THE HIGH COURT

[2021] IEHC 213

[Record No. 2018 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

NOTICE PARTY

AND

MALACHY LYNCH

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 24th day of March 2021.

1. On 20th February, 2020, I delivered a judgment in relation to an application by the applicant, Mr. Flor Harrington, against the respondents pursuant to s.212 of the Companies Act 2014. That judgment ('the substantive judgment'), which is cited at [2020] IEHC 72, should be read in conjunction with the present judgment, which concerns the costs of the application, in respect of which the parties have each made detailed written submissions.

2. The proceedings concerned a long-running and unfortunate dispute between the applicant and the first named respondent, who are brothers, each of whom is a director and 50% shareholder of the second named respondent ('the company'). As is clear from the substantive judgment, a feature of the dispute between the parties is that the brothers have long recognised that a parting of the ways between them would be necessary. When the matter came before me, the parties managed to agree that the only issue that it would be necessary for the court to resolve would be the appropriate multiplier to be applied to the EBITDA – an acronym for earnings before interest, taxes, depreciation and amortisation – of the company. This would in turn enable the valuation of the company to be completed, and thus the price at which the applicant's shareholding in the company would be bought out by the first named respondent.

3. This was not a simple issue however. An expert in valuation of company shares on each side gave evidence over a number of days, in which they each contended for widely differing values to be used as a multiplier. This evidence, and the court's conclusions in relation thereto, are set out at length in the substantive judgment.

4. In the event, I decided that a multiplier of four would be appropriate. This was considerably less than the figure of eight suggested by the applicant's expert, and within the general range suggested by the respondent's expert for entities the size of the company. However, it is fair to say that I was critical of the methodology of both experts, and departed from their evidence in reaching my conclusions.

5. Having given judgment, I adjourned the matter at the request of the parties to enable the order of the court to be considered. This involved the parties applying their minds to the manner and timescale in which the buy-out of the applicant's shares by the first named respondent would be effected.

6. Unfortunately, this process was not completed until almost a year later. The first named respondent intimated to the court that the Covid-19 pandemic, and the consequent paralysis which descended upon the activities and trading of the banks from mid-March 2020 onwards, had made it difficult for him to raise the finance necessary to complete the share purchase. The matter was adjourned on a number of occasions with a view to monitoring the attempts by the first named respondent to raise finance, a task which he had not anticipated would cause undue difficulty. As time wore on, and it seemed increasingly difficult to resolve the matter, the understandable exasperation of the applicant was evident, and I was urged at various times to make an order notwithstanding the first named respondent's difficulties, and at one point even to make a winding-up order in the absence of a resolution.

7. Ultimately, on 10th February, 2021, I indicated some dissatisfaction with a proposal made by the first named respondent, and indicated that I would give one final adjournment for two weeks, after which, if the parties had not resolved the matter, I would proceed to make orders without further reference to the parties. By letter of 22nd February, 2021, the respondent's solicitors wrote to the court indicating that a formula for acquisition of the shares had been agreed by the parties.

8. A draft order was agreed by the parties and made available to the court. On 24th February, 2021, I indicated that the only matter requiring to be finalised was that of costs, and gave the parties fourteen days in which to make submissions in this regard.

9. There is no dispute between the parties as to the legal regime which governs the award of costs. The applicable statutory provisions are ss. 168 and 169 of the Legal Services Regulation Act 2015 ('the 2015 Act') and the recast O.99 of the Rules of the Superior Courts as introduced by the Rules of the Superior Courts (Costs Order) 2019 SI 584/2019.

10. The applicant submits that it seems clear that neither party was "entirely successful" in the proceedings. It is suggested that "…there was only one issue to be determined and it cannot be said that there was any other issue in play in which it could be said either side was successful…[I]n circumstances where no …Calderbank offer has been made by either party and where it seems that neither party has been successful it seems to follow the most appropriate Order for Costs is that neither side should be awarded its costs". [Paragraph 3 written submissions].

11. The applicant made reference in his submissions to the fact that the respondent had brought a motion in the course of the proceedings seeking an order directing the appointment of an independent professional valuer to value the applicant's shareholding in the company. I refer to this motion at paras. 4 and 5 of the substantive judgment. In

the event, Allen J held that the court did not have jurisdiction to entertain this application, and refused it. The costs of that application were awarded by the court against the first named respondent. The applicant draws particular attention to the comment by Allen J during the course of his judgment that "…[t]he applicant was not bound to go along with [the proposal that the parties would both be bound by an independent expert valuation] and neither was it unreasonable that he refused to do so". It was suggested that this decision vindicates the applicant in not having the matter determined outside the court process by the appointment of an agreed expert.

12. The applicant urges the court to consider the events which transpired following the substantive judgment. It is submitted that "…this Court is entitled to conclude…that the first named respondent did not make best endeavours to discharge his obligations until the eleventh hour…". The applicant emphasises the extra cost to which he was put through no fault of his own between February 2020 and February 2021, and urges that he should be granted the costs of the proceedings for this period.

