THE HIGH COURT

[2024] IEHC 319

[Record No. 2019/107COS]

IN THE MATTER OF CLADDAGH JEWELLERS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF SECTION 212 OF THE COMPANIES 2014

BETWEEN

ANDREW FRIED

APPLICANT

AND

PHILIP FRIED

RESPONDENT

AND

FELICITY FRIED

NOTICE PARTY

JUDGMENT of Mr Justice Kennedy delivered on the 12th day of June 2024.

1. Ideally, this decision should encourage the parties to engage constructively, avoiding further escalation, which could otherwise involve further destructive and expensive litigation, possibly encompassing other generations, jurisdictions and parties, to the potential detriment of all concerned. Unfortunately, the history of the matter does not encourage optimism so, in case such escalation proves unavoidable, I should make clear that my conclusions in this judgment are for the limited purposes of the current applications. The Court may revisit these issues in future hearings based on more extensive evidence and submissions, including oral evidence and cross examination.

2. The Respondent says that the Applicant and his wife, the Notice Party (who I will describe as "the Defendants" by reference their role in these applications), are breaching a Settlement Agreement and Consent Order respectively dated 18 December 2020 and 27 January 2021 ("the Agreement" and "the Order", or, when referring to both, "the Settlement") by failing to procure the transfer of a residence in Spain ("the Villa") to Janis Fried (who I shall refer to as "the Mother", that being her relationship to the Applicant and the Respondent, who I shall refer to collectively as "the Original Parties"). The Applicant has consented to the Respondent's application for injunctive relief against him. The Respondent now seeks such injunctive relief against the Notice Party and orders for committal or attachment against both Defendants (which I shall refer to as "the Contempt Applications" (in describing the events giving rise to the proceedings I will generally refer to the Notice Party as such, even though she only became a Notice Party on 27 January 2021)).

3. The issues include: (a) the extent to which the Notice Party is bound by the Settlement; (b) the parties' obligations under the Settlement and the consequences of any breach; (c) whether either Defendant breached such obligations (which includes an assessment of any constraints to which they may be subject); and (d) whether the criteria for injunctive relief or for Contempt Applications are met.

I. The Litigation Background

4. The Original Parties are brothers. These applications are the latest instalment in litigation arising from disputes concerning a family business. They concern a particular property in Spain (the Villa).

The Villa

5. In the 1970's, long before the events giving rise to this action, the parents of the Original Parties ("the Parents") decided to emigrate to Spain. They sold their house in Dublin to buy land in Malaga and to fund the construction of a home (the Villa), taking up residence there from 1975. Over the next half century, they spent time between the Villa and other locations, including London and Galway, where they founded a business. After they sold their London home in 2012, they divided their time between the Villa and Galway with the intention of retiring to the Villa in Malaga. The Villa was originally in the Mother's name but in or around 2012, she transferred it to a company, Villas Adelfas sl ("the Spanish Company") which the Parents owned jointly. On 3 August 2011, the Parents transferred ownership of the Spanish Company to their two sons, the Original Parties, so the latter each owned 50% of the company which owned the Villa. There has been no suggestion that these transactions resulted in any practical change with regard to the Parents' continued use, occupation and enjoyment of the Villa. The Parents still discharged mortgage repayments on the Villa and did not pay rent.

6. Two pertinent developments took place in relation to the Spanish Company before the Settlement. On 5 March 2012, the Applicant transferred another property (which he owned) to it in return for additional shares, increasing his stake to 67%. On 11 June 2020, he transferred that 67% stake to his (and the Notice Party's) two minor children ("the Children"), then aged 13 and 10. Accordingly, although the Parents originally transferred ownership to the Original Parties in equal shares, by the time of the Settlement, a controlling interest in the Spanish

Company which owned the Villa was legally vested in the Children, with the Respondent retaining a 33% stake. Although, as will be seen, the Settlement envisages the transfer of the Villa by the Spanish Company to the Mother, the Defendants say that they cannot require the Spanish Company to transfer the Villa to the Parents because the shares formerly owned by the Applicant are now vested in the Children. The Respondent disputes this and contends that the transfer to the Children was a sham. I consider those issues below.

The Applicant's Unsuccessful Oppression Proceedings and the Resulting Settlement

7. The Applicant originally commenced these proceedings seeking relief pursuant to Section 212 of the Companies Act 2014, alleging that the Respondent was conducting the affairs of the family business, Claddagh Jewellers Ltd, oppressively. Although legally represented and having actively participated in the litigation until shortly before the scheduled hearing date, the Applicant did not appear to prosecute his claim on 16 June 2020, the date fixed for its hearing. However, his non-appearance did not end the litigation. The Court proceeded to deal with the Respondent's outstanding applications and Sanfey J. delivered a detailed judgment on 2 July 2020, directing the Applicant to deliver up the relevant company's books, records and other assets and to account for company money and property. Subsequently, the Respondent issued a contempt application against the Applicant for the alleged breach of those orders. After lengthy cross examination of the Applicant focussing on (*inter alia*) financial transactions in which he had engaged, the motion was settled on the basis of the Agreement which the Respondent now seeks to enforce.

8. The Applicant's wife was not originally a party to the proceedings. Nor was she present or legally represented at the negotiations. However, serious issues canvassed at the hearing threatened to involve her. Accordingly, it was agreed that she should become a party to the Settlement and that she should be added as a Notice Party to the proceedings. The Agreement

named her as a party to the Settlement and recorded the Applicant's warranty of his authority to represent her. Having consulted with the Notice Party by telephone, the Applicant signed on her behalf, confirming her agreement to that course of action (but there is a dispute as to the extent to which she is bound thereby). The Order joined the Notice Party to the proceedings and referenced and appended the Agreement, with directions reflecting some of its provisions.

9. To appreciate the context for the Notice Party's joinder, it should be noted that the previous cross examination of the Applicant had focussed on his alleged misuse of the resources of companies associated with the family business for his (and his family's) personal benefit. Neither Defendant challenged the Respondent's evidence that the Applicant had admitted, *inter alia*, that he had taken large sums from bank accounts associated with the family business and that the two Defendants had used these company funds to buy a house in Galway ("the Galway Property") from a family company, for their personal use and benefit.

Terms of the Applicant's Transfer of Shares to the Children

10. In view of the Defendants' response to the current applications, it is important to note the deed of transfer and its context:

a. The deed was executed in Galway in the presence of both Defendants on 11 June 2020 and it records the terms of the transfer of the shares to the Children.

b. The transaction was a gift; there was no consideration.

c. Although ownership was given to the Children, the Applicant did not cede control. The deed (to which the Notice Party consented) provided that:

> "*all the rights inherent to the status of minors in the company Villas Adelfa SL, will be exercised by the donor MR Andrew Joseph Fried, with full freedom of decision, and with the widest powers of administrator, management and decision.*"

d. there is no evidence as to how the transaction was reflected in the Applicant or the Children's contemporaneous tax returns (which might go to the substance of the transaction).

11. The deed contained no provision in respect of jurisdiction or choice of law. It was executed in Galway and all parties were Irish resident. The donor is Irish, as are both donees, whereas the Notice Party is British. However, the deed concerned Spanish assets – the Applicant's shares in the Spanish Company which owned the Villa – and it appeared to reference Spanish legal requirements while also appearing to be designed to constitute a valid transfer under Irish law (as appears from the stipulation that a corresponding deed should be re-executed in Spain if necessary). Further legal argument would be required in order to determine whether the deed was subject to Spanish or Irish law and jurisdiction. However, even if Spanish law and jurisdiction had been specified, then there would be an issue as to the effectiveness of any such stipulation if, as the Respondent submitted, the deed was a sham, designed to frustrate enforcement and to put assets beyond reach.

12. Apart from the absence of consideration for the transfer of a valuable interest to the Children, the timing was the most striking feature of the transaction. It occurred five days before the trial of the Applicant's oppression claim, a trial which he did not attend and which resulted in significant orders being made against him.

The Settlement and the Arrangements for the Transfer of the Villa

13. Following the hearing, the Original Parties engaged in formal negotiations, through their respective legal teams, resulting in the Settlement. Although the Notice Party had her own solicitor, they did not attend the negotiations which led to the Agreement, a detailed document which ended the Applicant's involvement in the business and in other shared property interests. It provided for the transfer between the two sides of shares in various companies and other

family and business assets and the relinquishment of other rights. It was evidently intended to resolve all issues between the two sides. Accordingly, as is common (and sensible) in such circumstances, the Agreement was not confined to the Applicant's original proceedings. It addressed other issues, with a view to disentangling shared business and other assets. Both the Galway Property and the Villa were covered.

14. The Defendants relinquished any claim to the Galway Property and the Agreement also stipulated that the Spanish Company would transfer title to the Villa back to the Mother, its original owner, and that the Respondent would then transfer his shares in the Spanish Company to the Applicant (technically, the Agreement envisaged that the transfer might alternatively be to the Mother's nominee, but I will generally ignore that detail for brevity).

15. Although the Notice Party's submissions acknowledged that the relevant provisions were intended to benefit the Parents, ensuring that they retained the full benefit of the Villa which they had built nearly half a century earlier, the Applicant denied that the provisions were intended to protect the Parents in their later years. I do not understand the basis for the Applicant's position in that regard. Perhaps his comments were directed at the objects of the Agreement as a whole rather than the specific provisions. In any event, there is no obvious rationale for the provisions dealing with the Villa other than to provide for the Parents, nor did he suggest one. He also disputed references to the Parents' declining health and whether the Villa was their primary residence since they also spend time in Ireland, using an apartment provided by the Applicant and his wife, and serve as directors of Irish companies, whose filings reference their Irish address. To the (limited) extent that it is necessary for me to consider such issues for present purposes, I will simply note that I am satisfied that the Parties clearly envisaged the Parents being provided with independent accommodation in Spain which they would own and control in their later years; nor was there credible evidence to counter the Mother's affidavit testimony as to the distress which the threatened eviction, the water

disconnection and the failure to effect the transfer had caused her and her husband or as to their health issues and the negative impact of the litigation.

16. Although the Agreement stipulated that the Villa would be transferred to the Mother, the transfer has still not happened nearly 42 months later. The Respondent says that the Defendants (including their representatives) have breached the Agreement and Order by, *inter alia*: (i) failing to ensure that the transfer was effected; (ii) causing the water supply to the property to be (and to remain) disconnected; (iii) threatening or seeking to evict the Parents; and (iv) taking other steps in relation to the Spanish Company to frustrate the performance of the Agreement. However, the Defendants deny any breach and also deny any failure to use their best endeavours. They say that they cannot direct the Company to transfer the Villa because the controlling interest in the Spanish Company is now vested in the Children and it would be a breach of trust for them to require the Company to gratuitously divest itself of a valuable asset. The Notice Party also denies that she is bound by the provisions in the Agreement which concern the Villa. She says that she only intended to agree to the Galway Property provisions. The deal on that issue was that the Defendants would surrender vacant possession to the Respondent by 30 September 2021, but they could stay in the house, rent free, until then.

II. The Terms of the Agreement and the Order

17. The Parties were individually named in the Agreement - the Applicant, the Respondent and the Notice Party were all specified as parties, as were six family companies associated with the Irish business (but the Spanish Company was not a party, although it was referenced). A seventh family company was added as a party to the Agreement as part of the addendum to the Agreement before the Order was made. The recitals noted: (a) actual/intended proceedings to be covered by the Agreement; (b) that the Original Parties were concerned with the six

companies which were parties to the Agreement ("the Fried companies"); and (c) the agreement of the Parties (i.e including the Notice Party) to full and final settlement of all claims "*in consideration of the presents herein*".

18. Clauses 1 and 2 provided as follows:

> "*1. Felicity Fried is to be joined as a notice party for the purpose of giving effect to the terms herein.*
> *2. [The Applicant] warrants that he has authority to enter into these terms on behalf of [the Notice Party].*"

19. Clauses 24 - 27 specifically referenced the Villa and will be considered in detail below.

20. Clause 44 identified provisions in the Agreement that were to be specifically reflected in the Order. The parties (which, as noted above, included the Notice Party), agreed to seek orders: (a) directing that the Applicant transfer his shares in each and all of the Fried companies for no consideration; (b) removing the Applicant immediately as an officer or employee from all of the Fried companies, without compensation; (c) declaring that the Applicant was not owed any money by the Respondent, the Parents or the business; (d) removing a charge created over the Galway Property together with a declaration that no money is owed to the Notice Party by one of the family companies; (e) that the Defendants deliver up vacant possession of the Galway Property by 30 September 2021; (f) rectifying and/or correcting the Registrar of Trade Marks to record the Respondent as the sole owner of the mark, "*CLADDAGH JEWELLERS*"; (g) that the Applicant transfer over all domain names that incorporate the words "Claddagh" and/or "jewel" to the Respondent or his nominee; and (h) that the Applicant deliver up jewellery and other stock removed from Claddagh Jewellers Limited or any of the Fried companies.

