Neutral Citation Number: [2011] IEHC 518

THE HIGH COURT

2010 162 COS

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND

IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF SKYTOURS TRAVEL LIMITED

BETWEEN

MARK EDMOND DOYLE

PETITIONER

AND

JOHN BERGIN

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 20th day of December, 2011.

The law

1. On 29th July, 2011 I delivered judgment on the substantive application in these proceedings. I granted the reliefs sought by the petitioner against the respondent, namely:

> (a) a declaration in the terms sought by the petitioner that the affairs of Skytours Travel Limited (the Company) were being conducted in a manner oppressive to the petitioner and in disregard of his interests; and
>
> (b) an order directing the respondent to purchase the shareholding of the petitioner in the Company for cash in the sum of €58,769.74 by 16th September, 2011.

This judgment deals with where liability for the costs of the proceedings should lie. Although the petitioner was successful in the proceedings, the respondent has resisted the petitioner's application for all of the costs against the respondent and has contended that the respondent should be awarded certain costs against the petitioner. Broadly speaking, counsel for the respondent sought to support that position on two grounds.

First ground

2. The first ground was based on the proposition that the petitioner had not succeeded on all issues. Therefore, it was contended that the Court should adopt the approach adopted by the High Court (Clarke J.) in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, which was subsequently considered by Charleton J. in *James Elliot Construction Ltd. v. Irish Asphalt Ltd.* [2011] IEHC 338 and applied by Finlay Geoghegan J. in *McAleenan v. AIG (Europe) Ltd.* [2010] IEHC 279.

3. In the *Veolia* case, having stated that, where the winning party has not succeeded on all issues which were argued before the Court, ordinarily, the Court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the Court were increased by virtue of the successful party having raised additional issues upon which it was not successful, Clarke J. continued (at para. 2.9):

> "Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed."

Later (at para. 2.14) Clarke J. qualified the application of such approach, stating:

> "It seems to me that an approach along those lines is appropriate in more complex litigation involving a variety of issues even where, in the overall sense, one party may be said to have succeeded and the other party may be said to have failed. Before leaving the general principle I should, however, add that it seems to me that an approach such as . . . I propose applying in this case, may not be appropriate in more straightforward litigation, notwithstanding the fact that some element of a plaintiff's case or a defendant's defence may not have succeeded. The fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have effected the overall costs of the litigation to a material extent."

4. It was contended on behalf of the respondent that the petitioner was not successful to the extent that, in relation to the valuation by the Court of the petitioner's shareholding, the arguments advanced by the petitioner in relation to –

(a) the proper date at which the valuation should be carried out, and

(b) whether the value of the shares should be discounted or not,

were rejected by the Court. While that is true, I am absolutely satisfied that the arguments advanced and the approach adopted on behalf of the petitioner could not be said to have affected the overall costs of the litigation to a material extent for the following reasons. Following the opening of the case by counsel for the petitioner, the substantive application was at hearing for three days. The principal witnesses were the petitioner and the respondent. Apart from approximately one half of one day which was taken up with the evidence of the two accountants, one on each side, who testified, all of the Court time was taken up with the evidence of the petitioner and the respondent. That was primarily due to the fact that, as counsel for the petitioner put it, the respondent contested liability "tooth and claw". Accordingly, having regard to what actually occurred at the hearing, I consider that it would be wholly inappropriate to conclude that the presentation of the legal arguments advanced on behalf of the petitioner on the issues in relation to the valuation of the petitioner's shareholding, which issues had not been previously addressed in any authority in this jurisdiction, unnecessarily elongated the proceedings, although it left the Court with difficult issues to decide.

Second ground

5. The other ground advanced on behalf of the respondent was based on the fact that the solicitors for the respondent issued what was described as a "*Calderbank* letter" to the solicitors for the petitioner on 18th February, 2011. That letter, which was headed "WITHOUT PREJUDICE SAVE AS TO THE ISSUE OF COSTS" stated as follows:

> "In the interests of minimising the costs in this case we have been instructed by our client to formally offer the sum of seventy five thousand and one euro (€75,001) in return for the purchase of your client's shareholding of 1580 in [the Company] and in return for your client striking out the claim currently before the High Court bearing record number 162COS/2010.
>
> The sum of €75,000 is to be discharged on the following basis:-
>
> > 1. The sum of fifteen thousand euro (€15,001) (sic) to be discharged within four weeks of the date of acceptance of this letter:
> >
> > 2. The sum of sixty thousand euro (€60,000) to be discharged in monthly installments of €10,000 per month over the course of five months. The installment payments will commence eight weeks following the acceptance of this letter.
>
> In the event that the within sum is accepted, our client offers your client's reasonable legal costs arising directly from the proceedings up to the date of this offer, provided such offer is accepted within twenty one days of the date of this letter, your client's costs to be taxed in default of agreement."

