**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 140

**[2015 No. 170]**

**[2015 No. 487]**

**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 (N0.3)**

**RESPONDENTS**

**JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan on the 8th day of May 2017**

1. On the 8th June, 2016 the Court gave judgment ("the first judgment") in two appeals both arising from the same High Court proceedings [2013 No. 591 COS] which had been heard one after the other. Those appeals in chronological order were: -

> (i) An appeal against an order of the High Court (McGovern J.) of 16th January 2015, made pursuant to a judgment delivered on 5th December 2014, on a discrete issue which fixed the price at which the respondent should purchase the petitioner's shares upon the basis of a then assumed 35% stake in the company at €30.6 million ("the valuation appeal"); and
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> (ii) An appeal against an order of the High Court (McGovern J.) of 5th June, 2015, made pursuant to a judgment delivered on 21st May 2015 which ordered that the respondents purchase the petitioner's shares in Elst for €26,228,571 ("the remedy appeal").

2. In the first judgment concerning the remedy appeal, the Court upheld the determination of the trial judge that the respondents purchase the petitioner's shares in Elst for the reasons set out in that judgment. The Court, however, varied the amount at which those shares were to be purchased by reason of its decision in the valuation appeal.

3. In the valuation appeal the Court decided, *inter alia*, that it could not uphold the trial judge's decision on the EBITDA multiplier to be used in the valuation of the shares in Elst ("the Company").

4. As appears from the first judgment, the parties were in agreement that if the Court did not uphold the decision of the trial judge in relation to the multiplier selected by him then at minimum that issue had to be remitted to the High Court. The Court also considered the request of the parties that it remit to the High Court "as narrow an issue as it considered possible and with directions in relation to matters which should no longer be considered as capable of dispute between the parties". This was done in the context of the express jurisdiction given the Court pursuant to O. 86A, r. 3 of the Rules of the Superior Courts to remit proceedings to the High Court "with such directions as it considers just" and also when directing a new trial to confine it to "a particular question or issue".

5. In relation to the valuation date to be used the Court stated at paras. 89 – 92 of the first judgment : -

> "89. The Court has concluded that it must accordingly remit to the High Court the determination of the price at which the respondents should now purchase the 30% shareholding of Donegal in the Company. That price is now to be determined by the High Court in a context where it has been determined that the remedy to which Donegal is entitled is to have its shares purchased by the respondents at full market value.
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> 90. There was some debate before this Court as to the date upon which the shares in the Company should be valued if this Court had to remit the matter for retrial before the High Court. Mr. Cush S.C. on behalf of the respondents submitted that in s. 205 proceedings where the remedy is a purchase of shares, the valuation may often be fixed as at the date of presentation of the petition. However, no authority was put forward in support of any principled approach to this effect. It appears to the Court that, rather, the question as to the date upon which shares should be valued when the remedy is the purchase of the petitioner's shares depends upon the facts giving rise to the remedy. On the unusual facts of this case, where there is no evidence of specific oppression and where the petitioner appears to accept that the Company is being well managed and run, the Court considers that the price should be fixed at the current value of the shares after the remedy has been finally determined.
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> 91. Upon an assumption that this judgment finally determines the remedy issue, it appears to follow that the remedy is

that the respondents purchase Donegal's shares at the current full market value. There was no submission that the admitted act of oppression had affected in any way the current market value of the shares. In another case, where proven or admitted acts of oppression are contended to have affected share value, the relevant date might have to be prior to any adverse effect of acts of oppression so found.

92. At the first valuation hearing in the High Court in July and October 2014, the price was fixed by reference to valuations carried out by the experts as of July 2014, with possibly some additional evidence in relation to one transaction comparable, Adelaide Mushrooms, taken into account in October 2014. For the purpose of the then market approach valuation, the 2014 normalised EBITDA was utilised and not appealed. It may well be that at the remitted hearing further evidence will be adduced as to the current valuation of the Company."