21. Other relevant provisions of the Agreement included the following:

> "*35. The Parties acknowledge that they have had the benefit of independent legal advice prior to entering this Agreement.*

36. If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions of this Agreement nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

37. No variation of this Agreement shall be valid unless it is in writing and lawfully signed by or on behalf of each of the Parties.

38. This Agreement supersedes any current or prior understandings or agreements, both written and oral, between the Parties regarding the subject matter hereof and comprises the entire agreement between the Parties regarding the subject matter hereof. This Agreement can be modified only by an agreement signed by or on behalf of the Parties.

39. The Parties hereby agree to execute any and all documents required in connection with, and for the performance of, this Agreement and to take any steps as are necessary to give effect to the terms of this Agreement.

40. This Agreement shall be governed by and construed in accordance with the laws of Ireland. The Parties hereby agree that the courts of Ireland shall have jurisdiction to hear and determine any suit, action or proceedings that may arise out of or in connection with this Agreement and for such purpose that each Party irrevocably submits to the jurisdiction of the courts of Ireland.

41. If any provision of this Agreement shall be found by any court … to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement which shall remain in full force and effect.

42. If any provision of this Agreement is so found to be invalid or unenforceable but would be valid or unenforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid and enforceable."

22. Clause 45 provided, in what MacDonald J. has described as, "*classic Tomlin style*":

"*The Court to receive and note a copy of these terms and to make such declarations or orders as it deems fit but these terms of settlement to be otherwise confidential between the parties save to the extent necessary … for the purposes of enforcement or other court process.*"

23. The Applicant physically signed the Agreement twice, once on his own behalf and, separately, on behalf of the Notice Party.

The Addendum

24. A January 2021 addendum (predating the Order) was signed by the Respondent (on his own behalf and on behalf of Lazlo Jewellers Limited) and, in counterpart, by the Applicant to confirm, *inter alia*, that the transfer of the Villa would include a motor vehicle used by the Parents at the Villa. It is not clear whether the addendum was signed by or on behalf of the Notice Party.

25. More than a month after the execution of the Agreement and days before the hearing to confirm the settlement, the Notice Party's solicitors sent two letters (both dated 22 January 2021) to the Respondent's solicitors which consented to their client's joinder (and which are discussed below).

The Order

26. The Order was made on consent on 25 January 2021 in accordance with the Agreement. It referenced and appended the Agreement and its addendum, noting the appearance of counsel for the two Original Parties and the settlement of various proceedings on the agreed terms, including the addendum, and confirming that the Agreement and the addendum had been received by the Court and formed the schedule to the Order. The Court directed, by consent, the joinder of the Notice Party (noting the two letters dated 22 January 2021 from her solicitor) and also made all directions envisaged by Clause 44 of the Agreement, including as to arrangements for the eventual surrender of the Galway Property.

27. Significantly, the order gave liberty to all parties (i.e. including the Notice Party) to:

> "*apply including to enforce the terms of settlement scheduled hereto whether by way of an application for an injunction specific performance or otherwise*".

III. Correspondence between the parties and developments since the Settlement

28. After the execution of the agreement on 18 December 2020, followed by the Addendum in January 2021 and the Order on 25 January 2021, a copy of the Order (with Penal Endorsement) was served on the Applicant on 1 February 2021.

29. By letter dated 31 May 2021, the Respondent's solicitors complained of a breach of Clauses 24 and 25 because the Applicant was not cooperating in transferring the Villa to the Mother. The Applicant's solicitor responded on 8 June 2021 that the Spanish Company was dealing with a revenue audit and that:

> "*We understand the Administrator is not in a position to transfer the property from the company as of yet. Our client is working alongside the Administrator in order to resolve matters as quickly as possible. We understand that the Administrator contacted our respective clients directly informing them of the audit and he will likely require the assistance of both during the audit.*"

30. Accordingly, as of that point, the Applicant's solicitor appeared to acknowledge the duty to transfer the Villa and his correspondence did not suggest any major obstacle or issue in that regard.

31. Various developments have occurred with the Spanish Company since the Settlement which, according to the Respondent, were designed to frustrate the Defendants' commitments under the Agreement. These included: (i) the appointment of the Applicant as the Spanish Company's sole administrator (in lieu of Mr Ramos) on 5 October 2021; (ii) a tax audit in respect of the Spanish Company's affairs; (iii) the Spanish Company's commencement of eviction proceedings against the Parents in November 2021 (under cover of an eviction notice signed by the Applicant as its administrator, notwithstanding his obligations under Clause 28); (iv) Mr Reza Maleknia was substituted for the Applicant as the Spanish Company's administrator on 6 December 2022; and (v) on 27 April 2023, the shareholders received Notice of EGM to consider a proposal to liquidate the Spanish Company.

The Service of Penally Endorsed Orders and the Issuing of these Applications

32. No issue arose as to service of a penally endorsed Order on the Applicant, but the Order served on the Notice Party did not reference the Notice Party. Service of an amended version (referencing her as well as the Applicant with, again, the penal endorsement) was subsequently effected on the Notice Party, after the current application had issued. Even after the service of the penal endorsement on both Defendants, the impasse with the Villa continued. The Respondent issued injunction and contempt applications in July 2023 in respect of the Applicant, the contempt motion being one of the three motions dealt with in this judgment. Heslin J. dealt with the application for injunctive relief against the Applicant on 6 September 2023, granting injunctions which:

a. encompassed the Applicant and "*his servants or agents, and anyone on notice of the making of the Order*";

b. restrains those parties from taking any steps in respect of the Spanish Company pending the transfer of the Villa to the Mother and from taking or directing any steps in respect of the Villa including (but not limited to) the prosecution of the eviction proceedings; and

c. directed the Applicant "*on his own behalf and/or on behalf of his minor children, and anyone on notice of the making of the Order*" to direct the Spanish Company's administrator, Mr Maleknia, to immediately suspend or withdraw any proceedings brought on behalf of the Spanish Company pending the transfer of the Villa to Janis Fried or her nominee, including any eviction proceedings.

33. Surprisingly, the Applicant's last affidavit still seems to dispute the Respondent's entitlement to injunctive relief, notwithstanding his previous consent to an order making such injunctions, apparently on a permanent basis. Nor has he sought to appeal, vary or set aside the Order of Heslin J.. Perhaps he intended to object to the corresponding application in respect of

the Notice Party or to the Contempt Applications against both Defendants. In any event, the injunctions granted by Heslin J. in respect of the Applicant remain in full effect. Nothing in this judgment will affect that order, save that the Respondent's entitlement to interlocutory injunctive relief against the Notice Party will be determined by this judgment.

34. In October 2023, the Respondent issued applications seeking injunctive relief and an order for committal and attachment in respect of the Notice Party (corresponding to the applications previously issued in respect of the Applicant).

IV. The Respondent's Case

35. The Respondent submitted that the Agreement bound the Notice Party because the Applicant had authority to act on her behalf. Clause 2 of the Agreement confirmed that:

> "*Andrew Fried warrants that he has authority to enter into these terms on behalf of Felicity Fried*".

36. The Respondent notes that, at the time of the Settlement, the Notice Party and her solicitors (who did not attend the negotiations) did not dispute the Applicant's authority to sign on the Notice Party's behalf. She had been informed by telephone of the proposal and a copy of the Agreement was forwarded to her solicitor after its execution. She never sought to impeach the Order or Agreement for want of authority. Accordingly, her attempt to deny that she was bound was untenable. The Respondent maintained that: (a) throughout the negotiation, it was represented that Andrew Fried had the power to procure the transfer of the Villa; (b) the Applicant's wife was joined as a Notice Party to effect such a transfer and; (c) both Defendants are acting in concert and are: (i) bound by the Settlement; (ii) obliged to procure that the Company transfers the Villa; (iii) (actively or passively) the controlling minds behind the Spanish Company and able to procure the transfer of the Villa; (iv) refusing to procure the

transfer of the Villa; (v) responsible, with their representatives, for obstacles created to frustrate the Agreement; and (vi) in breach of the Agreement and in contempt of Court.

37. The Respondent's more concrete allegations as to actual steps allegedly taken to frustrate the commitment to transfer the Villa include: (a) the transfer of the Applicant's shares in the Spanish Company to the Children; (b) the way the Defendants have used their powers as nominees of the controlling shareholders (or as a trustee of shareholders), director or administrator of the Company and the way its affairs and accounts have been managed, including appointments of administrators; (c) the ongoing eviction proceedings; (d) the disconnection of the water supply; and (e) the threatened dissolution of the Spanish Company.

V. The Applicant's Defence to the Applications

38. The Applicant did not appear and was not represented at the hearing, but his replying affidavits explained his position. He maintained that:

a. The Order did not reference Clauses 24 - 27 of the Agreement, the clauses pertaining to the Villa.

b. He had complied with all clauses in the Agreement within his control and had applied his best endeavours as required by Clause 25.

c. He transferred his shares to his children six months before the Agreement and now had no personal legal authority regarding the Spanish Company, nor had he had such authority at the time of the signing of the Agreement. He was not a shareholder, director or administrator at the time. Mr Ramos was the Company's sole administrator when the Agreement was entered into.

d. The Spanish Company was not one of the six companies identified in the recitals to the Agreement as family companies and made parties to the Agreement. He

queried the enforceability of Clause 24 since the Spanish Company was not a party to the Agreement.

e. At the time of the negotiations, all parties understood the limitations on what he could do. He claimed that he signed the Agreement in good faith and that:

> "*…despite my best endeavours…it is not possible for me alone to effect the transfer of the Spanish property. Although I am a legal representative of my children shareholders, Felicity is also a co-legal representative and her consent is not forthcoming.*"

f. He was:

> "*only a co trustee for my children's assets along with their mother Felicity Fried, and I used my best endeavours to persuade her to agree to all aspects of the settlement agreement which I believed she had done. Subsequently, after obtaining legal advice, she consented only to clause 44 (d) & (e) of the settlement agreement relating to Irony Galway Properties, which was noted by the court in it's* [*sic*] *order perfected 27 January 2021.*"

g. Spanish law dictates that decisions relating to minors' assets can only be made by agreement of all trustees and only in the children's best interests and the Villa is subject to Spanish law and jurisdiction.

h. He denied the suggestion that he had vetoed the transfer of the Villa or that Mr Ramos had ever agreed to any such transfer prior to his intervention.

i. He claimed to have made his position clear in the negotiations:

> "*I made it crystal clear that I was no longer a shareholder of the company and that in June 2020 I had signed over all my shares equally to my children Isabella and Ruben. It is clear from the wording used in the signed settlement agreement that I was not in a position to effect the transfer. The Spanish Company was not a party to the Settlement Agreement and it was the circumstances that I did not have any ability to effect or procure the transfer of the Spanish Property myself that the phrase "Best Endeavours" was included. This is the only clause in the Settlement Agreement where such wording is used.*

The Terms of Settlement were not "premised on" any representations that I continued to be a shareholder in the Spanish Company, nor did I make any such representations."

39. The Applicant also states that the Notice Party's consent to the Agreement was limited to Clause 44(d) and (e) (which concern the Galway Property), citing the 22 January 2021 correspondence as confirming that she was only consenting to those clauses, concluding that:

"*Given the express position of Felicity Fried before any orders were made, it is not now open to the Plaintiff to take issue with paragraph 2 of the Settlement Agreement that I warranted that I had authority to enter into the Settlement Agreement on behalf of Felicity Fried. At the time, I believed I had such authority and it was made clear to all parties subsequently that Felicity Fried was only consenting to clauses 44(d) & (3)* [*sic*] *of the Settlement Agreement*".

