[2020] IEHC 72

THE HIGH COURT

[2018/69/COS]

IN THE MATTER OF

KUSH SEAFARMS LIMITED

AND IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN

FLOR HARRINGTON

APPLICANT

AND

JOHN HARRINGTON AND KUSH SEAFARMS LIMITED

RESPONDENTS

AND

BORD IASCAIGH MHARA

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 20th day of February, 2020

Introduction

1. By originating notice of motion of 19th February, 2018, Mr. Flor Harrington ('the applicant') initiated proceedings pursuant to s.212 of the Companies Act 2014 against Mr. John Harrington ('the respondent') and Kush Seafarms Limited ('the company'). A notice party, Bord Iascaigh Mhara, holds 15,872 preference shares in the company, and accordingly was joined as a notice party. A Mr. Malachy Lynch, who obtained judgment against the applicant in separate and unrelated proceedings and had obtained an order charging the applicant's shares in the company with repayment of that debt, was represented at the hearing having been made a notice party to the proceedings by order of this court of 23rd July, 2018. In the event, neither Bord Iascaigh Mhara nor Mr. Lynch took active part in the hearing before me.

2. The applicant and the respondent are brothers, and each are directors of the company and owners of 50% of the issued share capital of the company. In his affidavit of 16th February, 2018, the applicant referred to "irreconcilable differences" having arisen between him and the first named respondent. The applicant contended that, as the company was "trading successfully and employing a number of people", the appropriate remedy for the matters of which he complains was the "…purchase of [my] shareholding in a manner supervised by this honourable court, so as to ensure that I am properly paid for it, and not instead forced into an alternative and unjust transaction, in which the true value of my asset is not recognised…" [Paragraph 28].

3. The respondent did not disagree with this general approach. He denied the allegations by the applicant of oppression and/or disregard of interests, but accepted "…the contention of the applicant that the shareholder relationship is likely irreparably damaged and that the business and familial relationship between us has unfortunately irretrievably broken down". The respondent also accepted and acknowledged that the applicant was "operating under significant personal and financial stress and hardship, albeit that these issues have occurred and arisen from matters entirely outside of the ambit of the company and for which I am not responsible". [Paragraph 10, affidavit sworn on 23rd April, 2018].

4. By notice of motion returnable on 9th July, 2018, the respondent applied for an order directing the appointment of an independent professional valuer "…as may be nominated by the President for the time being of the Institute of Chartered Accountants to value the applicant's shareholding…. in the company". Allen J. made an order on 24th October, 2018, suspending the agreed timetable for pleadings between the parties to accommodate this motion, and heard the respondent's application on 19th November, 2018. In a written judgment of 20th December, 2018, Allen J. held that the court did not have jurisdiction to entertain the application, and refused it. The court also rejected the suggestion that it should appoint a valuer to assist the court in determining the purchase price of the shareholding.

5. The motion was in fact adjourned by Allen J. in October, 2018 to allow the parties and their legal and financial advisors to engage, but the court commented in the written judgment that "…if anything their positions had hardened when they came back to court". The court also urged the parties to "consider mediation as an alternative to this protracted and increasingly expensive litigation". [Paragraph 19 judgment Allen J.]. However, the matter proceeded to trial, and ultimately came before me on 28th January, 2020.

6. The hearing of the matter was to take three days. However, the parties asked on the first day for time to engage with each other in relation to the constituent elements of the valuation. The parties agreed that the appropriate date for valuation was 30th April, 2018, the most recent date for which accounts had been completed. It was suggested by counsel for the applicant that there were three elements in the valuation: the balance sheet adjustments from which a net asset value would be derived; the EBITDA (an acronym for earnings before interest, taxes, depreciation and amortisation, a widely accepted method of measuring a company's profitability); and the appropriate multiplier to be applied to the EBITDA.

7. The engagement between the parties bore fruit, in that it was agreed that the net asset value of the company, with all appropriate balance sheet adjustments being made, was – for the purposes of the valuation - €350,000, and that the EBITDA was €215,000. It must be emphasised that this agreement was the product of a negotiation, in which the parties each moved from their respective reasoned positions in the interest of reducing the number of issues to be decided by the court.

8. I was informed however, when the hearing commenced at the end of the first day, that it had not been possible to reach an agreement as to the appropriate multiplier to be applied to the EBITDA. The remainder of the hearing was therefore concerned with the expert evidence of Ms. Claire Cowhig for the applicant, and Mr. Paul Clarkin for the respondent, the cross-examination of the experts, and the submissions of the parties.

9. At the outset of the hearing, I was informed that the respondent would, for the purposes of the hearing, accept that there had been what the parties termed "technical oppression". Counsel for the respondent made it clear that the respondent did not accept any of the applicant's allegations of oppression or disregard of interests, but both parties

accepted that the court's jurisdiction to make an order under s.212 required a finding of oppression or disregard of interests in accordance with s.212(1). Accordingly, the respondent was prepared to concede that oppression or disregard of interests had occurred, while not accepting the detail of the allegations made. The parties set out their respective positions in this regard in a letter of 13th December, 2018 from the applicant's solicitors to the respondent's solicitors, to which the respondent's solicitors replied on 14th December, 2018.

10. In those circumstances, and given that the agreed position is that oppression or disregard of interests has taken place, I consider that the jurisdiction of the court is engaged so that the court can adjudicate on the evidence to resolve the issues before it.

The Company

11. The company was incorporated on 4th June, 1987. It carries on an aquaculture business, primarily the farming and sale of mussels. It has its principal operations on the Beara Peninsula at Ardgroom Harbour, Co. Cork and nearby at Kilmacilogue Harbour, Co. Kerry. The company has an authorised share capital of €120,000 divided into one hundred thousand shares of €1.20 each, of which €71,690 ordinary shares have been issued. Those shares are held in equal parts by the applicant and the respondent, so that each has a 50% stake in the company's issued share capital. The applicant and respondent are the directors of the company. Bord Iascaigh Mhara hold 15,872 preference shares on foot of an investment in the company.

12. The company operates offshore under licence from the relevant Government Minister, and currently has approximately fifty-two hectares of licensed sites between Ardgroom and Kilmacilogue Harbours. I am informed that the company is currently applying for a licence for a further eight hectares. The current area of 52 hectares is designated as "class A" waters, which means that mussels harvested there can be exported directly to France – the company's primary market – without having to undergo a purification process. The company has seven employees.

13. The company has two boats: the MV Blue Spirit, and the MV Mon Reve. The Blue Spirit is an all-aluminium vessel bought in 2007 for a sum in the order of €800,000. It is an integral part of the farming process. The mussels are harvested by the use of 'straps' or ropes which are lowered into the water. The mussels attach themselves to the straps which are ultimately retrieved from the water by equipment on the boat, weighed, bagged and left in an inter-tidal area for some days for acclimatisation. The mussels are then sent to buyers in France. The company also buys in product for sale depending on the market conditions. It was suggested on behalf of the respondent that the bulk of the products are sold in France, taking advantage of a gap in the market left by 'Bouchot' mussels between November and May, and that, while the company now sells into ten different markets, its success or otherwise is determined by French market conditions.

