell or dissipate any of the vehicles.

2. Thereafter, on 15 February 2019, the plaintiff's second motion seeks orders pursuant to RSC O. 15, r. 39 (14) and (15) seeking that Mr. Darius Gasperavicius be given conduct of the proceedings and essentially that the proceedings continue as a derivative action.

3. By order of MacGrath J. on 16 November 2018, in granting *ex parte* relief, the court made orders directing the defendant to deliver up certain vehicles being held by them and an order prohibiting sale or dissipation in terms sought within their notice of motion.

4. It is noteworthy that counsel on behalf of the plaintiff gave an undertaking as to damages on behalf of that entity (as opposed to Mr. Gasperavicius) before MacGrath J.

5. Within these proceedings, there is a grounding affidavit of Mr. Gasperavicius dated 15 November 2018, a reply of the second named defendant on 23 November 2018, an affidavit grounding the second motion on 11 February 2019, of Mr. Gasperavicius, sworn on 11 February 2018, which also appears to deal with the first notice of motion and a further replying affidavit of Mr. Gasperavicius filed on 14 March 2019.

6. There are a number of unusual features in respect of this application. I propose initially to deal with the notice of motion being first in time and the two affidavits of Mr. Gasperavicius that essentially deal with the salient points in these proceedings. Much of the material contained within his affidavits to the first motion would appear to me superfluous to the issues upon which I am required to decide.

7. In any event, the plaintiff was established in May of 2015 and is in the business of selling motor vehicles. It has two directors, Mr. Gasperavicius, who holds a 49% shareholding in the company, and the second named defendant who has a shareholding of 51% in the company.

8. It is noteworthy that within the affidavit of Mr. Gasperavicius grounding the application for *ex parte* relief, he does not make the usual averments within his means of knowledge clause as one would do when swearing an affidavit on behalf of a company, to the effect that he swears it with the consent and authority of that company and from an examination of the books and records of that company. He does not do so and I regard this as significant. He does aver that he is a director of the plaintiff and he makes the affidavit on behalf of that company. He is a 49% shareholder of that company – the remaining 51% shareholder of the company being the second named defendant who (as his affidavit will disclose) objects in the strongest terms to these proceedings being maintained.

9. Counsel for the plaintiff has asserted that this is in essence an inter-partnership dispute and should be considered in those terms. That is not what is sought on the face of any application before me. It may inform the background of this dispute but it is not amongst the reliefs sought. In any event how those acting for the plaintiff can appear on its behalf when they do not have the authorisation of that company (quite the reverse), whilst in reality acting for Mr Gasperavicius who holds a 49% shareholding, was in my view never satisfactorily explained.

10. In essence, the initial complaint is that certain cars acquired by the plaintiff were moved; essentially the first named defendant sold cars on behalf of the plaintiff for commission. The cars appear to have been moved, even on the affidavit of Mr. Gasperavicius, on the basis that the plaintiff's business lease was up and they were moving to alternative premises. Photographs were taken and the return of the vehicles is now sought.

11. Furthermore, on 29 October 2018, apparently it is alleged that the first named defendant was taking steps to sell some of the plaintiff's vehicles and solicitors letters were written to that effect. No undertaking being forthcoming, the interlocutory relief was obtained before MacGrath J. as set out above.

12. The replying affidavit is sworn by the second named defendant. He confirms he is a holder of a 51% shareholding in the plaintiff company with Mr. Gasperavicius the holder of a minority shareholding at 49%, there are only two directors of the company. The second named defendant immediately takes issue how, as a majority shareholder, a minority shareholder (Mr. Gasperavicius) is entitled to bring the proceedings in the name of the plaintiff company. He notes that interlocutory relief before MacGrath J. was sought. He avers that the proceedings had not been authorised by the board of directors of the plaintiff company, and are barred in law.

13. More pertinently, he asserts (and this is elaborated upon in correspondence) that Mr. Gasperavicius had, when proceedings issued and *ex parte* interlocutory relief obtained, not sought leave of the court to commence proceedings by way of a derivative action in accordance with RSC O. 15, r. 39 and accordingly that the proceedings are not maintainable in those circumstances.

14. He also details other complaints including the withdrawal of certain monies totalling some €14,762.40 which it was confirmed within an exchange of correspondence between the parties has been utilised for the discharge of legal fees owed to the solicitors whom Mr. Gasperavicius now instructs. That payment was not sanctioned by the plaintiff company.

15. I propose to now deal with the issues concerning the derivative action because if I were to find in favour of the defendants in

that regard, then it would seem that the court would not need to consider the remaining issues.

16. As set out above, MacGrath J. gave interim relief on 16 November 2018. On 19 November 2018, Gary Irwin Solicitors for the defendants, immediately wrote pointing out that Mr. Gasperavicius does not act on behalf of the plaintiff company and also pointing out that a minority shareholder cannot issue proceedings on behalf of a limited company in the absence of the leave of the High Court to commence a derivative action. They also point out that in order to obtain the leave of the High Court a minority shareholder must demonstrate that one of the exceptions to the rule in Foss v. Harbottle [1843] 2 Hare 461 applies and that the High Court has the discretion to grant or refuse the relief. Nor, the letter points out, at any point did Mr. Gasperavicius obtain an order granting him an indemnity from the company in respect of any legal costs.

