

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: September 3, 2009

Date Decided: September 14, 2009

Kurt M. Heyman, Esquire
Patricia L. Enerio, Esquire
Jill K. Agro, Esquire
Proctor Heyman LLP
1116 West Street
Wilmington, DE 19801

Peter J. Walsh, Jr., Esquire
Scott B. Czerwonka, Esquire
Meghan M. Dougherty, Esquire
Potter Anderson & Corroon LLP
1313 N. Market Street
Wilmington, DE 19899-0951

Re: *Wesley T. O'Brien v. IAC/Interactive Corp. f/k/a USA
Networks, Inc.*, Civil Action No. 3892-VCP

Dear Counsel:

In a memorandum opinion dated August 14, 2009 (the "Opinion"), I held the plaintiff's advancement and indemnification claims against his former employer's former parent are not time-barred under the controlling equitable doctrine of laches.¹ More specifically, I denied the defendant's motion for summary judgment on the plaintiff's claims for indemnification and advancement.² I also granted the plaintiff's motion for

¹ *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *1 (Del. Ch. Aug. 14, 2009). Defined terms in the Opinion are used in the same way and with the same designations in this letter opinion.

² *Id.* at *1, 10.

partial summary judgment on his claim for advancement of reasonable attorneys' fees and expenses incurred in this particular litigation.³

On August 24, Defendant, IAC, filed an Application for Certification of Interlocutory Appeal (the "Application") pursuant to Supreme Court Rule 42 requesting an interlocutory appeal to the Supreme Court of Delaware from the Opinion and the related order. On September 3, Plaintiff, O'Brien, submitted an opposition to the Application (the "Opposition"). For the reasons stated below, I deny Defendant's Application.

I. STANDARD

Applications for interlocutory review are governed by Supreme Court Rule 42, which prohibits certification of an interlocutory appeal unless the order of the trial court to be appealed from (1) determines a substantial issue, (2) establishes a legal right, and (3) meets at least one of the criteria in Rule 42(b)(i) – (v).⁴ "Those criteria include the reasons listed in Rule 41 for certification of questions of law, questions of the trial court's jurisdiction, instances where the trial court has set aside precedent, or instances where the trial court has ruled on a dispositive issue."⁵ Such applications require the exercise of the

³ *Id.*

⁴ *In re Pure Res., Inc. S'holders Litig.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

⁵ *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008); *see also Pure Res.*, 2002 WL 31357847, at *1 ("Applications for interlocutory appeal . . . balanc[e] the public interest in advancing appellate review of potentially case

trial court's discretion and are granted only in extraordinary or exceptional circumstances.⁶

II. ANALYSIS

In the Opinion, I applied the equitable doctrine of laches to conclude that IAC had not shown that O'Brien's indemnification and advancement claims are time-barred and, therefore, I denied IAC's motion for summary judgment on Plaintiff's claims. Defendant seeks to appeal that order denying summary judgment on an interlocutory basis. In support of its Application, IAC argues, as it must, that the Opinion and order determined a substantial issue and established a legal right. To satisfy the third requirement of the Rule 42 standard, Defendant further argues that the Opinion concerns (a) either an issue of first instance in Delaware, or (b) a case dispositive issue.⁷

Preliminarily, I note that the grant of O'Brien's motion for partial summary judgment on his claim for advancement requires only the payment of his reasonable attorneys' fees and expenses incurred in this litigation. It does not involve the presumably greater sums of money expended in the underlying arbitration, the Florida litigation regarding the indemnification claims against PRC, and the PRC bankruptcy.

dispositive issues while avoiding fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice.”) (internal citation and punctuation omitted).

⁶ See *Gifford*, 2008 WL 43699, at *4; *Pure Res.*, 2002 WL 31357847, at *1.

⁷ App. ¶ 15.

O'Brien's claim for indemnification seeks recovery of those expenditures, but the only motion pertaining to that claim was Defendant's motion for summary judgment, which I denied. Resolution of the indemnification issue, therefore, will require further proceedings in this Court.

A. The Opinion Did Not Establish a Legal Right

The "substantial issue" requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.⁸ To be appealable, an interlocutory order also must establish a legal right.⁹ A legal right is established when a court determines an issue essential to the positions of the parties regarding the merits of the case, *i.e.*, "where one of the parties' rights has been enhanced or diminished as a result of the order."¹⁰ In other words, "a legal right is established where the court determines an issue essential to the position of the parties regarding the merits of the case."¹¹

⁸ *Casteldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

⁹ *Pepsico v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969).