14. As regards profitability, the applicant contended that the company has been consistently profitable over the last ten years. Ms. Cowhig for the applicant produced detailed profit and loss accounts for the eleven years from year end 30th April, 2008 to 30th April, 2018.

Without reproducing these figures here, it does appear that the company has operated at a profit during this ten-year period. The sales figures for 2018, 2017 and 2016 respectively were €2,149,368, €1,772,785 and €2,000,835, and profits before tax of €128,748 and €96,247 were recorded in 2018 and 2016. The accounts show a loss before tax in 2017 of €17,817. This was the only year in the eleven-year period in which the company sustained a loss, although counsel for the respondent pointed out that the profit before tax figures for several of these years was very low, and a perusal of the accounts shows that, in five of these eleven years, the profit before tax was less than €10,000.

15. It was submitted on behalf of the applicant that the company is trading in stable conditions and is self-evidently profitable, and the fact that the company is presently undergoing a licence application process for a further eight hectares indicates the confidence of the respondent in the viability of the business going forward. It was submitted however on behalf of the respondent, primarily by his expert Mr. Clarkin, that the market is volatile in a number of respects, such as the possibility of competition, the danger of a harvest being destroyed by toxins in the water known as 'red tide', the activities of the 'gilets jaunes' in France which affected demand in France in November/December 2018, the unseasonably mild winter of 2018/2019 which made handling and quality difficult, and other matters.

16. I should say that the parties presented no oral evidence other than that given by their respective experts. Any factual matters adverted to by the experts in relation to the running of the company's affairs were therefore hearsay. While experts are of course permitted to refer to a range of evidence which would otherwise constitute hearsay and be inadmissible, I pointed out that I would not be able to resolve any conflicts of fact to which the experts had referred but in respect of which they were not in a position to give first-hand evidence. A particular difficulty in this regard was the contention of Mr. Clarkin that the respondent was so integral to the company's affairs that he was effectively irreplaceable, a factor which, if true, must necessarily lower the value of the company considerably in the eyes of any prospective purchaser. While it was common case that the respondent was involved in the day-to-day operations of the company and that the applicant was not, I made the point to counsel that no evidence as to the management structure had been presented to the court, and that I was therefore not in a position to come to any conclusion about the indispensability or otherwise of the respondent to the company.

17. Having discussed the matter, counsel informed me that I could regard the evidence in the respective reports and evidence of the experts as being admissible in the sense that neither party was objecting to such evidence, although assessment of the weight of such evidence would of course be a matter for the court. Counsel for the respondent indicated that he was not pressing the point that the respondent was indispensable, so that there was no need for evidence in this regard.

18. The agreed approach of the parties was, in summary, that they wished the court to consider the experts' evidence and any factual matters referred to in submissions or evidence which were not the subject of dispute, and to come to a view as to the appropriate value of the multiplier.

The Experts

19. As the parties came to an agreement as to the net asset value and the EBITDA, I do not propose to deal in any detail with the experts' deliberations on these matters, but rather to concentrate on their views as to the means of selecting an appropriate multiplier.

20. Ms. Claire Cowhig gave evidence for the applicant. Ms. Cowhig is a certified public accountant who qualified as such in 1994. She is a partner in CHK Partnership, a firm of accountants and auditors in South Mall, Cork. She gave evidence of having conducted fifteen valuations over a number of years, acting for both vendors and purchasers.

21. Ms. Cowhig prepared a report of 10th April, 2019 in relation to the valuation of the applicant's shareholding in the company. In relation to the multiple to be applied to the EBITDA, the report stated as follows:

> "When establishing the multiple of EBITDA to use, to calculate the value of Goodwill, I considered the following factors:
>
> (a) The type/sector of business.
> (b) The turnover level.
> (c) The gross margin.
> (d) The wages cost.
> (e) Future growth potential.
> (f) Competition.
> (g) Comparable sales.
> (h) Debt level.
> (i) Comparables.
>
> Taking all the above factors into account, in my opinion the correct multiple for this business is 8.
>
> I consider the multiple of 8, to be reasonable when compared to available data of food sector multiples".

22. Ms. Cowhig also set out details of the research which she undertook in coming to her conclusion that the correct multiple was 8. Ms. Cowhig paid particular attention to the sale of a company called Moy Park Limited ("Moy Park") in 2015. Her evidence was that this company, a major chicken processor based in Craigavon, Northern Ireland, was sold for a multiple of 7.9 of its EBITDA. Ms. Cowhig conceded that Moy Park was a "significantly bigger company" than Kush Seafarms Limited, but considered that the same principles would apply to calculating the multiplier notwithstanding the difference in size.

23. Ms. Cowhig did not produce any further comparable transactions, but relied on the following items of research:

(i) An article from overheadwatch.com of 22nd February, 2017 entitled "What are the EBITDA multiples by industry? See the stats here", in which it was suggested that, according to the Stern School of Business at NYU, the EBITDA multiple for the 'Food Wholesale Industry' as of January 2017 was 11.63;

(ii) Research conducted by Siblis Research Limited, an enterprise-level data provider, for S&P 500, which suggested that the EBITDA multiple for the 'consumer discretionary' category as of 30th June, 2018 was 14.66;

(iii) A document entitled "Private Company Price Index" for quarter two of 2018 prepared by BDO UK, which asserted that the private company price index indicated that private companies were being sold for 11.6 times historic EBITDA;

(iv) A 'Valuation Academy' article with data as of January 2014, which indicated a multiple of 10.73 for food wholesalers as of January 2014;

and

(v) A report from the accountancy firm Price Waterhouse Coopers entitled 'Global Agri-Business Deal Activity' from February 2016, which suggested that the median multiple for transactions in the 'fisheries sector' was 11.6.

24. Ms. Cowhig stated that, given the research which she had done, she selected a multiple of 8, which she regarded as a conservative figure. She was of the view that the company was consistently profitable. The company owned one of the biggest mussel farms in Ireland, and the fact that licensing had to be obtained to embark upon an activity such as mussel farming represented a restriction on access to competitors. The company had applied for an additional licence for eight hectares, which Ms. Cowhig regarded as an indication of the respondent's confidence in the business.

25. Ms. Cowhig did not agree with the approach adopted by Mr. Clarkin in his report, which is based on "sellers' discretionary payments", rather than EBITDA. Ms. Cowhig asserted that she had never come across this approach in her valuation experience, and in fact had never heard of it. She did not agree that the business was dependent on the respondent, and gave the example of pharmacies, which might have a comparable turnover and be operated primarily by one person, but which were regularly bought and sold without difficulty. Ms. Cowhig said that she had never heard of Bizcomps, a US-based transaction database which concentrates on small business transaction data, and which was relied upon heavily by Mr. Clarkin.

26. Ms. Cowhig's evidence was severely criticised in cross-examination. It was put to Ms. Cowhig that the purchase of Moy Park was on a scale so different to any prospective purchase of the company that it was not remotely comparable. It was suggested that Moy Park was founded in 1943 and employed more than 6,000 people. It was one of

Europe's biggest poultry processors, handling more than 5.7m birds every week, and had 13 processing plants located across the UK, Ireland, France and the Netherlands. It had a pre-tax profit in 2016 of €44.7m. It was suggested to Ms. Cowhig that, given the disparity in size and operations between Moy Park and the company, they were not remotely comparable. Ms. Cowhig did not accept this assertion, saying that "everything is relative", and that notwithstanding the difference in scale, the multiplier of 7.9 in the sale of Moy Park was instructive.

