

THE HIGH COURT

Record No: 113/COS/2020

IN THE MATTER OF THOMOND HEALTHCARE HOLDINGS LIMITED

AND

SARSFIELD HEALTHCARE S.A.R.L.

AND

IN THE MATTER OF THE COMPANIES ACTS 2014 TO 2020

AND

IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN:

**GERARD BLAKE, JOHN WEBB-O'ROURKE, DAVID LEHANE, KIERAN O'REGAN AND ABLE
FANCY INVESTMENT**

APPLICANTS

AND

**DAVID CHRISTIE, RICHARD HUNT, ZENA NAMIH, ZEST EQUITY HOLDCO S.A.R.L.,
JULIEN LAMBERT, RICHARD BUTLER AND GIANNI DE BORTOLI**

RESPONDENTS

RULING of MR JUSTICE DAVID BARNIVILLE delivered on 27th day of April 2020

Introduction

1. This is my written ruling on an application by the Respondents to enter these proceedings in the Commercial List. In light of the current COVID-19 pandemic restrictions, it is been agreed between the parties that I can deal with the Respondents' application on the basis of the papers. If necessary, I hereby give the Respondents' solicitors liberty to file the entry application returnable for today's date, at 11am and I deal with the application in this ruling. Further, with the agreement of the Applicants, I give liberty to the Respondents to proceed on the basis of the un-sworn affidavit of David Christie and note the undertaking by Mr Christie to swear the affidavit and to have it stamped and filed in the Central Office of the High Court as soon as practicable.
2. While the Applicants are consenting to the entry of the proceedings in the Commercial List, there is a dispute between the parties as to the directions which the Court should make, in the event that I decide to accede to the entry application.

The Proceedings

3. The Applicants commenced the proceedings by originating notice of motion on 24 March, 2020. That motion was grounded on an affidavit sworn by Gerard Blake, the first named Applicant, on the same date. It is apparently intended that a number of further affidavits will be sworn in support of the application by the other Applicants.
4. The Applicants seek various orders under section 212 of the Companies Act 2014 in relation to the alleged oppression of the Applicants and/or the alleged disregard of their interests as members of two companies, Thomond Healthcare Holdings Ltd ("Thomond") (an Irish company) and Sarsfield Healthcare S.A.R.L. ("Sarsfield") (a Luxembourg company) (the "Companies"). The Companies trade under the name Zest Healthcare and are involved in the development of primary care centres in Ireland, in conjunction with the HSE.

5. The Respondents have intimated an intention to challenge the jurisdiction of the Irish courts to make any orders in respect of Sarsfield, the Luxembourg company, or any of its members or directors.

Application to Enter in Commercial List

6. The Respondents seek to enter the proceedings in the Commercial List on a number of grounds, without prejudice to their jurisdiction challenge in relation to the claims concerning Sarsfield, and without accepting the validity of the claims made by the Applicants in the proceedings. The Respondents' application is grounded on a notice of motion, the affidavit of David Christie (to be sworn) and a certificate signed by Eoin MacNeill, a partner in the firm of solicitors representing the Respondents on 22 April, 2020.
7. The Respondents contend that the proceedings should be entered in the Commercial List on a number of grounds. First, they contend that the proceedings are "*commercial proceedings*" within the meaning of that term in Order 63A rule 1(a)(i) RSC. They contend that the proceedings concern claims which arise from, and relate to, business documents, business contracts or business disputes, where the value of the claims which will likely be advanced by the Applicants is not less than €1 million. They contend that although the Applicants' claims are phrased in terms of oppression (rather than in terms of an alleged breach of contract), such claims arise from, or are closely connected to, a suite of interlocking contracts (including a subscription and shareholders agreement relating to the Companies and a facility agreement) entered into in June 2018. They further contend that the dispute referred to in the originating notice of motion is a business dispute concerning the legal implications of those agreements, as well as the obligations of the parties in respect of the management of the Companies. They state that the Companies are substantial commercial enterprises. The business of the Companies involves the deployment of significant amounts of capital and involves property of very considerable value. They contend that of 20 envisaged primary care centre projects involving the Companies, one project has been delivered, two are in advanced stages of construction, two are imminently to commence and the Companies hold preferred bidder status in respect of another. In those circumstances, the Respondents contend that the proceedings are clearly commercial in nature.
8. The Respondents further observe that the Applicants comprise the entire executive team of the Companies' business and that the remaining directors are the first, second and third Respondents. The Respondents maintain that the dispute has the potential significantly to impact upon the operation and finances of the Companies in circumstances where two projects are nearing completion and where further projects await inception (subject to current government restrictions arising from the COVID-19 emergency). They further maintain that the reputation and ability of the Companies to win tenders for further primary care development projects may be adversely affected by the existence of the proceedings.
9. In those circumstances, the Respondents claim that it is in the interests of all the parties that their jurisdiction challenge in respect of the claims affecting Sarsfield is determined

