[2020] IEHC 495

THE HIGH COURT

[2018 No. 182 COS]

IN THE MATTER OF ABC LIMITED

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN

X

APPLICANT

– AND –

Y

– AND –

(BY ORDER) DEF LIMITED

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 5th October 2020.

I

Introduction

1. This is an application by DEF Limited, a co-respondent, to set aside an ex parte order made on 13 May 2019 joining it to the within proceedings. Essentially, Ms X has commenced the within proceedings acting on the belief (informed by the repeated advice of a forensic accountant whose services she has engaged) that her estranged husband, a fellow director and fellow 50% shareholder of ABC Limited has siphoned off the operations and funds of ABC to DEF (which latter company Ms X claims is a fraudulent front behind whose corporate identity Mr Y has concealed himself) in a bid to exclude assets/monies that ought to be available in ongoing family law proceedings between Ms X and her husband following on the breakdown of their marriage.

2. Although this application came before the court on the Family List, it is not *stricto sensu* a matrimonial cause or matter. That said, it would entirely defeat the fact that a procedurally unconnected, yet practically related matrimonial cause or matter is being heard in camera, and would involve the court proceeding with unjustifiable disregard for the protection of the private life of the parties, if it were, in this judgment, to name the parties to the within proceedings. For that reason, the identities of all the parties is anonymised herein. If there is, in reality, an 'ABC Limited' and/or a 'DEF Limited' and/or a 'GHI Limited', the court notes that these anonymised names bear no relation to the actual names of the companies referenced in this judgment and, more particularly, that no company by the name of 'ABC Limited', 'DEF Limited' or 'GHI Limited' is involved in any way in these proceedings.

II

Section 212

3. As much of what follows is centrally concerned with s.212 of the Companies Act 2014, it may be helpful to commence by setting out the text of ss.(1)-(3) of that provision and making some observations thereon:

> *"(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the company are being exercised – (a) in a manner*

oppressive to him or her or any of the members (including himself or herself), or (b) in disregard of his or her or their interests as members, may apply to the court for an order under this section .

(2) If, on an application under subsection (1), the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised in a manner that is mentioned in subsection (1)(a) or (b), the court may, with a view to bringing to an end the matters complained of, make such order or orders as it thinks fit.

(3) The orders which a court may so make include an order – (a) directing or prohibiting any act or cancelling or varying any transaction; (b) for regulating the conduct of the company's affairs in future; (c) for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; and (d) for the payment of compensation".

4. A number of points might be made concerning this provision:

(i) the antecedent provision in the Companies Act 1963 (s.205) was originally enacted to address the situation in which a person could not bring herself within one of the exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461 (which rule is considered later below) and where the only other relief available (before the Act of 1963) was to seek a winding up of the company on just and equitable grounds, a course of action that might well be in nobody's interests. Thus, a new and separate remedy was required, and came in the form of s.205.

(ii) as Professor Hutchinson observes in *Keane on Company Law* (5th ed., Haywards Heath: Bloomsbury Professional, 2016) at p. 388, "[P]*rovision of relief of this nature would have seemed peculiarly appropriate in Ireland for two reasons*….[i] *it is a form of relief…most likely to be invoked by shareholders in small private companies, an extremely prevalent form of business…in Ireland*….[ii] *the…Irish temperament makes the possibility of internecine warfare between shareholders…more likely than in the neighbouring jurisdiction*." The within proceedings have been brought by a shareholder in a small private company and in the context of alleged (and the court emphasises that it is but alleged) behaviour that, if it took place entirely as contested (and this is hotly disputed) would involve serious misbehaviour towards Ms X.

(iii) if a court, following the substantive hearing, is of the opinion that the complaint is well founded it may make such orders as it thinks fit with a view to bringing the state of affairs complained of to an end. Those orders include orders which "*prohibit or direct any act, cancel or vary any transaction*". Although that court will not be at large to act in this regard – the reliefs granted must be "*with a view to bringing to an end the matters complained of"* – it is notable that there is nothing in s.212 to the effect that the court cannot cancel or vary a transaction with a third party,

though such a process may of course present with difficulties some of which are touched upon in point (viii) below.

(iv) the relief available under s.212 is not confined to a member of an allegedly oppressed minority. A majority shareholder or, as here, a person entitled to 50% of the shares/votes may seek relief under the section (Hutchinson, *supra*, p. 390).

(v) oppressive conduct embraces all conduct which, be it lawful or unlawful, is "*unfairly detrimental to* [an applicant's] *interests*" (Hutchinson, *supra*, p. 392). In this regard, Viscount Simonds' mention in *Scottish Co-operative Wholesale Ltd v. Meyer* [1959] A.C. 324, at p. 342, to conduct that is "*burdensome, harsh and wrongful"* (phraseology adopted by Keane J., as he then was, in *Re Greenore Trading Company Ltd*. [1980] ILRM 94) can be a useful 'rule of thumb', though, *sensu stricto,* s.212 merely requires that there be conduct which can properly and objectively be described as oppressive; and notably Viscount Simonds was in this regard but using the dictionary definition of the word "*oppressive*" (a dictionary being one perfectly acceptable tool to employ when approaching statutory interpretation), so there is nothing 'sacred' about the formulation that Viscount Simonds used; he simply interpreted "*oppressive*" to mean "*oppressive*" and gave a few useful synonyms by way of expansion on what "*oppressive*" means.

(vi) a single act of oppressive conduct suffices to ground a s.212 application (*Re Westwind Holdings Co. Ltd.* (Unreported, High Court, Kenny J., 21st May 1974); *Re Williams Group Tullamore Ltd.* [1985] I.R. 613).

(vii) it is not necessary that the oppression complained of be operative at the time when the application commences. Thus, for example, in *Re Greenore, supra*, Keane J., as he then was, was satisfied to treat as oppression a failure by the majority to end the situation brought about by the oppression.

(viii) in terms of the reliefs that may be ordered, the court recalls the well-known article by Dr Temple Lang, "Minority Shareholder Protection Under Irish Legislation" (1974) 25(4) *Northern Ireland Law Quarterly*, 387-420, in which the learned author expressed the following views on orders concerning third parties, views with which the court would respectfully associate itself, *viz*:

> "[T]*he conduct of the affairs of a company or the exercise of the powers of its directors, in circumstances giving grounds for an application under the sections, may often create rights for third parties. As a matter of substantive law, it is difficult to assess how far these rights may be affected by the success of an application [under, inter alia, s.205* (now s.212*)]….At most the transaction involving the third party might be voidable by order of the Court, not void. The Court may cancel or vary 'any transaction.' Presumably the Court's powers would not be used to affect rights acquired by an outsider dealing bona fide with the company, for value, and without notice. Problems are more likely to arise, however, where there has been one or more*

transactions, not on arms' length terms, between the company in which the petitioner is a minority shareholder and a second company in which the majority shareholders in the first company also hold shares. Presumably if the majority shareholders between them hold all the shares in the second company the Court will always be willing to set the transaction aside or vary it if it resulted from a breach of the majority shareholders' duties implied by the sections. In such circumstances the veil should of course be pierced."

