THE HIGH COURT

Record No: 2024/11 IA

[2025] IEHC 49

IN THE MATTER OF AN INTENDED DERIVATIVE ACTION ON THE APPLICATION OF SIDNEY JOHN SUTTON

Between:

SIDNEY JOHN SUTTON

Applicant

-AND-

SALUMI GRAZING LIMITED T/A SALUMI GRAZING,
MARK LEAVEY, KAREN LEAVEY,
COHESION INFHEISTÍOCHTAÍ LIMITED, EOIN GOULDING,
JAMES MICHAEL McQUAID T/A McQUAID ACCOUNTANTS, MICHELLE PERKINS

And

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Respondents

JUDGMENT of Mr Justice Oisín Quinn delivered on 30th January 2025

I. Introduction

1. The applicant ("Mr. Sutton") seeks the leave of the court pursuant to Order 15, rule 39 of the Rules of the Superior Courts to bring a derivative action against the respondents on behalf of the company, Salumi Grazing Limited ("Salumi").

2. Salumi, which was founded on 25 August 2020, ran a small business selling charcuterie and cheese boards along with a selection of wines from a premises in Terenure, Dublin during the covid pandemic. The fourth respondent ("Cohesion") owned the premises and had entered

into a license for the use of the premises (the "License"), which may in reality have been a lease, with Salumi for 3 years commencing on the 18 September 2020.

3. Mr. Sutton owns 50% of the shares in Salumi and is one of two directors of Salumi. The second respondent ("Mr. Leavey") owns the other 50% of the shares and is the other director of Salumi. Mr. Sutton's background is in accounting and Mr. Leavey's background is in hospitality. There appears to be no shareholders agreement, or arrangement for a 'casting vote', or other particular constitutional provision of Salumi to provide a mechanism for dealing with a deadlock between the two owners.

4. Mr. Sutton claims, inter alia, that while he was in prison between 16 October 2020 and 23 April 2021 on foot of an increased sentence handed down by the Court of Appeal following a conviction for alleged assault by him of his former partner which has since been overturned (a re-trial has been directed) that Mr. Leavey essentially wrongly appropriated the business of Salumi and transferred it to another company Karmar Foods Limited ("Karmar") controlled by him and his wife, the third respondent.

5. Mr. Sutton claims that Cohesion and its director the fifth respondent ("Mr. Goulding") unlawfully facilitated this by, inter alia, summarily (and unlawfully according to Mr. Sutton) terminating the License with Salumi on 15 May 2021 and immediately granting a new license on the same terms to Mr. Leavey's new company Karmar which then continued the business in the same premises using, Mr. Sutton claims, Salumi's fixtures and fittings, goodwill and assets.

6. Mr. Sutton complains that the sixth and seventh named respondents ("McQuaid Accountants") wrongly facilitated a series of allegedly unlawful company filings and amendments to Salumi's Constitution during the time when he was in prison which removed Mr. Sutton from his positions and shareholding in Salumi and replaced him with the Leaveys.

7. He contends that the eighth respondent ("the Bank") unlawfully changed the banking mandates of Salumi on 17 November 2020 while he was in prison, removing him, and giving sole control of Salumi's bank accounts to Mr. Leavey. He claims all debits from the company accounts thereafter (during a period in which Salumi was trading) were fraudulent.

8. As Salumi is controlled equally between Mr. Sutton and Mr. Leavey and as the relationship between them has completely broken down, Mr. Sutton seeks the permission of the court to bring a derivative action on behalf of Salumi in respect of these alleged wrongs for the loss and damage which he claims the company has suffered.

II. Background

(a) Procedural history

9. Mr. Sutton represented himself in this and several related proceedings. The application was made by an Originating Notice of Motion issued following an *ex parte* application on 24 January 2024. The application ultimately involved multiple affidavits and exhibits running to more than four thousand pages and it came on for hearing before me over three days from Tuesday 14 January to Thursday 16 January 2025.

10. There was no appearance at the hearing or, apparently, on any previous occasion when the matter was before the court in the chancery list by or on behalf of Salumi or the Leaveys. Mr. Sutton produced an affidavit sworn on the 10 January 2025 indicating on its face, service on those respondents by email almost a year earlier. There was an *ex parte* order made on 24 January 2024 giving Mr Sutton liberty to serve those respondents in that fashion. This affidavit of 10 January 2025 also indicated that the papers had been sent by registered post to what Mr. Sutton believes is the Leaveys home address on the Friday 10 January 2025. I was not satisfied as to the adequacy of the service by registered post (as the papers would likely only have arrived on the morning of the hearing, being two working days later) but as Mr. Sutton had, on the face

of his affidavit, sent the papers to the Leaveys by email in accordance with the order of the High Court made on 24 January 2024, I determined that there was service in accordance with an order of the court, as can be provided under the rules governing these applications; see Order 15, rule 39(6).

11. Cohesion and Mr. Goulding, McQuaid Accountants and the Bank were all legally represented. These three groups of respondents all filed helpful written submissions, as did Mr. Sutton.

(b) Related proceedings

12. Aside from the reliefs sought in the Originating Notice of Motion herein, there have been three other proceedings or applications of relevance, each of which has led to a judgment of the High Court.

(i) The interlocutory application of Mr. Sutton leading to the judgment of Stack J., 22 June 2022

13. Firstly, in separate proceedings between the same parties and entitled *Sutton v Salumi Grazing Limited & Others*, record number 2021/5206P Mr. Sutton sought various interlocutory reliefs, similar to the reliefs he proposes to pursue on behalf of Salumi in the proposed derivative action and relating to the same underlying events. This application was ultimately heard by Ms. Justice Stack and in an *ex tempore* judgment of 22 June 2022 the court granted Mr. Sutton certain reliefs against the Leaveys and directed them to file such documentation in the CRO so as to reverse the removal of Mr. Sutton as company secretary of Salumi, to correct the allocation of shares in Salumi back to the previous 50/50 arrangement as between him and Mr. Leavey and to restore Mr. Sutton to his position as company director of Salumi; see para.s 28 and 50-51 of the judgment of Stack J. In addition, she directed that Mr. Sutton be restored to his status as a signatory on Salumi's bank accounts; see para 73 of the judgment.

14. Ms. Justice Stack refused to grant interlocutory relief against Cohesion and Mr. Goulding but did so in part because any claim to be restored to the premises was only a claim that could be made by Salumi. At para.s 55 to 59 Stack J. states as follows:-

> *"55. I have very serious concerns about the actions of the [Leaveys]. However, I also have very serious concerns as to how within 24 hours of [Mr. Sutton] attending on the premises, [Cohesion] acted to terminate the licence on a completely unclear legal basis and immediately granted to another company, owned, managed and controlled by the [Mr. Leavey] a similar licence.*
>
> *56. I am also concerned about the affidavit sworn by [Mr. Goulding] in these proceedings relating to the application to restore [Salumi] to the occupation of its business premises.*
>
> *57. I am somewhat underwhelmed by the submission made on behalf of [Cohesion and Mr. Goulding] which appeared to suggest that the licence had been lawfully determined by reason of a discrepancy of something over €900 in relation to the December licence fee. The notice terminating the licence purported to be based on the right to terminate for breach of a condition other than the payment of the licence fee/rent. Counsel for [Cohesion and Mr. Goulding] very properly admitted that there was no such breach, though he had identified a shortfall of over €900 in the payment of the licence fee/rent for December 2020, a time at which [Mr. Leavey] controlled [Salumi's] bank accounts and should have seen that this was paid.*
>
> *58. However, no notice was served in relation to the non-payment of the licence fee/rent, the notice served referred to a non-existent breach of a condition in the licence and I think a non-existent agreement as to when it would be remedied. It was not served by recorded delivery as required by the licence and there is no proof of its receipt although*

I think that is very much a secondary issue in my concerns. I therefore have significant concerns about the lawfulness of the termination of the lease.

59. However, the injunctions sought for restoration to the premises cannot be granted for two reasons. First, that is a right enjoyed by [Salumi] which has not, for reasons which I think must be obvious, sought to regain possession in these or any other proceedings. The rule in Foss v Harbottle means that [Mr. Sutton] cannot personally sue for this relief. He must regain, if he can do so lawfully, control of [Salumi] in order to procure to seek it, or he must bring a derivative action in accordance with the rules of court and the relevant legal principles.

60. Secondly, and in any event, the balance of convenience would not favour the granting of the relief. I think it is clear that Karmar Foods Ltd is trading from the premises and people are employed there. It is also clear that [Mr. Sutton] and Mr. Leavey could not do business together successfully into the future. They have set up a Company together of which they are 50% shareholders and they will have to work through the issues arising out of that, including the legal issues flowing from the matters the subject of these proceedings, but in terms of operating a business and trading I do not think there is any reality to forcing them to deal with each other. That would be the reality if I were to grant an injunction reinstating [Salumi] to its premises. It is likely that the business could not trade profitably or at all, that the current employees might lose their jobs, and that nobody would gain anything from it."

15. During the hearing before me, Counsel for Cohesion and Mr. Goulding did not invite the court to adopt any different analysis of the position for the purposes of the application before me.

