THE COURT OF APPEAL

Record No.: 2014/624

Article 64 Transfer Supreme Court Record No.: 466/12

High Court Record No.: 2008/402COS

Neutral Citation No.: [2022] IECA 264

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

OF THE COMPANIES ACT 1963

Murray J.

Costello J.

Haughton J.

BETWEEN/

EDWARD GERARD KELLY

PETITIONER/RESPONDENT

- AND -

WILLIAM KELLY

APPELLANT/RESPONDENT

-AND-

CHARLES KELLY LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Haughton delivered this 17th day of November 2022

Introduction

1. In the judgment of this court (Haughton J., Murray and Costello JJ. concurring) delivered on 24 September, 2021 reported at [2021] IECA 244 ("the principal judgment") appeals by William Kelly in respect of four modular hearings in "oppression" proceedings taken in the High Court under section 205 of the Companies Act, 1963 were dismissed. However the court left over for further consideration (1) certain issues arising in relation to the implementation of part of the order of High Court (Laffoy J.) dated 31 July 2012 (perfected on 1 October 2012) made under s.205(3) of the Companies Act, 1963, and (2) issues of the costs on the appeal. These issues are the subject of this supplemental judgment which should be read with the principal judgment.
2. Pursuant to directions given the court has since received up to date valuations (as of June 2022, in a report dated 25 August, 2022) by Sherry FitzGerald of the four properties that were to be transferred by Charles Kelly Limited ("the Company") to William Kelly pursuant to the said order dated 31 July, 2012. The court has subsequently received written submissions prepared by counsel for William Kelly, and written submissions filed by solicitors McDermott Creed & Martyn, now on record for Edward Gerard Kelly ("Gerard Kelly") on 26 September, 2022. The court reconvened on 7 November, 2022 and heard further oral submissions from counsel for both parties. It is helpful at this point to recall relevant parts of the orders made by Laffoy J., and the reasons why those orders were made.

High Court orders and judgments

3. The said High Court order of 31 July 2012 directed *inter alia* that in exchange for the Company acquiring William Kelly's beneficial shareholding of 3968 shares "at fair market value" the Company transfer four properties to William Kelly *in specie*, and further that he remit to the Company the sum of €165,000. The relevant parts of the said order read:

"And the Court finding that the four properties situate in Ramelton (Nos. 8, 10, 11 and 12 in Table 6.2 at page 29 of the report of Deloitte & Touche) be 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.

And the Court valuing the beneficial shareholding of the first respondent at €339,000 as at 31st August, 2011 on the basis that giving the first respondent such value is effected by transferring the properties above – mentioned to him in specie…

The Court doth provide

1. that the remittal of the sum of €165,000 by [William Kelly] to the company shall take place by 24th August, 2012 and
2. That the transfer in specie from the Company to [William Kelly] of the four properties at Ramelton as consideration for [William Kelly's] share shall take place by 24th August, 2012".

4. The order to remit €165,000 related to legal costs which Laffoy J. held had been improperly taken out of the Company account by giro or bank draft[1] and used by William Kelly to pay his then solicitors Gibson & Associates. An earlier order of 9 February, 2011 had directed William Kelly "reimburse to the company the sums aggregating €180,000 which he withdrew from the company after 14th September, 2009", but was varied downwards to €165,000 by the order of 31 July, 2012. Neither order made any reference to interest, whether pursuant to the Courts Act, 1981 or otherwise.
5. Also of significance is part of an order of Laffoy J. of 31 August, 2011 (which is recited in the final order of 31 July, 2012) which directed –

[1] By Giro or bank drafts dated 29 October, 2009 (€30,000), 9 December, 2009 (€100,000), and 12 February, 2010 (€35,000) – these payments were made during the hearing of Module 1 and up to and including the date upon which Laffoy J. delivered judgment on that module. A further payment of €15,000 dated 12 February, 2010 was never encashed.

