THE HIGH COURT

[2018 No. 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 AND MALACHY LYNCH

NOTICE PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 20th day of December, 2018

1. By this application the first respondent seeks to nip in the bud an application pursuant to s. 212 of the Companies Act, 2014 in the hope of avoiding protracted and expensive litigation.

2. Kush Seafarms Limited was incorporated under the Companies Acts on 4th June, 1987. It was established to carry on the business of aquaculture and has since been engaged in that business, primarily in mussel farming, at Ardgroom Harbour, Co. Cork. The promoters of the company were the applicant and the first respondent, who are brothers.

3. The authorised share capital of the company is €120,000 divided into 100,000 shares of €1.20. The 71,690 ordinary shares which have been issued are held equally by the applicant and the first respondent, who are the directors of the company. Bord Iascaigh Mhara holds 15,872 preference shares on foot of what is called a grant like investment in the company.

4. The applicant's case is that he has been excluded from participation in the business of the company and that the affairs of the company are being conducted in a manner oppressive to him and in disregard of his interests as a member. The first respondent contests this.

5. The applicant does not believe that it would be in the best interests of the company or its members that it should be wound up. On this, if on nothing else, the applicant and the first respondent are agreed.

6. It is clear that unhappy differences have arisen between the brothers. The applicant's case is that the differences are irreconcilable. I hope that they are not.

7. The applicant asserts, and the first respondent does not contest, that the applicant made a significant contribution to the establishment and development of the company and its business.

8. The remedy which the applicant seeks is that the first respondent should buy his shares in a manner supervised by the court, so as to ensure that he is properly paid for them. In principle, the first respondent is amenable to buying the applicant's shares at a fair price. In his affidavit grounding the substantive application, the applicant suggests that the company "*has a fair value of significantly more than €2m*". The first respondent contests the valuation of the company at in excess of €2 million and the methodology used to calculate that valuation. The first respondent suggests that the value of the company is something like €1.4 million.

9. On 23rd April, 2018, the first respondent, by his solicitors, made an open offer to buy the applicant's shares at a value to be independently determined by the court and on terms that the parties would bear their own costs, save in respect of the costs of the valuation in the event that the valuation should prove to be less than the respondent might have offered to pay or the applicant to take. That offer was made for the declared purpose of saving legal costs. The applicant responded that the proposal merited consideration "*save in relation to the obvious questions of costs*". This proposal appears to have foundered on the applicant's insistence that his costs be paid. The costs of the proceedings cannot not have been all that great at that stage. They will be a great deal more by now.

10. On 29th May, 2018, the first respondent made a further offer, again for the purpose of saving costs, that an independent expert valuer would be appointed for the purpose of valuing the applicant's shares, on the basis that both parties would be bound by that valuation. The applicant was not amendable to this suggestion either. In a letter of 5th June, 2018, the applicant, by his solicitors, declared himself open to resolution on a consensual basis but only "*in a process that is fair, and so transparent and balanced*". The applicant wanted the opportunity, at least in the first instance, to form his own view on value with appropriate professional advice, to which end, he said, he would require access to all relevant records and information.

11. By notice of motion issued on 21st June, 2018, and originally returnable for 9th July, 2018, the first respondent applied to the court for:-

> (i) an order directing the appointment of an independent professional valuer to value the applicant's shareholding in the company; and
>
> (ii) an order that the company should comply with all requests for access to documents and other relevant information by such independent professional valuer.

12. While the notice of motion did not say so in terms, the substance of the application was for an order directing the sale and purchase of the applicant's shares at a price to be determined by an independent professional valuer, acting as expert.

13. The motion was grounded on a short affidavit of the first respondent which emphasised his desire to save costs and court time, and the disproportion between the likely costs of a fully contested hearing and the value of the company, even if it was, as the applicant contended, worth significantly more than €2 million.

