THE HIGH COURT

COMMERCIAL

[2023] IEHC 575
[Record No. 2019 No. 352 COS]

IN THE MATTER OF:

SECTION 212 OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF:

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

BETWEEN

EDMOND PATRICK HARTY

APPLICANT

AND

DR EDMOND HARTY AND

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

RESPONDENTS

AND

BETWEEN

EDMOND PATRICK HARTY

APPLICANT

AND

DR EDMOND HARTY AND EDMOND P HARTY & COMPANY

UNLIMITED COMPANY

RESPONDENTS

AND

BETWEEN

DR EDMOND HARTY

COUNTERCLAIM APPLICANT

AND

EDMOND PATRICK HARTY, JOHN HARTY AND

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

COUNTERCLAIM RESPONDENTS

JUDGMENT of Mr Justice Kennedy delivered 21 September 2023.

1. These proceedings arise from an unfortunate dispute within the family responsible for the ownership and management of a world-class business. The dispute was resolved by agreement before trial and this application arises out of that agreement (the "Settlement Agreement").

2. Edmond Harty, the First Named Respondent and Counterclaim Applicant, (for brevity, "the Plaintiff") seeks summary judgment against the Second Named Respondent and Third Named Counterclaim Respondent ("the Company") in the sum of €10,000,000 together with Courts Act interest at 2% per annum from 29 October 2022. Other parties to the original proceedings include; (a) the Plaintiff's father, Edmond Patrick Harty, who established the Dairymaster business which is in issue in these proceedings and was the Applicant and First Named Counterclaim Respondent in the original proceedings ("the Founder"); and (b) John Harty, the Plaintiff's brother who is the current Chief Executive of the business ("the Chief Executive"). Affidavits have also been sworn by; (a) the Founder's wife, Maureen Harty; (b) his sister, Mary

Harty, a director and financial controller of the Company ("the Financial Controller"); (c) David Meagher, who joined the Company's board as an independent non-executive director after the settlement, bringing with him a wealth of sectoral accounting and corporate finance experience; and (d) Liam Booth, whose undoubted accountancy and corporate finance expertise was relied on by the Company.

3. The key issues are; (a) whether a corporate restructuring effected by the Company and its owners in October 2022 ("the Restructuring") constituted a sale within the meaning of the Settlement Agreement (such a finding could trigger an obligation to expedite payments otherwise due to the Plaintiff by 31 October 2023 and 31 October 2024); and (b) whether the Company was entitled to withhold any payments on the basis of the Plaintiff's alleged breaches of the agreement.

4. By way of context, the Dairymaster Business ("the Business") represents a remarkable achievement. At the time of the original proceedings the Plaintiff was its CEO and, following a controversial restructuring which was in issue in the original proceedings, its majority shareholder. The Founder had started the Business from scratch in 1968. He, his family, and their colleagues developed a world-class, global business based on the successful combination of Irish (they might say "Kerry") ingenuity, dedication, and entrepreneurship. It designs, manufactures, and exports innovative products to assist farmers. The Business is known for its automated milking parlour equipment but also supplies products to other farm sectors. Its solutions were originally directed to the needs of local farmers but won global acclaim (and customers). It employs approximately 300 people and has subsidiaries in the United States, the United Kingdom and elsewhere, supported by a large, modern, state-of-the-art manufacturing plant in Kerry (in an area with no previous industrial footprint). The Founder, an octogenarian, remains actively involved in the Business which represents

his life's work. By 1998 (when his sons, the Plaintiff and the (current) Chief Executive joined), he had developed a substantial global business, an impressive achievement.

5. It is unnecessary to ventilate the issues in the original proceedings save to note that unfortunate disagreements arose, and relationships deteriorated between the individuals centrally involved in the business, the Founder and his two sons, leading to mutual recriminations. The Founder (supported by the Financial Controller and the (current) Chief Executive) issued the proceedings to set aside a 2018 restructuring arrangement which had given Plaintiff majority control of the Company. The Plaintiff counterclaimed against the Founder and the (current) Chief Executive. The Company was a Respondent to the claims and counterclaims. The proceedings settled as the case came on for hearing and were adjourned with liberty to apply for enforcement.

The Settlement Agreement

6. The Settlement Agreement essentially provided the Plaintiff's interest to be "bought out". Clause 3.2 provided for the Company to redeem his majority stake with effect from 31 October 2020 "***in return for***" the payment of €44 million by a series of instalments (all but two of which have been paid, leaving €10 million outstanding). The payments were staggered over 5 years to enable the business to generate the funds. The Plaintiff's employment and directorship ended, and the restrictions typically imposed on exiting owner/directors were imposed.

7. Various provisions protected the Plaintiff's interest as an unsecured creditor until the shares had been paid for under Clause 3.2. These included; (a) Clause 3.3 which required all parties (i.e. including the Company, the Founder and the Chief Executive) to use all reasonable endeavours and to exercise their powers as members and directors to ensure that the Company had sufficient funds and profits available to

complete the redemption and associated payments under Clause 3.2; Clause 3.3 also provided that the Company could *prepay* the amounts due under Clause 3.2 if it wished; (b) Clause 3.4 which prohibited the Company from paying dividends or making distributions exceeding €300,000 in any financial year; (c) Clause 3.5 which provided that each Clause 3.2 instalment should be paid into escrow on specific dates (i.e. by 1 October 2023 and 1 October 2024 for the final instalments); (d) Clause 3.6, the clause in issue in these proceedings, which provided that all outstanding payments would become immediately payable in the event of the sale of the majority of the Company's shares, business or assets; (e) Clause 3.7 recorded the Company's irrevocable consent to judgment in respect of any amount payable by the Company under Clause 3.2, Clause 3.6 or 3.18 that was not paid on time.

8. The agreement also contained provisions which are usual in such situations, including mutual non-disparagement and confidentiality obligations and the Plaintiff's non-compete & non-solicitation commitments and undertakings not to interfere with the Business or to intentionally make use of its data (e.g., clauses 3.17 & 3.21).

9. Clause 4.4, which is reflected in the October 2020 High Court order adjourning the proceedings, provided for liberty to re-enter to enforce the terms:

> "*including but not limited to, an application under Clause 3.9 (sic) for judgment in the event of default on the part of the Company of its obligations under Clauses 3.2, 3.6 or 3.18*".

10. Clause 7.1 (headed, 'Breach of Agreement') provides that, in the event of any breach:

> "*the right of the non-breaching Party to take whatever steps it deems necessary to protect its legal rights and interests, and to recover any loss and damage which the non-breaching Party suffers as a result of such breach, is strictly reserved.*"

11. Clause 8 noted each party's acknowledgment that they had received independent legal advice and that the precise meaning and effect of all the terms and the parties' obligations had been explained to them.

12. Clause 9 contained an entire agreement clause noting that the agreement "fully sets out the terms agreed" and that the parties had not relied on any representations or warranties other than those set out in the agreement.

<u>Inadmissible or Irrelevant Material</u>

13. While the Court has considered all affidavits, each side's affidavits contained repetitive material or material which was not relevant to the application. While this reflected the mutual depth of feeling, extraneous material will generally not be referenced here save to note that it includes:

(a) Comments on the issues in the underlying proceedings, including each side's responsibility for the original dispute, and other past issues;

(b) Arguments as whether the €44 million (plus costs) payable to the Plaintiff under Clause 3.2 represented more than the value of his interest in the Company (because of the desire for a clean break);

(c) Observations, some of which may have been unfair or unnecessarily personal or pejorative, criticising one or other of the siblings;

(d) The impact of the 2022 restructuring of the Company on parties who were not agitating those issues in these proceedings before this Court;

(e) Possible difficulties for the business if the payment obligation is expedited.

14. The principal issue in this application is whether the Restructuring (which was implemented by the Company and its principals in October 2022), constituted a "sale" within the meaning of Clause 3.6, thus expediting the payment obligation. Clause 3.6

provides, in summary, that all amounts due to the Plaintiff under the Settlement Agreement become immediately payable in the event of a sale of **either**; (a) all or a majority of the shares in the Company; or (b) all or a majority of the Company's business and assets. The Plaintiff says that both (alternate) conditions were met.

15. The Company denies that there was any sale within the meaning of Clause 3.6, maintaining that the application of that provision was confined to "*arms' length*" sales to a third party, involving a change of control. It says that the parties "*cannot have intended*" Clause 3.6 to be engaged by what it sees as a technical internal re-organisation. Secondly, and independently, it argues that the Plaintiff's alleged breaches of the Settlement Agreement disentitled him from enforcing Clause 3.6.

Issue One: Did the restructuring trigger an early payment obligation?

16. Clause 3.6 of the Settlement Agreement provides:

> "*If all or a majority of the issued shares of the Company, or all or a majority of the Company's business and assets, are sold all amounts set out in Clause 3.2 that have not already been paid shall immediately become due and payable by the Company to DMG and/or [the Plaintiff] as appropriate*".

17. The main facts relating to the Restructuring are undisputed (although the parties disagree as to the applicability of Clause 3.6). The Harty family traditionally adopted corporate structures which avoided the need for public financial filings. It had previously been necessary to restructure to avoid having to file accounts. The Plaintiff and the Financial Controller dealt with the issue at that time and an EY report in October 2017 proposed changes to the corporate structure of the business to prevent an obligation to file accounts arising from 2018. While doing so, EY noted that a further statutory provision (which, in effect, would ultimately mean that a filing obligation arose even with its proposed structure) would come into effect from 2022. Accordingly, the Financial Controller and the Plaintiff were both informed in 2017 that the

restructuring proposed at that time would not prevent a filing obligation arising in 2022. However, the EY report did not say what, if anything, should happen in 2022, focussing on the more immediate restructuring. There is no suggestion that the issue was discussed by any of the parties or their advisors during the negotiation of the October 2020 Settlement Agreement.