"(e) That there be set off against the value of the shareholding of [William Kelly] in the company of all or so much of the sum of [€165,000] taken by [William Kelly] from the company, so that the purchase price to be paid by the company for the said shareholding of [William Kelly] will be the value so determined less the amount of the set off."

In the order of 9 February, 2011 Laffoy J. had also ordered that the €180,000 was to be held in escrow pending the determination of the proceedings. As no money had been paid over by the time of the final order on 31 July, 2012 the escrow provision lapsed.

6. The order of 31 July, 2012 also ordered that the petitioner Gerard Kelly recover the costs of the proceedings when taxed and ascertained from William Kelly (save the costs of accountants Deloitte & Touche (Mr. O'Flanagan's report and evidence) for valuing the shares of William Kelly, which costs were to be discharged by the company).
7. While initially both the remittal of €165,000 and the property transfers were ordered to take place by 24 August, 2012, there was 'liberty to apply' and extensions of time were granted, with a final High Court order of 8 March, 2013 granting a further extension of 21 days for rectification of the Register of Members and the record in the CRO only.
8. It is important to note that William Kelly did not seek any stay on the said orders in the High Court or before this court.
9. In the High Court on the evidence the aggregate valuations of the four properties varied between €640,000 (Property Partners) and €339,000 (CBRE). Laffoy J., in her third judgment delivered on 19 June, 2012 and reported at [2012] IEHC 330, decided as follows:

"14. However, there is a further major imponderable in this matter, which is more likely to impact on the ultimate fairness of the outcome of this mater, that is to say, the property valuation, and, in particular, whether the difference between the CBRE "desktop" valuation, which Mr. O'Flanagan properly had regard to, on the one hand, and the Property Partners valuation, on the other hand, is justifiable. For instance, there are four non-core properties

situate in Ramelton (Nos. 8,10, 11 and 12 in Table 6.2 at page 29 of the report) which are valued at €640,000 by Property Partners at 31st August, 2011, whereas they are valued by CBRE on a "desktop" basis at €339,000. I have come to the conclusion that justice and fairness as between the petitioner and the first respondent would be best achieved if those four properties 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.

15. That means that, while I am wholly in agreement with the approach adopted by Mr. O'Flanagan in his thorough and comprehensive report, to take account of the imponderable in relation to the property values, I am valuing the beneficial shareholding of the first respondent at €339,000 as at 31st August, 2011 on the basis that giving the first respondent such value is effected by transferring those properties to him *in specie*."

10. On 31 July, 2012, when considering her final orders, Laffoy J. was prompted to state the following (reported at [2012] IEHC 355):

"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 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."

11. In the principal judgment the remedy under s.205 is addressed at para.207, where I stated:

"…The whole purpose of the order under s.205(3) was to bring an end to the circumstances that warranted the bringing of the petition. At any rate matters have drifted far enough and I would propose that in the first instance Mr. William Kelly be afforded a period of four weeks from the date of publication of this judgment in which to make the payment, in exchange for the transfer of the properties. If Mr. William Kelly is not in a position to make the payment within that four-week period then, in the absence of agreement between the Company and Mr. William Kelly, there should be appropriate adjustment by order of this court of the property to be transferred. This would require the matter to be re-entered before this court and for there to be up to date valuation of the four properties, and for that reason I would propose that this matter be relisted before this court for mention only in six weeks' time."

Revaluation

12. William Kelly did not pay the sum of €165,000 or any sum to the Company within four weeks of delivery of the principal judgment. Since then the properties have been revalued by Sherry FitzGerald, as of June, 2022, on a 'drive by' basis. Their report, furnished to William Kelly on 25 August, 2022, now values the four properties as follows:

    (i) 12 acres of land contained in Folios DL26095, 26096 and 26097

    €165,000 - €220,000

    (ii) 2 townhouses at the Mall, Ramelton

    €150,000 - €175,000

    (iii) Drummonaghan Mill, Ramelton

    €185,000 - €200,000

    (iv) Millers Cottage, Drummonaghan, Ramelton

    €200,000 - €225,000

    In aggregate this is €820,000 - €700,000.

