Judgment Title: In re Via Net Works (Irl) formerly Medianet (Irl) & Cos Acts

Neutral Citation: [2002] IESC 24

Supreme Court Record Number: 172/01

High Court Record Number: 2001 No. 76 Cos

Date of Delivery: 23/04/2002

Court: Supreme Court

Composition of Court: Keane C.J., Murphy J., McGuinness J.

Judgment by: Keane C.J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Keane C.J.	Link	Appeal allowed - set aside High Court Order	Murphy J., McGuinness J.

Outcome: Allow And Set Aside

THE SUPREME COURT

Keane C.J.
Murphy J.
McGuinness J.
172/01

IN THE MATTER OF VIA NET WORKS IRELAND LIMITED FORMERLY MEDIANET IRELAND LIMITED
AND
IN THE MATTER OF THE COMPANIES ACTS 1963 - 1999

JUDGMENT delivered the 23rd day of April, 2002 by Keane C.J.

The respondents to this appeal, Stuart Fogarty and Aubrey Fogarty Associates Limited, presented a petition to the High Court, in which they claimed to be members of the company named in the title of the proceedings (hereafter "the company") and sought relief pursuant to s.205(3) of the Companies Act 1963 (hereafter "the 1963 Act") on the ground that the affairs of the company were being conducted and the powers of its directors exercised in a manner oppressive to them or in disregard of their interests. The appellants are a Dutch company called Via Net Works Europe Holding BV, formerly Via Net Works Inc. who own a majority of the shares in the company. They applied in the High Court by way of notice of motion for an order dismissing the petition as an abuse of process or, alternatively, an order staying the proceedings pending a referral to arbitration. Both reliefs were refused by the High Court (Lavan J) in a brief extempore judgment.

The history of the matter, insofar as it is not in dispute, is as follows. The company was incorporated on the 12th June, 1995, with the object of carrying on the business of designing, operating and servicing computer networks. The capital of the company, paid up or credited as having been paid up, is £30,000 divided into 30,000 ordinary shares of £1.00 each which, at the time of the hearing in the High Court, according to the petition, were held as follows.

(a) The appellants - 18,000 shares
(b) Stuart Fogarty - 2,940 ordinary shares
(c) Aubrey Fogarty - 3,825 ordinary shares

(d) Thomas Kelly - 5,235 ordinary shares

(It would appear that the shares of Aubrey Fogarty were in fact vested in the second named respondent but nothing turns on this.)

Until the 15th March 1999, there were 10 shareholders in the company. On that day, the appellants entered into a share purchase agreement with the existing shareholders, under which the latter agreed to transfer 18,000 ordinary shares, representing 60% of the issued and outstanding share capital of the company, to the appellants. The consideration paid by the appellants was
(a) the sum of £840,502 to the shareholders, made up of £119,392 each to Mr. Stuart Fogarty and Mr. Thomas Kelly and £601,718 paid to the other shareholders;
(b) the sum of £200,000 subscribed to the company for 5% redeemable preference shares.
It is not in dispute that, at the time of the purchase, the company was in an insolvent position and in need of cash to fund its ongoing operations. This transaction was duly completed and it is also not in dispute that, since that time, the appellants have advanced £2,156,549 by way of loans to the company with a view to ensuring the survival and continued operations of the company.

On the same day, i.e., March 15th 1999, a further agreement was entered into, called “the Shareholders’ Agreement”, between Thomas Kelly, Stuart Fogarty and Aubrey Fogarty Associates Limited, who were described as the “existing shareholders”. This agreement, according to the recitals, was intended to clarify the respective rights and obligations of the existing shareholders with respect to the management, capitalisation and operation of the

company. Clause 7.1 provided that, within a specified period, the appellants were to have the right, but not the obligation, to purchase all the shares held by the existing shareholders on giving them at least 30 days prior written notice. The clause provided a mechanism for determining the price to be paid for the shares.

Clause 11.1 of the Shareholders' Agreement under the heading "Law" provides that
"THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK, USA, WITHOUT REGARD TO ITS PRINCIPLES REGARDING CONFLICT OF LAWS (OTHER THAT SECTION 5 - 1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK)."