18. The Plaintiff's involvement in the Business ended in October 2020 in accordance with the Settlement Agreement. In January 2021 the Company and its continuing management implemented arrangements (which were independent of the subsequent Restructuring), for Dairymaster Unlimited Company, a key operating company within the Group, to furnish a promissory note to the Company guaranteeing to fund the payments due to be made by the Company to Plaintiff.

19. Unfortunately, the harmony which the Settlement Agreement sought to establish was short lived. Issues arose soon after it was entered into. The company held back earlier instalment payments alleging that the plaintiff was breaching the agreement and demanding undertakings as to his future conduct. He denied the allegations and disputed the company's entitlement to delay payment or impose new requirements. He said he would (continue to) comply with his obligations (as he saw them) and, under threat of proceedings, the company finally paid the instalments.

20. In advance of October 2022, the Company turned its mind to the need to either change its corporate structure or to file financial statements. It took professional advice in Ireland and the Isle of Man in respect of the complex legal, accounting and tax issues. This led to the Restructuring which primarily (but not exclusively) addressed the filing issue. As Mr. Meagher explained, an Isle of Man incorporated holding company allowed Dairymaster to retain its non-filing structure while avoiding personal liability for the ultimate owners. There were two key aspects to the Restructuring (either of

which would, in the Plaintiff's submission, trigger the payment obligation); (a) the Founder and the Chief Executive sold their shares in the Company (99.65% of its voting shares) to a newly incorporated Isle of Man entity, Bovis; (b) the Company separately sold its shares in a subsidiary to Bovis which essentially represented its entire business and assets, including the operating companies which carry on the Dairymaster business. In order to effect (a), Bovis offered to acquire each shareholder's shares, in return for cash or Bovis shares, at each shareholder's election. The Chief Executive and the Founder promptly accepted, exchanging their 99.65% stake for Bovis shares. Maureen Harty declined, retaining her small interest.

The Plaintiff's objections to the Restructuring

21. The Plaintiff's affidavits note that at the time of the Settlement Agreement, a potential claim against the Company to enforce the Settlement Agreement provided protection to the Plaintiff because the Company was the top-level holding company in the Group, a profitable business with substantial cash and other assets in Ireland. Various provisions provided further reassurance that the Company's assets and ability to pay would be preserved by preventing a sale of the majority of shares, business, or assets and by limiting the dividends or distributions that the Company could pay. Following the Restructuring, the Plaintiff remains an unsecured creditor of the Company but the contractual protections have been eroded because it is no longer the top-level holding company with a central and controlling position in the corporate structure. It cannot control the operating companies or participate in their profits. The Restructuring also circumvents agreed restrictions on dividends and distributions, allowing the owners to extract more money from the business than had been agreed (e.g., through Bovis dividends, and this has already happened in practice).

22. The Company denied that the Restructuring prejudiced the Plaintiff. In particular, its expert, Mr. Booth, concluded that the credit risk had not changed from a creditor's perspective as a result of the Restructuring, a view reiterated by other company witnesses. He referenced the January 2021 promissory note (intended to ensure the Company had sufficient funds to meet its obligations under the Settlement Agreement) which was not impacted by the Restructuring and noted that the Group had not taken on additional debt and therefore the Company's credit risk was not increased by the Restructuring. However, this high level analysis did not address the practical and legal significance of the corporate changes if enforcement was ever required, including the reality that the Plaintiff would no longer have a claim against the entity which owned and controlled the Business, that the Company's entire assets had been transferred to an offshore entity, and replaced with an unsecured, interest-free debt claim repayable over five years or that the Restructuring enabled Bovis to circumvent the restrictions on dividends and distributions. The Plaintiff argued that the Restructuring would make it more complex and time-consuming to recover the payments owed to him, comparing the value of a judgment against a top-level holding company with valuable subsidiaries to a judgment against a shell company with no assets save for unsecured debt obligations against unrelated entities, including one in a non-EU jurisdiction with no automatic recognition for Irish judgments. The Company's affidavits did not address these points.

23. The affidavits on the Company's behalf did not dispute the facts of the Restructuring; nor did they address the transaction documents and how they represented the transaction. Instead, the Company focussed on the motivation for the transactions to argue that they did not constitute a sale within the meaning of Clause 3.6 because

there had been no change in ultimate beneficial ownership – it was an internal reorganisation, not a "sale". For example, Mr Meagher testified that:

> "*No cash changed hands as part of the intragroup restructuring, which was not a sale in the commercial sense. In simple terms, the Dairymaster group moved the corporate 'boxes' around within the group and added a new holding company*".

24. The Company also relied on Mr Booth's extensive expertise for expert testimony as to whether the restructuring would be considered a sale "*for corporate finance purposes*" or a sale "*to a third party for accounting purposes*". On both questions, Mr. Booth's opinion emphasised that neither the ultimate beneficial owners nor the parties in control of the Group changed. He accepted that a restructuring involving the transfer of ownership and control of a company to another entity may be considered a sale event (and he did not seem greatly concerned whether shares were exchanged for cash or, as here, "swapped" for the acquiror's own shares). However, he opined that a restructuring (such as this one) within a group for internal organisational or operational purposes would not be considered a sale event without a change in ownership or control. He also stated, again without identifying specific or concrete examples or citations from relevant publications, that in his experience a corporate finance sale was seen as involving the transfer of ownership and control of a business by an existing owner to a third-party buyer, which was not the case on this occasion. He noted that in this case: (a) the main purpose of the Restructuring was to maintain the non-filing status; (b) it involved the sale of the Company's shares to a newly established group Company without resulting in a change to the ultimate beneficial ownership of the Group or its control under the Chief Executive; (c) there was no new third-party purchaser; (d) no cash consideration was received; (e) ownership and control remained almost identical to all intents and purposes. He concluded that the restructuring would accordingly not be considered a sale of shares, assets and/or

business "*for corporate finance purposes*" and that "*In such cases, the restructuring may be viewed as an internal reorganisation or a corporate restructure, rather than a sale*". Likewise, he considered (again without examples or citations) that the Restructuring would not be considered a sale to a third party "*for accounting purposes*" because "*no new third-party external to the Group and its ultimate beneficial owners had been introduced as a result of the restructure*".

25. The Plaintiff challenged the admissibility and relevance of such evidence, also noting that the expert had not explained or exhibited the documents relating to the Restructuring (which showed that <u>both</u> the sale of shares in the Company to Bovis <u>and</u> the sale of the Company's business and assets to Bovis were consistently characterised as "sales" by the parties to those transactions). The Company had elicited Mr. Booth's comments on narrow questions rather than the words of Clause 3.6 which does not require the transaction to be a sale for "*corporate finance purposes*" or a "*sale to a third party for accounting purposes*". Nor does it exempt sales undertaken to effect an "*internal reorganisation*" or to preserve the non-filing structure. The Plaintiff also challenged the assertion that the transactions would not be considered a sale "*to a third party for accounting purposes*", criticising the absence of any meaningful explanation as to the basis for that conclusion or of any reference to accounting standards. The Plaintiff observed that there could be no doubt that the accounting standards would require that the Company's sale to Bovis of materially all its assets were reflected in financial statements prepared by both the Company and Bovis and Mr Booth did not appear to dispute this. The Plaintiff also suggested that Mr. Meagher's statement that there was no sale "*in a commercial sense*" appeared inconsistent with his statements that the Restructuring "*was undertaken for legitimate commercial purposes, and for the Company's benefit*" and that "*there was commercial substance to the restructuring*".

26. The Plaintiff's replying affidavit criticised the belated provision of the transaction documents relating to the Restructuring, which had not been exhibited or discussed in detail by any of the five affidavits filed on the Company's behalf. The Company furnished them after the Plaintiff's solicitors had required the disclosure by the Company of documents briefed to the expert. The Plaintiff's analysis of the transaction documents showed that – contrary to the position adopted by the Company in the current application - the parties to the Restructuring evidently considered at the time of the Restructuring that there had been a sale to Bovis of both (i) the vast majority of the Company's shares and (ii) all or a majority of the Company's business and assets to Bovis. The documents repeatedly describe the transactions as effecting a sale, purchase, and acquisition, and used similar terms throughout. For example, to effect the sale to Bovis of all shares in DMG Central ("DMG"), the key holding company for the operating companies and other assets of the Business, the Company entered into a detailed, 14 page, Share Sale and Purchase Agreement with Bovis. It was entitled "Share Sale and Purchase Agreement" and contained the terms typically found in such agreements, identifying the Company as the seller and Bovis as the buyer. The recitals noted the Company's entitlement and agreement to sell (and Bovis' agreement to buy) the Shares. The Company's entire value in October 2022 was essentially attributable to the DMG shares, so their sale to Bovis for €39.25 million constituted the sale of substantially all the Company's business and assets.

27. The Plaintiff rejected the suggestion of an expectation of a future internal restructuring in 2022, noting that there had been no discussion prior to the Settlement Agreement about a possible restructuring in 2022, nor had advice been received in that regard. No decision had been taken that the Company would undergo a restructuring in

2022 to maintain its non-filing structure. The Company could have simply accepted the obligation to file financial statements like other businesses.

