Neutral Citation: [2013] IEHC 628

THE HIGH COURT

2013 No. 96 IA

IN THE MATTER OF AN INTENDED DERIVITED ACTION

IN THE MATTER OF EDEN MUSIC LIMITED

BETWEEN

EDMOND KENNY

APPLICANT

AND

EDEN MUSIC LIMITED, DAVID LYNCH AND ROBERT PENDER

RESPONDENTS

JUDGMENT delivered this 6th day of November, 2013, by White, Michael J.

1. By motion dated the 1st August, 2013 returnable for that date the Applicant applied for leave to commence a derivative action on behalf of Eden Music Limited, and has exhibited a draft Plenary Summons.

2. The Company was incorporated on the 13th June, 2007. It has an authorised share capital of one million shares. Fifteen hundred shares have been issued. There are three directors, the Applicant and the second and third named Respondents having five hundred shares each.

3. The main purpose of the company is the operation of a wedding band titled "Eden". The band was a three piece with the Applicant the lead singer and also playing drums, David Lynch the second named Respondent the keyboard player and Robert Pender the third named Respondent the lead guitarist.

4. The band is popular and plays at wedding receptions around the Midlands and has bookings up to November 2014.

5. Unfortunately the relationship between the Applicant and the other band members the second and third named Respondents has irretrievably broken down.

6. The assets of the company are a van and future bookings. The Court is not sure if any equipment is in company ownership.

7. There is a dispute about future bookings if any, made by the second and third named Respondents which may not have been disclosed by them.

8. The Applicant alleges that the second and third named Respondents made payments from the company account without his authorisation, and proceeded to replace him as lead singer and formed a new band called "The Eden Wedding Band" They also stopped payment to him.

9. The second and third named Respondents allege that the Applicant arbitrarily appropriated the company van and removed them from the insurance, and originally agreed to a voluntary winding up of the company and then reneged on this commitment.

10. The Applicant is not singing with the band now but the second and third named Respondents with another singer are fulfilling the engagements. The Applicant's salary has been restored but the amount is in dispute. He is being paid €323 per engagement which the second and third named Respondents state is the net amount of a gross payment of €440. The Applicant alleges he is entitled to €440 net. The Applicant still holds the company van but has stated that it is available to fulfil company engagements.

11. The Applicant alleges that the registration by the second and third named Respondents of a business name "Eden Band" is an attempt by them to convert one of the Company's principal assets to their own use. The Applicant also has concerns about the appearance by the second and third named Respondents at a wedding fair in the Hampton Court Hotel on the 4th August, 2013.

12. The second and third named Respondents deny acting to the detriment of the company.

13. They allege that the working relationship between the second and third named Respondent and the Applicant deteriorated over a period of time and the decision by the Applicant to acquire a catalogue of backing tracks and to purchase musical equipment to facilitate him performing as a sole performer further exacerbated the difficulties.

14. They rely on a letter of the 21st May, 2013 from O'Meara & Co., Solicitors then acting for the Applicant which stated:-

> "We have taken instructions from our client and must point out that our client remains extremely disappointed with the turn of events resulting in the present situation. It is nevertheless correct to say that our respective client's relationship would appear to have reached a point where the continuation of the business would not appear to be possible".

15. The letter went on to say:-

> "No realistic proposal would appear to be made by your clients in respect of same, we can only propose that you proceed immediately to wind up the Company."

16. The relationship between the Applicant and the second and third named Respondents has reached an empass. There are genuine grievances between them which require either resolution by agreement or the intervention by a court.

17. The Applicant is seeking to bring an action in the name of the company and to be indemnified by the company in respect of the costs of that action.

Legal Principles
18. Order 15, Rule 39 (2) as inserted by S.I. No. 503/2010 states:-

> "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.