Though the instance contemplated by Dr Temple Lang is not quite on a par with the situation that presents here, it is clear that Dr Temple Lang (in the court's respectful view, correctly) contemplates that a third-party transaction may in some instances require to be and can be unwound; and there is nothing in statute or in case-law to indicate that this cannot be done – indeed s.212 is quite explicit that this can be done – albeit that doing it in any one instance may present with the types of difficulties contemplated by Dr Temple Lang.

III

Background Facts

5. DEF was incorporated on 14 December 2015. Its sole shareholder and director is Ms Z. Ms Z formerly worked as a bookkeeper in a company called ABC Ltd. In essence, the underlying dispute in these proceedings concerns ABC. The applicant, Ms X, is a 50% shareholder in ABC and a director of ABC. Her estranged husband, Mr Y, the first-named respondent is also a 50% shareholder and a director of ABC. Ms X originally issued proceedings against Mr Y in May 2019. Those proceedings were issued pursuant to s.212 of the Companies Act 2014 and a number of reliefs in relation to alleged oppression by her husband in the context of ABC were sought. The proceedings come against the background of the family litigation between Ms X and Mr Y. DEF is not a party to that family law litigation.

IV

Summary of Claims Made in Originally Constituted Proceedings

6. By way of summary of the claims made in the original proceedings against Mr Y, if one looks to the affidavit of Ms X of 3 May 2018, she refers, *inter alia*, to the following concerns:

(i) that turnover and profitability was deliberately transferred to DEF in a series of transactions involving Mr Y and Ms Z;

(ii) there was a well thought out plan to transfer the business from ABC (which for many years had successfully traded with Ms X as a director and 50% shareholder);

(iii) Ms X has consequently been deprived of the value of her shareholding;

(iv) DEF was incorporated on 4 December 2015 and began trading from the premises of ABC; four months later, DEF registered the name 'ABC [Business Name]';

(v) by the end of the 2016 financial year, ABC, which had shareholder funds in excess of [Stated Sum] as of 30 April 2016, had all but disappeared and had been de-registered for VAT and PAYE;

(vi) the business carried on for years by ABC has been arranged in such a manner that DEF is holding itself out to be ABC in a well-orchestrated and executed series of transactions;

(vii) DEF has effectively engaged in what Ms X styles 'corporate identity fraud', *i.e*. the deliberate misrepresentation of a company's identity by taking over trade previously carried on by ABC (her counsel put it that DEF is the fraud, a point to which the court returns later below);

(viii) Ms X's estranged husband has been in breach of his duties as set out in the directors' report in the financial statements for the year ended 30 April 2016, and s.228 of the Companies Act 2014;

(ix) the employees that were employed by ABC before it ceased trading have continued to work for DEF.

V

Forensic Accountants

7. The above-recited claims are contested by Mr Y (and DEF). Mr Y has engaged a forensic accountant who has reported, *inter alia*, that (i) the financial statements for the year ended 30 April 2016 did not give a true and fair view and were in fact misleading (the court admits that it read this aspect of the forensic accountant's evidence twice as it reads a little counter-instinctively to what one might expect); (ii) he (the forensic accountant) cannot determine whether or not the errors contained in the financial statements were deliberate; (iii) there was a disposal of the trade of ABC to DEF for commercial reasons; (iv) the disposal resulted in significant losses to ABC; (v) "*there are questions around the losses that ABC suffered".*

8. Aspects of the last-mentioned report have been subject to significant criticism by Ms X, who herself procured a further financial accountant's report which goes through the conclusions of the last-mentioned report and itself concludes, *inter alia*, as follows:

(i) both accountants were of the view that the financial statements of ABC for the year ended 30 April 2016 did not give a 'true and fair view';

(ii) the disposal of the trade of ABC was not a normal commercial disposal and was not at arm's length;

(iii) one of the reasons relied on by the respondent for disposing of the trade of ABC was a particular letter from a bank terminating a €[Stated Sum] facility; however, that letter was never acted upon by the bank;

(iv) what transpired was not a trade sale to a third party but a transfer of assets between a company in which Mr Y was managing director and Ms Z was company secretary to a company in which Ms Z was sole director;

(v) the disposal was carried out without regard to normal independent verification of values such as stock; no goodwill was factored into the formula to calculate an acquisition price; and there was no supporting documentation in respect of the calculation of the purported redundancy of each employee;

(vi) roughly one-sixth of the balance payable by DEF to ABC following the transaction went unpaid as of 22 November 2018, a position which the forensic accountant for Ms X concluded would not have been allowed to pertain if the transaction had genuinely been an arm's length transaction;

(vii) the loss to ABC resulted from a sham transaction which was dressed up as an arm's length transaction;

(viii) there was a paucity of detailed/legal documentation concerning the transaction;

(ix) DEF has effectively engaged in what Ms X's forensic account describes as "*corporate identity fraud*";

(x) ABC had effectively been subsumed into DEF in such a way that it effectively reduced the value of Ms X's shareholding in ABC to nil.

VI

Joinder and After

9. Having regard to the just-mentioned conclusions, Ms X's forensic accountant recommended that an application be made to join DEF as a party to the proceedings. This was done on an *ex parte* basis on 13 May 2019 and the title of the proceedings altered to include DEF as a co-respondent. Obviously, this was done without the knowledge of DEF, and DEF, as mentioned, now comes to seek the setting aside of the *ex parte* order. Thereafter, the amended originating motion issued on 5 June 2019, in which *inter alia,* the following reliefs are sought:

"*(a) [a] declaration that the affairs of ABC…and….the powers of the directors of the company* [have] *been exercised in a manner that is oppressive to the Applicant and in disregard of the Applicant's interest as a member of the company*.

(b) Directions…in respect of future conduct of ABC['s] *affairs to include (but not limited to):*

(i) if necessary directing the purchase of the Applicant's shares in the company at the value prior to the oppression and/or transfer of funds out of the company and/or at a value as to [the court]…*shall appear just and meet and/or compensation for the loss in the value of the Applicant's shareholding.*

(ii) [a]*n Order directing the Respondent to account to the company for any benefit gained as a consequence of his position as a director of the company.*

(iii) [a]n Order directing the Respondent to take all necessary steps to prevent the company from being struck off by the Companies Registration Office.

(iv) [a]*n Order directing the Respondent to facilitate inspection by the Applicant and her accountant of ABC*['s] *books, accounts, ledgers, bank statements (including credit card statements), records and any and all company documents and to take copies of same*.

(v) [a]*n Order directing the Respondent to facilitate inspection by the Applicant and her accountant of DEF*['s] *books, accounts, ledgers, bank statements (including credit card statements), records and any and all company documents and to take copies of same*.

(vi) [s]*uch orders cancelling/varying such transactions as t*o [the court]…*shall seem meet*.

(vii) [a]*n Order providing for tracing any funds transferred out of the company and/or funds generated by the sale of any equipment or assets and/or the transfer of customers to DEF….*

(viii) [a]*n order directing the payment of compensation by the Respondent to the Applicant in such sum as* [the court]…*shall assess fit*.