VI. The Notice Party's Defence to the Applications

40. The Notice Party's affidavit:

a. notes that she did not sign the Agreement and was not present when it was negotiated. She was in London with her dying father, unable to be by his bedside due to Covid restrictions. Sadly, he died on 3 January 2021:

"*I had no sight of the agreement or independent legal advice when Andrew called me on the 18th December to tell me they had reached an agreement with the plaintiff and he was agreeing to things on my behalf. I informed him that my father had lapsed into a coma that very morning and I was beside myself with worry and anxiety and not in any state to concentrate on what he was telling me over the phone. He obviously thought I had agreed to everything, and went ahead and signed his own signature to my name. I only read the agreement myself for the first time when my solicitor, Desmond Fitzgerald, emailed it to me on the 22nd December 2020. It was only then that I fully understood what Andrew had signed, as at the time I had only been concerned about my dad's ailing health. When I understood the full extent of what Andrew had agreed to on my behalf, on 31st*

December 2020 I emailed my solicitor Desmond Fitzgerald telling him how upset I was about it and asked him how to extricate me from such agreement."

b. emphasised:

"*I did not consent to anything except to agree to vacate and give up my home in Barna, County Galway. After huge pressure I consented only to clause 44 d & e of the agreement relating to Irony Galway Properties, regarding giving up my house in Barna, County Galway, forcing me and my children to be left homeless. As far as I am concerned this was made absolutely clear to all parties including the court, which notes the letters dated 22nd January 2021 which my solicitor sent on my behalf five days before the court order was perfected.*"

c. denies any suggestion of a premeditated plan to frustrate the transfer:

"*Firstly, I was completely ignorant to the fact that Andrew had transferred his shares to our children until about 6 months afterwards. Andrew always left me out of his business dealings. It had nothing to do with me. Everybody knows that Andrew and his family never ever involved me any discussions or details of their family business. Secondly, as far as I understand, he transferred his shares six months prior to the settlement agreement even existing, it seems Philip is alleging that we can both see into the future.*

8. As it now transpires, I find myself in a position of being a co trustee for my children's assets. I understand that I would be in breach of my fiduciary duty if I were to agree to give away the only asset of value in the company and it would be construed as a deliberate act of fraud in Spain, Ireland and the U.K. where myself and my children reside."

d. argues that any control she can exercise over the Spanish Company is as trustee for the Children - she cannot transfer of the Villa contrary to their interests.

41. The Defendants rely on Spanish legal advice as to their responsibilities under Spanish law in respect of their Children's assets. The Notice Party submitted that:

a. She could not be bound by the Agreement as she did not know its terms when it was entered into, and she could not have authorised its enforcement by motion.

b. In view of her personal circumstances at the time, it would be wrong in principle to enforce an agreement that she had not knowingly consented to.

c. Before the Order was made on 25 January 2021, the Notice Party's solicitor advised the Applicant as to the extent of the Settlement Agreement she was prepared to consent to (the provisions affecting her family home) and stipulated that this was on the basis of full and final settlement.

d. The Respondent secured the Order by reference to her solicitor's correspondence (the Order referenced the correspondence). Accordingly, he was bound by its terms.

e. The Notice Party should not be deprived of equitable and other defences, which she would be entitled to pursue in a full action. She did not agree (in her solicitor's correspondence) to be bound by an Order permitting the Respondent to enforce against her provisions of the Agreement to which she did not consent.

f. There was no ostensible authority because the only representation made by the Notice Party to the Applicant was through her solicitor's correspondence. While acknowledging that authorities such as *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 3 All ER 795 ("*Armagas*") and *Kett v Shannon* [1987] ILRM 364 ("*Kett*") confirmed that ostensible authority may be created through conduct, *Armagas* shows that any such representation by conduct involves:

> "*permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.*"

g. Ostensible agency issues typically arise in employment contexts. There was no employment relationship here and the Applicant had no usual authority to act on the Notice Party's behalf.

h. There was no sense in which the Notice Party permitted the Respondent to enter into the Agreement.

i. Whatever interpretation can be put on the telephone call between the Defendants, there is no basis for suggesting that the Notice Party permitted the Applicant to act in her name in relation to the Children's property interests.

j. Even if the Applicant had authority to enter into an agreement affecting the Notice Party's interests (in the family home or otherwise), he did not have authority to do something different (bind the Children's property interests).

k. The Applicant had no actual or express authority to enter the Agreement on her behalf - she did not know what was contained in the Agreement.

l. The provision in relation to the Villa was not for the Respondent's benefit but for the Parents and the provisions were not the subject of the original proceedings.

m. The provisions do not concern the Applicant's property but rather shareholdings in the Spanish company which belong to the Children.

n. The height of the Respondent's case was that the Notice Party agreed to confer authority on the Applicant to agree things on her behalf. However:

> "*There is no evidence that she gave him authority to agree things on behalf of their children. In the circumstances, whatever theory of agency the* [*Respondent*] *may seek to rely, it cannot extend on any basis to the property rights of the children*".

o. There was no consideration for the creation of the agency nor any consideration passing from the Applicant (or his parents) to the Notice Party (or the Children) for the transfer of the Villa to the grandparents.

42. The Notice Party's written submissions concluded that:

> "*... there is no evidence of any consent to the far ranging agency which it is alleged in this instance. At most, and at a considerable stretch, the authority*

given extended to the Notice Party's family home, insofar as it seems (even this is not entirely clear) that the ownership of the family home was put in issue in the original proceedings, between the original protagonists (the Applicant and Respondent).

But did the Notice Party authorise the [*Applicant*] *to give away the children's shareholding in the Spanish company and to do so in her name? Alternatively (with reference to Ostensible Authority), did she permit him to agree (on her behalf) to transfer the children's shareholding (when in fact she did not know he was so agreeing). It is respectfully submitted that there is absolutely no evidence of any such authority having been given to the Respondent and …the Notice Party is not bound by an agency agreement with the Respondent in respect of the Spanish shareholdings.*"

VII. Key Legal Principles

Principles Relating to the Construction and Enforcement of Settlement Agreements

43. In *Brendan Mullin v. John G. Burns Limited* [2022] IEHC 499, Simons J. identified at paras. 24 – 27 the public interest in certainty as to the terms on which proceedings are settled:

"*this is achieved by giving an objective interpretation of the language actually employed by the parties to embody the agreement in written form and which both parties have signed up to. The precise purpose of reducing the terms of settlement in writing is to avoid any possible dispute as to what has been agreed.*

It is important that a party who enters into a settlement agreement can do so secure in the knowledge that the agreement can be enforced in accordance with its written terms."

44. Clarke J. (as he then was) discussed the interpretation of agreements and orders in *Ranbaxy Laboratories Ltd v. Warner-Lambert Company* [2009] 4 I.R. 584 ("*Ranbaxy*") at pp. 599-600:

"*38. … significant commercial contracts, carefully negotiated with the assistance of experienced lawyers, must be assumed to have been properly worked out by those lawyers. A court will not likely assume a mistake in this regard either. ... In addition, a court may need to know the overall context of the circumstances leading to the negotiation of the contract in the first place. This is because the contract should be construed in the way in which a reasonable and informed person entering into a contract*

of that type would be likely to interpret it. That person will not come to the interpretation of the contract with a blank mind. The contractual negotiations will commence against a particular factual backdrop and the parties will be seeking to advance their commercial interests against that factual back drop".

45. *Solicitors Mutual Defence Fund Limited v. Peter Costigan & Ors* [2020] IEHC 213 ("*SMDF*") focussed on whether the court was *functus officio* in particular circumstances, but the decision discusses orders referencing settlement terms. Unlike this case, para. 14 of the judgment confirms that the settlement terms were not received and filed:

"*Nor was an order made in classic Tomlin style under which, as formulated by Tomlin J. in Dashwood v Dashwood [1927] W.N. 276, the proceedings would be stayed on terms agreed between the parties (and usually scheduled to the order) with liberty to apply to the court for the purposes of enforcing the terms of settlement.*"

46. In a thorough review of the authorities, McDonald J. (at para. 45) cited Barron J.'s observations in *Ascough v. Roe* (High Court, Unreported, 21 May 1992) ("*Ascough*") in respect of a settlement agreement which similarly did not form part of the final order:

"*it is like any other contract. The rights of the parties depend on the intention of the parties as expressed by the words used. Whether or not the parties intend the construction of the agreement towards (sic) enforceability or any other matter relating to it to be controlled by the Court depends upon the terms of the contract itself and, in so far as any of these terms are embodied in a court order, by the terms of such order. … If the Court is intended to be involved in the enforcement of the consent, then the order should be sought and made in the form known as a Tomlin order. Such an Order reserves jurisdiction to the Court in so far as it may be required to give effect to the terms of the order.*"

47. At para. 53, McDonald J. noted that in *Carthy v. Boylan* [2020] IEHC 166:

"*It was also ordered that the settlement agreement "be received and filed in court" and the order expressly gave "liberty to apply to all parties for the purposes of enforcing the said settlement". …like Barron J. in Ascough and O'Neill J. in O'Mahony, O'Connor J. had regard to the terms of the settlement agreement in seeking to understand the meaning*

and effect of the order… he rejected the suggestion that fresh proceedings were required".

48. McDonald J. referred to *Ranbaxy* as cited above, concluding that:

"*55. …a consent order of this kind cannot be construed in isolation. In circumstances where, by reference to the language used in the order, there is doubt as to its meaning and effect, it must be construed against the backdrop of the settlement agreement ….*
58. …Use of the words "liberty to re-enter" clearly envisaged a potential future role for the court; … it is entirely legitimate, in these particular circumstances, to have regard to the underlying settlement agreement… in many cases, it should not be necessary, in order to divine its meaning, to go beyond the express terms of an order."

Principles on Agency

49. The burden of establishing authority (actual or ostensible) rests on the party asserting its existence. As *Bowstead & Reynolds on Agency* (22nd ed., 2021) ("Bowstead") notes at para. 3-004, actual and apparent authority often coincide, and it may not matter which is relied upon but the concept of:

"*apparent authority is essentially confined to the relationship between the principal and third party: the principal may under it be bound by unauthorised acts of the agent.*"

50. White, in *Commercial Law* (2nd ed., 2012) likewise observes that:

"*Apparent authority usually coincides with an agent's actual authority, when A appears to have the authority he actually does have, but it can go further and it can:*

(i) create authority where none existed;
(ii) extend an existing agent's actual authority;
(iii) create or extend authority despite an express restriction from the principal, unknown to the third party; or
(iv) extend an agent's authority after termination of the agency."

51. Diplock L.J. identified the elements typically required to establish ostensible authority to contract on behalf of a company in the English Court of Appeal decision in *Freeman &*

Lockyer v Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 ("*Lockyer*"), at p. 506:

"*(1) That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;*
(2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
(3) that he (the contractor) was indeed induced by such representations to enter into the contract, that is, that he in fact relied upon it; and
(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority enter into a contract of that kind to the agent."

52. Henchy J. agreed with that summary in *Kett*:

"*Ostensible authority…derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal… The essence of ostensible authority is that it is based on a representation by the principal…to a third party…that the alleged agent… had authority to bind the principal by the transaction he entered into.*"

53. Henchy J. approved the observations of Goff L.J. in *Armagas* (at p. 804):

"*… ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.*"

54. Courtney's *The Law of Companies* (4th ed., 2016) also sees apparent or ostensible authority as an estoppel preventing the company from denying the authority, which it had represented the agent as having:

> "*The law views the company as 'misrepresenting' the agent's authority, or lack of it. In consequence the company is estopped from later denying that agent's authority to bind the company. Implicit in this analysis is that there must be a representation from someone with actual authority.*"

55. Barrett J. reviewed the jurisprudence (including *Kett*, *Fennell v N17 Electrics Ltd* [2012] IEHC 228 and *Vanguard Auto Finance Ltd v Browne* [2015] 1 ILRM 191), in *Healy v Ulster Bank Ireland Limited* [2018] IEHC 12 ("*Healy*"), and helpfully summarised the position:

> "*A. Actual and Ostensible Authority*
>
> *1. In the law of agency a distinction is drawn between actual (or real) authority and ostensible (or apparent) authority.*
>
> *2. Actual authority exists when it is based on an actual agreement between the principal and the agent.*
>
> *3. Ostensible authority derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal.*
>
> *4. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.*
>
> *5. In assessing whether or not a person has ostensible authority, a Court will take into account the surrounding circumstances which reasonable persons in the position of the parties would have in mind.*
>
> *6. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world*

is generally regarded as carrying authority to enter into transactions of the kind in question.

7. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.

8. Ostensible general authority can never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal.

9. Liability for agents should not be strictly confined to acts done with the employer's authority.

10. The conduct for which the employer is sought to be held liable must be so closely connected with acts the employee was authorised to do that the wrongful conduct may fairly and properly be regarded as done by the employee in the course of the employee's employment."

56. The agent cannot unilaterally give himself authority. As Forde states in *Commercial Law* (4th ed., 2020) at [2.42]:

"*The holding-out must have been by the principal or by someone it has duly authorised to do so; a holding-out by the agent is meaningless*."

57. Such "holding-out" need not be a positive action. In *Allied Pharmaceutical Distributors Ltd v Walsh* [1991] 2 IR 8 ("*Allied Pharmaceuticals*"), Barron J. distinguished *Kett*, finding that ostensible authority had arisen on the facts before him due to:

"*the absence of any comment from the Defendant firm was a sufficient representation by conduct that Mr Walsh had the authority of the Defendants to direct the making of such deposits*".

58. Neither party referenced the jurisprudence concerning the ostensible authority of barristers and solicitors to commit their clients to settlements such as *Waugh v H.B. Clifford & Sons Ltd* [1982] Ch. 374 ("*Waugh*") and *Barrett v WJ Lenehan & Company Ltd* [1981] ILRM 206 ("*Lenehan*"), in which the client's attempts to disavow settlements (on the basis that the authority had been exceeded because the settlement encompassed collateral matters) failed.

