TOMRAN, INC.	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
WILLIAM M. PASSANO, JR., et al.	*	BALTIMORE CITY
Defendants	*	Part 20
	*	Case No.: 24-C-02-002561 [*2003 MDBT 3*]
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MEMORANDUM AND OPINION

1. Background

Plaintiff Tomran, Inc. (hereinafter "Tomran"), which asserts that it owns approximately 4,800 American depositary shares in Allied Irish Banks, PLC (hereinafter "AIB"), through counsel, on March 6, 2002 and again on April 5, 2002 made demand on the chairman of AIB and the chairman of Allfirst Financial, Inc. (hereinafter "Allfirst Financial") and Allfirst Bank (hereinafter "Allfirst") to take immediate legal action to recover losses reported at approximately $691,000,000.00 during the period 1997 through 2002 from currency trading losses made by John Rusnak, an employee of Allfirst. The first letter indicated that unless proceedings were initiated against the responsible parties by March 25, 2002, it was Tomran's intention to file suit on behalf of Allfirst and/or AIB to recover the losses. AIB responded to the March 6 letter through counsel on March 28, 2002, posing questions about plaintiff's standing to bring a shareholder action against AIB under Irish law and providing plaintiff with a copy of the report on the currency trading losses submitted to AIB's Board of Directors on March 12, 2002.

Thereafter, on May 13, 2002 Tomran filed a derivative action in the Circuit Court for Baltimore City on behalf of AIB with respect to the foreign currency trading losses. The action was brought against current and former directors and officers of Allfirst and against Allfirst, Allfirst Financial and AIB as nominal defendants. That action was met by defendants' motions to dismiss and, at a hearing conducted before this Court on August 8, 2002, the Court agreed to reserve ruling on defendants' motions to dismiss and to permit plaintiff to file an amended complaint, which it did on August 14, 2002, suing the same defendants but this time styling its action as a "triple derivative" action on behalf of Allfirst by a shareholder in Allfirst's ultimate parent, AIB. The first amended complaint attempts to state causes of action for negligence (Count I), gross negligence (Count II), for a declaratory judgment and an injunction regarding the December, 1998 transaction (Count III), and prays a jury trial on all issues so triable. Again, defendants filed motions to dismiss and these motions, with respect to the first amended complaint, were the subject of a hearing before this Court conducted on November 22, 2002.[1] After carefully considering the voluminous material submitted by counsel for the respective parties and the arguments presented on November 22, 2002, the Court, having

[1] After the filing of the first amended complaint but prior to the hearing on the motions to dismiss, AIB announced a proposed merger and acquisition between Allfirst Financial and M&T Bank Corporation. The proposed merger and acquisition has now been approved by the shareholders of both M&T Bank Corporation and AIB and awaits ratification by U.S. and Irish bank regulators. Plaintiff had sought discovery in connection with the proposed merger and acquisition while these motions were pending but the Court declined to permit same.

assumed the truth of all well pleaded relevant facts, has determined that the first amended complaint fails to state a claim upon which relief may be granted and, accordingly, will grant the defendants' motions to dismiss for the reasons set forth herein.

2. Jurisdiction

At the outset, defendants assert that the longstanding "internal affairs doctrine" is a complete bar to the present action. While neither side cavils with the respect long accorded the internal affairs doctrine in corporate law, their positions differ dramatically. Defendants claim that the doctrine deprives this Court of jurisdiction over the internal affairs of a foreign corporation such as AIB, but the plaintiff asserts that the doctrine has evolved, during the latter half of the 20th Century, into a choice of law principle now recognized in both the 1971 *Restatement* (2d) *of Conflict of Laws* and by the United States Supreme Court in *Edgar v. Mite Corp., et al*, 457 U.S. 624, 645-46 (1982).

The most recent Maryland case to discuss the internal affairs doctrine is *NAACP v. Golding*, 342 Md. 663 (1996), which involved the internal affairs of a non-profit, voluntary membership corporation, incorporated in the State of New York. The Baltimore City Circuit Court had intervened at the request of certain youth members and enjoined the organization to conduct an election and to permit the youth members to vote. This decision was reversed by the Court of Appeals of Maryland, which held that, under the circumstances of this case, the trial court should not have intervened in the organization's internal dispute. *NAACP v. Golding* refers specifically to the Supreme Court's utterance in *Edgar v. Mite Corp*., *supra*, to the effect that the internal affairs doctrine is a conflict of laws principle and applies that doctrine narrowly, stating

"[T]hus, ordinarily, we shall not intervene in the internal affairs of a foreign corporation." *Id,* at 674.