(c) [s]*uch further or other orders as shall be deemed appropriate*."

10. There is now more than one respondent and the court admits to a degree of uncertainty when reading the above as to which reliefs are being sought of which respondent; this is a matter to which counsel for Ms X might usefully attend.

VII

DEF's Next Steps

11. DEF was served with the joinder papers on 27 June 2019. An appearance was entered on 5 July 2019 and a letter also issued to the applicants stating that as a matter of law the proceedings were misconceived for a number of reasons: (i) DEF cannot be guilty of oppression under s.212; (ii) in essence, what the applicant is trying to do in these proceedings is to recover reflective loss from DEF in relation to the damage to her shareholding; (iii) insofar as there were any losses due to DEF (and DEF did not accept that there were) the proposed action is one for the company to make, not Ms X; (iv) no application for leave to bring a derivative action by way of exception to the rule in *Foss v. Harbottle* has been sought. (Such a derivative action is an action brought by a minority of shareholders where the injury that they allege to have been done is an injury against the company and thus is an exception to the usual rule that one cannot bring proceedings in respect of a wrong done to another party).

12. Ultimately, DEF asked that the proceedings be discontinued within seven days or it would bring the within application. The proceedings were not discontinued and the within application has been brought.

VIII

Reliefs Now Sought

13. The motion underpinning the within application seeks, *inter alia*, the following reliefs: (i) an order discharging DEF from the within proceedings on the basis that it is not a necessary or proper party; and/or (ii) an order setting aside the joinder order of 13 May 2019; and/or (iii) an order pursuant to the inherent jurisdiction of the court and/or pursuant to O.19, r.28 of the Rules of the Superior Courts ("RSC") striking out and/or dismissing the proceedings herein as against DEF on the grounds that it is unsustainable as against the second-named respondent and/or that it is bound to fail.

IX

The Grounding Affidavit

14. Ms Z has sworn the grounding affidavit in support of the within application, in which she avers, *inter alia*, as follows:

> *"I wholly reject the allegations…made…by the Applicant. In summary my position is as follows:*
>
> *i. DEF was incorporated on the 14th of December 2015….DEF began trading on that date from a registered office at* [Stated Address];
>
> *ii. I am the sole shareholder and director of DEF. I have all the risks and rewards of the Company. The First Named Respondent has no stake in the Company. All dividends in DEF are paid to me. I have personally guaranteed DEF's overdraft, wages files, credit card and all HP/leases save for two.*
>
> *iii. The Report of* [the forensic accountant engaged by Mr Y] *accurately describes the trading conditions facing the Company during the year ending 30th day of April 2016 and the options which it faced. The acquisition by DEF of certain of the company's assets was not a sham transaction as alleged. It was a commercial transaction in which the sum of* [Stated Sum]…*has been paid to date in instalments by DEF to the Company. Those payments were made directly to the Company's Bank account. As at 31st of May 2019, a sum of* [Stated Sum]…*remains outstanding to the Company from DEF, which is being discharged by minimum weekly instalments of* [Stated Sum]….
>
> *iv. DEF is not engaging in 'corporate identity fraud' as alleged:*
>
> *i. DEF has been able to obtain asset finance and has invested heavily in new trade stock and fresher vehicles in excess of* [Stated Sum*]…(not including the items purchased from ABC…). DEF has sold the majority of stock purchased from ABC….It has been able to compete for new business, DEF's operations include the new business of* [Stated Line of Business], *which has been a very profitable enterprise for the company.*
>
> ii. DEF has two invoice formats in operation, a preprinted duplicate invoice for a printer and an A4 one. Lots of companies have similar

invoice formats due to the accounting packages which are commonly in use….

iii. *The trade name of ABC was never registered in any capacity. I registered the name 'ABC* [Business Name]' *as a trade name for DEF on the 16th of March 2016. I was quite entitled to do this. I do not understand the basis upon which this objection is being made as the word 'ABC' is* [Innocuous Reason Stated]….*At all events, 85-90% of money received from debtors is by way of EFT and not by cheque….*

iv. *DEF purchased the domain of ABC.com….*

v. *DEF rents the business premises which consists of a yard, sheds and a small shop building from a third-party landlord.*

vi. *While a number of DEF's employees formerly worked with the company, a large proportion of DEF's* [employees] *did not.*

vii. *With regard* [to] *the* ad hominem *attacks on my qualifications, I am a* [Stated Profession] *and a member of* [Stated Professional Body]. *The applicant had no issue with me preparing accounts for many years for both ABC and GHI Limited (companies in which her and the First Named Respondent are Shareholders), submitting all relevant returns to* [the] *Revenue* [Commissioners] *and* [the] *CRO. I was never the Company Secretary of ABC Limited, rather the Applicant has always been secretary"*

…*Specifically, I say that:*

i. *Whatever about the Applicant's case against the First Named Respondent, DEF cannot be guilty of oppression under section 212 of the 2014 Act, insofar as it is not and was never a member or director of the company.*

ii. *In substance the Applicant is seeking to recover 'reflective loss' for the alleged damage to her shareholding from DEF (which, for the avoidance of doubt, is fundamentally disputed). Whereas it is a matter which will be addressed in legal submissions, I say and am advised that the case being advanced against DEF offends basic principles of company law.*

iii. *Even taking the Applicant's case at its height (which I understand the Court must for the purpose of this type of application), I am advised that insofar as the matters complained of must give rise to a cause of action at law against DEF, ABC would be the proper applicant/plaintiff to the proceedings.*

iv. *In substance, the case being made is that ABC has suffered loss by reason of the sale of its assets to DEF at an undervalue, that substantial monies are due and owing to ABC and that DEF is guilty of passing off. While it is not necessary for present purposes to deal with the factual basis for these claims (which are disputed, for the avoidance of doubt) at all events I am advised that the losses alleged, if any, are those of ABC. Any diminution in the value*

of the shares is a loss suffered by all [of] ABC's shareholders and, as such, is a loss suffered by ABC.

v. *No application was made pursuant to the Superior Court Rules seeking leave of the court to bring a derivative action on behalf of ABC….I am advised that a derivative action may no longer be commenced without first obtaining leave of the court and leave must be obtained prior to issuing proceedings and not afterwards.*

vi. *Insofar as the Orders sought in the proceedings include the production of documentation from DEF, this is also not an appropriate ground for joining DEF to the proceedings, since such documentation can be sought in the usual way by means of a request for third party discovery."*

X

The Replying Affidavit

15. Ms X in her replying affidavit avers, inter alia, as follows:

"*4. I say that your Deponent herein has raised issues of the most serious nature. Your Deponent with the benefit of advice from her forensic accountant has stated clearly in previous Affidavits that the Respondents and* [Ms]…*Z participated in a sham transaction and corporate identity fraud to reduce your Deponent's shareholding in ABC….*

