THE HIGH COURT

[2008 No. 402 COS]

IN THE MATTER OF CHARLES KELLY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963- 2006

AND

IN THE MATTER OF SECTION 205 AND SECTION 213(F) OF THE COMPANIES ACT 1963

BETWEEN

EDWARD GERARD KELLY

PETITIONER

AND

WILLIAM KELLY AND CHARLES KELLY LIMITED

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 31st day of July, 2012.

The purpose of the judgment

1. The purpose of this judgment is two-fold. First, I will deal with liability for costs of the proceedings, having had the benefit of written submissions from the legal advisers of both the petitioner and the first respondent, and having heard oral submissions from both on 17th July, 2012. Secondly, I will address the form of order to be made on the substantive aspect of the proceedings, having regard to the current position.

Costs: the law and its application

2. The most recent judgment on the costs of complex litigation to which the Court's attention has been drawn is the judgment of the High Court (Clarke J.) in *ACC Bank Plc v. Johnston* [2011] IEHC 500. In that judgment (at para. 2.1) Clarke J. alluded to the fact that he had occasion to consider the general principles applicable to the award of costs in complex litigation in *Veolia Water UK. Plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 and that his judgment had been followed in a number of cases subsequently, citing the judgment of the High Court (Charleton J.) in *Mennolly Homes Ltd. v. Appeal Commissions* [2010] IEHC 56; the judgment of the High Court (Smyth J.) in *Kavanagh v. Ireland & Ors*. [2007] IEHC 389; and the judgment of the High Court (Finlay Geoghegan J.) in *McAleenan v. AIG (Europe) Ltd.* [2010] IEHC 279. He then outlined a number of matters which are clear from those judgments.

3. Clarke J. (at para. 2.2) identified what he considered to be the overriding principle stating:

> "First, the overriding principle is that costs follow the event. That is so not least because the Rules of the Superior Courts (0. 99, r. 1(3)) say so. There can, of course, be cases where deciding precisely what the 'event' was can give rise to its own difficulties. Indeed, *Veolia* is one such case. Order 99, r. 1(4) speaks of the costs of every issue of fact or law following the event. It is, however, in that context, important to make one significant distinction. There is a very great difference between the different elements that go to make up a cause of action, on the one hand, and a series of entirely separate causes of action, potentially dependent on different facts, on the other hand."

4. These proceedings were unquestionably in the former, rather than the latter, category. The proceedings were brought by the petitioner against the first respondent seeking against him the statutory remedy provided for in s. 205 of the Companies Act 1963 (the Act of 1963). In pursuing that remedy, the different elements which made up the cause of action were that the petitioner had to establish that he was a member of Charles Kelly Limited (the Company) and that the powers of the directors of the Company were being exercised in a manner oppressive to him, and that, with a view to bringing to an end the matters complained of, the Court should make an order of the type envisaged ins. 205(3). Although the Company was a party, as respondent, to the proceedings, the Company took no active part in the proceedings. The dispute was between the petitioner and the first respondent, they being, as was established in the first module of the proceedings, equal shareholders in the Company.

5. As I recorded in my judgment on the second module of the proceedings delivered on 31st August, 2011 ([2011] IEHC 349) at para. 1.6, prior to the commencement of the second module, when the solicitors who had been on record for the petitioner in the first module were given liberty to come off record, I had pointed out that the legal position is correctly stated in Courtney on *The Law of Private Companies* (2nd Ed.) at para. 19.052 where it is stated:

> "Disputes under ... s. 205 are typically between the members inter se or the members and the directors. The separate legal entity which is the company will usually not play an active part in the litigation . . .. In the particular context of disputes involving the exclusion of quasi-partners from the company's management it would be wrong for the company's controllers to utilise the company's resources in connection with the proceedings."

