APPROVED **[2025] IEHC 11**

THE HIGH COURT

Record No.: 2023/262 COS

IN THE MATTER OF MAXELA LIMITED

AND IN THE MATTER OF EASTDELI LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

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

BETWEEN:

ALEXANDR VAKIY

Applicant

-and-

MAX BULGAKOV

Respondent

JUDGMENT of Mr Justice Rory Mulcahy delivered on 15 January 2025

Introduction

1. In these proceedings, the applicant, Mr Vakiy, claims that the affairs of two companies, Maxela Limited ("**Maxela**") and EastDeli Limited ("**EastDeli**"), have been conducted in a manner oppressive to him and in disregard of his interests as a member of those companies. He has, therefore, instituted these proceedings pursuant to section 212 of the Companies Act 2014 ("**the 2014 Act**") seeking relief.

2. There has been a full exchange of pleadings, and the respondent, Mr Bulgakov, has delivered points of defence in which he denies Mr Vakiy's claims. Importantly, for present purposes, in addition to denying all the allegations of oppressive conduct in his points of defence, Mr Bulgakov raises a preliminary objection. He contends that Mr Vakiy is not a member of Maxela or Eastdeli ("**the Companies**") at all, having sold his interests to a third company, Corex Emerald Limited ("**Corex**") in 2021. He argues, therefore, that Mr Vakiy has no standing to maintain these proceedings.

3. Mr Vakiy denies that he has sold his interests in the Companies. There is, therefore, a factual dispute on this issue, which will have to be resolved for the purpose of determining these proceedings. In those circumstances, Mr Bulgakov seeks an order pursuant to Order 36, rule 9 of the Rules of the Superior Courts ("**the Rules**") directing a modular trial on the following issue:

Whether the applicant has standing to maintain these proceedings

Background facts

4. This judgment is not concerned with the merits of the underlying proceedings. Nor is it necessary or appropriate to make any findings of fact in relation to the proceedings. Insofar as the background facts are set out here, it is for the purpose of explaining the issue for determination in this application and should not be regarded as a final determination of any issue in controversy.

5. The applicant and respondent established Maxela in or about 2005. They were directors and equal shareholders. Maxela's principal business activity is the importation and distribution on a wholesale basis of Central and Eastern European food supplies. In addition to its wholesale trade, it operates a retail franchise known as 'Polo Stores'. There are fourteen such outlets across the State. Maxela has 110 employees. It had an annual turnover in 2021 of €30,715,789.00, which included a gross profit of €4,924,729.00.

6. EastDeli was established in 2011. Its principal business is the operation of one Polo Store in a rented premises in Clondalkin. It employs 13 to 14 people, and its annual turnover is approximately €2,500,000.

7. Maxela's IT infrastructure has, since 2007, been maintained by a company, Schnell Systems GmbH, owned by Mr Oleg Schnell. Mr Schnell has, therefore, been engaged with the parties and the Companies for a significant period of time. In or about 2019, a proposal was developed whereby Mr Schnell would become a partner in the Companies. It seems to be agreed that the proposed mechanism for establishing this partnership was that Mr Vakiy and Mr Bulgakov would transfer their interests in the Companies to a holding company, Corex, in which the parties and Mr Schnell would each have an equal interest.

8. In addition, between 2020 and 2021, the parties explored the possibility of purchasing or constructing their own warehouse rather than, as had been the case, renting available warehouse space. Various options were considered and feasibility studies conducted. Ultimately, Mr Schnell and Mr Bulgakov were in favour of the proposal to construct a warehouse, but Mr Vakiy opposed it. Mr Vakiy claims that this led to a demand by Mr Bulgakov and Mr Schnell for a division of the business, a proposal which he says he rejected. It seems, though this remains to be decided, that disagreement on these issues may have led to the other matters of dispute between the parties.

9. In his affidavit grounding the proceedings and in his points of claim delivered thereafter, Mr Vakiy details the differences which have arisen between him and the respondent since the middle of 2021. He details various steps which have been taken, which he claims have been oppressive, or in disregard, of his interests in the Companies.

