



COURT OF APPEAL

Record No. 2015/486

Finlay Geoghegan J.
Hogan J.
Cregan J.

IN THE MATTER OF ELST

AND

IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF SECTION 213(F) OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

BETWEEN

DONEGAL INVESTMENT GROUP PLC

PETITIONER/APPELLANT

- AND -

DANBYWISKE, RONALD WILSON,

THE GENERAL PARTNERS OF THE WILSON LIMITED PARTNERSHIP 1,

MONAGHAN MUSHROOMS IRELAND AND ELST

RESPONDENTS

JUDGMENT (No. 2) of the Court delivered by Mr. Justice Cregan on the 27th day of July, 2016

Introduction

1. This judgment deals with two matters. These are:

(1) The respondents' appeal against the costs order of the High Court (McGovern J.) dated 5th June, 2015 in which the High Court awarded the costs of the High Court proceedings (both in relation to the valuation module and the remedy module) in favour of the petitioner/and against the respondents; and

(2) The costs of the appeal to this Court.

Background

2. After a lengthy hearing in the High Court, referred to as the "Valuation Module", McGovern J. delivered his judgment on 5th December, 2014 in which he fixed the price at which the respondents might purchase the petitioner's shares in the company at €30.6million. The High Court order was perfected on 16th January, 2015.

3. Subsequently, in a second, one day, hearing, referred to as the "Remedy Module", McGovern J., pursuant to a judgment delivered on 21st May, 2015, ordered that the respondents purchase the petitioner's shares. This order was perfected on 5th June, 2015.

4. On Friday, 5th June, 2015 McGovern J. also proceeded to deliver his ruling on the costs application in relation to the petition to include the Valuation Module and the Remedy Module. In his judgment McGovern J. stated:

"I am satisfied that it was necessary for the petitioner to bring the petition. The defendants admitted non-specific acts of oppression for the purpose of giving the court jurisdiction. The value of the petitioner's shares which has been fixed by the court is greater than the value offered by the Respondents prior to the commencement of the petition. The respondent argues that prior to the proceedings commencing, the solicitor for the petitioner made a demand on the respondents that they pay €34million for the shares and if they did not do so the matter would proceed. While it is true that the demand was made in terms which were uncompromising and the petitioner received less than that sum, there was no counter offer by the respondent.

When the third module came on for hearing the respondent admitted a specific act of oppression by way of sample and the court did not require to hear evidence on other acts of oppression. The fact that this admission was made undoubtedly shortened the length of the trial but the shortening of the length of the trial was as much to the respondents' benefit as the petitioner.

The third module was for the purpose of determining the relief to which the petitioner was entitled and that hearing was a necessary consequence of the petition being brought. While it is true that the court accepted the argument of the respondent that it should buy out the petitioner's minority interest rather than determining the matter by way of an IPO or a purchase of the majority interest by the petitioner, this does not seem to me to be a good reason for awarding the

costs of that module to the respondent.

The third module was merely a consequence of the successful petition brought by the petitioner.

Having considered the arguments made by counsel on behalf of both parties I am satisfied that it was necessary for the petitioner to bring the petition. Oppression has been conceded by the respondent and the final module has determined the nature of the relief to be granted to the petitioner. In the circumstances, I am satisfied that the petitioner is entitled to the costs of the petition and the costs will include all reserved costs and the costs of discovery."

5. Thus the learned High Court judge concluded that the petitioner was entitled to its costs in the High Court of the petition to include the Valuation Module, the Remedy Module and all reserved costs.

Submissions on High Court costs

6. The respondents have appealed that costs order to this Court. Both sides have filed lengthy submissions in relation to this appeal.

7. In relation to the valuation module, the respondents submit that they effectively "won" the valuation in the High Court because the price fixed by the High Court was much nearer to that which was argued for by the respondents than the petitioner. In broad terms, the petitioner argued for a value of approximately €63.5 million; the respondents argued for a figure of between €22.3 million - €22.6million and the court decision was for a sum of €30.6 million.

8. The petitioner submitted that the sum which was awarded by the High Court was greater than the sum which was offered to the petitioner by the respondents before the commencement of proceedings and on that basis, the petitioner submits that it was successful in the High Court.

9. Both these arguments are based upon comparing the petitioner's and the respondents' figures for the sale or purchase of shares before the hearing with the figure eventually decided on by the learned High Court judge. However, the figure of the learned High Court judge was in turn based upon the multiplier which he decided on in his judgment. The issue of the multiplier was appealed by the petitioner to this Court and this Court has allowed that appeal and has remitted the issue of the multiplier back to the High Court for further determination. In those circumstances, the figure arrived at by the High Court in relation to the multiplier is, in the view of the court, not a figure which can be used by either party. It may well be that the figure arrived at by the High Court judge on a re-trial will be closer to the petitioner's figure than to the respondent's figure or vice versa. This Court does not know this at this stage. Moreover in relation to the 2014 figures, this Court will never know that figure because this Court has directed that the re-trial is to determine a valuation as of a 2016 date and deal with the multiplier using the EBIDTA figure for 2016.

