Neutral Citation no. [2005] NICh 2 | *Ref:* **WEIF5289**

Judgment: approved by the Court for handing down | *Delivered:* **19/05/05**

(subject to editorial corrections)

2004 No.707

IN THE MATTER OF MS (NI) LIMITED

BETWEEN:

CHARLES RICHARD ALAN LENNON

Petitioner;

-and-

MS (NI) LIMITED
WESLEY HANSON
STANLEY McFARLAND
3i Group PLC

Respondents.

WEIR J

The Background

[1] The Petitioner is a shareholder to the extent of 30.9% in MS (NI) Limited ("the Company") having acquired his shares in 1996 when there was a management buy-out. He was also until October 2001 the Managing Director of the Company at which time he was dismissed. His case is that his dismissal was unjustified and was contrived by the majority shareholders. He subsequently brought wrongful dismissal proceedings at a Tribunal, which proceedings were compromised in his favour. Thereafter the Petitioner commenced the present proceedings which are directed to compelling a fair valuation of the Company and of his shares and their purchase from him at that valuation. The proceedings were begun against the Company only but subsequently extended to include the second, third and fourth Respondents. The thrust of the Petitioner's allegations is against those added Defendants and not against the Company itself.

The present Application

[2] The Petitioner applied by summons for an Order under Order 24 Rule 7 RSC against the Company for discovery of the documents and classes of documents enumerated under five paragraphs and for a consequential Order under Order 24 Rule 11 RSC for inspection of such of the discovered documents as are in the possession, power or control of the Company. In the event it was agreed between the parties before the hearing of the summons that discovery of many of the matters sought would be provided voluntarily and that the discovery of those sought relating to advices obtained from the Company's solicitors and from Counsel concerning the Petitioner's dismissal and subsequent claim arising therefrom would not be pursued. That left the following documents and classes of documents in dispute:

> "3. Advices obtained from the Company's solicitors and relating to the following issues:
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> b. Queries raised by Dr Lennon in respect of the Deloitte and Touche valuation;
> c. The request made by Dr Lennon for management accounts for the Company in respect of the months November 2001 and December 2001;
> d. The drawing up of and contents of the Board Statement of 15th April 2002 in respect of the reconciliation of the accounts;
> e. Disclosure of documents requested by Dr Lennon;
> f. The marketing of the Company for sale in 2003/2004 by PWC under "Project Ocean" and the conclusion of that process;
> g. Activation or use of any process contained within the Articles of Association concerning Dr. Lennon's shareholding;
> h. Correspondence with Deloitte and Touche, PWC and KPMG.
>
> 4. Advices obtained from Counsel and relating to:
>
> b. Disclosure of documents requested by Dr. Lennon;
> c. The marketing of the Company for sale in 2003/2004 by PWC under "Project Ocean" and the conclusion of that process;

d. Activation or use of any process contained within the Articles of Association concerning Dr Lennon's shareholding;
e. The involvement of and valuations prepared by Deloitte and Touche, PWC and KPMG."

There was no challenge to the discoverability of any of the above other than on the ground of privilege.

The competing arguments summarised

[3} Mr Horner QC submitted in a helpful skeleton argument augmented by oral submissions that there is nothing in the facts of the present case to displace what he submitted is the general principle applying to the entitlement of shareholders to obtain production of documents acquired by the company in which they hold shares. Where, as he submitted is the case here, the dispute is essentially one between the shareholders in control of the Company and others seeking relief rather than hostile litigation between the Company and shareholders the shareholder is entitled to disclosure of all documents obtained by the Company in the course of the Company's administration including legal advice about its affairs. He conceded that this principle does not apply where there is hostile litigation against the company itself. I presume that it was on the basis of this distinction that the claim for discovery of any legal advice obtained by the Company relating to the Petitioner's dismissal by it was not further pursued by him.

[4] Mr Orr QC for the Company, supported pithily by Mr Shaw QC for the respondent shareholders, submitted that, as these proceedings were initially, and incorrectly, commenced against the Company only and continued against it alone for some time before the respondent shareholders were joined, there was at least during that initial period "hostile litigation" against the Company which operates to protect by legal professional privilege the types of documents sought to be discovered. He further submitted that, depending on the final outcome of the proceedings, the Company may in due course be ordered to purchase the Petitioner's shares in it and therefore the Company itself continues to be in dispute with the Petitioner, at least to that extent.

