Neutral Citation Number: [2007] IEHC 436

THE HIGH COURT

[1995 No. 143 COS]

IN THE MATTER OF
NEW AD. ADVERTISING COMPANY LIMITED
AND
IN THE MATTER OF
SECTION 205 OF THE COMPANIES ACT 1963 – 1990
AND
IN THE MATTER OF
VINCENT KELLY

Judgment of Mr. Justice T.C. Smyth delivered on the 18th day of December, 2007

1. This is a case in which I find as a fact on the evidence of Mr. Kelly that he invested £3,000 in "New-Ad" and has occupied the Court for eight days on the basis that the case required to be answered by one George McNulty under section 205 of the Act of 1963 in respect of which I find there was no sustainable evidence.

2. New Ad was a patent holding company which was dependent for its success on the licences of its patents to Newspaper Security Services Ltd., Newspaper Security Services (N.I.) Ltd. and Newspaper Security Services (UK) Ltd. (cumulatively referred to as "NSS") being successful in their businesses. In the events NSS were unsuccessful and were put into liquidation at different dates, the last of which was sustained by funds made available to New Ad (including the Petitioner's £3,000). This transference of funds was lawful and was a last ditch attempt (primarily at Mr. McNulty's initiative - but in accordance with proper corporate governance and the Companies Acts) to keep a marketing company operable in the hope that it could generate income and be successful with a hoped for "knock-on" benefit for New Ad. In the events this additional working capital did not produce the desired result and New Ad arrived at a stage of being owed royalties by NSS which it had no hope of recovering and which it eventually waived. I am satisfied and find as a fact that there was no impropriety in waiving non-recoverable royalties from NSS companies in liquidation, notwithstanding that the Applicant's Accountant in accountancy treatment would not have expressly waived such. Mr. Kelly did not demur, to the waiver as expressed in the minutes of the directors of New Ad held on 21 October 1999 at which his friend Mr. Martin Barry attended, in or about that time. The only asset New Ad possessed was its patent (which itself was not without question) for newspaper security boxes, which when ultimately sold realised so modest a price as to make no appreciable inroads on its obligations, and accordingly yielded naught to Mr. Kelly.

3. When Mr. Kelly, who had taken his redundancy moneys on leaving Tara Mines Ltd., joined his nephew and others in a venture similar to that, but distinct from New Ad and NSS he invested £15,000 in Pound Savers Security Ltd. He honestly but mistakenly believed this sum had been invested in New Ad. It is clear from the evidence that when he with Mr. Barry, Mr. Wilson and Mr. Watters (his nephew) found that they needed working capital, a share structure was put in place that provided that no one person would ever own more than 50% of the shares.

4. It is clear from the evidence and I find as a fact that Mr. McNulty who had other business interests and the only person who seemed to have resources such as might make New Ad a success - formed a view of some of Mr. Wilson's conduct - he bought Mr. Wilson's one share with the knowledge and acquiescence (if not wholehearted support and consent) of Mr. Kelly. I found it difficult to believe that Mr. Kelly who was aware that a letter intended to have the effect of conferring on Mr. McNulty a 51% stake in the shareholding of New Ad and who did nothing to destroy it or signal to those affected by his inactivity that he was in fact (as opposed to in uncommunicated mental reservations) opposed to its intendment.

5. Applying In the matter of *Greenore Trading Company Ltd.* [1980] I.L.R.M. 94 I am satisfied that the Petitioner Mr. Kelly is estopped from asserting that the transaction was irregular. Even if it is not an estoppel it was and is not per se oppressive. (Towards the end of his cross-examination Mr. Kelly was asked what were his real grievances, and they were:

