THE HIGH COURT

COMMERCIAL

[2017 No. 215 COS]

[2017 No. 117 COM]

IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT 2014

AND IN THE MATTER OF EMERALD ISLE ASSURANCES AND

INVESTMENTS LIMITED

BETWEEN

JAMES MOREY

APPLICANT

AND

TIMOTHY MAVERLY

RESPONDENT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 10th day of November, 2017.

1. The applicant & the respondent are both shareholders and directors in Emerald Isle Assurances and Investments Ltd. The applicant brings this application pursuant to s. 212 of the Companies Act 2014 and seeks liberty for and on behalf of the company to take all such decisions as may be necessary to pursue and conduct all further proceedings in the company's claim against the defendant in the proceedings having the title and record no. of *Emerald Isle Assurances and Investments Limited, Timothy Maverly and James Morey v. Dorgan & Ors*. practising under the style of Coakley Moloney Solicitors 2010/6640P (hereinafter referred to as "the Coakley Moloney proceedings"). These decisions would include any further appeal and said liberty would operate until the final determination of the proceedings by way of settlement and/or an order of the Court. Further, the applicant seeks an order granting him liberty for and on behalf of the company to negotiate with the defendants in the Coakley Moloney proceedings and to conclude a final settlement. Any such settlement would only be binding with the consent of the respondent or, in the absence of that consent, with a ruling by the Court upon notice to the respondent. Finally, the applicant seeks an order prohibiting the respondent from disclosing any information concerning this application to the defendants in the Coakley Moloney proceedings or any other party, save as may be required by law pursuant to the provisions of the Companies Act 2014 and/or the inherent jurisdiction of the Court.

2. The background to this application is long, drawn out and unfortunate from the point of view of the company and its two directors. The applicant was represented at hearing by Gary McCarthy S.C. and Arthur Cunningham B.L., instructed by Carley Connellan Solicitors. The respondent represented himself.

3. A very helpful schedule to the background to these proceedings was drawn up by and on behalf of the applicant. It begins with the incorporation of Emerald Isle Assurances and Investments Limited on the 17th October, 1991. The respondent points out that there were, in fact, three directors of the company at the outset. However, the third director was bought out at an early stage and, from 1994 onwards, there have only been two directors. The applicant and respondent are the only directors and are equal 50% shareholders in the company. In or around 1991/1992, the company entered into various tied agency agreements with Hibernian Life Limited. By November, 1994, the company had issued summary proceedings against Hibernian Life. In February, 1995, the company issued plenary proceedings against Hibernian Life, seeking damages for breach of contract. The two sets of proceedings were consolidated and had a title and record no. of *Emerald Isle Assurances and Investment Limited v. Hibernian Life Limited* 1995/1132P (hereinafter referred to as "the Hibernian Proceedings"). Coakley Moloney Solicitors represented the company in the Hibernian Proceedings. An amended statement of claim was delivered on behalf of the company on the 18th December, 1996, seeking special damages in the sum of IR£6,248,600. It appears that no further steps were taken to prosecute the proceedings until 26th June, 2002, when the first motion was drawn up to strike out the company's claim against Hibernian. That motion was struck out on consent with no order for costs on 9th April, 2003. It appears that, following a further period of inaction, a second motion to strike out the company's claim came on for hearing before the Court on 7th July, 2010. At that stage, it appears that Senior Counsel was of the view that there was a hazard to the company in respect of the defendant's motion succeeding and, in circumstances where a sum of €300,000 was on offer for full and final settlement of the company's claim against Hibernian, counsel recommended that the settlement be accepted. That settlement was agreed subject and without prejudice to the company's entitlement to pursue other remedies against other parties.