10. It is therefore impossible, as a matter of logic, to ascertain, at this stage, which side was successful in the Valuation Module before the High Court.

11. In relation to the Remedy Module, it appears that after the Valuation Module had been heard, the petitioner brought an application to amend its petition. On 13th January, 2015 the High Court made an order permitting the petitioner to amend its petition to seek an order that the petitioner could purchase the respondents' shares in the company. The respondents' response at that time was that the petitioner had a right to litigate this issue and, if it was shut out, that it might have an immediate appeal to the Court of Appeal on that point. However the respondents submitted to the High Court that such an application was, on the facts of this case, almost certain to fail and that this should have cost consequences. The remedy which had been offered by the respondents from the beginning was to purchase the shares of the petitioner.

12. Subsequently orders for discovery were made in relation to this issue and the matter was set down for an eight day hearing. However, on the morning of the trial the petitioner indicated that it would not proceed with evidence on any particular acts of oppression as the respondents conceded unspecified acts of oppression.

13. The High Court in its judgment on the remedy module identified three possible remedies which the court could grant. These were:

(1) An order directing the realisation of the company in accordance with clause 10 of the Share Exchange and Shareholders Agreement of 1st June, 2004;

(2) An order directing the respondent to purchase the petitioner's shares in the company; and/or

(3) An order directing the petitioner to purchase the respondents' shares in the company.

14. The trial judge, for the reasons set out in his judgment rejected the remedies at (1) and (3) and made an order directing the respondents to purchase the petitioner's shares in the company at the valuation set out in his judgment of 5th December, 2014.

15. Mr. Cush S.C. for the respondents therefore submitted that, in effect, the respondents were successful on the Remedy Module in the High Court and yet the High Court judge awarded the costs of the Remedy module against them. He submitted therefore that the learned high court judge erred in law in so doing.

Assessment of submissions on the High Court costs issue

16. The normal rule, under Ord. 99, r. 1 (3), of the Rules of the Superior Courts is that the costs follow the event, "unless the Court, for special cause, to be mentioned in the order, shall otherwise direct".

17. It is true that the petitioner brought its s. 205 petition against the respondent alleging acts of oppression. However in reality, the problem was that the shareholders had fallen out and needed to go their separate ways. The respondents were not refusing to buy out the petitioner's shareholding; the real dispute between the parties was in relation to the valuation of the company.

18. Thus the manner in which these proceedings were conducted was unusual. The petitioner presented its petition on 22nd December, 2013 alleging various acts of oppression since 2009. However, instead of hearing the petition to establish acts of oppression, then considering the remedies and if relevant to the remedy the valuation of the shares, an early hearing was directed of a discrete issue "to determine the price at which the respondents might purchase the petitioners shares". By order of 11th April, 2014 Kelly J. fixed a trial of such a discrete issue and gave directions. This hearing of the valuation module commenced on 23rd July, 2014 and ended in November 2014 after sixteen days. As appears from the judgment of McGovern J. of 5th December, 2014 the respondents admitted a non-specified ground of oppression so as to give the court jurisdiction to determine the valuation at which

the respondent shareholders might purchase the petitioner's shares.

19. Subsequently and until shortly before the hearing of the Remedy Module, the petitioner appeared intent on adducing evidence in relation to the acts of oppression alleged in the petition and points of claim. The solicitors for the petitioner wrote to the respondents on 16th March, 2015 seeking admission of specific grounds of oppression to shorten the proposed remedy hearing. William Fry solicitors for the respondents responded by letter of 26th March, 2015 in which they indicated that the respondents were prepared to concede a single ground of oppression to invoke the jurisdiction of the court in respect of the grounds pleaded. Subsequently, on the first day of the hearing of the remedy module on 21st April, 2015 the High Court was informed that the respondents had admitted to "unspecified acts of oppression" and on that basis it was intended to proceed with the remedy hearing without any further evidence being adduced. This remedy hearing then proceeded on submissions only over one day. Thus the manner in which the s. 205 proceedings came to be heard and determined was unusual and this is a significant factor which this Court takes into account in the assessment of the appeal on the costs issue.

20. The real "event", therefore, in the High Court was not the winning or losing of the petition; rather there were two events the first of which was the actual valuation of the shares. However as that "event" has now been remitted for re-hearing by the High Court, that "event" has not yet been determined.