6. Insofar as is relevant to the issue now before the Court, the conclusion of the Court in relation to price and valuation in the first judgment was: -

"(i) That the price should be the full current market value of the shares without application of a minority discount, or discounted cash flow or marketability discount.

(ii) That the EBITDA to be utilised should the 2016 normalised EBITDA determined in the same manner in which the 2014 normalised EBITDA was determined at the first hearing by Mr. Lindsay and utilised by the trial judge."

7. The judgment was delivered and handed down on 8th June, 2016. The parties were given the opportunity of considering the judgment prior to the order to be made pursuant thereto being finalised. The matter was listed for 17th June for the purpose *inter alia* of considering any clarification requested in respect of the terms of the order proposed in the judgment. A draft agreed order was submitted by the solicitors for the parties and on 16th June the solicitors for the appellants wrote to the Court referring to para. 90 of the judgment and indicating that their client wished to raise the following clarification with the Court in respect of the judgment: -

"With regard to para. 90 of the judgment, please clarify the precise date upon which the shares in the Company should be valued. Is it the date of the judgment or the date of perfection of the order in the remedy appeal?"

8. Following a short hearing on 17th June, 2016 the order of the Court made that day and perfected on 23rd June, 2016, vacated the High Court order of 16th January 2015 and varied the order of 5th June 2015 by specifying insofar as relevant to the current application," such that **IT IS ORDERED**

(i) that the Respondents purchase the Petitioner's 30 per cent shareholding in the Company at the price to be determined by the High Court;

(ii) that the issue of the price at which the Respondents purchase the Petitioner's 30 per cent shareholding in the Company be remitted to the High Court for determination.

And having regard to the matter remitted to the High Court as aforesaid the Court directs as follows:

(i) That the price should be the full current market value of the shares (i.e. the 30th day of June 2016) without application of a minority discount, or discounted cash flow or marketability discount.

(ii) That the EBITDA to be utilised should be the 2016 normalised EBITDA determined in the same manner in which the 2014 normalised EBITDA was determined at the first hearing by Mr. Lyndsay and utilised by the trial judge."

9. The specification of 30th June, 2016 as the date to be considered as the "current market value of the shares" was the result of the following exchanges between Mr. McCarroll S.C., counsel for the petitioner/appellant, and Mr. Cush S.C. for the respondents, with the Court. Mr. McCarroll, consistent with the letter from the appellant's solicitors, requested that the Court specify a date rather than simply saying "current value". However he then identified three rather than two possible dates by stating "but whether that is the date of judgment or the date the order is perfected or we are suggesting perhaps the 30th of June which happens to be of course half year-end for a company".

10. In response to that suggestion I am recorded in the transcript as stating:

"Well, that would seem to make sense – I was wondering about that myself in the context of . . . that's assuming that you are going to have a relatively proximate further hearing in the High Court later this year, which would seem to be hopefully – I hope you will."

11. The hope of an early hearing by both parties was then confirmed by counsel. Mr. Cush S.C. for the respondents confirmed agreement to the 30th June "so long as it isn't cutting across something else in the judgment". He referred in particular to the ruling of the Court that the EBITDA to be utilised should be "the 2016 normalised EBITDA". He also sought and obtained confirmation that it was to be determined "in the same manner in which Mr. Lyndsay determined the 2014 EBITDA", pointing out that Mr. Lyndsay's valuation date was July.

12. The order of the Court made on 17th June, 2016 and perfected on 23rd June, 2016 includes this clarification. It is the final order of this Court on both the remedy and valuation appeals, save in relation to the costs of the appeals which were adjourned to 7th July, 2016 and were the subject of a separate judgment and order. No liberty to apply is given in the order of 17th June, 2016.

**Events after 17th June 2016**

13. On 4th July, 2016, the High Court fixed the trial date for the matters remitted for 8th December, 2016 and gave directions in relation to same. On 21st July, 2016 the respondents signalled an intention to apply for leave to appeal to the Supreme Court against the decision of this Court on the valuation appeal. There was no such application in respect of the decision on the remedy appeal and no application by the petitioner to cross appeal any aspect of the decision on the valuation appeal including the valuation date.