4. Shortly thereafter, on the 13th July, 2010, the company, the applicant and the respondent issued proceedings against Coakley Moloney Solicitors, alleging negligence in the conduct of the Hibernian proceedings. The Coakley Moloney proceedings were admitted to, and later discharged from, the Commercial Division of the High Court. On 3rd September, 2010, a statement of claim was delivered and, on 8th October, 2010, a defence was delivered. On 4th November, 2011, a late lodgement was made by the defendant in the amount of €1,124,350. The proceedings came on for hearing before Kearns P. on 6th December, 2011. On 18th January, 2012, he dismissed the plaintiff company's claim and made no order in respect of costs. On 30th February, 2012, a notice of appeal was issued by the plaintiff company. Unfortunately, in or around the month of February, 2012, the applicant and the respondent fell into dispute and remained in dispute as to the manner in which the appeal against the order of Kearns P. was to be conducted. On 5th March, 2012, a notice to vary was delivered by the defendants in the Coakley Moloney proceedings. On 24th July, 2012, the applicant issued proceedings by way of petition against the respondent pursuant to s. 205 Companies Act 1963, alleging oppression and seeking carriage of the Coakley Moloney proceedings.

5. On 22nd August, 2012, the High Court (Laffoy J.) directed that the petition be heard in camera and made directions in respect of the exchange of affidavits. Further directions were granted on 9th October and 16th October, 2012, in which Laffoy J. directed that no further motions be issued before the petition pursuant to s. 205 of the Companies Act 1963 was heard and determined. The respondent delivered a notice of appeal against the order of Laffoy J. of 16th October, 2012. On 6th November, 2012, Laffoy J. issued a report for the purpose of the appeal in respect of the order the Court had made on that date.

6. The s. 205 petition came on for hearing before Murphy J. in the High Court, who heard it over three days at the end of December, 2012 and delivered judgment on 12th February, 2013. Murphy J. found in favour of the applicant, granted the reliefs sought in the petition and awarded costs to the applicant, with a stay on execution pending attempts to settle the Coakley Moloney proceedings. The order of Murphy J. was finalised on the 19th February, 2013, and it authorised the applicant to attempt to settle the Coakley Moloney proceedings or run the appeal as needs be. In or around March, 2013, the respondent filed a notice of appeal against the order of Murphy J. Throughout the remainder of 2013 and 2014, attempts were made to settle the Coakley Moloney proceedings, which proved unsuccessful. On 18th June, 2014, McGovern J. lifted the stay of execution on the costs order, following which the respondent delivered a notice of appeal against McGovern J.'s decision.

7. On 21st and 22nd October, 2015, the appeal against the decision of Kearns P. in the Coakley Moloney proceedings was heard over the course of two days in the Court of Appeal and judgment was reserved. On 25th January, 2016, the Court of Appeal found in favour of the company and overturned the order of Kearns P., having found that there was negligence on the part of the defendants. The Court of Appeal's order was perfected on 25th February, 2016, and directed that the company's claim be remitted to the High Court for assessment of damages in respect of such loss, if any, caused to the plaintiff as a result of the finding of negligence, taking into account any contributory negligence. Having been remitted to the High Court, the matter has now been listed for hearing in February, 2018 and is scheduled to last for a period of approximately four weeks.

8. On 30th May, 2016, the defendant in the Coakley Moloney proceedings was refused leave by the Supreme Court to appeal the Court of Appeal's decision. On 4th November, 2016, a notice of lodgement in the sum of €1,500,010 was made in the High Court by the defendant in the Coakley Moloney proceedings. On 16th November, 2016, the Court of Appeal heard an application brought on behalf of the applicant to strike out the three pending appeals taken by the respondent in respect of the order of Laffoy J. on 16th October, 2012, the order of Murphy J. on 19th February, 2013, and the order of McGovern J. on 18th June, 2014. It was argued that the appeals were moot. The Court of Appeal granted the reliefs sought and struck out the remaining appeals. An *ex tempore* judgment was delivered in respect of that decision.

