

Neutral Citation No: [2022] NICH 20	Ref: McB11958
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 20/51478/A01
	Delivered: 14/10/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
—————

Between:

LINUS MURRAY

Respondent/Plaintiff

and

**O'REILLY STEWART SOLICITORS LTD
IMELDA ANN McMILLEN, JOSEPH MOORE, JANET WILLIAMSON,
JAMES TURNER, STUART GILMORE, ADRIAN JAMES McGRANAGHAN**

Appellants/Defendants

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**Mr Colmer KC and Ms Rowan of counsel instructed by Crawford Lockhart and Black
Solicitors for the Appellants/Defendants**

**Mr Orr KC and Mr Morgan of counsel (instructed by McGarrigle Legal Solicitors) for the
Plaintiff/Respondent**
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McBRIDE J

Introduction

[1] This is the defendant's appeal from part of the order of Master Hardstaff dated 24 June 2021 when he ordered that the plaintiff's claim pursuant to section 994 of the Companies Act 2006 ("Unfairness Prejudice Claim") be stayed and "not to be proceeded with unless by leave of the Chancery judge."

[2] The defendant/appellant was represented by Mr Colmer KC and Ms Rowan of counsel. The plaintiffs/respondents were represented by Mr Orr KC and Mr Morgan of counsel. The court is grateful to all parties for their very comprehensive and helpful submissions.

Background

[3] On 4 August 2020 the plaintiff issued a writ claiming relief in respect of alleged breach of a service contract dated 29 June 2015; harassment and bullying at work; constructive dismissal; breach of a shareholders' agreement dated 29 June 2015 and at Part B(ii) claimed relief as follows:

“Pursuant to Part 30 of the Companies Act 2006 on the grounds that the affairs of the first named defendant are being or have been conducted in a manner unfairly prejudicial to the plaintiff.”

[4] On 10 August 2020 the defendants' solicitors corresponded with the plaintiff's solicitors and advised as follows:

“Your client has purported to claim relief under Part 30 of the Companies Act 2006 ... It is a statutory requirement of the Companies Act (section 994) that any such proceedings are commenced by petition. Accordingly, paragraph B(ii) of the claim in the writ is invalid and must be withdrawn or struck out. Please confirm this will be done.”

[5] On 13 August 2020 the plaintiff's solicitors responded and stated as follows:

“We do not accept that paragraph B(ii) of the Writ of Summons is invalid and must be withdrawn. Seeking relief under Part 30 of the Companies Act 2006 in this matter is consistent with the overriding objective but, if directed by the court, we will file a separate petition and seek to have both matters joined together.”

[6] On 17 August 2020 the defendants' solicitors replied as follows:

“We have already pointed out that the requirement to commence proceedings under Part 30 of the Companies Act 2006 by petition is a statutory requirement.”

[7] On 23 March 2021 the defendants issued a summons to strike out various parts of the writ and statement of claim under Order 18 rule 19 of the Rules of the Court of Judicature (NI 1980) (“the 1980 Rules”) and/or under the inherent jurisdiction of the court.

[8] On 24 June 2021 Master Hardstaff struck out parts of the claim but stayed the unfair prejudice claim.

[9] On 29 June 2021 the defendants issued a notice of appeal appealing only

“That part of the order made by the Chancery Master dated 24 June 2021, whereby the Master made an order that the plaintiff’s alleged claim pursuant to Part 30/section 994 of the Companies Act 2006 and/or grounded upon unfair prejudice, was stayed and was not to be proceeded with without leave of the Chancery Judge, either at the trial or on application to the Chancery Judge.”

Key issue for determination

[10] The key issue for determination is whether unfair prejudice proceedings which are not brought by way of petition are thereby fatally flawed and so defective that they must be struck out on the ground that they amount to an abuse of process.

[11] The issue comes into sharp focus in this case as the plaintiff ceased to be a member of the company on 6 November 2020 and, therefore, is now unable to issue fresh unfair prejudice proceedings by way of petition.

Discussion

[12] Section 994 of the Companies Act 2006 provides:

“Petition by company member

- (1) A member of a company may apply to the court by petition for an order under this Part on the ground –
 - (a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself) ...”

[13] Mr Colmer KC on behalf of the defendant submitted that the statute provided that an unfair prejudice claim must be brought by petition. As the plaintiff’s claim in respect of unfair prejudice is included in a writ, he submitted that this was a clear breach of the express requirements set out in the primary legislation. In support of this interpretation of the statute he relied upon the provisions of section 996 of the companies Act, and the case of *Re Osea Camp Sites* [2005] 1 All ER 820.

[14] In contrast Mr Orr KC submitted that the use of the word “may” in section 994 meant the issuance of proceedings via petition is permissive and not mandatory and he relied on the rules of statutory interpretation in support of this interpretation. Further, he submitted that this interpretation was supported by Order 102 rule 4 of

the 1980 Rules. Order 102 rule 4 sets out a list of cases in which proceedings must be commenced by way of a petition. Claims of unfair prejudice are not included within this list and he therefore submitted that unfair prejudice claims did not have to be brought by way of petition.

[15] In *Re Osea Camp Sites* the claimant made an unfair prejudice claim by way of a claim form, the English equivalent of our writ. The defendants applied to strike out the proceedings on the basis they were irretrievably procedurally flawed. Pumfrey J in determining whether the requirement to commence proceedings by petition was mandatory, or merely directory, stated as follows at para [13]:

“It seems to me plain that the requirement that a petition be used is mandatory is clear from the manner in which section 994 (is framed). There is only one gateway through which a member of a company who alleges unfair prejudice may pass and that is through the gateway of petition to the court.”

