DUGGAN - BOURKE

THE HIGH COURT

1983 No.1286P

BETWEEN

NEAL DUGGAN PLAINTIFF

and

JOHN PAGET BOURKE
JOHN ROBERT NEILAND
JOHN HENRY STANLEY
KEVIN WYLIE
THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANTS

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE DECLAN COSTELLO
ON 30 MAY 1986 (2nd Day)

At the end of the Plaintiff's case, Mr O'Neill, on behalf of the Defendants, applied for a non-suit. The principal basis on which this application was brought was reliance on the well-known case and the principle decided in it of Foss v Harbottle. The principle in that case has been clearly set out by Mr Justice Keane at page 219 in his book "Company Law in the Republic of Ireland", and I quote from it as follows:

> "In the leading case of Foss v Harbottle it was laid down that only the company could maintain proceedings in respect of wrongs done to it. Neither the individual shareholder nor any group of shareholders had any right of action in such circumstances. The rule was based on the following practical considerations:
>
> "(1) If individual members were allowed to bring proceedings to redress wrongs done to the company the result would be a multiplicity of actions. Accordingly, such actions could only be brought with the authority of a meeting of the company and this effectively meant that only the company could sue.
>
> "(2) If the action complained of was one which it was within the powers of the company in general meeting to sanction, then even though it may have been irregular, proceedings would be futile since the company could always ratify it at a general meeting.
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> "In Foss v Harbottle the company in general meeting refused to take any action against directors who were alleged by the minority shareholders to have committed fraudulent acts. The court dismissed an action by the minority shareholders against the directors in which it was sought to compel them to make amends to the company. It was held that only the company could maintain such proceedings."

Having quoted further from the authorities, at paragraph 26.03 four clear exceptions are set out. The first of these is featured in submissions and is stated as follows by Mr Justice Keane:

> "The majority cannot commit an act which is illegal or ultra vires the company. An individual shareholder may always bring proceedings in respect of such an act."

In my view the Defendants are entitled to rely on the case to which I have referred and in my view they are entitled to a non-suit. I will briefly give my reasons which are as follows:

At the end of the Plaintiff's case the following facts were established or, alternatively, had been admitted by Mr Duggan:

(1) The appointment of the four individual Defendants in March 1978 by the Court of Directors of the Bank of Ireland was a valid appointment under the bye-laws. At that time each of the Defendants

beneficially owned an amount of qualifying stock as required by bye-law 65. However, they were not registered as owners and holders of the stock. So on a strict but, it seems to me, correct construction of the bye-law they vacated within two months of their appointment their office as directors and as executive directors so their purported appointment at the following General Court of the Bank was not valid.

(2) No suggestion has been made that the irregularity which occurred was deliberate; indeed, the object of the bye-laws had been achieved, namely, that the directors should have a financial interest to the extent of a holding of at least £500 of stock in the Company. The irregularity, I am satisfied, was entirely inadvertent.

(3) When it was discovered, the directors met and on 1 February 1983 appointed the four Defendants as directors pursuant to their powers under bye-law 87. Subsequently, each of the four was appointed by a meeting of the General Court following the appointment under bye-law 87.

It has been suggested by the Plaintiff that these appointments were invalid because the declarations as to the ownership of shares were in an invalid form. I am satisfied that this is not so. I am satisfied that the declarations made as to the ownership of the shares was sufficient for the purposes of the bye-laws. Accordingly, I am satisfied that each of the Defendants was validly appointed on 1 February 1983 and then subsequently as directors of the Defendant Bank.

(4) The Defendants received remuneration and other emoluments and benefits between May 1978 and February 1983. During this time they were, however, acting as executives of the company on a fulltime basis. In a letter of 15 February 1983 the Bank informed the Plaintiff that "no remuneration or other emoluments or benefits were paid to any of the four parties named by you in respect of their office as directors". This matter is again referred to in the Defence where it is claimed that any remuneration received by the Defendants was received pursuant to their contract of employment and not as directors

In the circumstances which I have just outlined the Plaintiff is now seeking orders which would compel the return by the directors who have obtained remuneration during the period before February 1983 to repay the sums which they have received. Specifically, the Plaintiff seeks an order from the Court directing the company to hold a meeting so that these four Defendants can account to the meeting, which I understand to mean to account and repay the sums that are due during the period when they had vacated office and during which it was, he says, a period when invalid payments were made. Secondly, the Plaintiff seeks in particular a declaration that the payments were not within the powers of the Bank.

I think it is important to appreciate the nature of the Plaintiff's claim. It may be, as submitted on behalf of the Defendants, that by virtue of bye-law 97 and perhaps by the Companies Act the payments made to the Defendants in the relevant period were not ultra vires. It may be that the payments were validly made by virtue of bye-law 97 notwithstanding the defect in their appointment. I express no view on that submission because it is not necessary for me to do so.

