

**THE HIGH COURT**

[2022] IEHC 158

**Record No. 2019/ 1373 S**

**BETWEEN**

**JEAN KENNEDY, CAROL O'RIORDAN AND ANDREW O'RIORDAN**

**PLAINTIFFS**

**- AND -**

**PAUL WARD**

**DEFENDANT**

**Judgment of Mr. Justice Quinn delivered the 22nd day of March 2022**

1. The first and second named plaintiffs and the defendant are siblings. Between them they are the owners of substantially all of the shares in a group of companies referred to in these proceedings as the "Ward Cinema Group". Arising from disputes between them they entered into an agreement, entitled "Binding Heads of Terms" (the BHOT) on 18 April 2019. The BHOT provided that the defendant, either by himself personally or by his nominee, would acquire the shareholdings of the first and second plaintiffs for a consideration of €31.5 million.
2. The first instalment of the consideration in the amount of €25 million was to be paid on or before 31 October 2019. The balance was payable in three further instalments, on 31 October 2020, 31 October 2021, and 31 October 2022.
3. The BHOT provided that in the event that the consideration was not paid in accordance with the terms of the agreement the defendant would consent to judgment in the sum of the "outstanding balance" and to a charging order in respect of his shares in the companies in that sum.
4. In these proceedings, the plaintiffs claim that the consideration was not paid in accordance with the terms of the agreement and they have applied for summary judgment against the defendant in the total sum of €31.5 million.
5. I have concluded that the plaintiffs are entitled to summary judgment, not for the entire amount of the consideration, but for those amounts thereof which have fallen due at the time of delivery of this judgment.
6. The third named plaintiff is the husband of the second named plaintiff and the donee under an enduring power of attorney executed by the second plaintiff on 12 October 2016, which was registered on 7 January 2020.
7. Issues have been raised by the defendant concerning the capacity of the second named plaintiff to enter into the BHOT and at later dates to perform her obligation to transfer shares, and regarding the commencement of these proceedings. The court has also been informed that the second named plaintiff is now deceased. I shall return later in this judgment to the questions of capacity which were raised. Issues may also arise on which the court will hear submissions regarding the constitution of these proceedings for the purpose of any enforcement or continuance. This judgment is concerned with the merits

of the application for summary judgment having regard to the affidavits exchanged between the parties and their advisors and representatives.

### **The BHOT**

8. The BHOT was signed at the conclusion of a mediation between the parties.
9. In the BHOT, the defendant is referred to as the "First Party" and the plaintiffs are referred to as the "Second Parties".
10. The BHOT recites that the parties are shareholders, directly and indirectly, of a number of companies, described in a certain "Crowe Valuation dated 26 September 2017" which are then referred to as "the Companies". The BHOT recites that the parties are in dispute in relation to matters concerning the companies and that:-

*"The parties have agreed to resolve their differences in accordance with the terms outlined in this Binding Heads of Terms".*

11. Clause 1 of the agreement is referred to as the "Settlement Terms", clause 2 is referred to as "General" although it contains a number of the critical operative provisions which are the subject of dispute on this application.
12. *Clause 1.1 provides: - "The parties agree to a full and final settlement of the dispute as follows".*
13. It is necessary to quote in full a number of the operative provisions of the agreement.

#### *"Clause 1.1.1*

*The First Party agrees to procure the acquisition of all of the shares owned directly or indirectly by the Second Parties, and the Second Parties agrees (sic) to procure the transfer of those shares with unencumbered title to the First Party or his nominee(s) for a combined consideration of €31.5 million (the "Consideration") payable as follows: -*

- (i) €25 million payable on or before 31 October 2019 (this was subsequently extended to 21 November 2019).*
- (ii) €2 million payable on or before 31 October 2020.*
- (iii) €2 million payable on or before 31 October 2021.*
- (iv) €2.5 million payable on or before 31 October 2022.*

#### *Clause 1.1.2*

*The Second Parties agree to procure that title to the shares owned by the Second Parties shall be transferred to the First Party or his nominee(s) upon payment of the first tranche of the Consideration pursuant to Clause 1.1.1 (i).*

*Clause 1.1.3.*

*The Consideration will be payable 50% to each of the Second Parties or their nominees.*

*1.1.4*

*The First Party agrees to procure the discharge of any outstanding amounts in connection with dividends paid out in 2017 in Galway Multiplex Cinema Limited and/or shareholder loans from Cameo Cinema Limited, to the second parties within 28 days from the date hereof, subject to certification in writing by the auditor, Eric Logan, that such sums are properly due and owing.*

*1.1.5*

*The First Party agrees to procure the payment of any management fees due and owing to Andrew O’Riordan, Carol O’Riordan and Jean Kennedy as may be certified as properly due and owing by the auditor Eric Logan and on receipt of appropriate invoices within 28 days of the date hereof.*

*1.1.6*

*The Parties will use their best endeavours to ensure that all sums to be paid to the Second Parties will be structured in a tax efficient way for the Parties.*

*1.1.7*

*The Parties will use their best endeavours to ensure that the sums paid are done in such a way as will circumvent any pre-emption rights in favour of any third parties, to the extent this is possible and that clauses 1.1.1 and 1.1.2 are subject to any pre-emption rights being exercised. The Parties agree that any sums paid to the Second Parties by any third party shareholders under pre-emption rights will reduce the consideration by equivalent sums.*

*1.1.8*

*The First Party will procure that the Second Parties and their spouses will avail of free passes for life to all of the cinemas owned by any of the Companies as well as 50 cinema tickets per annum for each of the Second Parties (subject to the usual restrictions associated with such passes and tickets).*

*1.1.9*

*The Second Parties will resign and procure the resignation of their nominees from the boards of the Companies upon receipt of the first tranche of the Consideration pursuant to Clause 1.1.1 (i) of this agreement and in the meantime will not participate or interfere in any way in operation of the Companies”.*

**General**

14. *Clause 2.1 "The Parties shall use best endeavours to do or procure the doing of all such things and acts and/or execute and/or procure the execution of all such documents as may be necessary for giving effect to this Binding Heads of Terms and/or comply with any and all regulatory and legal requirements which might arise".*
- 2.2 *"The parties shall each bear their own costs arising out of or in connection with this Binding Heads of Terms and the steps required to implement its terms".*
- 2.3 *"This Binding Heads of Terms may only be varied by an agreement in writing signed by all of the parties".*
- 2.4 *"The signatories to this Binding Heads of Terms hereby warrant and represent that they have full power and authority to execute this Binding Heads of Terms in their own capacity and/or as attorney or authorised signatory".*
15. Clause 2.5 contains an acknowledgement that the parties have participated jointly in the negotiation and drafting of the BHOT and excludes the "contra proferentem" rule.
16. Clause 2.6 is a confidentiality provision. Clause 2.7 concerns the services of notices. Clause 2.9 provides that the terms and any dispute relating thereto shall be governed by Irish law. Clause 2.11 confers exclusive jurisdiction on the Courts of Ireland. Clause 2.10 contains a standard counterparty clause.
17. Clause 2.8 provides as follows: -
- "The parties acknowledge that in the event that the Consideration is not paid in accordance with the terms of this agreement, or such later date as may be agreed between the Parties, the First Party shall consent to judgment in the sum of the outstanding balance and to a charging order in respect of his shares in the Companies in that sum".*
18. The BHOT was signed by the defendant and by the first named plaintiff. It was signed also by "Gerry Carron for and on behalf of and as attorney for Carol O'Riordan."
19. The plaintiffs say that the consideration was not paid in accordance with the terms the BHOT and invoke clause 2.8 quoted above to ground their application for summary judgment in the amount of €31.5m against the defendant.

