THE HIGH COURT

[2015 No. 232 COS]

BETWEEN

JURRAS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT,

1963 TO 2014 AND IN THE MATTER OF SECTION 212 AND

SECTION 214 OF THE COMPANIES ACT 2014

BETWEEN

DERMOT CORKERY

PETITIONER

AND

DONAL RING, NOREEN RING AND

JURRAS LIMITED

RESPONDENTS

AND

KELLOR SERVICES (IRL) LIMITED

TRADING AS MUNSTER JOINERY

NOTICE PARTY

JUDGMENT of Ms. Justice Stewart delivered on the 31st day of March, 2017.

1. This is a decision on foot of the defendants' motion seeking leave pursuant to O. 25, r. 2 of the Rules of the Superior Courts directing trial of a preliminary issue, namely the issue of the petitioner's *locus standi* to bring his petition.

2. This matter commenced by way of a petition brought before the High Court on 10th June, 2015, together with the notice of motion seeking directions with regard to the proceedings to be taken on foot of the petition herein. Preliminary directions were made by consent of the parties on 12th October, 2015. Thereafter, points of claim were delivered on 2nd December, 2015, and points of defence were delivered on the 8th February, 2016.

3. The respondents pleaded as a preliminary issue in the points of defence that the petitioner does not have *locus standi* to bring the within petition, as he is not a member of the company. A notice seeking voluntary discovery dated 25th February, 2016, was furnished by the petitioner's solicitors and was followed up by a motion seeking voluntary discovery on 4th April, 2016. This resulted in an affidavit of discovery being sworn by Adrian Hegarty, a solicitor for the respondents, on 3rd May, 2016. The respondents' solicitors sent a request for voluntary discovery on 7th March, 2016, which resulted in an affidavit of discovery being sworn by the petitioner herein on 4th April, 2016.

4. On 14th June, 2016, the respondents issued a notice of motion seeking trial on the following preliminary issue:

> *"1. An Order pursuant to Order 25 rule 2 directing the trial of a preliminary issue of law, namely, the preliminary issue raised in the points of defence of the said Respondents that the Petitioner does not have locus standi to bring his Petition.*
>
> *2. An Order staying the operation of the amended consent order for directions made by the Honourable Court on 25th January, 2016 pending the determination of the within motion."*

5. The notice of motion seeking leave for a trial of a preliminary issue was grounded on the affidavit of Adrian Hegarty, solicitor for the respondent, which was sworn on the 13th June, 2016. There was a replying affidavit sworn by John P. Cahill, the solicitor for the petitioner, on 28th June, 2016. A further affidavit of discovery was sworn by Adrian Hegarty on 15th July, 2016. A supplemental replying affidavit of John P. Cahill was sworn on 13th July, 2016. A second affidavit of Adrian Hegarty was sworn on 18th July. 2016. A third affidavit of Adrian Hegarty was sworn on 18th July, 2016. A second supplemental affidavit of John P. Cahill was sworn on 14th September, 2016. A notice of motion, dated 13th October, 2016, was brought by the petitioner in respect of further & better discovery, which was grounded on the affidavit of John P. Cahill sworn on 10th October, 2016. Adrian Hegarty swore a relpying affidavit thereto on 12th December, 2016.

6. The petitioner was employed by the respondent, initially as a general operative and then later as a window salesman. It appears that, in or around 2004, he was allocated a shareholding in Jurras Limited, the respondent company. There seems to be a dispute as to whether the initial holding comprised of 80 ordinary shares or 53 E-Ordinary shares. The petitioner's employment with the respondents terminated on 25th September, 2014. This occurred following a mutual agreement between the petitioner and his employers which is confidential and has not been disclosed to this Court. The parties appear to agree that the confidential agreement was silent as to the question of the petitioner's extant shareholding in the company at the time his employment was terminated.

7. The respondents maintain that, at the time of his employment, the petitioner held 35 e-Ordinary shares in the company. The respondents rely on Clause 2A of the company's amended Articles of Association, which provide that an E-Ordinary shareholder does

not have the right to receive notice, attend, speak or vote at any general meetings of the company. Further, the respondents rely on the provisions of Article 4, which provides as follows:

> *"E Ordinary Shares may only be held by an individual who is in the employment of a company which is a subsidiary of Gairdini. Any E Ordinary Shareholder whose employment is terminated for whatever reason shall agree to have their shares converted into redeemable E Ordinary Shares and the provisions relating to the redemption as specified in Article 4A hereof shall apply or to transfer the shares to a person nominated by the directors of the company and shall complete whatever documentation necessary to give effect to the either the redemption or transfer as appropriate. The price to be paid on the E Ordinary Share(s) shall be determined as if the company was to be wound up…"*