28. In its submissions, the Plaintiff argued that:

(a) Both pre-conditions in Clause 3.6 were met. The payment had accordingly been accelerated on either or both grounds. Clause 3.6 applied to *any* sale – whether or not it involved an external purchaser or a group restructuring.

(b) The detailed Settlement Agreement was heavily negotiated, with the benefit of legal and tax advice. If the parties had envisaged an exception for restructurings, the agreement would have said so.

(c) The Company's construction was inconsistent with other terms of the Settlement Agreement such as the Clause 3.4 restrictions on the Company's ability to pay dividends or make distributions. Had the parties envisaged the transfer of assets to a non-EU vehicle, amendments would have been required.

(d) The Company cannot rely on alleged pre-contractual discussions or understandings to change the ordinary meaning of agreed terms. Whether or not the parties had subjectively envisaged a restructuring in 2022 was irrelevant and inadmissible. Further, even if pre-contractual representations were not already irrelevant, the entire agreement clause meant that they cannot be relied upon. In any event, no advice or decision had been taken prior to the Settlement Agreement on any such future restructuring or whether, when or how it might be implemented. There was no rational connection between the Company's factual evidence (that the parties were told in 2017 that the non-filing structure would expire in 2022) and the alleged consequences (that the Settlement Agreement must be presumed to permit future restructurings to change that outcome).

(e) In response to the argument that the transactions did not effect "sales", the Plaintiff noted that, while the Chief Executive, Financial Controller and the Founder's affidavits stated that they did not believe the 2022 Restructuring effected any sale, Mr Meagher did not expressly deny that the transactions effected "*sales*", only saying that it was "*not a sale in the commercial sense*". The Plaintiff argued that the Court must objectively assess the substance of the transactions, in light of the rights and obligations they created. The primary focus of this analysis was on the legal form of the transactions, not their economic effects. In any event the evidence of the deponent's belief was bare assertion, unsupported by evidence or reasoning and was contradicted by the transaction documents which repeatedly used the words "*sale*", "*purchase*", "*acquisition*" and cognate terms to describe the transactions. The Plaintiff argued that, even if the Company's deponents' beliefs were relevant to the legal characterisation of the transactions, such evidence would not give rise to an arguable defence.

29. The Plaintiff submitted that the expert evidence was; (a) inadmissible, because the Court did not require an expert accountant to decide the construction of the provisions or to determine whether a "share sale and purchase agreement" effected a sale; and (b) irrelevant because the questions put to Mr Booth only considered sales of the Company's shares, assets or business "*for corporate finance purposes*" or sales "*to a third party for accounting purposes*", limitations not appearing in Clause 3.6.

30. The Company submitted that:

(a) the entitlement under Clause 3.6 to accelerated payment had not been triggered because the re-organisation did not constitute a sale for the purposes of the clause. The sole purpose of the internal corporate re-organisation was to preserve the group's non-filing structure. The parties could not have intended

that Clause 3.6 would be triggered by a re-organisation which did not change the Company's ultimate beneficial ownership or control.

(b) Clause 3.6 can be broken down into two stages: whether the clause is wide enough to encompass the Restructuring; and, if so, did the parties intend, or should they be taken to have intended, that the clause would be triggered by such a re-organisation or that it would apply in the circumstances. The applicability issue required an analysis not of a sale as an abstract concept; or how the transaction was described or labelled in the transactional documents; but whether the parties intended the clause to apply in the circumstances.

(c) On the pure interpretation issue, the clause only covered a sale which resulted in a change of ownership or control of the Company or of the Company's assets, an arms' length sale to a third party. The sale contemplated by Clause 3.6 was one where the beneficial (or economic) interest in the shares or business were alienated for consideration, as opposed to "*a technical paper exercise*" to preserve the non-filing structure. An interpretation which confined Clause 3.6 to arms' length third-party sales, and excluded internal re-organisations, chimed with the commercial purpose, to protect the Plaintiff from a potential default risk if ownership of the Company or its assets changed. The re-organisation did not increase the Company's credit risk and the commercial rationale for Clause 3.6 was not engaged.

(d) If Clause 3.6 was susceptible of more than one interpretation, the Court should prefer the "narrower" interpretation (as applying only to an arms' length sale to a third party involving a change in ultimate ownership and/or control), which better aligned with commercial logic.

(e) The Plaintiff's interpretation would give rise to a commercially startling and absurd result: that the balance due to the Plaintiff would become immediately payable as a consequence of an internal re-organisation which did not change ownership or control, and which was implemented for technical reasons to avoid the obligation to file public accounts. If the parties had intended such a result, explicit words to that effect would have been required.

(f) While expressing caution regarding the use of commercial common sense to override an agreement's wording, the Courts have also recognised the need for commercial common sense in the interpretative process, a sympathetic understanding of the practical context in which the Settlement was intended to operate, including the impending requirement to re-organise to preserve the non-filing privilege. The parties were aware at the time of the Settlement that the group would need to be restructured to retain the privilege. They cannot have intended that steps to that end would trigger Clause 3.6.

(g) As an alternative to the pure interpretation argument, the Company contended that the parties did not intend the clause to operate or apply in the circumstances. The parties could have foreseen in October 2020 that the Company or group might have needed to be restructured to preserve the non-filing privilege. The parties cannot, however, have foreseen, anticipated, or intended, that "*dry and technical steps*" to preserve the non-filing structure would trigger Clause 3.6. Since the parties knew that steps would need to be taken to preserve the non-filing structure; the objective intention that those steps would engage Clause 3.6 cannot have imputed to them. They did not foresee in October 2020 that preserving the non-filing structure would (*ex hypothesi*) involve a sale of the Company's shares, thus engaging Clause 3.6, at least on a

prima facie basis and did not make express provision for what would happen if a technical paper re-organisation, involving a share swap, leaving the owners and controllers unchanged, was required to maintain the non-filing privilege. In such circumstances the Court must consider (and, in truth, speculate on) whether the parties would have intended that Clause 3.6 would be triggered or engaged in the event of the internal re-organisation. The parties cannot be taken to have intended that Clause 3.6 would be triggered in such circumstances.

Issue Two – the Plaintiff's alleged breach of the Settlement Agreement

31. The Company submitted that, even if the Court concluded that Clause 3.6 encompassed the Restructuring, the application should still fail, because the parties cannot have intended that the clause would apply given the Plaintiff's own alleged breaches of the agreement. Affidavits sworn by the Founder, the Financial Controller and the Chief Executive confirmed that:

(a) The dispute had a seriously detrimental impact on the business. Accordingly, the driving commercial purpose of the Settlement was to achieve a clean break, ending the Plaintiff's involvement in the business. It was a central feature of the deal from the continuing directors and shareholders' perspective that the Plaintiff would leave the business and refrain from interfering with it or its staff. Various provisions were directed to that goal; (i) he was required to resign as a director and employee, to transfer patents to the Company and not to use confidential Company Data; (ii) he was placed on gardening leave and required not to attend the Company's premises or to have any involvement in its management or affairs and he was prohibited from interfering with the business; and (iii) the parties also agreed not to disparage each other or the Company, its

employees, products or services. Such clauses were included because of the Plaintiff's previous behaviour. They saw the parties' obligations under the Settlement Agreement as mutually dependent and considered that the Plaintiff's entitlement to the significant payments depended upon his complying with his own obligation not to interfere with the business. That was the commercial logic of the deal from their perspective.

(b) In fact, they considered that he repeatedly breached his obligations. They referenced alleged incidents from October 2020 onwards. These included alleged inappropriate and offensive communications with the Founder, the Chief Executive, the Financial Officer and with employees and with the Company's solicitors and alleged threats and alleged misuse of Company data, resources, funds, and facilities (it is unnecessary to recount the detail, and inappropriate to do so since many very serious allegations are disputed, and none have been adjudicated. For present purposes, it suffices to endorse the observations by Counsel for the Plaintiff who, firstly, acknowledged that those allegations – if true – would reflect very badly on the Plaintiff and, secondly, observed that if - as the Plaintiff contended - the allegations were substantially untrue, then they would reflect very badly on those who advanced them).

(c) The payments by instalment were designed to ensure that the Plaintiff honoured his obligations. In the light of his behaviour, which allegedly continued up to the issuing of this application, there would be no check to ensure his compliance if payment was expedited.

32. The Company submitted that the Plaintiff repeatedly breached his obligations under the Settlement Agreement, in particular, by interfering with the business, and that the importance from the Company's perspective of such requirements supported its

argument that the payment entitlements depended on the Plaintiff's compliance with his own "core obligation" to disassociate himself from the business and to stay away from its premises. The Plaintiff's promise to disengage from the business constituted a substantial part of the consideration for the Company's obligation to make the instalment payments under the Settlement leading to "*an irresistible inference*" that, on a proper construction of the Settlement Agreement, the Company's payment obligations were dependent on the Plaintiff's compliance with his own obligations. Since the Plaintiff had breached his obligations, the Court should not permit him to enforce entitlements under Clause 3.6.

33. The Plaintiff responded to some (but not all) of the Company's detailed criticisms of his actions, rejecting the Company's narrative about his conduct and motivation. He testified that he cared very deeply about his father, the Founder. He noted that Maureen Harty, his mother, had been present on key occasions (being the Founder's wife and therefore living with him). She had declared in a letter (subsequently confirmed on affidavit) that she rejected key allegations against him.