13. For their part, the respondents emphasise what they contend are the pre-trial efforts made by them to avoid or minimise legal costs. It is suggested that, from the very outset of the proceedings, the respondents accepted that the relationship of trust and confidence between the brothers had irretrievably broken down, and that this had resulted in deadlock in the board of the company. The respondents had made a number of open offers to acquire the shares, which offers were subject to all parties bearing their own costs. Their position was that the only issue between the parties was the price to be paid for the applicant's shares, and that the question of valuation should be negotiated between the parties.

14. During the course of a second open offer by letter of 29th May, 2018, the respondents suggested that an independent third party be appointed by the President of the Institute of Chartered Accountants to value the company. This offer was not accepted by the applicant, who continued to insist that his legal costs be discharged. The respondents subsequently brought the motion seeking an order directing the appointment of an independent valuer to which I refer above, and which was refused by order of Allen J on 20th December, 2018.

15. The respondents contend that it was not until 13th December, 2018 that the applicant confirmed by letter that he would agree to confine his claim to a determination of share valuation by the court. Notwithstanding this, the applicant rejected a subsequent offer from the respondents that both parties would bear their own costs.

16. As regards the substantive judgment, the respondents contend that "the valuation determination by the Court reflected significantly closer the methodology and outcome of the Respondents' expert than that of the Applicant's expert…" [para. 19 written submissions]. They point to the fact that the court noted that the valuation which it had determined was "broadly in line" with an offer made by the first respondent to the applicant to purchase the latter's shares in October 2012, which offer had been rejected by the applicant. By way of summary, the respondents submit as follows:

"Accordingly, in all of the circumstances, it is submitted that at all times, the Respondents acted commercially and sensibly in seeking to minimise and avoid legal costs. This is clear from their pre-trial efforts to avoid the costs of a court hearing, with early and repeated offers to appoint an independent valuer and to go back-to-back on costs. It is also clear that at the hearing of the action, the Respondents' expert evidence informed the decision of the court to a significantly greater extent than that of the Applicant's expert whose evidence was in effect wholly discounted".

17. As regards the legal position, the respondents rely on the decision of the Court of Appeal in *re Elst; Donegal Investment Group plc v. Danbywiske & Ors*. [2016] IECA 226, in which it is submitted that the court held that, in circumstances where the oppression was admitted and the court was confined to conducting a valuation exercise only, the most appropriate order in relation to costs was that there be no order as to costs. It was urged however that the court "should have regard to the respective positions of the parties' experts at the hearing of the valuation case and the attitude of the parties in advance of the hearing and their respective efforts to avoid and/or minimise legal costs" [Paragraph 27 written submissions]. The respondents urge that the circumstances warrant the respondents being entitled to their costs of the hearing on the basis of their pre-trial efforts to avoid costs being incurred "…and the fact that the ultimate outcome was very significantly closer to the position adopted by the Respondents than the position of the Applicant". [Paragraph 32].

Decision

18. It is certainly the case that the respondent made a number of attempts to narrow the issues in the proceedings, and to urge that the valuation be carried out at lower cost by an independent third party, even going so far as to apply to court for the appointment of such a party. The respondent resisted these attempts, with the result that both sides incurred costs in the process which ultimately produced a valuation.

19. However, as Allen J pointed out, the applicant was within his rights to do so. He was at no stage obliged to submit to a valuation by a third party. While open offers were made by the respondents, these related to the way in which the valuation was to be carried out, rather than offering a specific price at which the first named respondent would acquire the shares. If a Calderbank offer had been made, this might well have given the applicant serious pause for thought as to whether he should proceed along the legal route. However, no such offer was made. Also, while the use of an independent third party valuer would have saved legal costs, one does not know what such a valuer would have concluded. It is at least possible that such a valuer would have attributed a higher value to the company than the court.

20. One must also bear in mind two other factors: the unfortunate level of distrust between the brothers that is evident from the affidavits before the court, and the fact that the applicant did not have direct access to the books, records and ongoing operations of the company given that – despite his status as director and 50% shareholder of the company – he had not been involved in the running of the company for many years. It may be

that these factors inclined the applicant more towards determination by the court than by an independent third party.

21. It is fair to say that, in the substantive judgment, I inclined more towards the expert evidence of the respondents than that of the applicant in coming to my decision. However, it is clear that I was critical of the methodology of both experts, and departed ultimately to a significant degree from the views expressed by the respondents' expert. It was not a case of accepting the evidence of one expert rather than another which, if it had occurred, might well have influenced my decision on costs.

22. Taking all matters into account, I am of the view that the parties should bear their own costs. I do not consider that the costs of the period from the delivery of the substantive judgment to date should be awarded to the applicant. I am satisfied that the respondent experienced genuine difficulties in raising finance which he could not have foreseen, and which were outside his control. I do not consider that the inference contended for by the applicant that he "…did not make best endeavours to discharge his obligations until the eleventh hour…" is warranted. Indeed, given the first named respondent's evident eagerness to acquire his brother's shareholding and to develop the company's business further, it seems to me that his exasperation at the inability to complete the acquisition of the shares may well have been equal to that of the applicant.

23. The order of the court, then, will be perfected to reflect the terms agreed by the parties, and will provide that there be no order as to costs.