

**THE HIGH COURT**

**COMMERCIAL**

**[2011 No. 215 COS]**

**IN THE MATTER OF JOSAR HOLDINGS LIMITED AND**

**THE COMPANIES ACTS**

**BETWEEN**

**JOHN MURPHY**

**PETITIONER**

**AND**

**MICHAEL FRANCIS KENT, SARAH KENT,**

**JOHN KENT AND JOHN GILLEY**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Kelly delivered on the 24<sup>th</sup> day of October, 2014**

**Introduction**

1. The sole issue which remains to be decided on this motion, apart from the question of costs, is whether the judgment which I entered jointly and severally against the second and third respondents in the sum of US\$683,922.31 on 15<sup>th</sup> October, 2014, should be stayed as to execution and registration.

2. Affidavit evidence has been exchanged on various factual issues touching upon the grant or refusal of a stay.

3. Before dealing with those factual matters, I wish to indicate the legal position which now obtains.

**The Legal Position**

4. The petitioner is now a judgment creditor of the relevant respondents. His position is, therefore, no different to that of the plaintiff in *Allied Irish Bank Plc v. O'Reilly & Ors* [2014] IEHC 326, where I said, in the context of an application for a stay on execution and registration, the following:-

*"60. A creditor who has obtained a judgment has a strong prima facie entitlement to immediately execute on foot of it in whatever way the law permits. Whilst there is undoubtedly a jurisdiction in the court to suspend such an entitlement, the court should exercise particular care and caution before so doing. The grant of a stay is, in effect, a refusal to permit a judgment creditor to exercise legal rights obtained on satisfying a court as to the entitlement to judgment. The grant of a stay negates the entitlement of a judgment creditor to exercise the very rights which that creditor acquired by obtaining the judgment.*

*61. It would not be wise to attempt to set out, even in a general way, hard and fast rules which ought to apply to the exercise of the judicial discretion to grant a stay. The reason for that is simple. There are so many circumstances in respect of which the court may be asked to consider granting a stay that it is impossible to contemplate them all. They cover a vast range of circumstances and even, on occasions, issues of humanitarian concern. Whilst judicial sympathy and humanitarian concern do have a part to play, it is the duty of the court to uphold the law and to maintain a fair balance between litigants so as to achieve a fair result.*

*62. The court should approach an application for a stay with caution. It should exercise the discretion judiciously since the grant of a stay is a serious curtailment of legal rights."*

5. That is the approach which I have to take in the current case.

**Relevant Background Facts**

6. The first matter to note is that the judgment of 15<sup>th</sup> October was entered on foot of terms of settlement executed by the parties on 10<sup>th</sup> October, 2012. Under those terms, the respondents agreed to buy the petitioner's shares for an agreed sum of US\$11m. They also agreed to pay his costs.

7. The settlement agreement provided for the payment of the US\$11m in stages. Paragraph 3 set out how that sum was to be discharged by reference to specific dates and amounts which were to be paid. These dates were self selected and agreed to by the parties to the settlement.

8. Paragraph 22(a) of the agreement provides as follows:-

*"If at any time after 1 November, 2013, the sum of US\$600,000 or more shall be outstanding to the petitioner as a result of the failure of the second, third and fourth respondents to make payments pursuant to the terms of this agreement, the petitioner shall be at liberty in such circumstances to re-enter these proceedings for the purpose of obtaining judgment against the second, third and fourth respondents in respect of the outstanding amount and the*

*second, third and fourth respondents will consent to such judgment."*

9. There was no doubt but that on 15<sup>th</sup> October, 2014, there was a sum of more than US\$600,000 outstanding to the petitioner as a result of the failure of the relevant respondents to make payments pursuant to the terms of the agreement. The relevant respondents did not actually consent to judgment but in the light of the clear evidence of default as contemplated in clause 22(a), I entered judgment against them.

10. The petitioner, as his primary relief, sought judgment pursuant to the provisions of clause 22(b) of the agreement. That clause reads:-

*"22(b) If at any time after 1 November, 2003, the sum of US\$1.5m or more shall be outstanding to the petitioner as a result of the failure of the second, third or fourth respondents to make payments pursuant to the terms of this agreement, the petitioner shall be at liberty in such circumstances to re-enter these proceedings for the purposes of obtaining judgment against the second, third and fourth respondents in respect of the full amount payable under this agreement less credit for any sum actually paid and the second, third and fourth respondents will consent to such judgment."*

11. On the true construction of that clause, I held that the petitioner's entitlements under it had not been triggered. In short, the argument of the petitioner was that he was entitled to add to the sums due in respect of the purchase money for the shares, an amount (€568,858.26) of an interim certificate of taxation (denominated in euros but calculated in dollars at current exchange rates) and thus to exceed the monetary threshold as specified in clause 22(b) in order to obtain judgment. I held against that argument and construed clause 22(b) of the agreement to relate only to dollar sums which were specifically referable to the purchase price of the shares. It is only such sums which are captured by the provisions of clauses 22(a) and 22(b). Costs are not covered by clause 22. Accordingly, I entered the judgment in suit pursuant to clause 22(a).