Lenehan concerned negotiations for a surrender of possession. Barrington J. concluded that the tenants:

> "*must have authorised their legal advisors to negotiate on the issue of compensation. It appears to me that this necessarily implies in a case such as the present, authority to negotiate on collateral matters such as the date on which the tenant was to receive the compensation, give up possession, arrears of rent and the like.*"

59. In *Waugh*, the Court held that a compromise did not involve a "*collateral matter*" merely because it contained terms which a court could not have ordered by way of judgment in the action. The proceedings concerned a contract to sell sites and build houses and a solicitor was acting within his ostensible authority in entering a compromise which involved the return of the houses on payment of their current value.

60. A "principal" may also be bound by an act done without authority if they subsequently ratify it. Bowstead, at para. 2-048, notes that such ratification is "*equivalent to an antecedent authority*". The ratification must be by the principal, or by someone authorised to ratify. Bowstead notes at para. 2-074, ratification may be express or by conduct:

> "*Ratification would be implied whenever the conduct of the person whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction*".

Citing venerable New Zealand authorities such as *Waiwera Co-Operative Dairy Company Limited v Wright, Stephenson & Co. Limited* [1917] NZLR 178 and *Akel v Turner* [1926] GLR 574 (NZ), as well as more recent decisions such as *Suncorp Insurance and Finance v Milano Assecurazioni SpA* [1993] 2 Lloyd's Rep. 225 (at p. 234) and *Yona International Limited v La Réunion Française SA d'Assurances* [1996] 2 Lloyd's Rep. 84 (at pp. 103, 106), Bowstead concludes that ratification may be implied where the conduct of the person in whose name the transaction is entered into constitutes clear evidence that he recognises such transaction and may also be implied from his acquiescence or inactivity. Bowstead also notes at para. 2-080

that an estoppel may arise based on silence or inactivity - the "principal" may be estopped from denying that he has ratified.

61. Principals cannot be selective. Bowstead also notes at para. 2-081 that

> "*The principal cannot adopt the favourable parts of a transaction and disaffirm the rest: he cannot approbate and reprobate, for this would enable him to effect a transaction into which the third party had never intended to enter. He must therefore adopt or reject the transaction in toto, and where it can be said that this has not been done, the conclusion may be drawn that there was no ratification.*"

62. For completeness, it should be noted that if the Applicant did not in fact have authority to sign the Agreement on the Notice Party's behalf, then, at common law, he would be liable for breach of warranty of authority. In this case, the Respondent can invoke the Applicant's express warranty of authority in the Agreement which renders him liable to the Respondent if the Notice Party was able to disavow the Agreement for want of authority. Conversely, if the Applicant did have authority to sign on the Notice Party's behalf, then the latter might allege that he was obliged to discharge that duty with reasonable skill and care. Any breach of such a duty would be a matter between the Defendants and would not affect the Agreement.

63. Bowstead considers the principles applicable to ambiguity at para. 3-020:

> "*Where the authority of an agent is conferred in such ambiguous terms, or the instructions given the agent are so uncertain, as to be fairly capable of more than one construction, an act reasonably done by the agent in good faith which is justified by any of those constructions is deemed to have been duly authorised, though the construction adopted and acted upon by the agent was not that intended by the principal.*"

General Principles with regard to Injunctions

64. The submissions as to the legal principles governing injunctions were by way of general reference to the well-established principles laid down in *Okunade v. Minister for Justice & Ors* [2012] 2 IR 152, *Merck Sharp & Dohme Corp. v. Clonmel Healthcare Ltd* [2020] 2 IR 1

("*Merck*") and their ancestors, such as *Campus Oil v Minister for Industry (No. 2)* [1983] IR 88 ("*Campus Oil*") and *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396, authorities concerning interlocutory injunctions, rather than enforcement injunctions. I need not set out those principles at length because there does not appear to be any controversy in that regard. However, the Respondent did emphasise the observations of Geoghegan J. in *Ó Murchú v. Eircell Ltd* [2001] IESC 15, that, although the injunctions sought were technically mandatory:

> "*... they are not of that type. They are directed simply towards retaining the status quo pending the outcome of the action, which is the normal purpose of a prohibitive injunction.*"

65. In view of the submissions concerning the alleged impossibility of effecting the transfer, it may also be appropriate to note that in *Leeds Industrial Cooperative Society v Slack (No. 1)* [1924] AC 851, the House of Lords observed that the jurisdiction to award damages in lieu of an injunction may arise in cases in which damages would not be awarded at common law. See also Kirwan on *Injunctions: Law and Practice* (3rd ed., 2020) ("Kirwan"), at para. 4-119, which discusses the:

> "*complex debate in the courts in England as to how to measure damage, and in particular the extent to which there might be an assessment of damages on what might be termed a 'new' basis*".

66. At para. 4-122, Kirwan also notes the observation of Lord Nicholls in the House of Lords decision in *Attorney General v Blake* [2001] 1 AC 268 ("*Blake*"), that:

> "*…damages are not always narrowly confined to a recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.*"

Contempt Applications

67. The principles in respect of contempt applications have been considered in authorities such as *Board of Management of Wilson's Hospital School v. Burke* [2023] IEHC 528, *Laois County Council v. Hanrahan & Ors* [2014] 3 IR 143 ("*Hanrahan*"), *IBRC v. Quinn* [2012] IESC 51 ("*Quinn*"), *Dublin City Council v. McFeely* [2015] 3 IR 722 ("*McFeely*"), *Pepper Finance Corp. v. Persons Unknown* [2023] IESC 21 ("*Pepper Finance*"), *Century Insurance Company Ltd v. Larkin* [1910] 1 IR 91, and *Ulster Bank v. Whitaker* [2009] IEHC 16 ("*Whitaker*"). As Fennelly J. observed in *Hanrahan*:

> "*The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.*"

68. As Binchy J. observed in *B.L. v Governor of Castlerea Prison* [2017] IEHC 569:

> "*A person cannot be committed to prison for contempt of court if it is impossible for that person to comply with the order in respect of which the application for his contempt is made. But it is a matter for a person in such circumstances to satisfy the court that it is impossible for him to do so.*"

69. The criminal standard applies – the Court must be satisfied beyond reasonable doubt that the appellant was guilty of contempt. Procedural safeguards must be satisfied. All allegations of contempt must be clearly articulated, and the party alleged to have committed contempt must be personally served with a penally endorsed copy of the order. In *McFeely*, the Supreme Court allowed an appeal because the inquiry into whether an order had been breached preceded the contempt application. The Supreme Court revisited the procedural requirements in *Pepper Finance* confirming that personal service of a penally endorsed order was required to ground a contempt application.

70. Directors or shadow directors can be liable for contempt of court in the event of a company's failure to comply with court orders. For example, see *Irish Shell Ltd v. Ballylynch Motors Ltd* (Unreported, Supreme Court, 5 March 1997), *Masri v. Consolidated Directors*

International Co SAL [2010] EWHC 2458 (Comm) and *Kagalovsky v. Balmore Invest Ltd* [2013] EWHC 3876 (QB) and *Schwartz v. VGV (UK) Ltd* [2020] EWHC 2227 (Ch). Accordingly, whether or not formally appointed as directors, individuals can be found in contempt of court by reason of the acts or omissions of a company under their effective control.

VIII. Discussion

Service of Penal Endorsement

71. Although there was no issue as regards the Applicant, service on the Notice Party was not sufficient for a contempt application. She was only served with a correctly addressed penally endorsed order after the issuing of the application. In *Pepper Finance*, Hogan J. emphasised the need for personal service of such a penally endorsed order before any contempt proceedings (while recognising the jurisdiction to direct substituted service if necessary). Likewise, in *Whitaker*, the High Court refused sequestration where the order served lacked the penal endorsement. Also, *McFeely* shows that a contempt application must be grounded on acts postdating the service of the penally endorsed order. The original service was defective. The subsequent service of a duly endorsed order would have been effective save that it was served after the application had issued. Accordingly, I would dismiss the Contempt Application in respect of the Notice Party on that ground alone. However, Counsel were unable to identify any authority on that issue. Therefore, in case I am wrong on that issue, I will also deal with other issues raised by the application.

Observations as to the Affidavit Evidence

72. In the context of the committal applications in particular, I have concerns as to aspects of the evidence currently available from each side, including, for example:

a. Some of the Respondent's claims are generalised assertions rather than evidence, let alone evidence which could justify contempt applications (and some of the Defendants' rejoinders are equally general). The Respondent raises points such as the circumstances of the transfer of the Applicant's stake in the Spanish Company although it predated the Settlement. Likewise, he raised issues as to, for example, Company debts and the adequacy of its accounts, which seem only marginally relevant (to the extent they bear on the Defendants' *bona fides* or demonstrate an attempt to frustrate the Agreement).

b. There were apparent omissions or inconsistencies in the Defendants' various affidavits but also erroneous statements in the Respondent's earlier affidavits, such as concerning his awareness prior to the Settlement of the transfer of the shares in the Spanish Company to the Children. In fairness, the Respondent proactively filed an affidavit of his own volition to acknowledge receipt of an 31 July 2020 email from the Company's then Administrator which referenced the share transfer. I do not think that he deliberately misled the Court, but he should have offered a fuller explanation for his earlier inaccuracy on a key point.

c. While denying any role in the ongoing attempts to evict the Parents, the Applicant does not explain the eviction notice issued in his name or various steps which, on their face, would appear difficult to reconcile with his obligations under either Clauses 24 or 26. He also claims to have tried to secure the transfer but does not detail what steps he actually took. Nor does he explain the contradiction between his position that the Notice Party's attitude was, in effect, tying his hands, and the fact that the 11 June 2020 deed ensured that he retained effective control of the shares. The Applicant's apparently deliberate retention of such control in the deed is difficult to reconcile with the position adopted by the Defendants that it was the Notice Party who was primarily

blocking the transfer or with the latter's claim to have been unaware of the transfer of the shares.

d. A fundamental feature of the Applicant's evidence is his denial of responsibility for the affairs of the Spanish Company, on the basis that those were matters for its Administrator. However, he does not address his own role in appointing (and retaining) Mr Reza Maleknia, which is difficult to square with his own previous damning testimony as to the latter's conduct and motivation, including his attempts to obstruct the restoration of assets owned by the family business. In these applications, the Applicant maintained that Mr Maleknia "*was well known to all parties and related to Philip Fried by marriage*". This bland character reference does not explain why Mr Maleknia was a suitable candidate for a fiduciary position in the light of his previous conduct. The Respondent's scepticism as to the *bona fides* of the appointment reflects the Applicant's previous admissions as to his past transactions with Mr. Maleknia, which involved the exchange of €353,000.00 worth of jewels removed from the family's main company to fund the purchase of a fleet of classic cars from Mr Maleknia. The Applicant has testified that Mr. Maleknia, having suffered a heart attack during a police interrogation, refused to deliver the cars from the United Kingdom because he wished to prevent either the Respondent or Claddagh Jewellers Limited from receiving any benefit from the returned cars, jewels or cash (for completeness, and in fairness to Mr Maleknia, he is not a party to the proceedings and he may well not have had the opportunity to answer the Applicant's allegations. I am not making any findings against him but simply noting the issues arising on the Applicant's testimony).

e. The Notice Party's denial of awareness of the transfer of the Applicant's interest in the Spanish Company until six months after it happened is questionable - she was present when the deed was executed - she herself signed it before the notary to signify

her consent to the arrangements (including the retention of control by the Applicant). Her reference to supposedly only learning about the transaction six months after it happened would merit elaboration if this implies a discussion between the Defendants concerning the significance of the transfer to the Children in December 2020, around the time of the negotiations. The detail of any such discussion and its timing (in the context of the negotiations) could be material to these applications.

f. Nor have the Defendants disclosed whether, prior to the telephone call during the negotiations, they had anticipated that the Notice Party would need to sign up to any settlement or whether the issue only arose on the day. A fuller account from both Defendants might have been helpful.

73. In the circumstances, my conclusions as to the obligations arising from the Agreement and the Order are primarily based on the terms of the documents themselves, along with undisputed or objectively established facts which form part of the factual matrix in which the Settlement was negotiated. I largely discount assertions from all sides as to their subjective understandings, or as to what was represented or communicated during negotiations in which they did not personally participate. I have three concerns about such evidence.

74. Firstly, it is generally inadmissible in principle. No party has sought rectification, so the position remains that, following intensive negotiations in the context of ongoing Court hearings, the lawyers negotiated and documented a formal settlement agreement. The document was signed by or on behalf of each party and contained the provisions typical of such commercial agreements which were designed to ensure its legal enforceability. All parties agreed to the agreement becoming part of the Court Order concluding the proceedings and other actual and threatened claims. In such circumstances, the parties' obligations must primarily be determined by reference to the language of the Agreement and the Order. Courts will only have recourse to extrinsic evidence of negotiations to interpret such documents in

limited circumstances (however, such evidence may be relevant to the contempt applications, for example, as to what constitutes *"best endeavours*". Concrete contemporaneous evidence of discussions from the original negotiations might go to the credibility of subsequent explanations or to what was expected of the parties).