14. On 18th October, 2016 the Supreme Court issued its determination granting leave to appeal. On the same date the parties applied by consent to the High Court to vacate the trial date of 8th December, 2016. On 31st January, 2017 the Supreme Court heard the appeal and on 27th February, 2017 delivered judgment dismissing the respondents' appeal and upholding the order of this Court remitting the matter to the High Court. No variation was made to the order of this Court.

15. On 21st March, 2017 the solicitors for the petitioner wrote to the respondents seeking consent to vary the valuation date in the order of this Court of 17th June, 2016 from 30th June, 2016 to 31st December, 2016. This was refused on 23rd March, 2017.

16. On 7th April, 2017 the petitioner issued a motion seeking an order pursuant to O. 86A, r. 2(1)(b) and/or O. 28, r. 12 of the Rules of the Superior Courts varying the valuation date of the Company directed in the order of 17th June 2016 from 30th June, 2016 to 31st December, 2016. The application is grounded upon an affidavit of Mr. Padraic Lenihan, the Financial Director of the petitioner, and opposed by the respondents in reliance upon legal submissions as to jurisdiction and facts set out in an affidavit of Mr. Paul Wilson, a director of the Company and a member of the Wilson Limited Partnership 1.

**Order of 17th June 2016**

17. As appears from the extract of the order of 17th June, 2016 set out above the valuation date for the shares in the order forms part of the directions being given by this Court in relation to the matter remitted to the High Court. This was done, as stated, pursuant to the express power under O. 86A, r. 3(1) of the Rules of the Superior Courts which provides:

> "Following the hearing of an appeal, the Court of Appeal may remit proceedings to the High Court with such directions as it considers just."

18. Counsel for the petitioner sought to rely in his submissions upon the fact that the valuation date specified forms part of a direction given by this Court, in order to contend that the date should be considered in a manner analogous to pre-trial directions given by the High Court. The further submission was that pre-trial directions are not always considered to be final and conclusive and may be varied as circumstances arise and require.

19. That analogy does not appear to the Court to be correct. Whilst the wording used in the order of 17th June following O. 86A, r. 3(1) is that the "court directs", it is an order of the Court which forms part of the final order made by the Court on the remedy and valuation appeals in accordance with the decisions reached by the Court on matters in dispute or raised during the appeals as set out in the judgment delivered on 8th June, 2016. Accordingly the directions given by the Court in the order of 17th June form part of a final order made by the Court on the appeals, and any application to vary any part of those directions must be considered in accordance with the established principles in relation to the jurisdiction of the Court to vary or amend a final order.

**Jurisdiction of the Court to amend or vary a final order**

20. The Court was referred to the applicable principles set out by the Supreme Court in a judgment delivered by Finlay C.J. in Bellville Holdings Limited v. The Revenue Commissioners [1994] 1 I.L.R.M. 29 and repeated in and applied in a further judgment of Finlay C.J. in Attorney General v. Open Door Counselling Limited (No. 2) [1994] 2 I.R. 333. These were accepted by both parties to be the applicable principles if the relevant part of the order was considered to be a final order of this Court.

21. In Bellville Holdings, Finlay C.J. at p. 36 considered the common law principles applicable to the power of a court to vary or amend a final order made by it otherwise than under the "slip rule", where he stated as follows:

> "The position and principles appear, however, to be accurately stated in the judgment of Romer J in Ainsworth v. Wilding [1896] 1 Ch 673, where, at p. 677, he stated as follows:
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> > "So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
> >
> > (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under O. 28, r. 11;
> >
> > (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.
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> Having referred to the decision of the Court of Appeal in In re Swire 30 ChD 239, Romer J quoted from the judgments in that case as follows at p. 678:
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> > "Cotton LJ says: 'It is only in special circumstances that the court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced.'
> >
> > Lindley LJ says: 'If it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'
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> > And Bowen LJ says: 'An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice.'"
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> I am satisfied that these expressions of opinion validly represent what the true common law principle is concerning this question. I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached."