8. Article 4A of the Articles of Association provides that:

> *"In accordance with Article 4 the shares of a departing E Ordinary Shareholder or a deceased E Ordinary Shareholder shall be classified as redeemable as long as the number of the shares redeemable shall not exceed 90% of the issued share capital.*
>
> *(a) Redemption of the whole or any part of the redeemable E Ordinary Shares for the time being issued and outstanding shall be at the discretion of the Company; howsoever, that a decision of the Company regarding such redemption shall be by Ordinary Resolution passed at a duly convened General Meeting of the shareholders entitled to receive notice of, attend and vote at General Meetings, or Resolution of the shareholders entitled to vote on such resolutions.*
>
> *(b) There shall be paid on each redeemable E Ordinary Share redeemed, the amount which would be paid if the company was to be wound up.*
>
> *(c) When any redeemable E Ordinary Shares are being redeemed by the Company, the Company shall give 7 clear days notice of such redemption to the holder (s) of the relevant shares to be redeemed."*

9. The respondents maintain that a person who is not a member of a company or who is not currently a member of a company cannot petition for relief pursuant to s. 212 of the Act of 2014. The respondents rely on *Re Via Net works (Ireland) Limited* [2002] 2 I.R. 47, in which the Supreme Court held that persons who had agreed to transfer their shareholding pursuant to a shareholder's agreement did not have *locus standi* in their action against the company, notwithstanding that their names were still present on the Register as shareholders. Keane C.J. explained the remedy in the following terms:

> *"Persons, such as the petitioners, who have voluntarily disposed of their entire shareholding in a company could not conceivably have been contemplated by the legislature as persons who would be entitled to relief under s. 205. Nor is it any answer to say that, because the petitioners have not transferred their shares, as they are contractually bound to do, they remain registered as members of the company. It is undoubtedly the case that a person who has become entitled to be registered as a shareholder may be unable to exercise any of his rights as a shareholder until his name has been entered on the register. But it does not follow that a person who, conversely, has voluntarily divested himself of all his shares in the company, but remains on the register must be treated as a member of the company for all purposes. I have no doubt that, when the legislature enacted s. 205(1) [the predecessor of section 212], it was not envisaged that persons without any interest in the company but who, for whatever reason, remained on the register as members would be entitled to present a petition grounded on alleged oppression of them as members."*

10. In assessing the suitability of a trial on the question of *locus standi* as a preliminary issue, the petitioner stated in the oral and written submissions that the main issue in dispute is the payment of monies that he is rightfully due as a shareholder. In seeking to have a preliminary issue tried, the respondents allege that two facts have been established: (a) - the employment was terminated on 25th September 2014, and (b) - The resolution to redeem the petitioner's shares is valid.

11. Further, the petitioner states that the *Via Net Works* case is not relevant because the mechanism that went about divesting the petitioners of their shares was a shareholders' agreement and not the Articles of Association (which allegedly fill that role in the case currently before the Court). Even if the court were to adopt the view that a shareholders' agreement could be equated with the Articles of Association, the petitioner maintains that there was no triggering event giving rise to the redemption of the shares. This is asserted as the Articles of Association do not provide for a self-executing alienation of the shares on the termination of employment. The petitioner alleges that the triggering event envisaged by the Articles of Association never occurred. The respondents argue that a triggering event did occur. According to the petitioner, this dispute puts to rest any question of O. 25 procedures being invoked and this matter should therefore proceed to a unitary hearing.

12. The petitioner also submits that Article 4C mandates a seven day notice period between the conversion of shares and the passage of a resolution to redeem. The petitioner maintains that no such notice was served on him and no admissions/concessions are made in this regard. The petitioner also raises issues in relation to the purported value of the redeemed shares at par of €1, notwithstanding that the Articles of Association refer to higher share value.

13. Finally, the petitioner complains that the application for the trial of a preliminary issue is out of time, in that it should have been sought at the hearing for directions on 12th October, 2015. The respondents assert in reply that any alleged delay in bringing the O. 25 application accrues from 8th February, 2016, when pleadings were closed.

14. The respondents also submit that the petitioner's attempt to dispute the special resolution that redeemed his shareholding is merely a formal traverse.

Decision

15. I do not accept that characterisation of this dispute as a formal traverse would be a correct approach for the Court to adopt. The petitioner has raised serious issues in his points of claim and in his affidavits. The petitioner specifically put in issue every matter raised by the respondent and has put the respondent on full proof of all matters pertaining to his shareholding.

16. Both parties seem to agree that cessation of employment occurred within the meaning of Article 4A. However, the petitioner submits that Article 4A is only triggered when the shares in question are properly converted. The petitioner further points out that he should have been called upon by the company to transfer or convert his shares. In the event that he refused to so do, it was allegedly open to the company to seek specific performance under the Articles of Association. There is no record of a transfer or conversion taking place regarding his shares. The respondents purport to rely on a resolution of the company dated 5th October,

2014, redeeming the petitioner's shares. However, there is no evidence before the Court of a resolution of the company referring to the transfer/conversion of the shares, nor is there any document calling upon the petitioner to transfer or convert the shares. The petitioner is entitled to put the respondent on full proof of matters which are at issue in the proceedings.