27. As regards the S&P 500 research in the 'consumer discretionary' category, it was put to Ms. Cowhig that this related to current and past S&P 500 companies, and that the eligibility market cap for such companies was $8.2bn or greater. It was suggested that this might be an appropriate measure of the multiplier for international giants such as Starbucks, Amazon or McDonalds, but was entirely inappropriate for a small company with a turnover in the region of €2m. A similar point was made in relation to the PCPI, in respect of which it was put to Ms. Cowhig that the deals considered for this index have an average enterprise value of £40m sterling. Ms. Cowhig again expressed her view that the multiples emerging from these items of research were of assistance notwithstanding that the companies and transactions were of a vastly different order to the company.

28. It was suggested to Ms. Cowhig that other sources suggested that the multiple for an entity of the size of the company would invariably be much lower. Overheadwatch.com itself had suggested that most small businesses managed to sell based on an earnings multiple of 1-4. Other data were put to Ms. Cowhig to suggest that smaller businesses would have a multiplier which was much smaller than the sort of figures gleaned by Ms. Cowhig from her research. It was put to Ms. Cowhig that the very document upon which she had relied from overheadwatch.com made the point that "…not only will the larger company enjoy a larger valuation, which makes perfect sense, but the larger company would also benefit from a higher EBITDA multiple. This is because a larger business is inherently less risky than a smaller one". The article then went on to say that "…in general, any business with an EBITDA somewhere between the $1m and $10m dollar range will enjoy an EBITDA multiple anywhere between 4.0 times to 6.5 times."

29. Ms. Cowhig was examined in relation to her investigation of the company other than her research. She denied the assertion that the business was inherently risky, on the basis that it had substantial EBITDA over the last ten years. She accepted that she had not visited the premises or interviewed the management, although she had visited the company's accountant and had unfettered access to the company's books and records. She did not accept that the market was volatile, as sales had been consistent over the last ten years. As far as Ms. Cowhig was concerned, the sales performance of the company over the previous ten years had proved that it was a successful stable business. In response to the suggestion that the company was under threat from competition, Ms. Cowhig expressed the view that the figures as set out in the accounts "speak for themselves", and that they suggested that there was no reason to believe that there will be difficulties in the market into which the company sells.

30. In all the circumstances, Ms. Cowhig did not accept the principle that a smaller business will necessarily result in a smaller multiple, and in particular did not accept that the appropriate multiple would be somewhere between 1 and 4.

31. Mr. Paul Clarkin qualified as a Chartered Accountant in 1972. He outlined his experience working in industry in Ireland and the United States, some of which involved buying and selling companies. In recent years he operated what he called a 'brokerage for buying and selling businesses', and has acted as a business consultant, advising in relation to the sale of approximately twenty businesses.

32. Mr. Clarkin adopted as part of his evidence a report as of 10th April, 2019, which comprised his valuation of the business of the company as of 28th February, 2019. Mr. Clarkin set out in the report his overall view of the company's operations, and had the benefit of input from the respondent in this regard. Mr. Clarkin opined in the report that the "business performance of the company has been highly volatile both as to sales and margins with high risk both as to security of supply and stability of markets" [pg. 4]. Given what he saw as the "volatile nature of the market", Mr. Clarkin stated that "…providing a realistic basis for a valuation based on a projection as to future maintainable profits, is out of the question and together with the microscale of the business, rules out the satisfactory adoption of the typical cash flow methods of valuing the business. In addition, considering the level of risk associated with the sector, the company is highly invested in capital and associated equipment."

33. Mr. Clarkin was of the view that the characteristics of small businesses affected the application and relevance of methods of valuation. Theoretically, the value of the company "…is the present value of expected future earnings. The lack of stability, insecurity and reliability in forecasting future earnings makes this approach problematic for a small business as is the case with the company". Mr. Clarkin considered and rejected methods of valuation such as a "discounted cash flow" or "liquidation value" basis as being inappropriate for the company.

34. Mr. Clarkin was of the view that a "seller's discretionary earnings" ['SDE'] approach was the appropriate method of valuing the company's income. According to Mr. Clarkin, this method "…aims to identify the amount of discretionary earnings available to an owner…discretionary earnings are the cash profits (or losses) arising from normal day to day business transactions which are available to the owner". [pg. 8]

35. As regards an appropriate multiplier, Mr. Clarkin's approach involved using a database of statistics compiled from thousands of business sales in what he deemed to be an appropriate sector. He made the point that, as those figures are based on actual sales of similarly sized businesses, they give a realistic view of current prices in the market place. The statistics were extrapolated to give multiples of SDE's and, according to Mr. Clarkin, were typically 1.5 to 3 times SDE, depending on the sector.

36. Mr. Clarkin set out at pages 7-9 of his report the "assumptions and considerations" which he took into account in his opinion. In as far as they related to the appropriate multiple,

they may be summarised as follows: the company is a small business with turnover of less than €4m, and is "not capable of existence independent of the owner". Its future performance is "…very much dependent on international weather and market conditions". It is a "highly specialised area with limited opportunities to sell the business in Ireland". Mr. Clarkin assumed payment of 50% of the purchase price by any prospective buyer, with an earn-out by the owner over two years. The valuation was to be carried out at "fair value", defined as "the amount at which the shareholding could be bought or sold between willing parties", and on the basis of how the business is presently run... 'not on how it is perceived someone else might run it'".

37. In order to derive an appropriate multiplier, Mr. Clarkin consulted Bizcomps, a US transaction database which *inter alia* compiles details of thousands of transactions for statistical analysis. The database records details of business transfers for approximately 12,000 small US businesses. Bizcomps compiled no such details for Irish or UK businesses, but stated that its databases were "used extensively by Irish and UK brokers". Mr. Clarkin sought data relating to sales of companies with turnover of less than €4m. Figures were also sourced according to the appropriate "standard industry code" ('SIC'), in order to access data relating to transfers of similar companies in the same or a comparable industry.

38. This research yielded data in relation to nine 'transaction market comparables'. One of these comparables was excluded by Mr. Clarkin as being anomalous and not broadly in line with the trends established by the other eight. There were no background details of the circumstances in which the sales had taken place, such as the specific type of business, or where in the US the sale had taken place. The details available were figures in relation to such matters as the asking price, the annual gross sales, the SDE, the actual selling price, the deposit, the value of equipment fixture and fittings, and the multiplier to be applied to the SDE. Two of the sales had taken place in 2008, with the remainder taking place in the period 2012-2015.

39. The first two of the eight transactions bore a SIC of 5146. This code covers 'fish and seafoods' and the narrative description of the businesses comprised in this category is as follows:

> "Establishments primarily engaged in the wholesale distribution (but not packaging) of fresh, cured or frozen fish and seafoods, except canned or packaged frozen. The preparation of fresh or frozen packaged fish and other seafood, and the shucking and packing of fresh oysters in non-sealed containers, are classified in manufacturing, industry 2092…".