> (a) He disagreed with the way the company was run - not that there was any form of oppression on him, but in that he would (left to his own devices) have acted differently. He considered that there was too much diversification too early.
>
> (b) He was not given a sufficiency of information, and the frequency of its availability did not permit of "a hands-on" appraisal of the activity of the company. I am satisfied and find as a fact that he received accounts in accordance with law as they became available. It is not a fault (if it be such) to fail to be able to read accounts: but such accounts as were available indicated adverse results and that understanding required no special skill. Monthly or quarterly accounts, such as were available to Mr. Kelly in his early years of his association in business, involve a cost - which, for a company not trading and dependent on royalties it was (in substance) not receiving; was considered unwarranted. This was a commercial decision that was justifiable, particularly in a company chronically short of income.
>
> (c) He asserted that he was never made an offer to relinquish his claim(s) or shares. While so baldly stated Mr. Kelly is correct; however, it is only a half truth. He was offered the value of his shares to be determined by an expert through arbitration. He was at one stage offered £40,000 (£5,000 initial payment plus 35 instalments of 1,000 over a fixed term) which he declined to respond to. Almost on the eve of the hearing a figure of £25,000 "all-in" was available and again Mr. Kelly would not engage. The evidence made it clear that Mr. Kelly was waiting for either the company or more particularly the Notice Party, Mr. McNulty, the legitimus contradictor, to make a bid as if he were at an auction to dispose of a valued asset or a commercial nuisance.

6. At the conclusion of the case for the Petitioner Mr. Lyndon MacCann SC for the Notice Party applied for a direction to strike out the Petitioner's case. He did so in light of the decision in *O'Toole -v- Heavy* [1993] 2 I.R. 544 - his election was not to call evidence on the basis that the Petitioner had failed to prove his case and he submitted that the cause of action pleaded and as disclosed by the evidence was quite different. The submission that Mr. Kelly's complaints in Court were not reflected in the Pleadings I find to be correct in fact and in law. While undoubtedly Mr. Kelly considered bad commercial decisions were made, but no dishonesty was averred to and he expressly did not overtly challenge decisions with which he was unhappy and he admitted that they were not devious. In my judgment the claim in fraud should never have been made - specifically there was no failure to account for royalties.

7. Section 205 is concerned with complaints about how the affairs of the company are conducted or that the power of the directors of the company are being exercised in an oppressive manner to a member or in disregard of the interests of a member.

8. A distinguishing feature of this case from *Greenore Trading* (upon which both sides cited in support) is that in the instant case no corporate fund was used to purchase Mr. McNulty's shares. In the course of his judgment in *Greenore Trading* Keane J (as he then

was) noted by analogy with decided cases on the equivalent section in the UK legislation that oppressive conduct had been defined as meaning the exercise of the company's authority (not a power of a director qua director) in a manner burdensome, harsh and wrongful (*Scottish C.W.S. Ltd. v. Meyer* [1959] Ac 324 at p342). In my judgment while Mr. Kelly considered some of the decisions made (on the initiative of or with the assistance of Mr. McNulty), were wrong commercially there was no or no sustainable evidence that the powers of the directors were conducted in a manner oppressive to him. Indeed Mr. Kelly agreed in evidence that the person who stood to lose most by the decisions if they were unsuccessful was Mr. McNulty.

9. A further complaint made by Mr. Kelly concerned share dealing. In this regard both parties referred in argument to *Re Leeds United Holdings P LC* [1996] 2 B.C.L.C., a judgment of Rattee J. Mr. John Gibbons SC for the Petitioner very adroitly sought to argue that Mr. Kelly when he subscribed the £3,000 to New Ad could have the legitimate expectations that funds would be retained by that company and not transferred to enable the trading company to continue to operate so that it might (inter alia) generate sufficient income to pay the royalties on foot of its licence to use the patent of New Ad. In my judgment even if such legitimate expectation existed - and I am satisfied on the evidence and Mr. MacCann's submissions that none existed, same might give rise to a case for breach of contract, but not a section 205 case in oppression.