17. By way of reply, Michelle Cronin & Company, solicitors it is asserted for Saggart Motors Ltd. (again I reiterate taking instructions only from a 49% shareholder Mr. Gasperavicius) state the following: -

> "We are fully aware of the law in relation to minority shareholder oppression and in this regard, Mr. Gasperavicius, in his personal capacity, reserves his position in relation to any possibility of any reliefs available to him. Notwithstanding same, for the purposes of the above entitled application, Mr. Gasperavicius grounds the application in his capacity as director of the company Saggart Motors Ltd. Accordingly, s. 212 of the Companies Act 2014 is not applicable in the present circumstances.
>
> Leave was not sought in respect of Mr. Gasperavicius personally as a minority shareholder but rather relief was sought by a company, whose director was acting in accordance with its fiduciary duties to that company.
>
> The court order was sought and granted on Friday 16th November through the company solicitor, Mr. Gasperavicius on various occasions sought the compliance of your client, Mr. Fritsch. No compliance was forthcoming.
>
> We are satisfied that the director, Mr. Gasperavicius, maintained proceedings on behalf of Saggart Motors Ltd. in circumstances where he is acting in the interests of the company. We note your suggestion that Mr. Gasperavicius should personally initiate proceedings. In circumstances where NG Motors Ltd. were actively seeking to sell property of Saggart Motors Ltd. and in circumstances where no legal nexus exists between Mr. Gasperavicius and NG Motors Ltd., the appropriate plaintiff is Saggart Motors Ltd.
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> Fees were withdrawn from the company account as described."

18. I am not sure that I follow all of the matters set out within that letter and I am very far from satisfied that the matters asserted are sustainable as a matter of law.

19. Counsel for the plaintiff was at pains to assert on more than one occasion that the second motion was really issued in aid of the defendants. If the plaintiff issues a motion, then it is the plaintiff's motion and that plaintiff is obliged to satisfy the court pursuant to its terms.

20. The motion seeking to proceed by way of a derivative action was issued on 11 February 2019, and in my view, it follows from the correspondence exhibited between the parties as to the defendants' insistence for the necessity that an application to proceed by way of a derivative action should have been initiated at the outset.

21. In any event, that application is now before the court. Counsel for the plaintiff has also suggested that as the nature of the dispute was known throughout, the late application to proceed by way of a derivative action (that is after the institution of proceedings, the issuing of the motion and the grant of *ex parte* interlocutory interim relief before MacGrath J.) is simply a matter that has now arisen and which they have elected to do. Moreover, he claims full compliance with RSC O. 15, r. 39 (14) and (15).

22. In any event it is correct that RSC O. 15, r. 39, (14) begins by stating the following:-

> "Where a claim which might be the subject of a derivative action arises in proceedings pending before the Court, the provisions of this rule shall, with the necessary modifications, apply to such a claim…."

23. I cannot determine any matter within the above entitled proceedings that has necessitated a belated application in seeking to proceed by way of a derivative action. The section as I construe it, clearly envisages where issues or matters arise in the conduct of litigation or in a course of proceedings that thereafter make it necessary for an application for a derivative action to be heard. It was perfectly plain on the facts of this case and averred to by Mr. Gasperavicius from the outset that he was a 49% shareholder within the plaintiff company. At no point does he aver to the consent of the company to initiate proceedings.

24. The relevant facts were always known and in my view an application in respect of issuing proceedings as a derivative action should have been pursued, particularly when the initial court application sought interim *ex parte* interlocutory relief.

25. I do not doubt that there is considerable enmity between the parties to this proceeding. But, in my view, Mr. Gasperavicius connot now seek to proceed by way of a derivative action when in my view a derivative action should have been sought at the at the initiation of proceedings and certainly before any interim *ex parte* injunctive reliefs were obtained before the court.

26. By the amendment to O. 15 introduced by SI No. 503 of 2010, subs. 39 (2) and (3) state: -

> "(2) Subject to the provisions of this rule, a derivative action may not be commenced without the leave of the Court, given in accordance with this rule.
>
> (3) An application for leave to commence a derivative action shall be made by Originating Notice of Motion in which is sought:
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> (a) the leave of the Court to commence the derivative action;
>
> (b) where relevant, an order requiring the company to indemnify the applicant in respect of the whole or part of the costs and expenses reasonably incurred by the applicant in conducting the derivative action (including any costs for which the applicant may be made liable in such action), and

(c) any interim relief of an urgent nature".

With regard to (c) above I am not aware of any application of this type before MacGrath J.