9. The applicant was anxious to make progress in relation to the rescheduled Coakley Moloney proceedings, which had been remitted to the High Court and scheduled for hearing. On 9th February, 2017, an application was made based on the liberty to apply provided in the order of Murphy J., seeking renewal or confirmation that the applicant was entitled to progress the Coakley Moloney proceedings and bring them to conclusion. This application was refused by Humphreys J. on the basis that the order of Murphy J. was spent. The appeal having been determined, such liberty to apply was no longer operative. Humphreys J. also pointed out that it would be unfair to the respondent to revive or re-activate the s. 205 order in circumstances where the appeal had been determined and been used to strike out his pending motions, including the pending appeal against the order of Murphy J. Humphreys J. indicated that it would be more appropriate to bring a new application to the High Court pursuant to the revised statutory provisions, namely s. 212 of the Companies Act 2014. On 27th February, 2017, the Supreme Court determined an application by the respondent for leave to appeal the judgment in the Court of Appeal, which had struck out his appeals on grounds that they were moot and it refused same.

10. On 23rd June, 2017, the applicant issued a fresh application under s. 212 Companies Act 2014, seeking liberty to take such actions as may be necessary on behalf of the company to pursue and conduct all further proceedings in the company's claim in the Coakley Moloney proceedings. The respondent opposes that application. The matter was listed for hearing before this Court on 5th October, 2017. The matter proceeded by way of hearing on affidavit evidence only. The Court afforded the respondent some considerable latitude in the manner and nature of his oral submissions to the Court in circumstances where he was representing himself. However, the nature of some of the submissions made to the Court undoubtedly went beyond the bounds of reason and Mr. McCarthy S.C. on behalf of the applicant objected to same. It was necessary for the Court to remind the respondent that the Court was confined to the evidence that was set out on affidavit and that it was not open to him to make outrageous and/or unfounded allegations against members of the legal profession, some of whom were not in court (nor should they have been in court, as they were not party to this particular application).

11. It seems to be an unavoidable conclusion from this Court's point of view that the respondent has an unshakeable view of past events. I have no doubt that those views are sincerely held. However, it is equally clear that, while he repeatedly states that he is anxious and willing to work with the applicant, no progress will be made unless the applicant concurs with his viewpoint. It seems to me that not a lot has changed and/or progressed since the decision of Murphy J. At para. 8 of that decision, Murphy J. states:-

> *"On 19th April, 2012, Mr. Maverly emailed John Connellan of Carley and Connellan, saying that he never instructed that firm to lodge an appeal on his behalf or on behalf of the company and instructed them not to lodge an appeal. They had no authority to act on his behalf or on behalf of the company and that they were very aware of his concerns for some time. They did not have authority to instruct Senior Counsel, to do any negotiations on his behalf or on behalf of the company and asked that he get his partner to confirm in writing that no such instructions had been given and if they had that they would then be withdrawn. He also required Senior Counsel to confirm the same in writing. A reply was made on the same day to Mr. Maverly, who did not respond.*
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> *9. In his replying affidavit Mr. Maverly said that he had always acted in the best interest of the company and its lawful creditors. He says further he was not and that the company was not properly and duly served with the court pleadings. He said he would submit to the authority of the court. He said that the normal client-solicitor relationship in the ordinary course of business expected to exist between John Connellan and himself had been irreparably compromised by the fact that John Connellan ignored his instruction and purported to be acting on Mr. Morey's instructions when he, without Mr. Maverly's knowledge and authority, improperly served and filed the purported Supreme Court appeal (Case No. 58/2012). He averred that the petition was maliciously intended to be put in the hands of the petitioner and/or John Connellan so as to remove his right to run his own affairs and to protect from unjust attack the good name and the assets of the company. The reported appeal was in its essence flawed and bound to fail."*

12. On foot of the order made by Murphy J., which authorised the applicant to give instructions, the appeal was progressed to the Court of Appeal and was ultimately successful. The adverse findings of Kearns P. were overturned and a finding of negligence was made against the defendants, Coakley Moloney. The question of quantum was remitted to the High Court for hearing and determination, along with the question of any contributory negligence. This is the matter that is listed for hearing in February, 2018.