Clause 11.2, under the heading "Arbitration of Disputes" provides that
"Any and all disputes between or among the buyer and the sellers (individually a "party" and collectively the "parties") arising under or related to the transaction documents including, without limitation, the interpretation of the transaction documents or the breach, termination or invalidity thereof (a "dispute") shall be resolved exclusively and finally by binding arbitration among the parties. It is specifically understood and agreed that any dispute may be submitted to arbitration regardless of whether such dispute would otherwise be considered justiciable or ripe for resolution by a court."

The "transaction documents" referred to in clause 11.2 are the Shareholders' Agreement, the share purchase agreement and a service agreement entered into with

Thomas Kelly.

There was exhibited with the affidavit of Mr. Nydell an opinion of Hogan and Hartson LLP, Attorneys in the City of New York, which states:-

1 *"It is our understanding that after VIA provided its VIA Call Notice, but before the transfer date, the Fogarty shareholders filed a proceeding in the High Court of Ireland alleging, among other things, oppression by the majority shareholder. We have been asked to provide an opinion under New York law as to the standing of the Fogarty shareholders to maintain such action.....*

"Under the circumstances presented here, the Fogarty shareholders were divested of their shareholder status as of March 8th, 2001, and any rights they had as shareholders, including the right to maintain any judicial proceedings requiring shareholders' status, ceased at that time."

In March, 2000, the appellants acquired the shares of Thomas Kelly, who until that time had been the managing director of the company. As a result, their interest in the company increased to 77.45%. On the 5th February 2001, the appellants gave notice to each of the respondents that, under the provisions of s.7(1)(i) of the Shareholders' Agreement they would purchase the remaining shares on March 8th 2001. The letter also stated that as of the transfer date, the price calculated in accordance with the Shareholders Agreement would be a negative amount, but that they were agreeing to purchase the shares at a price of 0.01p per share.

The grounds on which the respondents seek relief pursuant

to s.205(3) can be summarised as follows. They say that the appellants are responsible for a state of affairs in which the managing director of the company, Thomas Kelly, has been wrongfully dismissed at what they claim to be considerable cost to the company, where debts of the company have not been collected in a timely fashion, again at considerable cost to the company, and where they have been excluded from any prospect of real participation in the affairs of the company. They further say that their interest in the company has been greatly diluted because of the activities of the appellants and will continue to be diluted because of the way in which the appellants are conducting the affairs of the company. In particular, they say that the making of cash calls by the company upon the shareholders is further diluting the respondents' interest in the company and that, if they were to dispose of their shares in the company, the sale price which they would achieve would be very much reduced as a consequence of the appellants' activities.

The averments to this effect in affidavits sworn by Stuart Fogarty in these proceedings are strenuously contested in affidavits sworn on behalf of the appellants by Matt Nydell and Declan Black. They say that Mr. Kelly left the company following the agreement of a severance package between him and the company and that his replacement was believed by the appellants to be in the best interests of the company. They say that the company suffered no loss as a result. They further say that the petitioners have not provided any funding for the company, in contrast to the substantial funding provided by the appellants, that they had been kept fully informed of all funding by way of cash calls, but that they declined the opportunity to

participate in the funding. They also deny that the petitioners have been excluded from participating in the affairs of the company. They say that at its board meeting on the 7th June 2000, the first named petitioner attended but withdrew shortly after the commencement of the meeting after handing in a solicitor's letter. They say that he attended and participated in further board meetings on the 11th September 2000, the 8th January 2001, and 5th February 2001. The appellants agree that they have funded the company to a significant extent since they made their investment in it, but do not accept that this gives the respondents any cause of complaint, since this has been done to ensure the survival of the company and at the request of the local management of the company.