#### **Affidavits**

20. The application is grounded on an affidavit of the first named plaintiff sworn 18 December, 2019.
21. A replying affidavit was sworn by the defendant on 27 January 2020. There followed exchanges of further affidavits by the first plaintiff and the defendant and also affidavits by the third named plaintiff, by Mr. Lorcan Ward, son of the defendant, by Mr. Carron and by Mr. David Robinson consultant physician and geriatrician, whose affidavit concerns the capacity of the second plaintiff. Affidavits were also sworn by Lisa Kinsella a partner at

Crowe Ireland and Colm O'Callaghan, a partner at PricewaterhouseCoopers Ireland, who the plaintiffs and the defendant respectively had engaged as financial and tax advisors.

22. The affidavits contain extensive evidence regarding the events which transpired after 19 April, 2019, and very limited evidence as to the events which occurred on that day itself, which is understandable having regard to the fact that the mediation was a confidential mediation of disputed matters.
23. In the context of the "best endeavours" language used in Clause 1.1.6 of the agreement, and the obligation to do "all such things and acts as may be necessary" to give effect to the BHOT referred to in Clause 2.1 of the agreement, much reference has been made by the parties to the sequence and the timing of communications between the parties and their professional advisors. It is not necessary to recite each and every communication between the parties over the months which followed the signing of the BHOT, but I shall refer to a number of key dates and communications.

### **Chronology**

24. In April 2019, the defendant made initial contact with Mr. O'Callaghan of PwC. On 25 April 2019 his son Lorcan Ward emailed Mr. O'Callaghan providing him with certain basic information in relation to the intended transaction and requesting a fee quote as to how to structure the transaction in a tax efficient manner. He noted in that email that Messrs. Crowe had been significantly involved in the process from as early as 2016 and that they also were looking at structuring options. In this email Mr. Ward states that "*the transaction will be financed from cash reserves and there is approximately 20% payable by way of deferred consideration for a three year period. In respect of the Northern Ireland entities, I understand Paul is arranging for there to be a share buyback of their interests*". He states also "*given it is a family transaction the share sales will be effected by way of stock transfer forms or a very simple form share purchase agreement*".
25. On 10 July 2019 Lisa Kinsella of Crowe wrote to the defendant introducing herself and requesting certain information.
26. Under the heading "Financing Matters" she states the following: -

*"The binding heads of terms provides for you to acquire the shares in question from Carol and Jean personally.*

*To ensure that Carol and Jean are not caught by specific anti avoidance provisions that were introduced in the Finance Act 2017, whereby the consideration paid to them could be subject to income tax at 52% if the reserves of the company's shares acquired are used directly or indirectly to fund the acquisition of the shares, I would be grateful if you could please confirm how you intend to finance the acquisition of the shares from Carol and Jean".*

Ms. Kinsella also enquired if the defendant was appointing a tax advisor.

27. On 20 July 2019 the defendant replied to Ms. Kinsella confirming that he had engaged PwC and that Mr. Colm O'Callaghan would be responding.
28. Ms. Kinsella and Mr. O'Callaghan met for the first time on 25 July 2019. It appears from affidavits sworn by Mr. Kinsella and Mr. O'Callaghan respectively that there is disagreement as to what precisely was said at the meeting of 25 July 2019 regarding funding, and the respective expectations of the parties regarding funding.
29. A note of that meeting exhibited by Mr. Lorcan Ward includes a comment under the heading "Principal Points Made by CH (Crowe Horwath)" to the following effect: -

*"Had general expectation that funding would come from corporates and not from PW personally".*

30. While there are differences between the accounts of this meeting given by Ms. Kinsella and by Mr. O'Callaghan it is clear from their respective affidavits that at this meeting Mr. O'Callaghan, in accordance with his own description in his affidavit of 14 September 2020, explained to Ms. Kinsella the intention as follows: -

*"I also explained the intention to utilise, to the extent necessary, funds from within the relevant target companies to partially fund the payment of the consideration where necessary. It was always my understanding, on the basis of instructions from the defendant, that funds held by the companies were to be used to finance the consideration."*

31. Ms. Kinsella states that the bullet point quoted from the notes of PwC is not accurate insofar as it implies that she was confirming any measure of agreement that her clients recognised the requirement for the cash reserves in the target companies to be utilised.
32. On any view of the different accounts given of this meeting and of the subsequent correspondence the defendant's intention to utilise target company funds was explained by Mr. O'Callaghan to Ms. Kinsella at the meeting on 25 July 2019. On the following day Ms. Kinsella telephoned Mr. O'Callaghan and it is said that the contents of that telephone conversation were summarised in an email sent by Ms. Kinsella to Mr. O'Callaghan on that day, namely 26 July 2019 in which Ms. Kinsella states as follows: -

*"We have had subsequent discussions with our clients and they have asked us to clarify to you that their understanding is that Paul will purchase the shares from them directly.*

*Any funding proposals, specifically the use of company funds to make payments to Carol and Jean, will only be considered by our clients if there is no additional tax cost to them.*

*As noted we are concerned with potential implications of FA 2017 section 135 amendments and consequent tax risk our clients could be exposed to."*

33. Whilst much has been made by the parties of events which took place after this date, it is clear that the most fundamental issue of disagreement between the parties and which was the subject of extensive meetings, exchanges, correspondence, emails and other communications thereafter had come to light in July. It was at that stage that Mr. O'Callaghan indicated to Ms. Kinsella that the defendant intended that funds, being cash reserves within the relevant target companies would be used to at least partially fund the payment of the consideration. It is clear from Ms. Kinsella's email of 26 July 2019 that the plaintiffs were in disagreement with this intended approach.
34. This disagreement was not only about the tax efficiency of the payment of the consideration. It concerned the choice of the defendant to utilise cash reserves in the target companies to fund the consideration. Whether that was a choice, or as the defendant asserts, a necessity, does not matter. It was clearly the introduction of a new feature to the transaction.
35. If there were any doubt as to the extent of this agreement the position was made even clearer when Mr. O'Callaghan replied to Ms. Kinsella on 20 August 2019 stating the following: -