5. I say that your Deponent does not accept that [Ms]…*Z is a genuine sole director and shareholder of the second-named respondent*….[Ms] *Z works for the first-named respondent and the second-named respondent is nothing more than a vehicle to deprive the Applicant of the value of her shareholding in ABC….*

6 [Ms] *Z was the in-house accountant with ABC….She was involved at all stages in the sham transfer to…DEF….She signed off on the accounts of DEF…for the 30th April 2015 and 2016 as an external accountant for that company. My forensic accountant described the ABC…Accounts prepared by…*[Ms] *Z as having 'major inaccuracies'. The forensic accountant retained by the first-named respondent stated that the said financial statements prepared by* [Ms*]…Z 'did not give a 'true and fair view"*….[Ms] *Z who claims that she is a qualified*…[professional] provides no explanation for the foregoing. What is undisputed is that Ms Z was centrally involved in turnover and profitability being deliberately transferred to DEF…even before 18th May 2016. I say that…[Ms] Z…*never contacted your Deponent regarding my business which she took over despite having a central role in the transfer out of ABC…and into DEF….*

7. I say that continually your Deponent has complained about the paucity of documentation and information surrounding the transfer of the business from ABC…to DEF….I say that following the receipt of the Grounding Affidavit of [Ms]…*Z*

dated the 26th July 2019 your Deponent consulted her Forensic Accountant who requested further documentation. I say a request for discovery was made….

8. *I say that the refusal to provide any of the said documentation and indeed the failure to make any substantive response to the matters put before this Court are in your Deponent's respectful submission, telling. The Affidavit of the 12th July 2019 was Ms Z's chance to establish that the transaction which deprived your Deponent of her shareholding was not a sham and she demonstrably failed to do so. There was no evidence of alleged indemnities or personal guarantees; there was no evidence of dividends paid to* [Ms]…*Z. Further, there is no proper evidence of the alleged consideration* [of Stated Sum]…*being paid. There is no explanation as to where the balance of the value of ABC…went to. Indeed many other questions arise such as where is the money allegedly paid for ABC*['s]…*stock. Why was goodwill not factored in? Why is* [Ms]…*Z completely silent about the transfer agreement either [as to] the particulars or existence of same? What was the consideration? How were assets valued? What happened to stock leased by ABC..? Why was the balance of €[*Stated Sum], *calculated by* [Ms]…*Z, as being due to ABC…not paid….Why did* [Ms]…*Z not consult with your Deponent? Who is* [Stated Name]? *Why did the first-named respondent resign as secretary? Why are there no details as to the employees retained, redundancy monies and how was the lease of the premises taken over?*

9. *I say that the first-named respondent has hindered your Deponent's access to the records and accounts of ABC….However, further investigations have shown that ABC…had substantial contracts with* [Stated Party]…*for the provision of* [Stated Stock]…*and its stock records at 30th April 2015 showed substantial stock of* [Stated Stock]….*All of this stock had been removed from the stock records at 30th April 2016. The first-named respondent's forensic accountant…said in his report 'Another driving factor in the turnover and profitability (of DEF…) is* [Stated Factor]…*this is an area that DEF has expanded into and invested…'*….[T]*he affidavit of* [Ms]…*Z of 12th July 2019 also stated, 'DEF's operations include the new business of* [Stated Business]…*which has been a very profitable enterprise for the company.' The business of* [Stated Business]…*carried on for some time by ABC…is now apparently carried on by the second-named respondent*….

10. *All of the foregoing matters have not been adequately dealt with by* [Ms]…*Z or her 'employee' the first-named respondent. None of these questions are unreasonable and it is submitted to* [the court]…*that given* [the] *seriousness of the matters raised such explanations would have been expected to be given eagerly by* [Ms]…*Z to ground the application herein*.

11. *I say in summary*…[Ms] *Z has failed to refute this was not a sham transaction and that both she and the respondents were not involved in the oppression of your defendant.*

12. With respect to the merits of joining the second-named respondent I say this is not a situation where the second-named respondent was a genuine company. It was…used as a vehicle to perpetrate a sham transaction to deprive your Deponent of her shareholding….[Ms] *Z is centrally involved in this sham transaction along with…the first-named respondent".*

XI

The Final Affidavit

16. In a final affidavit of Ms Z, she reiterates some of her previous points and avers, inter alia, as follows:

"3. I say that the Replying Affidavit does not seek to put the facts before the Court, rather it is argumentative and demonstrates a basic misunderstanding of the motion before the court. However, I reject the matters deposed to in the Replying Affidavit of Ms X in their entirety. DEF…did not reduce the Applicant's shareholding in ABC…to nil. I have no personal relationship with the first-named respondent.

4. I say that the replying affidavit does not seek to engage in any way with the two critical issues before the court, namely that (i) DEF cannot be guilty of oppression within the meaning of section 212 of the Companies Act and (ii) the claim which is being made here is that the sale of the assets of the Company at an undervalue to DEF is damaging to the Applicant's shareholding, which is a claim for reflective loss that is irrecoverable at law.

*5. I also note that Ms X does not put in issue…matters of fact which can be proven by reference to documentation lodged with the CRO….[*viz. that] *I am the sole director and shareholder of the first-named respondent. I was never a director or shareholder in ABC….DEF has never had any shareholding in…ABC….DEF was only incorporated on 14th December 2015. The First Named Respondent has never had any directorship or shareholding in DEF.*

6. I say and am advised that the Applicant's discovery request is entirely premature. I say and am advised that the question of whether these proceedings discloses a cause of action as against the second[-named] *respondent is a matter which has to be considered in the first instance. I say and am advised that it would be a wasteful exercise to require the second-named respondent to make discovery prior to any determination as to whether the proceedings disclose a cause of action as against the second-named defendant.*

7. While I take issue with the very serious allegations being alleged by Ms X, I say and am advised that, even taking everything said by Ms X at its height, the fact remains that these proceedings are bound to fail against DEF and DEF has no interest in the within proceedings."

XII

Some Key Points Made for DEF

17. Counsel for DEF contended that the case made by Ms X is fatally flawed for two reasons. First, the claims made against DEF are claims that could only be made by ABC as plaintiff. Second, the applicant cannot recover reflective loss from DEF for damage to Ms X's shareholding.