To the extent that any of these contested issues of fact are relevant to the granting or withholding of relief pursuant to s.205 of the 1963 Act, their resolution would have to await a plenary hearing. It is also clear that the test to be applied in considering the application to strike out the proceedings as being an abuse of process is whether, assuming the respondents succeed in establishing the facts as pleaded in their petition at such a plenary hearing, they would be entitled to relief under s.205. If they would, the pleadings cannot be struck out as being an abuse of process. (See the decision of this court in*Jodifern Limited -v- Fitzgerald*, unreported, judgments delivered 21st December 1999.)

On behalf of the appellants, Mr. Paul Gardiner SC submitted that the proceedings should be struck out as constituting an abuse of process on two grounds, i.e.,

(a) that the respondents had no locus standi to maintain the proceedings; and

(b) that the facts as pleaded in the petition, even if established, did not constitute oppression or conduct in disregard of the respondents' interests within the meaning of s.205(1) of the 1963 Act and that there is no reasonable prospect of the court finding that they constitute such conduct or of granting the reliefs sought by the respondents.

As to the first ground, Mr. Gardiner submitted that a petition under s.205(1) of the 1963 Act could be brought only by a member of the company. It had not been disputed by the respondents that they were obliged to transfer all their shares to the appellants pursuant to the Shareholders' Agreement, that the terms of the agreement provided that it was to be governed by the law of the State of New York and that, under that law as set out in the opinion of the New York attorney, the respondents had been divested of their rights as shareholders as of March 8th 2001, including their right to maintain any judicial procedures requiring shareholder status. He cited in support of these submissions the decision of this court in *O'Neill -v- Ryan and Ors* [1993] ILRM 557.

As to the second ground, Mr. Gardiner submitted that, even if all the facts pleaded in the petition were proved and the court found that the company's interests had been damaged and the value of the respondents' shareholding, as a result, diminished, this would not constitute oppression or conduct in disregard of the respondents' interests within the meaning of s.205(1). He also cited in support the decision in *O'Neill -v- Ryan and Another*.

Mr. Gardiner further submitted that the respondents were seeking to make use of the s.205 procedure in order to

circumvent the provisions in the Shareholders' Agreement under which the price of their shareholding was to be calculated and that, in the result, the proceedings were clearly an abuse of the process of the court.

Mr. Gardiner submitted that, in any event, the learned High Court judge had erred in law in refusing to stay these proceedings pursuant to s.5(1) of the Arbitration Act 1980. He submitted that the section was mandatory in its terms and that, where a dispute came within the scope of a valid arbitration clause and was not excluded by exceptions, the court was bound to make an order pursuant to s.5, citing in support the decision of the High Court (Lardner J) in*Williams -v- Artane Service Station Limited and Another*, [1991] ILRM 893.

He further submitted that the fact that the proceedings were brought under a statutory provision was of no relevance, since there was no express provision in the Arbitration Act 1980 or in the Companies Acts, 1963 - 1999, delimiting the applicability of the Arbitration Act 1980 in respect of an application for relief pursuant to statute. He cited in support *Re Vocam Europe Limited* [1996] VCC 396.

Alternatively, Mr. Gardiner submitted that the proceedings should be stayed in pursuance of the inherent jurisdiction of the court to stay such proceedings where the parties have expressly agreed a method of resolving their disputes, citing in support *Channel Tunnel Group Limited -v- Balfour Beatty Construction Limited* [1993] AC 334.

On behalf of the respondents, Mr. Shipsey SC submitted that the question as to whether the factual matters pleaded

by the respondents amounted to oppression within the meaning of s.205 of the 1963 Act could only be resolved by the High Court at the plenary hearing of the petition, citing in support the observations of Murphy J in*Horgan -v- Murray* [1998] ILRM.

As to the issue of locus standi, Mr. Shipsey submitted that since, at the date of the presentation of the petition and the hearing in the High Court, the respondents appeared in the register of members of the company as shareholders, they were entitled to bring the proceedings as such shareholders pursuant to s.205.

As to the submission by the appellants that the proceedings could not be maintained by the respondents because they were based on a claim that the company's interests had been damaged by the actions of the appellants and that this was not actionable at the suit of individual shareholders, Mr. Shipsey submitted that this was essentially an issue which would have to be resolved at the plenary hearing. He said that it was clear from the petition and affidavits that the respondent's claim rested, at least in part, on their being excluded from any participation in the company's affairs and that this was clearly a ground which, if established, would entitle them to relief under s.205.