*"In this regard the Heads of Agreement clearly state that their shares can be bought by Paul or Paul's nominee (i.e. a company of Paul's choosing) and that they will transfer their shares to Paul or nominee upon payment of the first tranche of consideration.*

*In relation to Clause 1.1.6 (which deals with the tax efficiency of implementing the heads of terms) it was agreed that the parties (which includes all parties) would use their best endeavours to ensure that payment of the sums would be structured in a tax efficient way for the Parties (which again includes all parties). This means that the Parties would facilitate the payment to be structured in a way that is tax efficient for everyone (and not only one side or the other).*

*As we have previously stated the expectation on our side is that funding would come from corporate sources rather than from Paul Ward personally. In this regard an element of pre-sale restructuring would be necessary and we are open to working with you and Jean and Carol to find a solution to progress."*

36. On 26 August 2019 Ms. Kinsella replied again. In this email she stated that it was difficult for her clients to put forward a proposal around pre-sale restructuring as they did not have up to date financial information. She invited Mr. O'Callaghan to submit a detailed proposal "outlining the corporate sources that Paul intends to utilise to fund the transaction. We are particularly interested in determining the quantum of funds that may be extracted from the target companies. On receipt of this information I will then be in a position to evaluate the overall tax implications".

37. On 6 September 2019 PwC presented to Crowe a document entitled "Ward Cinema Group – Heads of Agreement dated 18 April 2019 (*sic*) and Related Funding and Tax Considerations."
38. The PwC report identified possible approaches to the funding of the payment of the consideration. The principal approach was based on the utilisation of funds from within the target companies. It was proposed that of the "upfront consideration" of €25 million, some €13.8 million would be sourced within the target companies and the balance from outside the target companies. It was also proposed that in respect of the deferred consideration of €6.5 million, one half would be sourced from within the target companies and one half from outside.
39. The report contained proposals as to the manner in which there could be mitigation of the risk identified by the plaintiffs, that application of funds within the target companies could be deemed by Revenue to comprise a distribution to the plaintiffs and therefore attract income tax at the rate of 52%, by contrast with the rate of 33% payable if only capital gains tax were applied to the consideration.
40. I pause at this point to identify the tax risk which the plaintiffs say precluded the utilisation of funds from within the target companies, at least to the extent proposed by the defendant.
41. Section 135(3A) of the Taxes Consolidation Act 1997 (as inserted by s. 23(1)(b) of the Finance Act 2017) provides that where a member of a company, being a "close" company within the meaning of s. 430 (and it is accepted that the relevant companies are close companies, being controlled by the first and second plaintiffs and the defendant) enters into an arrangement whereby such member disposes of an interest in shares of the company and the consideration for the acquisition of those shares is paid or to be paid directly or indirectly out of the assets of the company, any amount received by the disposing member "shall be treated for the purpose of this chapter as a distribution" to that member at the time of the payment.
42. Section 20 of the Taxes Consolidation Act 1997 provides that a distribution is subject to income tax under Schedule F of the Act.
43. The plaintiffs say that on a disposal of their shareholding, such as envisaged by the BHOT, they expected to have a liability to pay capital gains tax, at the rate of 33%. They say that Clause 1.1.6 does not oblige them to participate in a scheme which would expose them to a potential liability to income tax at a rate higher than 33%.
44. The defendant and Mr. O'Callaghan each recognise the existence of a risk that where funds in the target companies are utilised to implement the acquisition of the shares under the BHOT, the plaintiffs could be exposed to liability for income tax having regard to the provisions of s. 135.



45. The report of PWC dated 6 September 2019 acknowledges and addresses this risk and identifies methods by which the potential additional tax can be mitigated. It is also suggested that not all of the funds so utilised would necessarily be exposed to such risk. In subsequent correspondence the parties and their advisors appeared to have open discussions as to how the risk be mitigated or minimised. There is also a conflict of evidence as to the extent to which the defendant would have been willing to source all or part of the consideration from external funding, if necessary by external borrowing or asset realisations.
46. On the PWC description of the matter, it was suggested that only a sum of €5.58 million out of the "upfront consideration" of €25 million would be sourced from the target companies and would therefore be potentially characterised as "bad cash", meaning cash susceptible to the risk under s. 135.

#### **Exchanges after PWC Report**

47. Messrs. Crowe enquired whether the defendant would be willing to consider funding that "bad" amount with debt financing which they said would help "narrow down our proposals".
48. In reply, PWC indicated as follows: -

*"In terms of whether it is possible to fully debt finance the €5.5 million (as opposed to utilising the available cash within the entire) we have discussed this with our client and as I said previously when we met, at present I think this will likely ultimately only add to the complexity of the transaction (by including banks) and possibly end up delaying the process – both of which are currently in no sides interest. Therefore, we are keen to understand what alternate structure may be available or palatable to Jean and Carol".*

49. On 15 October 2019, Crowe replied by stating that their clients would not be proceeding with the PWC proposal. Ms. Kinsella stated "My clients Jean Kennedy and Carol O'Riordan are extremely anxious to complete this deal. However, they do not wish to complete this deal in such a manner that would result in an exposure to income tax at a rate of 51%".

50. Ms. Kinsella continued: -

*"I note that Clause 1.6 provides for all sums to be paid in such manner that is tax efficient for both parties. However, if my clients agree to the use of 'target companies' reserves, this would be far from tax efficient for them.*

*Furthermore, I note that the agreement does not provide for any of the consideration to be funded from 'target company's reserves'. It is our understanding that no such funding can occur where there is a risk that this will result in a distribution".*

51. Ms. Kinsella continued by stating that her clients were still anxious to progress the deal and then made a counter – proposal which was based on the availability of a sum in the

order of €19.5 million of “good money that could be paid to them without triggering the anti – avoidance provision referred to above”. She enclosed a document outlining this proposal. Under this proposal the initial instalment of €25 million would be reduced to €19.5 million on 31 October 2019, and the balance to be payable as to €5.5 million on or before 30 April 2020, and the remaining balance of €6.5 million to be paid on or before 31 October 2020. Other amendments would be made to the BHOT concerning retention of certain shares and target companies for a period of time and the giving of security in respect of the deferred element of the consideration.