While it is clear from *NAACP v. Golding* that the internal affairs doctrine is alive and well in Maryland, the case is distinguishable because it turns on both the limited circumstances under which a court should address the disputes of voluntary membership organizations, particularly where there is no economic interest at stake, and on the failure of the youth members to exhaust their internal remedies.

Also, to the extent to which the internal affairs doctrine has evolved into a conflict of laws issue, it naturally entails a *forum non conveniens* analysis which would seem to favor plaintiff under the facts of the present case. As emphasized by plaintiff, the acts giving rise to the claims here occurred in Maryland, the evidence and witnesses related to the claims are principally located in Maryland, as are most of the defendants, including nominal defendant Allfirst, which is a Maryland chartered bank. In these circumstances, the Court is not prepared to say that a Maryland court is required to abstain from exercising jurisdiction over the internal affairs of AIB, even if that entails the application of foreign law to the rights and duties of the parties.

3. Choice of Law

An interpretation of the deposit agreement, pursuant to which Tomran owns a beneficial interest in AIB, is critical to a determination of the choice of law issue in this case.

In its memorandum in opposition to the motions, plaintiff places great reliance on the terse statement contained in §7.6 of the instrument with respect to the governing law. That language states that "This deposit agreement and the receipts shall be interpreted and all rights

hereunder and thereunder shall be governed by the laws of the State of New York." Contrasting this language to that contained in a deposit agreement in the *Batchelder v. Kawamoto*, 147 F.3d 915 (CA 1998) case, Tomran urges the Court to hold that the failure of AIB to include limiting language such as that which was contained in the Honda Corporation instrument, which stated that "The rights of holders of stock and other deposited securities, and the duties and obligations of the Company in respect of such holders, as such, shall be governed by the laws of Japan," clearly leaves such determinations in this case with respect to AIB to be governed by the laws of New York. According to Tomran, because New York law recognizes the standing of a beneficial owner of shares after demand, sanctions derivative suits based on misconduct by the officers and directors where the company fails to act after demand, and permits multiple derivative suits such as this, Tomran is entitled to bring this proceeding in the name of Allfirst and AIB against the bank's officers and directors, without regard to Irish law.[2]

Defendants, on the other hand, strenuously assert that it would require a leap of faith for the Court to take the language of §7.6 and read it as a predicate for a triple derivative shareholder action against a bank incorporated under the laws of Ireland. The defendants urge

[2] In argument before the Court, plaintiff's counsel appeared to offer a somewhat more restrained interpretation of its rights under the deposit agreement. They argued that the intent of the governing law provision was to create parity between registered shareholders and beneficial owners of shares in AIB, at least for the purpose of challenging the actions of AIB's Board of Directors. Because the Court does not believe that the instrument can be read even that broadly, this alternative position does not advance plaintiff's standing here.

the Court to read the deposit agreement in its entirety and to take into account the nature of the obligations spelled out under §5.3 for the depositary, the custodian and the issuer and to read same in conjunction with the governing law principle of §7.6.

While AIB could have put this issue to rest by including language similar to that contained in the Honda Corporation deposit agreement, discussed in *Batchelder v. Kawamoto, supra*, this Court does not believe that AIB's failure to address the governing law for an action of this type within the confines of its deposit agreement is alone determinative of the choice of law which should govern an action of this nature. Indeed, under the circumstances of this case, where the Court has held that the internal affairs doctrine does not pose a complete bar to its exercise of jurisdiction over the internal affairs of a foreign corporation, it is unwilling to go farther and ignore the well settled principles that underlie that doctrine and require that the law of the place of incorporation govern the rights and responsibilities of the parties with respect to its internal operations. *Kostolany v. Davis, et al.*, 1995 Del. Ch. LEXIS 135. Consequently, the Court will apply Irish law in determining the sustainability of plaintiff's claims in this case.

4. Irish Law

Having determined that choice of law principles require the application of Irish law to the claims in this case, the Court, as plaintiff correctly points out, is authorized to take judicial notice of the common law and statutes of jurisdictions where the system of law derives from the common law of England and to inform itself of the relevant laws in "the manner it deems proper," calling upon counsel to aid it in obtaining appropriate information. Md. Code Ann. [Cts. & Jud. Proc.] §§10-501 and 10-502. In this case counsel for the respective parties have briefed the relevant law of Ireland, England and the commonwealth countries and provided

the Court with affidavit statements from distinguished members of the English and Irish bar.

