

THE HIGH COURT

[2020] IEHC 630
[2020/287 COS]
[2020/1061 P]

BETWEEN

KEVIN DEVLIN

PLAINTIFF

AND

JOHN O'DRISCOLL

APPLICANT

AND

SGC GLOBAL ADVANCED TECHNOLOGIES LTD

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of November, 2020.

1. In these proceedings, brought pursuant to the provisions of section 212 of the Companies Act 2014, the Applicant (Mr. O'Driscoll) claims that the affairs of two companies are being conducted in a manner oppressive to him or in disregard of his interests as a member of SGC Global Advanced Technologies Ltd. (SGC).
2. There is one immediate problem with this claim. Mr. O'Driscoll is not currently registered as a member of SGC. While he asserts that he is entitled to be registered as a member of SGC, and has (in other proceedings) sought an Order pursuant to section 173 of the 2014 Act requiring SGC to rectify its register to reflect his claimed ownership of shares in that company, it is common case that as things stand Mr. O'Driscoll is not a member of the company.
3. The Respondents to the section 212 proceedings, Mr. Devlin and SGC, therefore brought a motion seeking to stay this action until the other proceedings have been determined. These other proceedings ('the plenary proceedings') are the ones in which Mr. O'Driscoll makes his claim under section 173. He makes this claim by way of counterclaim in partial response to the Plenary Summons issued on behalf of Mr. Devlin. That writ seeks specific performance by Mr. O'Driscoll of an alleged agreement between the two men by which Mr. O'Driscoll sold his interest in SGC to Mr. Devlin.
4. At the risk of oversimplifying matters, the Respondents say that the section 212 proceedings are doomed to fail as things stand since Mr. O'Driscoll is not registered as a member of SGC. They say that only a registered member of a company can maintain such proceedings. The Respondents argue that they are entitled to an Order striking out this claim at this time, but do not seek such relief as (i) Mr. O'Driscoll would be less distressed by a stay than by a strike out and (ii) the Court would be more comfortable granting a stay than making an order striking out the claim. Whatever may be the truth of these alternative altruistic motives on Mr. Devlin's part, the stay sought by Mr. Devlin properly reflects the fact that it is quite possible that Mr. O'Driscoll may eventually obtain an order that he be registered as a member of SGC and (if he does) it is a better use of time and resources that he then resume prosecution of the current application under section 212 rather than be forced to start similar proceedings anew.

5. Mr. O'Driscoll initially hotly disputed the stay motion. He swore an affidavit on the 23rd of October 2020 stating that it was 'neither impermissible nor unusual' for section 212 proceedings to be coupled with separate proceedings which would establish the entitlement of the 'claimant for oppression' to be on the register of shareholders. He also gave evidence that the value of his interest in SGC, his alleged exclusion from SGC, and Mr. Devlin's alleged knowledge that he was attempting to obtain Mr. O'Driscoll's interest in SGC 'at a massive undervalue' were all matters which would be addressed in the plenary proceedings and in the section 212 proceedings. His lawyers extrapolated from these averments that it would be inefficient 'in terms of time and costs' for the stay to be granted as this would result in two separate trials, with significant duplication of evidence.
6. During the course of the hearing of the stay motion, it became clear that both sides accepted that findings of fact made in respect of the plenary proceedings would bind the parties in the section 212 proceedings. In a way, this was presaged by the written submissions of Mr. Devlin (at paragraph 70), where it was argued that:-

"The case management provisions of the Commercial Court can easily allow for the cases to be heard in sequence with the evidence in one being evidence in the other."
7. This contention is of course correct. If evidence in one action is evidence in the other, then the concerns of Mr. O'Driscoll about duplication of evidence would be handily addressed.
8. It is a small step from this proposition to the idea that a decision on any issue in the plenary action would bind the parties to the oppression claim. Logically, if the parties are (to all intents and purposes) the same in the plenary proceedings and the section 212 proceedings, it would make little sense for them to be free to suggest that the evidence on (for example) valuation to be the same in both actions but simultaneously argue that the Court should come to different conclusions as to value in the oppression proceedings as opposed to the plenary action.
9. I therefore believe that the concerns expressed by Mr. O'Driscoll about prejudice to him in the event the stay motion succeeded were without any real foundation. In any event, it is now accepted on his behalf that a stay on the oppression action will not compromise Mr. O'Driscoll's position to anything like the extent originally envisaged.
10. However, I do not believe that this motion should be decided on the basis of the prejudice which may be suffered by either Mr. Devlin or Mr. O'Driscoll in the event it fails or succeeds. The motion throws up a simpler issue, which is whether Mr. O'Driscoll can advance an oppression claim at all in circumstances where he is not a registered member of SGC.
11. Section 212 (1) reads as follows:-

“Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised—

(a) in a manner oppressive to him or her or any of the members (including himself or herself), or

(b) in disregard of his or her or their interests as members,

may apply to the court for an order under this section.”

12. The reference to ‘a member of a company’ suggests in itself that the person making the assertion of oppression is registered as such. The position is put beyond doubt by the definition of ‘member’ at section 168, which provides:-

“(1) The subscribers to the constitution of a company shall be deemed to have agreed to become members of the company, and, on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.”

13. On a bare reading of the relevant provisions of the 2014 Act, therefore, Mr. O’Driscoll is not a member of the relevant company and does not qualify to bring a claim under section 212.

14. Given that reading of the Act, is there anything in the case law that would both assist Mr. O’Driscoll and bind me in the decision that the motion requires me to make?