75. My second (related) concern is that each side's evidence advanced very subjective assertions as to what was said or intended in the negotiations. Such retrospectives are inherently unreliable, being vulnerable to hindsight.

76. My third concern is that the generalised nature of such references (by all parties) is a further reason for scepticism – the dearth of detail as to who said what to whom. None of the deponents were directly involved in the negotiations. It was common ground that they were conducted by the Original Parties' lawyers and, as the Applicant put it in his first replying affidavit:

> "*The Settlement Agreement was drafted and prepared by the legal teams representing all parties - except Felicity Fried. She did not sign the Settlement Agreement. All parties were aware of these facts.*"

No testimony was forthcoming from the actual negotiators as to what was said, understood, or promised. Generalised hearsay assertions from individuals who were not "*in the room*" are of negligible probative value. For example, while cross examination would be necessary to probe the Applicant's claim to have "*made it crystal clear"* during the negotiations that he was no longer a shareholder in the Spanish Company, he has not explained who he made this clear to. Since the negotiations were between the legal teams, he presumably simply conveyed this information to his own lawyer, which is of negligible relevance without evidence that it was relayed to the Respondent's representatives. For completeness, I should note that the Applicant's observation that the Notice Party did not sign the Agreement is odd since he signed on her behalf, having warranted his authority to do so.

Were the Notice Party's obligations confined to Clause 44 (d) and (e) of the Agreement (the "Galway Home provisions")?

77. A central premise of the Notice Party's defence to both applications is whether she was bound by: (a) the entire agreement or (b) only by the Galway Home provisions. I propose to consider this issue by, firstly, examining the terms of the Agreement and the Order (before dealing with the agency issue), examining the implications if the Applicant was authorised to sign on her behalf. Secondly, I will consider whether her solicitor's 22 January 2021 letters changed the position. Thirdly, I will consider the crucial agency issue – whether the Applicant had actual or ostensible authority to sign on the Notice Party's behalf or whether she is estopped from denying any such authority as a result of her actions before or after the Settlement.

Did the Agreement limit the Notice Party's obligations to the Galway Home Provisions?

78. There is no suggestion in the language of the Agreement itself that the Parties intended to confine the Notice Party's obligations to the Galway Home Provisions. Nor was any such submission made to me by reference to its wording. The Agreement identified the Notice Party as a party, stipulating that she should also be joined as a party to the proceedings. There are other linguistic difficulties with an interpretation of the Agreement which would confine the Notice Party's obligations. The broad language of Clauses 1 and 2 provides no basis for the conclusion that her participation was to be limited. If that had been the intention, then references in Clauses 1 and 2 to "*the terms herein*" and "*these terms*" would have been qualified accordingly. If the Parties had intended to limit her involvement, it would have been easy for them to have made that clear. The language of the Agreement does not suggest any such intention.

79. Furthermore, when the agreement is read as a whole, there is a clear differentiation between the obligations placed on particular parties in certain contexts without any indication

of such an intention to confine the Notice Party's obligation to the Galway Home Provisions. For example, Clauses 3 – 13, 16 – 20 and 31 – 34 confine certain obligations to the Applicant, whereas Clauses 21 – 23 impose other obligations exclusively on the Respondent and/or the Companies. Other provisions (including clauses 28 – 30, 35, 37 – 44 and 46) apply to all Parties, including the Notice Party. Accordingly, the language and structure of the document does not seem to confine the Notice Party's commitment to the Galway Home Provisions.

80. While, as I have noted, agreements must be construed objectively, it is significant that the Notice Party's own email to her solicitor on 31 December 2020 suggests that she immediately understood the ramifications when she read the Agreement. She recognised that the Applicant had committed her to the Agreement generally, not just the Galway Homes Provisions. I agree with her interpretation of the document in that regard.

Did the Notice Party's solicitors' 22 January 2021 correspondence change the position?

81. More than a month after the execution of the Agreement and days before the hearing to confirm the settlement, the Notice Party's solicitors sent two letters (both dated 22 January 2021) to the Respondent's solicitors. Neither letter took issue with the terms of the Settlement or the Applicant's authority to sign the Agreement on their client's behalf. The first stated that:

> "*our client consents to the orders sought at para. 44(d) and (e) of the settlement with no order as to costs against our client and confirmation that in consideration of the said consent this amounts to a full and final settlement of all claims, disputes, actions and causes of actions howsoever arising between Philip Fried and all of the corporate entities recited in the settlement and Felicity Fried.*"

The second letter simply referenced the first and consented to joinder in the proceedings.

82. I do not consider that those letters – which postdated the Agreement – changed the position or limited her commitment to the Galway Home Provisions. The effect of the Defendants' submissions would be that the letters superseded the Agreement and that the

Notice Party was only bound to the extent specified. The letters did not say that. If the Parties had intended to amend the formal Agreement, I would have expected any such change to be explicitly stated, formally documented and signed by all parties. This is what the January addendum did. It is the course mandated by Clause 37 which stipulates that no variation would be valid unless it was in writing and signed by or on behalf of each party.

83. Furthermore, the Defendants overstate the terms of the January 2021 letters. In the absence of express language, the Respondent or his solicitors could not reasonably have been expected to interpret them as superseding the Agreement or as confining the Notice Party's obligations. In any event, a unilateral stipulation would have been nugatory if the Notice Party was already committed to the Agreement.

84. A more plausible interpretation of the letters is available. The Agreement stipulated that the Notice Party should be joined to the Proceedings and that directions should be made on consent, including the Galway Home Provisions. Unless the Notice Party was to personally attend or be represented at the hearing, it was necessary for her or her solicitor to furnish correspondence confirming her consent. The Court would not have joined her as a party to the proceedings as envisaged by the Agreement otherwise. Nor would it have made orders affecting her without such evidence of her consent. It is common for correspondence to be exchanged between solicitors to facilitate such consent orders. Such correspondence is primarily for the Court's benefit, evidencing accords already reached and avoiding the need for numerous parties to appear when there is no controversy. The explicit reference to the Galway Home Provisions in the correspondence is consistent with the agreed arrangements for specific directions to be made in respect of those issues (and, far from varying the Agreement, can thus be seen as consistent with and implementing Clauses 1, 2, 14, 15, 39 and 44 thereof). The Respondent and his solicitors were entitled to view the letters in that light. Such an interpretation would also align with Clauses 39 and 44 which obliged the Parties to consent

and cooperate to facilitate the implementation of the Agreement. In my view, the most obvious interpretation of the correspondence is that it was intended to facilitate the orders envisaged by the Agreement, rather than to supersede it or to retrospectively limit the Notice Party's commitments.

85. The Notice Party and her advisors did not take any other step when they received the Agreement after it had been executed. They did not issue proceedings. Nor did they take any other step to disclaim the Agreement. From the material before me, it appears that the first communication to the Respondent of any suggestion that the Notice Party's obligations under the (December 2020) Agreement were confined to the Galway Home Provisions appeared in the Applicant's 19 September 2023 affidavit in the context of the current applications.

Did the Notice Party's 31 December 2020 email to her solicitor change the position?

86. The Notice Party's email to her solicitor dated 31 December 2020 stated:

> "*I have just had a chance to digest the contents of this agreement and I have spoken to Andrew who has explained it to me in more detail.*
> *I am furious with Andrew as I did not give him permission to sign for me or for me in my capacity as co-trustee of our children's assets.. Andrew did call me from court on Friday 18th December and said something about reaching agreement with the other side but to be honest I had just heard that my dad had gone into a coma and wasn't really concentrating on what he was telling me. Please advise me on what steps to extricate myself from these agreements that I did not sign*".

87. The email does not assist the Notice Party, being internal correspondence with her own lawyer. It is the objective interpretation of the Agreement that matters, rather than later reactions or private communications. In fact, I consider that the email reveals the Notice Party's recognition that she was committed to the entire Agreement. She was unhappy because – under enormous pressure – she had told the Applicant that he could sign on her behalf without "*really concentrating*". Her email reveals her frustration with the detail of the outcome to which the

Applicant had committed her. For entirely understandable reasons in the circumstances, she may not have grasped (or the Applicant may not have explained) the full implications of the Agreement. Perhaps, she had second thoughts on 31 December 2020 when, she says, she finally read the document signed on her behalf. However, "buyer's remorse" is not (without more) a basis to renounce an agreement. If she authorised the Applicant to sign the Agreement on her behalf, then the ship had sailed by 18 December 2020. She or her solicitor could not unilaterally change the position (and any agreed change would have needed to be formally documented and signed by all parties).

88. It is also unsatisfactory that the Notice Party should disclose an isolated email without disclosing her solicitor's response and all associated communications (and issues as to waiver of privilege may arise). Nor has she disclosed the detail of her discussions with the Applicant after the Agreement. There is no evidence as to whether the Defendants decided to refrain from explicitly raising an issue which could have collapsed the settlement with all that that might have entailed (the revival of the litigation, including the contempt motion, the continuance of the Mareva injunction and an earlier need for the family to vacate the Galway Home). Testimony (and cross examination) would be required to resolve such issues. At present, I can only note that the email does not assist the Notice Party. To the contrary, it tends to reinforce the Respondent's claim to an estoppel, particularly since, as noted above, a principal cannot approbate and reprobate their agent's actions.

Did the Applicant have actual or ostensible authority to sign the Agreement on the Notice Party's behalf (or is the Notice Party estopped from denying that he had such authority)?

89. The most fundamental issue as far as the Notice Party is concerned is the extent of the Applicant's actual or ostensible authority to act on her behalf. As the founders of this State could attest, principals' dissatisfaction with the outcome of negotiations may not entitle them

to disavow actions duly authorised on their part. Accordingly, the issue here is whether the Notice Party is bound by the Agreement – did the Applicant have her actual or ostensible authority or was all such authority limited to the Galway Home Provisions?

90. The Notice Party's 31 December 2020 email to her solicitor, her affidavit and her submissions do not deny that she authorised the Applicant to sign the Agreement on her behalf and in her name. However, she now says that she only understood she was agreeing to the Galway Home Provisions and that she never intended to agree to the clauses dealing with the Villa – on her behalf as "*co-trustee*" of the Children's assets. She does not suggest that she told the Applicant not to agree to such provisions. The Notice Party is opaque in her chronology, but it is not clear that she was not even aware of the issue until she read the Agreement on 31 December 2020, nearly a month after the Applicant had signed it in her name and with her approval.

91. It is not clear whether any such lack of awareness of the detail of the Agreement was the Applicant's fault – because he failed to explain the terms sufficiently or whether the Notice Party was understandably preoccupied with other matters and, to the extent she was concerned with the Agreement, her attention was focussed on the Galway Home Provisions which would immediately impact her and her children. The Applicant seemingly believed that he had briefed the Notice Party as to the Agreement and that he had her authority. He warranted as much in the Agreement itself and also warranted that the Defendants had been legally advised. The Respondent was entitled to take him at his word.

92. It is important to consider the context. Having telephoned the Notice Party during the negotiations, the Applicant signed the Agreement twice, once on her behalf and in her name and once in his own name and on his own behalf. When doing so, he expressly warranted his authority to commit her to the Agreement. He did not qualify that commitment. Nor did he

stipulate that she was only agreeing to be bound by the Galway Home Provisions. The first two clauses of the Agreement could not have been clearer:

> "*1. [The Notice Party] is to be joined as a notice party for the purpose of giving effect* ***to the terms herein****.*
> *2. [The Applicant] warrants that he has authority to enter* ***into these terms*** *on behalf of [the Notice Party].*" (emphasis added)

93. The Notice Party and her solicitor both received a copy of the Agreement once it was executed. Neither suggested to the Respondent or his lawyers that there was any issue. They did not inform the Respondent that the Notice Party had not in fact authorised the Agreement. They should have done so immediately if that was the case. They made no attempt to impugn, vary or set aside the Agreement. To the contrary, their actions, including their correspondence, implied that the Notice Party accepted her obligations under the Agreement. There was no indication of the reservations which have recently emerged.

94. The express terms of the Agreement show that all parties, including the Notice Party, envisaged her becoming a party to the Agreement and the Proceedings. I am satisfied that the Respondent has established a strong case that the Notice Party did authorise the Applicant to sign the Agreement on her behalf in the knowledge that it contained various provisions and that neither she nor her solicitor had reviewed it in full. There is no suggestion that she imposed any specific limitation on the Applicant's authority to represent her (certainly no such limitation was communicated to the Respondent). Whether her mind was understandably elsewhere or whether the Applicant did not explain the matter properly is a matter between the Defendants. As far as the Respondent is concerned, the Notice Party authorised the Applicant to sign on her behalf as well as his own. It is not the Respondent's responsibility if, as the Notice Party suggests, the Applicant failed to properly explain what the Settlement involved, nor is it the Respondent's responsibility if the Notice Party approved the arrangement without checking the detail or asking her solicitor to do so. The Applicant personally allowed the

Settlement to proceed on the basis that she had agreed to it (with the benefit of legal advice). No reservation was communicated to the Respondent at the time of the Agreement or thereafter.