Distilling that material, it is apparent that the plaintiff must overcome three related but distinct hurdles in order to survive defendants' motions. First of all, Tomran must establish its entitlement, as a beneficial owner of AIB shares rather than a registered shareholder, to bring a shareholder derivative action against AIB. Secondly, plaintiff's first amended complaint must set forth allegations sufficient to constitute a "fraud on the minority" exception to the rule in the case of *Foss v. Harbottle*, 2 Hare 461 (1843), which stands for the general proposition under Irish law that even registered shareholders may not maintain an action on behalf of the company. Thirdly, Tomran must convince this Court that Irish law would permit a triple derivative action such as that stated in its first amended complaint.

The Court does not believe that plaintiff, although it made an impressive effort to do so, has overcome any of those hurdles. The parties' research has uncovered no Irish case in which a beneficial owner of shares in an Irish company was permitted to maintain a derivative action, even where the claimant was able to set forth allegations that would constitute exceptions to the rule in *Foss v. Harbottle*. Consequently, plaintiff refers the Court to three 19th Century English cases, on which they assert that the Irish courts would most likely rely in fashioning a ruling consistent with the realities of modern commercial practice in Ireland. Defendants naturally point to the seeming inconsistency in asserting that 21st Century Irish courts would turn to 19th Century English cases when establishing new Irish law to comport with the realities of modern commercial practice. They counter with two fairly recent decisions from the common law jurisdictions of New South Wales and the Cayman Islands, both of which hold that only a registered shareholder has standing to pursue a derivative claim on behalf of a corporation. See

Hooker Investments Pty. Ltd. v. Email, Ltd., (1986) 10 ACLR 443; *Svanstrom v. Jonasson*, (1997) CILR 192. The defendants claim that these cases would be more persuasive to a modern Irish court because they are more temporally and factually relevant than plaintiff's authorities.

With respect to those authorities, defendants point out that neither *Bagshaw v. Eastern Union Railway Co.*, (1849) 7 Hare 114 nor *Binney v. Ince Hall Coal & Cannel Co.*, (1866) 35 L.J. Ch. 363 were really shareholder derivative actions. Moreover, plaintiff in the third case, *Great Western Railway v. Rushout*, (1852) 5 De G. & Sm. 290, owned its shares in the subject company through a trustee and was permitted standing to sue derivatively by the court but the case turned in part at least on the interpretation of an act of Parliament which granted the company's charter and stated that it should not be bound to see to the execution of any trust. It is defendants' contention that the court's interpretation of the statutory language there renders the case distinguishable from the present action and an insufficient precedent for establishing the general availability of derivative actions to beneficial owners of company stock.

The parties' respective experts disagree on how these authorities would be construed by an Irish court today. Plaintiff's Irish counsel, Eoin McCullough, S.C., states that the 19th Century English cases, combined with the well established principle that derivative actions are equitable in nature and with the common understanding among corporate lawyers in Ireland that American depositary receipts are the means through which Irish quoted companies market their shares in the U.S., would convince an Irish court today that Tomran should be permitted to pursue its action against AIB under the facts set forth in its first amended complaint. Defendants' expert, Michael Ashe, S.C., Q.C., is admitted to the bar in England, Wales, Ireland and Northern Ireland. He states that Irish law is extremely restrictive of the right of shareholders to sue in the

name of an/or on behalf of the company in which they hold shares. In his opinion, under Irish law, the right to maintain such an action does not exist in favor of any person or entity which is not itself a registered ordinary shareholder and, therefore, a member of AIB and, even a registered shareholder of AIB could not maintain such an action based upon the allegations set forth in the first amended complaint.

Thus, this Court finds itself in the unenviable position of having to interpret a critical point of Irish corporation law in the absence of any direct authority from the Irish courts. The only case cited to the Court that actually deals with the status of holders of American depositary receipts is that of *Batchelder v. Kawamoto, et al.,* 147 F.3d 915 (CA 9 1998), in which a United States Court of Appeals applied Japanese law to deny shareholder standing to holders of American depositary receipts in Honda, Japan because Japanese law limited the right to bring shareholder actions to registered shareholders. *Id*., 147 F.3d at 921.