17. Both sides acknowledge the question of terminating the shareholding was not addressed in the agreement terminating employment. Perhaps it should have been. But it wasn't and I am of the view that the question of whether or not the petitioner was a shareholder on the date the petition was issued is a live issue in the case.

18. With regard to the allegations of delay, the principles outlined by McKechnie J. in *Campion v. South Tipperary County Council* [2015] IESC 79 are relevant and are as follows:

> *"35. The following therefore is a summary of the legal position before Order 25 of the RSC can be successfully invoked:-*
>
> *• There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.*
>
> *• There must exist a question of law which is discreet and which can be distilled from the factual matrix as presented.*
>
> *• There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.*
>
> *• The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.*
>
> *• Conversely if irrespective of the courts decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.*
>
> *• Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.*
>
> *• As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.*
>
> *• It must be "convenient" to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.*
>
> *•"Convenience" therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.*
>
> *• The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.*
>
> *• The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*
>
> *• Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."*

19. It seems to me that the respondents seek to have matters both ways. The petitioner's solicitors sent two letters to the respondents prior to the commencement of litigation and received no response. The explanation given for this failure to respond to the pre-litigation correspondence was that the petitioner was not a member of the company and therefore not entitled to such information. That being the case, they would have been immediately aware that there was a *locus standi* point to be made. I do not accept that it was more appropriate to await the closure of pleadings, given that there was a costly and extensive discovery process undertaken in the interim. In *Garcia v. Kilkenny* [2016] IEHC 89, Hedigan J. found that a three month delay between the closure of pleadings and the instigation of the O. 25 application was inexcusable, regardless of there being an argument in favour of calculating the delay from the previous January. His findings at para. 6.1 of his judgment are of particular relevance to the application currently before this Court:

> *"Order 63 A r. 5 and r. 6 (1) (ii) cited above at 3.2 makes it clear that a judge at the initial directions hearing has a wide range of powers to direct the manner in which the case shall proceed. This includes the fixing of any issues of fact or law. Thus the bank could at any time from when the case entered the commercial list have applied for the trial of this preliminary issue. It argues that this right only arose on the 24th of July 2015 when the pleadings closed. It brought this application on the 19th of October 2015 almost three months later. This in itself is somewhat delayed. Yet it is clear from the affidavit of Michael Leonard sworn on the 19th of January 2015 notably at para. 15 thereof, that the bank intended to rely upon its security to answer the claim of the applicant herein. No explanation is offered (other than above) for the failure to move more swiftly to raise this preliminary issue … In my judgment this application for the trial of a preliminary issue ought to have been made in January 2015 or immediately thereafter. Much forensic water has flowed under the bridge since then. In any court but most particularly in the commercial court, it is incumbent upon the parties to move with all possible expedition. In this matter the third respondent has delayed too long. Moreover it is undesirable that multiple applications be made in a piecemeal fashion for the determination of certain issues on a preliminary basis..."*

Given the prior knowledge referred to by the respondents and the further delay between the closure of pleadings and the issuance of their notice of motion, it does not seem to me that the delay on this point is a matter from which the respondents should benefit.

20. With regard to the question of the saving of time and costs, it seems to me that a large amount of time and costs has already

been expended since the petition first commenced. An extensive discovery process has taken place and all that remains is for the matter to proceed to a hearing. It is also clear from McKechnie J.'s decision in *Campion v. South Tipperary County Council* [2015] IESC 79 that the default position is that there should be a unitary trial. It seems to me that there is fundamental disagreement between the parties as to whether or not there was a triggering event that would have warranted the redemption of the petitioner's shareholding in the respondent company.

21. The petitioner's submissions raise a host of issues in relation to the factual background of this case. These include, *inter alia*, the manner in which the petitioner was paid over the course of his employment, the manner in which dividends were paid, whether or not such dividends in fact amounted to commissions, future tax implications for both the petitioner and the respondent in respect of those matters, the amount of the initial shareholding allocated to the petitioner and the nature of that shareholding (i.e. whether or not they were E-Ordinary shares). That being the case, even if it could be said that the respondents had not delayed in bringing their O. 25 application, it would still be unfair to the petitioner and against the interests of justice to allow the respondents to have the *locus standi* question tried as a preliminary issue in these proceedings.

22. I am therefore directing that this matter proceed to a full unitary hearing and refusing the respondents' O. 25 application. I will discuss with Counsel the question of what further directions may be necessary in order to ready this matter for final hearing at the earliest opportunity.