APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/143

Barniville P.
Noonan J.
Allen J.

Neutral Citation Number [2022] IECA 221

BETWEEN

JEAN KENNEDY

AND

ANDREW O'RIORDAN

(ON BEHALF OF THE ESTATE OF CAROL O'RIORDAN)

PLAINTIFFS

AND

PAUL WARD

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 11th day of October, 2022

Introduction

1. This is an appeal by the defendant from the judgment and order of the High Court (Quinn J.) giving summary judgment to each the plaintiffs for €14,500,000, plus interest, for

the price of shares but adjourning to plenary hearing a dispute as to the defendant's entitlement to a transfer of the shares.

2. The first plaintiff, Mrs. Jean Kennedy, the late Mrs. Carol O'Riordan, and the defendant, Mr. Paul Ward, were siblings who, between them, are the owners of substantially all of the shares in a group of companies referred to in these proceedings as the *"Ward Cinema Group"*. The second plaintiff, Mr. Andrew O'Riordan, is the legal personal representative of Mrs. O'Riordan.

3. By an agreement in writing dated 18th April, 2019 entitled *"Binding Heads of Terms" ("BHOT")* Mrs. Kennedy and Mrs. O'Riordan agreed to sell, and Mr. Ward agreed to purchase, Mrs. Kennedy's and Mrs. O'Riordan's shareholding in the group for a total consideration of €31.5 million, to be paid by a first instalment of €25 million on or before 31st October, 2019 and the balance in three further instalments on 31st October, 2020, 31st October, 2021 and 31st October, 2022.

4. The agreement provided that on payment of the first instalment of the agreed consideration, Mr. Ward – whether by himself or his nominees – was to have a transfer of the shares. The plaintiffs insist that Mr. Ward is liable to pay the money but the shares have not been transferred.

5. The plaintiffs' position as to the entitlement of Mr. Ward to a transfer of the shares has fundamentally shifted since the commencement of the proceedings. In correspondence before the proceedings commenced and up to and including the hearing before the High Court, the plaintiffs' position was that Mr. Ward was not entitled to a transfer of the shares at all. The High Court judge found that it was not clear that Mr. Ward was not entitled to a transfer of the shares but that it was clear that he was obliged to pay for them.

6. After the judgment of the High Court was delivered, the plaintiffs' position changed. They now acknowledge Mr. Ward's entitlement to a transfer, subject to payment of the

agreed consideration in accordance with the terms of the BHOT, or at least in accordance with what they, the plaintiffs, contend were the terms of the BHOT.

7. There is sharp disagreement as to the parties' respective obligations under the BHOT. That dispute is the subject of a counterclaim by Mr. Ward for specific performance of the BHOT and a variety of declarations. In the meantime, Mr. Ward has been decreed for the price of the shares.

8. As will become apparent, I have sacrificed strict accuracy for the sake of simplicity but the issue on the appeal, in a nutshell, is whether it is clear that Mr. Ward is bound to pay for the shares before they are transferred. Or, the other way around, the issue is whether the plaintiffs are entitled to insist on payment immediately but to retain the shares until the dispute as to Mr. Ward's entitlement is resolved.

The applicable principles of law

9. If on nothing else, there is agreement between the parties as to the applicable principles of law and there is no suggestion that the High Court judge did not correctly identify those principles.

10. The test, as formulated by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 is whether the defendant has demonstrated that there is a fair and reasonable probability of his having a real or *bona fide* defence. Or, as Hardiman J. put it in *Aer Rianta*:-

> *" ... is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues that are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

11. Counsel for Mr. Ward emphasised the first of the twelve point summary of the law by McKechnie J. in *Harrisrange*, which is that the power to grant summary judgment is to be exercised with discernible caution.

The evidence

12. The Binding Heads of Terms were executed at about midnight on 18th April, 2019 following a long day of mediation. The document is quite short, running to just three pages. About half of it is boilerplate.

13. The agreement identifies Mr. Ward as the first party and Mrs. O'Riordan and Mrs. Kennedy as the second parties and recites that they were together, directly and indirectly, the shareholders in a number of companies as outlined more particularly in a valuation report dated 26th September, 2017. It recited that the parties were in dispute and had agreed to resolve their differences on the terms *"outlined in this Binding Heads of Terms".*

14. The material provisions of the BHOT were:-

> *"1.1.1 The First Party agrees to procure the acquisition of all of the shares owned directly or indirectly by the Second Parties, and the Second Parties agrees (sic.) to procure the transfer of those shares with unencumbered title to the First Party or his nominee(s), for a combined consideration of €31.5 million (the **'Consideration')** payable as follows:*
>
> *(i) €25 million payable on or before 31 October 2019;*
>
> *(ii) €2 million payable on or before 31 October 2020;*
>
> *(iii) €2 million payable on or before 31 October 2021;*
>
> *(iv) €2.5 million payable on or before 31 October 2022;*
>
> *1.1.2 The Second Parties agree to procure that title to the shares owned by the Second Parties shall be transferred to the First Party or his nominee(s)*

upon payment of the first tranche of the Consideration pursuant to clause 1.1.1(i).