10. In his replying affidavit and points of defence, Mr Bulgakov refers to the proposal that he and Mr Vakiy were to transfer their interests in the Companies to Corex. He claims that the transfer of interests was accepted by him *and by Mr* Vakiy and was actually completed by Mr Vakiy on 9 June 2021. He relies on an acceptance form executed by Mr Vakiy in which it is stated that he irrevocably accepts Corex's offer for his shares in Maxela in return for the issue of 50 ordinary shares in Corex. He also relies on documentation lodged in the Companies Registration Office (CRO) on 12 July 2021 which records the allotment of 50 shares in Corex to him and to Mr Vakiy. He states that the transfer of their shares in Maxela

to Corex hasn't been recorded in the CRO because of Mr Vakiy's failure to approve the necessary filings.

11. In his reply to the points of defence, Mr Vakiy contends that the share transfer from the Companies to Corex was "*never consummated*". In his affidavit replying to the motion to direct a modular trial, he avers that he doesn't remember executing the acceptance form relied on by the respondent but that if he did sign it "*the contents of that document must have been misrepresented to [him]*." He contends that this is further evidence of the respondent's oppressive behaviour. He also argues that the respondent is estopped from contending that he is not a shareholder in the Companies in circumstances where "*at all times*" the parties proceeded on the basis that he and Mr Bulgakov were 50% shareholders in the company.

12. The proceedings were commenced by originating notice of motion issued on 21 December 2024. Following delivery of the points of claim by the applicant, the respondent issued a motion seeking to have the claim struck out as bound to fail on the grounds that Mr Vakiy was not a member of the Companies and, therefore, had no standing to maintain these proceedings. That motion was listed for hearing on 31 July 2024.

13. By letter dated 18 July 2024, the respondent's solicitor wrote to the applicant's solicitor indicating that, as an alternative to the relief seeking to strike out the proceedings, the respondent would seek a preliminary hearing on the issue of the applicant's standing. It described the issue of the applicant's standing as a "*threshold or preliminary issue that must be determined in advance of the substantive relief sought in the petition*." The letter indicated that if the applicant was agreeable to the matter being moved as a preliminary issue, it was prepared to proceed on that basis.

14. By letter dated 22 July 2024, the applicant's solicitor replied, making clear that the applicant did not consent to the respondent's proposals. In addition to objecting to the amendment to the motion proposed by the respondent, the applicant made the point that the issue of standing was not suitable to be determined as a preliminary issue and that the respondent's proposal would only lead to delay. The letter called on the respondent to consent to the motion being struck out with an order for costs in the applicant's favour.

15. In their reply, dated 24 July 2024, the solicitors for the respondent indicated consent to the applicant's proposal, *i.e.*, to strike out the motion with costs to the applicant. The letter stated that the issue the subject of the strike out motion was more appropriately addressed by way of preliminary hearing or modular trial and made clear that they were in the process of preparing application papers.

16. The motion seeking a modular trial issued on 31 July 2024.

The application for a modular trial

17. In his motion issued on 31 July 2024, the respondent sought an order directing a modular trial pursuant to Order 36, rule 9 of the Rules, or, in the alternative, the trial of a preliminary issue pursuant to Order 25, rule 1 or Order 34, rule 1 of the Rules. At the hearing of the motion, it was accepted that, as there were no agreed facts for the purpose of directing a preliminary issue of law under Order 25, or a special case under Order 34, the only relief being sought was a direction for a modular trial pursuant to Order 36, rule 9 or the court's inherent jurisdiction.

18. The respondent's proposition is straightforward. Section 212 of the 2014 Act provides a potential remedy to members of a company:

> ***212.*** *(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors 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.*

19. The respondent argues that it is clear from section 212 that only a member of a company has standing to make an application under that section. He refers to *Re Via Net Works (Ireland) Ltd* [2002] 2 IR 47 in which the Supreme Court dismissed an oppression claim as

bound to fail in circumstances where, at the time of the presentation of the petition, the applicant was contractually obliged to transfer his shares to the respondent. The respondent contends that the applicant has already transferred his shares in the Companies, to Corex, and is, therefore, no longer a member of the Companies. Accordingly, he has no standing to maintain section 212 proceedings in relation to those Companies. A module confined to the single question of fact, whether the applicant has transferred his shares in the Companies, could, therefore, resolve the proceedings without the necessity for a full trial on all the issues of oppression alleged.

20. The applicant opposes the motion. In addition to arguing that this proposed issue is not suitable or appropriate for a modular trial because the evidence relevant to the balance of the case is relevant to the question of standing, he argues that the respondent's reliance on *Re Via Net Works* is subject to an important *caveat*, suggested in Courtney, *The Law of Companies*, (Bloomsbury, 4th Ed) at 11.049:

> "*It is thought that where the oppression or disregard of interests alleged is the expropriation of the petitioner's shares, the decision in* Re Via Net Works Ireland Ltd *ought to be distinguished and should not preclude the petition being heard under s. 212.*"

21. He also contends that this motion represents an abuse of process. He argues that in light of the respondent's motion to strike out the proceedings, he is not entitled to seek a modular trial on the very issue which he elected not to pursue in the earlier motion.