52. The Crowe proposal of 15 October 2019 was not accepted.
53. The defendants say that the Crowe proposal of 5 October 2019 was an attempt to renegotiate or restate the fundamental commercial terms of the BHOT. There is no doubt but that the Crowe proposal involved a change in the commercial terms. The plaintiffs do not claim otherwise. Mr. O’Callaghan had by this time indicated that he did not consider that financing the balancing amount of €5.5 million with an external bank was a realistic option and could cause delay. In that light, Mr. O’Callaghan had invited the plaintiffs to indicate what alternative structure may be available or palatable to them. The Crowe proposal was the plaintiffs’ response to this invitation, and was their statement of the terms on which they would relieve the defendant of his obligation to pay €25m by 31 October 2019.

#### **Extension of Deadline**

54. No agreement regarding the implementation of the BHOT having been concluded by 31 October 2019, the plaintiff’s solicitors Orpen Franks wrote to the defendant’s solicitor Matheson on 1 November 2019, referring to the ongoing communications and stating that they had instructions to agree to a three – week extension of the deadline for the first payment of €25 million.
55. On 5 November 2019, Messrs. Crowe wrote to PWC referring to what they understood had been a measure of agreement whereby certain shares held in one of the companies in the group, Galway Multiplex Limited, would be acquired by way of a share buyback and that “all other shares held in ownership by my clients will be acquired by a non-target company that is tax resident in Northern Ireland, including the shares that my clients hold personally in Galway Multiplex Limited”.
56. On 8 November 2019, the defendant emailed Ms. Kinsella stating that he was not in agreement with that proposal.
57. More emails and letters were exchanged and on 19 November 2019, Mr. O’Donovan of Orpen Franks emailed the defendant (having been informed that direct contact should be made and that Matheson were no longer engaged in the matter) as follows: -

*“We do not accept that you are in a position to complete as my clients’ approval (which has not been given) is required for your proposal to buy the shares through the existing companies. The heads of terms, which deadline we have now*

*extended, requires you to buy the shares personally. Our clients will only consider a change to that requirement on the condition that there are no negative tax consequences”.*

58. This was an unfortunate phraseology for the plaintiffs’ solicitor to use. It is clear from the BHOT that the defendant was not obliged to acquire the shares “personally”. He was at liberty to nominate a party to whom the shares will be transferred.
59. On 22 November 2019, Orpen Franks and Matheson wrote letters to each other which crossed.
60. Orpen Franks invoked Clause 2.8 of the BHOT and gave notice that if the sum of €31.5 million was not paid by 5 p.m. on Friday 29 November, the plaintiffs would take immediate steps to have the matter listed before the High Court to secure judgment and a charging order in accordance with Clause 2.8 of the agreement.
61. Matheson wrote on the same day, pointing out that their client was not obliged to buy the shares personally as alleged. They referred to clause 1.1.2 which entitled the defendant to appoint a nominee. They continued: -

*“The reason for this was to mirror the previous provisions of the heads of terms related to the Cameo/Castle agreement negotiated and agreed between your clients, our client and Mr. Paul Anderson when his interest was acquired previously. This was similarly the case when your clients and our client acquired shares in Galway Multiplex Ltd. and IMC Mullingar Ltd. Your clients are perfectly aware of these agreements (having been previously involved in both). The proposed transaction in this case is no different”.*

62. Messrs. Matheson continued by stating: -

*“There was never a commitment from our client to complete this transaction in a way that is ‘risk free’ for your clients. Clause 1.1.6 of the heads of terms requires the parties to structure the transaction in a way that works for all parties, and not just your clients”.*

63. Messrs. Matheson referred also to two additional issues which had obstructed the completion of the transaction. Firstly, they referred to a Bank of Ireland facility which had been “lined up for this transaction” and which they say would have assisted towards its execution and which they said was due to expire on 18 December 2019.
64. Secondly, they referred to a proposed sale of the group’s interest in Casino Cinemas Limited which it was said had by then fallen through at a cost of €2.1 million to Melvin Trust Ltd., one of the companies at the top of the Ward Cinema Group.
65. By this time, the deadline for implementing the BHOT had expired and this was the first occasion on which it was suggested that either the Bank of Ireland facility relating to

Cameo or the proposed sale of the interest in Casino Cinemas Ltd. were required for the defendant's funding of the consideration.

66. Correspondence continued between the respective solicitors, each making allegations and counter allegations regarding the circumstances in which the transaction had not been completed.

**December 2019**

- On 6 December 2019, Matheson wrote to Orpen Franks informing them of the following: -
    - *"Lorcan Ward was co – opted to the boards of Melvin Trust Limited, Cameo Cinema Limited, Galway Multiplex Limited, Underwood Entertainment Limited. and Castle Entertainment Limited. on 4 December 2019, noting your client's agreement in the Heads of Terms 'not to participate or interfere in any way in the operation of the companies'.*
    - *Consideration in the sum of €12.5 million was paid to Ms. Jean Kennedy's personal bank account on Wednesday 4 December 2019 (lodgement docket attached), in consideration of the purchase of her shares in the Companies (as defined in the Heads of Terms).*
    - *We are instructed that the sum of €6 million is in the process of being transferred to Ms. Carol O'Riordan's personal bank account and the balance of €6.5 million will be made up of the sale of Melvin Trust Limited shares in Casino Cinema Limited and bank debt which has been secured on Cameo Cinema Limited. (the deadline in respect of which has previously been flagged to you).*
    - *Our client now anticipates the balance of Tranche 1 of the completion monies will be paid to Carol O'Riordan by 20 December 2019."*
67. Matheson then called on Orpen Franks to provide transfers executed by each vendor in respect of shares in the companies together with share certificates, certificates under the Taxes Consolidation Act 1997, PPS numbers, and letters of resignation.
68. On 10 December 2019, Orpen Franks replied asserting that the letter of 6 December 2019 constituted evidence that the defendant was unable to and had in fact failed to complete the transaction in accordance with Clause 1.1.1 (i) of the BHOT, namely the obligation to pay €25 million by 31 October 2019. Orpen Franks stated that the defendant was in breach of the BHOT and referred again to the requirement under Clause 2.8 to consent to judgment in the sum of €31.5 million. They took issue with the manner in which the funds had been transferred. They noted that although one lodgement docket had been attached to the letter from Messrs. Matheson, the funds had been made up in the case of the first plaintiff, of eight separate payments coming from seven companies, four of which were target companies. They pointed out that in the case of the second plaintiff they understood that four separate payments have been made amounting to €4.75 million, at least one of which was from a target company.
69. Orpen Franks then referred to the provisions of s. 82 (2) of the Companies Act 2014 prohibiting the giving by a company of financial assistance for the purpose of an

acquisition of shares in the company or in its holding company. They asserted that the letter from Matheson was silent as to the basic requirement for a summary approval procedure which would have validated the giving of any such financial assistance, and called for an explanation.

70. Orpen Franks made a number of other points in relation to the payment of monies, and the appointment of Mr. Lorcan Ward which they said was in clear breach of the rules regarding the appointment of directors. They indicated that their client would not be "holding on to this money" and that their clients were transferring all of the funds to Orpen Franks client account to be forwarded back to the defendant.