13. It is important to note that Sherry FitzGerald's up to date valuations did not have regard to title, and assumed that the properties would be transferred with vacant possession.

14. Also, since the orders were made in the High Court, no monies have been remitted to the company by William Kelly, who has always asserted that he is not a position to comply with the order. It need hardly be said that the properties have never been transferred.

    In the light of the foregoing, and of the Sherry FitzGerald re-valuations, the parties were invited to make submissions on the orders that this court should now make, and to address property transfers, interest, and costs.

Adjournment application

15. At the outset counsel for William Kelly sought an adjournment – for the purpose of seeking the advice of Senior Counsel and bringing a motion to review the principal judgment of this court, and revisiting the remedy fashioned by the trial judge, including reversing the orders made in

relation to shareholdings and the transfer of shares and resignation of William Kelly as a director. It was suggested by counsel that there was scope for splitting the company between the parties, and that there should be an opportunity given for a further round of affidavits focussing on the appropriate remedy.

16. The first basis for this application was stated to be that it had emerged from the written submission filed on behalf of Gerard Kelly that –

> "6) It has not been possible to transfer the four properties unencumbered to the First Named Defendant because of Ulster Bank's refusal to release them from various mortgage debentures. It is submitted that the difficulties with the encumbered properties can be avoided by removing the properties from the equation. The properties were directed to be transferred to the First Named Defendant *in lieu* of a monetary payment, at a time when the payment of a monetary sum would have been difficult for the Company. This is no longer the case."

A second basis was that the company debt with Ulster Bank and the associated security had been assigned to a Promontoria company; the court was informed by counsel for Gerard Kelly that this had indeed occurred, in or about 2015. Counsel for William Kelly argued that the failure to inform the court of these matters constituted a fraud sufficient to ground an application to review or set aside the principal judgment of this court.

17. The court rose to consider the application, and on resitting conveyed its decision to refuse an adjournment. The application to adjourn was very late in the day, and considered to be without merit. The review of a judgment by a court is a serious matter that can only occur in the most exceptional of circumstances, a threshold that did not appear to have been given due consideration by counsel in making the application, and was not reached. Moreover it was apparent that Laffoy J. in 2012 was live to the possible difficulty that if the debentures were not released by Ulster Bank, property transfers would not be possible. It was also accepted by counsel that William Kelly was well aware of the debentures, which, it should be noted, were referred to by Mr.

O'Flanagan (Deloitte & Touche) in his report to the court and his evidence given in 2011. Further, counsel accepted that William Kelly was aware that the Ulster Bank had subsequently assigned its interest in the underlying debt and the debentures to a third party. In the appellant's counsel's own written submissions it was observed that "the Company is and was unable to transfer the properties" by reason of the mortgage debentures, and it was proposed that they should remain with the company – something on which the parties agreed. It was also the case that William Kelly's legal team were aware of the written submissions of Gerard Kelly since they were filed on 26th September, 2022, yet did not signal an intent to seek an adjournment until shortly before the hearing on 7 November, 2022. The court was also firmly of the view that it is necessary to bring finality to these long running s.205 oppression proceedings, and justice would not be served by any further adjournment or further round of affidavits and submissions.

What orders should now be made

18. Turning to what orders this court should now make, it is common case that the four properties remained the subject of mortgage debentures with Ulster Bank, now assigned to Promontoria, and therefore they cannot be transferred unencumbered (if they can be transferred at all). As indicated earlier, this was known to Laffoy J., who remarked on 31 July 2012 that "If Ulster Bank will not release those properties from the debenture, the appropriate remedy will have to be reconsidered by the court." In counsel's submissions on behalf of William Kelly it is noted that in the evidence to the High Court of Mr. O'Flanagan of Deloitte & Touche, referred to by Laffoy J. in her judgment of 31 August, 2011 at para.20.10, he stated "…I think it must be assumed, that in the event of some of the properties being sold, the issue of procuring a release from the mortgage debentures would arise".