40. The other six transactions bore the designation SIC 5421, which covers 'meat and fish (seafood) markets, including freezer provisioners'. The narrative description of this category is:

> "Establishments primarily engaged in the retail sale of fresh, frozen, or cured meats, fish, shellfish, and other seafoods. This industry includes establishments

primarily engaged in the retail sale, on a bulk basis, of meat for freezer storage and in providing home freezer plans…".

41. The sales of the two companies in the SIC 5146 category were stated to have involved multipliers of 4.6 and 2.3 respectively. The average of these multipliers was 3.45. The six companies in the SIC 5421 category had multipliers of between 0.8 and 3.0. The average of these multipliers was 1.82. The average of the multipliers of the nine companies – including the anomalous excluded company – was stated to be 2.23. In his report, Mr. Clarkin formed the judgment that this multiplier should be further reduced by applying a percentage of 66% to it, which resulted in a multiplier of 1.47, which Mr. Clarkin rounded up to 1.5. Having calculated the SDE at €162,000, he applied the multiplier of 1.5, and arrived at a value of €243,000 as the present value of the future earnings of the company. When this figure is added to the net asset value of the company as calculated by Mr. Clarkin – which does not concern the court as it has been agreed between the parties at €350,000 – Mr. Clarkin ascribes a "total enterprise value" of €556,000 to the company. This may be contrasted with Ms. Cowhig's view, on an EBITDA approach, that the company, as of 30th April, 2018, was worth €2,680,061.

42. Mr. Clarkin sought to bolster his view as to the correctness of the selected multiplier by use of an exercise which he said had been developed by him and various colleagues over a number of years. This involved rating the business on the basis of ten criteria: stability of historical profits, business and industry growth, type of business, location and facilities, stability and skills of employees, competition, diversification of products, services and geographic markets, desirability and marketability, depth of management, and terms of sale. On the basis that, in Mr. Clarkin's opinion, a business of the size of this company would not have a multiplier of more than three, the company would be assigned a value of between 1 and 3 in respect of each of these 10 criteria. The criteria themselves were weighted in descending order from 10 down to 1 in the order set out above. For instance, Mr. Clarkin was of the view that the company was entitled to a multiplier of 1.75 out of 3 for the category 'stability of historical profits'. Multiplied by a weighting of 10 for this category, this gave a weighted value of 17.5. Mr. Clarkin assigned a value of 1.25 out of 3 to the company in respect of the next category, 'business and industry growth', to which a weighting of 9 was applied, giving a weighted value of 11.25.

43. This process was carried out for all ten categories. The weighted values of all ten categories were added, and found to be 92.75. This figure was divided by the sum of the weighting values: 10+9+8 etc. This gave a figure of 55. The appropriate multiplier, according to the weighted values, was therefore 92.75 divided by 55, which was 1.69. This fortified Mr. Clarkin in his view that his calculated multiplier of 1.5 on foot of the Bizcomps' data was broadly correct.

44. Of course, this weighting exercise was subject to certain key assumptions: that the multiple to be applied to the SDE for an entity the size of the company could never be more than 3; and that the weighting ascribed to the 10 criteria accurately reflected the relative significance of those factors to the company. The exercise also required Mr.

Clarkin to select a value of the multiplier between 1 and 3 based on his assessment of the company's circumstances.

45. Given the agreement between the applicant and the respondent that the supposed indispensability of the respondent was not being pressed, counsel for the respondent very properly asked Mr. Clarkin on examination in chief whether, if the business could be operated without the respondent, that factor would affect his valuation. Mr. Clarkin said that it would, and suggested that, in those circumstances, a multiple of between 1.75 and 2 would be warranted. Mr. Clarkin was also asked whether, in circumstances where the parties had agreed an EBITDA of €215,000, and given that the calculation of EBITDA would result in a lower figure than would have resulted if the parties had agreed an SDE figure, he might accept that a slightly higher multiplier was warranted. Mr. Clarkin agreed with this proposition, stating that he thought an increase in the multiplier of 10% in those circumstances was appropriate.

46. In summary, Mr. Clarkin's net position appeared to be that he might be prepared to accept a multiplier of 2.2, which is consistent with the 2.23 multiplier emerging from the Bizcomps' data, albeit that the average figure of 2.23 included a multiplier from the anomalous excluded transaction.

47. As with Ms. Cowhig, Mr. Clarkin's methodology was subject to trenchant criticism on cross-examination. It was suggested that the Bizcomps' exercise was fundamentally flawed in a number of respects, but particularly by the inclusion of six items from SIC 5421, which concerns establishments primarily engaged in retail rather than wholesale business. It was suggested that there could be no comparison between a 'fish shop' and the sort of niche business conducted by the company, and the fact that the average of the multiplier of the first two entities in the sample – which were for SIC 5146 – was appreciably higher than the average multiplier for the other six entities was significant.

48. Mr. Clarkin's contention that the discount to the multiplier by the application of 66% was justified by the fact that a cash buyer will generally look for a discount, was suggested to be inappropriate in the current circumstances where the applicant was being bought out by the respondent, who would continue to operate the business. It was also suggested to Mr. Clarkin that he had given excessive weight to the difficulties which he perceived in the company's necessity to have a licence. It is fair to say that there were two views on this: the respondent's view, espoused by Mr. Clarkin, that the licence could in theory be removed or not renewed, and that it should therefore be regarded as a factor which increased the volatility of the company's trading position; and the applicant's view, that the necessity for a license was a wholly positive factor in that it constituted a barrier to entry to the market for any prospective competitor.

49. A similar difference of opinion occurred in relation to the requirement in the business for sea-going vessels. The applicant relied upon a valuation report procured by the respondent which valued the MV Blue Spirit and the MV Mon Reve at €300,000 and €45,000 - €50,000 respectively. It was accepted by both parties that, as the vessels generate the income of the company, their value should be reflected in the EBITDA with

the appropriate multiplier applied, rather than in the net asset value. The applicant made the point that, according to Mr. Clarkin's figures, the appropriate SDE figure multiplied by 1.5 gave a figure of €243,000. If this figure were correct, a buyer for €243,000 would be acquiring vessels worth €350,000, which in the applicant's submission did not make sense.

50. It seems to me that Mr. Clarkin's evidence was primarily concerned with two considerations. Firstly, he was firmly of the view that, as the company was what he called a "micro-business", it would not ever have a multiple of SDE of more than 3. Secondly, he regarded the company's trade as somewhat volatile and vulnerable to a variety of factors, most notably competition and other factors such as failure of a harvest, loss of a licence or key personnel, the necessity to replace essential equipment, and so on. His views in this regard were hotly contested by the applicant in both cross-examination and submissions.

51. Both Ms. Cowhig and Mr. Clarkin, in my view, compiled their reports conscientiously and thoroughly, and backed up their respective views with in-depth research into the company, its accounts, records and valuations where appropriate. However, it would be fair to say that neither expert resiled from their respective positions despite vigorous cross-examination of each of them. The result is that a chasm remains between their respective valuations of the appropriate multiplier.