18. The first case counsel opened to the court in making the just-mentioned contentions was *O'Neill v. Ryan (No. 1)* [1993] I.L.R.M. 557. There, the plaintiff was a shareholder and former CEO of Ryanair. He brought proceedings against Ryanair and a number of other entities alleging that those entities were engaged in anti-competitive practices contrary to European Union law which damaged the value of his shareholding in Ryanair. Those other entities brought an application under O.19, r.28 RSC that the application was bound to fail against them. Two judgments were given in the Supreme Court, one by Blayney J. and another, concurring judgment by O'Flaherty J. In his judgment, Blayney J. observes, inter alia, as follows, at p. 569 *et seq*:

> *"Counsel further submitted that even though the damage was primarily to Ryanair, the plaintiff nonetheless was entitled to sue, but he was unable to point to any authority for this proposition. I am satisfied that there is none. What was being submitted was that a shareholder in a company has a personal action in respect of the reduction in value in his shareholding resulting from damage to the company against the party who cause such damage. Such a proposition was firmly rejected in England in the Prudential Assurance Company Limited case to which I referred earlier [i.e. Prudential Assurance Company Limited v. Newman Industries Limited and Ors* [1982] 1 Ch. 204]. *Prudential was a minority shareholder in the respondent Newman Industries Limited. It brought both a derivative action and a personal action against Newman Industries and two of its directors alleging in regard to the latter claim that as a result of the fraud of the two directors the quoted price of Newman Industries must have been affected and accordingly that they had suffered damage to their shareholding. The Court of Appeal dealt with this in its judgment at p.222:-*
>
> > 'In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr Bartlett did not dispute that he and Mr Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has personally been caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution of the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. 'Loss' is through the company, in the diminution in the value of the net

assets of the company, in which he has (say) a three per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the Articles of Association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.'

And at p.224 the court said:

'A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires cause of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the Articles of Association.'

In my opinion that is a correct statement of the law in regard to the status of a shareholder in a limited liability company. What is also a relevant consideration in addition to the matters referred to in the two passages cited is the consequences which would flow from giving shareholders in a company a personal action against a party causing damage to the company. It would enable a multiplicity of actions to be brought and deprive the company itself of the ability to control them. So it would be harmful to companies and very much against the public interest in opening the door to irresponsible litigation. For these reasons also I am satisfied that a personal claim by a shareholder should not be permitted."

19. The concurring judgment of O'Flaherty J. in that case is in similar terms.

20. Another, more recent, case along similar lines is the judgment of Costello J. in *Alico Life International Ltd v. Thema International Fund Plc & Anor*. [2016] IEHC 363. There, the plaintiffs were unitholders/shareholders in a limited fund which was promoted by Thema, a limited plc. Thema invested in Bernie Madoff-related investments and ultimately that had the consequence that the investment funds were entirely lost. The plaintiffs brought an action against Thema, even though they were shareholders/unit holders in the fund. In her judgment, Costello J. discusses the rule in *Foss v. Harbottle*, endorses the rule in *O'Neill v. Ryan*, accepts Thema's arguments that the assets lost belonged to Thema and

that the damage done was to Thema, and accepts too that the unitholders/shareholders can only bring a derivative claim and that they cannot have an individual cause of action as a shareholder as this is contrary to the distinction between a company and its shareholders. Notably, Costello J. also accepts that if she is wrong as to the foregoing, the form of action brought by the unitholders/shareholders, they were barred by the rule against reflective loss, *i.e*. the rule whereby a shareholder cannot recover damages for personal losses which are reflective of the company's losses.

XIII

Some Amplification by the Court

(i) ***The Rule in*** **Foss v. Harbottle**

21. Company law like all branches of the law has its own specialised language which it can sometimes be useful to pause to consider. The reference above to "*the rule in* Foss v. Harbottle" is an example of such a specialised phrase. The 'rule in Foss v. Harbottle' has, if the court might respectfully observe, been succinctly described (along with the related elaboration on same by Jenkins LJ in *Edwards v. Halliwell* [1950] 2 All E.R. 1064) by Professor Hutchinson *supra*, at pp. 373-74, under the heading "*The Rule in Foss v Harbottle and Its Exceptions*" (the exceptions are not of concern in the within proceedings as it has not been sought to rely on them):

> *"The case from which the rule derives its name was decided before the first modern companies legislation was on the statute book and concerned a company incorporated under a private Act. Some of the defendants – effectively the promoters and in some cases directors of the company – had bought land which they knew would be used in the company's operations and then sold it on to the company at an inflated price. Two of the shareholders brought an action claiming among other reliefs the setting aside of these transactions and the payment of compensation to the company on the ground that they were fraudulent. Wigram VC dismissed the action, pointing out that the Act left it to the 'proprietors', as the shareholders were described, to decide whether to bring proceedings and that, since the actions complained of, were neither illegal nor beyond the powers of the company, it was always open to the shareholders to ratify them. Hence only the company could sue and the decision whether to sue or not had to be taken by a majority of the shareholders.*
>
> *The clearest, most comprehensive and most succinct statement of the rule in a – relatively – modern case is generally regarded as that contained in the judgment of Jenkins LJ in* Edwards v. Haliwell *[op. cit.]. (The relevant passage was adopted as a correct statement of the law in Ireland by the Supreme Court in* Balkanbank v. Taher *[Unreported, 19 January 1995]). He said:*
>
> > 'First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is, *prima facie*, the company or association of persons itself. Secondly, when the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of its members, no individual

> member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio* [there is no issue], no wrong has been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of the members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue.'
>
> *The courts in Ireland, as in England, have on many occasions, endorsed this principle as being in accordance with common sense and justice. Requiring the company rather than an individual shareholder to bring the action prevents the institution of a multiplicity of proceedings by individual shareholders* [though *quaere* why, if their interests are adversely impinged, such an exclusion should necessarily be seen as a good thing; a classical liberal might contend that it is an unwarranted constraint on individual freedom, and as Dr Temple Lang has observed, *supra* at p. 397, "*multiplicity of actions does not seem to have been a problem in practice"*]. *It also recognises the futility of allowing such actions to proceed when the transactions in question can in any event be ratified by the majority."*

(ii) Prudential *Identifies an Exclusionary Principle*

22. Among the cases included by counsel for DEF in his bundle of authorities was that of *Johnson v. Gore Wood & Co*. [2001] 2 WLR 72. That case is of interest both in itself and how it has been treated by both the English and the Irish courts. Again, there seems little point in re-inventing the wheel when Professor Hutchinson, *supra*, at p. 386-87, has comprehensively, yet succinctly treated with the points that the court wishes to make in this regard, in the following terms:

> "*The House of Lords*…in Johnson v. Gore Wood & Co. *while approving of the decision in* Prudential Assurance Co v. Newman Industries Ltd, *made it clear* [in what it clearly believed to be but an existing aspect, not a variation of the *Prudential* rule previously incorporated by reference into Irish law] *that this rule will not preclude the recovery by an individual shareholder of damage caused to him or her as a result of a breach of the duty on the defendant's part which is personal to him or her as a result of a breach of duty on the defendant's part which is personal to him or her and does not simply 'reflect' the damage caused to the company by the defendant's wrongdoing. More recently in* Shaker v. Al-Bedrawi [[2003] Ch. 350] *the Court of Appeal of England and Wales held that the rule did not preclude an action brought by a claimant in his or her capacity as beneficiary under a trust against his or her trustee for a lost profit unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover, Peter Gibson LJ stated:*
>
> > 'In our judgment the *Prudential* principle does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against

his trustee for a profit unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the *Prudential* principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, but that such claim is available on the facts.'

This statement of principle was cited with approval by Laffoy J. who delivered the judgment of the Supreme Court in O'Donnell v. Bank of Ireland [[2014] IESC 77], *though in that case the court found that the appellants' claim did not fall within its bounds."* [Emphasis added].