### **The Stay**

12. The respondents seek a stay on execution and registration of the judgments against them until 31<sup>st</sup> December this year but they also seek liberty to apply for an extension of that stay beyond that date.

13. The petitioner has so far been paid over US\$3m pursuant to the settlement agreement. Various reasons have been proffered for the delay in making the payments which are now due. It is pointed out that the agreement itself envisaged that there might be delay because an interest rate of 6% on overdue payments in respect of the share price is specifically provided for at clause 3(f).

14. Clause 2 of the agreement requires the respondents to use their best endeavours to procure the sale of the petitioner's shares in the company on the open market. Save with the consent of the petitioner, no shares in the company are to be sold on the open market to a third party investor prior to the sale or redemption of the petitioner's shares. That provision, however, does not prevent the sale of other shares in the company at the same time as the sale of the petitioner's shares.

15. The respondents say that notwithstanding their best endeavours, it has not been possible to date to procure the sale of the petitioner's shares in the company on the open market. They detail two specific proposals, one in the first quarter of 2013 and the other in the second quarter of that year. Neither came to fruition. The advice that the respondents have consistently received is not to go to the market to sell the shares until the company has recorded a stronger set of financial results. The respondents say that the company is now in a better position to procure the sale of the shares and has engaged Investec to sell the petitioner's shares on the open market. The petitioner was advised of this on 19<sup>th</sup> September, 2014. Preparatory work for this process is being completed. The petitioner has queried the appointment of Investec and has sought an explanation as to the circumstances of its appointment in lieu of the previously appointed advisers. The explanation is that Investec have significant industry knowledge and have acted for the Kentz group for many years and were instrumental in its sale in August of this year to the Canadian engineering and construction company, SNC Lavalin group for about STGE1.164 billion in cash.

16. During 2012 and 2013, the company was making losses but it is said that that situation has improved. In addition, it is said that the company's group bankers are Danske Bank who are quitting the Irish market. The company has been working on securing alternative banking relationships but with two years of reported losses in 2012 and 2013 and with the continuing bad publicity arising from these proceedings, these arrangements have not been completed. The company previously had a \$25m overdraft facility with Danske Bank but this is now down to \$7m.

17. A new non-executive chairman has been appointed as of 1<sup>st</sup> June, 2014. Additional appointments to the board are envisaged over the coming months. The company is now forecasting an EBITDA of US\$5.6m for 2014 and a normalised EBITDA of US\$12m for 2014. The hope is that there will be a sale of the petitioner's shares in the next few months with a likely discharge of all obligations on foot of the settlement agreement.

18. The respondents contend that the company is a worldwide company headquartered in Cork employing 3,000 people. If judgment is permitted to be registered and executed, the respondents believe that that is likely to put the company in a position of what is described as "*immediate peril*". They believe that there is every risk that Danske Bank might call in the US\$7m facility plus US\$4.5m of outstanding bonds which would prevent the company from continuing to trade.

19. Thus, the basis upon which I am asked to grant a stay can be summarised as follows:-

(a) It is said that the refusal of a stay will jeopardise the current attempts being made to sell the petitioner's shares under the terms of the settlement agreement.

(b) Danske Bank may call in the facilities which it affords the company thereby undermining its ability to trade and compromising any efforts which it might make to raise funds elsewhere.

(c) There will be a threat to 3,000 jobs within the company.

20. The petitioner swore an affidavit dealing with these contentions and in turn there was a replying affidavit sworn by the second respondent.

21. The petitioner points out that the company has annual revenue of between US\$130m – 140m and the amount of the judgment against the respondents (not the company) is less than US\$700,000. He contends that it is scarcely credible that registration and

execution of judgment for such a relatively small sum of money would imperil the company.

22. The petitioner points out that the obligations under the settlement agreement are personal to the respondents but they do not appear to regard their liabilities in that light. Rather, they seem to regard them as liabilities of the company. In this context, he points out the significant remuneration which the respondents have received in recent times. In the half year to June 2014, he points to a sum of US\$757,485. For the year 2013, the sum was US\$1,320,130. There were also share dividends paid which in 2013 amounted to US\$800,000. He criticises the lack of any financial information being furnished concerning the personal positions of the respondents.

23. Insofar as the position with Danske Bank is concerned, he says that there has already been a direction given to the company by Danske Bank to find alternative banking facilities. The respondents have been aware of the 31<sup>st</sup> December, 2014, deadline for a considerable period of time. In May of this year they directed the company's chief financial officer to organise new facilities for the company.