6. The response to that offer was contained in the petitioner's solicitors' letter of 24th February, 2011, in which the offer was rejected on the following basis:

> "The amount offered is unacceptable and furthermore the proposal of phased payments in unacceptable.
>
> We also believe that the proposed payment plan is an affection of impecuniosity.
>
> This matter is not an appropriate case for a Calderbank. Your client has committed a gross fraud and the proceedings involve the Petitioner satisfying himself as to the nature and extent of the fraud and as to whether there has been any other fraud, such as the taking of cash payments over and above the established fraudulent diversion of monies. This is quite apart from the fraudulent diversion of cheques from the company.
>
> The institution and maintenance of these proceedings is the natural and inevitable consequent of the fraudulent and of Mr. Bergin (*sic*).
>
> In the event that the Petitioner's shareholding is valued at less that €75,000 we would be asking the court to disregard the offer made on foregoing grounds and to fix your client with the costs subsequent to the Calderbank letter, which was sent after the allocation of a hearing date and after the briefs had been sent out."

7. In submitting that the Court should have regard to the offer in the letter of 18th February, 2011 and its rejection, counsel for the respondent referred the Court to the amendment of Order 99, rule 1 of the Rules of the Superior Courts (the Rules) introduced by S.I. 12 of 2008 with effect from 21st February, 2008, that is to say, the introduction of rule 1A. The relevant portions of rule 1 now provide as follows:

> "Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
> > (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
> >
> > (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.
> >
> > (1A.)(1) Notwithstanding sub-rules (3) and (4) of rule 1 –
> >
> > (a) . . .
> >
> > (b) The High Court, in considering the awarding of the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgement or tender offer in lieu of lodgement may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party's (or those other parties') claim, counterclaim or application.

> (2) In this rule, an 'offer in writing' includes any offer in writing made without prejudice save as to the issue of costs."

It is common case that the petitioner's proceedings were not proceedings in which a lodgement or a tender offer might have been made in accordance with Order 22. On the basis of the application of rule 1A, counsel for the respondent submitted that the respondent should be awarded the costs of the proceedings after 18th February, 2011.

8. The Court was informed that, as yet, there is no authority on rule 1A. It was submitted by counsel for the respondent that, in the application of that rule, the key test should be the essential test propounded by Sir Thomas Bingham M.R. in *Roache v. Newsgroup Newspapers Ltd.* (1992) C.A.T. 1120, in relation to determining whether a *Calderbank* offer is effective in relation to costs of litigation, in the following terms:

> "The judge must look closely at the facts of the particular case before him and ask: Who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

In my view, that test is a useful yardstick in a court's assessment of what is just in a situation to which rule 1A applies.

9. Counsel for the respondent has outlined what the outcome would have been in monetary terms, if the petitioner had accepted the offer on the twenty first day after it was made. He would have been entitled to receive the following sums from the respondent on the following days:

> 8th April: €15,100,
>
> 6th May: €10,000,
>
> 6th June: €10,000,
>
> 6th July: €10,000,
>
> 6th August: €10,000,
>
> 6th September: €10,000,
>
> 5th October: €10,000.

10. In answering the submission that the respondent was entitled to the costs of the proceedings as against the petitioner from the date of the letter of 18th February, 2011, counsel for the petitioner made three points. First, he submitted that the Court must have regard to the fact that the respondent had not conceded liability in circumstances where there was obvious fraud perpetrated by the respondent on the Company. The petitioner had a rational personal interest in pursuing his claim for a declaration in the terms sought by him, with a view to disconnecting himself from the gross fraud perpetrated by the respondent. Secondly, it was submitted that there is a "public dimension" to s. 205 in that it incentivises a member of a company to expose through litigation a serious fraud, such as the fraud perpetrated by the respondent on the Company. Thirdly, it was submitted that, given that the letter of 18th February, 2011 provided for the phasing of the payment of the sum offered as consideration for the petitioner's shares, the petitioner was justified in considering the offer unacceptable and in rejecting it.

11. In addressing the first and second bases on which counsel for the petitioner contended that, notwithstanding that the price offered for the petitioner's shares on 18th February, 2011 exceeded the price fixed by the Court, the petitioner should be awarded the costs of the proceedings after 18th February, 2011, in my view, it is crucial to identify with precision the jurisdiction of the Court under s. 205. The jurisdiction conferred on the Court in subs. (3) of s. 205 is to make such order as it thinks fit with a view to bringing the oppression complained of to an end. The remedy the petitioner sought in this case, and the remedy afforded by the Court, was an order directing the respondent to purchase the petitioner's shares at a fair value. In effect, it has transpired that, subject to one qualification, the respondent proffered that remedy to the petitioner in the letter of 18th February, 2011, because the price offered by the respondent for the petitioner's shareholding (€75,000) exceeded the fair value ascribed by the Court to the shareholding (€58,769.74). The one qualification is the phased method of payment provided for in the letter of 18th February, 2011, to which I will return.