19. Counsel for Gerard Kelly, in response to questions from the court, informed the court that following the order of 31 July, 2012, an effort was made by the company to have the four properties released from the debentures, but Ulster Bank declined to do so unless the company

debt was cleared in full - as appears from a letter dated 27 October, 2012 from the Bank. It appears that further negotiation ensued, but came to nought, and ended when the company in or about 2015 issued proceedings against Ulster Bank arising out of the payments from company accounts constituting the sum of €165,000 mentioned earlier. A further difficulty that arises is that Millers Cottage is reported by Sherry FitzGerald to be subject to a letting to one family since 1970. However it seems that this is the sort of title issue that Laffoy J. anticipated when stating the properties:

> "are to be conveyed by the Company to [William Kelly] on the basis of the Company's title "as is" ".

20. In light of this it is necessary for this court to reconsider the appropriate remedy under s.205(3). It will be recalled that that subsection reads:

> "(3) If, on any application under subsection (1) or subsection (2) the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

21. This provision is in its terms widely drafted – the court may make "such order as it thinks fit". Counsel for William Kelly submits that the provision does not entitle the court to award damages, but no party has suggested that the court cannot order a payment of money and in exchange order a share transfer – an order commonly made by the High Court in order to resolve 'oppression' petitions.

22. Any order that this court makes should have as its aim "the bringing to an end the matters complained of". The trial judge sought to achieve this by directing the registration of the 3968 shares to which William Kelly was beneficially entitled and then directing the company to purchase them "at fair market value" with consequential reduction in the share capital of the company. The registration, transfer of shares to the company, and reduction in capital have occurred, and William Kelly has not had any interest in the company for some 10 years.

23. He is however still entitled to compensation approximating to "the fair market value" of his shareholding, which was found by Laffoy J. to be €339,000 as at 31 August, 2011. The remedy which she fashioned was that the company should transfer specified "non-core" property as it was not at that time in a position to pay the fair market value of the shares in cash, but the difficulty now faced by this court is that property transfer now proves to be problematic if not impossible.

24. In these circumstances the manner in which William Kelly must be paid for his shares must be reconsidered. It is submitted on behalf of Gerard Kelly that the court should now operate on the basis of the purchase price of €339,000, as the value placed on the shares by the trial judge. Counsel for William Kelly submits that the four properties are not ones that William Kelly wants transferred to him - he does not want to be responsible for them, or be liable for capital gains tax or stamp duty, or have to regularise title, or sell them - and counsel does not seem to disagree that the resolution lies in the payment of money, but suggests that this should be based on the updated valuation at the top range of €820,000.

25. In all the circumstances the appropriate course for this court to take is to direct appropriate payment to William Kelly, based on Laffoy J.'s finding that his shareholding fell to be valued at €339,000. This accords with the key finding in the High Court based on the expert evidence of Mr. O'Flanagan and valuation evidence that was before Laffoy J. – a finding that remains undisturbed - and in this court's view ordering payment is the best means by which matters can now be brought to an end, and the most just in all the circumstances.

26. However it is not appropriate to base the payment on the recent re-valuation. That revaluation was sought by this court for an entirely different purpose – to assist the court in deciding what reduction (if any) there should be in the properties to be transferred by the company to William Kelly on account of his non-payment (and asserted inability to pay) the €165,000 that he was ordered to pay to the Company, and for hearing the submissions of the parties accordingly. However it transpires that property transfers *in specie* are simply not possible. The recent valuations cannot now be deployed by William Kelly to suggest a revaluation of his shares in the company, which he ceased to hold in 2012, and which were valued by Laffoy J. at €339,000 at 31 August, 2011; nor can they be used as an argument for him being paid a greater sum as compensation for the purchase of his shares. Further for reasons given below in relation to interest, it would be inappropriate for this court to grant William Kelly the benefit of any uplift in value of the four properties.