23. As to the underlined point above, DEF has not established that ABC has a claim to recover the entire loss claimed by Ms X, nor has DEF established that a claim by ABC to the entire loss claimed by Ms X is available to ABC on the facts. Indeed, the co-respondents contend that ABC has suffered no improper loss. A striking feature of the affidavit evidence of Ms Z is that she denies everything while proffering little or nothing by way of exhibits supporting what she asserts, making it effectively impossible to bring the above-quoted element of *Shaker*, as endorsed by the Supreme Court in *O'Donnell* to bear. It may in truth be difficult for DEF to meet what might be styled the *Shaker-O'Donnell* test adverted to above, but if it is, that difficulty is a benefit which accrues to the advantage of Ms X by virtue of the *Prudential* rule being an exclusionary rule.

XIV

Some Points Concerning Section 212

24. When it comes to the express wording of s.212, counsel for DEF contended that:

(i) the reference in s.212(1) to the "*affairs of the company*", points to this being a provision that is directed at the internal operation of the company's affairs,

Court Response: As Laffoy J. indicates in *Re Charles Kelly Limited* [2011] IEHC 349, at para.11.1, citing the then current edition of Dr Courtney's *The Law of Companies*, the phrase "*affairs of the company*" refers to "*the conduct of the members when acting as corporators*" (there is a typographical error in the judgment of Laffoy J. but it is entirely clear what she means to state), *i.e*. the conduct of members as members (the wording to which Laffoy J. means to refer is the wording that now appears in the 4th edition of Dr Courtney's text (Haywards Heath: Bloomsbury Professional, 2016), at p. 711).

(ii) the reference in s.212(1)(b) to "*interests as members*" is a reference to the right to participate in the acting management of the company;

Court Response: The court respectfully does not accept this contention. The wording of the enactment empowers the court to have regard to a wide array of matters that may or may not be connected with the legal rights of a member as

member. Dr Courtney, *supra* at p. 709, refers in this respect to the court being empowered "*to have regard to the widest possible matters, unconnected with the petitioner's purely legal rights as a member of the company*". In passing, the court notes, as Barrington J. previously noted in *Re Williams Group Tullamore Ltd* [1985] I.R. 613, that this ground of relief is a separate ground of relief available additionally and alternatively to relief grounded on oppression.

(iii) the statutory purpose of s.212(2) is to protect minority shareholders from the majority;

Court Response: The court respectfully does not accept this contention. The relief available under s.212 is not confined to a member of an allegedly oppressed minority. A majority shareholder or, as here, a person entitled to 50% of the shares/votes may seek relief under the section (Hutchinson, *supra*, p. 390).

(iv) the remedy granted by s.212(2) is aimed at resolving mismanagement, not wrongs done to the company as those wrongs can be litigated through a derivative action

Court Response: The court respectfully does not accept this contention. As mentioned above, the antecedent provision in the Companies Act 1963 (s.205) was originally enacted to address the situation in which a person could not bring herself within one of the exceptions to the rule in *Foss v. Harbottle* (which rule is considered later below) and where the only other relief available (before the Act of 1963) was to seek a winding up of the company on just and equitable grounds, a course of action that might well be in nobody's interests. Thus, a new and separate remedy was required, and came in the form of s.205. Thus the relief available under s.205 (now s.212) was intended to supplement the derivative action regime and to provide an alternative basis for relief in the manner prescribed and contemplated by s.205/s.212. As mentioned above, Ireland may present with an especially pressing need for this supplementary and separate basis for relief, Professor Hutchinson observing in this regard, supra at p. 388, that "[P]*rovision of relief of this nature would have seemed peculiarly appropriate in Ireland for two reasons*….[i] *it is a form of relief…most likely to be invoked by shareholders in small private companies, an extremely prevalent form of business…in Ireland*….[ii] *the…Irish temperament makes the possibility of internecine warfare between shareholders…more likely than in the neighbouring jurisdiction*."

(v) under s.212 only a member or director can be guilty of oppression,

Court Response: It is true that s.212, to borrow from Dr Courtney, *supra*, p. 694 *"provides a company's members with their most powerful and far-reaching remedy against the company and its directors in cases of oppression and disregard of their interests*". That said, s.212 does not restrict the making of an order thereunder to an order against a member and/or director.

(vi) there is no case in which a court has made an order that a third party is guilty of oppression or requiring a third party to make restitution to a company,

Court Response: The court notes that Dr Courtney, *supra* at p. 738, indicates that *"On a number of occasions the High Court has cancelled or varied transactions*". Moreover, if one looks to the very first case on s.205 – *Re Westwind Holdings Co. Ltd., op. cit*. – it is very clear that but for the practical difficulties that he perceived to arise in so proceeding on the facts of the case before him, Kenny J. would have been satisfied to make a third-party order, observing, *inter alia*, as follows, at paras. 22-24:

"22. The sale of the lands at Knocknacarra was an exercise by the directors of their powers in a manner which was fraudulent and oppressive to the petitioner [member] *and was in total disregard of his interest as a member of the company. On this ground alone the conditions for the exercise of the powers of the Court under s. 205 (3) have been fulfilled*.

23. The mortgage by deposit of the 24th of May 1972 of deeds relating to the property at Whitestrand Road to guarantee the amount which Ardos Holdings Limited owed Allied Irish Banks was not for the benefit of the company or of the petitioner. It was done solely to benefit Ardos Holdings Limited in which Mr. Martin Hession holds almost all the shares. The forgery of the petitioner's signature to the minutes of the meeting at which this transaction was authorised, and of his signature to the particulars of the charge, which were filed with the Registrar of Companies, indicate that Mr. Martin Hession was anxious to conceal the transaction. If it be assumed that the deposit was effective to create any security…it was an exercise of the powers of the directors of the company which was oppressive to the petitioner and in total disregard of his interest as a member. At a late stage in his evidence, Mr. Martin Hession said that he had bought the reversion in the lands at Whitestrand Road from the company at the full market price. No evidence to support this was given and while this may be relevant on the remedy to be given for the oppression, it does not alter the position that the transaction, when carried out, was both fraudulent and oppressive.

24. This is the first case in which the question of the appropriate order under s. 205 of the Act of 1963, which made a profound change in the remedies available to a shareholder, has been discussed. The petitioner asks that the transfer by the company of the lands at Knocknacarra to Country Developments Limited and the charge given to Allied Irish Banks Limited should be cancelled, but neither of these courses can be taken without hearing the parties to whom the transfer and charge were given. That will involve prolonged litigation. The company has ceased trading and a winding-up by the court would be expensive and would involve the liquidator in litigation in connection with the transfer of the lands and the charge given to the bank. It seems to me therefore, that the appropriate remedy is an order

directing Martin Hession to purchase the shares of the petitioner at a price fixed by the court".

The third-party issues to which Kenny J. refers show that a third party order can be made and surely suggests that in the right case it may be necessary to join such a third party to proceedings so as to ensure the most orderly despatch of matters in the manner desired by an applicant, should that applicant be successful in his oppression/disregarded interests application.