34. The Plaintiff rejected the suggestion that the payments due to him were contingent on his compliance with the Settlement Agreement, noting that that was never his understanding. The Plaintiff's principal submission was that "*the rights and wrongs of the unhappy family dispute*" had no bearing on the issue on the application, whether the remaining €10 million had become due under the Settlement Agreement. Acknowledging that the substance of those allegations could only be resolved at plenary hearing, he submitted that - even leaving aside the fact that the allegations were disputed - they could not afford a defence to the application because, even if the Company could substantiate those allegations, such alleged breaches would not entitle it to withhold payments due under the Settlement Agreement:

(a) The agreement stipulated that the Consideration was to be paid "*in return for*" for the redemption and acquisition of Plaintiff's shares. The payment obligation was not dependent on other conditions. Nothing in the agreement made the payment for the shares contingent on future compliance with other provisions. To the contrary, Clause 3.2 provided that:

> "*The Company shall … (A) redeem and cancel all of the shares in the Company … and (B) acquire any and all other shares [in the Dairymaster Group],* ***in return for*** *the following payments of €44,000,000*". (emphasis added)

Clause 3.2(b) also referred to:

> "*the redemption of the shares held by DMG and/or [the Plaintiff] in the Company an aggregate amount of €43,000,000 to be satisfied as follows …*".

(b) Accordingly, the payment was tied to the share redemptions and was not contingent on compliance with other provisions. There was no basis for the argument that the Company was not required to pay the deferred consideration if the Plaintiff breached other obligations. There was no relationship between the Company's obligation to pay for the shares and the obligation not to interfere with the business. Nothing in the agreement rendered Company's obligation to pay for the shares conditional upon the Plaintiff's compliance with obligations such as the obligations (i) not to compete or solicit; (ii) "not to interfere, either directly or indirectly, with the Dairymaster business"; and (iii) not to intentionally make use of Company Data.

(d) The Company's interpretation would rewrite Clause 3.2 to provide that the Company was not required to pay for the shares if Plaintiff breached other obligations, an interpretation which Clause 3.2 could not fairly bear. It would change the bargain to make the share payments contingent on future conduct.

(e) If the Plaintiff breached the Settlement Agreement, the Company's remedies were damages or an injunction to restrain ongoing breaches. Clause 7.1 ("Breach of Agreement") provides that, in the event of any breach;

> "*the right of the non-breaching Party to take whatever steps it deems necessary to protect its legal rights and interests, and to recover any loss and damage which the non-breaching Party suffers as a result of such breach, is strictly reserved*."

The clause does not suggest an entitlement to withhold payments nor was there any reason why the share payments would depend on future conduct.

(g) On the Company's case, any alleged breach by Plaintiff – no matter how minor, and irrespective of whether it caused any loss – could deprive the Plaintiff of the right to receive millions of euros in payment for the sale of his majority stake. Nobody would agree to such terms and they would be unenforceable as a penalty in any event.

(h) The Company's interpretation was supported by the express terms of the agreement and amounted to the implication of a new term but the conditions for the implication of a new term were not satisfied.

(i) Even if the disputed allegations were true, it would not follow that the Plaintiff had breached the Settlement Agreement or was continuing to do so. Most of the alleged incidents dated from 2020 and 2021. They would not constitute a breach of the Settlement Agreement. The issues had been dealt with in solicitors' correspondence. Instalments were paid subsequently, so those issues could not justify the Company's current position. There was no evidence, that the alleged "breaches" had caused the Company financial loss (as opposed to distress or aggravation experienced by individuals), nor any serious suggestion that the alleged "breaches" were ongoing.

<u>Legal Principles</u>

35. The parties largely agreed as to the legal principles but not their application.

36. The principles governing summary judgment applications are well established. Authorities including *Aer Rianta v. Ryanair* [2001] 4 IR 607 ("*Aer Rianta*"), *Harrisrange v. Duncan* [2003] 4 IR 1 ("*Harrisrange*"), *IBRC v. McCaughey* [2014] 1 IR 749 ("*McCaughey*") confirm that the power to grant summary judgment must be exercised with caution. The *Aer Rianta* test (a fair or reasonable probability of a real or *bona fide* defence) is subject to the Court's entitlement to resolve disputes of law or construction. In *Danske v. Durcan New Homes* [2010] IESC 22 the Supreme Court approved Clarke J's comments in *McGrath v. O'Driscoll* [2007] 1 ILRM 203 that:

> "*So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.*"

37. As *Harrisrange* confirms, a factual dispute is only a basis for remission to plenary hearing if the resolution of that dispute is material to the outcome of the application. Accordingly, the Court must determine whether issues between the parties require oral evidence or whether, as the Plaintiff contends, the only relevant disputes concern (i) the interpretation of key clauses, and the correct legal characterisation of the transaction documents.

38. A bare assertion, not borne out by the contractual documentation, will not establish an arguable defence. The Supreme Court said at para. 5.5 of *McCaughey*:

> "*The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances*".

39. The principles governing the interpretation of commercial contracts are summarised in authorities such as *Rohan Construction v. ICI* [1988] ILRM 373

("*Rohan*")*, Analog Devices v. Zurich Insurance* [2005] 1 IR 274, *ICDL v. European Computer Driving Licence Foundations* [2012] 3 IR 327 ("*ICDL*"), *Rainy Sky v. Kookmin Bank* [2011] 1 WLR 2900, *Marlan Homes v. Walsh* [2012] IESC 23 ("*Marlan Homes*"), *Arnold v. Britton* [2015] AC 1619, *Law Society v. MIBI* [2017] IESC 31 and *Brushfield v. Arachas Corporate Brokers* [2021] IEHC 263 and can be conveniently canvassed by reference to the comprehensive review of the authorities by Barniville J. (as he then was) in *Clarion Quay Management Company v. Dublin City Council* [2021] IEHC 811 ("*Clarion Quay*"):

> "*85. The starting point in terms of the task of the court in construing or interpreting a contract is the following statement of Keane J. in Kramer v. Arnold [1997] 3 IR 43, where he said:*
>
> > *"In this case, as in any case where the parties are in disagreement as to what a particular provision of the contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances." (per Keane J. at p. 55)*
>
> *86. Those observations echo what had previously been said by Griffin J. in the Supreme Court (in the context of the interpretation of an insurance policy)* in *Rohan Construction v. Insurance Corporation of Ireland Plc [1988] [ILRM] 373, where he stated:*
>
> > *"It is well settled that in considering the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked at on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. <u>The whole of the policy must be looked at, and not merely a particular clause</u> (per Griffin J. at p. 377) (emphasis added)*
>
> *87. The general principles applicable to the construction or interpretation of contracts under Irish law are well settled and have been the subject of several significant recent decisions of the Supreme Court. The relevant principles were set out by Lord Hoffman in his seminal judgment in Investor Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 (at p. 912) and were expressly approved and applied in this jurisdiction by the Supreme Court in several cases, including Analog Devices BV v. Zurich Insurance Company [2005] 1 IR 274, ICDL v. European Driving Licence Foundation [2012] 2 IR 327, Law Society of Ireland v. Motor Insurers Bureau of Ireland [2017] IESC 31 ("MIBI"). The five*

principles set out by Lord Hoffman are so well known that it is unnecessary to set them out again here.

88. In very brief summary and without attempting comprehensively to summarise the principles set out in those cases, the following can be stated. The interpretation of a written contract is an entirely objective process. The court must interpret the written contract by reference to the meaning which the contract would convey to the reasonable person having all the background knowledge which would have been reasonably available to the parties when the contract was made. The court looks not only at the words used in the contract but also considers the relevant legal and factual context at the time the contract was made. Context is given a wide meaning and includes any objective background facts or provisions of law which would affect the way the words used in the contract would have been understood by a reasonable person. The contract must be considered as a whole and not by reference to the individual words used.

89. The Supreme Court extensively considered and discussed the applicable legal principles on the construction of contracts in MIBI. Although the court was split on the outcome of the case, several members of the court adopted what has been seen as the "text in context" approach to interpretation. Although he was in the minority on the outcome of the case, Clarke J. referred to this as being "the modern approach" to the construction of contracts (at para. 10.4). His observations on the "text in context" approach to interpretation did not differ substantially from those made by other members of the court, including O'Donnell J. who delivered the lead judgment. Clarke J. described the approach in this passage:

> *"…It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question the legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs a risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence." (para. 10.4)*

90. At para. 10.5, Clarke J. observed that the "main underlying principle" is that such a document should be interpreted by the court:-

> *"in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context."*

91. Clarke C.J. (as he had by that stage become) repeated those observations in his judgment in Jackie Greene Construction Ltd. v Irish Bank Resolution Corporation (In Special Liquidation) [2019] IESC 2.

92. In his leading judgment for the majority in MIBI, O'Donnell J. made a number of important observations on the proper approach to interpretation of contracts. At para. 6 of his judgment, O'Donnell J. stated that the meaning of the relevant provision of an agreement as "to be determined from a consideration of the Agreement as a whole" and "not an interpretation in which some aspects win out over others". He stated:-

> *"Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that argument cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features... It is important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the agreement."*

..