[16] Whilst this is a first instance decision and is not binding upon this court, I nonetheless, respectfully agree with the analysis of Pumfrey J, and adopt his reasoning. I am satisfied that the use of the word “may” in section 994 grants a power to a member of a company to apply to the court for relief. Section 994 then goes on to provide the means by which such an application is to be brought and provides that it is to be brought by way of petition. Therefore, the word “may” in section 994 relates to the right to apply to the court and not to the means. I consider this to be the plain and obvious meaning of the words used. Consequently, I find that the statute proscribes that the means to be used when such a power is exercised is a petition.

[17] Such an interpretation is further supported by section 996. Section 996 sets out the powers of the court and states that such powers are only exercisable if it is “satisfied that a petition under this part is well-founded.” The powers are not stated to be exercisable when “claims are well-founded.” Accordingly, the court’s powers are dependent upon first and foremost the existence of a petition and, thereafter, upon being satisfied that the petition is “well-founded.”

[18] In respect of Order 102 rule 4 I am satisfied that the reason it does not refer to an unfair prejudice claim is because the Companies (Unfair Prejudice Applications) Proceedings Rules (Northern Ireland) 1991 (“the 1991 Rules”) which were promulgated under the authority of the Insolvency (Northern Ireland) Order 1989 and the Companies (Northern Ireland) Order 1986 set out the procedure for unfair prejudice petitions and, therefore, such petitions have their own discrete set of rules. Consequently, there was no need for the 1980 Rules to deal with the procedure for unfair prejudice claims. I am therefore satisfied this is the reason for the omission of such claims from Order 102 rule 4.

[19] Accordingly, I am satisfied that there is a statutory requirement that proceedings for unfair prejudice are brought by way of petition.

[20] That being so, the question then arises whether there is a power to dispense with the requirement of the statute that proceedings be brought by way of petition.

[21] Mr Orr KC submitted that the unfair prejudice claim was not a single freestanding cause of action but rather part of a wider claim featuring further causes of action set out in the writ, all of which were based on substantially similar factual grounds. In such circumstances, he submitted, that this pleading was not an abuse of court and the court should, therefore, exercise its powers of amendment and/or conversion of pleadings thereby ensuring compliance with the overriding objective set out in Order 1 rule 1(a).

[22] Order 2 rule 1 of the 1980 Rules provides:

“Where ... there has ... been a failure to comply with the requirements of these rules ... the failure ... shall not nullify the proceedings.

2. The court may ... allow such amendments to be made and to make such order in dealing with the proceedings generally as it thinks fit.

3. The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.”

[23] In *Townsley v McKay Holdings (Belfast) Ltd* [2001] NIJB 409 the plaintiff brought an originating summons in respect of a claim under the Companies (Northern Ireland) Order 1986. Under the 1980 Rules the application ought to have been brought by originating motion. Girvan J found that the court could in the exercise of its powers under Order 2 rule 1 treat the application as if it had been brought by an originating motion.

[24] I consider that this authority is not of assistance to the plaintiff in the present application. In *Townsley* the rules provided the route by which proceedings were to be brought. Accordingly, in accordance with the powers set out in Order 2 rule 1 and, in particular, sub-paragraph 3 the court had power as Girvan J indicated to treat the proceedings as if they had been brought by the correct route. In the present case, however, it is not the rules which provide the route by which proceedings must be brought but rather the statute. Order 2 rule 1 specifically confines the exercise of its powers to a failure to comply with “the requirements of these rules.” Accordingly, I

find that the rules cannot and do not override the provisions set out in the primary statute.

[25] Mr Orr KC further relied on Order 28 rule 8. It provides as follows:

“Where, in the case of a cause or action begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the case, cause or matter had been begun by writ, it may order the proceedings to continue as if the case, cause or matter had been so begun and, may, in particular, order that any affidavit shall stand as pleadings...”

[26] It is my view that this order is not of any assistance to the plaintiff as it is limited to the power of the court to allow originating summonses to be converted into writ actions. Nowhere within the rules does it state that a writ action can continue as if begun by petition.

[27] Mr Orr KC further relied on the overriding objective. This states:

“The overriding objective of these rules is to enable the court to deal with cases justly ...

3. The court must seek to give effect to the overriding objective where it:

(a) exercises any power given to it by the rules; or

(b) interprets any rule.”

[28] As appears from the provisions of the overriding objective the court must give effect to it when exercising any power given to it by the rules or its interpretation of the rules. The overriding objective is not, therefore, freestanding and is only applicable when the rules of court are being exercised or interpreted.

[29] In the present case the court has found that none of the rules are applicable given that the statute provides the means by which the proceedings must be brought. In these circumstances, therefore, the overriding objective is not applicable.

[30] I am satisfied that the provisions of the statute take primacy over the provisions of the rules. Indeed, this is recognised in Order 5 rule 2 which states:

“Subject to the provisions of any statutory provision ...”

[31] Accordingly, it is my view, that none of the rules can override the statutory provision and, accordingly, the only means by which an unfair prejudice claim can be brought is by way of petition as this is a statutory requirement.

[32] Failure in the present case to use the prescribed statutory mechanism to commence proceedings, I find, renders the proceedings to be fatally flawed. They are, therefore, a nullity and should therefore be struck out.

[33] I will hear the parties in respect of costs.