In passing, the court notes that when it came to the 'cancellation of third-party transactions' aspect of matters, the court was referred by counsel for DEF to the decision of the Supreme Court in *Irish Press plc v. Ingersoll Irish Publications Ltd* [1995] 2 I.R. 175. That was a case where the petitioner was the publisher of a number of newspapers. It entered into agreements with Ingersoll where they became equal shareholders in two particular companies. Ultimately a petition was brought under s.205 in which the petitioners alleged oppression by Ingersoll and they sought orders for their shares to be purchased and also seeking compensation for losses caused to their shareholding by Ingersoll.

In that context, the Supreme Court considered the ambit of s.205(3), and in particular the submission that the court was at large in what it could do, Blayney J. observing as follows, at p. 188:

"The relief which may be given under the section is that the court may make such order as it thinks fit 'with a view to bringing an end the matters complained of.' The court is not at large as to what it may do. Whatever order it makes must have this object. It must be made with a view to bringing to an end whatever it was that was causing the oppression",

[Court Note: The court respectfully notes and accepts (as is required of it) the observations of Blayney J.]

and, at p. 190:

"It was also submitted that the provisions of s.205, sub-s.3 were so wide that they would permit damages to be awarded. I am unable to agree. Firstly, an award of damages would not satisfy the condition that the order be made 'with a view to bringing to an end the matter complained of'; secondly, an award of damages is a purely common law remedy for a tort, breach of statutory duty or breach of contract, and acts of oppression would not come within any of these categories; and finally, if the Oireachtas had intended to include the remedy of damages as one of the reliefs which could have been granted, there would be no difficulty in doing so, and it is quite clear that this was not done."

[Court Note: The court respectfully notes and accepts (as is required of it) the observations of Blayney J. However, what is being sought in this case is an unwinding of one or more objectionable transactions and/or a share purchase at such level of recompense as the court should set, not damages as such.]

XV

Key Points Made for Ms X

25. Counsel for Ms X urged, *inter alia*, the following points on the court:

[1] Section 212(2) of the Companies Act provides, *inter alia*, that the court may "*make such order or orders as it thinks fit*", which orders, per section 212(3) may include an order "*(a) directing or prohibiting any act or cancelling or varying any transaction; (b) regulating the conduct of the company's affairs in* [the] *future; (c) for the purchase of the shares of any members of the company or by the company, and in the case of a purchase by the company, for the reduction accordingly of the company's capital; and (d) for the payment of compensation"*. In practice, more often than not, a combination of reliefs (c) and (d) is sought; however, in this case, what is sought is relief (a) by reference to what has occurred between ABC and DEF.

Court Response: Noted.

[2] There is nothing in s.212 that the court cannot cancel or vary a transaction with a third party. The provision refers to "*cancelling or varying any transaction*".

Court Response: Agreed for the reasons stated previously above.

[3] Of note are the provisions of O.15, r.13 RSC which provides, *inter alia*, that "*The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any parties…whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be ordered*". It is against the background of both s.212 and O.15, r.13 RSC that a decision was taken to apply for the joinder of DEF to these proceedings.

Court Response: Noted. The court turns to a consideration of O.15, r.13 RSC later below.

[4] The background to the proceedings is, in essence, the family law dispute. Mr and Ms X were married in [Year Stated], they are both in their [Number of Years Stated], they have [Stated Number] of children, [Stated Number] of whom being dependent, they separated some years ago. Ms X has worked in particular employment. There were two 'family' companies, if the court might put matters so: GHI ran one type of business; and then there was ABC. After the parties separated,

proceedings in relation to the family law matter and s.212 were issued in 2018. That being so, why is it the case that the family law proceedings have not yet been dealt with by the courts? Counsel for Ms X maintains that the answer is that this has to do with the behaviour of Mr Y: he has had a number of firms of solicitors represent him in the family proceedings, and now he represents himself in the family and the s.212 proceedings with the attendant inefficiencies/consequences which self-representation so often brings. Mr Y is in breach of a maintenance order. He is also being prosecuted by the State for a serious property offence vis-à-vis Ms X.

Court Response: Noted. Mr Y of course enjoys the presumption of innocence in relation to the alleged offence.

[5] Per counsel for Ms X: "*It is not that DEF is engaged in fraud. It's that DEF* is *the fraud. That's the essential point that we make and we don't make that allegation lightly and my Friend has very fairly referred to the two reports we have from the forensic accountant in that regard*."

Court Response: It seems to the court that this is a key aspect of the within application. Ms X claims relief against ABC under s.212 consequent upon the actions of Mr Y, her fellow director/member, who she claims is also masquerading as DEF. Counsel for Mr Y contended in this regard that that this is not correct, that what is correct, when one has regard to the company records is that the sole shareholder and director of DEF is Ms Z. However, those CRO records do not obviate the potential that Ms Z is but the 'puppet' of Mr Y and that Mr Y is, in truth, DEF. This is something that would fall to be established by Ms X at the substantive proceedings.

[6] Ms Z was the bookkeeper for ABC. Mr Z and Ms X were each a 50% shareholder and also a director. Essentially it was run, day to day, by Mr Y and Ms Z. DEF was incorporated in 2015; the registered offices are Ms Z's private residence. It commenced trading initially from the same premises that ABC was based in for years. Ms X was asked to sign certain documents in early-2016 in relation to the accounts, which she was not happy to do. Some of those documents included reference to PAYE and employees, *etc*. There were 14 employees in ABC and 14 in DEF at the same time. Ms Z, apparently, is the sole shareholder/director of DEF and Mr Y is an employee.

[7] Among the evidence before the court is a screenshot from the website of 'ABC [Business Name]', the business name that DEF registered in relation to its business. In that screenshot, 'ABC [Business Name' states, *inter alia*, that it was founded in [Long-Ago Period Stated] by Mr Y, that it commenced as a one-man operation and has expanded year-on-year, to a position of some eminence, that it has been in business for over [Big Number Stated] years. The livery used by 'ABC [Business Name]' – again, the business name that DEF registered in relation to its business – is almost identical to that used by ABC. There is a Facebook entry for 'ABC

[Business Name]' which refers to its being founded in [Long-Ago Period Stated] and proceeds along the lines of the screenshot text. "*DEF*", counsel urged on the court having recited the just-mentioned facts, *"is a sham. DEF is Mr Y. And that is the point that we…seek to make to the court. The fraud is DEF."*

Court Response to [6] and [7]: Taking Ms X's case at its height, these would be odd truths if it were established that they were true and there was no innocent explanation forthcoming. The 'Mr Y is DEF' point has been addressed in the context of point [5] above.