15. Mr. Devlin’s counsel relied upon the judgments in *O’Tuama v. Allied Metropole Hotel* (Unreported, High Court, 19th December 1988), *Re Via Net Works Ireland Ltd.* [2002] 2 IR 47, *Re Charles Kelly Ltd.* [2010] IEHC 38, *Banfi Ltd. v. Moran* [2006] IEHC 287. All of these suggest in plain terms that an applicant for relief under section 212 must be registered as a member of the company involved.

16. Counsel for Mr. O’Driscoll relies upon three authorities.

17. The first of these is a decision of Roderick Murphy J. in *Madigan v. Rea* [2010] IEHC 453. In this judgment, it is noted that the history of the dispute between the parties featured a consent Order, made earlier in the proceedings, consolidating an oppression petition with a plenary action in which (among other things) Mr. Madigan sought declarations about his status as shareholder in the company in which he claimed to have been oppressed. There is no analysis of the provisions of the analogous legislation (the Companies Act 1963), no consideration of the authorities going back to *O’Tuama* and no suggestion that a consent Order in any way governed a situation where the parties were at odds over the Court’s ability to hear an oppression petition where the petitioner was not registered as a shareholder. This is no criticism of the learned judge; as I have said, the reference to the consent Order consolidating the two actions is one made in passing in describing the

procedural progress of the case. Clearly, this authority does not advance Mr. O'Driscoll's position in any meaningful way.

18. The second authority is the judgment of Laffoy J. in *Re Charles Kelly Ltd*. In that decision it is noted that, when the case was being opened, the issue about the standing of the petitioner to seek relief for oppression 'emerged' – to use the language of the judgment. In these extreme circumstances, '[I]t was decided that a modular approach would be adopted to the hearing of the petition [...]'. The modular approach was to firstly determine if the petitioner was a member of the company and secondly, if he was, the extent of his shareholding.
19. There is no suggestion in the judgment that this approach was anything other than a pragmatic way of dealing with an issue which should really have been addressed much earlier in the proceedings, and certainly before the trial. There is also no reason to believe that there was a dispute between the parties, and (as in *Madigan v. Rea*) no sign of a consideration of the line of authorities which state unequivocally that a person claiming relief for oppression must be registered as a shareholder in the company concerned. Again, this is no surprise given that Laffoy J. was simply explaining how the issues before the Court had evolved rather than deciding a contentious dispute between the parties before her.
20. I will shortly return to the real significance of *Re Charles Kelly Ltd*. Before doing so, I will deal with the third authority upon Counsel for Mr. O'Driscoll relies, which is *Via Net*. At page 15 of that judgment, Keane C.J. (delivering the decision of the Supreme Court) said:-

"Section 205 is a valuable protection against the misuse by shareholders, usually constituting the majority, of their powers in a manner which is oppressive to the other shareholders or fails to have regard to their interests. Persons, such as the respondents, who have voluntarily disposed of their entire shareholding in a company could not conceivably have been contemplated by the legislature as persons who would be entitled to relief under the section. Nor is it any answer to say that, because the respondents have not transferred their shares, as they are contractually bound to do, they remain registered as members of the company. It is undoubtedly the case that a person who has become entitled to be registered as a shareholder may be unable to exercise any of his rights as a shareholder until his name has been entered on the register. But it does not follow that a person who, conversely, has voluntarily divested himself of all his shares in the company, but remains on the register must be treated as a member of the company for all purposes. I have no doubt that, when the legislature enacted s.205(1), it was not envisaged that persons without any interest in the company but who, for whatever reason, remained on the register as members would be entitled to present a petition grounded on alleged oppression of them as members."

21. Counsel submits that this passage does not stipulate that a person not on the register "can't issue the proceedings". He makes a similar submission about *Re Charles Kelly Ltd*.

22. It is plain that, in this portion of his judgment, Keane C.J is describing the need for a person asserting oppression not only to be registered as a member of the company but also to be the beneficial owner of the shareholding in respect of which he is so registered. In so doing, he is rejecting the idea that a shareholder who is not on the register nonetheless can make such a claim; full ownership of the shares by the claimant is required, but is not enough, in order to exercise 'his rights as a shareholder [...]' I think that this is the correct analysis of the wording used by Keane C.J. It is also the analysis consistent with the subsequent Irish authorities.

23. None of the Irish decisions which follow *Via Net* are clearer on this issue than *Re Charles Kelly Ltd.*, to which I now return. After the passage in the judgment which counsel for Mr. O'Driscoll prays in aid, Laffoy J. says;-

"[...] in order to maintain an application under s. 205, the petitioner must be a member of the company. In accordance with s. 31 of the Act of 1963, given that he was not an original subscriber to the memorandum of association, he must establish that he agreed to become a member of the company and, crucially, that his name is entered on the register of members."

24. I cannot accept the submission on behalf of Mr. O'Driscoll that section 212 allows a person to initiate and prosecute an action under the section without being on the register of members provided that, at some time before or in the course of the final judgment in the claim, the applicant is found to be entitled to an Order placing him or her on the register. Looking generally at this submission, section 212 (1) allows a member (and only a member) to apply for an order under section 212; the making of this application, through the initiation of proceedings, can only properly be done by someone who qualifies as a member through registration. Considering this submission more narrowly, Mr. O'Driscoll's claim for oppression does not seek any Order rectifying the register of members so as to include him; in itself, this correctly recognises that the claim of the applicant to be acknowledged as a member of the company is not to be determined in an application under section 212. It follows that Mr. O'Driscoll should have established his standing as a person on the register of members separately and independently from the oppression proceedings. Without having his name on the register of members, Mr. O'Driscoll cannot "maintain" these proceedings in the ordinary sense of that word; he cannot support or continue them.

25. I therefore find in favour of SGC and Mr. Devlin, and will make an Order staying the oppression proceedings until the determination of the plenary proceedings.