27. Thereafter the proofs required to proceed by way of such an action are clearly defined with subs. (3) to (5).

28. Subsection 14 states that where the claim arises in proceedings pending before the court, that a party may be brought by motion on notice in the pending proceedings and the court may make any order it considers just. Subsection 15 requires that the grounding affidavit shall: -

> "(a) set out the grounds on which the applicant claims that the proceedings should continue as a derivative action, and verify any facts and circumstances relied on in that regard; and
>
> (b) set out the nature and extent of the evidence available to support the applicant's claim to be a proper person to continue the proceedings as a derivative action."

29. In the case of *Fanning v. Murtagh & Ors* [2009] 1 IR 551, Irvine J. (in a case which essentially presaged RSC O. 15, r. 39), stated that in any application to grant a plaintiff leave to issue derivative proceedings, that plaintiff, as a minority shareholder, would only be permitted to assert a claim on behalf of the company if he could bring himself within one of the four recognised exceptions to the rule in *Foss v. Harbottle* [1843] 2 Hare 461.

30. Those exceptions provide (at para. 32): -

> "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.
>
> (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."

31. As in the *Fanning v. Murtagh* case, it appears that Mr. Gasperavicius appears to cast his right to maintain a derivative action on behalf of the company under the "fraud against a minority" exception as quoted above. For the avoidance of doubt I have also had regard to the other criteria.

32. Within the same case, Irvine J. quotes from the decision of Finlay Geoghegan J. in *Glynn & anor. v. Owen & ors.* [2007] IEHC 328, in determining that the onus is on the plaintiff when 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."

33. I can find nothing in the papers and in particular the affidavits sworn by Mr. Gasperavicius in respect of both motions as to why no application for him to proceed by way of a derivative action was brought at the outset. In my view, this is not a case where the provisions of RSC O. 15, r. 39 (14) can properly be invoked. That provision envisages where an event occurs in the course of litigation which necessitates such an application. This is not such a case. Counsel for the plaintiff (in reality Mr. Gasperavicius) was clear in his submissions that the motion seeking leave to proceed by way of a derivative action was brought largely to assuage any concerns that the court might have in response to queries raised by the defendant. In my view all the relevant facts were known when these proceedings were issued and more importantly when interim *ex parte* interlocutory relief was obtained before the High Court.

34. The proofs required when an application for a derivative action is sought *ab initio*, are somewhat different and more detailed to that where an application is brought within the course of proceedings. In my view that is due to the fact that in an application within the course of proceedings the criteria set out within RSC O. 15, r. 39 (2), (3) and (4) would be before the court in the sense that the court would be fully appraised of the case before it and therefore the more detailed requirements might duplicate matters somewhat. Here neither is the case. The details are not before the court in respect of either criteria - RSC O. 15, r. 39 (2) or RSC O. 15, r. 39 (14).

35. Were this application pursuant to RSC O. 15, r. 39 (14) being made in the usual context of normal proceedings, the pleadings would be fully available before the court, together with other matters which would enable it to form an opinion. No such documentation is before this Court. On the basis of the three affidavits sworn by Mr. Gasperavicius (not all in respect of the application to proceed by way of a derivative action) and a plenary summons, I find that none justify the failure to institute such proceedings in advance or with the issuing of proceedings in particular in respect of the interlocutory relief obtained. If I am incorrect in this view then I am further satisfied that none of the threshold criteria necessary to establish an entitlement to proceed by way of a derivative action have been met; specifically that none of the exceptions of *Foss v. Harbottle* have been satisfied. Accordingly I am satisfied on the facts of this case and the legal submissions opened before this court that no basis has been established for this matter to proceed by way of a derivative action.

36. There was no evidence before the court in the application seeking *ex parte* interlocutory relief before MacGrath J. of the status of Mr. Gasperavicius, the status of the second named defendant as a 51% shareholder in the company, that the plaintiff to the proceedings had *not* sanctioned this litigation and the possibility of an application for a derivative action was not opened comprehensively (or at all) before him. Of course, in any *ex parte* application, the duty of full disclosure to the court is paramount. The plaintiff company has obtained reliefs in a cause of action it did not sanction and is opposed by the majority shareholder.

37. In circumstances where the disclosure of these matters to MacGrath J. is doubtful, and was not clarified before this Court, and because I can see no basis for Mr. Gasperavicius to have *locus standi* in the proceedings brought for interim interlocutory relief with regard to the motion issued on 16 November 2018, returnable on 19 November 2018. For this reasons and the reasons set out above

this motion should stand struck out.

38. With respect to the notice of motion issued on 11 February 2019, returnable on 15 February 2019, I strike out that motion on the basis that it was improperly brought (there being no valid or other reason why it was not brought prior to the initiation or at the initiation of proceedings), and also, considering the motion simpliciter, in my view none of the exceptions to the rule in *Foss v. Harbottle* have been made out by Mr. Gasperavicius and accordingly both reliefs sought within this motion also stand struck out.

39. I shall hear the parties as to any further orders including an order for costs as required.