Applicable principles

22. Order 36, rule 9 of the Rules provides as follows:

> *9. (1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:*
>
> *(a) that different questions of fact arising therein be tried by different modes of trial;*
>
> *(b) that one or more questions of fact be tried before the others;*

(c) that one or more issues of fact be tried before any other or others.

23. Thus, the court enjoys an express jurisdiction to try particular questions or issues of fact other than in the course of a unitary hearing of all issues in a case. It is also clear that the court has an inherent jurisdiction to order a modular trial where considered appropriate (see, for instance, *Cork Plastics (Manufacturing) v Ineos Compound UK Limited* [2008] IEHC 93). It remains the case, however, that the default position is that there should be a single trial of all issues at the same time.

24. There is no dispute regarding the principles which should be applied in determining whether it is appropriate to depart from that default position and direct a modular trial. These have been comprehensively addressed most recently by Simons J in *McGovern v Governor of Limerick Prison* [2024] IEHC 210 when directing a modular trial in a plenary action concerning the treatment of the plaintiff during her incarceration in Limerick Prison. The defendant claimed that the proceedings had been commenced out of time or should be dismissed for delay. The court, having considered the applicable criteria, determined that there should be a modular trial in which the first module would address the question of whether the proceedings were statute-barred or otherwise inadmissible by reason of delay. Counsel for the respondent, in his oral submissions, placed particular emphasis on this decision and the manner in which the relevant criteria were applied by the court.

25. Both parties' submissions refer to the summary of the applicable criteria contained in the High Court judgment (Charleton J) in *McCann v Desmond* [2010] 4 IR 554 (at p. 558):

> "*7. Therefore, given that the default position is a full hearing, I believe that the questions which would naturally address themselves to the mind of a court in considering an application such as this for a modular hearing, would include:*
>
> *(1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate so that the*

case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.

(2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing, simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.

(3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's cases, or the response which a defendant might make to it, then the order should not be made.

(4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts or one capable of being made within the inherent jurisdiction of the court. Obvious examples of pre-trial motions that may merely be tactical are motions to strike out proceedings as being vexatious or frivolous or to seek an order for security for costs under s. 260 of the Companies Act 1963. Other instances include the lengthy arguments that can sometimes ensue in relation to discovery. If the removal of issues in to a modular hearing is likely to disadvantage the proper process of pre-trial preparation that discovery orders, notices for particulars and notices to admit facts, involve, then such a motion should be refused as resulting not from a genuine process that will assist the trial but for tactical reasons related to wrong-footing the other party."

26. As noted by the respondent in his written submissions, although the criteria identified in *McCann v Desmond* were not intended as a rigid or statutory test, they do provide a useful guide for the exercise of the court's discretion.

27. Both parties sought to argue that the application of the criteria in *McCann v Desmond* to this application supported their position. In addition, the respondent argued that, as in *McGovern*, the module proposed would be quite short when compared with the length of a full trial, which it estimates at eight weeks. Rather than rehearse those arguments, it is convenient to address the parties' arguments when considering the application of the relevant criteria to this application. Before doing so, it is appropriate to address briefly the applicant's suggestion that this application constitutes an abuse of process. I should note that the applicant did not press this argument at the hearing of the motion, though it was not expressly withdrawn.

Abuse of process

28. The applicant argues that this motion represents an abuse of process because it seeks to re-visit an issue which the respondent initially sought to raise in his motion to strike out the proceedings but which he elected not to pursue. He claims that the attempt to re-agitate the same issue in this motion breaches the rule in *Henderson v Henderson*. He claims that the purpose of the motion is simply to delay the proceedings, and that this is consistent with the respondent's conduct to date. In oral submissions to the court, his counsel referred to various alleged breaches of undertakings regarding the transfer of funds from the Companies, which have been the subject of prior applications to the court and, as alleged by the applicant, failure by the respondent to comply with previous directions.

29. As counsel for the respondent pointed out, none of the allegations regarding breaches of undertakings or directions were set out in the affidavits filed in this motion. I agree with him that it would, therefore, be inappropriate to have regard to this alleged conduct in seeking to determine whether the motion is an abuse of process. It seems to me, however, that even if I accepted the applicant's contentions regarding the respondent's conduct of the proceedings, that would not warrant a conclusion that this motion is an abuse of process. It plainly is not.