10. I accept as correct Mr. MacCann's very forceful submission that the conduct of the company's affairs does not apply to share dealing between the directors, in Re Leeds United at pp 558-560 of the judgment of Rattee J. is particularly in point in this regard. Again in the context of share dealing it is clear from a consideration of the more refined provisions of section 459 of the Companies Act 1985 in the United Kingdom in Re Legal Costs Negotiators Ltd. [1999] B.C.L.C. 171 at pp. 179/180 that "the meaning of conduct of the company's affairs was limited and should not include the acts of shareholders acting in a private capacity". In the course of his judgment in the Court of Appeal (which affirmed the decision of the High Court) Peter Gibson LJ at p195 reviewed the earlier decision of Hoffmann L.J. in *Re Saul D. Harrison & Sons PLC* and reiterated that the point made in the Court below that "the unfairly prejudicial conduct" must be about the way the company's affairs are conducted. The Lord Justice said the section is concerned with the company's affairs rather than the affairs of individuals and to be concerned with acts done by the company or those authorised to act as its organs.

11. Mr. Gibbons SC emphasised the fact that as from the time when Mr. McNulty came to have a majority shareholding, initially acquiring Mr. Wilson's one share and thereafter the buy out of other than Mr. Kelly's shares, the dynamics of the governance of the company altered and unwise or economically flawed decisions led to the final debacle. The response of the Notice Party was to cite in aid the decision in *Re Five Minute Car Wash Services Ltd*.[1966] 1 WLR 745 where the preliminary point was that the petition was demurrable as showing no ground for relief under section 210 of the Companies Act 1948. Buckley J. held that "it must be shown at the time when the petition was presented that the affairs of the company were being conducted at least unfairly in regard to the Petitioner in his character as a member of the company and not in any other capacity; the mere fact that a member has lost confidence in the manner in which the company's affairs were being run or had been outvoted (of which there is no sustainable evidence even when the Petitioner attended meetings) or was dissatisfied with or disapproved of the company's affairs on grounds of policy or efficiency, is not enough". It is necessary for a petitioner to allege and establish that the conduct complained of was designed to achieve some unfair advantage over the person claiming to be oppressed. Later in *Re Elgindata Ltd*. [1991] BCLC 959 Warner J. at p993 considered the *Five Minute Car Wash* case and others and concluded:

> "I do not doubt that in an appropriate case it is open to the Court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But I share Peter Gibson J's view that the Court will normally be very reluctant to accept that managerial decisions can amount to prejudicial conduct."

12. A *fortiori* where mere general opinion evidence of a subjective nature unsupported by provable fact is tendered to the Court as in the instant case. Notwithstanding the leisured ease of a Mr. Purslow, the alleged mismanager in the *Elgindata* case Warner J said at p1000:

> "....there were occasions when Mr. Purslow neglected the management of the company's business and instances of bad management on his part. I also had, from the evidence, and from Mr. Purslow's attitude in the witness box, a general impression that his management lacked vigour and purposefulness. However, if I was right in what I said earlier about the manner in which the Court may find that mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders, it does not seem to me that Mr. Purslow's shortcomings amounted to such conduct. Prejudicial to those interests they were, but not unfairly so. They were, in my judgment, of a kind of which Mr. Rowland took the risk when he invested in the company."

13. While in the instant case Mr. Kelly's involvement with the venture predated that of Mr. McNulty - Mr. Kelly was given an opportunity to be "bought out" and did not accept it. He, therefore, continued voluntarily to be engaged when not only was Mr. McNulty financially more able and willing to support the venture, but clearly exercised more initiative. Mr. Kelly invested money in a business, such as to take a risk - the reward for successful risk taking is a dividend - if less than successful no dividend or loss. Mr. McNulty's decisions - and they were not such, but decisions of directors and/or shareholders, Mr. Kelly took the risks attaching to his investment, he has in my view on the evidence no ground for complaint in oppression. There was no evidence of negligence made by Mr. Kelly. He simply had another point of view, which if articulated did not carry the day. There is no evidence in the instant case that compares to the fractious relationship between Mr. Rowland and Mr. Purslow set out by Warner J. at p972-983 in *Elgindata*. Even if the correct test is that of Slade J. (as he then was) in *re Bovey Hotel Ventures Ltd.* (31st July 1981, unreported) and of Nourse J. [1983] BCLC 273 at 290-291) referred to by Warner J at p984, i.e.