95. The circumstances surrounding the telephone conversation were tragic and unsatisfactory. However, those circumstances were not the Respondent's responsibility, nor is it clear that he was even aware of them. Perhaps the Applicant should not have sought the Notice Party's decision under such fraught circumstances (although he may have had little alternative). It was his responsibility to explain what was intended. It would have been reasonable (and prudent) for the Notice Party to have declined to engage in any such discussion at the time or to have insisted that the Agreement was checked by her own solicitor. If she had refused to agree on the spot, then another solution would have been required (such as making the Agreement conditional upon the Notice Party's consent being forthcoming within a defined period). However, that is not what she did. There seems to be no dispute about the objective facts that: (i) the Applicant sought the Notice Party's approval to sign on her behalf as well as his own; (ii) she gave such approval by telephone; (iii) having spoken to her, the Applicant communicated her assent to the Respondent, warranting his authority to sign the agreement on her behalf and proceeding to do so; and (iv) the Notice Party failed to disavow the Agreement when she became aware of it – the 22 January 2021 letters were the only communication on her behalf to the Respondent.

96. The situation seems to me to be analogous to the recent decision of Stack J. in *Everyday Finance DAC v Flood* [2024] IEHC 252. That was not an agency case but concerned a claim under a guarantee. The Bank had identified the need to ensure that the guarantor received independent legal advice and obtained confirmation that this had been done. Although it subsequently transpired that the legal advice was inadequate, that did not affect the Bank's entitlement to rely on the guarantee as it was not privy to the legal advice and was not on notice

of any issue as to its adequacy. Accordingly, any communication issues between the Defendants do not entitle the Notice Party to renounce the Agreement signed on her behalf.

97. For completeness, I have considered whether it is possible to conclude that the doctrines of ostensible authority, estoppel and/or ratification can apply in circumstances where there is no evidence of direct communication between the Notice Party and the Applicant. An agent cannot unilaterally give himself authority, and the Notice Party would not be bound if the Applicant had signed without consulting her or if he had only pretended to telephone her. For example, in *Armagas,* the "principal" was not bound where the "representative" falsely said that he had obtained authorisation. However, unlike *Armagas,* the Applicant actually did obtain approval from the Notice Party. There is no suggestion that he acted dishonestly or fraudulently in warranting his authority. When relaying the Notice Party's confirmation of his authority to sign for her, he was a conduit for the Notice Party, directly communicating her position to the Respondent with her permission. The Notice Party's own 31 December 2020 email to her solicitor confirms this (even if she didn't realise how far he would go in the negotiations). Accordingly, there is a strong case that the Notice Party is estopped from denying the Applicant's authority, just as much as if she had communicated with the Respondent directly. The representation of authority originated from the Notice Party, albeit it came via the Applicant. It would be different if it were a fabrication of the latter. She allowed the Applicant to represent her. The mandate originated from her even if it was channelled through the Applicant. I consider that the first three criteria identified by Lord Diplock in *Lockyer* were clearly met (the fourth not being applicable in this context). In particular, the Notice Party's telephone confirmation to the Applicant that he could sign in her name (and her subsequent conduct) satisfies the second criterion. The Notice Party's actions constitute a representation made by her to the Respondent that the Applicant had authority to bind her in entering into the agreement and would accordingly fall within Henchy J.'s formulation of the principle in *Kett*

as cited at paragraph 52 above. This conclusion is also consistent with the analysis of Barrett J. in *Healy*, in that, when the Notice Party's conduct is considered along with the surrounding circumstances, there was a sufficient representation made by the principal (the Notice Party) to the Respondent (albeit relayed via the Applicant) which was intended to - and did in fact - convey to him that the arrangement entered into by the Applicant on the Notice Party's behalf would be binding on her.

98. Another crucial point, which also goes to ratification or estoppel, is the Notice Party's failure to disavow the Agreement at the time. Her silence appears similar to *Allied Pharmaceuticals*, in which Barron J noted that silence could be *"a sufficient representation by conduct".*

99. As an aside (although it does not affect my conclusion), I note that it is not clear that an alternative outcome could have been achieved even if the Notice Party had focussed on the clauses relating to the Villa. The Defendants may have had limited room to manoeuvre. The Applicant's claim had backfired. He had had orders made against him. He was facing a contempt application and was under scrutiny in respect of controversial transactions involving the property of the family business, including alleged misappropriation of money, valuable jewels and other assets. Some of these allegations extended to the Notice Party. He was restrained by the Mareva injunction. The Notice Party bitterly (if justifiably) resented but grudgingly accepted the need to surrender the Galway Property. The Applicant presumably considered that that was the best deal he could get. It seems unlikely that the Applicant would have given way in respect of the Villa or that the issue would have been a dealbreaker for the Notice Party, since: (i) she had conceded in respect of the Galway Home; (ii) she says that she had not even been aware of the transfer to the Children in the first place; and (iii) the Parents had continued in uninterrupted occupation of the Villa over the years. If the issue had been ventilated, the likely outcome may have been the addition of more detailed provisions

concerning the mechanics. I expect that, if the governance issue had been identified (that the shares were vested in the Children), the Defendants would still have had to concede the return of the Villa, but arrangements would have been made to resolve any such obstacle, perhaps by securing the Administrator's agreement to the addition of the Spanish Company as a party to the Agreement. I doubt that the Respondent would have dropped the requirement to transfer the Villa. There would have been no obvious justification for the Applicant to seek such an outcome in the circumstances, including the background to the transfer to the Children.

Did the Notice Party receive consideration?

100. The Notice Party submitted that there was no consideration for granting authority to the Applicant, but consideration is not required for an agency – it was required for the Agreement itself but the opening words of the Agreement addressed that issue. On a related point, I disagree with the submission that the Children received no benefit from the Agreement. The litigation presented serious challenges for the Defendants and their family. The Notice Party may well have been dragged into the dispute about the alleged misappropriations and the acquisition of the Galway Home. The Children could even have been involved (either directly or indirectly) when the share transfer was impugned, as it probably would have been. The family presumably wished to get the Mareva Injunction lifted. Accordingly, the Settlement was arguably to the benefit of the Children as well as the Defendants, as were provisions allowing them all to remain in the Galway Property until September 2021.

101. The extent of the Applicant's authority to act on the Notice Party's behalf can be probed further at an oral hearing. However, as matters stand, there is a strong case that he had such actual and/or ostensible authority and/or that, on the basis of her conduct both during the negotiations and subsequently, the Notice Party is estopped from denying that she is bound by

the Agreement. If that was not the case, then the Applicant would be liable to the Respondent for breach of warranty. Even if he gave the warranty in good faith, he could still be liable.

102. For completeness, I should note that I disagree with the submission that the Notice Party could not be bound by the Agreement because she did not know its terms of when it was entered into and, therefore, she could not have authorised its enforcement by motion. If an individual signs a contract without reading it, they are bound thereby. If the Notice Party authorised the Applicant to sign the Agreement on her behalf without checking its detail, then, in my view, she would be similarly bound.

What are the Defendants' obligations in respect of the transfer of the Villa?

103. Having confirmed that, in my view, there is a strong case that both Defendants are bound by the entire Agreement, I need to consider the obligations placed on them in relation to the Villa by: (i) the Agreement; and/or (ii) the Order; and/or (iii) (in the case of the Applicant) the injunction granted by Heslin J. on 6 September 2023.

The Meaning of the Agreement

104. Turning to the provisions on which the Respondent relies, the primary clause is clause 24, which is in the following terms:

> "*The parties agree that* [*the Spanish Company*] *will transfer to* [*the Mother*] *or her nominee* [*the Villa*]. *Such transfer to be structured in the most tax efficient manner possible.*"

105. As noted above, the Agreement and Order must provide the foundation for any assessment of the parties' obligations. However, the factual matrix may assist in ascertaining their objective meaning as every order or agreement must be read in context. Also, terms must be interpreted in the context of the Agreement as a whole. The evident intention in entering into the Agreement was to disentangle the Defendants from the family business and to divide

family and business assets, ending their shared legal and commercial interests in the business and in any other assets, including the Villa. Such broader objectives also underpinned the clauses dealing with the Villa. I am satisfied that the intention underpinning the relevant provisions (which complemented the objective of the entire Agreement) was to provide for the Parents. Title to the Villa was to revert to the Mother and the Respondent would then relinquish his interest in the Spanish Company (which also owned assets contributed by the Applicant). The effect would be to return assets to their original owners, while separating the Applicant's interests from those of the family.

106. Clause 24 references the agreement of "*the Parties*" (which would include the Notice Party) that a particular event would happen - they agreed "*that* [*the Spanish Company*] *will transfer to* [*the Mother*] *or her nominee* [*the Villa*]."

107. Matters are complicated by the fact that the Spanish Company was not a party, but the language of Clause 24 seems to me to assume that the Parties would and could procure the transfer of the Villa by the Spanish Company and the clause placed an absolute obligation on them to do so. I consider that the only sensible interpretation of Clause 24 is that the Parties committed to procure the transfer of the Villa by the Spanish Company. This is consistent with the Applicant's statement in his first replying affidavit that his understanding at the time of the Agreement was:

> "*that what was being asked of me was lawful and within my power to legally accept. This however turned out not to be the case. As far as I am aware, no advice on Spanish law was obtained at the time of the Settlement Agreement*."

108. It is important to compare Clause 24 to the following Clauses 25 to 27:

> "*25.* [*The Applicant*] *warrants and undertakes to use best endeavours to facilitated* [*sic*] *the transfer to* [*the Mother*] *or her nominee of the aforementioned property from* [*the Spanish Company*] *in the most tax efficient manner possible from the perspective of all parties.*

26. Pending such transfer, no further steps to be taken by the Parties or their servants or agents in respect of [*the Spanish Company*].

27. Following the transfer of the property, [*the Respondent*] *to surrender or transfer such shares as he may then hold in* [*the Spanish Company*] *or* [*the Applicant*] *or his nominee* [*sic*]."

109. The Applicant emphasises the use of the phrase "*best endeavours*" in Clause 25, which was only employed on two occasions in the Agreement and argues that he had no obligation to procure the transfer of the Villa but only to use his best endeavours in that regard (which he claims to have done). I disagree. The "*best endeavours*" phrase appeared in relation to Clause 25 but not in respect of Clauses 24, 26 or 27, which were framed in absolute terms. If the Applicant's interpretation of Clause 25 is correct, there would be no need for the clause – the addition of a reference to best endeavours to Clause 24 would have had the same effect. Furthermore, the Applicant's interpretation would give no protection to the Respondent, so it seems unlikely that he would have agreed to it in circumstances in which the Parties did not trust each other. The language of Clause 25 seems to imply that the Parties understood that the Applicant would be primarily responsible for effecting the transfer. This would be logical, since he was the former Administrator of the Spanish Company and he also stood to be the recipient of the Respondent's interest under Clause 27. Secondly, he was committing to use his best endeavours to ensure that the transfer of the Villa was done as tax efficiently as possible from the perspective of all parties. However, there is no indication that the use of the best endeavours phrase in Clause 25 (which only dealt with the Applicant's responsibility for tax efficiency) was intended to qualify the more general obligation placed on all parties by Clauses 24 and 26. Applying basic principles of interpretation, it seems to me that the use of the phrase in Clause 25 but not in the other clauses was intended to reflect the uncertainty as to how the transfer could best be structured in terms of tax efficiency. I don't think that it qualified the Clause 24 or 26 or 27 obligations. The "*best endeavours*" qualification only applied to Clause 25.

110. My view that the Parties were committed to effecting the transfer of the Villa and clearly believed that they were in a position to effect it is reinforced by a consideration of Clauses 26 and 27. Clause 26 would clearly have been in different terms if there was any contemplation of a possibility that the transfer would not happen and presumably an alternative mechanism would have been negotiated to deal with the scenario in which the transfer was not effected, if that was seen as a possibility.