As to the claim by the appellants that the proceedings should in any event be stayed because of the arbitration clause, Mr. Shipsey submitted that, as a matter of public policy, an arbitration clause could not be availed of so as to deny a member of a company who claims to be the victim of oppressive and unreasonable behaviour by those

in control of the company from invoking and relying on s.205 of the 1963 Act. He also submitted that the purported reliance by the appellants on s.5 of the Arbitration Act 1980 was inconsistent with their submission that the Shareholders' Agreement was governed by the law of New York.

Section 205(1) of the 1963 Act provides that *"Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section."*

Under the Rules of the Superior Courts, a complaint under the section

by a member of a company is to be brought by petition.

It was not contended on behalf of the respondents in this case that the jurisdiction of the High Court to dismiss an action pursuant to Order 19 Rule 28 on the ground that the pleadings disclose no reasonable cause of action or one which is frivolous or vexatious or to strike out such proceedings as an abuse of process in the exercise of its inherent jurisdiction is inapplicable in the case of such petitions. I think that they were correct in adopting that approach, since it appears to be the clear implication of the judgments of this court in *Horgan -v- Murray and Another* [1998] ILRM 110 that the jurisdiction is applicable in the case of such petitions, although one that should, in those cases as in all other cases, be exercised

sparingly and, on the facts of that particular case, was unsuccessfully invoked.

As to the first ground relied on by the appellants, I am satisfied that the learned High Court judge was clearly wrong in treating the issue of locus standi in this case as one that could be resolved only at the trial. The argument advanced on behalf of the appellants was quite straightforward and grounded on undisputed facts, i.e., that at the date of the presentation of the petition and the hearing in the High Court the appellants were legally bound by the Shareholders' Agreement to transfer all their shares to the appellants and, accordingly, could not be heard to complain that the affairs of the company were being conducted or the powers of the directors exercised in a manner oppressive to them or in disregard of their interests as members.

Section 205 is a valuable protection against the misuse by shareholders, usually constituting the majority, of their powers in a manner which is oppressive to the other shareholders or fails to have regard to their interests. Persons, such as the respondents, who have voluntarily disposed of their entire shareholding in a company could not conceivably have been contemplated by the legislature as persons who would be entitled to relief under the section. Nor is it any answer to say that, because the respondents have not transferred their shares, as they are contractually bound to do, they remain registered as members of the company. It is undoubtedly the case that a person who has become entitled to be registered as a shareholder may be unable to exercise any of his rights as a shareholder until his name has been entered on the register. But it does not follow that a person who,

conversely, has voluntarily divested himself of all his shares in the company, but remains on the register must be treated as a member of the company for all purposes. I have no doubt that, when the legislature enacted s.205(1), it was not envisaged that persons without any interest in the company but who, for whatever reason, remained on the register as members would be entitled to present a petition grounded on alleged oppression of them as members.
The provisions of s.205 are, of course, to be construed solely in accordance with Irish law. The relevance of the opinion of the New York attorney is that it establishes beyond doubt that, under the terms of the agreement, the respondents, in the events that have happened, were contractually bound under the law of New York to divest themselves of their rights as shareholders and transfer them to the appellants as of the 8th March 2001. It follows that, as and from that date, whether registered as shareholders or not, they were deprived of any standing under Irish law to present a petition under s.205. It is, accordingly, clear that the proceedings should have been struck out in the High Court in exercise of the jurisdiction to strike out proceedings which disclose no cause of action or constitute an abuse of process.

In any event, it is difficult to see how the allegations made by the respondents, even if they were established, could constitute a case of oppression or disregard of their interests within the meaning of s.205(1). They are, in the main, claims that the appellants are running the company in a manner which is damaging to the interests of the shareholders. It has been the law, however, since the venerable decision in *Foss -v- Harbottle* [1847] 2 Hare

461 that only the company can maintain proceedings in respect of wrongs done to it and that neither the individual shareholder nor any group of shareholders has any right of action in such circumstances. That rule was emphatically reaffirmed by the decision of the High Court and of this court in *O'Neill -v- Ryan* [1990] 1ILRM 140; [1993] ILRM 557. There are undoubtedly well established exceptions to the rule, but it is clear that this case does not come within any of them.