94. At para 12, O'Donnell J. referred to the complexity of language and of the business of communication which might throw up issues which are not anticipated or precisely considered when the relevant agreement was made. He continued:-

> *"It is not merely therefore a question of analysing the words used, but rather it is a function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time in forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate…"*

95. Later, at para. 14, O'Donnell J. observed:-

> *"It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is*

necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."

96. Finally, at para. 30, O'Donnell J. expressed the view that the majority in the Court of Appeal had elevated the "ordinary meaning of the words to a position which is perhaps not entirely merited", although he did agree that "since in any agreement words are used to convey meanings and to express agreement, very considerable weight must be given to them…"

97. The importance of context can also be seen in the observations of Fennelly J. in the Supreme Court in ICDL where he stated:-

"Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words." (per Fennelly J. at para. 70, p. 352)

98. The significance of context can also be seen in some of the leading English cases... In Arnold v. Britton [2015] AC 1619 ("Arnold"), Lord Neuberger stated that the meaning of the relevant words in the contract at issue (in that case certain leases) had to be considered in their "documentary, factual and commercial context". He continued:-

"That meeting has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any parties intentions..." (per Lord Neuberger at para. 15, pp. 1627 -1628).

99. One of the matters to be considered, according to Lord Neuberger, is "commercial common sense". He stressed, however, that this is not to be invoked retrospectively and observed that:-

"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made." (per Lord Neuberger at para. 19, p. 1628).

100. Lord Clarke had mentioned, in Rainy Sky SA v. Kookmin Bank [2011] 1 WLR 2900 ("Rainy Sky"), in the context of his description of the unitary process of construction, that:-

"If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other." (per Lord Clarke at para. 21)

….

102. In certain circumstances, recourse can be had to business or commercial common sense in the interpretation of an agreement. In BNY Trust Co (Ireland) Ltd v. Treasury Holdings [2007] IEHC 271, ("BNY"), Clarke J. (while a judge of the High Court) cited with approval the passage from the judgment of Lord

Diplock in Antaios Compania Naviera SA v. Salen Rederierna A.B. [1985] AC 191 (at p. 201) where he said that:-

> *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense." (approved by Clarke J. in BNY at para 4.4)*

103. It should, however, be noted that, in Marlan Homes Ltd v. Walsh [2012] IESC 23 ("Marlan Homes"), McKechnie J. in his judgment for the Supreme Court stated:-

> *"It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned." (per McKechnie J. at para. 51)*

104. McKechnie J. approved the statement of Lord Mustill in Charter Reinsurance v. Fagan [1997] AC 313 that:-

> *"... to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court..." (per Lord Mustill at p. 388 and approved by McKechnie J. at para. 52 of Marlan Homes)*

105. Another word of caution with regard to the use of commercial common sense in construing a contract was expressed by MacMenamin J. in his judgment (in the minority) in MIBI. He expressed concern that:-

> *"... the application of 'business commonsense' can, in certain circumstances be difficult to distinguish from subsequent rectification of a contract. At what point does business commonsense end and rectification begin, albeit with the benefit of hindsight? Part of the attraction of a 'contextual approach' is that it can obviate injustice. But it can also create contractual uncertainty, or it can lead to an interpretation with the wisdom of hindsight." (per MacMenamin J. at para. 16)*

106. MacMenamin J. approved of the limitations to the court's reliance on commercial or business common sense discussed by Lord Neuberger in Arnold and agreed that it should not "undermine the importance of the language and wording of the provision to be construed" (per MacMenamin J. at para. 18).

40. The importance of the documentation in which parties have expressed their agreement is repeatedly reflected by the authorities:

a) In *ICDL*, after citing *Investor Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896*, Fennelly J warned at para. 69 against "*a loose and unpredictable path to interpretation*":

> "*A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises,*

> *normally be interpreted in accordance with their 'natural and ordinary meaning…'. Business people will be assumed to know what they are doing and will normally be bound by what they have signed.*"

b) In *Marlan Homes*, at para. 51, the Supreme Court noted that:

> *"… where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly, it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions."*

c) McKechnie J approved the observations in *Charter Reinsurance v. Fagan*: [1997] AC 313:

> "*… the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.*"

41. The Company relied on *Luxor Investments v. Beltany* [2015] IEHC 316 ("*Luxor*"), in which McGovern J. approved Lord Hoffmann's observations in *Jumbo King v. Faithful Properties* [1999] 2 HKCFAR 279, (at para. 35) that:

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean and this involves having regard not merely to the individual words they have used but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this will lead to the conclusion that although there is no reasonable doubt what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, it means something different from what they obviously intended. In ordinary life, people often express themselves infelicitously without leaving any doubt about what they meant."*

In *Luxor,* the Court held that although there was no doubt about the meaning of an agreement in respect of fees payable for the redemption of loans, it was evident the

parties did not intend for it to apply where the underlying loans were redeemed in full. At para. 40, McGovern J. also approved a passage of Chadwick LJ. in *Bromarin v. IMD Investments* [1999] S.T.C. 301 ("*Bromarin*"), which considered the approach when circumstances arose which *were unforeseen at the time of contracting* (at p. 310):

> *"The difficulty with that approach is that it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.*
> *It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee."(Emphasis added)*

42. *Bromarin* differed from the current application. It concerned the sale of a loss-making company for tax planning purposes and the application of price adjustment provisions when the qualifying tax losses were less than anticipated, partly due to intervening legislation. There was a clear mutual understanding of the commercial objective and the contract was construed in that context. Likewise, in *Luxor*, the evident commercial rationale for a particular provision was the mutual assumption that particular loans would be redeemed below par. The commercial logic for the provision

fell away when the full value of the loans was recovered and the Court was satisfied that the parties would not have intended the provision to operate in such circumstances. In a passage cited with approval by Clarke J. in *BNY,* McGovern J. held, at para. 39, that although the agreement did not make provision for what would happen if the loans were redeemed at par the parties could not have intended that the fee would be payable in that scenario.

43. *Luxor* and *Bromarin* may be contrasted to *Point Village Developments v. Dunnes Stores* [2017] IEHC 676; [2019] IECA 233 ("*Point Village")* in which the High Court and Court of Appeal rebuffed a similar commercial logic argument (that the word 'tenants' in an agreement should be interpreted as meaning 'high quality tenants', to meet a similar commercial logic argument). Both Courts made clear that commercial logic cannot be invoked to change an agreed deal. In that case, the agreement required the defendant to pay the plaintiff €15 million once his solicitors had certified that binding leases had been exchanged with "*tenants*" of seven units. After the certification was provided, the defendant refused to pay, contending that "*tenants*" meant "*high-quality tenants*", in light of (a) the commercial background, including pre-contractual representations and "*the common intention of the parties that the Centre was to be a high quality development*", (b) commercial logic and obviousness, and (c) the other terms of the agreement. Costello J rejected that argument without oral evidence, observing (at para. 95) that:

> "*The court should give the word [i.e., tenant] its ordinary and natural meaning, in the sense as would be understood by a reasonable person having an interest in or knowledge of the material circumstances. However, evidence of the surrounding circumstances should not normally be allowed to alter the plain meaning of words. In particular, the warning of Lord Mustill, approved by McKechnie J. in Marlan Homes, against forcing upon the words a meaning which they cannot fairly bear is particularly apposite in this case. It is to substitute for*

the bargain actually made one which the court believes could better have been made and that is not permissible."

The Court of Appeal (Whelan J., Irvine J., Baker J.) agreed (paras. 105-106):

> "*The substance of the contentions asserted on behalf of Dunnes distils down to this; that the perfectly clear word 'tenants' in the Terms of Settlement negotiated by the parties and signed off on with extensive legal and expert advice should be construed to mean 'tenants of a high quality'. To accede to this contention would be to grant an Alice in Wonderland licence to Dunnes to interpret words in the negotiated and executed Terms of Settlement of 7th July, 2010 as they wish depending on the result they sought to achieve.*
> *To construe Clause 11(c) by implication or otherwise so as to replace 'tenants' with 'high quality tenants' would be to obliquely impeach the clauses' clear words and distort its simple, plain language. It would supplant certainty with uncertainty, clarity with opacity and would be a measure amounting to a Trojan horse capable of sempiternally facilitating any party who wished to obstruct, delay or defeat performance of the provisions of the Terms of Settlement.*"

44. As the principles summarised in *Re Eteams International* [2019] IECA 145 show, the Court must assess the substance of transactions, by focusing on the legal form of the agreement and the rights and obligations undertaken by the parties rather than its effects. Baker J said:

> *"The starting point for the analysis is the proposition as stated by Staughton L.J. in Welsh Development Agency v. Export Finance Co Ltd that in general, the court will not look at the economic effects of an agreement but to the legal nature of a transaction".*

45. Likewise, in *Kearns v. Dilleen* [1997] 3 IR 287 the Supreme Court said:

> "*The general principle is that parties are entitled to carry out their legal transactions in whatever form they wish. In construing the substance of those transactions the courts look not to the intention behind the transaction but to the form in which the transaction takes place and to the rights and duties imposed by the transaction itself.*"

46. The impact of entire agreement clauses was considered in *Inntrepreneur Pub v. East Crown* [2000] 3 EGLR 31 at 33:

> "*The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a*

> *claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.*"

47. Consistent with these principles, in *Point Village* the Court held that an entire agreement clause precluded the defendant from relying on representations in pre-contractual marketing materials as an aid to the construction of the settlement agreement.