111. Given the approach adopted throughout the Agreement, and as a matter of commercial logic, the way the provisions were framed suggests to me that the Parties acted on a common understanding that they could and would procure the transfer of the Villa by the Spanish Company and that they committed to doing just that. If any obstacle had been anticipated as a result of the Applicant's having transferred his stake in the Spanish Company, then it is inconceivable that the issue would have been left hanging. In that scenario, it is probable that the Respondent's advisors would have required the Defendants to come up with a solution (since the obstacle was the result of their actions in purportedly transferring the shares). This may have entailed additional provisions in the Agreement, perhaps joining the Spanish Company or its Administrator as parties (as was done with the Fried Companies and the Notice Party) and perhaps also expressly joining the Defendants in their capacity as trustees as well as on their own behalf (which would align with the terms of the injunction to which the Respondent consented on 6 September 2023). If there had been any doubt as to the ability to procure the transfer of the Villa by the Spanish Company, the Agreement would have been in different terms. This conclusion is a matter of commercial common sense, but it is reinforced by the structure of the Agreement and the care taken to provide for other eventualities by, for example, joining six family companies and the Notice Party as parties (with the addition of a seventh family company in the addendum). Spanish legal advice may have been sought, along with a commitment from the Administrator and, if necessary, the joinder of the Spanish

Company or the Children as parties. It seems unlikely that the lawyers negotiating the Agreement or the parties instructing them focussed on the fact that the shares had been transferred to children – if they had, then additional safeguards would have been required.

112. Accordingly, in my view, Clause 24 imposes an absolute requirement to procure the transfer of the Villa to the Mother (or her nominee), its original owner, with a reciprocal obligation on the Respondent, under Clause 27 (an obligation that has not yet been triggered). By contrast, the Clause 25 duty (which required the Applicant to effect the transaction in a manner as tax efficient as possible for the parties) was limited to a "*best endeavours*" obligation. There was no such qualification or limitation in Clauses 24 or 26.

113. Interestingly, the January 2021 addendum confirmed that the transfer by the Spanish Company should include the motor vehicle used by the Parents at the Villa. The language used corresponds to the terminology of the Agreement and also seems to imply a contemporaneous commitment that the parties could and would procure such actions on the part of the Spanish Company. By the time of the addendum, the Notice Party had read the Agreement and discussed it with the Applicant and with her solicitor; it would be concerning if the Applicant had agreed to the Addendum (or the Agreement) in circumstances in which he knew that he would be unable to procure the transfer of either the Villa or the vehicle.

114. The exchange of correspondence between the Original Parties' respective solicitors on 31 May 2021 and 8 June 2021 also seems consistent with a recognition by the two sets of lawyers that the parties were obliged to facilitate the transfer to the Mother and the Applicant's solicitors seemed to envisage that this would be effected once the tax audit had been completed. The Applicant's solicitor's letter of 8 June 2021 certainly did not suggest that there was any legal impediment to the transfer. If the Applicant's hand were tied, as he now maintains, then it is surprising that his lawyers' letter did not say so.

Have the Defendants breached their obligations under the Agreement? Have they sought to frustrate the transfer of the Villa?

115. In my view, Clause 24 constituted an absolute commitment obliging the Parties in general to ensure that the Company transferred the Villa to the Mother or her nominee. The Respondent has sought to do so but the Defendants, who control the Spanish Company, have failed to effect the transfer. The Respondent says they are deliberately frustrating the Agreement, whereas the Applicant protests that he is unable to effect the transfer without the Notice Party's consent and that both Defendants now appreciate that it would be unlawful to direct the transfer of the Villa to the detriment of their Children.

116. The position with regard to Clause 26 appears even more stark. It provided that, pending the transfer of the Villa to the Mother, no further steps were to be taken by the Parties or their servants or agents in respect of the Spanish Company. On the basis of the extensive affidavit evidence before me and the documents exhibited, it appears clear that many steps have been taken at the Defendants' direct or indirect behest in respect of the Spanish Company which could breach Clause 26.

117. Even if the Defendants are genuinely unable to procure the transfer of the Villa (and cross examination would be needed to resolve that issue), they could still be in breach of Clause 24. If they promised to ensure that the Villa is transferred then they would still be in breach of contract if they fail to honour that commitment, even if the breach was due to factors genuinely outside their control (as *force majeure* would not apply). The severance clauses in the agreement (Clauses 36, 41 and 42) would not exculpate them. They also appear to be in breach of Clause 26.

118. There is a strong *prima facie* case that the intention or effect of the Defendants' acts or omissions - particularly the Applicant's – were to frustrate the commitment to transfer the Villa and could thus constitute breaches of Clauses 24, 25 and 26. These include: (i) the way the

Applicant has exercised the controlling shareholder powers; (ii) the Applicant's role from 5 October 2021 to 6 December 2022 as the Company's Administrator; (iii) the Defendants' choice of Mr Maleknia as Administrator and (iv) the Defendants' responsibility (as a result of acts or omissions on their part) for the way the Company's affairs and accounts have been managed, such as, for example, the attempted eviction, the ongoing disconnection of the water supply, alleged accounting irregularities associated with the Spanish Company and its tentatively threatened dissolution. The Respondent accuses the Defendants of having deliberately procured the frustration of the Agreement by what might (in a more spiritual age) have been described as sins "*of omission*" as well as "*of commission*". Such matters would need to be probed on cross examination, but serious questions call for an explanation in the light of the Applicant's earlier testimony and the Defendants' actions (and inaction), including the Applicant's decision to install (and retain) Mr Maleknia. The choice of administrator calls into question the *bona fides* of the Applicant's attempt to disassociate himself from Mr Maleknia's subsequent actions, including the ongoing attempts to evict the Parents, contrary to the terms of the Agreement (and also contrary to the Order of Heslin J.).

119. The Applicant also repeatedly says that he was "*not involved in any way with the company, other than co-legal representative of my children who are shareholders*", and denies any involvement in the proposal to liquidate the company or responsibility for the disconnection or the attempted eviction. However, he fails to deal with: (i) his period as Administrator and the failure to effect the transfer during that period; or (ii) his passivity as the only legal representative of the majority shareholders (under the deed); or (iii) the fact that he signed the eviction notice. The Applicant may well be in breach of Clauses 24, 25 and/or 26. Even if he was in fact legally unable to effect the transfer despite taking all steps within his power that might not provide a defence to a claim for breach of Clause 24 and his positive

actions in relation to the company (and his failure to try to reverse such actions) do appear to breach Clause 26.

Are the Defendants legally unable to procure the transfer of the Deed?

120. The complication has arisen because, as the Defendants emphasised, the Spanish Company owned the Villa and, by the time of the Settlement, the Applicant's interest in the Company was vested in the Children (although the Respondent disputes the *bona fides* of that vesting transaction). There is no evidence that this issue was identified or discussed during the negotiations. However, it is clear that, four months previously and at much the same time as he appears to have been embarking on other controversial transactions, the Applicant purported to transfer his shares in the Spanish Company to the Children. No evidence of the transfer was furnished to the Respondent, but it was referenced in an email on 11 July 2020 from the Company's then Administrator to the Respondent. Many contentious issues were occurring or being litigated at around the same time (including many which may have been more significant in financial terms), being transactions involving the alleged misuse of substantial Company resources by the Applicant, the Galway Property transaction and other issues. Collectively, such issues appear to have culminated in the original committal application which triggered the Settlement. Perhaps the other transactions were more immediate priorities for the Parties at the time. In any event, I have seen no contemporaneous evidence that either the Respondent or the lawyers who negotiated the agreement were conscious of the transfer to the Children at the time the Agreement was negotiated or that the Administrator's 11 July 2020 email was considered in that context. With so much going on in different jurisdictions, it would not be surprising if the point had not landed. Indeed, the Respondent and the Notice Party both appear to have overlooked the issue despite the fact that the Respondent had received the

Administrator's email five months earlier and the Notice Party had actually been present at and had signed the deed transferring the shares. There was a lot going on.

121. The key issue raised by the Defendants in opposition to the three applications is their assertion that they are legally unable to procure the transfer of the Villa. If this was factually correct then it would seem to be a complete answer to the Contempt Applications, at least in respect of Clause 24 (because a party cannot be in contempt for failing to do the impossible). However, even if their hands were tied from a legal perspective, that would not prevent the Defendants' being in breach of contract if there was an absolute obligation to procure the transfer. It would not necessarily be an answer in respect of Clause 26. The remedies available to the Respondent for such a contractual breach would normally include damages or injunctive relief. Injunctive relief would not be available if, as the Defendants maintain, it was genuinely impossible to transfer the Villa. However, in that scenario, the Respondent would seek other remedies. English authorities suggest that, in order to achieve a just result in accordance with the principles of equity and restitution, the Court may award damages in lieu of injunctive relief beyond those due on a purely compensatory basis. Those issues do not arise at this point, however. At this stage, I will simply assess the current evidence as to whether the Defendants have complied with their obligations under Clauses 24 – 27 or whether they are simply unable to meet those obligations. Injunctions will not be granted to require a party to undertake an impossible task (and damages, possibly assessed on an alternative basis might be an alternative remedy in that scenario).

122. The Defendants primarily relied on the Deed of Transfer and the Spanish legal advice as confirming that they were joint trustees of the shares in the Spanish Company on the Children's behalf, meaning that: (a) they both needed to approve any decision; and (b) any such decision must be in the Children's interests, rather than their own. However, the Deed of Transfer and the Spanish legal advice do not support the contentions that the parents were joint

trustees or that the Applicant could not effect the transfer of the Villa without the Notice Party's consent. The provision of the Spanish Civil Code cited in the Applicant's Spanish legal advice, Article 154, does confirm that parental authority should be exercised for the benefit of the Children, including the power to represent them and to manage their assets. However, the provision stipulates that parental authority shall be exercised jointly by both parents "*or by one of them with the express or implied consent of the other*".

123. Since the Deed provides that authority in respect of the shares would be exercised exclusively by the Applicant, express consent appears to have been furnished to the Applicant, suggesting that the Notice Party may have no right to prevent the Applicant dealing with the shares in the Spanish Company. Accordingly, the Applicant's legal advice seems to undermine his own claim to be unable to secure the transfer of the Villa without the Notice Party's agreement. The Applicant's Spanish legal advice ignores this issue and does not consider the terms of the Deed.

124. The Notice Party plausibly submitted that such an interpretation of the Deed would imply that the failure to transfer the Villa could only be blamed on the Applicant (exonerating her). However, the Respondent also submitted that the Defendants had conspired to frustrate the Agreement. In any event, it appears from the Notice Party's own affidavit that, whether or not her position was legally well founded, she believed that the transfer could not happen without her consent and that she was refusing such consent. Accordingly, it appears that she was seeking to obstruct the transfer whether or not entitled to do so.

125. I agree that the documents exhibited by the Applicant are inconsistent with any contention that any powers as trustees of the shares must be exercised jointly. However, the more fundamental issue – which arises whether the powers are to be exercised jointly or exclusively by the Applicant – is whether it would be a breach of trust or otherwise unlawful for those powers to be exercised so as to secure the transfer of the Villa to the Parents. The

Notice Party says that the Defendants would be acting unlawfully if they were to use their powers as representatives of the Children to transfer the Villa because this would reduce the value of the Children's interest in the Company. I agree with the Defendants that it seems uncontroversial (and consistent with Article 154) to conclude that a parent's powers as their children's trustee must be exercised lawfully and in the beneficiaries' interests. Spanish and Irish law may well be similar in that respect. However, the validity of the Defendants' contention (that their duties as trustees preclude their facilitating the transfer) may ultimately depend on mixed questions of fact and law including: (a) whether both the legal and beneficial ownership of the shares in the Spanish Company are in fact vested in the Children or whether, as the Respondent contends, the transaction was a sham; and (b) whether the Respondent or the Parents have any equitable or other claim against the Defendants (and/or the Children and/or the Spanish Company or its Administrator). The Respondent's oral submissions contended that the transfer to the Children was evidently a fraudulent or unconscionable manoeuvre by the Defendants to put assets out of the reach of creditors (such as the Respondent) and to defeat equitable claims in respect of such assets. If such allegations were established, then the transaction would be vulnerable to a legal challenge by the Respondent (and, perhaps, the Parents, although that possibility is not relevant for present purposes).

126. The Respondent may have strong grounds for doubting the *bona fides* of the transaction in circumstances in which the transfer to the Children: (a) involved the transfer of valuable assets to the Children while keeping them entirely under the Applicant's control, a device that would be consistent with an intention to put assets beyond the reach of creditors; (b) was not an arm's length or independent transaction; (c) involved no consideration; and (d) had no obvious economic rationale. I was not impressed by the Defendants' argument that the transfer could not have been designed to frustrate the Settlement because it predated the negotiations. The litigation was rapidly escalating at the time of the transfer and the various financial

transactions and assets were under the spotlight. The real question, which the Applicant has not addressed, is whether the transfer was a manoeuvre to put the asset out of reach in the context of the wider litigation, rather than the Settlement alone. At the time of the transfer, the Applicant was (unsuccessfully) pursuing litigation with the Respondent in respect of the family business and other jointly owned assets (including the house in Galway). The transfer may have had similarities to other controversial financial transactions in which the Applicant engaged over the same crucial period, conduct which was, according to the Respondent, designed to enable the Applicant to expropriate assets and to put them out of the reach of the Applicant (and, presumably, the Parents). The Respondent apparently asserts that the transfer to the Children was part of a fraudulent conspiracy and a sham. If so, then the fact that such conduct was in the context of the litigation rather than the negotiations a few months later may be irrelevant.