Interest

27. This brings the court to consider the question of interest, particularly in light of the substantial period of time – some ten years – since the operative orders were made in the High Court.
28. Laffoy J. made no order, under the Courts Act, 1981 or otherwise, for interest to accumulate on the sum of €165,000 which she directed should be remitted to the company by William Kelly, and which sum was to be treated as a set off against the value of the shareholding.
29. It is nonetheless submitted on behalf of Gerard Kelly that this court should apply interest pursuant to s.22 of the Courts Act, 1981and s.26 of the Debtors (Ireland) Act, 1840 to the sum of €165,000 from 24 August, 2012, which is calculated[2] at €76,433 to 30 September, 2022. When added to the €165,000, this gives a total of €241.433 which, it is submitted, should be a set-off against the €339,000, leaving a net payment due by the company of €97,567.

[2] Correctly calculated based on the prevailing rate of 8% p.a. from 24 August, 2012 to 31 December, 2016, and 2% thereafter, being the rates set by S.I. 12/1989 and S.I. 624/2016 respectively.

30. It is submitted on behalf of William Kelly that through the use of set-off, and the words "provide" in reference to the remittal of €165,000 and transfer of properties, and the specifically the use of the phrase "as consideration for [William Kelly's] share", the trial judge imported contractual principles into the order, and that "the open-ended and provisional nature of the time means that time for remittal continues to run without interest". It is pointed out that petitioner or the company could have sought Courts Act interest, but never made any such application.

31. I do not agree that the High Court order was "open-ended" in any material respect, not least the time within which matters should have been concluded. I also do not agree with the submission insofar as it suggests that the order of the court is in some form contractual. It is an order directed to William Kelly and the company requiring that certain things be done to bring an end to the oppression that the High Court found to exist. However, I am persuaded that because the trial judge treated the transfer of certain property as satisfying fair market value of €339,000 for transfer of William Kelly's shares, on the basis that the transfers occur at or about the same time, it was an order and exchange that was not intended by Laffoy J. to attract Courts Act interest on the one side, or uplift in property value on the other. It is also correctly pointed out that neither the company nor Gerard Kelly ever sought Courts Act interest, and it did not feature in any of the judgments or orders of the High Court. Whilst it is now sought, and this court arguably has a discretion to grant it within its broad powers under s.205(3) to fashion an appropriate remedy, to grant it would not be consistent with the exchange – of a fixed sum of money for property transfers assessed to satisfy a fixed valuation of shares – that the trial judge envisaged happening at or about the same time.

32. Equally, viewed from the perspective of the company, the trial judge envisaged an exchange occurring in 2012/2013, and it would therefore be wrong to enhance William Kelly's share valuation by applying some inflationary uplift to Laffoy J.'s valuation of €339,000, whether by applying Courts Act interest rates or some other rate such as a Consumer Price Index or property

revaluation. The figure of €339,000 represented a fair market value for William Kelly's shares based on the value of the company at or about the date of the decision of the High Court. It would be incorrect to simply assume that the uplift in the value of certain properties owned by the company should now be credited to the value of the William Kelly's (former) shareholding. In essence William Kelly now asks this court to re-assess the value of the company and William Kelly's former shareholding *de novo*, but that is not the task of the court on this application, particularly as the principal judgment dismissed the William Kelly's appeal *inter alia* on the issue of remedy.

33. A further compelling reason is that William Kelly neither sought a stay on the High Court order in 2012 nor made any application thereafter in relation to the remedy ordered by the court – in respect of which there was liberty to apply. It was open to him at any time to have called on the Company to transfer the properties, or, given the difficulties posed by the debentures, to re-apply to court for a monetary payment instead of property transfers. It was within his power to make such application and thereby crystalise the sum due to him, and to seek Courts Act interest thereafter, but he did not take any such action, and chose instead to appeal, an appeal which he has lost. In any event arguably the Courts Act/Debtors (Ireland) Act interest provisions only apply to a monetary judgment, and so could not apply to the trial judge's valuation of shares.