Other matters relevant to valuation

52. In proceedings by Mr. Lynch ('the Lynch proceedings') against the applicant and a company called Appreciating Assets Limited, Mr. Lynch made an application to this Court to have the applicant's shares transferred to the Sheriff for sale. In the course of that application, the applicant swore an affidavit on 3rd November, 2017 which he exhibited to his grounding affidavit in the present application. In that affidavit, he averred that "…some years ago, John Harrington had Kush valued in an exercise that put a value (net of debt) of €1.4m on that company". The applicant went on to set out various matters which, in his view, suggested that this valuation was understated, and on the basis of which he estimated "the net of debt value of Kush to be not less than €2.1m".

53. In his replying affidavit in the present proceedings sworn on 23rd April, 2018, the respondent replied to these assertions as follows: -

> *"7. The valuation of the company contented [sic] for by the Applicant (significantly in excess of €2m) is grossly in excess of what I am informed and believe to be a fair market value of the company. Further, the basis and method of calculation upon which the applicant contends for this valuation (the price paid per hectare for Bunaw Mussels in 2007) is invalid by reason of the fact that the growing capacity of this very small site is significantly in excess of other sites together with the fact that very significant physical infrastructure was acquired in this deal".*

54. The respondent did not however express an opinion in that affidavit as to what he would have considered an appropriate valuation to be. Rather, he exhibited a letter which he

had instructed his solicitors to write to the applicant, comprising "an open offer to acquire the applicant's shares at a value to be independently determined by the court in default of agreement by the parties". This approach culminated in the unsuccessful application to Allen J. to have an independent valuer appointed. At no stage in that process did the respondent ascribe a value to the company.

55. In cross-examination of Mr. Clarkin, a letter of 10th October, 2012 from the solicitors for the respondent to the applicant was produced. This letter referred to certain offers made to the applicant, and stated that, should those options not be attractive to the applicant, the respondent would be "prepared to purchase your shareholding of 50% of Kush Seafarms Limited at fair value based on Jose's [Jose Perez Domingues, described in the letter as a "key employee"] workings (last company valuation being €1,344.385.00) and settlement of amounts due by directors. Clearly, the precise valuation will vary from time to time and a final figure will need to be agreed or determined."

56. Mr. Clarkin did not accept that this letter had any relevance to the exercise performed by him. Counsel for the respondent submitted that the court should not have regard to this offer as an indication of valuation, given that the court had no evidence as to the elements of the valuation or the circumstances in which it was being made. Counsel said that, if the court did have regard to it, the court should have equal regard to an averment sworn by the applicant on 9th March, 2015 in the Lynch proceedings, in which he said "…as for Kush, the book value of my shareholding (based on the accounts of that company for the year to 30th April, 2014) is in the order of €357,000".

57. No further evidence was adduced to explain this figure, or as to whether the applicant received advice as to the figure or simply inferred from a perusal of the accounts that it represented the book value of his shareholding. In particular, it is unclear as to whether this figure took account of a multiple of EBITDA, or some similar mechanism for estimating the value of future profits.

58. I accept the submission that the figure of €1,344,385 referred to in the letter of 10th October, 2012 cannot be regarded as determinative of the value of the company at that time, due to the absence of corroboration or context in relation to that figure in the evidence before me. I do think however that I can take into account the plain words of what was an open letter as indicating that the respondent was prepared at that time to purchase the applicant's shareholding of 50% of the company at a certain value to be determined, with a value of €1,344,385 being given by him as being indicative of the company's value. The letter was clearly an invitation to treat on the basis that the amount of the company valuation was likely to be of this order.

59. I do not think however that I can have regard to the figure of €357,000 referred to by the applicant in his affidavit in the Lynch proceedings as representing the value of his shareholding in the company at that time, due to the complete absence of any information as to how the applicant arrived at this figure.

The Law

60. There was no significant disagreement between the parties as to the principles to be applied by the court in assessing the evidence of experts. As I have mentioned, both parties accepted that I was entitled to have regard to evidence given by the experts in their reports and in the course of their evidence which would normally be regarded as hearsay. Counsel for the respondent referred me to the judgment of the Supreme Court in *People (Director of Public Prosecutions) v. Boyce* [2009] 2 IR 124, in which Fennelly J. cited with approval a ruling of the Court of Criminal Appeal in that case as follows:

> *"Furthermore, in a long established exception to the hearsay rule, an expert can ground or fortify his or her opinion by referring to works of authority, learned articles, recognised reference norms and other similar material as comprising part of the general body of knowledge falling within the field of expertise of the expert in question."*

[Referred to at para. 49 of the judgment of Fennelly J.]

61. I was also referred to the decision of the Supreme Court in *Karen Millen Fashions Limited v. Dunnes Stores* [2004] 1 IR 10, a case in which the plaintiff sought reliefs against the defendants in respect of an alleged infringement of an unregistered community design pursuant to Council Regulation (EC) No. 6/2002 of three items of clothing. At para. 25 of his judgment, O'Donnell J. considered the rule that expert witnesses should not give evidence as to the ultimate issue, and stated as follows:

> *"For my own part, I can see how it is at least convenient to permit experts to give evidence in general as to their conclusions, so long as it is very clearly understood that what are important are the reasons leading the expert to that conclusion rather than the fact of the conclusion itself. Anything else is somewhat artificial. It is a matter of near certainty that the only expert witnesses called by either side will have formed an opinion favourable to that side and their evidence can often be best understood when both the reasons and conclusions are stated so long as it is understood and appreciated that the reasons leading an expert to a particular conclusion are the important matters for the court to consider…."*

62. In Irish Press Newspapers Limited & Anor, unreported, Supreme Court, 25th May 1995, the Supreme Court held that the trial judge in that case, having analysed the evidence of the two valuers who gave opposing evidence in the matter, was entitled not to accept the approach or conclusions of either. Blayney J. stated that, in accordance with the decision of the Supreme Court in *Hay v. O'Grady* [1992] 1 IR 210, the Supreme Court could not disturb findings of primary fact made by a trial judge provided there was credible evidence to support them, and was satisfied that there was credible evidence to support the findings of the trial judge on valuation.

63. In the present case, both parties agreed that the appropriate principles concerning the way in which a court should assess expert evidence of an appropriate multiplier in the valuation of a company's profits could be found in the decisions of the Court of Appeal and the Supreme Court in Re *Elst, Donegal Investment Group plc, v. Danbywiske & Ors.,*

[2016] IECA 193 and [2017] IESC 14 ('Donegal Investment'). In that case, the Court of Appeal had held that the finding by the High Court of an EBITDA multiplier of 6.1 which was an arithmetically derived median of multipliers from a subset of transaction comparables was not supported by evidence. As Finlay Geoghegan J. stated at para. 76 of her judgment:

> *"…the trial judge's finding of an EBITDA multiplier of 6.1 cannot be sustained on the evidence. There was no evidence to support the use of an arithmetically derived median of multipliers from a subset of transactions comparables as decided. Firstly, all the experts were agreed that arriving at the relevant EBITDA multiplier involves the exercise of professional judgment based on transaction and trading comparables and deriving a range of EBITDA multipliers based on these comparables. It is a qualitative not mathematical exercise. Therefore, the error of approach by the learned High Court judge, for which there was no evidential support, was to derive an EBITDA multiplier by reference to a purely mathematical approach when all the experts agree that this was not an appropriate manner in which to generate an EBITDA multiplier. Furthermore, all experts were also agreed that in arriving at the appropriate multiplier to be used in the valuation of shares in the company using the market approach, it was necessary to consider and assess both transaction and trading comparables. The conclusion of the trial judge is, however, based only upon an assessment of one data set of the transaction comparables and does not make any assessment by reference to the trading comparables at all."*