16. Stack J. refused to grant any relief against McQuaid Accountants (Mr. Sutton was seeking their removal as accountants for Salumi); see para.s 62-63 of her judgment. This was in part because, by the time of the hearing before her, McQuaid Accountants were no longer acting as accountants for Salumi.

17. Stack J. also refused to grant any relief as against the Bank; see para.s 64 to 69, principally on the ground that same was not necessary and that access to Salumi's bank account depended on the nature of relief granted against other parties. As described above, Stack J. directed Mr. Leavey to take such steps as were required to return Mr. Sutton to his status as a signatory on the account; see para 73 of her judgment.

(ii) The interlocutory application of Cohesion to restrain a winding up petition, leading to the judgment of Sanfey J. 20 February 2024, [2024] IEHC 230

18. In another set of proceedings bearing record no. 2023/6003P, Cohesion sought an interlocutory injunction to restrain Mr. Sutton and Salumi from presenting a petition to wind up Cohesion on the basis, inter alia, that same was an abuse of process and the purported invoices issued by Salumi to Cohesion were not authorised and had been issued simply by Mr. Sutton.

19. Notably, in those proceedings, Mr. Sutton claimed that Salumi had continued to trade *after* the termination of the license by Cohesion; see para. 15 of the judgment of Sanfey J. Mr. Sutton made the same assertion in the proceedings before me and produced draft accounts of Salumi which he had prepared and which he said showed that the company was continuing in business and making substantial profits. This continued assertion of Mr. Sutton (that Salumi continues to trade, much less trade successfully) is difficult to understand in the context of the claim he seeks to bring on behalf of Salumi to the effect that Salumi's occupation of its premises

was unlawfully terminated by Cohesion and its business taken by Mr. Leavey and transferred to his new company.

20. Sanfey J. granted the application on the basis that he found that the presentation of the petition was an abuse of process on the grounds that the alleged debt from Cohesion was *bona fide* disputed and secondly, that Mr. Sutton did not have authority to launch a winding up petition on behalf of Salumi; see para.s 29 to 32 of Mr. Justice Sanfey's judgment:-

> *"29. There is no evidence which convinces me that the dispute of these debts by [Cohesion] is not bona fide. While the judgment of Stack J suggests strongly that it may have some uncomfortable questions to answer in relation to the termination of the licence, [Cohesion] has to some extent got caught in the middle of a row between Mr Sutton and Mr Leavy. It appears to have charged Mr Leavy's company the same rent as charged to Salumi Grazing Limited and in that sense did not exploit the differences between the two gentlemen to extract an increased rent or other advantage for itself. I accept that it is likely to strenuously contest any proceedings seeking damages served on it by or on behalf of Salumi Grazing Limited.*
>
> *30. In these circumstances, it seems to me that any petition to wind up the company would be bound to fail, is an abuse of process and the presentation of which should be restrained by this Court.*
>
> *31. While that conclusion is sufficient to warrant the grant of an interlocutory injunction, I do not accept in any event that Mr Sutton was entitled to present a 21-day letter on behalf of Salumi Grazing Limited. It is clear that he has not played any substantive part in that company's affairs for almost three years. He has no dealings with Mr Leavy and cannot locate him to serve him with the derivative action application. He is a 50% shareholder and director of the company but, as Stack J*

pointed out at para. 59 of her judgment, he has to gain control of the company or get this Court's permission to sue on its behalf in order to represent the company in litigation, or I should say, for the purpose of the service of the 21-day letter under s.569 of the Companies Act.

32. Mr Sutton has clearly, and somewhat belatedly, recognised this by commencing an application for leave to bring a derivative action. However, this cannot retrospectively validate his threat to initiate winding up proceedings at a time when he was not entitled to represent the company. Mr Sutton's subjective view that he has been defrauded does not entitle him to disregard the provisions of O.15, r.39 and threaten winding up proceedings in circumstances where he does not control the company or have the authority of the court to sue on the company's behalf."

(iii) The interlocutory application of Mr. Sutton for Mareva style relief leading to the judgment of Mulcahy J. 16 February 2024, [2024] IEHC 286

21. Finally, at the commencement of this originating application in January 2024, Mr. Sutton sought a *mareva* style injunction against Cohesion to restrain it from selling the property where Salumi had previously run its business. In passing, Mulcahy J. stated at para. 12 that, based on the evidence to date, he shared Stack. J.'s concerns "about the lawfulness of the termination of the licence".

22. Ultimately, the application for *mareva* style relief was refused on the ground, principally, that the court was not satisfied that the proposed sale of the premises by Cohesion was being done to dissipate its assets to avoid a judgment in the potential derivative action; see para.s 30 to 39. Notably in relation to the potential derivative action, Mulcahy J. made, inter alia, two observations. At para. 35 he states:-

"In this regard, it is of significance that, on the basis of the evidence before the court, the case against Cohesion is that it facilitated the Leaveys in taking possession of the premises and getting the benefit of the licence and, on [Mr. Sutton's] case, the business of [Salumi]. Cohesion's evidence is that it obtained no benefit from this and simply received the same licence fee from Karmar [the Leaveys' new company] as it had from [Salumi]."

and at para 38, Mulcahy J. states:-

"If [Salumi] is ultimately successful in a claim, the most it could possibly obtain from Cohesion is an award of damages; it could never have an interest in the properties being sold."

(c) The criminal proceedings involving Mr. Sutton

23. As described above, the event that immediately preceded the problems that have afflicted Salumi, was the imprisonment of Mr. Sutton on the 16 October 2020. The background is briefly as follows. The DPP charged Mr. Sutton with assault contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997 and four counts of assault contrary to section 2 of that Act and production of a knife contrary to section 11 of the Firearms and Offensive Weapons Act, 1990. These offences are said to have occurred arising out of alleged events on 6 February 2016 wherein it is alleged Mr. Sutton assaulted his former partner. Mr. Sutton denies the charges and he pleaded not guilty. Following a trial in the circuit court before a jury Mr. Sutton was convicted on 2 November 2017. He was subsequently sentenced to a two-year term of imprisonment (one year of which was suspended) in respect of the section 3 assault and the production of the knife, and a four month term in respect of the section 2 assaults, the sentences to run concurrently.

24. The DPP sought a review contending that the sentence was too lenient. At the same time, Mr. Sutton appealed the conviction. The DPP's application came on first. The Court of Appeal explained that "the entire delay since the conviction appeal came before this Court is attributable to [Mr. Sutton] whose actions forced this Court to proceed with the review of sentence in advance of the appeal against conviction", per McCarthy J. on behalf of the Court of Appeal, [2021] IECA 161. On the 25 September 2020 (one month after Salumi had been incorporated and only one week after Salumi entered into the License for its premises with Cohesion) the Court of Appeal determined that the sentence imposed on Mr. Sutton *was* unduly lenient and proceeded to re-sentence Mr. Sutton to, in effect, an additional 16 months. Mr. Sutton was given until the 16 October 2020 to "get his affairs in order", as he described it. The affidavits in this application do not disclose any appropriate effort to inform Mr. Leavey of any of this or to make any appropriate arrangements for the running of the business of Salumi during this period of incarceration. Mr. Sutton, during the hearing, appeared to suggest in some portions of his oral submissions that he had discussed it with Mr. Leavey, and he seemed to claim that he had agreed with Mr. Leavey that his niece would take over his bank mandate functions while he was due to be in jail, but none of this was set out on affidavit. This account, such as it was, is therefore not evidenced for the purposes of this application (aside from the fact that it is flatly at odds with the account of this period of time set out by Mr. Leavey in his affidavit of 27 September 2021 from the 2021 injunction application; see para.s 17 to 21 thereof in particular).

25. While Mr. Sutton was in jail from 16 October 2020, his appeal against conviction came on and was dealt with by the Court of Appeal on 26 April 2021. Arising from a decision of the Supreme Court in a case called *DPP v Almasi* [2020] IESC 35 the Court of Appeal decided that there was a substantive error of law that had occurred in Mr. Sutton's original trial and accordingly the conviction was quashed. While this meant Mr. Sutton was immediately

released (he was initially released on bail on 23 April 2021) having served just over 6 months of the additional 16 months previously added to his sentence, the Court of Appeal nonetheless directed a retrial; [2021] IECA 161. Mr. Sutton has since tried to stop this retrial happening. First on 19 July 2021 he sought leave to appeal the decision of the Court of Appeal directing a retrial to the Supreme Court and on 21 January 2022 the Supreme Court declined to admit that application. Then he commenced proceedings in the High Court and was unsuccessful, see Gearty J. [2024] IEHC 155. His appeal of that decision was also unsuccessful, see the judgment of Ms. Justice Tara Burns for the Court of Appeal of 6 December 2024, [2024] IECA 303. Mr. Sutton informed me during this hearing that he has made or intends to make an application for leave to appeal that decision to the Supreme Court. He also described bringing some other proceedings claiming a miscarriage of justice. As matters stand though, at the time of this judgment, Mr. Sutton is a person who is presumed innocent of the charges but is a person charged with those offences and facing a trial. As well as being relevant context so as to understand what befell Salumi in 2021, these matters were also relied upon, along with other matters to which I will refer later, by Mr. Sutton himself to answer a complaint of delay in relation to seeking permission to commence a derivative action.

