

Tomran, Inc.v. Passano

In *Tomran v. Passano*, 2005 WL 3369477 (Md.), the Court of Appeals upheld the decision of the Circuit Court for Baltimore City in a Business and Technology Court case. This represents, so far as we are aware, the first Maryland Business and Technology Court case to be heard by the Court of Appeals.

Allied Irish Bank (“AIB”) was incorporated under the laws of Ireland. It wholly owned Allfirst Financial, a Delaware corporation with headquarters in Baltimore, which in turn owned several subsidiaries, among them Allfirst Bank (“Allfirst”). In 2002, after falsification of bank records by an employee was revealed, Allfirst was forced to revise its earnings downward by nearly \$700 million dollars. Tomran, Inc., a Maryland corporation (“Tomran”), was a depositor in Allfirst and holder of American Depositary Receipts (“ADRs”) of stock in AIB worth more than \$100,000. After Allfirst announced its earnings restatement resulting from the fraud, Tomran demanded AIB’s and Allfirst’s boards of directors to take action to recover the losses. When that demand was refused, Tomran filed a derivative suit for damages and injunctive relief against the directors and officers of Allfirst, and other defendants. Tomran’s complaint was essentially a “triple derivative” suit alleging negligence and gross negligence directly leading to the loss to Allfirst. All of the defendants filed motions to dismiss.

The trial court held that Tomran’s complaint failed to state a claim upon which relief could be granted and that Irish law would apply in the determination of the sustainability of Tomran’s claim. To maintain an action, Tomran was required to establish (i) that it was entitled, “as a beneficial owner of AIB shares rather than a registered shareholder,” to bring a derivative suit against AIB; (ii) that its amended complaint “set forth allegations sufficient to constitute a “fraud on the minority” exception to the rule in *Foss v. Harbottle*, [1843] 2 Hare 461, which stands for the general proposition under Irish law that “even registered shareholders may not maintain an action on behalf of the company”; and (iii) that “Irish law would permit a triple derivative action.” Applying these requirements, the trial court held that no Irish case had permitted a beneficial owner of shares to maintain a derivative suit, that the allegations of the complaint were unlikely to satisfy a court that the “fraud on the minority” had been adequately plead and that there was no authority leading the court to believe Ireland permitted double or triple derivative actions by even registered shareholders. Accordingly, holding that Tomran could not bring the action, the trial court dismissed it and all of Tomran’s subsequent motions.

The Court of Special Appeals affirmed the Circuit Court decision. The Court of Appeals considered whether the lower courts erred in determining (i) that the choice of law clause in the Deposit Agreement did not govern the determination of whether Tomran had the right to sue derivatively; and (ii) that Tomran would not have a cause of action under Irish law. Tomran argued, among other things, that the choice of law provision in the Deposit Agreement mandated the application of New York law to the determination of whether it could bring its derivative action on behalf of AIB. The choice of law clause in the Agreement contained the language “hereunder and

thereunder,” which Tomran asserted did not limit the scope of the provision to those rights set forth in the Deposit Agreement and the ADRs. In its holding, the Court of Appeals applied Maryland contract interpretation and construction principles when considering the meaning of “hereunder and thereunder” in the Deposit Agreement. Applying its ordinary, plain meaning and reading it in the context of the Deposit Agreement’s choice of law provision, the Court of Appeals decided that “hereunder and thereunder” had to be viewed as referring to the rights set forth in the Deposit Agreement and ADRs. Accordingly, because neither the Deposit Agreement nor the ADRs provided Tomran with a right to sue derivatively, the Court determined that the choice of law provision contained in the Deposit Agreement did not apply to the issue of whether Tomran could sue derivatively.

Once the choice of law provision in the Deposit Agreement was deemed to be inapplicable to the determination of Tomran’s rights, the Court of Appeals determined which jurisdiction’s law would govern by looking to the internal affairs doctrine. The internal affairs doctrine provides that the law of the jurisdiction of incorporation governs the rights and responsibilities of the parties involved. This determination was made easy since both parties to the action agreed that AIB was an Irish corporation. Thus, according to the Court of Appeals, Irish law governed whether Tomran could maintain the derivative suit on behalf of AIB.

The parties further agreed that there was a lack of applicable case law in Ireland on a shareholder’s right to maintain a derivative suit, and that early English cases were persuasive. Tomran cited several English cases that were dismissed by the Court of Appeals as not providing any basis for the assertion that Irish courts would recognize a beneficial owner’s right to maintain a derivative suit. The Court of Appeals stated that the issue before it was not what it believed an Irish court should hold when faced with this particular issue, but rather what it would hold based on applicable laws and precedent. Because no applicable Irish or English cases could be found, the Court of Appeals was not willing to conclude that Irish courts would grant beneficial owners the right to sue derivatively on behalf of corporations.