As the Court indicated earlier, plaintiff has constructed a well reasoned argument as to how and why an Irish court should extend whatever rights registered shareholders have to sue a company derivatively to beneficial owners of shares, such as holders of American depositary receipts, in order to comport with the realities of modern commercial life and practice. But it is not the function of this Court to predict the direction in which Irish courts may head in the future when presented with an appropriate case of this nature.[3] Rather, it is the obligation of

[3] Plaintiff urges the Court to do just that, citing the Wright & Miller treatise (Wright, Miller & Cooper, *Federal Prac. & Proc. 2d* (1996) on the doctrine derived from the famous case of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). The Court disagrees. No trend supportive of plaintiff's position is to be discerned from the Irish authorities reviewed by this Court. Nor is this a case where forum law must be substituted because the Court is unable to glean Irish law from the materials available to it.

this Court, under the choice of law principles herein stated, to interpret the corporate law of Ireland as it exists today. Undertaking that serious responsibility, the Court is unable to find any basis in the deposit agreement or in Irish case law or statutes to support the right of a beneficial owner such as Tomran to bring a derivative action against AIB. Even the limited authority presented in the older English cases is not directly apposite to the situation presented here. Faced with a paucity of precedent and confronted by an Irish legal system that is clearly more restrictive of the rights of shareholders than our American system, this Court is unwilling to hold that Tomran has established its standing to bring this action against AIB.

Given this conclusion, it is unnecessary to determine whether plaintiff's allegations satisfy the "fraud on the minority" exception to the rule in *Foss v. Harbottle.* This Court, however, shares Mr. Ashe's view that it is unlikely that the bald allegations contained in paragraphs 26 through 28 of the first amended complaint would satisfy an Irish court that the "fraud on the minority" exception to the *Foss v. Harbottle* rule has been pled adequately in this case. Moreover, the two recent Irish Supreme Court cases cited by the parties which address derivative suits lend little support to the notion that Ireland is likely anytime soon to expand the rights of corporate shareholders. Both Chief Justice Keane's opinion in *Crindle v. Wymes*, (1998) 2 I.L.R.M 275 (Ir. S.C.) and that of Justice O'Flaherty in *O'Neill v. Ryan*, (1993) I.L.R.M. 557 (Ir. S.C.) adhere to the highly restrictive view of shareholder rights embraced within the rule in *Foss v. Harbottle* in 1843. Indeed in *O'Neill*, Justice O'Flaherty states that "The basic theme of *Foss v. Harbottle* (19843) 2 Hare 461 is that where a wrong has been done to a company it is for the company itself to seek redress for the injury done to it, though in appropriate circumstances a derivative claim by a minority shareholder may be allowed." He goes on to cite with approval

language from *Prudential Assurance Co., Ltd. v. Newman Indus., Ltd.* (No. 2) (1982) Ch 204 at 224 as follows:

> This is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is a consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. *When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortune of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting.* (Emphasis added) The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association.

Nothing in the above quoted language or in the text of either of those decisions suggest to this Court that Ireland is about to permit double or triple derivative actions by even registered shareholders. Thus, Tomran is unable to overcome any of the legal obstacles in its path to trial in this Court.

5. Declaratory Judgment and Injunction

Plaintiff's request for a declaratory judgment and an injunction regarding the December 1998 transaction whereby Allfirst altered its charter from a national banking association to a Maryland chartered bank, as set forth in Count III of the first amended complaint, is rendered moot by the Court's determination that plaintiff lacks standing to bring this action.

ALBERT J. MATRICCIANI, JR.
Judge
December 30, 2002

cc: Cyril V. Smith, Esquire

Charles J. Piven, Esquire
Marshall N. Perkins, Esquire

Andrew J. Graham, Esquire

James Mathias, Esquire

Robert B. Mazur, Esquire
Michael W. Schwartz, Esquire
John F. Lynch, Esquire

Mark Gately, Esquire

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O R D E R

Upon consideration of defendants' motions to dismiss the first amended complaint, the plaintiff's opposition thereto and the memoranda of law submitted by counsel for the respective parties, as well as the arguments presented in open court on November 22, 2002, it is this 30th day of December, 2002, by the Circuit Court for Baltimore City, Part 20

ORDERED that the defendants' motions to dismiss the first amended complaint are **GRANTED** for the reasons more fully set forth in the accompanying memorandum and opinion of this date.

ALBERT J. MATRICCIANI, JR.
Judge

cc: Cyril V. Smith, Esquire

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