Conclusion

[5] While it is right that the proceedings were initially launched against the Company only, the Petitioner's attack has throughout been directed against the majority shareholders and not the Company except for the separate complaint of unfair dismissal which had to be brought against the Company itself as the Petitioner's former employer and in respect of which, as noted above, the claim for discovery is no longer pursued. I take the

fundamental principle to be that enunciated by Phillimore LJ in *Woodhouse and Co. (Limited) v Woodhouse* (1914) 30 TLR 559 at 560:

> "The principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e. company's money or trust fund, was the common property of the shareholders, or cestui qui trust. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged."

That case, which on its facts is quite unlike the present, was one brought by the company against the defendant who had formerly been a director of the company claiming the return of certain company monies allegedly expended by him for his own purposes. By contrast, in the present case, to borrow an expression of Harman J in *Re Hydrosan Ltd* [1991] BCLC 418, "the wrongs claimed and the nature of the allegations are of wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense." He distinguished that situation from a claim for unfair dismissal which he considered is truly a claim against the company. Interestingly, the *Hydrosan* case involved a claim that the company's funds had been improperly employed in financing the defence of earlier proceedings which chimes with a previous application by the Petitioner in the present proceedings. I therefore conclude that the present case falls within the principle in *Woodhouse.*

[6] Mr Orr's second submission, namely that the Company is, or in certain events will come to be, in dispute with the Petitioner because of the claim that the Company should buy the Petitioner's shares in it, therefore requires consideration. Mr Horner's response to that submission is that the Petitioner's substantive claim is against Messrs McFarland, Hanson and 3i, the latter acting through its appointed Director, Mr Nairn. The Company is only a nominal respondent in the sense that there are no allegations against (or by) it in these proceedings and its only role will be, if so ordered, to buy in the Petitioner's shares at a proper valuation. I have concluded that Mr Horner's position is the correct one. In the *Hydrosan* case Harman J. referred to the decision of Vinelott J. in *Re Kenyon Swansea Ltd* [1987] BCLC 514 at 521 where he said:

> "There is…one matter that has given me considerable concern. At a meeting of the board of directors of the company…it was resolved to instruct solicitors to act on behalf of the company. In reliance on that resolution solicitors retained by the company have incurred considerable expense in filing evidence and instructing counsel to oppose this application. I can

> see no possible justification for this course. The directors no doubt have very strong feelings as to the person they would like to see in control of the company and able to appoint and remove its directors including themselves. But they are not entitled at the expense of the company to take part in a dispute as to whether Mr Kenyon's shares should be compulsorily acquired by Mr Mitchell or by the company."

To that Harman J added:

> "Plainly an order that the shares be acquired by the company would be an order affecting the company and yet Vinelott J said, and I wholly agree with him, it could not properly be an action where the company's finances should be employed to influence the result of the claim.
>
> In my view that supports the proposition that I have already enunciated that a contributories' petition for just and equitable winding up, although it does produce severe results upon the company if it succeeds, yet is not properly within the classification of Phillimore LJ and Lush J in the *Woodhouse* case I have already cited.
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> For those reasons it seems to me that all the documents concerning the solicitors acting in the earlier petition are discoverable documents and should be produced. I do not include in the category of discoverable documents those relating to any steps taken by solicitors acting in the course of the Chancery proceedings for wrongful dismissal or the industrial tribunal proceedings for unfair dismissal. As it seems to me completely different considerations apply to those latter sorts of proceedings."

[7] I accept and adopt the reasoning of Harman J and Vinelott J. I conclude that the claim of privilege asserted by the Company in respect of the documents and classes of documents set out at [2] above has not been established in respect of any such. I therefore make the orders sought for discovery and inspection of all the said documents and classes of documents to be complied with within seven days of this ruling.

[8] Subject to hearing any contrary submissions I am provisionally disposed to make an order that Dr Lennon's costs of this application be born

by the Company subject to the proviso that the amount of such costs, when agreed or taxed in default of agreement, are to be disregarded in any valuation of the Company for the purposes of valuing the Petitioner's shareholding, if such valuation be ultimately ordered. I am further provisionally disposed to order that the respondent shareholders bear their own costs of choosing to participate in this application.