64. Finlay Geoghegan J. went on to state that:

> *"79. The Court has concluded that, although there was before the trial judge significant complex evidence in relation to valuation, much of which he took into account and made decisions in respect of certain elements from which there is no appeal, there were, nevertheless, key elements of the expert evidence in relation to the proper approach to determining the multiple to be used with which he simply did not engage and in respect of which he gave no reasons for departing from what appears to this Court to have been a consensus amongst the experts, namely, the necessity to form a judgment or considered expert view as to the appropriate multiple following upon an assessment of multiples derived from relevant transaction and trading comparables. In those circumstances, consistent with the approach of the Supreme Court in Doyle v. Banville [2012] IESC 25 and Hay v. O'Grady [1992] 1 I.R. 210, it is a finding which cannot be upheld.*
>
> *80. In reaching this conclusion, the Court is not intending to indicate that the trial judge was bound to follow the conclusion reached by expert testimony on the multiple offered by one or other party. As is clear from the judgment of Blayney J. in Irish Press plc. v. Ingersoll Irish Publications Ltd. [1995] 2 I.R. 175, a trial judge is entitled to reach his own conclusion, albeit that that is different to the conclusions reached by the expert evidence of either party. Nevertheless, in a*

matter such as this, where there has been a consensus of approach to market valuation as between the experts - albeit differing in its application to the particular facts - then if a trial judge is going to depart from and use a different approach, this is a matter [which] must be explained and explained by reference to the key elements of the evidence before him.'

65. On appeal, these principles were cited with approval by Clarke J. (as he then was), who addressed the degree of explanation required by a trial judge who proposes to adopt an approach different from those advocated by the experts:

"7.4 where the trial judge adopts an approach which is significantly different from the positions espoused by the experts in their testimony, there is a greater obligation on the trial judge to explain why a particular approach is favoured. Where a trial judge favours one approach espoused by an expert over another espoused by a different expert then that choice may not require a great deal of explanation in a judgment other than to indicate in brief terms the reason why the views of one expert was preferred. Obviously each of the experts will have given their reasons for preferring their own approach.

7.5 But where the trial judge finds 'a third way' then a much greater degree of explanation is required for otherwise the parties (and appellate courts) will not know why that approach found favour for the argument in favour of the approach in question will not have been made by either expert."

66. At para. 7.7 of his judgment, Clarke J. succinctly summarised the essential issues involved in expert appraisal of comparators for the purpose of identifying an appropriate multiplier:

"7.7 It is certainly correct that none of the experts suggested that the valuation exercise required to be carried out in determining the multiplier involved a mathematical calculation. Rather it was agreed that it was necessary to exercise an informed judgment on the appropriate multiplier having regard to the evidence concerning all potential multipliers from comparable companies weighted in accordance with the extent to which companies might be regarded as close comparators. That expert evidence is hardly surprising. It will very rarely be the case, in a valuation exercise, that there will be an exact comparator. Perhaps in valuing assets (such as residential houses) where there is a regular market for very similar properties, it may be possible to find very close comparators in sufficient numbers to reach a fairly clear view. But significant companies always will have differences between them. Differences in their geographical reach, their product ranges, perception as to their prospects for the future, management strengths and a whole range of other factors may, in the particular circumstances of an individual case, appear to be of a special importance".

67. Clarke J. concluded that:

"7.13 For the reasons which I have already sought to identify, I am satisfied that a trial judge can adopt an approach which differs from that of any of the experts who give testimony provided that the trial judge puts forward a sufficient reason rooted either in the evidence or in logic for adopting the approach concerned…"

Discussion

68. Having set out the principles to be applied in considering the evidence of the experts, the court must consider the application of these principles to the evidence given by the experts.

69. One of the obvious problems facing both experts in this case was the difficulty in sourcing appropriate comparators. In *Donegal Investment*, the EBITDA used by the trial judge on the basis of expert evidence was €44.9m. The multiplier was to be selected following an assessment of 'transaction comparables' or 'trading comparables'. These categories were described by Clarke J. as follows:

"6.6 In any event, as noted earlier, the market approach requires identifying the sort of multiplier that the market is likely to apply to EBITDA in the context of a company of the type under consideration. The market itself can be divided into two sectors. First, there are companies which are publicly quoted. Such companies are referred to as trading comparables. The value of such a company is, of course, fixed by market forces in the light of the views which investors in shares take. In the case of such companies it is possible to calculate the multiplier which, from time to time, the market considers appropriate.

6.7 Second, there are specific transactions where companies or businesses are taken over in a single transaction and where there may be information available to experts as to the price actually paid and other relevant details of the companies' financial position. Such companies are referred to as transaction comparables. Again, in such circumstances it is possible to calculate the multiplier which operated.

70. Neither side sought to use any trading comparables as comparators for the company, presumably on the basis that a publicly quoted company could not reasonably be used as a comparator for a small company with a turnover in the region of €2m. However, it was also difficult to find appropriate transaction comparables for a number of reasons.

71. Firstly, information in relation to the performance of private companies is limited and generally not freely available, and reliable data concerning multipliers used for the sale of shares in private companies is very difficult to find. This in turn makes difficult the compilation of data which could show general trends in the market for the value of such companies. Secondly, as Clarke J. pointed out in *Donegal Investment*, "significant companies always will have differences between them", and this is perhaps even more true of small companies, which are even more likely to have a range of individual characteristics which differentiate them fundamentally from other companies of similar size and render them inappropriate as comparators.

72. As regards Ms. Cowhig's evidence, it is fair to say that the only approach which she used or even considered in relation to the value of future profits was to arrive at a figure for EBITDA and apply a multiplier. In relation to the multiplier, Ms. Cowhig produced a booklet entitled 'Book of Comparable Multiples'. I have set out at para. 23 above the items in this booklet to which Ms. Cowhig had regard in coming to the conclusion that 8 was an appropriate multiplier.

73. Ms. Cowhig produced only one specific transaction comparable, that relating to Moy Park, in which a multiplier of 7.9 was used. I have set out at para. 26 above the manner in which use of this comparator was criticised by the respondent. In my view, those criticisms were well founded. I do not think a company of the size of Moy Park and the scale of its operations can be reasonably considered as an appropriate comparator for the company. While both companies are in the business of exporting foodstuffs, even the minimal information supplied by Ms. Cowhig about Moy Park – which included the assertion that the "enterprise value" of Moy Park was fixed at US$5bn. – would suggest that any similarity between the two companies ends there.

74. Ms. Cowhig then made reference to a range of resources containing information about EBITDA multiples. These are set out at para. 23 above. The first of these was the February 2017 article by overheadwatch.com, which suggested an EBITDA as of January 2017 for 'food wholesalers' of 11.63. No further context or explanation for this figure is given, and it follows a statement in the same article that "…any business with an EBITDA somewhere between the one million and ten million dollar range will enjoy an EBITDA multiple anywhere between 4.0 time to 6.5 times. Needless to say, these numbers are extremely generic, and plenty of industries have a multiple above or below that average." In my view, this article is not an authoritative source for the proposition that a multiplier of 11.63 is warranted.