(d) The current position

26. As matters stand now in January 2025, Mr. Sutton as a plaintiff in his own right has plenary proceedings in being since 2021 in which each of the respondents to this application are named as defendants. As a result of the interlocutory order made in that case, Mr. Sutton has been restored to the positions of director and company secretary of Salumi and his 50% shareholding in Salumi has also been restored. He also now, as a result of that interlocutory order, has access to Salumi's accounts; although, what little funds were contained therein (approximately €5,860) he withdrew on 5 October 2022. No statement of claim has been delivered by him in those 2021 plenary proceedings. Somewhat confusingly, he has exhibited

a draft statement of claim for the 2021 proceedings in this application. In oral submissions, he explained that he wanted to bring a motion within the 2021 action for liberty to include a derivative action within that case but that somehow the central office would not let him. Either way, the next substantive step in the 2021 action (assuming Mr. Sutton wishes to continue it) would seem to be the delivery of a statement of claim.

27. As for Salumi, no accounts have ever been signed by the directors or filed in the CRO. The purported draft accounts for Salumi which Mr. Sutton exhibited in this application indicate on their face that the company is still trading and has been making substantial profits - even since May 2021, when Mr. Sutton claims that the business of the company was wrongly taken. Mr. Sutton's explanations for this were not entirely clear as he did not in truth appear to assert that Salumi is *actually* still trading. Rather, he appears to have drawn up these accounts to reflect what might have happened had Salumi not lost its business and had it continued to trade from the premises in Terenure, and possibly online. He claimed in oral submissions that the figures in these accounts were based on figures he had obtained from the accounts of what he called the "business" which he appeared to suggest was being run by the Leaveys since May 2021.

28. In summary, there was no evidence before the court to suggest that Salumi has traded since 15 May 2021 when Cohesion terminated the License. Its bank accounts have been emptied since Mr. Sutton was restored to the accounts in October 2022 following the perfection of the order of Ms. Justice Stack. The premises which contained its fixtures and fittings have since been sold in 2024 by Cohesion. In reality therefore the actual position is that Salumi is not trading and has not traded since 15 May 2021. It has no assets (aside from this potential claim) and no accounts filed. It is carrying on no business. Moreover, there is deadlock as between the two shareholders and directors.

29. At its essence, the core argument of Mr. Sutton is that Salumi has been wronged by Mr. Leavey and the other respondents who, he claims, effectively orchestrated unlawfully taking the business of the company in May 2021 and that, accordingly, given the deadlock as between Mr. Sutton and Mr. Leavey (who is, from Mr. Sutton's perspective, one of the wrongdoers) the court should grant permission for a derivative action to be brought. Realistically, that could only now be a claim for damages. If the claim was successful, and to avoid the company having to be would up, some solution to the deadlock would need to be found. That could take the form of Mr. Sutton purchasing Mr. Leavey's shareholding or, as indicated by Mr. Leavey in his affidavit of 27 September 2021, Mr. Leavey could purchase, or introduce another party to purchase, Mr. Sutton's shareholding; see para 60 of Mr. Leavey's affidavit.

III. Relevant legal principles

30. The court was provided with helpful written submissions. There was no substantial disagreement as to the relevant legal principles governing the rule in *Foss v Harbottle* and the potential exceptions to it. The main cases referred to as containing the principles applicable to an application for leave to bring a derivative action were *Glynn & McCabe v Owen & Ors* [2007] IEHC 328, *Fanning v Murtagh* [2009] 1 IR 551, *Connolly v Seskin Properties & Ors* [2012] IEHC 332, and *Kenny v Eden Music Ltd & Ors* [2013] IEHC 628.

31. In *Connolly*, Kelly J. provides a helpful overview of the rule in *Foss v Harbottle*, at para.s 1-3 as follows:-

> *"1. If a company suffers a legal wrong it is the company itself which must sue in respect of damage resulting from it. That is the rule in Foss v. Harbottle [1843] 2 Hare 416.*

2. The reason for the rule is that, in law, a company is a legal person with its own corporate identity. That identity is separate and distinct from its directors and shareholders.

3. As is the case with most legal rules, the rule in Foss v. Harbottle admits of exceptions. Were it not to do so, it could work injustice. For example, if a company is defrauded by directors who control it and who hold a majority of the shares, they will not authorise proceedings to be taken by the company against themselves. So the rule in Foss v. Harbottle may be abrogated in such circumstances. In an appropriate case, the law permits of a derivative action being taken on behalf of the company with leave of the court. The applicant contends that this is such a case."

32. In *Fanning*, Irvine J at para 32 thereof recites the well known "four recognised exceptions to the rule in *Foss v. Harbottle*" as follows:-

"There are four recognised exceptions to the rule in Foss v. Harbottle (1843) 2 Hare 461, which may permit an individual shareholder as a minority to sue on behalf of the other shareholders. These exceptions, briefly stated, comprise the following categories of wrongdoing namely:-

(a) an act which is illegal or ultra vires to the company;

(b) an irregularity in the passing of a resolution which requires a qualified majority;

(c) an act purporting to abridge or abolish the individual rights of a member;

(d) an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company."

33. In addition, some of the cases refer to a less well established fifth exception, which entitles the court to allow a derivative action "where the justice of the case clearly demanded that such a claim be brought"; see the discussion of same in *Glynn* at para 15 and in *Fanning* at para.s 33-36.

34. In reality, Mr. Sutton's case is properly viewed as being argued on the basis that his potential claims against the respondents come within the fourth of these exceptions. In terms of what the word 'fraud' is understood to mean in this context, Kelly J. states as follows in *Connolly* in relation to the fourth exception from para.s 60-63:-

> **"***Fraud on the Minority - The Fourth Exception*
>
> *60. In Crindle Investments v. Wymes [1998] 4 I.R. 567, Keane J. said in this context:*
>
> > *"To make out such a case it is not, of course, necessary to establish that there was fraudulent conduct in the criminal sense. Doubts have even been expressed as to whether fraud in any sense need to be established: thus, Templeman J., as he then was, in Daniels v. Daniels [1978] Ch. 406 at p. 413 said:*
> >
> > > *'The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company and that breach of duty not only harms the company but benefits the directors . . . If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority*

shareholders themselves. It would seem to me quite monstrous - particularly as fraud is so hard to plead and difficult to prove - if the confines of the exception to Foss v. Harbottle (1843) 2 Hare. 461, were drawn so narrowly that directors could make a profit out of their negligence'.

In the context of the present case, it is unnecessary to say whether that interesting passage states the law too widely. Whatever be the confines of the exception, the submissions on behalf of the plaintiffs in the present case overlook one critical factor which renders the exception - and, for that matter the less securely based fifth exception - inapplicable."

61. The respondents accept that the applicant does not have to establish fraudulent conduct in the criminal sense in order to fall within this exception.

62. What constitutes fraud on a minority has been considered in many cases. It has been found to exist in different situations involving varying degrees of moral turpitude. In Pavlides v. Jensen [1956] Ch. 565, Danckwerts J. speaks of the observations of Lord Davey in the case of Burland v. Earle [1902] AC 83, as confining the cases in which a derivative action can be brought "to those in which the acts complained of are of a fraudulent character (in which he includes appropriation by a majority in fraud of the minority of the shareholders) or beyond the powers of the company".

63. It would, given the ever changing circumstances of modern commercial life, be unwise to attempt to identify what might or might not constitute fraud on a minority in any given case. What can be said, however, is that it usually involves some element of moral turpitude."

35. Next, it was agreed that the applicant must establish at this juncture that the potential claim has a "reasonable prospect of success". Again, in *Fanning*, Irvine J. states as follows at para 70:-

> ***"****For the aforementioned reasons the court concludes that the appropriate burden of proof is for the plaintiff to establish to the court that he has a realistic prospect of success, not based upon any assumption that he has an arguable case in support of the conduct alleged, but based upon the extent of the evidence laid before the court on the leave application and preferably supported by counsel's opinion in the form already discussed."*

36. While at para 35 of *Glynn*, Finlay Geoghegan J. states:-

> *"I respectfully agree that the formulation of the rule in the earlier cases makes clear that it should not be applied in such a way as to lead to injustice. Nevertheless, the entitlement of a shareholder to pursue by way of derivative action a claim for and on behalf of a company is an exception to an "elementary principle" as referred to above. As such it should not be broadly or liberally applied. A very strong case would have to be made out. It would also have to be consistent with the principles underlying the rule in Foss v. Harbottle and the exceptions to it. These include the reluctance of the courts to interfere in the internal management of a company."*

37. Order 15, rule 39 (introduced after *Glynn* and *Fanning* by S.I. 503 of 2010) provides for the procedure and the requirements of such an application. Order 15, rule 39(5) provides as follows:-

> *"(5) The Originating Notice of Motion shall be supported by an affidavit:*

(i) setting out the nature and extent of the evidence available to support the applicant's claim to be a person entitled to bring the intended derivative action;

(ii) setting out the nature and extent of the evidence available to support the applicant's assertion that the company is entitled to make the claim to which the intended derivative action relates, and where such evidence is of an expert or technical nature, the substance of that evidence shall be provided to the Court in a report of a qualified person verified by its author and exhibited to the grounding affidavit, or in other suitable form;

(iii) setting out the basis of the deponent's belief as to the existence of the facts or circumstances referred to in paragraphs (i) and (ii);

(iv) specifying the efforts, if any, made by the applicant to cause the company to prosecute the claim concerned;

(v) setting out the basis on which it is alleged that it is reasonable and prudent in the interests of the company that the applicant be given leave to commence the intended derivative action;

(vi) including evidence, where available, of the views of members other than the applicant;

(vii) to which is exhibited an opinion of counsel as to whether the applicant has a realistic prospect of success in the intended derivative action; and

(viii) to which is exhibited a draft of the summons or other originating document, and a draft of any statement of claim, in the intended derivative action."

