Neutral Citation [2015] IEHC 439

THE HIGH COURT

COMMERCIAL

[2013 No. 591 COS]

IN THE MATTER OF ELST

AND IN THE MATTER OF SECTION 205 COMPANIES ACT 1963

AND IN THE MATTER OF SECTION 213F COMPANIES ACT 1963

AND IN THE MATTER OF THE COMPANIES ACTS 1963 - 2012

BETWEEN

DONEGAL INVESTMENT GROUP PLC

PETITIONER

AND

DANBYWISKE, RONALD WILSON, THE GENERAL PARTNERS OF THE WILSON LIMITED PARTNERSHIP ONE, MONAGHAN MUSHROOMS IRELAND AND ELST

Respondents

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 21st day of May, 2015

1. This judgment is given in respect of the final phase of litigation which took place in three parts before this court. The first piece of litigation was a valuation module arising from the petition presented to the court by the petitioner alleging oppression and seeking, *inter alia*, an order pursuant to s. 205 of the Companies Act 1963, that the respondents purchase the petitioner's shares in ELST (the company). Judgment was given by this court in the valuation module on 5th December, 2014, and it was determined that no minority discount should be applied when valuing the petitioner's shares. The court also determined on the appropriate valuation of the petitioner's shares.

2. The second piece of litigation was conducted in separate proceedings [2014 No. 47 COM] and concerned the respondents' entitlement to exercise an option which had been granted to them by the petitioner in respect of 5% of the petitioner's shareholding in ELST. In a judgment of this court delivered on 16th January, 2015, it was determined that the respondents are entitled to exercise the option which gives them an entitlement to 70% of the shares in the company.

3. This final module arises in order to determine the appropriate remedy to be granted to the petitioner under s. 205 of the Act, having regard to the fact that the respondents have admitted to unspecified acts of oppression, although they have conceded as a sample act of oppression, the purchase by the company of a mushroom business in Canada without the matter having been brought to the board for approval. The unspecified admission of acts of oppression was given for the purpose of granting the court jurisdiction to deal with the matter under s. 205. Under that section, the court is given a wide discretion as to what it may do with a view to bringing to an end the oppression complained of.

4. For the purposes of this case there are three possible remedies which the court can grant:-

> (i) an order directing the realisation of the company in accordance with clause 10 of the Share Exchange and Shareholders Agreement (SESA) of 1st June, 2004;
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> (ii) an order directing the respondents to purchase the petitioner's shares in the company; and
>
> (iii) an order directing the petitioner to purchase the respondents' shares in the company.

5. If the court were to order the petitioner to purchase the respondents' shares, it would amount to an order directing a minority to purchase the shares of the majority. The petitioner has informed the court that it is willing and able to do so and invites the court to make such an order. It is clear on the authorities which have been opened to the court that such a remedy would be exceptional. In *Re A. Company (No. 006834 of 1988) ex parte Kramer* [1989] B.C.L.C. 365, Hoffman J. (as he then was) stated:-

> *"I think it must be very unusual for the court to order a majority shareholder actively concerned in the management of the company to sell his shares to a minority shareholder when he is willing and able to buy out the minority shareholder at a fair price. I am not going to exercise my imagination to suggest circumstances in which this might happen, but I am quite sure this is not such a case. Mr. Kramer founded the company and has at all times been the person principally concerned in its management. Mr. Kay's contribution to the company's growth measured in both time and degree of responsibility has been relatively small. I think it inconceivable that a court would order Mr. Kramer to be compulsorily expropriated."*

6. The circumstances outlined by Hoffman J. in that extract closely mirror the circumstances of this case. The evidence in this case establishes that Mr. Ronnie Wilson was the driving force behind the company (and its predecessor) and that he and other members of his family have been actively engaged in the day to day management of the company. While the petitioner has a substantial shareholding in the company and has members on the board, the evidence shows that the representatives of the petitioner adopted a fairly passive role in the day to day running of the business and were content that Mr. Ronnie Wilson would manage and largely

control the business since they were satisfied as to his competence and expertise notwithstanding their various complaints giving rise to this petition. There is no evidence of dishonesty or fraud, divesting of assets, illegal use of company funds or other serious misbehaviour by Mr. Ronnie Wilson or other members of his family, or the respondents in this petition which would entitle the court to treat this as such an unusual case that the petitioner should be directed to buy out the respondents in circumstances where they do not wish to dispose of their interest.

