THE HIGH COURT

COMMERICAL

[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 213(F) COMPANIES ACT 1963

AND IN THE MATTER OF THE COMPANIES ACT 1963 – 2012

BETWEEN

DONEGAL INVESTMENT GROUP PLC

PETITIONER

AND

DANBYWISKE, RONALD WILSON, GENERAL PARTNERS

OF THE WILSON LIMITED PARTNERSHIP ONE AND MONAGHAN MUSHROOMS IRELAND AND ELST

RESPONDENTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 21st day of July, 2017.

1. This is an application for three categories of discovery as follows:-

Category 1

> All documentation evidencing, referring and/or relating to the value of the Company communicated by: (1) Danbywiske; (2) The general partners of the Wilson Limited Partnership 1; (3) Ronnie Wilson (4) Monaghan Mushrooms Ireland to any third party in order to secure financing (whether debt or equity) and shareholder loans. This said documentation is sought from each respondent individually.

Category 2

> All documents detailing the proposed Tunnel Tech South capex project of 14.36 metres of which €9.66m was included in the 2016 environmental capex budget of the company including copies of documentation shared with and correspondence directed to and from Santander Bank concerning the nature and earnings potential of the capex project.

Category 3

> All documents and reports prepared by or behalf of the auditors and/or accountants of the company referring to the value of the company and or the petitioner's shares in the company.

2. There have already been extensive court hearings on the petition in this matter involving the High Court, Court of Appeal and Supreme Court. These proceedings originally gave rise to two distinct modules: the valuation module and the remedy module. Each module required its own Commercial Court directions including discovery. Both modules gave rise to separate reserved judgments. The valuation judgment was delivered by this Court (McGovern J.) on 5th December, 2014, [2014] IEHC 615 and the remedy judgment was delivered by this Court (McGovern J.) on 21st May, 2015, [2015] IEHC 439. Both judgments were appealed to the Court of Appeal. The Court of Appeal upheld the appeal on the valuation judgment and made an order on 17th June, 2016, to remit the valuation of the petitioner's shares to the High Court for re-hearing. The petitioner was unsuccessful in respect of its appeal on the remedy module and the Court of Appeal ordered that the respondents purchase the petitioner's 30% shareholding in the company at a price to be determined by the High Court. The Court of Appeal fixed the valuation date as 30th June, 2016.

3. On 4th July, 2016 the High Court gave directions for the re-hearing of the valuation module and a trial date for 8th December, 2016 was fixed and any discovery requests were to be made by 8th July, 2016. Requests for discovery were made and the first to the third named respondents agreed to make discovery of thirty-one categories of documents. Discovery was made on 30th September, 2016. On 18th October, 2016, the Supreme Court granted leave to appeal against the Court of Appeal's decision on valuation and this had the effect of suspending the High Court's previous directions and required the trial date of 8th December, 2016 to be vacated.

4. On 27th February 2015 the Supreme Court delivered judgment [2017] IESC 14 in which it upheld the Court of Appeal's decision on the valuation module. On 7th April, 2017 the petitioner issued a motion to the Court of Appeal seeking to change the valuation date. The Court of Appeal refused that application and confirmed the valuation date to be 30th June, 2016. It is against that background that this application for discovery has to be considered.

5. Essentially what is sought in the application for discovery are documents dealing with two themes. The first is the question of what has been said to bankers about the value of the company (category 1 and 3) and the second theme is what has been said to a particular financier, namely Santander Bank, about whether or not the capital expenditure on one project, namely the Tunnel Tech South Project, is, in fact, earning enhancing. The petitioner and applicant in this motion claims that there has been a material change in circumstances since the matter came back to the High Court and that this information is relevant and necessary on the basis that it may show up a discrepancy between the valuation offered to the court by the respondents and the value placed on the business in discussions with financial backers and also on the issue as to whether or not, in their discussions with Santander, they made the case that the Tunnel Tech South Project was earnings enhancing. The documents sought to be discovered post date 30th June, 2016, which is the valuation date set by the Court of Appeal.

6. The respondents contend that the valuation date has remained the same and that the only thing that has changed is the trial date in the High Court.