I do not think this action is concerned, as the Plaintiff seems to think it is, with an ultra vires act in relation to the payments. This action is concerned with the failure of the Defendants, the individual Defendants, to repay the Bank and the failure of the Bank to take steps to require this repayment.

It seems to me that if the Bank were now to sue the Defendants, the Defendants would be fully entitled to claim that, notwithstanding the invalidity of their appointment, they are entitled to be remunerated on a quantum meruit basis. The authority for this case is Craven-Ellis v Canons Ltd. [1936] 2 K.B.403, which is referred to in Palmer and Pennington, and seems to be perfectly clear that if the Defendants had in fact provided services in the five years or so of their invalid appointment, apart altogether from bye-law 97, a claim could be made by them that they are entitled to be paid for the services they have rendered on a quantum meruit basis.

It seems to me that it would be well within the powers of the stockholders to determine that a reasonable remuneration would be what was

in fact paid to them and it would be well within the powers of the Court of Directors to determine that a reasonable remuneration payable to the four first-named Defendants would be the remuneration and benefits which they in fact received.

In these circumstances it seems to me that it is unnecessary for this Court now to make any findings of fact as to whether or not the payments which were made were made in respect of the Defendants as holders of the office of director or as executive director. Even if they were, and not as is claimed in the Defence and in the letter to which I have referred, the payments could be validated in the way I have described. In my view there would be nothing ultra vires the Company or the Court of Directors in deciding if they so wished to do that the directors who had received payments during the period that a technical invalidity existed should be entitled to retain these sums.

In these circumstances it seems to me that the Plaintiff has failed to establish that he has brought himself within the exception to the rule in Foss v Harbottle. In fact, what the Plaintiff is seeking to do is to get an order of the Court to compel, in one way or another, the Defendants to refund to the Company the moneys which they have been paid in the period to which I have referred. In my view that is just the sort of action which the rule in Foss v Harbottle expressly prohibits.

I agree with the view expressed in the case to which I was referred by both Mr O'Neill and the Plaintiff, that the Court must look to see that the rule in Foss v Harbottle is not applied so that an injustice is done. That was the case in the 1952 All E.R. of Edwards v Halliwell. In my view no injustice was done in this case and there is no injustice done to the Plaintiff as an individual. I cannot agree that the Plaintiff has got any status as an individual who has suffered loss as a result of what has happened. There would be an injustice done to the four directors if this claim was permitted

The irregularity that occurred occurred inadvertently. It was of a purely technical kind in that the four directors had in their beneficial ownership the requisite number of shares but had not through inadvertence got themselves on the register as registered proprietors of this stock. In these circumstances the Company would be fully entitled to decide either that bye-law 97 was an effective

remedy or that on the facts the sums received by the four Defendants were received as salary as executive directors of the Company or that the four Defendants were entitled to quantum meruit and that this should be based upon the sums they received.

In these circumstances there is no case made out to justify an order directing the Company to hold a meeting for the purpose that the Plaintiff now suggests and no case has been made out to justify the Court departing from the principle in Foss v Harbottle so as to make any of the other orders which the Plaintiff seeks, and I will dismiss this action.

MR O'NEILL: I would ask your lordship for costs and the usual order in relation to the costs of discovery.

MR DUGGAN: I submit that, prior to enduring these proceedings, I have acted in good faith and have acted bona fide at all times. There was full justification for me to bring the matter before the Court.

I appreciate your lordship's judgment in relation to the Defendants' application. Your lordship has excused the conduct of the Defendants and I would ask that no order be made as to costs.

JUDGE: There might have been some force in what the Plaintiff has stated in relation to costs had he not been made aware of the situation. He was told on 4 February 1983 in reply to his letter that the Court of the Bank had taken the view that there may be technical validity in what he raised and that they had taken steps to validate the appointments. The Plaintiff asked for particulars of this and on 15 February he received a letter giving further particulars. The Summons had been issued just at this time but it would have been open to the Plaintiff at that stage to serve a Notice of Discontinuance. On 24 February the Plaintiff was sent a copy of the Resolution of the Board of Directors, and the Law Agent, Mr Black, told him that proceedings were unnecessary and that each of the Defendants would look to the Plaintiff for costs.

As I have held that these proceedings should not have been brought and as the Plaintiff had been made aware of the situation, I think the result must be that I must award costs against him.

MR O'NEILL: I would ask your lordship to include the costs of discovery.

JUDGE: Yes, and any costs reserved will be costs in the action.

I certify the foregoing to be a true and accurate transcript of the shorthand note taken by me.

J Kenny
Official Stenographer
20th June 1986

Approved
JC
2/7/86