While the respondents also maintain that they have been excluded from participation in the company's affairs - a plea which, if established, might amount to the sort of conduct aimed at by s.205 - the averment by Mr. Nydell that the first named respondent attended board meetings on the 7th June 2000, 11th September 2000, the 8th January 2001 and the 5th February 2001 has not been denied. Nor, it would seem, has he exercised his right pursuant to the Shareholders' Agreement to request that further board meetings be called. I am satisfied that, in the result, if the petition were allowed to proceed, on the undisputed facts of this case, the respondents would not be in a position to establish that the affairs of the company were being conducted or the powers of its directors exercised in a manner oppressive to them and in disregard of their interests.

In the alternative, the appellants say that the High Court judge should have granted an order staying the proceedings, having regard to the arbitration clause in the Shareholders' Agreement. I have no doubt that the High Court judge was wrong in law in treating this as an issue which should be decided at the trial of the action. Either the appellants were entitled as a matter of law to have the

proceedings stayed at this stage so that any issues arising between them and the respondents could be referred to arbitration or they were not. There was no ground whatever for deferring that decision until the trial of the action.

I am also satisfied that the proceedings, even if properly instituted and not constituting an abuse of process, should in any event have been stayed having regard to the arbitration clause.

Section 5(1) of the Arbitration Act 1980 provides *"If any party to an arbitration agreement, or any person claiming through or under him commences any proceedings in any court against any other party to such agreement, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the proceedings may at any time after the appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."*

It is not in dispute that clause 11 of the Shareholders' Agreement incorporates an "arbitration agreement" within the meaning of s.5(1). Nor has it been suggested that that agreement is null and void, inoperative or incapable of being performed. It is also clear that the Shareholders' Agreement was voluntarily entered into by the parties with a view to governing the future management, capitalisation

and operations of the company. The disputes, accordingly, which have subsequently arisen between the appellants and respondents are manifestly encompassed by the terms of the arbitration clause.

Mr. Shipsey has urged that it would be contrary to public policy to operate the arbitration clause in a manner which would deprive the respondents of their statutory right to have the oppression allegations determined by the High Court. I am satisfied that this argument is misconceived. When the respondents entered into the arbitration agreement, they were expressly waiving the right to have issues that arose between them arising out of the Shareholders' Agreement litigated in any forum other than the arbitral tribunal: that is the essence of an arbitration agreement. It is irrelevant in this context whether the right of action they might otherwise have enjoyed was one which arose at common law or was statutory in origin. I think that that conclusion is borne out by the decision of the English High Court in *Re Vocam Europe Limited*.

Nor could the respondents successfully rely on clause 12.8 of the Shareholders' Agreement which provided that *"the rights and remedies granted under this agreement shall not be exclusive but shall be in addition to all other rights and remedies available under law or equity."*

To treat that clause as entitling the parties to have recourse to the courts for the resolution of issues arising under or relating to the Shareholders' Agreement would have been effectively to render clause 11.2 of the agreement meaningless. That cannot have been the intention of the parties. No doubt the parties to the agreement might have been in a position to institute proceedings relating to

matters which were not within the scope of the arbitration clause, but no such issues have been identified in the present case.

I am also satisfied that the High Court enjoyed an inherent jurisdiction to stay the proceedings in this case having regard to the existence of the arbitration clause. I would adopt as a correct statement of the law in this jurisdiction the following passage from the speech of Lord Mustill in *Channel Group -v- Balfour Beatty Limited* [1993] AC 334 at p.353:

"I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."

While, as the passage makes clear, in that case the contract was one which was more characteristic of the high level world of international commerce than the agreement now under consideration, I have no doubt that the general principle is equally applicable to the agreement in this case.

I would allow the appeal and substitute for the order of the High Court an order striking out the petition.

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