In my judgment on the second module, I addressed what I considered to be the wrongful withdrawal by the first respondent of the sum of €180,000 from the Company to discharge legal fees due to his former solicitors, directing that so much of the money withdrawn as had not been paid back to the Company pursuant to the direction I gave on 9th February, 2011 be set off against the value of his shareholding in the Company. I draw attention to that fact, to make clear, for the avoidance of doubt, that the issue of liability for costs falls to be determined between the petitioner, on the one hand, and the first respondent, on the other hand. No liability for the costs of these proceedings falls on the Company, save as is provided for in paragraph 14 below.

6. In elaborating on the "overriding principle" in *ACC Bank Plc v Johnston*, Clarke J. pointed to the various means by which a party to litigation can narrow the scope of the issues which the Court has to determine in various types of action, for example, making a lodgment where appropriate or issuing a so-called *Calderbank* letter, which may bear on the determination of what the "event" is.

7. The solicitors for the first respondent, in their written submissions, have referred to a variety of matters which they submit the Court should have regard to in determining liability for costs. In broad terms, it is the contention of the first respondent that the petitioner should have done more to "mitigate costs", referring to settlement talks, offers made by the first respondent, efforts at mediation and so forth. There is only one aspect of that submission which, in my view, requires to be commented on. In an open letter dated 16th March, 2012 from the solicitors for the first respondent to the solicitors for the petitioner, a proposal was made for determining the price to be paid by the Company for the shareholding of the first respondent in the Company and for the method of discharge of the consideration. That letter came very late in the overall process. It came at a time when all of the issues in the substantive proceedings had been decided and all that remained was to determine the value of the shareholding of the first respondent, which, at the time, was being addressed by Mr. David O'Flanagan of Deloitte & Touche, the independent accountant appointed by the Court to carry out a fair market valuation of the shareholding. Apart from that, the determination of the Court as to the value of the plaintiffs shareholding, as set out in the judgment delivered on 19th June, 2012, which was given after Mr. O'Flanagan's report was furnished to the Court and after both sides had an opportunity to make submissions to the Court, fixed the fair market value of the shares of the first respondent at an amount which was much less than the price sought by the first respondent in the letter of 16th March, 2012. When one poses the question posed by Sir Thomas Bingham M.R. in *Roache v. Newsgroup Newspapers Ltd.* (1992) C.A.T. 1120, on the issue as to whether a *Calderbank* offer is effective in relation to costs of litigation ("Who, as a matter of substance and reality, has won?"), the unequivocal answer in this case is that the petitioner has won. Therefore, the offer in the letter of 16th March, 2012 can have no bearing on the issue of costs.

8. The second relevant principle identified by Clarke J. in *ACC Bank Plc v. Johnston* was outlined in his judgment (at para. 2.6) as follows:

> "The second general principle deriving from the case law is that the starting position should be that the party who wins the event gets full costs. As pointed out in *Veolia*, the reason for such an approach is that the winning party, should they be a plaintiff, had to come to court to get something they could not otherwise get or, if a defendant, had to defend the proceedings to avoid having to meet a demand against them which the court has found to have been unjustified."

9. In this case, it is undoubtedly the case that the petitioner had to come to court to get the remedy which was necessary to bring an end to the oppression which was established on the facts and, indeed, to safeguard the Company, not only for the benefit of its members, but also for the benefit of the other stakeholders, such as its creditors and its employees. It is regrettable that, even at this late stage in the process, the first respondent fails to comprehend the impact that the winding up of the Company would have had, not only on its members, but also on third parties in the economic climate which has prevailed since these proceedings were instituted, approximately ten days after the collapse of Lehman Brothers.