21. The second event – in the Remedy Module – was, after the amendment of the petition, the decision of the High Court on the remedy. The respondents at all times had adopted the position that they would purchase the petitioner's shares at a price to be arrived at by a High Court decision on valuation. It was the petitioner's position that, in the alternative, the shares of the company should be realised in accordance with the shareholders agreement and/or that the petitioner should have the right to purchase the respondents shares in the company. The petitioner was unsuccessful on both of these points in the Remedy module and therefore in the usual way the respondents should have been awarded their costs of the remedy module in the High Court.

22. Having considered these issues, and taking into account that the petitioner was required to bring the petition by reason principally of a failure to agree on a price at which the respondents might purchase its shares and the other matters in relation to the valuation and remedy modules set out above, this Court is of the view, that on the special and unusual facts of this case and in order properly to do justice between the parties, the appropriate order in relation to the High Court costs under appeal is that there should be no order as to costs on the petition in the High Court to 5th June, 2015 (to include all costs in relation to the valuation and remedy modules and all reserved costs). Accordingly the appeal will be allowed and the order for costs in the High Court order of 5th June will be vacated.

The Costs of the Appeal Hearing

23. As set out in the first judgment of this court of 8th June, 2016, there were two appeals before the court on that date. These appeals were:

- (1) An appeal against the order of the High Court (McGovern J.) of 16th January, 2016 made pursuant to his judgment of 5th December, 2014 wherein the learned High Court judge fixed the price at which the respondent had purchased the petitioner's shares (the "valuation appeal"); and
- (2) An appeal against the order of the High Court (McGovern J.) 5th June, 2015 made pursuant to a judgment delivered on 21st May, 2015 wherein the learned High Court judge ordered that the respondents should purchase the petitioner's shares (the "remedy appeal").

24. For the reasons set out in that judgment, this Court decided that the petitioner/appellant's appeal in relation to the valuation appeal should be allowed and it remitted the matter to the High Court with directions for a further hearing on the valuation.

25. However, for the reasons which are also set out in the court's judgment of 8th June, 2016, this Court refused to allow the petitioner/appellant's appeal on the remedy appeal.

26. The petitioner/appellant submitted that, as it had been successful on the valuation appeal, it should be awarded its costs on the basis that the costs follow the event. In the alternative, the petitioner/appellant submitted that, even if the court considered the various issues which arose in the course of the valuation appeal, it was successful on most of them. These issues were:

- (1) The multiplier issue, (on which the petitioner submitted it was successful);
- (2) The "Capex" issue (which, given the court's finding, has now been remitted to the High Court for consideration);
- (3) The issue of the failure to engage with the evidence – (in respect of which the petitioner submitted it was successful);
- (4) The issues on findings of fact (in respect of which the petitioner submitted it was successful);
- (5) The issue of expert evidence (which the petitioner accepted it lost but submitted was a minor issue).

27. The respondents accepted that the petitioner was successful on the valuation issue but indicated that in reality the first, third and fourth issues identified by the petitioner were all, in effect, one issue.

28. In relation to the costs of the remedy appeal, the respondents submitted that they were clearly successful in the remedy appeal and on that basis the respondents were entitled to their costs of the remedy appeal.

29. However, counsel on behalf of the respondents also submitted that, given the dispute between the parties in the High Court and in the Court of Appeal, the most appropriate order to make, on the facts of this case, and to meet the justice of the situation between the parties, was no order as to costs in relation to both hearings. He submitted that making no order as to costs in relation to the High Court and Appeal hearings would mean that both parties would avoid time, effort and expense in engaging cost accountants and having disputes about the taxation of costs when their efforts ought to be directed elsewhere.

Conclusion on appeal costs

30. In considering the issue of costs in relation to an appeal again the normal rule is that the costs follow the event. This would mean, in the normal course of events, that the petitioner/appellant would be awarded its costs in relation to the valuation appeal in which it was successful and the respondents would be awarded the costs of the remedy appeal in which it was successful. These

costs could then be offset against one another and a net sum paid by one party to another. It is certainly the case that the valuation appeal took up some more time than the remedy appeal in the hearing before this Court. However, it is also the case that the valuation appeal involved a number of issues and the petitioner/appellant was not successful on all of those issues. It is also the case that the capital expenditure issue, which did take some time was an issue on which this Court decided it needed to make no determination given that it was remitting the multiplier issue back to the High Court for determination.

31. In the circumstances this Court is of the view that, on the unusual facts of this case and in order to do justice between the parties, the most appropriate order to make in relation to the costs of the valuation and remedy appeals is also to make no order as to costs.

32. This leaves in all three appeals only the question of costs of the costs appeal. While this is a matter upon which the parties are entitled to make submissions, it may be helpful in the interests of minimising further legal costs to set out the Court's preliminary view. The Court tends to the view that there should also be no order as to costs on the costs appeal. The parties ought to be able to agree on this but if that is not possible we will hear submissions from the parties as to costs of the costs appeal.

NO REDACTION NEEDED