13. At p. 23 of the booklet of pleadings, documents dated 31st May, 2017, set out extensive advices from John Finlay S.C. to John Connellan of Carley Connellan Solicitors, who are the solicitors on record on behalf of the company in the Coakley Moloney proceedings. The letter states as follows:

> "Dear John,

> I refer to the application on Wednesday 24th May, 2017, by Senan Allen S.C. on behalf of the defendants to have a date fixed for hearing of these proceedings and the order made by the Deputy Master listing the case for hearing on 13th February, 2018.
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> As you know, I advised the Deputy Master that, whereas I appeared on your instructions for Mr. James Morey, I did not act for Mr. Timothy Maverly and that Mr. Morey and Mr. Maverly, who were owners of 50-50 shareholding in Emerald Isle Assurances and Investment Limited ("the company") and were both directors of the company, were not agreed as to how the company should pursue its claim in the proceedings. I also advised the Deputy Master that I believed, in order to deal with the situation, it would be necessary for an application to be brought under s. 212 of the Companies Act 2014.
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> In my view, it is essential in the interests of the company, and Mr. Morey and Mr. Maverly as members of the company, that the company should be represented by a solicitor and counsel in the proceedings with clear instructions and authority to pursue and conduct the proceedings and to enter into negotiation and, if appropriate, conclude a settlement of the proceedings. Since Mr. Morey and Mr. Maverly are effectively the only members of the company and do not agree, such instructions and authority will have to come from one or other of them. Having regard to the history of the matter to date and the conduct of the both parties, I think it is essential in the interests of the company and its members that Mr. Morey should obtain an order pursuant to s. 212 of the Companies Act 2014 in similar terms to the order previously granted to him by Murphy J. in the proceedings under s. 215 of the Companies Act, 1963 as amended.
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> Since the order was made by Murphy J., the successful pursuit of an appeal to the Court of Appeal and successful resistance of an application by the defendants for leave to appeal to the Supreme Court, solicitors and Counsel instructed by Mr. Morey have brought about a situation in which the dismissal of the claim by all three plaintiffs by Kearns P. has been reversed and the company's claim has been remitted with a finding of negligence against the defendants for the assessment of the loss and damage (if any) suffered by the company, taking into account any contributory negligence. The individual claims of Mr. Morey and Mr. Maverly have also been remitted for a complete re-hearing.
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> It would, of course, be very much in the interests of the company and its members if Mr. Morey and Mr. Maverly could agree on a joint approach to pursuing the proceedings and any negotiations. However, in my view, those interests would not be sufficiently protected by a simple agreement from Mr. Maverly as to how matters should proceed, since his consent to any particular course of action could be subsequently withdrawn. Having regard to Mr. Maverly's approach and conduct to date, there must be a strong likelihood that this would occur.
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> In order for the company to pursue the claim remitted for hearing to the High Court, and to avail of any appropriate opportunity for negotiation, I believe it is essential for Mr. Morey to obtain orders under s. 212 of the 2014 Act in similar terms to the orders previously made by Murphy J. … I suggest that, on this occasion, it would be important that any orders would deal with all further proceedings in the company's claim, including any appeals, and that the authority to conclude a settlement in the company's claim, subject to a ruling by the court on notice to Mr. Maverly, in the event that he did not agree with the settlement, should continue in force until the proceedings are finally determined either by court order or settlement.
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> Without the certainty which will be brought about by such orders under s. 212, the company is likely to face a number of potentially disastrous situations, all of which would be totally against its interests and that of its members. The company might be totally unable to proceed with the claim due to the inability of its members to agree on how it should do so. The company's ability to pursue the proceedings might be delayed due to disagreements between its members, resulting in a successful application by the defendants to have the proceedings struck out for want of prosecution. If the company is not in a position to enter into realistic negotiations, it might be forced to proceed to a hearing in the face of a significant lodgement of €1.5m in circumstances where, having regard to the available expert evidence, it was against the interest of the company as members to so do."