38. In this application, Mr. Sutton was not legally represented and did not have an opinion of counsel. None of the counsel for the respondents appeared to argue that this requirement was so rigid as to automatically disentitle Mr. Sutton to relief, although it was referred to as a 'mandatory requirement' in submissions. In the caselaw preceding this rule, the phrase used is "preferably supported by counsel's opinion"; see *Fanning* para 70. The constitutional rights of access to the courts and the right to litigate, in this case to achieve by action in the courts an appropriate remedy for an alleged actionable wrong which is claimed to have caused damage to the company, would suggest that it is to be inferred that this rule should not be applied so rigidly as to do an injustice. Accordingly, the matter has been approached on the basis that in certain circumstances relief can be granted in the absence of an opinion of counsel.

39. Next, both *Glynn* and *Fanning* indicate that in the context of the aforementioned fourth exception that the onus is on the applicant to establish that the wrong done to the company happened at a time when the company was controlled by the alleged wrongdoers and those wrongdoers benefited from their alleged wrongdoing. At para 72 of *Fanning,* Irvine J. states as follows:-

> *"As Finlay Geoghegan J. emphasised in her judgment in Glynn v. Owen [2007] IEHC 328, (Unreported, High Court, Finlay Geoghegan J., 5th October, 2007), the onus is on the plaintiff where he seeks to rely upon the fourth exception to the rule to establish:-*
>
> > *(i) that a wrong was done to the company;*
> >
> > *(ii) that it was done at a time when the company was controlled by the alleged wrongdoers; and*
> >
> > *(iii) that those wrongdoers benefited from their alleged wrongdoing."*

40. Next, those cases and now also the rules, indicate that even if an applicant satisfies the foregoing requirements, the granting of the relief is still discretionary and that discretion is governed by a consideration of some well-established criteria, including: delay, the views of other minority shareholders, alternative remedies, whether efforts have been made internally to persuade the company to take the action, and whether the proposed litigation is prudent and in the interest of the company and not for some ulterior purpose; see para.s 53 & 97-106 of *Fanning*, para 53 of *Connolly*, and Order 15, rule 39(5)(iv), (v) and (vi) in particular.

41. Attention was also drawn to the jurisprudence that provides that a company is not entitled to be represented in litigation by a person (for example a director, shareholder or indeed any lay person) who is not a lawyer with a right of audience, save in exceptional circumstances; see *Battle v. Irish Art Promotion Centre Limited* [1969] I.R. 252 and *AIB v Aqua Fresh Fish Ltd* [2018] IESC 49, where Finlay Geoghegan J. states at para.s 39-40:-

> *"39. The discretion of the Court to permit in exceptional circumstances representation of litigants, whether human or corporate, by persons who are not lawyers with a right of audience is both important and essential in ensuring that the general rule is not in breach of the constitutional guarantees of rights of access to the courts and fair procedures.*
>
> *40. Accordingly, I have concluded that the so-called rule in Battle, when complemented by the inherent jurisdiction and discretion of the Court to permit, in exceptional circumstances, the representation of a company by a person who is not a lawyer with a right of audience, continues to be the law in this jurisdiction and is consistent with the Constitution."*

42. Finally, of some relevance, are sections 148 and 158 of the Companies Act, 2014. Section 148(2)(d) provides, save to the extent that the constitution of the company provides otherwise, that the office of director is vacated if, inter alia, "the director is sentenced to a term of imprisonment following conviction of an indictable offence". Section 158(1) provides that the "business of a company shall be managed by its directors".

IV. Submissions

(i) The submissions in relation to the potential claim of Salumi against the Leaveys

43. Mr. Sutton contends that the Leaveys essentially perpetrated a fraud on Salumi by appropriating the company accounts in November 2020 (shortly after Mr. Sutton had been returned to jail by the Court of Appeal) and then, in May 2021, the entire business of the company when they colluded, he says, with Cohesion and Mr. Goulding to transfer the business, the License and the fixtures and fittings and the goodwill of the business across to a new entity Karmar, controlled by them.

44. While the Leaveys did not appear at the hearing to oppose this application, the court has had the benefit of considering the affidavits filed on their behalf in opposition to the 2021 interlocutory application (when the same claims against them were essentially made). In addition, the court has the benefit of the summary of their position as reflected in the judgment of Ms. Justice Stack of 22 June 2022.

45. Essentially, Mr. Leavey asserted that he was left in an impossible position from his perspective in October 2020 when Mr. Sutton, from his point of view, simply disappeared. He only found out, he says, afterwards that Mr. Sutton was in jail. He says that the business was only just starting and would have collapsed if he had not been able to access the accounts. He disputes any assertion that he committed a fraud or wrongly used company funds while he had

sole access to the accounts. Shortly after Mr. Sutton was released on 23 April 2021 the Bank then froze the accounts, save for lodgements. As for the events of the 14 and 15 May 2021 he says, essentially, that there was no possibility of the two of them working together and in reality, the business of the company was inevitably over.

46. From the perspective of Mrs. Leavey it should of course be noted that she was not a director of Salumi. She was however, briefly appointed by Mr. Leavey as company secretary. However, it should be observed that while she did not appear to contest the application, as a matter of law a company secretary is not considered, *qua* secretary, to be involved in the management of the company; see *Courtney, The Law of Companies, 4th Edition*, para 6.210 – 6.214. In addition, as *Courtney* explains, at para 6.211:-

> *"Because a company secretary does not usually or ex officio, have powers of management or decision making, it is thought that a company secretary is not a fiduciary to the same extent as directors and that the secretary does not owe the same fiduciary duties as are owed by directors."*

(ii) The submissions in relation to the potential claim of Salumi against Cohesion and Mr. Goulding

47. Mr. Sutton accuses Cohesion and Mr. Goulding of colluding essentially with the Leaveys in and about the termination of Salumi's License and the grant of a new license on the same terms to a new corporate entity Karmar, set up and controlled by the Leaveys. He referred to a transcript of Mrs. Leavey's evidence given to a committee of the Institute of Certified Public Accountants on 1 November 2023 in relation to a professional complaint made against Mr. Sutton wherein she stated:-

> *"What had happened as well is that the landlord [Cohesion], we had to tell the landlord what was happening, and he was very supportive and everything, he said "I will do you*

another lease, I will do you up another lease without his [Mr. Sutton's] name on it, get it signed and everything, and try to get him out of the business that way." Rightly or wrongly that is what he did anyway. He got his solicitor to draw up a new lease that evening [14 May 2021] and we came in early on the Saturday morning [15 May 2021] to sign a new lease without Mr. Sutton's name on it and that it would just be in myself and [Mr. Leavey's] name".

48. Mr. Sutton says that Cohesion benefited in many ways from this. Firstly, it took the fixtures and fittings which had been installed into the premises by Salumi worth approximately €50,000. Next the premises was, more recently after Karmar had vacated the property, clearly both offered to let and then ultimately sold with the benefit of these fixtures and fittings (professional brochures advertising the property on behalf of Cohesion were exhibited by Mr. Sutton in that regard appearing to show the property interior with the fixtures and fittings present). Next, Cohesion terminated the License without giving any notice and has since withheld the company's deposit. Next, by colluding with the Leaveys, Cohesion was able to install a new trading occupier without any delay or period of vacancy which would not otherwise have been easy during the covid pandemic.

49. On behalf of Cohesion and Mr. Goulding, multiple arguments were advanced as to why the application should be refused. Notwithstanding this, the court was not, for the purposes of this application, invited to depart from the analysis in the earlier judgments (of Stack J. and Mulcahy J. in particular) and in truth counsel did not seriously dispute the contention that, based on that analysis (which involved a consideration of essentially the same affidavit evidence) as against Cohesion, the threshold of 'reasonable prospects of success' had been met in relation to the contention that the License of Salumi had been unlawfully terminated by Cohesion.

50. Rather it was submitted that Cohesion was not an insider or a 'wrongdoer' within the meaning of the jurisprudence. It was said that Mr. Sutton was not a 'minority' and that Mr. Leavey did not have 'control'. Furthermore, if Cohesion was a 'wrongdoer' then it had not benefited as the new license was granted to a new company on precisely the same terms as the License with Salumi.