**Events after commencement of these proceedings**

71. On 19 December 2019, these proceedings were issued and served.

72. On 20 December 2019, Matheson wrote to Orpen Franks by way of reply to theirs written on 16 December 2019. This was yet another letter in the exchanges of claims and counterclaims and allegations made as between the parties. Of note in relation to this letter is the statement by Matheson as follows: -

*"Our client has put in train what needs to be done to pay your clients the sums agreed in as expedited a manner as possible. It is in our view incumbent on your clients to cooperate, at the very least with a view to mitigating their loss".*

73. With reference to the validity or otherwise of the payments by reference to s. 82 of the Act, they stated that the steps in the transaction, taken already by their clients, were structured in such a way that there was no breach of s.82. They attached a "step plan outlining the steps taken in purchasing Jean Kennedy's shares" stating that at no point did any nominee attempt to buy its own shares.

74. They continued: -

*"Jean Kennedy has been removed from the board of Melvin Trust Limited given she has received the consideration as per the HOTS. There is no basis for Ms. Kennedy to remain on any boards in circumstances where her interests have been acquired for the sums agreed and it is now incumbent on her to stand by her obligations and agreements under the Heads of Terms. By not doing so she is impeding payment to Carol O'Riordan*

*In respect of Carol O'Riordan, she is already in receipt of the sum of €6 million. It is obviously not in dispute that Carol is still owed €6.5 million as per the HOTS, however there was an understanding all parties would work together to complete this transaction, which unfortunately has not happened.*

*Despite this, as you are aware, a Bank of Ireland loan facility was available for drawdown by today to pay Carol O'Riordan a significant portion of the Consideration. However, it is now unlikely that the sum can be drawn down today in the absence of a genuine appetite from your clients to progress matters in a*

*prompt manner (including Carol O’Riordan, bearing in mind her obligation to mitigate her loss)”.*

75. There was attached to this letter a document dated 4 December 2019 and described as “Step Plan for the acquisition of Jean Kennedy’s shares”. The step plan was a one – page document identifying seven steps which it was being said by Matheson have been implemented.
76. The steps variously refer to acquisition of Jean Kennedy’s shares in Melvin Trust Limited, Castle Entertainment Limited, IMC Limited, Galway Multiplex Limited, and others. It stated that “the total consideration for the transactions yesterday was €12,495,074 approx.” and that “the total consideration then paid to Jean Kennedy yesterday was €12.5 million in accordance with the binding HOTS”.
77. This letter and its enclosures are remarkable for a number of reasons. It appears to be informing the plaintiffs of the occurrence of a series of corporate acts and transactions concerning companies in which the plaintiffs were shareholders and directors despite the fact that neither of the plaintiffs had been invited to or notified of any director or shareholder meetings to authorise them.
78. The only conclusion which can be made is that the defendant considered himself capable of implementing those “steps” unilaterally. If he had so concluded, no explanation was given as to why any of these steps were not taken earlier than 31 October 2019. There is therefore no basis put forward, anywhere in the replying affidavits or in the correspondence, for the note at the foot of the “Step Plan” to the effect that the amount of €12.5m paid to the first plaintiff “yesterday” was “in accordance with the binding HOTS.”
79. The defendant’s assertion, that he was at all times ready willing and able to implement and make the payments required, is undermined by those events after the payment deadline and reveals a contradictory and inconsistent position such was as identified by Clarke J. in *IBRC v. McCaughey* [2014] 1 I.R. 749.
80. Orpen Franks informed Matheson that their clients had returned the funds to them and that they were holding them for the account of the defendant. After further exchanges of correspondence, on 12 March 2020, Matheson called on Orpen Franks to remit the monies to their client account “in the light of the changing economic landscape caused by the Corona Virus and the imminent closure of cinemas”. The funds concerned, being a total of €18.5 million, were transferred to Matheson on 13 March 2020.

**Clause 1.1.6.**

81. The defendant asserts that the plaintiffs have adopted a position, from the very outset of the engagement between the professional advisors through to the hearing of this application that the BHOT entitles the plaintiffs to insist that under no circumstances should they be exposed to tax at any greater rate than the rate of 33% being capital gains tax on the consideration. The defendant asserts that Clause 1.1.6 is a two – way

obligation and that it is unstateable for the plaintiffs to insist that any deviation from an exposure to only capital gains tax cannot be imposed on him. He says that the clause means that the plaintiffs are obliged to consider tax efficiency for all the parties and not simply their own exposure.

82. As regards the defendant's tax exposure, he says that were he not permitted to structure the transaction in the manner proposed by him, by the utilisation of reserves in the target companies, he could incur capital gains tax in liquidating property assets to fund the consideration, and that he should not be required to do so simply to eliminate the slightest risk to the plaintiffs of unfavourable tax treatment for part of the consideration. He also says that at his age he would be unable to borrow to fund the consideration. In this regard, the defendant asserts that the plaintiffs are in breach of Clause 1.1.6.
83. The defendant also asserts that because the BHOT permits him to nominate a nominee to take the transfer of shares, this includes the possibility that he could nominate target companies themselves and source the payment of the consideration from the reserves of those companies.
84. The defendant asserts the following: -
  - (i) that a nominee can be or can include target companies, including companies which are not in his sole ownership or control, the plaintiffs themselves being shareholders and directors of a number of those companies:
  - (ii) that the cash reserves in the target companies can be applied to pay the consideration for which he is liable under clause 1.1.1;
  - (iii) that a refusal by the plaintiffs to cooperate in the corporate actions required to validly release the reserves of the target companies to pay the consideration constitutes a breach of Clause 1.1.6, Clause 2.1 and certain implied terms including, he says, an implied term that the plaintiffs would not prevent the defendant from performing his obligations.
85. It may be that the use of target company reserves, whether by companies buying shares held by the plaintiffs or other such schemes would, if compliant with s. 82 and other provisions of the Companies Act generally, achieve a tax efficiency within the meaning of Clause 1.1.6. It may also be the case that the use of target company funds in transactions of this nature commonly forms part of the "flow of funds" sourced for payment of the consideration. No such case is made by the defendant. If the defendant intended that the consideration would, in whole or in part, be sourced from reserves in the companies, such an important facility is more than tax planning, but relates to the very sourcing of the consideration. In support of his assertion that this was always contemplated by the parties, the defendant says that all parties knew that there were significant cash reserves in the target companies and that they knew that he did not have access to the amount of the consideration. This is to imply into the BHOT a term

permitting access to the reserves of the target companies to fund payment of all or part of the consideration itself.