30. In the application to strike out the proceedings as bound to fail, the respondent would have been required to establish that, taking the applicant's case at its height, he had no reasonable prospect of success. In the context of the application brought in these proceedings, it would have required the respondent to establish that the applicant had no arguable case that he remained a member of the Companies.

31. Following the exchange of affidavits on the motion, the respondent decided not to pursue that application. That in no way involved a concession, or could have been understood as involving a concession, of the argument that the applicant lacked standing. In light of the pleadings which were still being exchanged between the parties, this would have been clear even in the absence of the correspondence from the respondent which plainly indicated an intention to pursue the issue by way of the current application. The concession of the strike out motion was merely an acknowledgement that the respondent's argument could not succeed on this point without the relevant evidence being tested in a plenary hearing. That is entirely consistent with the bringing of this motion. The respondent is not pursuing an argument which he could have but did not pursue in earlier proceedings, contrary to the rule in *Henderson v Henderson*. Rather, he has decided not to pursue the argument by way of a motion to strike out while at the same time making clear that he would pursue the argument in the substantive proceedings and, indeed, would seek a modular trial on the issue. Accordingly, no question of the rule in *Henderson v Henderson* being breached arises.

32. Indeed, it is apparent from the applicant's own arguments that this is so. The applicant doesn't contend, nor could he, that the respondent is not entitled to argue that Mr Vakiy has transferred his shareholding in the Companies, subject to the estoppel argument referred to above. It is difficult to see, therefore, how it could be an abuse of process for the respondent to contend that that argument should be addressed in a modular trial. Whether it is appropriate for a modular trial is, of course, another matter entirely.

33. Insofar as it is suggested that the respondent's pursuit of the earlier motion has delayed the proceedings or that the applicant has been prejudiced thereby, it is not apparent that this is so. The delivery of pleadings continued while affidavits and submissions on the motion to strike out were being exchanged. The reply to the points of defence was delivered on 14 June 2024. The respondent first raised the possibility of pursuing the relief now sought in

this motion within five weeks thereof, in his solicitor's letter of 18 July 2024. The motion issued on 31 July 2024. The applicant obtained the costs of the earlier motion. In the circumstances, no appreciable delay or prejudice has been caused to the applicant. There has been no abuse of process, and the respondent is entitled to pursue this application to direct a modular trial.

Discussion

34. Although I consider that the respondent is entitled to ask the court to direct a modular trial, and the parties should be encouraged to try and achieve efficiencies in the progress of these proceedings, I am not persuaded that this is an appropriate case in which to direct a modular trial on the issue proposed . Although the proposal has much to recommend it, it seems to me that the determination of this issue, isolated from the balance of the case, may not be possible and has the potential to operate to the disadvantage of the applicant, contrary to the requirements of justice.

35. Were the trial to proceed by way of modular trial as proposed, the respondent would be at an obvious litigation advantage in that first module. If the issue of standing is decided in favour of the respondent, he will succeed in the proceedings. However, if it is decided against him, he will still have the opportunity to fully contest the proceedings in the remaining module. Looked at from the applicant's point of view, the applicant can lose the proceedings by failing in the first proposed module, he can not win by succeeding in that module. It is appropriate therefore to carefully scrutinise the purported benefits of directing a modular trial. I acknowledge, of course, that is in the interests of all parties to litigation, including the party which is ultimately unsuccessful, that a resolution of the proceedings be achieved in as cost effective and timely a manner as is consistent with the requirements of justice.

36. Insofar as the applicant invites the court to draw the inference that this motion has not been brought *bona fide*, or that it has been brought solely for the purpose of delaying a resolution of these proceedings, I decline to draw such an inference. Although I have no doubt that the respondent sees a potential advantage to himself in seeking to have this issue addressed in a modular trial, there is nothing untoward about that. Litigants typically only

issue motions when they consider it is in their interests to do so. As discussed below, the application for a modular trial appears to be an appropriate attempt to achieve time and costs efficiency in the progress of these proceedings. Any such attempts are to be encouraged not deprecated and the fact that the proposed form of trial may offer some advantage to the respondent is not, of itself, a basis for refusing the application.