19. The general principles are set out in *Connolly v. Seskin Properties others* ***[2012] IEHC 332***, where Kelly J. stated

> 1. If a company suffers a legal wrong it is the company itself which must sue in respect of damage resulting from it. That is the rule in *Foss v. Harbottle* [1843] 2 Hare 416.
>
> 2. The reason for the rule is that, in law, a company is a legal person with its own corporate identity. That identity is separate and distinct from its directors and shareholders.
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> 3. As is the case with most legal rules, the rule in *Foss v. Harbottle* admits of exceptions. Were it not to do so, it could work injustice. For example, if a company is defrauded by directors who control it and who hold a majority of the shares, they will not authorise proceedings to be taken by the company against themselves. So the rule in *Foss v. Harbottle* may be abrogated in such circumstances. In an appropriate case, the law permits of a derivative action being taken on behalf of the company with leave of the court. The applicant contends that this is such a case."

20. At paragraph 53 he stated:-

> "The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs were set out with clarity by Peter Gibson L.J. in delivering the leading judgment in the Court of Appeal in *Barrett v. Duckett* [1995] 1 BCLC 243. He said:-
>
> *'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. Where 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.'*

At Paras 54 & 55 Kelly J stated,

Derivative Action: The Test
54. In *Prudential Assurance Company Limited v. Newman Industries Limited (No 2.)* [1982] 1 Ch. 204, the Court of Appeal in England held that before a minority shareholder should be permitted to bring a derivative action on behalf of the company, he *'ought at least be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v. Harbottle'*. In a moment, I will consider the exceptions to the rule in Foss and *Harbottle*. Before doing so, however, I ought to point out that in this jurisdiction, Irvine J., in *Fanning v. Murtagh* [2009] 1 I.R. 551, held that the standard of proof required of an intended plaintiff is that he must establish *'a realistic prospect of success'*. It is accepted by the applicant that that is the more appropriate standard to apply rather than the establishment of a mere *prima facie* case as identified in the *Prudential* case *supra*.

Exceptions to the Rule in Foss v. Harbottle
55. These were dealt with by Irvine J. in *Fanning v. Murtagh* where she said:-

> *'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:-*
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> *(a) an act which is illegal or ultra vires to (sic) 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.'"*

21. In *Fanning v. Murtagh & Ors* [2009] 1 I.R. 551 at p. 552 it was held:-

> "3. That, if the court concluded, on the basis of the evidence and material referred to, that the plaintiff had discharged the appropriate burden of proof, it would then proceed to consider whether there were any discretionary matters which would, nonetheless, justify the refusal of the relief sought. The court might consider, *inter alia*: (i) any delay in the institution of the proceedings; (ii) whether the plaintiff was an appropriate party to maintain the action on behalf of the company (the court might conclude that a plaintiff was 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); (iii) the possible damage that might be done to the company in the course of such proceedings; (iv) whether the plaintiff had an ulterior motive for the maintenance of the action; and (v) whether there was any other remedy available."

22. While initially an objective observation of the activities of the second and third named Respondents reveal the company's asset being threatened, they have gone a long way since to rectify the position, first by restoring monies to the company which they state was for the purposes of the agreed winding up of the company, secondly by restoring the payment to the Applicant of his fee, and continuing to pay a lead singer to fulfil the obligations of the company in relation to bookings that have already been made.

23. The Applicant indicated through his previous solicitors that he was agreeable to a winding up of the company. He removed the company van in controversial circumstances and removed the second and third named Respondents from the insurance. He himself has accepted that it is open to the individual members of the band to operate a new wedding band provided it does not infringe the name of the band operated by the company.

24. This company has very limited resources which are finite.

25. The future bookings of the band are an asset to an extent, but circumscribed by the fact that they can be cancelled and will not ultimately be an asset until performance.

26. It would be to the overwhelming disadvantage of the company if the Court were to permit the Applicant to commence a derivative action on its behalf and to indemnify him in respect of the whole or part of the costs and expenses incurred in conducting the derivative action.

27. The relief is refused.