Applicable Legal Principles

7. In *Bula Ltd. v. Tara Mines (No. 5)* [1994] 1 I.R. 487, Finlay C.J. acknowledged that there was a very limited jurisdiction to order discovery of specified documents created after the filing of an affidavit of discovery. At p. 498, he identified four conditions to be satisfied before an order might be made:-

> "I am, first, satisfied that in any instance where a party seeks such a discovery he must specify documents, and not merely indicate the possibility of a type or range of document. Secondly, I am satisfied that in any instance where the documents specified are created out of the proceedings and would therefore *prima facie* be exempt from production as privileged documents that the court should not make an order unless it is satisfied on proof that for some special reason that exemption must be lifted. Thirdly, I am satisfied that the court should not make such an order where it has not been established to its satisfaction that the party seeking it is unable to obtain the document or a copy of it by any other means, or has not already obtained a copy of it from other sources or by other means. Lastly, I am satisfied that if such an application were to succeed in the rare circumstances in which it would be appropriate, it would be necessary for the party seeking it to prove not only a general probability of relevance but a significant important relevance of a specified or identifiable kind."

8. That decision was cited by approval by Clarke J. in *Moorview Developments Ltd. v. First Active plc.* [2009] 2 I.R. 788, at 817, where he stated that a party is under no obligation to disclose any documents coming into existence after the date of discovery although there remains a clear obligation on a party to remedy any failure to make proper discovery in the first place.

9. At para. [105] of his judgment, Clarke J. discussed the issue of discovery of documents that only came into existence after the party concerned had complied with its discovery obligation. He said:-

> "That such a jurisdiction exists is not contested. However reliance is placed on behalf of First Active on those passages from the judgment of Finlay C.J. in that judgment [Bula (No. 5)] which emphasise that the jurisdiction is one to be rarely exercised and should involve only documents which are likely to be important (rather than tangentially relevant) to the case and which can be readily identified."

At para. [106] he stated:-

> "Clearly in many cases the question of the precise entitlements of a plaintiff (should he or she succeed) will continue to evolve up to the time of trial. Special or calculateable damages will normally change as time passes. Events may occur which may have the effect of either mitigating or exacerbating loss. Where a significant or material alteration occurs in the factual basis upon which the court might reasonably be expected to approach the question of the remedy should the plaintiff succeed, and where such alteration occurs at a time after discovery has been made, then it seems likely that the court would ordinarily be persuaded to make a discovery order in respect of documentation relating to such alteration because it would, of course, be necessary for the court, in any event, to have the relevant information in order to assess properly damages or decide the appropriate remedy."

10. In the *Bula (No. 5)* case, the High Court Judge (Murphy J.) directed that the respondents were not required to make discovery in relation to any documents which came into existence after the date on which the affidavit of discovery was made on their behalf. That decision was upheld by the Supreme Court. He did, of course, advert to the fact that if a party having made discovery subsequently traced a document which was overlooked, that error would have to be corrected and this happens on a not infrequent basis. However, he said at p. 493:-

> "But I am not convinced that there is a continuing obligation to make further affidavits of discovery to detail documents which come into existence subsequent to the date of the original affidavit. Certainly, it is not done in general because there must be innumerable cases in which further relevant documents are generated by the proceedings. I have never heard of an affidavit of discovery being made simply to list the documents which were generated by the proceedings themselves. Logically, that would be necessary if there was a continuing obligation on the party against whom the order was made, but the obligation does not, in my view, exist under the order which was made in the present case."