51. In relation to Mr. Goulding, it was said that he could have no liability and had only ever acted in his capacity as a director of Cohesion.

52. Furthermore, the court should refuse the application on discretionary grounds. Firstly, it was submitted that there was gross delay between May 2021 and January 2024, and even from June 2022 (when Stack J. referred to the potential of a derivative action) and January 2024. As a result, the License period of three years has now expired, and Cohesion has since sold the property.

53. Next, it was submitted that the potential derivative action was not prudent or in the interests of the company and was in reality being pursued by Mr. Sutton for his own personal ulterior purposes. The company was bound to fail once it was clear Mr. Sutton and Mr. Leavey could not work together so terminating the License should be seen in those circumstances. In other words, as the company was bound to fail, then that is what the caused the loss of its business, not the termination of the License.

54. In addition, as the company was now no longer trading and had no assets, if leave were granted then an application for security for costs would inevitably be made to which there would be no good answer, it was claimed.

55. Attention was also drawn to the absence of a draft plenary summons and the absence of an opinion of counsel.

56. While it was acknowledged that Cohesion still held the deposit of Salumi in the amount of €2,017, it was said that this could be lodged in court or held "pending further order of the Court".

57. Next, it was argued that the draft accounts appeared to be an effort to quantify damages and that Order 15, rule 39(5)(ii) requires essentially a report from an expert to be exhibited in that context.

58. Attention was drawn to the fact that there was no evidence of any efforts made by Mr. Sutton to cause the company to pursue the claim and Order 15, rule 39(5)(iv) was referred to.

59. Finally, it was said that since a lay person could not represent a company, then Mr. Sutton should not be given leave to bring a derivative action on behalf of the company and he was not generally an 'appropriate person' to maintain the action. Aside from the fact that Mr. Sutton is a lay litigant it was said that his approach to the litigation is unsatisfactory as he "swamps" the parties with paper and he has a tendency "to produce a prolix amount of paper" which should not inspire confidence as to the manner in which any derivative action would be prosecuted.

(iii) The submissions in relation to the potential claim of Salumi against McQuaid Accountants

60. Mr. Sutton said that the claim against these respondents was one in "fraud" and that they "should be in jail". He outlined many and various forms of complaint about professional qualifications. He said the claim on behalf of Salumi would be to remove these respondents as accountants of the company and seek damages of €10,000 and the return of fees paid, which amounted to €605.

61. On behalf of McQuaid accountants it was submitted there was no plausible case against them for the reliefs being sought in the draft Statement of Claim. Firstly, they no longer act as

accountants for Salumi, and this is noted by Stack J. in her judgment of 22 June 2022. They had resigned on 31 August 2021 and returned whatever records they had by 7 September 2021. This is also deposed to by both of these respondents. Next, any actions carried out or filings made by them were obviously done pursuant to the instructions of Mr. Leavey (who signed the various forms) and who, by virtue of section 148 of the Companies Act, was the only director of Salumi at the time. Next, the exhibits indicate that they only ever charged €605 and that is all they were ever paid. The professional criticisms were without merit it was said, and reference was made to Mr. McQuaid's averment at paragraph 38 of his affidavit of 15 February 2024 in that regard where Mr. McQuaid explains that he was registered with the Association of Chartered Certified Accountants with a part-time status entitling him to practise for 770 hours per year. It was submitted therefore that there were no realistic prospects for success on the part of Salumi in seeking the "removal" of the accountants, the "return" of the €605 in fees paid or the claim for damages of €10,000.

(iv) The submissions in relation to the potential claim of Salumi against the Bank

62. Mr. Sutton stated that the claim against the Bank was also one in "fraud". He also said he wished to pursue a claim on behalf of the company under the Data Protection legislation, claiming that the Bank had "deliberately suppressed" a letter. The claim of fraud was said to be the decision of the Bank to alter the bank mandate of the company on 17 November 2020 to give sole permission over the accounts to Mr. Leavey. He drew attention to a letter from the Bank's customer care team which admitted an error in amending the bank mandate.

63. As for the Bank's argument that *at that time* Mr. Sutton was not a director (as he had been sentenced to imprisonment on foot of the conviction for an indictable offence), Mr. Sutton described this argument as "crazy" by virtue of his subsequent acquittal, which meant that he had never been convicted. He claimed in oral submissions that he had arranged, during the

period between the increased sentence on 25 September 2020 and the commencement of the additional jail time on 16 October 2020, with Mr. Leavey that his niece would take over his bank mandate permissions while he was in prison. He accepted that this precise claim had not been made by him at any stage in any affidavit. He also accepted that the Bank had not been told of this alleged arrangement. He sought permission for Salumi to be able to claim as against the Bank for the return of all debits on the accounts of the company since 17 November 2020.

64. On behalf of the Bank it was said that there was no claim on behalf of Salumi that had a realistic prospect of success. Firstly, the company as a matter of law cannot maintain a data protection claim – that is only a claim Mr. Sutton can make; see Article 1.1 of the GDPR. Next, at the time the mandate was changed on 17 November 2020, Mr. Sutton was in prison and section 148 of the Companies Act applied, according to the Bank. Accordingly, Mr. Leavey was the only director and was entitled to give those instructions in accordance with the terms of the mandate agreed with the Bank in circumstances where there is one director. It is the directors who run the company according to section 158 of the Companies Act and at that time Mr. Leavey was the only director. The letter from the customer care team had not taken account of this but it does not alter the legal position, much less subtend a claim for fraud it was urged.

65. Next, counsel for the Bank submitted that the monies drawn from the company account since 17 November 2020 were clearly for the benefit of the company - how otherwise could it have traded, purchased supplies, paid license fees and staff and so on. When Mr. Sutton emerged from prison on 23 April 2021 the Bank shortly thereafter froze the account on 29 April 2021, save for lodgements. The relationship had clearly broken down as between Mr. Sutton and Mr. Leavey and the company was in reality inevitably going to have to cease trading, it was said. When Mr. Sutton was restored to the accounts by the perfected order of Ms. Justice Stack, it was Mr, Sutton who then emptied the accounts. While Mr. Leavey should not,

according to the Bank, have removed Mr. Sutton as a shareholder, that was nothing to do with the Bank it was submitted.

V. Decision

66. I propose to deal first with the specific question as to whether or not Mr. Sutton has established a case as against each of the respondents of the type envisaged by the authorities in the context of the fourth exception to the rule in *Foss v Harbottle* and to the threshold ("a claim on behalf of the company with reasonable prospects of success") required. Thereafter, I propose to address the other considerations and discretionary factors that apply to the potential claims.

(a) Has Mr. Sutton established that any derivative claim on behalf of Salumi has 'reasonable prospects of success'?

(i) The potential claim of Salumi against the Leaveys

67. I am satisfied that Mr. Sutton has identified a claim on behalf of the company against Mr. Leavey of the type contemplated by the jurisprudence that has reasonable prospects of success in relation to the events of May 2021 (and in particular 15 May 2021), namely the *de facto* transfer of the business of the company to an entity controlled by Mr. Leavey.

68. Based on the legal principles discussed above it is clear that, in terms of the fourth exception to the rule in *Foss v Harbottle*, the concept of fraud in this context can include situations where a director is in breach of their fiduciary duty to the company and benefits from that breach, even without traditional fraud; see Kelly J. in *Connolly*, referring in turn to Keane J. in *Crindle.*

69. Essentially, Mr. Leavey as a director of Salumi owed fiduciary duties to Salumi that, on the basis of the evidence before the court in this application, Mr. Sutton has established, to the necessary threshold, a sufficient argument that these duties were broken. The likelihood, based on the evidence before the court at this juncture, is that Cohesion would not have summarily terminated the License with Salumi in the absence of a clear understanding that Mr. Leavey would sign up to a new license and commence running a similar business and paying to Cohesion a similar license fee. The probable effect of this was, again based on the affidavits, that Salumi lost its deposit, its right to trade from the business premises (potentially a leasehold interest), the goodwill that had been established and the investment in the fixtures and fittings which it had made in the premises. The nature of this claim is discussed further hereunder in the context of the potential claim of Salumi against Cohesion.

70. However, I am not persuaded that a case has been established to the required degree against Mr. Leavey in relation to the use of the company accounts from November 2020 until they were frozen on 29 April 2021. The reality appears to be that the company could not have traded at all during this period had Mr. Leavey not had access to the accounts. In that regard I have taken account of the background and context as described by Mr. Leavey in his affidavit of 27 September 2021. There is no evidence that Mr. Sutton made any, much less any prudent, arrangement in relation to the accounts when he was sent back to jail. By virtue of section 148 of the Companies Act he vacated his office as director at that time. The subsequent quashing of the conviction does not alter the reality that pertained for the company during that period when Mr. Sutton was in jail. In addition, references to occasional purchases of sandwiches or taxis or items that were claimed by Mr. Sutton to be personal items for Mr. Leavey's personal benefit were not persuasive. I have taken into account Mr. Leavey's explanations in this regard contained in his affidavit of 27 September 2021, in particular in paragraphs 21, 33, 34, 47 and 56. Of note, Mr. Leavey describes therein at paragraph 34 that he was required to make

lodgements to the company account in March and April 2021 due to what he says was the company being "undercapitalised" at that time. In relation to the earlier withdrawals complained of by Mr Sutton, whether some of these may or may not have been legitimate expenses or otherwise does not reach the threshold required for a derivative action. Indeed Mr. Sutton did not present his complaints in that way. Rather he sought to claim that *every* debit during this period was a fraud on the company by Mr. Leavey. That allegation does not meet the required threshold. The company could not have traded during this period without access to its bank accounts to pay suppliers, employees, license and utility fees and so on. There is not a realistic prospect of success for the company to sue Mr. Leavey for monies spent to its own benefit during that period.