10. It was on the third principle set out by Clarke J. in *ACC Bank Plc v. Johnston* that counsel for the petitioner focused, with a view to demonstrating that it is not applicable. Clarke J. stated (at p. 2.7):

> "The third principle is that the court should consider departing from awarding full costs to the party who wins the event where it is clear that that party, although generally victorious, materially added to the costs of the proceedings by raising additional grounds or arguments which the court found to be unmeritorious. In that context, it is important to emphasise that the exercise is not one of narrowly looking at the amount of time spent on each point, but rather taking a broad view as to whether it can fairly be said that the costs of the proceedings as a whole were materially increased. . .. it is possible to envisage a case where a great deal of evidence and a great deal of argument was directed by an otherwise successful party to an issue on which that party lost. In those circumstances the court should make an appropriate order to reflect the fact not just that the winning party should not be awarded costs attributable specifically to an aspect of the case on which that winning party lost, but also to compensate the losing party for the fact that that party's costs had been increased by reason of the raising of the unmeritorious issues concerned."

11. In applying that principle to what transpired in these proceedings, it has to be considered by reference to each of the three modules in the proceedings.

12. The first module, to which the Court's judgment delivered on 12th February, 2010 ([2010] IEHC 38) relates, was necessitated by the fact that there was a dispute as to whether the petitioner was a member of the Company, so as to have *locus standi* to bring this application under s. 205. Aside altogether from these proceedings, both the petitioner and the first respondent, as the directors of the Company, were clearly at fault in not maintaining proper records of the Company in accordance with their statutory obligations, and, in particular, in maintaining the register of members of the Company up to date. At the hearing in relation to costs, the first respondent attempted to attach most blame for that state of affairs on the petitioner, who was the secretary of the Company at the time. However, the reality of the situation is that what I described as the "tortuous" process which the Court had to undertake in determining the respective shareholdings of the petitioner and the first respondent was primarily attributable to the stance adopted by the first respondent in asserting that the petitioner did not beneficially own an interest in the share capital of the Company equal to his interest, despite the existence of the documentation which was analysed in the judgment of 12th February, 2010. Even if the quantum and ownership of the issued share capital of the Company, which, as to quantum, was incorrectly stated, and, as to ownership was silent, in the petition, had been properly explored, as it should have been, before the petition was presented, having regard to what happened at the hearing of the first module, I have no doubt that the first module would have been necessary to establish the petitioner's beneficial interest in the shares of the Company and to procure the rectification of the register of members. The first respondent should have conceded from the outset what the Court held, namely, that the petitioner owned 7,936 shares of the 7,938 issued shares of the Company jointly with him. I am satisfied that the petitioner is entitled to the costs of the first module as against the first respondent.

13. The second module dealt with the substantive issues of oppression, which I found was established, and the appropriate remedy necessary with a view to bringing it to an end. As I pointed out in the judgment delivered on 31st August, 2011 on the substantive issues at para. 1.7, the evidence at the hearing of the second module, which was heard over seven days, focused almost entirely on the allegations and counter-allegations made by the petitioner and the first respondent against each other and only minimally on the issue of the appropriate remedy. While the Court was very critical of some of the behaviour of the petitioner, and while the conclusion set out at para. 8.10 of the judgment was that the petitioner had contributed to and must share responsibility with the first respondent for the fact that the relationship of the petitioner and the first respondent as equal shareholders, directors and employees or executive managers of the Company had irretrievably broken down, nonetheless, I am satisfied that the petitioner had to pursue the course he pursued in order to procure the appropriate remedy in his own interest as a member, and in the interests of the

Company and all its stakeholders. I am satisfied that, taking a broad view of the matter, it cannot be fairly said that the costs of the proceedings as a whole were materially increased by the petitioner adducing evidence to establish or rebut factual matters in respect of which there was a finding that he shared responsibility with the first respondent. Accordingly, I am satisfied that the petitioner is entitled to the costs of the second module against the first respondent.