75. In general, I found the criticism by the respondent's counsel in cross-examination of the sources relied upon by Ms. Cowhig to be justified. The sources used, in general terms, related to companies the size of which made it clear that their enterprise was of a completely different magnitude and a degree of complexity which rendered them unfit for comparison with the company. I did not agree with Ms. Cowhig's assertion that these companies could be used as a comparator because "everything is relative".

76. Ms. Cowhig was unswerving in her reliance on the EBITDA approach. Her view that the company was not volatile or inherently risky was based on her view of the company's accounts, in particular that it had had substantial EBITDA over the last 10 years, rather than on any views elicited from management or external sources. Ms. Cowhig did have the benefit of the views of the applicant, who was involved in the establishment of the company and certainly has an understanding generally of how the business operates, and I do not doubt that she considered the various factors mentioned by her in her report – set out at para. 21 above – in arriving at a multiple of 8. However, in my view the evidence of multiples considered by her led her to select a multiplier for which there was no acceptable or appropriate evidential basis.

77. Mr. Clarkin, as we have seen, restricted his comparables to entities with turnover of less than €4m. However, this yielded data in relation to eight transactions, only two of which fell under the SIC 5146 Code of 'Fish and Seafoods'. The other six transactions were designated under SIC 5421: "meat and fish (seafood) markets, including freezer provisioners". As counsel for the applicant pointed out in cross-examination, the former is a designation for wholesale distribution businesses; the latter is for retail businesses.

78. The transactions occurred in undisclosed locations in the US between 2008 and 2015. No context or explanation was provided for any of the transactions over and above the bare financial details which I have set out above.

79. While these transactions escape the criticism levelled at Ms. Cowhig's comparables that they are of a completely different order in terms of size, they are also unsatisfactory in a number of respects. Four of the eight comparators have an 'annual gross sales' figure of approximately €600,000 or less. Only two of the comparators – one from each of the 5146 and 5421 categories – have an annual gross sales figure close and clearly comparable to the sales figure of the company for year-end 30th April, 2018 of €2,149,368. The absence of background or context makes it impossible to compare the characteristics of these entities to those of the company, but in my view, the sample group is not large enough to allow for reliable inferences as to an appropriate multiplier, particularly in view of the justifiable reservations as to whether entities in SIC 5421 are comparable at all, given that the designation includes meat markets 'including freezer provisioners', and is for retail businesses rather than wholesale.

80. Mr. Clarkin, in considering the appropriate multiple, very properly took into consideration matters which he considered relevant to the performance of the company. In his oral evidence, he laid some emphasis on his assumption that "the business would probably collapse" if the respondent ceased involvement with the company. A problem with the harvest would "wipe out" the company. "Security of supply" was a problem, as the mussels are produced under licence, and the company did not have the same security in terms of production as an entity that owned a factory. He said that demand was declining in the French market, with increased competition from Spanish, Italian and Chilean product. It would be fair to say that Mr. Clarkin, while accepting that the company had been generally profitable to date, considered the company to be operating in a volatile market, and that its position was precarious, particularly if the circumstances of the purchase of the company brought to an end the involvement of the respondent.

81. Mr. Clarkin's assumptions in his report were put to Ms. Cowhig in her examination in chief. Ms. Cowhig, who did not have the benefit of discussions with the respondent, based her assumptions mainly on the books and records of the company, and disagreed with Mr. Clarkin's assumptions. She saw no reason to believe that the involvement of the respondent was essential to the business. She emphasised the reliability of the financial statements, which she pointed out must be tax-compliant, and the consistent profitability of the company. She was particularly critical of the assumption by Mr. Clarkin that a sale of the business would involve a deposit of 50% with an earn-out of the balance over two

years. She did not accept that this was typical, saying that the bulk of consideration was usually paid over at the conclusion of the sale. It followed that she did not accept Mr. Clarkin's assumption that, if a full upfront payment were required "…then a large discount would be requested or more likely the sale will not be completed".

82. Assessing the current trading performance and future prospects of the company poses a particular difficulty for the court in the present case. Mr. Clarkin clearly sought instructions from the respondent in this regard, and it is fair to assume that much of his evidence represents what he was told by the respondent. As I have said, the agreed position of the parties was that I could consider otherwise clearly hearsay evidence in this regard, although the weight to be given to such evidence would be a matter for me. In the event, the respondent did not give evidence at the hearing, with the result that his views on the performance and prospects of the company were not directly available to the court, nor could they be tested by cross-examination.

83. I am mindful also of the dicta of Charleton J. in *James Elliott Construction Limited v. Irish Asphalt Limited* [2011] IEHC 269, in which he commented that "*every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability*". Charleton J. went on to say that:

> *"…the most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been genuinely and objectively considered on the basis of their merit. A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team. Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view. As with demeanour, this is not readily demonstrated on a transcript of evidence. Rather, to a trial judge, it can be possible to see the degree to which a witness is thinking through the potential for an opposing theory before giving a reasoned answer. Experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important".*

84. After citing these dicta with approval, Clarke J. in Donegal Investment went on to say:

> *"5.3 It follows that the assessment of expert testimony does require a trial judge to assess the way in which that testimony is given. As Charleton J. pointed out, the way in which an expert responds to questioning or to the views of an expert witness tendered by the other side, can play an important role in the assessment by the trial judge of the extent to which the expert's views may truly be said to be uninfluenced by the case which his or her side is seeking to put forward.*

Furthermore, experience has shown that it is much easier to engage with the detail of evidence which is explored and explained (and, indeed, challenged) at an oral hearing by being present at that hearing rather than reading a transcript of what transpired".

85. I wish to emphasise that I consider Mr. Clarkin to have discharged his duties to the court as an expert witness honestly and conscientiously. While his status as an expert was challenged on cross-examination, I am satisfied to accept him as an expert in the area of acquisition of businesses. However, some of his assumptions are in my view unsound. Firstly, the parties agree that the indispensability or otherwise of the respondent is not an issue. In any event, what is proposed is that the respondent would buy out the shareholding of the applicant. The only issue is the price at which the sale would be concluded. The respondent will continue to be involved in the business, and Mr. Clarkin's concerns in this regard are without basis.

86. Secondly, while a discount might normally be required where a purchaser pays up front – and Ms. Cowhig did not accept this as a general proposition – that does not apply in the present case, in which what is proposed is a simple cash buy-out of the applicant by the respondent. The application of 66% of the multiplier of 2.23 is therefore not warranted in the present case.

87. Thirdly, Mr. Clarkin took a particular view that the fact that the company operates under licence rendered the business of the company precarious and unstable, as a licence might not be renewed. There was however no evidence or even suggestion before me that this was likely to happen and, as pointed out by the applicant, the necessity to obtain a licence may constitute a barrier to entry for competitors. While the possibility of a harvest being compromised by toxins such as 'red tide' was also mentioned, I did not hear any evidence that this was likely to happen in what are class A waters, or that the respondent considers it a particular risk.