14. In response to the motion the applicant's solicitor swore a short affidavit on his behalf. The substance of that was that the applicant did not have, and an accountant instructed to advise him did not have, the information necessary to even form a preliminary view on valuation. While the applicant and his solicitors protested that they did not have the necessary information, they

did not say what information was required until a letter of 3rd August, 2018 set out a list of nineteen items. That information was promptly made available in August but appears not to have been considered by the applicant's accountant until after the November, 2018 tax deadline.

15. Litigation can be very expensive. The first respondent is perfectly right in his determination to try to keep costs down. Moreover, litigation can be destructive of personal relationships and a distraction from the parties' lives and useful endeavours. But however well-intentioned this motion is, it seems to me that it must fail.

16. Under s.212 of the Companies Act, 2014 the court has a wide discretion to make orders with a view to bringing to an end the oppression or disregard complained of but it is clear from the wording of the section and it is well established that the jurisdiction of the court is engaged by a finding of oppression.

17. In cases, such as this, where there is a willingness to sell and willingness to buy, but a dispute as to valuation, the jurisdiction of the court can be engaged by an admission by the respondent of "*technical oppression*". This allows the parties to avoid a protracted and expensive hearing into the nature of the alleged oppression. In this case, the first respondent steadfastly denies that there has been any oppression and, I think, is reluctant to make any admission without an assurance that it will not be relied upon in support of an application for costs.

18. Having heard this motion, I adjourned it for a number of weeks to allow the parties and their legal and financial advisors to engage but if anything their positions had hardened when they came back to court. The applicant, as he was perfectly entitled to do, asked for judgment on the first respondent's motion for the appointment of an independent expert valuer. The first respondent, as he was perfectly entitled to do, asked the court to reset the timetable for the progression of the action towards a full trial. Without, as far as I understand it, having properly considered the nineteen items of information sought and given in August, the applicant is launching into the abyss of discovery.

19. This litigation has the capacity to beggar one or other or both of the applicant and the first respondent. It occurs to me, if I am allowed to say so, that the first respondent's ability to buy out the applicant may depend as much upon his ability to pay or raise finance as upon what notional value might be ascribed to the company or the shares. I urge the parties to consider mediation as an alternative to this protracted and increasingly expensive litigation.

20. As far as this motion is concerned, I am persuaded by counsel for the applicant that the court simply does not have jurisdiction to entertain the motion.

21. In any event it seems to me that it would not be just or fair to the applicant to fix him with an expert valuation into which he would have no input. The motion proposed that the independent expert should have from the company all information that the expert required but did not address the applicant's complaint that he did not have the information he needed and that he was entitled, in the first instance at least, to form his own view on valuation.

22. In my view, the proposal that the parties would both be bound by an independent expert valuation of the applicant's shares was not without merit: but it would have been a rough and ready solution. The applicant was not bound to go along with it and neither was it unreasonable that he refused to do so. The applicant, in first place, was entitled to form his own view as to the value of his shareholding and thereafter to be in a positon to engage with any valuer in an informed way.

23. At the hearing before me the position of the first respondent shifted. It is clear from the authorities, for example *Charles Kelly Ltd* [2011] IEHC 349 that while the court has an inherent jurisdiction to appoint a valuer to assist the court, the decision as to the value of the shares and the purchase price will remain with the court. It was more or less conceded that the court could not delegate or abdicate its decision to fix a price to a valuer but it was said that if the court was not minded to appoint an independent expert to value the shares it might appoint a valuer to assist the court in determining the price.

24. I am afraid that I must reject this suggestion also. In the first place, since the jurisdiction to order a sale and purchase of shares is triggered by a finding of oppression or a concession of technical oppression, it would be premature to contemplate such an appointment. Secondly, if the parties have their own valuers, the appointment of a third valuer would add a layer of costs. In a case in which there is sharp disagreement between the experts engaged by the parties it might well be useful to consider the possibility of a third opinion but it seems to me that before appointing a third valuer, the court would need to assess the nature and extent of the disagreement between the valuers appointed by the parties and to form a view as to whether it needed any further assistance.

25. In my view the first respondent's motion must be refused, with an order for costs in favour of the applicant, but I will stay execution on foot of the order for costs until the final determination of the proceedings.