14. Mr. Finlay S.C. then goes on to proffer further advice in relation to how the matter should be progressed. But the penultimate paragraph of the letter is also worthy of quotation in full, where it states as follows:-

> "If the company's case is not ready to proceed on 13th February, 2018, it seems almost inevitable that the defendant will bring a motion to dismiss for want of prosecution, which the company might very well lose resulting in the case being struck out with orders for costs against the company. It would be a supreme irony if that was the eventual outcome of proceedings seeking damages from the defendants due to their negligence in failing to prosecute the company's claim against the Hibernian Insurance Company with sufficient speed and diligence."

15. It seems to me that the respondent has not demonstrated any appreciation and/or understanding of the position of the company, its status as a separate legal entity in need of separate legal representation and the duty and obligation of the members of the company to act in the best interests of that company. In his affidavit sworn on the 24th July, 2017, he states at para. 25:-

> "…I tell John Connellan that I do not wish to appeal unless the truth is told to the court and I believe that is what I am required to do by the law.
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> 26. On 13th February, 2012, an appeal was lodged against my instructions and this fact was kept from me."

16. Regrettably, I am left with no other conclusion but that the respondent would prefer to see the company flounder and its sole asset, which is the Coakley Moloney proceedings and any award achieved from same, squandered rather than proceed without disharmony or anger and prepare for the hearing in February, 2018. In response to a question from the Court asking whether he agreed with the advices of Mr. Finlay S.C., he stated that he would accept the advices on the condition that Mr. Finlay S.C. was told that the respondent had done everything in his power to meet with the applicant and resolve this matter. He expressed concern as to whether Mr. Finlay S.C. was informed in that regard.

17. As an alternative to the application made by the applicant, the respondent suggests that three individuals, namely Mr. Barry Scannell (the company auditor), Mr. Gerard Murphy (the company forensic accountant) and Mr. Frank Dodd (a company insurance expert) be given carriage of the proceedings and be vested with the power to make decisions in progressing the action following consultation with both the applicant and the respondent. In my view, this is an unworkable solution, particularly in the context where both Mr. Scannell and Mr. Murphy have sworn affidavits in these proceedings in support of the respondent's position and have not demonstrated any understanding of the position in which the company finds itself and the risk to its sole asset flowing from an adverse outcome of the Coakley Moloney proceedings.

18. A matter of further concern to the Court, which was raised at the conclusion of the hearing, is that the previous solicitors representing the company in the Coakley Moloney proceedings have now issued proceedings seeking recovery of their costs as against the company, as well as against the applicant and respondent in their personal capacity. While those proceedings were delivered to the premises of Carley Connellan Solicitors, they of course have no authority to date to enter an appearance in respect of same. Following discussions in Court, the respondent indicated his agreement to Carley Connellan entering appearances to the said proceedings in order to prevent a precipitous judgment being entered by default, but without prejudice to his right to be consulted in relation to any future steps to be taken in respect of that litigation. That seems to be a sensible approach at this late juncture, as it would be doubly ironic if any award ultimately achieved in the Coakley Moloney proceedings were followed by a judgment in an undefended court action against the company.

19. In conclusion, it seems to me that there has been little or no change in the respondent's position since the decision of Murphy J. in 2013. The respondent does not appreciate the extent of the success achieved in the Court of Appeal. He has not demonstrated that he is prepared to act in the interests of the company and/or its members. In those circumstances, the Court is left with no option but to make orders pursuant to s. 212 of Companies Act 2014 in the terms of the notice of motion authorising the applicant to take the necessary steps in order to bring the Coakley Moloney proceedings to a conclusion, either by settlement, a hearing and/or a determination on appeal, as required.