88. Fourthly, Mr. Clarkin took a downbeat view of the prospects of the company in terms of competition and contraction of markets. Once again, the evidence was somewhat nebulous in this regard. While there was reference to some factors which might impact adversely on competition, every company is subject to risk in this regard. What is not contested is that the company's sales figures for year-end 30th April, 2018 is the largest of the eleven years from 30th April, 2008 surveyed; that the company is expanding into a number of different markets; that the respondent wants to take over whole ownership of the company, and has been keen to do so since at least 2012; and that the company is currently in the process of acquiring a further eight hectares to increase its production capacity. While the vicissitudes of trade and unforeseen circumstances must be borne in mind, the evidence suggests to me that the company is profitable and stable, and that Mr. Clarkin's views are unduly pessimistic.

Conclusions

89. Having considered the totality of the written reports and oral evidence of the experts, and the submissions of the parties, my conclusions are as follows:

(1) I accept Ms. Cowhig's evidence that the company is generally profitable and shows reasonably strong EBITDA in the eleven years to 30th April, 2018.

(2) While there is uncertainty in any prediction of a company's future, I am of the view that the company is stable and the conditions it faces in the market, while challenging, are not such as to render the company's position precarious.

(3) I am fortified in this conclusion by the fact that the respondent has been eager for some years to acquire sole ownership of the company, and is currently seeking to extend its operations.

(4) I do not consider that the comparators or research cited by Ms. Cowhig support her opinion that a multiplier of 8 is warranted.

(5) I do not regard the SIC 5421 comparators from the Bizcomps' database adduced by Mr. Clarkin to be appropriate comparators.

(6) The SIC 5146 comparators are of some relevance to discerning an appropriate multiplier, given that they comprise examples of transactions from what seems to be an appropriate and comparable category of transactions: enterprises involving wholesale distribution of fish and seafoods with turnover of less than €4m.

(7) The database overheadwatch.com, relied upon by both parties, suggested in its article of February 22nd, 2017 relied upon by Ms. Cowhig that businesses with an EBITDA of between $1m and $10m 'will enjoy an EBITDA multiple anywhere between 4.0 times to 6.5 times' (see para. 74 above). The same article also expressed the view that a larger company would benefit from a higher multiple of EBITDA because 'a larger business is inherently less risky than a smaller one'. The respondent relied on an overheadwatch.com article from November 24th 2017 which suggested that "…most small businesses manage to sell based on an earnings multiple of 1-4. This means that the owners get between 1 and 4 times their SDE. The multiple is related to how attractive the business is for a buyer." The term 'small businesses' was not defined for the purpose of the article.

(8) Taking all of the foregoing matters into account, and having considered the detailed oral and written evidence of both experts, I am of the view that an entity with a turnover similar to that of the company is more likely to warrant a multiple in the range of 1-4 than the 8 which Ms. Cowhig suggests.

90. However, while I think that Mr. Clarkin's range is more appropriate than that of Ms. Cowhig, I do not consider it appropriate to adopt the methodology used by Mr. Clarkin, or that his Bizcomps' multipliers offer sound comparators for the reasons set out above.

91. This places the court in something of a quandary. It is clear from the dicta quoted above in *Donegal Investment* that the trial judge is entitled to adopt an approach which is significantly different from the position espoused by the experts in their testimony. In fact, counsel for both parties emphasised this in submissions to me. It was clear that, the

Respondent having unsuccessfully attempted to persuade Allen J. to appoint an independent valuer to either give a binding valuation, or to assist the court in doing so, the parties are eager to bring the process to a conclusion and, to that end, want the court to assess the multiplier even if that means departing from the methodology used by the experts.

92. However, how is the court to do this? Given my view that the comparators on both sides are unsatisfactory, and the absence of any first-hand evidence as to the operations and trading outlook of the company, there is a dearth of material from which a court could make a reasoned assessment of the multiplier.

93. Nonetheless, I have attempted to estimate a multiplier which I believe is fair in all the circumstances, having considered and weighed all the evidence available to me.

94. As I indicated above, it appeared that Mr. Clarkin was prepared to accept a multiplier of 2.2 (see paras. 45-46 above). However, in arriving at his multiplier, Mr. Clarkin had erroneously applied a percentage of 66% to his original figure, derived from the Bizcomps' comparators of 2.23, on the basis that there would be a discount for a purchaser paying up front. When the anomalous transaction is excluded, the average of the multipliers remaining is 2.225. If the increases which Mr. Clarkin was prepared to countenance, referred to at para. 45 above, were applied to this figure rather than 1.5, Mr. Clarkin's multiplier would have been somewhere in the region of 2.75 – 3.

95. There is also the fact that the respondent, in October, 2012, was prepared to treat with the applicant on the basis of purchasing his 50% shareholding pursuant to a company valuation, the 'last company valuation being €1,344,385'. The sales figures for year-end April 2012, 2011 and 2010 were €1,557,284, €1,381,456 and €1,467,491 respectively, which yielded profits before tax of €9,164.00, €36,827.00 and €116,976.00. Sales figures for the year end April 2018, 2017 and 2016 are all greater than those for the period 2010 – 2012. Profits before tax of €128,748.00 and €96,247.00 were made in 2018 and 2016, with a loss in 2017 of €17,817.00 – the only year between 2008 and 2018 in which the company incurred a loss.

96. While this is an extremely simplistic snapshot of the health of the company in the years leading up to and including 2012 and 2018, it is merely by way of illustration of the general picture which emerges from the profit and loss accounts produced by Ms. Cowhig for the years 2008 to 2018. The company has had strong EBITDA in that period, and has grown its sales consistently.

97. Furthermore, for the reasons set out above, I believe that the company is in good health, and with the experience and commitment which the respondent clearly has, it has every prospect of thriving in the future. The respondent is eager to acquire the applicant's shareholding which, together with the efforts of the company to expand its markets and resources, I take to be an expression of the confidence of the respondent in the company's prospects. Having said all of that, there is no doubt that expanding into markets brings with it risk, and increased competition.

98. I do not have any acceptable evidence which would allow me to conclude that the multiplier should fall outside the range of 1-4. Mr. Clarkin's multiplier, when properly calculated, may be as high as 3. The two SIC 5146 comparators give an average of 3.45 which, while we have no background information regarding the companies and a statistical sample of two is not a proper sample at all, gives some limited comfort that a multiplier of between 3 and 4 would be appropriate.

99. Given that EBITDA has been agreed at €215,000, and that the net asset value has been agreed at €350,000, a multiplier of 4 would result in a value of the company of €1,210,000. This figure is broadly in line with the valuation mentioned by the respondent's solicitors in 2012, which itself may well have had to be adjusted further. It seems to me that, given the stable profits and good prospects of the company, tempered by the uncertainty that comes with expansion and competition, a multiplier at the highest end of the 1-4 range is warranted.

100. I am therefore of the view, based on all of the evidence before me, that 4 is an appropriate multiplier. This is a judgment in a field of expertise which is not an exact science even at the best of times. Hopefully the parties will find it acceptable, or use it as the basis for negotiation of a mutually acceptable outcome in order to bring this long-running saga to an end.

101. I will hear the parties as to the appropriate orders to be made.