11. In *Bula (No. 5)*, p. 497, Finlay C.J. stated:-

> "Having regard to the importance of the discovery of documents, as enshrined in the procedures in our courts, and as most recently dealt with by this Court in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 I.R. 469, it would not be correct to say that there may not be cases and instances where a court would in the interests of justice direct the discovery and production of a specified document, at the request of a party, even though it had come into existence after the filing of an earlier affidavit of discovery. I reach that conclusion with some hesitation and on the basis of principle only, by reason of the fact that it has not been possible to discover any reported decision in Ireland of such an order having been made. Neither my own experience at the bar or on the bench, nor the experience of the counsel who were before me in this case could point to an example in practice of such an order having been made.
>
> For the reasons which I have very shortly set out, of the practical impossibility and inconsistency with a just and proper administration of the law, of a continuing obligation for discovery automatic and right up to the time of trial, I am satisfied that if such a jurisdiction exists to order the production of specified documents created after the filing of an affidavit of discovery, as I believe it does, then it must be very sparingly used and only in accordance with very limited and restricted conditions.
>
> I am, first, satisfied that in any instance where a party seeks such a discovery <u>he must specify documents, and not merely indicate the possibility of a type or range of document</u>. Secondly, I am satisfied that in any instance where the documents specified are created out of the proceedings and would therefore *prima facie* be exempt from production as privileged documents that the court should not make an order unless it is satisfied on proof that for some special reason that exemption must be lifted. Thirdly, I am satisfied that the court should not make such an order where it has not been established to its satisfaction that the party seeking it is unable to obtain the document or a copy of it by any other means, or has not already obtained a copy of it from other sources or by other means. Lastly, I am satisfied that if such an application were to succeed in the rare circumstances in which it would be appropriate, it would be necessary for the party seeking it to prove not only a general probability of relevance but a significant important relevance of a specified or

identifiable kind." (Emphasis added).

12. The respondents draw the court's attention to a decision of *Ng v. Crabtree* [2011] EWHC 1834 (Ch) a decision of Arnold J. in the Chancery Division, Companies Court. In that case, the court was tasked with valuing shares following an oppression petition, so there are obvious similarities with this case. At para. [17], the learned judge said:-

> "The order also requires me to determine fair value as at 10 March 2005. It is well established that the basic rule when valuing shares as at a particular date is to exclude evidence of events which occurred after that date: see *Re Holt* [1953] 2 All E.R. 1499, [1953] 1 WLR 1488, [1953] 2 Lloyds Rep 506 and *Joiner v. George* [2002] EWCA Civ 160, [2003] BCC 298 at 68."

13. Counsel for Mr. Crabtree relied upon the statement of Staughton J. in *Buckingham v. Francis* [1986] 2 All E.R. 738, [1986] BCLC 353 at 355, 2 BCC 98 that:-

> "The company must be valued in the light of the facts that existed at 24 March 1981…But regard may be had to later events for the purpose only of deciding what forecast for the future could reasonably have been made on 24 March 1981."

14. As counsel for Mr. Ng pointed out, however, the consequences of that approach was that Staughton J. left out of account the company's figures for the year ended 31st December, 1981. As he said at 358:-

> "I resolutely exclude after events, save for the purpose of checking what was a proper estimate at that date."

15. Moreover, in *Joiner v. George* at [7.3], the Court of Appeal rejected the proposition that, for the purpose of valuing shares in a company at a fixed date, his trading results after the valuation date should be preferred to which trading results actually known at the valuation date, even if the later results turned out to accord with a forecast made prior to the valuation dates.

Discussion

16. What the above authorities establish is that the jurisdiction to direct discovery of documents arising after the original discovery process was complete – and in this case after the relevant date for valuation of the shares – is one which must be exercised sparingly and only in the most exceptional circumstances.

17. An application of this kind cannot be treated in the same way as an ordinary application for discovery, it can only be made under the most limited and restrictive of conditions and the parties seeking discovery must prove that the documents have a significant and important relevance of a specified or identifiable kind. In this case the documents sought are not for the purpose of checking what is a proper estimate of value at 30th June, 2016, but rather for the purpose of a possible challenge to the respondents' valuation.

Conclusion

18. So far as categories 1 and 3 are concerned, they are too broad in their scope and I am not satisfied that they are necessary. The fact that the discovery sought may show up a discrepancy between figures offered by the respondents to the court on value and that value placed on the business in discussions with financial institutions is not sufficient to meet the test required and warrant the exercise of this extraordinary jurisdiction.

19. In my opinion, the documents sought in all three categories are too broad and general although they are limited in two cases to communications with third parties in order to secure financing and in the other case, communications with Santander Bank detailing the proposed Tunnel Tech South Capex Project. That is not sufficient to meet the test of proving the documents have a significant and important relevance of a specified and identifiable kind.

20. Without the discovery sought, the applicants are in a position to adduce expert evidence on the value of the company as of 30th June, 2016.

21. I refuse the relief sought.