¹⁰ Donald J. Wolfe, Jr. & Michael A. Pittenger, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 14-4(b) (2000).

¹¹ *Id.*; *cf. Pure Res.*, 2002 WL 31357847, at *2 (questioning whether an injunction entered in favor of plaintiffs but not as broadly as plaintiffs sought in an alleged coercion case seeking a particular price in a tender offer met the Rule 42(b) requirement, but accepting plaintiffs' argument that the absence of a more complete injunction would deprive them of a legal right for purposes of Rule 42(b)).

IAC relies on this court's decision in *Cochran v. Stifel Financial Corp.*¹² in support of its position that my denial of Defendant's motion for summary judgment based on the timeliness of O'Brien's claims determines a substantial issue and establishes a legal right.¹³ IAC's reliance on *Cochran*, however, is misplaced.

The defendant in *Cochran* sought certification of an order by this court denying its motion to dismiss the plaintiff's indemnification claims on the ground that they were time-barred.¹⁴ This court discussed and cited "case law going both ways as to whether a denial of a motion to dismiss on limitations grounds meets those [Rule 42] criteria."¹⁵ Vice Chancellor Strine suggested in dicta that, in his view, the best way to reconcile the conflicting cases would be to "recognize that a denial of a motion to dismiss on statute of limitations grounds does in fact determine a substantial issue and establish a legal right."¹⁶ Ultimately, though, the court in *Cochran* held that its decision was controlled by

¹² 2000 WL 376269 (Del. Ch. Apr. 6, 2000).

¹³ App. ¶¶16, 19.

¹⁴ *Cochran*, 2000 WL 376269, at *1.

¹⁵ Compare *Levinson v. Conlon*, 385 A.2d 717, 720 (Del. 1978) (holding that denial of a limitations defense involves the denial of an affirmative defense but does not establish a legal right between the parties) with *Christiana Hospital v. Fattori*, 714 A.2d 754 (Del. 1998) (interlocutory review granted for denial of motion to dismiss complaint as barred by statute of limitations).

¹⁶ *Cochran*, 2000 WL 376269, at *2.

the Supreme Court's decision in *Edgcomb Corp. v. Scharf*,¹⁷ in which the Supreme Court refused to certify the indemnification limitations issue because the issue failed to "meet the requirements of Supreme Court Rule 42."¹⁸ In noting that a ruling determining that a specific affirmative defense was not available generally does not establish a legal right, the Supreme Court cited *Levinson v. Conlon*, supra, with approval.¹⁹

Regardless of whether the approach suggested in dicta in *Cochran* would be advisable in the circumstances of this case, I am persuaded by the ultimate conclusion reached in *Cochran* that the denial of a statute of limitations or laches defense in an indemnification action does not establish legal right as required by Rule 42. This conclusion is strengthened by the Supreme Court's refusal to entertain the interlocutory appeal sought in *Cochran*.²⁰

Because Defendant's Application does not meet the legal right requirement, I need not address whether the Opinion presents a question of first instance in Delaware or whether an interlocutory appeal could end the litigation. Nevertheless, I note that, for the reasons stated in the Opinion, I do not agree that the proposed appeal presents a question

¹⁷ 705 A.2d 243, 1998 WL 15017 (Del. 1998) (ORDER).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Stifel Fin. Corp. v. Cochran*, 750 A.2d 530, 2000 WL 431629 (Del. 2000) (Order).

of law of first instance in this State.²¹ I also am dubious as to whether an immediate appeal of the interlocutory order denying IAC's motion for summary judgment likely would terminate this litigation. There may be additional issues, for example, relating to the meaning and effect for limitations and other purposes of IAC's contractual obligation, beyond its own assumption of the obligations of the indemnification agreement, to "cause the Surviving Corporation [IAC] to, to the fullest extent permitted by law" indemnify PRC officers, like O'Brien.²²

Because Defendant's Application fails to satisfy the prerequisites for certification under Rule 42(b), I decline to certify the Opinion and Preliminary Injunction Order for interlocutory appeal.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

lef

²¹ Indeed, as noted by O'Brien, the Opinion did not even decide the second of the two issues IAC identified as being of first impression. Opp'n at 8.

²² See *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *7 & n.37.