127. While I can make no determination without oral evidence, the timing of the share transfer does seem remarkable. The Applicant divested himself of the shares, for no consideration, days before the hearing of his oppression claim against the Respondent, a hearing in which he failed to appear and in which he was facing, at a minimum, adverse costs orders for complicated commercial litigation. The circumstances give rise to a suspicion that the transfer was a sham, and the Respondent appears to have a strong claim to set it aside. There might also be a possible tracing claim in equity in the circumstances. However, cross examination and more extensive submissions would be required to determine such issues. A parent's desire to provide for their family is generally commendable and virtuous. However, the timing of this benevolent gesture calls for explanation. An observer would not need to be of an unduly cynical disposition to wonder whether that the Applicant's undoubted love and affection for his progeny was the main reason for the generous gift at that time.

128. I am not in a position to determine whether it would necessarily be unlawful for the Defendants or the Spanish Company to transfer the Villa. No party adduced evidence or made submissions as to whether, for example, the settlement of the wider litigation was actually in the best interests of the Children (as well as the Defendants). Perhaps that possibility may need to be tested. In the absence of the Settlement, the rapidly escalating actual and threatened litigation may have extended to encompass the enforceability of any existing commitments to the Parents and there may also have been a risk of the Children being drawn into the litigation (concerning the transfer). In all the circumstances, the benefit to the Children of the resolution of the disputes (and securing the right to remain in the Galway Home until 30 September 2021) should not be ignored. Evidence and submissions would be needed to determine whether such matters might be legitimate considerations from the perspective of the Children's interests, so as to render it appropriate to transfer the Villa. Without further factual and expert evidence, I cannot determine whether such considerations could justify a decision by the Defendants to authorise the transfer of the Villa. Nor can I determine the procedures which would have needed to be followed in order to ensure that the transaction was effected in accordance with all relevant legal requirements (including tax and company law requirements and also with due regard for the Children's entitlements). However, it would be surprising if sophisticated parties and their legal representatives could not have found appropriate and workable solutions to achieve the desired result (the transfer of the Villa) while complying with all governance obligations. Indeed, such constructive engagement appears to be precisely what was envisaged by Clause 25. For example, they might have agreed that the Applicant should pay the Spanish Company the market value of the Villa to secure its transfer to the Mother (and the Respondent's reciprocal surrender to the Applicant of his interest in the Spanish Company). Presumably such options may still remain open to the parties and could allow the Agreement to be honoured while avoiding any detriment to the Children or the Spanish Company.

However, I can make no determination on such issues on the basis of the limited affidavit evidence and submissions to date.

129. I consider that the Contempt Applications cannot be based purely on the original transfer to the Children, since it predated the Agreement (although it could perhaps be based on the Defendants continuing to give effect to the transaction if it was shown to be fraudulent or a sham or otherwise invalid or part of an ongoing conspiracy or other wrong). Also, a future court may need to decide whether such allegations would require fresh proceedings. For example, any attempt by the Parents to enforce any alleged breach of their rights would need to be the subject of separate proceedings, possibly involving the Children and that possibility is irrelevant to the current applications (as noted at the outset of this judgment, such escalation would be undesirable, and I would encourage the Parties to engage to avoid such an outcome). Thirdly, detailed evidence would be required to support such grave claims and, in view of the serious conflicts of evidence, it would be necessary to afford all parties the opportunity for cross examination. Documentary disclosure as to how the transaction was reflected in contemporaneous tax and other filings on behalf of the Children and the Applicants) could go to the substance of the transactions.

130. If substantiated at trial, the Respondent's allegations could constitute a serious breach of Clauses 24, 25 and 26 of the Agreement and give rise to claims in law and equity. However, while the Respondent has strong grounds to challenge the plausibility and completeness of explanations proffered for steps taken (or not taken) by the Defendants, I cannot resolve such issues (or be satisfied beyond reasonable doubt) until all parties have been afforded the opportunity for cross examination.

IX. Findings

Injunction Application (in respect of the Notice Party)

131. There was no great divergence between the parties as to the principles relating to injunctions and the jurisprudence was only referenced in general terms. The cases briefly mentioned in submissions concerned interlocutory injunctions. Although different principles may apply when injunctions are granted as final remedies, I agree that it is appropriate to apply the *Campus Oil*/*Merck* interlocutory approach at this stage because it is not a straightforward enforcement situation in which all liability issues (on the applications) have been resolved and because some issues may need to be revisited at an oral hearing.

132. I consider that any injunctive reliefs granted at this stage should be directed to preserving the status quo, to prevent the Parents' eviction and to prevent any action to frustrate the transfer of the Villa as envisaged by the Agreement. On that basis, I accept the Respondent's submission that the reliefs under consideration are prohibitory rather than mandatory. However, I consider that on the basis of the evidence to date, the Respondent has met the higher, *Maha Lingam*, standard, (a strong case likely to succeed at trial) in any event.

133. In addition to the normal range of contractual remedies (such as for example, possible damages claim if he has to bear the costs of alternative accommodation arrangements for his Parents), the Agreement and Order empowered the Respondent to enforce the provisions of the Agreement. Clause 45 provided that:

> "*The Court to receive and note a copy of these terms and to make such declarations or orders as it deems fit but these terms of settlement to be otherwise confidential between the parties save to the extent necessary to obtain legal, tax or other professional advice or for the purposes of enforcement or other court process.*"

134. Furthermore, the Order (to which both Defendants consented) provided for:

"*Liberty to all parties to apply including to enforce the terms of settlement scheduled hereto whether by way of an application for an injunction specific performance or otherwise.*"

135. The Respondent has established a strong case that the Notice Party committed to the obligations of the Agreement as a whole and that she is in breach of Clauses 24 and 26 of the Agreement in particular (and probably Clause 25 as well). Since I do not consider that her obligations are confined to the use of "*best endeavours*", it follows that a breach of those obligations, even for reasons outside her control, could *prima facie* render both Defendants liable in damages. A potential complication in assessing damages or the basis for a restitutionary claim might be that the loss was primarily suffered by the Parents and the benefit by the Children, but they were not parties to the Agreement. However, in the light of *Blake*, and in circumstances in which the Applicant has transferred the assets to his minor children in the context of aggressive litigation with the Respondent, it would not necessarily be a major extension of the principles of equity to require the Defendants to account for the benefit gained as a result of the non-performance of the Agreement, even though that benefit accrued to their children rather than to themselves personally and even though it most directly impacted on the Parents rather than the Respondent personally.

136. However, if the Notice Party is genuinely legally unable to either permit or prevent the transfer (and I have not determined that issue), then a court would be unlikely to grant injunctive relief to that end. She claims to have done everything possible to preserve the status quo by requesting the Administrator to refrain from further action in the eviction proceedings but also claims that she has no authority to compel the Administrator to adopt any particular course of action. The Respondent takes issue with her, and I cannot resolve that issue without cross examination.

137. If I were to grant interlocutory injunctive relief in respect of the Notice Party, broadly corresponding to that granted (on consent) against the Applicant, then any such order would:

a. restrain the Notice Party (including her servants or agents) from taking any steps in respect of the Spanish Company pending the transfer of the Villa to the Mother and from taking or directing any steps in respect of the Villa, including (but not limited to) the prosecution of the eviction proceedings (save for the purposes of complying with Clauses 24 and 26 of the Agreement); and

b. require the Notice Party to take every lawful step within her power to ensure that the Spanish Company's Administrator, Mr Maleknia, immediately suspends or withdraws any proceedings brought on behalf of the Spanish company pending the transfer of the Villa to the Mother or her nominee including any eviction proceedings.

138. An order in these terms would preserve both sides' positions. It would prevent the Notice Party from taking any step which will have the intention or effect of frustrating the agreement and it would oblige her to use whatever power or influence she could bring to bear to preserve the status quo by suspending or holding the eviction proceedings. However, it would not require her to do anything which was truly impossible or unlawful.

139. The precise determination as to whether the Notice Party has done everything lawful within her power would require an oral hearing and the determination in that regard could obviously be crucial if, unfortunately, the Court has to deal with a further contempt application in the event of any wilful breach of any such injunction (after service of the penal endorsement).

140. Since the Respondent has shown an arguable case which could give rise to an entitlement to such injunctive relief at "trial", I must decide whether the balance of convenience and balance of justice favours such relief. The main submissions for the Notice Party in opposition to such relief were to deny that she had any obligations under Clauses 24 and 26 or that she had breached any such obligations or that the Court could direct her to do something which was impossible or unlawful. With regard to the first point, I am satisfied that there is a strong case that she did have obligations under the two clauses and that she may well be in

breach thereof. An order in the terms which I have proposed would avoid any risk of requiring the Notice Party to do something which was unlawful or impossible. There was no evidence or submission to suggest that there would be any adverse financial impact or other prejudice to the Notice Party as a result of my making an order in such terms.

141. By contrast, I am not satisfied that damages would be an adequate remedy for the Respondent, particularly since it appears from the Notice Party's submissions that the Defendants would argue that the distress suffered by his ageing parents could not be addressed by an award of damages to the Respondent (in that any such loss would not be suffered by him personally, although he may counter that he would have suffered a legally cognizable loss if, in practice, he needed to fund alternative accommodation arrangements for his parents). I consider that in exercising my judicial discretion in this unusual situation I am entitled to consider the interests of the Children, the Parents and the Spanish Company as well as those of the Defendants and the Applicant. There is no evidence or submission to suggest that an order in these terms would be prejudicial from the perspective of the Children or of the Spanish Company. In any event, I give particular weight to the Parents' interest as this aligns with the preservation of the status quo and the contractual intention that the Villa should remain as their family home, a home which they originally paid for and which they have occupied for decades. The Children, by contrast, paid nothing for their interest, an interest which may well be vulnerable to challenge. The proposed orders would be consistent with the commitments which the parties enshrined in the Agreement which was incorporated in the Order. It is highly relevant to the balance of justice and balance of convenience that the order would preserve the status quo and would seek to prevent any further steps which might have the object or intention of frustrating the terms of the agreement which the parties concluded. I am satisfied that I should exercise my discretion to grant an injunction in such terms. The balance of convenience

favours the granting of such orders in respect of the Notice Party based on those granted by Heslin J..

Contempt Applications

142. As I have noted, I would dismiss the committal application in respect of the Notice Party purely on the basis of defective service. However, I will also set out my conclusions in respect of the applications generally.

Are the Defendants in contempt?

143. I agree with the Defendants' submissions that breaching the terms of the Agreement does not have the same legal consequences as breaching the terms of an Order.

144. The parties adopted a "*Tomlin*" approach, agreeing that the settlement should be "ruled" and annexed to the Order, a procedure specifically designed to allow for enforcement of the entire Agreement (not just the Order) without the necessity for new proceedings. Accordingly, the Respondent is entitled to seek to enforce the entire Agreement against both Defendants. He is not confined to enforcing the specific provisions of the Order. However, that does not mean that a breach of the Agreement, without more, will immediately constitute contempt. The Order gave specific directions. The wilful breach of those specific directions could constitute contempt. However, I accept the Defendants' submission that a breach of other provisions of the Agreement, which were not referenced in the body of the Order, would not constitute contempt, although it may render the Defendants liable for breach of contract. The fact that the Agreement was "*ruled*" and incorporated as a schedule to the Order does not, in my view, mean that any breach of its terms would immediately constitute contempt. An express provision would have been required in the Order if that had been the intention.

145. The Respondent has secured specific injunctive relief from Heslin J. in respect of the Applicant and is now seeking similar injunctive relief against the Notice Party. Where any such

order of the Court is wilfully breached (after due service of a penally endorsed copy), then the defaulting party could be liable for contempt for breach of that injunction (as opposed to the original Agreement or the Order).

146. Accordingly, the current applications for committal and application must fail because Clauses 24 - 26 were not reflected in specific directions in the Order. However, the Respondent can make a similar application in future if, having been properly served with a penal endorsement, the Defendants persist in contempt of the order of Heslin J. or of any subsequent order in these proceedings, including on foot of this judgment.

147. I have noted the potential grounds to impugn the transfer to the Children and the Defendants' past acts and omissions could be characterised as attempts to frustrate the Agreement. However, contempt applications would have to primarily rely on acts or omissions after service of the relevant penally endorsed injunction and, in the light of the conflicts of evidence, would need to be tested on cross examination.

148. Accordingly, although I intend to dismiss both Contempt Applications for the reasons outlined previously, I intend to make the orders in respect of the Notice Party in the terms outlined in paragraph 137 above.