71. Finally, I am not persuaded that there is a realistic prospect of success of any case against Mrs. Leavey. She was not a director of the company. While she was briefly appointed by Mr. Leavey as company secretary, in this role she would not have had any management responsibilities. Nor would she have owed the company fiduciary duties akin to those owed by a director, such as Mr. Leavey. The fact that she was a director of Karmar and seems to have had some, albeit potentially significant, degree of awareness of what was going on in mid-May 2021 does not establish that Salumi has a legal case reaching a sufficient threshold to justify suing her as part of a derivative action.

(ii) The potential claim of Salumi against Cohesion and Mr. Goulding

72. I am satisfied that Mr. Sutton has made out a sufficient case on behalf of Salumi against Cohesion for the reasons explained in the judgment of Ms. Justice Stack; see para.s 55-58 in particular, referred to above. In addition, Mr. Goulding's affidavit, sworn on behalf of Cohesion, is less than clear as to the precise circumstances in which Cohesion decided to terminate the License with Salumi and simultaneously grant a new license to a company

controlled by Mr. Leavey. Neither Mr. Leavey nor Mr. Goulding have set out in their affidavits in a forthright way what arrangements were discussed between them. While the transcript of Mrs. Leavey's evidence to the Institute of Certified Public Accountants offers an explanation as to how this came about, Mr. Goulding at paragraph 7(a) of his affidavit of 25 June 2024 denies this account but fails to set out any detailed alternative explanation.

73. In addition, I am satisfied that the preponderance of the evidence indicates that Cohesion broke the License unlawfully when it summarily terminated the License on the 15 May 2021 and I adopt the reasoning of Stack J. described above.

74. Next, the argument by Cohesion that the company was going to inevitably fail is not borne out by the averments of both Mr. Sutton and Mr. Leavey. Each have indicated that they could have sought a solution, including buying the other persons shares, or in the case of Mr. Leavey, he suggests on affidavit the additional solution of potentially introducing another party to buy Mr. Sutton's shares; see Mr. Leavey's affidavit of 27 September 2021 and para. 60 in particular.

75. The combination of the actions of Mr. Leavey and Cohesion over the 14 and 15 May 2021 appear, on the affidavits, to have created a situation where the company suddenly had no premises, had lost its fixtures and fittings, and had lost its goodwill (the same business with a similar name, now 'Salumi Grazing', suddenly continued to trade from the same premises without any interruption). Accordingly, the argument by Cohesion that Salumi did not suffer a loss as a result of the termination of the License is incorrect.

76. In addition, the contention that Cohesion made no gain is unconvincing. Cohesion was able to terminate a License which was probably a Lease by giving no notice; it almost certainly wrongly retained the company's deposit; it ended up with the benefit of the company's fixtures and fittings (which Mr. Sutton claims cost approximately €50,000) which it subsequently

appears to have included in brochures offering the premises initially to let and then, later, for sale; and, by virtue of some unexplained (by either Mr. Leavey or Mr. Goulding) interaction between Cohesion and Mr. Leavey, Cohesion was able to obtain a new tenant carrying on the same business without any period of vacancy, despite the fact that in May 2021 there were significant public health restrictions affecting the restaurant and hospitality sector.

77. The preponderance of the evidence before the court as part of this application is that it is probable that there was explicit coordination between Mr. Leavey and Cohesion whereby Cohesion was to summarily terminate the License with Salumi (probably unlawfully) and immediately grant a new license for the same premises to a company set up and controlled by Mr. Leavey to enable it to carry on the same business. I am satisfied that this is the type of claim that comes within the fourth exception to the rule in *Foss v Harbottle*. It involves alleged collusion between two parties one of whom is a director of the company, using unlawful means, likely to cause damage to the company and designed to bring benefits to the alleged wrongdoers.

78. I am satisfied that Mr. Sutton has identified a plausible claim with reasonable prospects of success for damages on behalf of Salumi as against both Mr. Leavey and Cohesion for conspiracy, in that there was a combination of two persons who deliberately acted to the detriment of Salumi. Neither could accomplish the result achieved without the actions of the other. The co-operation of Mr. Leavey was likely a breach of his fiduciary duties to Salumi. The actions of Cohesion likely involved unlawful means, namely the summary termination of Salumi's License. The result was likely damage to Salumi. I propose to address the balance of the multiple arguments advanced on behalf of Cohesion later in this judgment.

79. I am not satisfied that a case to the appropriate threshold has been established against Mr. Goulding. The License was between Salumi and Cohesion, not Mr. Goulding. The benefits

which were triggered by the summary termination of that License fell to Cohesion, not Mr. Goulding. Cohesion retained the deposit. Cohesion terminated the License with a company that was suffering from shareholder deadlock without giving any notice. Cohesion retained the benefit of the company's fixtures and fittings. Cohesion gained the benefit of a new occupier who was ready to take up occupation straight away without any period of vacancy and on the same terms, notwithstanding the then (as of May 2021) ebb and flow of constraining public trading restrictions during the covid pandemic. Cohesion then, after Karmar had vacated the premises sometime later, advertised the premises for let with the apparent (according to the photographs) benefit of Salumi's fixtures and fittings. Finally, it was Cohesion that sold the premises with the apparent benefit of those fixtures and fittings.

80. While Mr. Goulding may be a director of Cohesion that does not make him liable for the foregoing to Salumi. I am not persuaded that the foregoing amounts to any action of fraud on the part of Mr. Goulding against Salumi. Mr. Goulding was an outsider to the internal affairs of Salumi. He personally had no contractual or other legal relationship with Salumi and such decisions as he made were made as a director and officer of Cohesion.

(iii) The potential claim of Salumi against McQuaid Accountants

81. I am not satisfied that Mr. Sutton has established an appropriate basis for a derivative action on behalf of Salumi against McQuaid Accountants. Firstly, the affidavits and exhibits establish that they are no longer retained by the company; see in particular the affidavit of John McQuaid of 15 February 2024 and para.s 20 and 21 thereof. Indeed, this has already been accepted in the judgment of Ms. Justice Stack; see para 63.

82. Next, I am satisfied that the probability is that all of the filings made by McQuaid Accountants were made on the instructions of Mr. Leavey, who, by virtue of section 148 of the Companies Act, was the only director of Salumi at the time, and accordingly who had the

authority at that time to give those instructions by virtue of section 158 of the Companies Act. To the extent that any of these filings were wrongly carried out on the instructions of Mr. Leavey, that is a matter in respect of which Mr. Sutton in his own right has already obtained relief from the High Court; see the descriptions of the interlocutory relief against Mr. Leavey ordered by Ms. Justice Stack, as described above.

83. Next, there is no sensible basis for authorising a claim for the return of €605 which is all that was ever paid by Salumi to McQuaid Accountants for the work carried out by them, and which, the evidence suggests was work carried out on the instructions of Mr. Leavey. Equally, there is no basis for the claim by Mr. Sutton that the company suffered damages of approximately €10,000 consequent on any actions of McQuaid Accountants.

(iv) The potential claim of Salumi against the Bank

84. I am not satisfied that Mr. Sutton has established any claim on behalf of Salumi against the Bank which has reasonable prospects of success. At the time that the Bank actioned an amendment to Salumi's bank mandates and authorisations Mr. Sutton was in jail and, by virtue of section 148 of the Companies Act, had by operation of law at that time vacated his office as director of Salumi. In that regard I have taken account of the averments of Hugh Lavelle on behalf of the Bank in his affidavit of 22 March 2024 and in paragraph 28 thereof in particular. In addition, I note the averment of Mr. Leavey in paragraph 21 of his affidavit of 27 September 2021 where he indicates that he informed the Bank of the circumstances whereby Mr. Sutton was in prison in advance of the Bank making the decision to accede to the application by Mr. Leavey to alter the mandates and authorisation arrangements. Therefore, there is a more than reasonable basis for the Bank to assert that it was acting on the instructions of the only director of the company at the time, Mr. Leavey. The fact that the Bank sent a letter in response to Mr.

Leavey's customer complaint admitting an error does not alter the position of the prospects of success of any claim on behalf of Salumi.

85. In reliefs granted to Mr. Sutton on an interlocutory basis by Stack J. against Mr. Leavey, Mr. Sutton was restored to his previous position as the authorised person on behalf of Salumi to operate the company's online banking. That order was not made against the Bank.

86. Mr. Sutton's complaints about data protection breaches do not support any claim against the Bank on behalf of Salumi by virtue of Article 1.1 of the GDPR. Those date protection rights do not attach to a company.