without delay and that, if necessary, following that determination, that the Applicants' further claims are determined quickly. In those circumstances, the Respondents maintain that the facilities afforded in the Commercial List for case management and for the possibility of early and assured hearing dates will greatly benefit the proceedings. The Respondents further maintain that they have brought the application for entry of the proceedings in the Commercial List without delay.

10. The Respondents maintain that the proceedings are "*commercial proceedings*" within the meaning of that term in Order 63A rule 1(a)(i) and should be entered in the list on that basis. In the alternative, the Respondents maintain that the proceedings should be entered in the list under Order 63A rule 1(b) having regard to the commercial, and other, aspects of the proceedings, which they maintain render the proceedings appropriate for entry in the Commercial List.
11. The Applicants have consented to the entry of the proceedings in the Commercial List.

Determination of Application

12. The above matters are set out in the affidavit of David Christie grounding the Respondents' application and in the certificate of Eoin MacNeill dated 22 April, 2020. In his certificate, Mr MacNeill gives the two undertakings required by Practice Direction HC 85.
13. I am satisfied that the proceedings are "*commercial proceedings*" within the meaning of that term in order 63A rule 1(a)(i) RSC, and that it is appropriate to enter the proceedings in the Commercial List. The proceedings are clearly in respect of a claim arising from, or relating to, business documents, business contracts and business disputes, where the value of the claim is not less than €1 million. Furthermore, the Respondents' application has been brought without delay. The Respondents' solicitor has provided the required undertakings. In those circumstances, I will enter the proceedings in the Commercial List under order 63A rule 1(a)(i) RSC.
14. I will also treat the hearing of this application on the basis of the papers as the initial directions hearing under order 63A rule 4(5).

Further Directions: Remote Hearing

15. As regards further directions for the proceedings, I note that it has not been possible for the parties to reach agreement on the directions to be made. The parties have requested a hearing (remote or otherwise) in order for the court to determine the necessary directions to be made. In light of the current restrictions caused by the COVID- 19 pandemic, and having regard to the possibility of remote hearings in respect of certain cases (including cases and applications in the Commercial List), I will direct that a remote hearing takes place in respect of the directions to be made at 11.45am on 30 April, 2020. The hearing should take no more than 30 minutes. The parties should liaise with Ms White, the Registrar, concerning the arrangements for the remote hearing. I further direct the Respondents' solicitors to provide by email to the Registrar (and copied to my judicial assistant, Stephen Belton) by 5pm on 29 April, 2020, a booklet of the open correspondence between the parties concerning the directions and the rival directions

proposed by the parties. If it is not possible for the parties to reach agreement in relation to the directions between the date of this ruling and the date of the remote hearing, I will hear the parties in relation to the rival directions and make the appropriate directions.

Concluding Comment: Mediation

16. It would be remiss of me to conclude this ruling without referring to the question of mediation. While I will refrain, at this stage of the proceedings, at least, from making any order or from adjourning the proceedings for the parties to consider mediation or to allow mediation to take place, whether under the RSC or under the Mediation Act 2017, I would urge the parties and their advisers to give (further) consideration to the potential for mediation in this case. I may choose to revisit this issue in the course of the remote hearing on 30 April, 2020 or at some other stage in the proceedings.

Costs

17. I will make an order that the costs of the entry application be costs in the cause. I will deal with the question of any costs in relation to the directions hearing at the conclusion of the remote hearing on 30 April, 2020.

18. I will give the parties Liberty to apply by correspondence to the registrar.

19. That concludes this ruling.

Mr Justice David Barniville

APPROVED