14. The third module, which dealt with the valuation of the first respondent's shareholding in the Company, in the absence of agreement between the parties, was a necessary consequence of the order made at the end of the second module that the Company purchase the shareholding of the first respondent in the Company at fair market value and that the share capital of the Company be reduced proportionately and that the necessary consequential matters be addressed, for example, the alteration of the memorandum and articles of association of the Company. The process which was adopted by the Court, the appointment of Mr. O'Flanagan of Deloitte & Touche, to carry out a fair market valuation of the shares as at 31st August, 2011, was designed to keep the costs of the process at a minimum. Nonetheless, legal costs were incurred in the course of that module. I am satisfied that the petitioner is entitled to those costs against the first respondent. It was ordered, following the second module, that the remuneration to be paid to Deloitte & Touche for performing the task of valuing the shares of the first respondent should be discharged by the Company. For the avoidance of doubt that remains the position. The first respondent does not become liable for that remuneration.

15. Finally, in his judgment in *ACC Bank Plc v. Johnston* (at para. 2.8) Clarke J. pointed out that, in addition to the factors he had already outlined, there can be other factors relevant to the award of costs, for example, where there is a change in the nature of a claim brought or the defence made, particularly at a late stage in the proceedings, for example, by amendment of the pleadings.

16. The fact that in this case, an amendment to the petition was sought when the matter first came before the Court for hearing on 15th December, 2009 (as set out in para. 2.5 of the judgment delivered on 31st August, 2011) and was granted did not, in my view, increase the costs of the proceedings. Similarly, the fact that, in the course of the second module of the proceedings, counsel for the petitioner sought the expansion of the reliefs claimed to include an order that the Company purchase the first respondent's shareholding in the Company at a market value did not, in my view, increase the costs of the proceedings.

17. The only other issue which it is convenient to deal with under the heading of costs relates to stenography fees. The solicitors for the first respondent submitted that of the sum of €165,000 taken out of the Company by him and paid to his former solicitors, Gibson & Associates, in discharge of their fees up to the time they were given liberty to come off record, the sum of €3,860.49 was paid by Gibson & Associates in respect of stenography fees. Accordingly, it was submitted that the sum which the first respondent should be required to return to the Company is €161,139.51. The stenography costs are legal costs, which, on the basis of the decisions I have made above, must be borne by the first respondent. Therefore, the amount to be remitted by the first respondent to the Company remains at €165,000. Any adjustments which require to be made in relation to costs actually borne by the petitioner, the first respondent or the Company, as the case may be, can be addressed in the cost billing process.

Final order

18. In summary, the final order will provide that the first respondent is to pay the petitioner's costs of the proceedings, other than the remuneration of Deloitte & Touche on foot of its appointment by the Court, such costs, to include any reserved costs, to be taxed in default of agreement.

19. In my judgment of 19th June, 2012 I concluded that justice and fairness as between the petitioner and the first respondent would be best achieved if four properties in Ramelton, which are not core to the Company's business, were transferred by the Company *in specie* to the first respondent as consideration for the shares of which he is beneficial owner, subject, however, to the first respondent remitting the sum of €165,000 to the Company. The solicitors for the first respondent in a letter dated 13th July, 2012 to the petitioner's solicitors, to which there was attached two appendices, raised queries which bear the character of pre-contract requisitions on title and on related matters in an ordinary commercial transaction. The transfer *in specie* to the first respondent is not an ordinary commercial transaction. The Court has made an order that the Company's existing interests in those four properties be transferred to the first respondent *in specie*. For the avoidance of doubt, what is intended is that whatever interest and title the Company has in those properties is to be transferred *in specie* to the first respondent. Of course, the first respondent should be furnished with the title documents and all other relevant documents in relation to those properties in the possession of the Company. However, the properties are to be conveyed by the Company to the first respondent on the basis of the Company's title "as is", with the benefit of all appurtenant rights, but subject to such rights as the properties are subject to, other than the debenture in favour of Ulster Bank. If Ulster Bank will not release those properties from the debenture, the appropriate remedy will have to be reconsidered by the Court.

20. The final order will provide that the remittal of the sum of €165,000 by the first respondent to the company and the transfer in specie from the Company to the first respondent as consideration for the first respondent's share shall take place by 24th August, 2012. There will be liberty to each party to apply to Court on notice to the other party.