24. On the topic of security of employment for employees, the petitioner expresses concern for them. But he points out that whilst the company is incorporated in Ireland, it is only a small number of staff who actually work in this jurisdiction all in an administrative capacity. Other staff are contract staff and are engaged on a "*per project*" basis. The bulk of the projects carried out by the company are on behalf of major oil companies who, as a rule, include in the relevant contract documentation safeguards in respect of performance of the project. An on demand bond has to be provided in the amount of 10% of the project cost which is used to ensure completion if the company is unable to do so. He believes that the bond will almost certainly ensure the continued employment of the project staff and that it is wrong to suggest that 3,000 jobs may be lost.

25. The petitioner then makes complaint about the history of default in the making of the periodic payments provided for under the agreement.

26. In her response, the second respondent reiterates the points already made in support of the stay. She exhibits correspondence from Investec which she says demonstrates the damaging effect which execution of the judgments would have on the ongoing exercise being undertaken by that entity.

27. The letter from Investec speaks of meetings in the week commencing 20<sup>th</sup> October, 2014, with potential investors. These are described as "*a highly credible potential source of capital*". It is believed that damage will be done to that exercise if the stay sought is not granted.

28. She points out that all three of the relevant respondents have used both salary and personal loans to the greatest extent possible in order to fund payments to the petitioner to date in respect of both his legal costs and stage payments. She says the funds paid on the case to date are in the range of US\$5m. She also says that no director's fees or expenses have been paid to the respondents in recent times.

29. On behalf of each of the relevant respondents, an undertaking is offered under oath that in the event of a stay being ordered, no dealings will take place in respect of any of the respondents' shares during the currency of such stay and, for the avoidance of doubt, that includes pledging, charging or any similar action in relation to them.

30. She reiterates that the raising of capital with a new bank in lieu of Danske Bank will be adversely affected if the stay is not granted. She repeats that there is a high risk that Danske Bank will call in all of the monies due including guarantees should the stay be refused.

31. Insofar as employees are concerned, she points out that the work of the company is international and that all of the employees have direct contracts of employment with the company and not the client. Most employees move from one Kentech project to the next. As to the performance bond, she contends that its purpose is to provide funds to the client in order to get another company to carry out the work if discontinued. It compensates the client for getting the work finished by somebody else. Only on occasions is the existing workforce retained. Thus, she believes that the petitioner's belief concerning the comfort afforded by the performance bonds to employees is mistaken. In any event, less than 10% of the company's contracts have such performance bonds.

32. Finally, she contends that on any objective analysis, the company's financial performance has improved thus enhancing the prospects of the sale of shares and the discharge of the obligations to the petitioner.

## **Conclusion**

33. The petitioner has a strong *prima facie* entitlement to immediately enforce the judgment obtained by him.

34. The respondents are in breach of contractual obligations undertaken following legal advice and in settlement of these proceedings. The time limits for the discharge of the relevant payments to the petitioner were self selected. They have not been met.

35. The petitioner is not at all convinced by the reasons which have been proffered for the failure to meet these self imposed deadlines. He views this application for a stay as just another example of the prevarication which he has encountered from the outset.

36. I find the reasons given for the failure to make payments on time as providing a plausible explanation though not an excuse for that failure.

37. On the evidence before me, substantial progress has now been made with a view to bringing about a sale of the shares and a discharge of the entire of the obligations owed to the petitioner.

38. I am persuaded that if a stay is not granted there is a realistic prospect of great damage being done to the company, its finances, its employees and indeed the likelihood of the settlement in suit ever being implemented.

39. There is an extremely bitter background to this whole dispute but I cannot believe that the petitioner would proceed to execute and register the judgment in circumstances where such an act would seriously jeopardise his ability to be paid the bulk of the purchase monies which remain outstanding. That would make no sense.

40. Notwithstanding that view, I do of course recognise the bitterness in the background and that in commercial affairs there must be certainty. Even the threat of such action on the part of the petitioner could seriously jeopardise the ongoing negotiations.

41. I am, therefore, of the view that the justice of the case warrants the granting of a stay. This will undoubtedly preclude the petitioner from exercising his legal rights for a limited period of time. But I am of the view that no real injustice will be done to him given the undertaking which is being offered to the court as set out at para. 29 of this judgment and the petitioner's contractual entitlement to interest in respect of delayed payments.

42. I am also satisfied, however, that the petitioner is also entitled to certainty as to when he can give effect to his legal rights on foot of the judgment. Thus, whilst I am prepared to grant a stay on execution and registration of the judgment until 1<sup>st</sup> January, 2015, I am not prepared to provide any further opportunity to the respondents to seek an extension of that period. The grant of this stay affords them a period in excess of two months which, given the delays that have already occurred is, in my view, ample time to meet their obligations as provided for in the settlement agreement.