86. The evidence of the plaintiffs, and of Ms. Kinsella, is that by effecting payment of the consideration by a scheme which availed of cash reserves within the target companies they are exposed to the risk of the utilisation of such cash reserves being treated as a distribution as referred to in s. 135 of the Taxes Consolidation Act and therefore exposes them to a liability to income tax.
87. The defendant is correct when he says that Clause 1.1.6 is a two – way mutual obligation and not intended to protect only the plaintiffs from a higher rate of tax. He does not detail how his tax position will be adversely affected by the plaintiffs’ insistence that the consideration be paid otherwise than through a scheme which exposes them to the risk of higher rates of tax. He says that if he has to realise other assets he will be exposed to the consequences of capital gains tax on such realisations. That is no different from saying that he does not have access to the funds necessary to pay the consideration and is not either willing or able to borrow for that purpose. Nor do such consequences touch on the payment passing between the parties to the BHOT
88. Clause 1.1.6 is a common form of clause in settlements. It is not surprising that it may cause difficulty when more time is taken and professional advice taken as to how it will be implemented. But the defendant is inviting the court to declare that clause 1.1.6 can be relied on to do both of the following: -
  - (a) To compel the plaintiffs to cooperate in a scheme which on the uncontradicted evidence exposes them to the risk of a higher rate of tax than would arise on a straightforward disposal of shares giving rise to capital gains tax and
  - (b) more importantly, permits the defendant to have recourse to cash reserves in the target companies to source the consideration.
89. The BHOT, was signed at or close to midnight at the conclusion of a mediation and it was clearly envisaged that further work and professional advice would be undertaken to complete the transaction. That much is clear from Clauses 1.1.6, 1.17, and 2.1. Nonetheless it was the outcome of a mediated settlement at which both parties had the benefit of legal advice.
90. The BHOT addressed a number of important commercial and legal matters such as the following: -
  - (a) The discharge of outstanding dividends (Clause 1.1.4);
  - (b) The payment of management fees (Clause 1.1.5);
  - (c) “Circumvention” of pre-emption rights (Clause 1.1.7);



- (d) The provision of free cinema passes for life and 50 cinema tickets per annum (Clause 1.1.8);
  - (e) Resignation of the plaintiffs from boards of relevant companies (Clause 1.1.9).
91. Clause 2 of the BHOT also contained what are commonly referred to as “boilerplate” or general terms regarding such matters as cooperation in the execution of the agreement (Clause 2.1), costs (Clause 2.2) non-variation otherwise than in writing (Clause 2.3), warranty of authority (Clause 2.4), interpretation and construction (Clause 2.5), and confidentiality (Clause 2.6).
92. Although Clause 2.8 appears under the category “general” it is by no means standard and is the provision now invoked by the plaintiffs in this application.
93. The parties had the benefit of professional advice available to them and they took the care to address the commercial and legal matters summarised above. The defendant is seeking to imply a further term that the consideration may, in whole or at least in part, be funded from the cash reserves of the target companies.
94. In his replying affidavit defendant says the following: -
- “It was always my intention that the acquisition of the plaintiffs’ shares would be financed mainly by funds which were held in the companies. I believe that this was clearly understood by my sisters, or at the very least would have been understood by any reasonable person in their position for the following reasons amongst others”.*
95. The defendant says that he does not have personal liquid resources of €31.5 million. He refers to the existence of large cash balances held by the companies and says that this information was available to the plaintiffs through their advisors and from receiving up to date financial accounts.
96. The defendant says also that the structure of the BHOT was based on “similar settlement terms that my sisters and I had entered into a number of years ago. Under this settlement, cash reserves held by the companies were used to facilitate the buyout of another shareholder”. There was not before the court any evidence as to what the terms of that previous settlement were. The evidence of the plaintiffs is that it was a different transaction with external parties.
97. Finally, under this heading the defendant says that “I believe that all participants of the mediation would have known that I intended that Carol and Jean’s exit would be funded in part by the company’s cash reserves”.
98. Even if this evidence of the defendant were admissible, which is questionable, it would be evidence only of the subjective intention of the defendant, which clearly cannot assist the court in the construction of the BHOT. The suggestion that the plaintiffs ought to have

known of his intention is no more than a bare assertion which relies only on the most general state of the parties' knowledge of each other's business affairs.

99. The defendant also swears that it "should have been obvious to all parties that the ultimate source of at least some of the purchase money would have to be the companies themselves".
100. He continues: - "I planned on funding the purchase money using the company's money" and he says "this had been discussed at the first meeting between PWC and Crowe in July 2019". Taken at its height this is only an assertion that the concept of utilisation of target companies reserves was the subject of discussion between the parties starting in July 2019. Even if this evidence is accepted, it is not evidence of any common intention and is evidence only of the defendant's subjective intentions.
101. Having considered the affidavits of the defendant, and as a matter of the most basic construction of the BHOT, there is no evidence to support the argument that a provision entitling the defendant to have recourse to cash reserves in the target companies can be implied either generally or as an extension of Clause 1.1.6.
102. It became clear in July 2019 that a difference of view between the parties had emerged on this issue. Notwithstanding this difference, the parties and their professional advisers continued to endeavour to agree a scheme, albeit that at a certain stage in the process the defendant stood down his professional advisers, stating that he himself would deal with implementation of the BHOT.
103. The defendant says that "nominee" in the BHOT could include the target companies or at least does not exclude them. That is correct. Nonetheless, it is one thing to introduce the target companies as the nominees, but to then propose that the consideration be sourced from the reserves in those companies is an entirely different matter. Doing so may indeed be one way of achieving tax efficiency and may frequently be a manner of implementing such a transaction. However, an entitlement to unilaterally impose such a scheme cannot be implied from Clause 1.1.6 or any other clause in the BHOT. The defendant's insistence that the consideration be sourced in this manner was the cause of non - payment of the consideration by 31 October 2019 and by the extended date. Accordingly, the provisions of Clause 2.8 apply.
104. As regards the use of the term "nominee" it is plain even at the most basic level, that a facility for a purchaser or acquirer of an asset to take the transfer in the name of a nominee envisages nominating an entity, whether it be a person or a corporate entity, of his choice. It is a novel proposition to unilaterally nominate an entity in which the vendors are also shareholders and directors, and further, to require as a consequence of such nomination that the cash reserves within that nominee should be utilised to fund the transaction and then to suggest that this was all permissible by a certain construction of Clause 1.1.6. If such had been required as part of any tax structuring, then it ought to have been provided for in the BHOT and I cannot find that Clause 1.1.6 extends to such a proposition or that the facility to identify a "nominee" permits such a series of steps.