22. In *Open Door Counselling*, Finlay C.J., having cited the above, indicated that exceptions to the above principles may occur in cases "where it is established to a court that a judgment has been obtained by fraud". That did not arise on the facts of *Open Door Counselling*, nor does it arise in this instance. The question for the Court in this application therefore is whether there are "special or unusual circumstances" which would warrant an amendment of the order made on 17th June, 2016 in relation to the valuation date of 30th June, 2016.

23. The Court draws attention to the fundamental importance of the finality of proceedings to certainty in the administration of justice as stated by the former Chief Justice in *Bellville Holdings*. This applies in particular not only to a court of final appeal, as he said, but also to this Court as a court of intermediate appeal from which there is no automatic right of appeal. In commercial proceedings, such as these, certainty of the position following judgment is also of commercial importance to the parties.

24. The principal submission made by Mr. O'Moore SC, on behalf of the petitioner was that the Court fixed the valuation date of 30th June 2016 in part upon an assumption that there was going to be a proximate date for the retrial in the High Court, *i.e.*, in the autumn of 2016. He makes that submission in reliance upon the exchange between his co-senior, Mr. McCarroll SC on behalf of the petitioner at the hearing of 17th June, and me. It is correct that I made a comment in the course of the exchange as recorded above in this judgment of an assumption of "a relatively proximate further hearing in the High Court" in response to the submission seeking clarification as to what the Court intended at para. 90 of its judgment by stating that the price "should be fixed at the current value of the shares after the remedy has been finally determined". The comment was made by me alone and no similar comment was made by the other members of the Court. Further, it was in response to a submission seeking clarification as to whether the Court intended by "current value" the date of judgment, the date of perfection of the order, or 30th June, being the half year end as then submitted. It was not intended to and did not reflect any reasoning of the Court different to that which had been given in paragraphs 90 and 91 of the first judgment of the Court as to what was intended by the "current value" and any assumption made by the Court in reaching that conclusion.

25. Paragraph 90 of the judgment of the Court records the submission made on behalf of the respondents by Mr. Cush S.C., at the hearing of the appeal that the valuation date should be the date of presentation of the petition. Mr. O'Moore S.C., on behalf of the petitioner, had submitted that it should be the date of trial. That submission is not expressly recorded in the judgment but it was taken into account by the Court. The Court at para. 90 of the judgment reached a conclusion that it should be "the current value of the shares after the remedy has been finally determined". Whilst the word "after" was used in para. 90, the intention of the Court is clarified by the first sentence in para. 91 of the judgment, which provides that it be the current full market value i.e. at the time of delivery of the judgment. That conclusion is expressly based upon one assumption, namely that the judgment of the Court "finally determines the remedy issue". The Court there stated:

> "Upon an assumption that this judgment finally determines the remedy issue, it appears to follow that the remedy is that the respondents purchase Donegal's shares at the current full market value."

26. There was no application for leave to appeal against this Court's determination of the remedy issue. The Court is satisfied that the only assumption upon which it decided a current valuation date was that this Court's judgment finally determined the remedy issue. The decision reached in the first judgment of the Court was not based upon an assumption of a proximate rehearing date in the High Court. The clarification made on 17th June which specified 30th June 2016 as the intended "current" valuation date took account of the commercial sense of using a half year end date which was sufficiently close to "current" in the sense of the judgment which was delivered on 7th June.

27. In those circumstances, the Court does not consider that the delay in the rehearing caused by appeal against the decisions of this Court in the valuation appeal constitutes "special or unusual circumstances". It follows, therefore, that in accordance with the principles stated in *Bellville Holdings* the Court does not have jurisdiction to amend the order of 17th June, 2016 which has been made and perfected.

**Conclusion**

28. The application to amend or vary the order of 17th June, 2016 must be refused.