[8] As to the relief that is sought, the varying of the transaction (the transaction being the emptying out of ABC of the assets and so forth), at a certain level by 'going after' Mr Y in the context of the s.212 proceedings, of necessity what happened at DEF will have to be examined by a court. Mr Y and Ms Z continue to maintain that DEF is a separate entity. In that context, why would DEF not want to be even a notice party to proceedings where the relief sought is to vary a transaction which Ms X claims was perpetrated by Mr Y? The answer, counsel for Ms X suggested is the same reason why (he contends) Mr Y and Ms Z do not want to make discovery, *viz*. (he contends) that what Ms Z has told to the court contains untruths, *e.g.*, that DEF has gone into a new and notably successful line of business (this, it is claimed, is patently untrue), that the impugned transaction was an arm's length transaction (no evidence has been provided to support this assertion), and how could any of what is purported to have happened actually have occurred without a 50% shareholder and director such as Ms X is not knowing what was going on?

Court Response: It is true that by 'going after' Mr Y in the context of the s.212 proceedings, of necessity what happened at DEF will have to be examined by a court and, *inter alia*, the 'Mr Y is DEF' point (addressed in the context of point [5] above) will have to be assessed. In passing, the court notes that there was some expression of surprise that DEF had not made discovery to this time. That, with respect, is to put the discovery cart ahead of the strike-out horse: the purpose of the within application is to strike out the proceedings as against DEF and to end any need for any such discovery.

[9] Mr Y is 'playing ducks and drakes' with this court and with every court with which he has thus far interacted.

Court Response: This seems to be but bare assertion. While Ms X's case falls to be taken at its height in the within proceedings that does not mean that the court can proceed on bare assertion.

[10] The fraud at play here, counsel contended, is not a "*sophisticated fraud",* it is a "*brazen fraud*". Thus invoices have been exhibited from the two companies in which literally no difference appears save for the most minor change in the business name. The name DEF does not even appear on the invoices.

Court Response: Taking Ms X's case at its height, this fact would be odd if it were established at hearing that it is true and there was no innocent explanation forthcoming (though some level of explanation has been furnished by Ms Z in her affidavit evidence).

[11] When it comes to reflective loss, the cases opened to the court are cases where compensation has been sought for loss in the value of the shareholding and so forth. Here, per counsel for Ms X, "*The point which I make to this court…is a more basic point and that relates to what exactly is DEF, and we say to the court 'DEF is Mr Y and this is yet another device that Mr Y is using in a sense to ensure that justice is not permitted to operate in the circumstances of the breakdown of his marriage*.'"

Court Response: See the response to point [5] above.

[12] Whereas counsel for Mr Y has focused (in the company law context) on personal rights and personal actions for reflective loss and so forth, counsel for Ms X considers that what is at play is the issue of disregarding separate legal personality.

Court Response: See the response to point [5] above.

[13] Ms X is not seeking to make new law. She accepts that there are issues with regard to reflective loss and is not seeking to make that case. Here, there is a family with a family business; it is not a multinational 'slugging it out' with another multinational; the background here is family law proceedings and not just an effort but an achievement by Mr Y in terms of essentially dissipating all the assets that should in fact be regarded as family assets.

Court Response: See the response to point [5] above.

[14] By virtue of the manner in which s.212 is drafted and by virtue of O.15, r.13 RSC, the court has the power to bring a party such as DEF into the proceedings, and to have Mr Y and Ms Z come into a court of law and answer for what they have done because, per counsel for Ms X, to suggest that DEF is a legitimate business enterprise set up by Ms Z that has nothing to do with ABC, and that all that transpired between ABC and DEF is the product of an arm's length transaction "*is not just a fraud but an insult to the intelligence of…this court….An injustice has been done to my client in the context of the breakup of her marriage. Her husband is 'ducking and diving'…and using whatever devices he can put in* [Ms X's]…*way to prevent a proper and fair and just resolution of their financial and marital dispute"*.

Court Response: See the response to point [5] above. As to the 'ducking and diving' aspect of matters, see the response to point [9] above.

[15] Among the reliefs sought by DEF is a strike-out of the proceedings brought against it. The bar is very high in an application of this nature and the court should be very slow to dismiss proceedings at this stage.

Court Response: Although no case-law was cited in this regard, the court assumes that what counsel had in mind was, for example, *Aer Rianta Cpt v. Ryanair Ltd* [2004] IESC 23, where Denham J., as she then was, points to the high degree of caution that a court should exercise in this regard. Suffice it for the court to note in this respect that it is not convinced that Ms X's claim against DEF will necessarily fail, as was contended for DEF.

XVI

Constitutional Law

26. One aspect of matters not touched upon by counsel, but to which a court in a constitutional democracy will ever be alive, are the provisions and requirements of constitutional law. In this regard, the court respectfully adopts the observation of Professor Hutchinson, *supra* at p. 387 that:

> *"As Hamilton J. hinted in Moylan's case [i.e. Moylan v. Irish Whiting Manufacturers Ltd* (Unreported, High Court, 14th April 1980)] *the rule in* Foss v. Harbottle *must be applied in the Irish courts in the light of the Constitution, and artificial bodies such as companies which owe their existence and privileges to Acts enacted after the coming into force of the Constitution must expect to have their activities scrutinised in that context. It is to be presumed under our law that the Oireachtas intended that powers conferred on the majority of the company would be exercised by them in accordance with the principles of natural justice, which in an appropriate case would require giving the minority at least an opportunity to be heard. The observation of Megarry J. in* Gaiman v. National Association for Mental Health [[1971] Ch. 317, at p. 355] that:
>
> > 'these duties (of directors towards the corporation) may be inconsistent with the observance of natural justice and accordingly the implication of any term that natural justice should be observed may be excluded'
>
> *should be seen in this light."*

27. The court recalls in this regard the contention made by counsel for Ms X at the hearing of the within application, that his client at some point discovered the actions that she claims to have occurred in relation to the assets of ABC. A question-mark necessarily arises, if one takes Ms X's case at its height, as to how, as a director and 50% shareholder in ABC, she could have come to discover such matters and not known them to be happening as they happened. If she did not know that they were happening as they happened that may perhaps point to an exercise of directorial/shareholder powers towards her in such a manner as did not conform to the principles of natural justice. However, it is possible for the court to decide this application without regard to this constitutional aspect of matters, and, given that the point was not raised by either side, it has done so.

XVII

Order 15, Rule 13 RSC

28. Order 15, rule 13 RSC provides, *inter alia*, as follows:

> *"…The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that…the names of any parties, whether plaintiffs or defendants…whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added…".*

29. It will be clear from the observations made by the court previously above that it considers the above-referenced necessity to present, not least though not only because of the difficulty identified by Kenny J. in *Re Westwind Holdings, op. cit., viz*. that the proposed relief sought by Ms X will, at the end of the day, require some form of hearing of DEF, that will lead to unnecessarily "*prolonged litigation" (Re Westwind*, at para.24) and further expenditure in the context of matrimonially-related proceedings that can be avoided through joinder at this time. (In truth, the court would have expected that, given the relief sought and all the circumstances presenting, DEF would wish for a part in the proceedings, whether as co-respondent or notice party).

XVIII

Conclusion

30. For the reasons set out above, the reliefs sought by DEF at this time are respectfully refused.

31. Given the ongoing Coronavirus pandemic, the parties are welcome to make submissions by email as to the costs order to follow on this judgment.