48. The Court of Appeal decision in *Flynn v. Breccia* [2017] IECA 74 (Finlay Geoghegan J.) provides a helpful summary of the principles relating to implied terms, endorsing the statement in *BP Refinery v. Shire of Hastings* [1977] 180 CLR 266:

> "*... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*"

Finlay Geoghegan J. added at para. 86 that to imply a term based on obviousness:

> "*requires the Court to be satisfied that, firstly, reasonable people in the position of the parties would all have agreed to make provision for the contingency in question, and second, that they would 'without doubt', or with something approaching certainty, have accepted the term proposed by the officious bystander*".

49. In *Clarion Quay* Barniville J. approved observations by the UK Supreme Court in *Marks & Spencer v. BNP Paribas Securities Services* [2016] AC 742:

> "*First, in Equitable Life Assurance Society v. Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional*

> *reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v. Belize Telecom Ltd [2009] 1 WLR 1988, at para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where one only of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p. 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is… that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.*"

50. For present purposes, the key principles governing the admission of expert evidence are that expert evidence may only be given on issues which are outside the knowledge or expertise of the Court; see *DPP v. Bowe* [2017] IECA 250, *O'Leary v. Mercy University Hospital* [2019] IESC 48, *Flynn v. Bus Átha Cliath* [2012] IEHC 398, *Kennedy v. Cordia (Services)* [2016] UKSC 6. *Crema v. Cenkos Securities plc* [2011] Bus LR 943 demonstrates that in exceptional circumstances expert evidence may be admissible to provide testimony in respect of market practice even if it fell short of a trade usage. The issue in that case was industry practice concerning whether stockbrokers were deemed liable to pay commission to sub-brokers when they had not themselves been paid by the underlying client. The example was also given in that judgment of expert evidence having been admissible to explain the cryptic language of an aviation leasing reinsurance slip. However, those are both examples of extremely

specialised contexts in which experts could assist the Court. Such evidence is not generally admissible to aid in the construction of a commercial contract.

51. The Company's alternative defence (that in any event the Plaintiff was not entitled to payment because of his own alleged breaches) necessitates an analysis of the relationship between (or interdependence of) the Company's payment obligations and the Plaintiff's obligations. Surprisingly, this issue has apparently not previously been formally addressed by the Irish Courts. The Company noted the adoption by the Court of Appeal of England and Wales in *Doherty v. Fannigan Holdings* [2018] 2 BCLC 623 and by the Supreme Court of New South Wales in *Sydney Attractions v. Schulman* [2013] NSWSC 858 of the summary in Lewison's *Interpretation of Contracts* (2021, 7th ed., Street and Maxwell at pp. 881-882). The Court is satisfied that that summary also accurately reflects the Irish law position:

> *"A contractual obligation may give rise to a liability which may only be enforced by a party to the contract if he has performed or offered to perform his own obligations under it ("a dependent obligation"); or it may be capable of enforcement whether or not the party seeking to perform has performed or offered to perform his own obligations ("an independent obligation"). Which species of obligation has been created is a question of interpretation, but if the obligation constitutes the whole or a substantial part of the consideration for the contract the court is likely to interpret it as a dependent obligation."*

Accordingly, interdependence comes down to contractual interpretation.

FINDINGS

52. The Court does not need expert evidence to interpret a standard commercial agreement. Clause 3.6 contains no term of art. The case does not concern an arcane context as in the examples identified in *Crema*. Expert testimony is not needed to

determine the contract's meaning or context. Nor is it necessary to understand trade usage, market practice or the nature of the Restructuring transactions and the application of the agreement to them. In any event, the narrowness of the questions put to the expert meant that the latter did not focus on the language of Clause 3.6 or comment on the transaction documents and rendering the testimony irrelevant in any event. The Court must consider the language of Clause 3.6 in its context. How such transactions are viewed in "corporate finance" or "accounting" terms is not germane.

53. For completeness, it should be noted that, although Clause 3.6 does not require the Plaintiff to prove potential prejudice, the evidence would meet any such requirement in any event. The promissory note continues to give the Company (if not the Plaintiff) assurance as to its ability to meet its obligations to the Plaintiff and the Company and its owners would doubtless appreciate the enormous reputational and legal consequences of any attempt to resile from the Settlement Agreement. However, the legal reality is that the Plaintiff's position was more secure before the Restructuring (when the Company was the top-level holding company, able to draw directly on the Group's assets). None of the Company's factual or expert witnesses acknowledged this. Nor did they consider the practical and legal difference in asserting a claim as an unsecured creditor against a company with no remaining assets other than unsecured claims. The Company says it did not intend to prejudice the Plaintiff and, in practice, the Plaintiff's ability to recover the amounts due to him may prove to be unaffected by the Restructuring. However, if enforcement action was ever required, his legal position would be less advantageous. The possibility of enforcement cannot be entirely excluded in the light of past events and the Settlement Agreement contained provisions to protect the Plaintiff against that risk. Such protections have been weakened by the

Restructuring, including the restrictions on dividends. Bovis had in fact paid a dividend three times greater than the Company was permitted to pay under Clause 3.4.

54. For completeness in respect of prejudice, the Chief Executive's proposal in his affidavit that Bovis would "underwrite" any payments due to Plaintiff might have been helpful if (like the assignment provisions often seen in commercial leases), Clause 3.6 had provided for the Plaintiff's consent on the basis that such consent was not to be unreasonably withheld, but the Plaintiff might still have objected that it was disadvantaged by needing to seek recourse against an Isle of Man company. In any event, there was no "reasonable consent" provision in Clause 3.6. The proposal might also have gained more traction if proffered earlier, with assurances as to dividends and distributions and other issues. As it was, the Plaintiff rejected the proposal as "too little; too late". In any event, if Clause 3.6 was triggered, the Plaintiff was not obliged to entertain any such proposal, even if it had addressed his legitimate concerns.

55. Although this is not determinative of the application, the Court has no reason to doubt the Company's assurances that the Restructuring was undertaken in good faith, for legitimate commercial purposes, in the best interests of the business and without any material change to the ultimate beneficial ownership of the Company or of the business or its assets. The chief motivation was to avoid a commercially disadvantageous filing obligation. However, changes were also made to the rights pertaining to certain shares in the complicated ownership structure. There is no evidence of any intention to prejudice the Plaintiff.

56. However, the legitimacy and reasonableness of the motivation for the Restructuring does not determine whether Clause 3.6 applies. That is a question of interpretation, an analysis which must be based on the words of the agreement itself, objectively interpreted in the light of the factual context when the contract was entered

into. As the authorities repeatedly warn, that exercise is not assisted by retrospective assertions from individual witnesses as to how they would subjectively interpret the clause. Without intending any disrespect to any individual witness, such subjective testimony is inevitably coloured by subsequent events and is inherently less reliable than contemporaneous evidence. It is for those reasons that the Courts have repeatedly made clear that a deponent's retrospective assertion of subjective belief (in this case that the transactions did not constitute "*sales*") is irrelevant. As Lord Templeman observed in *Street v. Mountford* [1985] AC 809:

> "*The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade*".

57. Even if the Company's deponents' beliefs and intentions had been relevant to the legal characterisation of the transactions, such evidence would not give rise to an arguable defence here because the evidence comprised bare assertions which were inconsistent with the transaction documents executed by or on behalf of the Company, the Chief Executive and the Founder which repeatedly used words such as *"sale" and "purchase"* to describe the transactions. They provide cogent contemporaneous evidence that – contrary to the Company's subsequent characterisation - the parties to the restructuring considered that there had been both (i) a sale of the vast majority of the Company's shares to Bovis and (ii) a sale of all or a majority of the Company's business and assets to Bovis. The Company sought to focus solely on its motivation, offering no meaningful explanation in respect of the documents. However, the contemporaneous evidence must be preferred to the Company's subjective and retrospective characterisation of the transactions.

58. The primary question with regard to Clause 3.6 is whether, as the Company contends, "sale" should be interpreted as requiring an "arms' length" sale to a third

party, involving a change of ultimate beneficial ownership and control (and therefore not applying to “internal” transactions). However, there is no express stipulation in Clause 3.6 (or elsewhere in the Settlement Agreement) to that effect, nor any express language in the agreement to support those submissions. On its face, Clause 3.6 applies to “*sale*”. The Company’s construction would depart from that wording.

59. For completeness it should be noted that the Company’s submissions did not seem to place great reliance on any possible distinction between a "share swap" and a "sale" (since the shares in the Company were exchanged for Bovis shares rather than for cash). The Court considers that the transaction constituted a sale even though the vendors chose the option of payment in shares rather than cash, a conclusion fortified by the Transaction Documents themselves (which referenced the transaction as a sale). In any case, even if the sale of the shares in the Company could be classified as a swap rather than a sale, the same could not be said of the Company’s sale of its shares in DMG Central, because that consideration was paid in cash. Accordingly, the “swap” argument could not greatly assist the Company in any event.