12. As regards the petitioner's personal position, in my view, the Court does not have jurisdiction under s. 205 to grant him any relief over and above what is necessary with a view to bringing to an end the oppression found. While the declaration made by the Court, as a preliminary to directing the respondent to buy the petitioner's shareholding, when read in the context of the judgment of 29th July, 2011, does have the effect of disconnecting the petitioner from the respondent's wrongdoing, in my view, it is not open to the petitioner to contend that such a declaration was necessary "with a view to bringing to an end" the oppression which the Court found existed.

13. Moreover, in my view, there is no public dimension of the type suggested by counsel for the petitioner to s. 205. The purpose of s. 205 is to provide a civil remedy to an oppressed minority shareholder. Where there is fraud involved in the oppression of a minority shareholder, the manner in which the public interest in exposing fraud and pursuing action to deter such conduct is protected is through the medium of complaints to An Garda Síochána or, possibly, the Director of Corporate Enforcement. Section 205 is not intended to give rise to an inquisitorial process of the type envisaged in the third paragraph quoted above from the petitioner's solicitors' response to the letter of 18th February, 2011. In summary, in my view, as regards the application of Order 99, rule 1A, which reflects the recognised common law jurisdiction in relation to a *Calderbank* letter, an action under s. 205 is not inherently different from any other civil action which goes beyond a simple money claim. However, that is not the end of the matter.

14. What the introduction of rule 1A(1)(b) of Order 99 has done is to point to one situation in which the Court, in exercise of its discretion under Order 99, may depart from the normal rule that costs follow the event. That situation is where there has been an offer in writing, including an offer which is made without prejudice save as to the issue of costs, offering to satisfy the whole or part of the other party's claim. In that situation the Court may have regard to the terms of the offer, where it considers it just to do so. As is the case with the lodgement, or tender offer in lieu of lodgement, procedure provided for in Order 22, the rationale underlying rule 1A of Order 99 is obviously to encourage compromise of legal claims with a view to shortening the duration of civil litigation. That is clearly a rational policy which the Court should implement where it is just and fair to do so.

15. Having said that, in any particular case, it may not be sufficient to base a conclusion that it is just to deprive a party who has rejected an offer to satisfy the whole or part of the claim and who, as a matter of substance and reality, has not achieved anything more than he was offered as a result of the decision of the Court, of the costs which accrued after the date of the offer. In this case, even if one were to take the view that, as a matter of substance and reality, the petitioner has got nothing of value which he could not have got if he accepted the offer contained in the letter of 18th February, 2011, it is difficult to see how, as a matter of fairness and justice, the respondent should be entitled to all of the costs which have accrued since the 18th February, 2011, including the costs of a hearing which ran into a fourth day to deal with legal submissions. As I have stated, the accountancy evidence, on the basis of which the fair price of the shareholding of the petitioner was assessed, took approximately half a day. A period in excess of two days was taken up with evidence on the issue of liability under s. 205. If the respondent had admitted that, by his egregiously wrongful conduct, the affairs of the Company were being conducted in a manner oppressive to the petitioner, the substantive action could probably have been dealt with in one day. A significant feature of this case in escalating the legal costs, in my view, was that the respondent put the petitioner on proof of the existence of oppression and disregard of the petitioner's interest even though, as I found in the judgment of the 29th July, 2011, the position of the respondent in denying that his actions constituted oppression of the petitioner was utterly untenable. Furthermore, the conduct which I found constituted oppression had been publicly admitted by the respondent in his statement of 9th November, 2010 to the Director of Corporate Enforcement referred to in the judgment. Having regard to the particular circumstances of this case, I am of the view that the justice of the case requires that the petitioner should recover from the respondent all of the costs of establishing liability and his entitlement to the remedy sought in the action.

16. However, the petitioner did not win anything of value in pursuing a claim to have his shareholding in the company valued at a price above the offer contained in the letter of 18th February, 2011. Therefore, I consider it is just to disallow the petitioner the costs relating to the input, as expert witnesses, of the two accountants who testified and to award those costs to the respondent. In arriving at that conclusion I have had regard to the fact that the offer contained in the letter of 18th February, 2011 envisaged the phased payment of the amount offered in settlement over a six month period. In reality the petitioner could have readily anticipated that the probability was that the Court would reserve judgment, as it did, and that, having given judgment, the Court would allow the respondent a period within which to comply with the order directing him to purchase the petitioner's shareholding, as it did. Therefore, it was probable that the Court ordered price for the purchase of the petitioner's shareholding would not have to be paid by the respondent to the petitioner before early September 2011, which is what happened. If the petitioner had accepted the offer contained in the letter of 18th February, 2011 he would have received a greater sum (€65,001) by 6th September, 2011 than he will get on foot of the Court order.

Order

17. Accordingly, there will be an order that –

> (a) the respondent pay to the petitioner all of the costs of the proceedings, other than the costs (the valuation evidence costs) relating to the input, as expert witnesses, of the two accountants who testified (that is to say, the witness and legal costs relating to that evidence),
>
> (b) the petitioner pay to the respondent by way of offset the valuation evidence costs,

all of the costs to be taxed in default of agreement.