## **Clause 2.2 and implied terms**

105. The defendant submits that the plaintiffs have prevented him from performing his obligations not only by refusing to cooperate in the scheme for the application of reserves in the target companies, but also by thwarting his ability to raise external bank funding and to implement the disposal of shares in Casino Cinemas Limited.
106. If the defendant had intended to render the performance of his obligations under the BHOT conditional on securing finance from external sources or the completion of other transactions such as the sale of shares in Casino, he had every opportunity to do so when negotiating the BHOT. Such a provision would have been at least as important as the other commercial terms which are contained in the BHOT including such matters as provisions for the settlement of dividends and such matters as the donation of cinema tickets and passes for life.
107. It is also significant that a number of the steps which he later acknowledges were critical to the payment of the consideration, were only put in place after the deadline for payment of the consideration, notably the facility with Bank of Ireland in respect of Cameo Cinemas Limited. Even then, by 20 December 2019, he had failed to pay the first tranche.
108. The defendant points out that the BHOT contains no express restriction or prohibition on the target companies being nominees or on the sourcing of the consideration from their cash reserves. Again, that is correct, but my conclusion is that the introduction of such a substantive facility for sourcing the consideration is not within the intended scope of Clause 1.1.6., and the defendant's affidavits only show a subjective intention on his part to rely on such source.

## **Summary Judgment**

109. Both parties have referred the court to the well-established lines of cases concerning the jurisdiction to grant summary judgment including *Aer Rianta v. Ryanair* [2001] 4 IR 607, *Harrisrange v. Duncan* [2003] 4 IR 1, *IBRC v. McCaughey* [2014] 1 IR 749, *McGrath v. O'Driscoll* [2007] 1 ILRM and *Allied Irish Banks plc. v. GRO Oil Ltd.* [2019] IEHC 189.
110. In *McGrath v. O'Driscoll op cit*, Clarke J. (as he then was) said the following: -
- "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment".*
111. In *National Asset Loan Management DAC v. Breslin* [2017] IEHC 350 (upheld by the Court of Appeal in *National Asset Loan Management DAC v. Breslin* [2017] IECA 283) McGovern J said: *"The raising of complex arguments in answer to an application for summary judgment will not avail a defendant unless those arguments address the basis of the claim and provide an arguable defence to the claim as pleaded. Just as mere assertions, without*

*proof, do not afford a defence to a claim for summary judgment, neither will the raising of complex issues of fact or law afford a defence unless they are referable to the claim made and raise issues suitable to be determined by plenary hearing”*

112. This court is required on an application for summary judgment to exercise caution, particularly where the defendant seeks leave to defend on so many grounds. In this case, a range of submissions, some potentially complex, have been introduced by the defendant regarding the operation of Clause 1.1.6 and other provisions of the BHOT, and regarding the conduct of the plaintiffs. But the core facts are clear and the consequence of non-payment is expressly provided in Clause 1.2.8. The dispute as to the manner of funding the consideration emerged in July 2019. Thereafter the parties and their advisers continued to engage as to the implementation of the transaction. The non-payment of the consideration by the stipulated date resulted from the reliance of the defendant on a construction of Clause 1.1.6 which I have found to be flawed. Even on the defendant’s version, the payment effected in December 2019 was both late and short. The application for summary judgment pursuant to Clause 2.8 can be determined by the finding which I have made that the introduction by the defendant of a requirement that the consideration be sourced from the target companies was an extension of Clause 1.1.6 which was not provided for in that agreement either expressly or impliedly. The BHOT cannot lose its binding effect by the unilateral attempt to introduce such a facility.

#### **The outstanding balance**

113. Clause 2.8 provides that where the consideration is not paid in accordance with the terms of the agreement, the defendant is required to consent to judgment for the “outstanding balance”. The plaintiffs claim that this is a reference to the entire balance of €31.5 million.

114. I am not persuaded that this amounts to a valid “acceleration clause”. Were the plaintiffs in those circumstances to be entitled to judgment for the entire of the consideration, including deferred instalments which have not yet fallen due, it would have been necessary to so stipulate by the express terms of the agreement. As dates for the payment of some of the deferred instalments have now passed, I shall hear submissions as to the exact amount of the judgment to be entered.

#### **The obligation to transfer shares**

115. The plaintiffs have asserted that by reason of the failure to make the payments and the operation of Clause 2.8, they are under no continuing obligation to transfer the shares to the defendant or his nominees. I cannot agree with this submission. Again, as a matter of basic construction of the BHOT, if the parties had intended that the plaintiffs could obtain summary judgment for the unpaid consideration and also be relieved of the obligation to transfer shares to the defendant or his nominee, such a provision would have been stated, even in such a basic form of agreement. The essence of clause 1.1.2 of the agreement is that the plaintiffs agree to procure that title in the shares will be transferred to the defendant or his nominee “upon payment of the first tranche of the consideration”.

116. I have considered whether this assertion, with which I disagree, means that the plaintiffs have gone too far and therefore whether I should refuse judgment for the amount of the consideration on that ground. My conclusion is that the overstatement of this element of the case by the plaintiffs is not such as would justify a refusal to grant judgment.
117. Arising from this finding I shall hear submissions as to whether the appropriate course is to permit the pursuit of the counterclaim in these proceedings, notwithstanding the entry of judgment for the amount of the consideration now outstanding, or whether it would be more efficient for this matter to be pursued by a separate plenary action. I shall also hear submissions as to whether a stay on the judgment for the amount of the consideration may be appropriate, having regard to my finding at paragraph 115.

**Time of the essence**

118. The defendant submits that there was no provision in the BHOT to the effect that time was of the essence.
119. Extensive case law has been referred to regarding the importance of time – bound provisions in contracts, particularly for the sale of shares which can fluctuate in value. (See *Redfern v. O'Mahony*, [2010] IEHC 253)
120. The clear effect of Clause 2.8, with the severe consequence of exposing the defendant to summary judgment, was to render time to be of the essence when it provided for judgment for the outstanding consideration in the event of the consideration not being paid in accordance with the terms of the agreement.
121. It is also instructive that the difference of agreement regarding the sourcing of the consideration emerged in July 2019, such that the defendant was on notice from then at the latest that his proposal to utilise target companies' cash reserves had been rejected. Even when he implemented the "step plan" which was dated the 4th December, 2019 and presented with the Matheson letter of 20th December, 2019, the initial payment to the first plaintiff was outside the agreed deadline and the payment to the second plaintiff was also outside the deadline, and was for less than half of the amount due.

**Capacity of the second named plaintiff**

122. The defendant suggests that an issue has arisen concerning the capacity of the second plaintiff to enter into the BHOT in the first place.
123. Clause 2.4 of the BHOT provided that the signatories warranted and represented that they had power and authority to enter into the Binding Heads of Terms and it has not seriously been contended that Mr. Carron did not execute pursuant to a valid power of attorney.
124. The evidence of Dr. David Robinson is that he met the second plaintiff on a series of occasions, namely 19 March 2019, 25 June 2019 and 15 October 2019.