60. The Company’s interpretation of Clause 3.6 was fundamentally premised on its assertion as to the commercial logic of the original agreement and as to what the parties must have intended (or be deemed to have intended). However, the Court does not accept this premise for the following reasons:

a) There was no common understanding or expectation either that there would be an internal restructuring or that the Settlement Agreement must be interpreted in that light. The Plaintiff’s evidence is to be preferred to that of the Financial Controller on this point, because the latter overstates the substance of the EY report. The report focussed on the earlier, then pending, restructuring and noted in passing a provision which would come into force in 2022 triggering a future filing

obligation even with the structure which was being implemented at that stage. That was the height of the EY report, noting a longer-term issue for future consideration. EY did not state what, if anything, could or should be done prior to that development in 2022. Although the Financial Controller said that the Plaintiff told her that further action would have to be taken in 2022, she was lacking in specifics, proffering no detail of when or in what terms this discussion took place. Nor did she suggest that the Board or the principals had considered the matter and reached a determination as to what, if anything, should be done in 2022. The documentary evidence (or lack thereof) is consistent with the Plaintiff's testimony. In view of the lapse of time and the pressing issues facing the Company, it would be unreasonable to assume that the parties were conscious of or focussed on such a future issue based on the passing EY comment three years earlier. The evidence falls short of establishing an arguable premise that any understanding or decision was reached before the 2020 Settlement Agreement that there would be a further restructuring or that either party was conscious of the issue in those negotiations. Nor is there any evidence that the issue arose in the Settlement Agreement negotiations between the principals and their advisors.

b) If parties to such a detailed, heavily negotiated, bespoke legal agreement had envisaged the need for a further restructuring at the time of the negotiation of the Settlement Agreement and had wished to except such "internal" transactions from the operation of the agreement, then the Court is satisfied that they would have provided accordingly in the agreement (which was clearly designed to deal comprehensively with all other anticipated contingencies). They did not do so. There was no discussion at the time of the Settlement Agreement, and certainly no agreement, regarding any restructuring to maintain a non-filing structure. Any

suggestion of mutual "awareness" or a common understanding in October 2020 is not supported by the evidence.

61. The Court does not accept the Company's alternative submission that, even if the parties did not expressly consider the issue when negotiating the Settlement Agreement, its interpretation should be adopted as a matter of commercial logic because both parties would have accepted that as the position if the issue had been raised in negotiations. Although this proposition was repeatedly asserted by the Company's deponents and in its submissions, it was never adequately substantiated by reference to the circumstances prevailing at the time of the agreement. There was no evidential foundation for the Company's position in this regard other than reiteration of subjective intention as to what deponents now say they (would have) thought.

62. The Court is not convinced by the Company's subjective arguments in respect of the commercial logic of the agreement, which largely discount the Plaintiff's perspective even though the provision was evidently designed for his benefit. To an objective observer, Clause 3.2 must be seen as the crucial provision, effectively committing the Plaintiff to transfer ownership of a majority stake in a multi-million-euro business in return for payments which, the Company itself says, were to be staggered over several years to meet its cashflow requirements. In such circumstances, the Plaintiff obviously required protection in the event of any subsequent corporate restructuring and Clause 3.6 was clearly designed to address this. The bar was set reasonably high, only being triggered in the event of the sale of a majority of either the shares in or assets of the Company. The provision did not prohibit such transactions but provided - as is not unusual in such contexts - that in the event of such developments, the payments would fall due immediately. It would be unreasonable to expect the Plaintiff to continue to wait for payment for the 2020 disposal in that scenario.

Accordingly, Clause 3.6 was evidently designed to ensure that the Plaintiff benefitted in the event of such transactions and that the Plaintiff's position was not adversely impacted by the transfer of the shares or assets of the Company to another entity. That risk could also arise if the sale was to a related entity (which happened here because the new structure undermined the dividend restriction and affected the credit risk). Unfettered latitude to undertake even internal restructurings would itself be contrary to commercial logic.

63. As appears from authorities such as *Rohan, Point Villages* and *Clarion Quay* (see paras 103 -106 in particular) the concept of commercial logic cannot generally be invoked to change the agreed terms of a deal. The Court does not agree that, if the parties had adverted to the need for a future restructuring to preserve the exemption, they would have simply disapplied Clause 3.6. It was certainly possible that, when they had eventually considered the advantages and disadvantages of various options, the Company and its owners might have wished to restructure once more to avoid the filing obligation if there was an appropriate way of doing so without adverse consequences. If such a request had been raised in the negotiations, then it would have been necessary for the parties to define how such transactions could take place without prejudicing the Plaintiff. This would inevitably have required significant modifications to various provisions, in addition to Clause 3.6. In the intense negotiations to settle bitter litigation, it is unlikely that the Plaintiff would have agreed to such a change to Clause 3.6 to permit internal restructurings unless the Company also offered other safeguards to ensure that its interests were appropriately protected at least to the same extent as under the original clause, including provisions to address the various credit risk concerns and concerns about dividends and distributions. This case is different from *Bromarin,* where there was a mutual understanding of the commercial objective and the contract

was construed in that context, and from *Luxor*, in which the evident commercial rationale for a particular provision for fees to be paid on loan redemptions was the mutual assumption that those loans would be redeemed below par with the result that the rationale for the provision fell away and the Court was satisfied that the parties would not have intended it to operate in the unexpected circumstances. The Company's "commercial logic" arguments are essentially subjective, failing to have sufficient regard to the commercial logic from the Plaintiff's perspective. However, unlike the position in *Luxor* and *Bromarin*, the Court does not consider that the Plaintiff would have agreed to the modification of Clause 3.6 without renegotiating other provisions. This case is more analogous to *Point Village* in which the High Court and Court of Appeal rebuffed a similar commercial logic argument (that the word 'tenants' in an agreement should be interpreted as meaning 'high quality tenants'). The judgments made clear that the concept of commercial logic cannot be invoked to change an agreed deal.

64. The Court does not agree that, if the parties had adverted to the need for a future restructuring to preserve the filing exemption, the Plaintiff would have simply agreed to disapply Clause 3.6. If, in the course of the 2020 negotiations, the Company had reflected on the possible need to restructure in 2022 then it might well have proposed changes to Clause 3.6 to permit a future "internal" restructuring without triggering the clause. The Company had itself accommodated a request from the Plaintiff to provide for a split share redemption structure in the Settlement Agreement to accommodate his tax planning requirements. A request to allow for an "internal" restructuring may well have made sense from the Company's perspective but it is hard to see why a sophisticated businessperson in the Plaintiff's position would have entertained such proposals without additional safeguards to continue to protect his position, including

changes to other provisions (including Clauses 3.4 and 3.5). The Plaintiff would have insisted on protecting his interests to the same extent as before the Restructuring. Such changes could have been extensive. It is not appropriate for the Court to redraft the contract to provide for such an exception to a blanket prohibition which the Company did not seek at the time. As the authorities make clear, a broad construction may not be adopted to cure a bad bargain or to deal with "buyer's remorse". In the absence of evidence to the contrary, the evident commercial logic of the Agreement is that Clause 3.6 should apply to any sale, irrespective of whether it was to a third party or a sale in the context of purely internal reorganisations. Accordingly, whether focussing on the literal meaning of the language used in Clause 3.6 or taking a broader "text in context" approach based on commercial logic, Clause 3.6 does not mean 'sold to an external purchaser'.

65. For the same reasons, there is no basis to imply language into Clause 3.6 to limit its impact to external transactions. Such language is not "*necessary to give business efficacy*" to the Settlement Agreement. Nor is it "*so obvious that 'it goes without saying'*". Nor was there any basis for suggesting that reasonable people in the parties' position "*would 'without doubt', or with something approaching certainty, have accepted the term*".

66. The effect of Clause 3.6 is that all amounts due to Plaintiff under the Settlement Agreement become immediately payable in the event of a sale of **either**; (a) all or a majority of the shares in the Company; **or** (b) all or a majority of the Company's business and assets. The Court is satisfied that both (alternative) conditions were met. As far as condition (a) is concerned, on their face, the transaction documents establish that the share transfers (from the Founder and the Chief Executive to Bovis) constituted a share sale in the ordinary and natural meaning of the word "sale". The Founder and the Chief Executive together owned more than 99% of the voting shares in the Company. Both individuals furnished to Bovis executed share transfer deeds, which

agreed to "*sell, assign and transfer to the Transferee [Bovis] the shares described below in the company*". Both in substance and in form, the transactions constituted a sale of shares.

67. The position is even clearer in respect of condition (b) of Clause 3.6. The transaction documents show that the transaction between the Company and Bovis constituted a sale of the DMG Central Shareholding in the ordinary and natural meaning of the word and that this was the understanding of both parties to the transaction. The parties entered into a "*Share Sale and Purchase Agreement*" which defined the Company as the "*Seller*" and Bovis as the "*Buyer*". Its operative terms explicitly and unequivocally provided for the sale of the Company's shares in DMG Central for a monetary amount (€39,250,000). In both substance and form, the transaction constituted a sale by the Company of the DMG Central shares. Nor is there any dispute that the transaction encompassed almost all the Company's business and assets, thus clearly meeting condition (b). Accordingly, both conditions were met.

68. The triggering of Clause 3.6 does not cause any injustice. It expedites an existing payment rather than creating a new obligation. It was triggered by the Company's choice. The Company and its owners are entitled to structure their affairs to their advantage, but such decisions may have unintended consequences such as, in this case, bringing forward a payment obligation. They and their Irish and international advisors doubtless confirmed that the new offshore shell company allowed the owners to maintain a limited liability shield (protecting them from creditors) while avoiding the disclosure obligations which would have been required but for the Isle of Man company. The Company cannot enjoy such advantages while disavowing the legal significance of its chosen structure. To borrow a phrase from the Company's own submissions, it cannot "reprobate and approbate" by disregarding the

reorganisation for the purposes of the Settlement Agreement. Nor would the Court endorse the Company's characterisation of the changes as merely "(*moving) the corporate 'boxes' around within the group*" or as "*a technical papering exercise*". The Plaintiff is correct in his unchallenged observation that the financial statements of the Company and of Bovis would have been required by law and by the applicable accounting standards to reflect the fact of the transactions; the sales could not be disregarded just because they were internal transactions. Choices of corporate structures have consequences. They are crucial in any insolvency context, impacting unsecured creditors such as the Plaintiff. The Company (and its owners) committed to major transactions which involved selling the assets of the Company and almost all of its shares to benefit the owners (maintaining limited liability and confidentiality for them). They must accept the legal consequences. They cannot have it both ways.