(b) Other factors to be considered before deciding whether to grant leave to bring a derivative action

87. Accordingly, having decided that Mr Sutton has established that Salumi would have reasonable prospects of success in relation to a claim for damages against Mr. Leavey and Cohesion in relation to the events of May 2021 when the License of Salumi was summarily terminated by Cohesion at a time and in a manner that facilitated the business, goodwill and other assets of Salumi being taken from the company and transferred to an entity controlled by Mr. Leavey, the next task is to consider all of the other arguments and factors which bear upon whether the court should grant the relief sought.

(i) Even if Mr. Leavey can be described as a 'wrongdoer', then did he have 'control'?

88. Firstly, I am not persuaded by the argument that the exception to the rule in *Foss v Harbottle* does not apply because Mr Sutton held 50% of the shares of Salumi and because Mr. Leavey held 50% and that Mr. Sutton was therefore not a "minority" and Mr. Leavey was not a "majority" for the purposes of the tests and principles outlined in the jurisprudence.

89. This argument lacks common sense in the circumstances of this case. As Ms. Justice Finlay Geoghegan states in *Glynn* at para 22:-

> *"What constitutes 'control' must be determined in a common sense way in the context of the relevant facts and company structure."*

90. In the case of Salumi, there was no mechanism within the company either by way of shareholders agreement, casting vote or other provision in the company constitution to break such a deadlock. If Mr. Sutton had brought forward a resolution seeking to commit the company to commence legal action against Mr. Leavey (and others) in relation to the matters complained of, then Mr. Leavey would have been able to block it by voting against it. In that sense Mr. Leavey, even though not holding a "majority" of the shares, had control, albeit a form of negative control, but it is the relevant type of control for the purposes of this analysis.

91. This brings the circumstances in relation to this matter within the type of exceptions identified in the jurisprudence to the rule in *Foss v Harbottle*. In this sense the alleged wrongdoer had control in that he could prevent a proper action being brought by the company to recover its assets or sue for damages, the only practical relief available now.

(ii) Should Mr. Sutton have made 'internal' efforts to persuade the company to sue?

92. By the same analysis, the criticism of Mr. Sutton for not adducing evidence of efforts made to internally persuade the company to bring such an action are wholly unrealistic. Indeed, the party who advanced this argument (Cohesion) also argued that the relationship between Mr. Sutton and Mr. Leavey had irreparably broken down. As Fairweather J. states in *Fisher v St John Opera House Co* [1937] 4 DLR 337 at 342:-

> *"This may be done by showing that the company has refused to allow the action be brought on its own behalf, or that, by reason of the wrongdoer being in control of the*

company at the time of bringing the action, it would be idle to apply to the company." (underlined for emphasis).

93. In my view the evidence establishes that it would have "been idle" for Mr. Sutton to apply to the company to bring this action. There is no realistic basis for assuming otherwise than that Mr. Leavey would have voted against any such resolution, thereby blocking it.

(iii) Can Cohesion be considered a wrongdoer since it was not an insider?

94. The argument that Cohesion was not a "wrongdoer" because it was not an insider also has no merit in the circumstances of this case. It is of course a requirement that there be a wrongdoer who has 'control' so as to be able to prevent the company from bringing an action in relation to the wrong. *That* wrongdoer will, by definition, be an insider. This does not mean that any other person who may have committed a wrong as part of the same events against the company (in this case Cohesion, the landlord in effect) cannot be sued. To adopt any other understanding of the jurisprudence would be to wholly undermine the logic of the exception, and it would enable other persons who may have, by virtue of a breach of contract for example, caused damage to the company and benefitted from the same events to escape all liability. It could potentially put assets of the company out of reach of any derivative action.

(iv) Can Cohesion be sued, even if it is a wrongdoer, if it received no 'benefit' from the breach of the License?

95. The argument on behalf of Cohesion that, if it was a wrongdoer, then it was not a wrongdoer who had benefitted from the wrong (the summary termination of the License) is also incorrect. On the evidence before the court as part of this application, Cohesion benefitted in multiple ways by summarily terminating the License. As described above, Cohesion retained the deposit; Cohesion terminated the License with a company that was suffering from shareholder deadlock without giving any notice; Cohesion retained the benefit of the

company's fixtures and fittings; Cohesion gained the benefit of a new occupier who was ready to take up occupation straight away without any period of vacancy and on the same terms, notwithstanding the then (as of May 2021) ebb and flow of constraining public trading restrictions during the covid pandemic; Cohesion then, after Karmar had vacated the premises, advertised the premises for let with the apparent (according to the photographs) benefit of Salumi's fixtures and fittings; and finally, it was Cohesion that sold the premises with the apparent benefit of those fixtures and fittings.

(v) Should relief be refused on the grounds of delay on the part of Mr. Sutton in making the application?

96. In this regard I am satisfied that, while there has been delay, in all the circumstances of this case it is on balance not sufficient in its duration and effect to justify refusing the relief. The period of delay runs from May 2021 (when the alleged wrong occurred) until January 2024 when Mr. Sutton initiated the application. Mr. Sutton explained this delay by reference to two periods. Firstly, the period up to June 2022 was explained by him stating that he did not know about the concept of a derivative action. He only discovered this when same was described in the judgment of Ms. Justice Stack on 22 June 2022. As for the next period of delay of approximately one and half years, he had a number of reasons which were broadly as follows:-

(i) June 2022 to October 2022 was taken up with time spent trying to finalise and get the judgment of Ms. Justice Stack turned into a perfected order;

(ii) he then became distracted by another legal matter involving a company called Showglade Ltd;

(iii) he was also distracted by various proceedings commenced by him in relation to the criminal matter;

(iv) he then had disputes and difficulties relating to his employment;

(v) Next, he referred to ongoing and distracting family law proceedings;

(vi) he then had a distraction from proceedings concerning an assault he suffered while in prison; and

(vii) finally, he described proceedings concerning an alleged miscarriage of justice and his efforts to stop the retrial.

97. While these reasons help explain the delay, I am not satisfied that they are in themselves good (from the point of view of the court's discretion) excuses for the delay and none can be levelled at the respondents.

98. There is at least one consequence of the delay and that is that the only sensible relief potentially available now in any derivative action against Mr. Leavey and Cohesion is a claim for damages. Mr. Sutton explained that Karmar was no longer trading and had, as far as he was aware, no assets. Equally, Mr. Goulding, in his affidavit of 15 February 2024 at para 26(iv), confirmed that Karmar had ceased trading at the premises owned by Cohesion. There is no related business operating from Salumi's former premises and Cohesion has now sold the premises. In those circumstances, had Karmar been made a respondent to this application (which it was not) I would not have been satisfied to give leave to sue Karmar in circumstances now where that would not be prudent, given that Karmar is not trading and Mr. Sutton explained that he did not believe that it had any assets.

99. Equally, any action by Salumi for damages for the events of May 2021 would, it seems, have a statutory time period for its commencement of six years. Counsel for Cohesion essentially conceded as much during the hearing. Consequently, the time provided in the Statute of Limitations would not expire, it seems, until May 2027.

100. In addition, Counsel for Cohesion could not point to any specific prejudice that has been caused to Cohesion by virtue of the delay, other than the general prejudice that occurs

combined with the fact that the property has now been sold. However, this later point primarily has the effect of narrowing the plausible reliefs that Salumi could seek to a claim for damages.

101. Consequently, while the delay is unimpressive and raises concerns about the future pace of any potential litigation, I am not satisfied that it is sufficient to refuse the relief. However, in the event of any future application in the potential proceedings, this decision should not be understood as precluding a defendant from relying on this delay to date as a basis for any application, either under the Rules or pursuant to the inherent jurisdiction of the court, to have the case dismissed for delay.

(vi) Should relief be refused because of the contention that the proposed action is not prudent or in the interests of the company?

102. I am not satisfied that the potential action against Mr. Leavey and Cohesion is imprudent for Salumi. It is true that Salumi appears (despite the protestations of Mr. Sutton) not to be trading and without any assets (save this potential claim). However, based on at least part of the case advanced by Mr. Sutton this is because the goodwill (save for perhaps the business name 'Salumi' which Mr. Sutton claimed on affidavit that he personally owns; see para.s 34 and 202 of his affidavit of 19 January 2024), the leasehold interest and assets (including the fixtures and fittings) of the company were wrongly appropriated and diverted from the company by Mr. Leavey, a director of the company, in breach of his fiduciary duties to the company and in circumstances where this wrong was facilitated and carried out in conjunction with the wrongful decision of Cohesion to summarily terminate the License with Salumi and its decision to grant a new one to Mr. Leavey's new entity, Karmar.

103. In these circumstances and where the foregoing claim has reasonable prospects of success, I am not satisfied that it would be imprudent or contrary to the interest of Salumi to prosecute such an action.

(vii) Should the relief be refused because of the contention that Mr. Sutton is pursuing the action for his own ulterior purposes or benefit?

104. Of necessity, any shareholder who claims the company has been wronged and that the wrongdoer is or will inevitably block any proposal to initiate legal proceedings, will potentially benefit from the derivative action succeeding in that the company may, depending on the nature of the action, recover property or the benefit of a contract or recover damages which in turn may likely increase the value of the applicant's shares.