34. In these circumstances the court should not exercise such discretion as it may have to adjust the High Court order by granting statutory interest on the sum of €165,000, or the sum of €339,000 payable to William Kelly. Equally it should not interfere with the valuation of shares by the trial judge at €339,000.

Costs

35. The High Court: The costs in the High Court were awarded by Laffoy J. to Gerard Kelly against William Kelly (save the report of Deloitte & Touche the costs of which the company was to discharge), to be agreed or taxed in default of agreement, and are governed by her order of 31

July, 2012, which this court has affirmed. In that respect there will be no change in that order as William Kelly did not succeed in his appeal.

36. The Appeal: The principal judgment proposed that as Gerard Kelly was entirely successful in defending the appeal he should be entitled to his costs (or outlays and expenses in so far as he was unrepresented) to be paid by William Kelly. No argument has been advanced to persuade this court otherwise, and accordingly Gerard Kelly is entitled to have his costs/outlays and expenses of the appeal paid by William Kelly, the same to be adjudicated by a legal costs adjudicator in default of agreement.

37. The company: it is submitted on behalf of Gerard Kelly that the company incurred significant costs implementing the High Court order, rectifying the register, reducing the company share capital, CRO filings etc. and that it should be awarded costs. This submission must be rejected as such costs are not costs of the litigation but rather are the expenses incurred in complying with the order of the court and, as such, not something which ordinarily a losing party would be required to pay. Moreover, the trial judge did not see fit to award any such costs or expenses.

38. As to the appeal, there is no formal application to this court for the payment of costs to the company. While the company solicitors Charles B.W. Boyle & Son attended at the first morning of the appeal and briefly on occasion thereafter, this was as a courtesy to the court and they never formally came on record, and it is clear that the company was not an active participant in the appeal. After delivery of the principal judgment Charles B.W. Boyle & Son had some further involvement, at the request of the court (and for which the court is very grateful), but this was limited and concerned only with obtaining a revaluation – see the next paragraph. Accordingly the court will make no order as to the company's costs of the appeal.

39. Sherry FitzGerald report: This was initially to be obtained by the company, acting through its solicitors Charles B.W. Boyle & Son. On 28 January, 2022 that firm was relieved of the obligation by this court, and the court directed that either Gerard Kelly or William Kelly instruct

the valuers – and if the latter it would be on the basis that the costs would be a credit against other liabilities that he might have. Gerard Kelly did not instruct Sherry FitzGerald – William Kelly did. Accordingly, the costs of the Sherry FitzGerald report will be a credit against William Kelly's liability for payment of costs to Gerard Kelly. The court was informed that the cost to William Kelly was €984, inclusive of VAT.

40. Set-off of costs in other proceedings against sums due by William Kelly to the company: In separate proceedings entitled *Charles Kelly Limited v Ulster Bank Ireland Ltd* High Court record no. 2015/6744P William Kelly's application to be joined as a Notice Party was refused on 9 August, 2020, and his appeal to the Court of Appeal failed on 22nd September, 2020 (an application for further leave to appeal to the Supreme Court also failed) with costs of the appeal granted to the company. The Bill of Costs served on William Kelly apparently remains outstanding.

41. On behalf of Gerard Kelly it is submitted that any order now made by this court for payment of monies to William Kelly should be contingent on him discharging those costs due to the company.

42. This should be refused as there is no proper application before this court from legal representatives on record for the company. Should the company wish to make such an application the court's view is that it should, in the first instance, be made to the High Court.