<u>The Second Issue – the Plaintiff's entitlement to withhold payment</u>

69. The Company agreed to redeem and acquire the Plaintiff's majority interest and the Court considers that, viewed objectively, these (rather than the covenants requiring the Plaintiff not to interfere in the business) were the core obligations under the Settlement Agreement and that the covenants as to the Plaintiff's behaviour now relied upon by the Company cannot objectively be viewed in that way. The Settlement Agreement provided that, in full and final settlement of the proceedings and all disputes and differences, the Company or its nominees would redeem and acquire the Plaintiff's shares in the Company, in consideration of the payment of €44 million. The shares were redeemed by the Company in 2020 in accordance with the Settlement Agreement and the Company has committed to pay for them.

70. However, the Court must determine as a matter of contractual interpretation whether particular obligations were intended to be dependent on each other, so that the Plaintiff's alleged breaches releases the Company from its side of the bargain. The Court is satisfied that there were dependent obligations in the Settlement Agreement. For example, the Plaintiff could only have demanded the payments due under the Settlement Agreement if he had duly allowed his shares to be redeemed. It is clear, both from the wording of the agreement and as a matter of commercial logic that the redemption and payment were interdependent obligations. However, the obligation to pay the Plaintiff was not expressly or implicitly subject to the Plaintiff's compliance with Clauses 3.17 and 3.21.

71. If the Plaintiff was in breach of such obligations (or threatened to be in breach) then the Company's remedies are preserved by Clause 7.1. It may seek damages or injunctive relief. Given the seriousness of some allegations, if those allegations could be substantiated and such alleged conduct was ongoing then it is conceivable that the Company (and, perhaps, other parties) could advance claims against the Plaintiff under (and possibly independent of) the Settlement Agreement seeking injunctions. The parties might not restrict themselves to seeking purely compensatory damages in that scenario. However, those issues do not require determination in the current application. For the current application the issue is whether the Plaintiff's entitlement to be paid for the redemption of the shares is subject to any claim which the Company (as opposed to other parties) can assert against him under the agreement.

72. On their face, the express terms of the Settlement Agreement do not suggest any such entitlement. Clause 3.2 makes clear that the payments are *"in return for"* the redemption of the shares. The Company's payment obligation is not stated to be dependent on the Plaintiff's future conduct, and such a requirement would be unusual.

Furthermore, the specific stipulation in Clause 3.3 that payments could be made *early* if the Company wished clearly implies that they must otherwise be made on the due date, there is no suggestion of an entitlement to delay payments. The linkage of Clauses 3.6 and 3.7 to the Clause 3.2 payment obligation is significant as is the terminology of Clause 4.4 providing for recourse to the Court for enforcement. The contractual wording supports the conclusion that the payments were in return for the redemptions and could not be withheld due to breaches of unrelated provisions.

73. The Plaintiff is not being permitted to simultaneously approbate and reprobate. He may enforce the express provisions concerning his right to be paid for the shares in such as Clauses 3.2, 3.6, 3.7 and 4.4. However, this is without prejudice to the Company's (and other parties') entitlement to pursue any other claim against him. Clause 7.1 makes clear that such contractual claims are separate from the payment obligation. Apart from it not being consistent with the words of the agreement, any conclusion that payment for the shares was subject to 100% compliance with the conduct obligations would be disproportionate to the point of being penal, as well as inconsistent with other provisions of the agreement.

74. It should also be noted that in any event many incidents referenced by the Company allegedly occurred in late 2020 or early 2021. While the allegations are invidious if true, there is no evidence that the company suffered any material loss (even if a set off was permissible).

75. The communications between the parties and their solicitors after entering into the Settlement Agreement cannot determine its construction and in any event the correspondence does not advance matters. Such "sabre rattling" does not change the contractual position, save that, having paid the earlier instalments, the company cannot now seek to invoke the earlier incidents to justify delaying later payments. If those

issues remained "live" and were sufficiently serious, then the Company should have issued proceedings (and can still do so). Such claims do not excuse it from its own obligations to pay for shares redeemed in 2020.

76. Express language would be required if the payment for the shares was to be contingent on future conduct because such a stipulation would be unusual and contrary to normal commercial logic when a party was transferring a majority stake in a multi-million-euro business. It is difficult to envisage commercial parties ever agreeing to such a provision – if the Company had proposed such an entitlement the Plaintiff would doubtless have insisted on adding provisions to determine how serious a breach would need to be to justify refusing to pay for the shares and the amount which could be held back. An adjudication mechanism would be required. It would be disproportionate to allow the Company to withhold payment at its whim in the absence of a major breach causing significant loss. Unilateral suspension of payments if the Company considered that the Plaintiff had breached the agreement in any way (or might do so) would be inconsistent with other provisions such as Clauses 3.2, 3.3, 3.5, 3.6, 4.4 and 7.1 which preserves the parties usual remedies. The Plaintiff permitted the redemption and cancellation of his shares in 2020. He is entitled to be paid in accordance with Clauses 3.2, 3.6 and 3.7.

77. Accordingly, as a matter of contractual interpretation, the Company's allegations against the Plaintiff do not afford a defence to the current application pursuant to Clause 3.6 even if those allegations were substantiated. The Chief Executive explained that the payment for the Plaintiff's interest in the business was staggered over 5 years to allow the business to generate sufficient cash to discharge the payments. This explanation is difficult to reconcile with the suggestion that the payments could be withheld if the Company deemed the Plaintiff to have infringed the agreement. There

would be no commercial logic in allowing the Company to withhold payment of future instalments on the basis of a perceived issue with the Plaintiff's behaviour. It would be more logical and in keeping with normal commercial practice for such issues to be dealt with independently, as envisaged by Clause 7.1. Once again, and for the same reasons as set out in paragraph 68, the conditions for the implication of a new term (to allow for the suspension of payments for the shares expressly provided for under Clauses 3.2, 3.5, 3.6, 3.7 and 4.4) are not satisfied.

78. Nor is the Court satisfied that past incidents would justify suspending the payments otherwise due under the agreement even if there was a right to do so or that the Company would have any entitlement to withhold the payment as a prophylactic measure, to ensure the Plaintiff's future compliance.

Conclusion

79. The Court is satisfied that the issues arising on the current application concern (i) the interpretation of the Settlement Agreement, and (ii) the correct legal characterisation of the transaction documents. There is no risk of injustice in determining such issues on a summary judgment application. No factual disputes require remission for hearing because the allegations about the Plaintiff's past or ongoing conduct are not material to the current application. Any such issues may be pursued in accordance with Clause 7.1.

80. Both key issues must be decided in the Plaintiff's favour. The Restructuring did constitute a sale within the meaning of Clause 3.6, thus expediting the payment obligation and the Company is not entitled to withhold any payments on the basis of the Plaintiff's alleged or anticipated breaches of the agreement.

81. If the company fails to comply with Clause 3.6 then, pursuant to Clause 3.7, it has irrevocably committed to consent to the entry of judgment. In exercising its jurisdiction, the court is mindful of the Plaintiff's testimony and submissions to the effect that, although it was necessary to bring this application to protect his entitlements, he loves his father and has no desire to hurt him (or, presumably, the business which is his life work and to which the Plaintiff and other family members and employees have also contributed in no small measure). It is to be hoped that the clarification of responsibilities in this judgment will obviate the need for judgment to be entered under Clause 3.7, which could be unhelpful from the perspective of the business and its owners. In the circumstances, it appears reasonable to afford the parties a very short window to seek to agree arrangements for the payment of the last two instalments (plus interest), but with liberty to apply in the meantime in the unlikely event that it should prove necessary. One of the two instalments was to be paid into escrow by 1 October in any event, with payment to the Plaintiff on 31 October, whereas the Restructuring meant that both payments fell due from 31 October 2022.

82. The matter will accordingly be listed before the Court in the coming weeks. If, by then, arrangements for the payment of the principal and interest have not been agreed by the parties, the plaintiff will be entitled to seek judgment in accordance with Clause 3.7. If the parties have agreed or implemented satisfactory arrangements in the meantime regard, the only remaining question will be costs, in circumstances in which the Plaintiff has succeeded in his application.

83. In the light of past events it may be unrealistic to expect all involved on either side to reflect on the benefits of constructive engagement not only to resolve arrangements in respect of the payment and associated issues but, more importantly, to avoid destructive future disputes or litigation but it would be in all parties' interests for

them to do so. More constructive engagement on each side may reduce the risk of recurrence of the past issues referenced by the Company. Such ongoing disputes would be unhelpful for the business and its employees. They would also be deeply damaging and distressing for all parties, particularly the Founder (and his wife) and their two sons and their relationships with each other and with other family members. Recriminations are unlikely to advance matters but mutual respect, restraint and forbearance will be required if future flashpoints are to be avoided.