37. The respondent contends that there would be a significant saving in time and costs were the issue modularised and then determined in his favour. He argues that the module proposed could be dealt with in a matter of days, whereas the full trial will take weeks. His solicitor has filed an affidavit in which he estimates eight weeks. The respondent refers to his own request for discovery and notes that only a handful of the 28 categories of discovery sought are potentially relevant to the issue of standing and therefore a greatly simplified discovery exercise could be conducted in respect of a module on that issue.

38. The applicant disputes the respondent's argument regarding the length of an overall hearing (though not on affidavit). I accept that the respondent's estimate of eight weeks may be overstated; certainly, any trial judge will use all tools at their disposal to ensure that the trial is conducted as efficiently as possible. It is also the case that though only certain categories of discovery may be relevant to the question of standing, this does not necessarily equate to a significantly reduced discovery exercise. The extent of that exercise is determined more by the number of documents which have to be reviewed than the number of documents which have to be discovered. It is not clear that the number of documents to be reviewed could be significantly affected were discovery confined to those categories relevant to the question of standing.

39. Despite those reservations, I accept the respondent's contention that the module proposed would, if the issue of standing could be decoupled from the balance of the issues in the trial, achieve a significant saving in time and costs relative to the overall length of the proceedings, assuming of course that it is determined in the respondent's favour.

40. However, it is far from clear that the question of standing, having regard to the manner in which it arises in this case, can be fairly determined in isolation from all the other issues raised in these proceedings. It is apparent from the affidavits filed and the pleadings exchanged that the applicant will contend that there was no transfer of his shares in the Companies to Corex, and therefore no issue arises as regards his standing. In seeking to

advance that argument, he will seek to rely on the context in which the transaction is said to have taken place for the purpose, it would seem, of persuading the court that it is inherently implausible that it occurred as alleged by the respondent. In his affidavit in this motion, he has averred that if he did sign the transfer form, it was because the contents of it were misrepresented to him, a further example, he alleges, of the respondent's oppressive conduct. In addition, he will also seek to argue that, by his subsequent conduct, *i.e.*, in allegedly treating the applicant as if he *is* a member of the Companies, the respondent is estopped from contending that he is not.

41. In the circumstances, although I think it would be an exaggeration to assert that separation of the issue of standing would "*tear the fabric of what the parties need to litigate*", it means that the issue of standing can not, or at least might not, be readily capable of being determined in isolation from the other matters in dispute. The first criteria identified in *McCann v Desmond* is therefore not satisfied. The evidence given in relation to the allegations of oppression could potentially be relevant to the question of standing, and the evidence given of the interactions between the parties more generally, after the purported transfer of the shares in the Companies, would be relevant to any alleged estoppel. If that is so, the potential savings in time and costs suggested by the respondent would quickly evaporate as the evidence strayed far beyond the precise circumstances surrounding the purported transfer of shares.

42. The question can also be considered in light of the third criteria in *McCann v Desmond*. If the issue of standing were decoupled from the case, this might operate to prejudice the applicant in the proceedings, *e.g.* if the credibility of the respondent's evidence regarding the alleged transfer of the shares in the Companies to Corex was determined in isolation from an assessment of the credibility of the respondent's evidence generally and of his conduct in the management of the Companies.

43. In the circumstances, notwithstanding obvious potential advantages in terms of savings in time and costs, I do not consider that this is an appropriate case in which to order a modular trial. I will, however, take the opportunity to emphasise what is no doubt already clear to the parties, that the question of the applicant's standing will have to be addressed by both sides. Even if the respondent is correct regarding the ownership of shares in the Companies, that may simply raise questions regarding the management of Corex. If the

applicant is ultimately to lose on the question of standing, it is not in his interests to engage in an eight-week trial to get to that point. As noted above, this motion represents at least an attempt to manage matters efficiently.

44. I note that in 2023, mediation of the dispute between the parties had been agreed but did not take place for reasons which are not entirely clear. The applicant's stated reasons for then electing not to engage in mediation are not compelling. In circumstances where the ongoing relationship between the parties will have to be addressed irrespective of the outcome of these proceedings, I strongly encourage the parties to reconsider engaging in mediation as an alternative to pursuing lengthy litigation, which may not resolve all the issues between them. There will, potentially, be costs consequences should they fail to do so.

Conclusion

45. I refuse the orders sought in the respondent's motion dated 31 July 2024. I will list the matter for mention on 28 January 2024 for the purpose of addressing the costs of this motion and giving such further directions as may be required. The parties should liaise for the purpose of agreeing directions prior to that date.