Stay on payment to William Kelly pending taxation/adjudication of High Court costs:

The costs in the High Court were awarded to Gerard Kelly against William Kelly following 28 days of hearings in that court. Counsel for Gerard Kelly informed the court that these costs have not been taxed, and no payment on account of such costs has been made by William Kelly. In response to questioning from the court counsel informed us that Gerard Kelly's then solicitors, Gore & Grimes, were paid €75,000 on account, and later presented Gerard Kelly with a Bill for the balance of their costs in the order of €480,000. Following non-payment of this sum it appears that a bankruptcy summons was obtained and served on Gerard Kelly. The court was not informed

whether or not the creditors were petitioning for Gerard Kelly's bankruptcy on the basis of his failure to pay the sum demanded in the bankruptcy summons, though this must remain a possibility.

43. On behalf of Gerard Kelly it is now submitted that there should be a stay on the payment of monies which this court directs be paid by the company to William Kelly (i.e. the sum of €174,000 after set-off of €165,000 against the share compensation of €339,000), presumably to allow Gerard Kelly's former solicitors an opportunity to tax their costs and for Gerard Kelly or his former solicitors to take such steps as they may be advised to secure payment, or partial payment out of the monies so retained by the company.

44. This of course would be in ease of Gerard Kelly, and recommends itself to the court, given William Kelly's repeated statement that he is not financially in a position to pay €165,000, and given the length of time that the costs have remained unpaid. Whilst there is no evidence before the court as to the level at which Gerard Kelly's High Court costs may tax, it is not necessary for the court to receive evidence to tell it that the costs of 28 days in High Court will be very substantial and are likely to exceed the sum of €174,000. However, it would not be fair to William Kelly to impose an indefinite stay. It is incumbent on Gerard Kelly to agree the costs or seek taxation (or adjudication by a legal cost adjudicator as appropriate) of those costs with expedition, and the court will therefore impose an initial stay of six months, and, provided the adjudication process has been commenced within that period the stay will be extended until the completion of the process (including any appeals) and three months thereafter. After that time, unless there has been agreement between the parties to extend the stay, or intervening court orders e.g. of garnishee, the balance due of €174,000 must be paid by the company to William Kelly.

45. Costs of this hearing: This further hearing, and the parties written and oral submissions, were necessitated primarily because the debenture holder declined to release its security over the interest of the company in the four properties which the High Court directed should be transferred.

In these circumstances the court will make no order as to the costs of this hearing or the submissions.

Summary

The court will therefore make the following orders:

1. An order vacating the order of the High Court of 31 July 2012 for the transfer *in specie* from the Company to William Kelly of four properties at Ramelton as consideration for William Kelly's shareholding in the Company and **substituting therefore** an order that the Company do pay the sum of €339,000 to William Kelly as consideration for the purchase by the Company of his shareholding in the Company.
2. For the avoidance of doubt, an order directing that the sum of €165,000 directed by the High Court to be paid by William Kelly to the Company shall be set off against the said sum of €339,000 to be paid by the Company for the said shareholding, so that the balance to be paid by the Company to William Kelly as consideration for the purchase by the Company of his said shareholding is thereby reduced to €174,000.
3. An initial stay on the payment by the Company to William Kelly of the said sum of €174,000 for six months from the date of perfection of this order, and, provided that within that time the process for taxation/adjudication of the costs awarded to Gerard Kelly in the High Court has commenced, the stay shall continue thereafter until the taxation/adjudication process is finalised (including all reviews or appeals) or the costs are agreed, and thereafter for a further three month period whereupon it shall lapse unless extended by further order of the court.
4. In all other respects an order affirming the order of the High Court dated 31 July, 2012 and dismissing the appeal.
5. The application of Gerard Kelly for Courts Act interest on the sum of €165,000 is refused.

6. An order that Gerard Kelly do recover his costs/expenses and outlays of the appeal from William Kelly, such costs/expenses/outlays to be adjudicated by a legal costs adjudicator in default of agreement.
7. An order that the costs of William Kelly of obtaining the Sherry FitzGerald up to date valuation report in the sum of €984 inclusive of VAT is be a deduction from the High Court costs when agreed or adjudicated.
8. Liberty to all parties to apply.

Murray and Costello JJ. have indicated that they agree with this judgment and the orders to be made.