105. In addition, even though Mr. Sutton made similar claims in his own 2021 proceedings on his own behalf, during this application he acknowledged that the purpose and intent of this application was to enable the company, Salumi to bring an action to seek redress for the wrongs which Mr. Sutton strongly asserts have been done to the company. Accordingly, I am not persuaded that Mr. Sutton is seeking the reliefs for an improper purpose.

(viii) Should the relief be refused because any action will be thwarted by a motion for security for costs?

106. While it is correct that Salumi appears to have no assets and therefore is likely to face a motion for security for costs (each of the respondents indicated that this would be the "first thing" that would happen should the court grant relief) this is not a good reason to refuse the relief in this case. Based on the evidence relied upon by Mr. Sutton, it may well be open to the company to contend that the reason it no longer has any assets is because of the wrongs complained of in the potential proceedings. Whether or not the company could point to sufficient special circumstances to fend off any application for security for costs is entirely a matter for consideration in the context of any such application.

107. However, for the purposes of this application, the submission that Salumi could not satisfy any order for security for costs is not a basis for refusing the relief sought herein as the

outcome of such a motion is not so obvious or inevitable as to render the granting of the relief sought herein futile.

(ix) Should the relief be refused because the likelihood is that Mr. Sutton will seek to represent the company in the derivative action and same is contrary to the rule in Battle v Irish Art Promotion Centre Ltd?

108. I am not satisfied to refuse the relief on this ground. Firstly, this actual application was not, obviously, made by the company – although clearly in some scenarios the shareholder in question could of course be a company. Therefore, the rule in *Battle* did not preclude Mr. Sutton from making this application. More importantly however, if relief is granted, then it is a matter for Mr. Sutton to seek legal representation for the company in relation to the proceedings that will then be brought on its behalf. If no legal representation for Salumi is obtained and the matter comes before the court on foot of some motion or otherwise, then of course the defendants could raise the argument that Mr. Sutton as a lay person cannot represent the company and the principles outlined in *Battle* and *AIB v Aqua Fresh* can be debated. That is an argument for another day, however.

(x) Should the relief be refused because Mr. Sutton, in the conduct of the litigation to date, has demonstrated, according to the respondents, that he is not an appropriate person to be given the responsibility of bringing the claim?

109. I am not satisfied that the relief should be refused by virtue of the manner in which the litigation has been conducted to date. Clearly, no account could fairly be taken of the pending retrial. Mr. Sutton must be assessed as a person presumed innocent of those criminal charges. While he has been, to use his own word, 'distracted' by various legal proceedings before, it cannot be assumed that he will necessarily be unable to discharge the responsibility of moving a derivative action forward promptly and in accordance with the Rules. The company may

potentially be able to retain legal representation. If there is delay or if no legal representation is retained, then it is open to the defendants to the derivative action to make such application(s) to the court as they think appropriate.

110. In addition, while complaint has been made on behalf of the respondents that Mr. Sutton has been prolix and has 'swamped' the parties (and the court) with excessive legal paperwork, it cannot fairly be assumed that this will continue in the context of a derivative action. Furthermore, it should also be observed that despite the volume, Mr. Sutton's paperwork was ultimately navigable and his arguments were not impenetrable.

111. Again, the defendants to such an action will have open to them the potential to apply to court in relation to any improper prosecution of the derivative action and there is, in general, extensive powers in the Rules in relation to case management (for example pursuant to Order 63C, rules 4 and 5; and see *Board of Management v Burke* [2023] IEHC 41, O'Moore J. at para.s 1-2 thereof).

(xi) Should the relief be refused because Mr. Sutton did not exhibit an opinion of counsel or a draft plenary summons or appropriate draft statement of claim as required by Order 15, rules 39(5)(vii) and (viii)?

112. The lack of an opinion of counsel is addressed above in paragraph 38 of this judgment and I am satisfied that it is not fatal in this case, not least where I am satisfied that a claim with reasonable prospects of success has been established as against Mr. Leavey and Cohesion. In relation to the lack of draft pleadings, as indicated earlier, somewhat confusingly, Mr. Sutton exhibited a draft statement of claim for the 2021 proceedings in this application. As described above, during oral submissions, he explained that he had wanted to bring a motion within the 2021 action for liberty to include a derivative action within that case but that the central office would not let him.

113. I am not satisfied to refuse Mr. Sutton relief on this ground. As the potential action has been limited to a claim for damages against Mr. Leavey and Cohesion only and is further limited in relation to Mr. Leavey to the events of May 2021 then clearly radical alterations to the draft statement of claim, if such was even to form a starting point, would be needed.

114. In addition, in relation to both of these matters, a certain degree of latitude must be afforded in these circumstances. The court has to be sensitive to the challenges facing a lay litigant making such a complex application as this one. As Birmingham J., as he then was, states in *JON v SMcD & Ors* [2013] IEHC 135 (dealing with an application by defendants to have a lay litigant plaintiff's claim dismissed as disclosing no reasonable cause of action and/or as being frivolous and/or vexatious):-

> *"While the court is concerned with the form and contents of the pleadings, it must be noted that an application under O. 19, r. 28 will fail if the deficiency in the pleadings can be rectified by means of an amendment that will set out a good cause of action or defence. See in that regard Delaney and McGrath, Civil Procedure in the Superior Courts, 3rd Ed., at para. 16.06. In my view, that observation which is of general application has a particular relevance when pleadings have been drafted by a lay litigant. Clearly, there can be no questions of a lay litigant being deprived of his right of access to the courts by reason of any lack of skill as a draftsman. It is also important to avoid a situation where the tone and style of the pleadings so grate on one that it leads to an assumption on the part of the reader that the pleadings are frivolous or vexatious." (underlined for emphasis).*

115. Nonetheless, a mechanism will need to be found, whereby draft pleadings will need to be prepared, and I propose to address that hereunder.

(xii) Should the relief be refused because Mr. Sutton has sought to rely on draft accounts prepared by him to support a claim for damages and without the benefit of an expert report contrary to Order 15, rule 39(5)(ii)?

116. Firstly, there was considerable confusion as to why and on what basis Mr. Sutton was seeking to rely on the presentation of the draft accounts of the company which he had prepared. For the purposes of the argument by Cohesion, I propose to assume that these draft accounts were intended to show how much trading and profits might have been carried on and earned by the company had the alleged wrongs not occurred. Seen in that way, one can see that, in normal circumstances, a company such as Salumi (preparing for a trial in which damages are to be claimed for the wrongful appropriation of its business) would retain an independent forensic accountant to analyse the situation and prepare a report indicating an appropriate basis for estimating the losses of the company.

117. At this juncture (and allowing for the fact that Mr. Sutton is both a lay litigant and was, in any event, unclear as to what the purpose of these accounts was) it is simply too early to consider what the position as to quantum of damages might be.

118. In addition, this issue was not an issue that relates to the primary question of whether or not the derivative action has "reasonable prospects of success". In a case where the question of liability may well turn to be decided on the evidence of an expert, then this argument - that there had been some non-compliance with Order 15, rule 39(5)(ii) - may well have some more bite. For the foregoing reasons however, I am not satisfied to refuse relief on this ground.

VI. Conclusion

119. For the foregoing reasons, I am satisfied that Mr. Sutton should be given liberty to bring a derivative action on behalf of Salumi claiming damages against Mr. Leavey and Cohesion.

120. In relation to Mr. Leavey, this action is limited to:-

(i) a claim in damages for breach of fiduciary duty relating to the alleged wrongful appropriation of the business, goodwill, and assets of Salumi in May 2021 whereby it is alleged that there was a *de facto* transfer of Salumi's business to Karmar, an entity controlled by Mr. Leavey; and

(ii) a claim in damages for conspiracy, whereby it is alleged that Mr. Leavey and Cohesion colluded together to achieve this *de facto* transfer of the business of Salumi to an entity controlled by Mr. Leavey.

121. Mr. Sutton is not being given leave in relation to his allegations concerning the use by Mr. Leavey of the company accounts during the period from November 2020 to April 2021 or in relation to any other matters such as involving the complained of filings in the CRO or relating to the shareholding. Although, during the course of any trial, it may be appropriate to refer to these matters as part of the evidential context and background to what happened in May 2021.

122. In relation to Cohesion, the action is limited to:-

(i) a claim in damages for the unlawful termination of the License;

(ii) a claim in damages for conspiracy relating to the alleged facilitation by Cohesion of the *de facto* transfer of the business of Salumi to an entity controlled by Mr. Leavey by means of the unlawful termination of the License, the immediate grant of a new license on the same terms to Karmar, and providing Karmar with the use of Salumi's fixtures and fittings; and finally

(iii) a claim in damages for the wrongful retention of the deposit and fixtures and fittings of Salumi.

123. I propose to list the matter for mention as against Mr. Leavey and Cohesion to allow for the preparation of a draft Plenary Summons and a draft Statement of Claim on behalf of Salumi, confined to the above matters and I will afford an opportunity to the parties to be heard on those drafts. I will hear from the parties as to the precise form of the order and in relation to the question of costs.