7. That leaves two other options, namely, whether the company should be realised in accordance with the SESA or whether the respondents should be directed to purchase the petitioner's shares.

8. Clause 10.1 of the SESA provides that:-

> *"The Company and each of the Shareholders and the Management Team hereby covenant with and undertake to each of the Major Shareholders to use their reasonable endeavours to promote, enhance and improve the business of the Group with a view to obtaining a Realisation within six years following completion including without limitation the bona fide consideration of any proposal to appoint a corporate finance adviser to procure a purchaser for the entire issue shared capital of the Company."*

9. The agreement was dated 1st June, 2004, and within the six year period referred to neither party sought a realisation. Long after the six year period had elapsed, a process of discussion took place between the relevant stakeholders in the business with a view to agreeing a new shareholder agreement. These discussions became known as the "*Investec Process*". The final meeting of the Investec Process took place on 26th November, 2013. The process involved considerable engagement between the parties and in the course of that engagement, the petitioner made it clear that one of its options was to exit the company at full value with no minority discount. Shortly before these proceedings commenced, the solicitors for the petitioner wrote to the company. The letter was written one week before the commencement of the petition. In that letter of 13th December, 2013, the petitioner's solicitors referred to the Investec Process and stated:-

> *"As stated in our letter dated 9 December 2013, unless the Wilson Shareholders agree within 7 days of that letter to purchase the Donegal shares at the price indicated by Donegal at the final meeting of the Investec Process held on 26th November, 2013, we have instructions to present a petition to the High Court seeking relief under s. 205 of the Companies Act 1963 and in the alterative an order to wind up the company pursuant to section 213(f) of the Companies Act 1963. This position remains unchanged."*

10. The evidence establishes that during the Investec Process, the two most likely options postulated were either a share redemption by the respondents or an IPO. But it was suggested that the company would not be ready to go to the market for several years. Throughout this period, the company was managed and controlled by the Wilson family and continued to be a very successful player in the international mushroom and compost business. It is clear that the Wilsons did not intend to sell out their interest in the company nor was the petitioner seeking realisation at that time. In determining what relief should be given to the petitioner, the court has a wide discretion. By the time of the hearing of the petition, the six year time limit referred to in clause 10.1 of the SESA had long expired and circumstances had changed to the extent that none of the parties were pressing for realisation. There is no evidence before the court which satisfies me that an IPO would achieve any greater value for the petitioner. The court has not received any evidence as to the effect of a forced sale of the company on its market value. I have already directed in the first phase of these proceedings that if the petitioner's shares are to be purchased, such a purchase must take place without any minority discount having regard to the relationship of the parties. It is difficult to imagine circumstances in which the value of the petitioner's shareholding would be any greater in the case of an IPO than a purchase of its shares by the respondents without discount. For this reason, and having regard to the background against which the Investec Process took place, I am not prepared to order that a realisation take place pursuant to the terms of the SESA.

11. That leaves the final option which is the purchase of the petitioner's shares by the respondents without discount. An order made in those terms would, to a large extent, give the petitioner what it was looking for in the Investec Process. They were looking for €34m but on the basis of my finding in the hearing of the first module, they would get €30.6m. In the circumstances of this case, that appears to me to be the appropriate order to make. It would also be in accordance with the norm in applications of this type. I am satisfied that it is the most appropriate relief to give to the petitioner in this case. I, therefore, direct that the respondents purchase the shares of the petitioner and that the purchase will be at a valuation which is referable to my judgment given on 5th December, 2014, and having regard to the respondents' rights under the option agreement as determined by me on 16th January, 2015.