125. Dr. Robinson states that when he met with the second plaintiff on each of 19 March 2019 and 25 June 2019, he was satisfied, after examining her, that she continued to have capacity to manage her own affairs despite a certain diagnosis made in 2018.
126. It is clear therefore that the second plaintiff had the capacity to enter into the BHOT.
127. Dr. Robinson says that when the second plaintiff attended him on 15 October 2019, he noted a deterioration in her condition and he formed the view that she was no longer in a position to manage her own affairs.
128. On 4 December 2019, Dr. Robinson provided a letter to that effect in the context of an application being made to register an enduring power of attorney which had been executed by the second plaintiff in favour of the third plaintiff. The enduring power of attorney was registered on 7th January 2020.
129. The evidence before the court is also that on a number of occasions during 2019 the defendant or his son Lorcan Ward sought to have the second plaintiff execute proxies and other documents necessary for corporate transactions, without questioning her legal capacity. The defendant says that it is only in the course of these proceedings that he became aware of the loss of capacity having occurred on a date earlier than 15 October 2019.
130. The defendant says that in consequence of these matters, in October, November and December 2019 neither Orpen Franks or Crowe had authority to negotiate on behalf of the second plaintiff and it would have been legally impossible for the second plaintiff or any person on her behalf to either reach agreement on the outstanding issues or to validly transfer the shares.
131. The defendant also says the second plaintiff had no capacity to commence these proceedings on 19 December 2019, being a time he says when neither Gerry Carron, or the third plaintiff or any other person had authority to instruct the commencement of the proceedings.
132. The intended defence based on an alleged incapacity of the second plaintiff is self – contradictory having regard to the following: -
  - (i) The correspondence from Matheson in December 2019 and the affidavits of the defendant sworn by or on behalf of the defendant acknowledge that monies are due to the second plaintiff.
  - (ii) The defendant seeks to make a counterclaim against each of the plaintiffs for breach of the BHOT including specific performance of the obligation to transfer the shares, thereby specifically affirming the agreement.
  - (iii) The defendant has maintained that payments made in December 2020 included a payment of €6 million to the second plaintiff “towards payment of Tranche 1 of the consideration”. He also states that the “Step Plan” presented by Matheson to Orpen

Franks in December 2020 “would lawfully have allowed for the balance of €6.5 million to be lawfully paid to Carol.”

133. As far as concerns the validity of these proceedings themselves, a point has been taken by the defendant that arising from certain queries by the Wards of Court office, the application for registration of the EPA had to be resubmitted on 23 December 2019, after the commencement of these proceedings.
134. The plaintiff has referred to s. 72 (a) of the Powers of Attorney Act 1996 which provides:  
-  
“(2) Where the attorney has made an application for registration of the instrument then, until the application has been determined, the attorney may take action under the power—  
  
(a) to maintain the donor or prevent loss to the donor's estate”.
135. The application for registration of the EPA had been filed before the commencement of the proceedings and was registered and activated very shortly thereafter. The third named plaintiff swore his first affidavit sometime after the activation of the power.
136. The first named plaintiff avers in her affidavit that she makes the affidavit also on behalf of the second plaintiff.
137. Even if the proceedings by the second plaintiff were struck out on a ground relating to capacity, the third named plaintiff would have had the power to apply to be rejoined as a plaintiff in her name.
138. The objection regarding matters of capacity in the context both of the entry into the BHOT, the negotiation of its implementation and the commencement of these proceedings does not require determination by a plenary hearing and is devoid of substance or merit.
139. In circumstances where the court has been informed that the second plaintiff is now deceased, attention will be necessary to any reconstitution of these proceedings required to respect the interests of her estate and in that context no injustice will be visited on the defendant.

**Draft Defence and Counterclaim:**

140. The defendant has exhibited the draft of a Defence and Counterclaim. It is not appropriate on the hearing of this application for the court to make findings as to many of the matters which are intended to be pleaded in such a counterclaim. However, I am satisfied based on the uncontroverted evidence before the court on this application that the insistence of the defendant on utilisation of target companies’ reserves to complete the acquisition and pay the consideration in accordance with clause 1.1.2 of the BHOT was nowhere contemplated in the BHOT and none of the replying affidavits disclose even a basis for proving any agreement to that effect. Therefore the provisions of Clause 2.8 apply and the defendant was obliged to consent to summary judgment.

## **CONCLUSION**

141. Clause 1.1.1 was not, as the defendant submits, an "agreement to procure an agreement". It established between the parties a binding agreement for the transfer of the shares for the consideration of €31.5m payable on the dates specified.
142. The term in Clause 1.1.1 providing that the shares be transferred to the defendant "or his nominee(s)" did not entitle the defendant to unilaterally nominate the target companies to the effect invoked by him, namely that the cash reserves of those companies would be utilised to source the funding of the consideration.
143. Clause 1.1.2 did not have the effect that where the target companies are nominated by the defendant as the transferees the cash reserves thereof could be applied to discharge the defendant's liability for payment of the first tranche of the consideration.
144. Clause 1.1.6 did not extend to imposing on the plaintiffs an obligation to agree to a scheme, however lawful or tax efficient it may be, whereby the cash reserves of the target companies be applied to fund the discharge of the consideration. The affidavits sworn by and on behalf of the defendant reveal, if anything, his subjective intention regarding the funding of the consideration. Even if such evidence were accepted, it goes only to such subjective intention and cannot assist in the construction of the BHOT.
145. Neither Clause 1.1.6 or 2.1 imposed on the plaintiffs an obligation to facilitate the defendant in implementing a scheme for the application of cash reserves of the target companies, whether in combination with other funding measures proposed by the defendant, or otherwise. Accordingly, the plaintiffs did not act in breach of those clauses.
146. Having failed to secure agreement to the proposed scheme by the deadline for payment of the first tranche of the consideration, as extended, the defendant unilaterally implemented a series of steps, including acts by the target companies, without convening meetings of the directors or shareholders thereof, as a basis for the transfer of part only of the consideration. Such transfer was made after the date stipulated in the BHOT and did not constitute payment in accordance with the BHOT. Pursuant to Clause 2.8 the defendant was obliged to consent to summary judgment for the outstanding balance.
147. In the absence of a valid "acceleration" clause, the outstanding balance means the amount which has fallen into arrears, and judgment will be entered for that balance only.
148. By this judgment, I do not find that the plaintiffs are relieved from the obligation to transfer the shares to the defendant or his nominee. Therefore, the defendant is entitled to maintain his counterclaim and I shall hear submissions as to the appropriate procedure to advance it.
149. I shall hear submissions as to the final amount of the judgment, and as to any further steps in the proceedings, whether in respect of the counterclaim or otherwise.