> "the test...is whether a reasonable bystander observing the consequences of their (i.e. the persons who have had de facto control of the company) conduct, would regard it as having unfairly prejudiced the Petitioner's interests."

14. I am not satisfied such a case is made out at all on the evidence in this case.

15. Mr. Gibbons at the outset of his submissions made the point that *O'Toole -v- Heavyis Limited* in its import to cases in tort and contract. While undoubtedly it is referable to a case in common law - it is applicable in principle to all contested litigation - where the onus lies on the party asserting the case propounded. The long prehistory of this case was traced from the defences of the company being struck out by Geoghegan J. in March 1996 due to the failure of the company to make discovery (Mr. McNulty having been nominated to swear such affidavit). In July 1996 Barron J. directed the cross-examination of the directors of the company before the Master - while this took place between February and May 1997 it left Mr. MacCann SC in this case with no opportunity to examine or cross-examine Mr. Wilson, who gave evidence before the Master, but died prior to this hearing. Notwithstanding Mr. Gibbons' well argued submissions, I am satisfied that the Notice Party was quite within his rights in seeking to rely on the Petitioner's own evidence and admissions to ground an application for a direction.

16. One of Mr. Kelly's complaints was that he was not given information, or if provided it was out of date – this was specifically directed to the furnishing of accounts. While it might have been in ease of Mr. Kelly to have been given more information, and more timeously, I am satisfied that he received what he was entitled to in law. Furthermore such information as he did receive could have left him in no doubt that NSS was not prospering; therefore, New Ad could not prosper. On his own admission (and this was not a fault) he could not "read" accounts which were furnished. At one stage he had (with the assistance of his son) received accounts, but made no meaningful or challenging response thereto he just kept on looking for further information, which if given, produced no engagement. Furthermore, NSS (UK) Ltd. could not furnish accounts as the auditors had not been paid outstanding fees.

17. As earlier determined Mr. Kelly cannot escape responsibility for permitting the letter concerning Mr. Wilson's share into circulation and as a matter of probability he must have appreciated that with the disposal of the additional share to Mr. McNulty he would effectively control NSS and New Ad: It matters not at all that Oakhill were the recipient of Mr. McNulty's additional interest. Mr. Kelly had the option of realising a return on his investment in October 1990 but declined it. Whether Mr. Kelly was represented in the ensuing correspondence by Finbar Cahill & Co. Solicitor or not - Mr. Cahill considered Mr. Kelly was his client, is not of great importance. The impression left on me by Mr. Kelly in evidence is that he may have been represented through Mr. Barry as a group of possible vendors of shares in the light of Mr. Cahill's letter of 3 May 1991. In May 1991 Mr. Cahill stated that all his clients had funds available to meet the cash call then envisaged. In the events the cash call made was at a much reduced figure.

18. It is common case that in April 1991 - to use Mr. Gibbons' expression, "the companies were in dire need of capital". The cash was not forthcoming. Even when the modest sum of £30,000 was available, and it was transferred to New Ad, Mr. Gibbons contended that the approval of the shareholders was necessary. I am unable to accept this submission in the light of article 80 of Table A of the Companies Act.

19. Perhaps the most perplexing circumstances of the entire case are to be found in the pre litigation correspondence which at different times and for different amounts (one of which required calculation by a perfectly reasonable and not unusual method of share evaluation) offered the Petitioner the opportunity of salvaging something from the debacle that this case has been for him. A critical evaluation of instructions and properly availing of the opportunity to inspect documents (such as when available to the Petitioner's accountant caused him (I perceived with a sense of embarrassment)) to so qualify and modify his report as first presented to the Court as to admit that only if the assumptions upon which it is based were true and proven could the Petitioner’s claim amount to £75,000.

20. In the events I find as fact that only on a conspectus view of the evidence, but on the elements highlighted in this judgment that the assumptions upon which his report was based were unproven. The Plaintiff was singularly ill advised not to have availed of the opportunities afforded to him to resolve this litigation. I accede to the direction and dismiss the petition.