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

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

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

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

15. Clause 2 of the BHOT, under the heading *"General"* comprises eleven sub-clauses, ten of which are boilerplate but one of which is the provision which is more or less central to the plaintiffs' claim to be entitled to summary judgment. It is clause 2.8, which provides:-

"2.8 The Parties acknowledge that in the event that the Consideration is not paid in accordance with the terms of this agreement, or such later date as may be agreed between the Parties, the First Party shall consent to judgment in

the sum of the outstanding balance and to a charging order in respect of his shares in the Companies in that sum."

16. What happened after the execution of the agreement was the subject of a protracted exchange of affidavits over a period of about ten months. Nine affidavits were filed on behalf of the plaintiffs: three sworn by Mrs. Kennedy, two by Mr. O'Riordan, two by Ms. Lisa Kinsella, a tax partner in Crowe Ireland, one by Mr Gerry Carron, who was Mrs. O'Riordan's attorney and who signed the BHOT on her behalf, and one by Dr. David Robinson, a consultant physician and geriatrician who had assessed the capacity of Mrs. O'Riordan. Six affidavits were filed on behalf of the defendant: four were sworn by Mr. Ward, one by Mr. Lorcan Ward, his son, and one by Mr. Colm O'Callaghan, a tax partner in PricewaterhouseCoopers.

17. In early July, 2019 Mrs. Kennedy and Mrs. O'Riordan engaged Crowe Ireland to provide tax advice in relation to the disposal of their shares in The Ward Cinema Group. By letter dated 10th July, 2019 Ms. Kinsella identified herself to Mr. Ward as his sisters' tax adviser and asked for a variety of financial information. It is unclear whether or if so when this might have previously been discussed, but Ms. Kinsella in her letter identified a risk – by reference to anti-avoidance provisions that had been introduced by the Finance Act, 2017 – that if the companies' reserves were used to fund completion of the transfers, Mrs. Kennedy and Mrs. O'Riordan might incur a liability to pay income tax, rather than capital gains tax, on the consideration paid to them. Ms. Kinsella twice asserted that the BHOT provided for the acquisition of the shares by Mr. Ward personally.

18. Mr. Ward had previously consulted PwC and on 25th July, 2019 Ms. Kinsella and Mr. O'Callaghan met to discuss the matter. By e-mail on the following day, Ms. Kinsella asked Mr. O'Callaghan for confirmation that Mr. Ward would purchase her clients' shares from them directly and said that any funding proposals, specifically the use of company funds to

make the agreed payments, would only be considered if there was no additional tax cost to her clients.

19. Following his return from annual leave, Mr. O'Callaghan replied by e-mail dated 20th August, 2019. Having consulted with Mr. Ward's solicitor, Mr. O'Callaghan made three points. First, he said, the BHOT clearly stated that the shares could be purchased by Mr. Ward or his nominee(s). Secondly, he said, clause 1.1.6 required the parties – that is, he said, all of the parties – to use their best endeavours to ensure that payment would be structured in a tax efficient way for the parties – that is, he said, all of the parties. And thirdly, he said that the expectation on Mr. Ward's side was that funding would come from corporate sources rather than from Mr. Ward personally. It was suggested that *"an element of pre-sale restructuring"* would be necessary and proposed a meeting to progress possible solutions. Ms. Kinsella countered with a request for a detailed proposal as to how completion might be funded.

20. On 6th September, 2019 Mr. O'Callaghan forwarded a document called *"Ward Cinema Group, Heads of Agreement dated 18 April 2018 (sic.) and Related Funding and Tax Considerations."* The *"Base Case Approach – No Pre-Deal Restructuring"* was that €13.8 million of the initial payment would be sourced within the target companies and €11.2 million from elsewhere, and that the deferred instalments would be funded equally from within and outside the target companies. An alternative *"Planning Option – Personal Holding Company"* was suggested with a view to mitigating potential additional tax. I suppose that the characterisation in the correspondence of the money within the target companies as *"bad money"* and the money to be sourced elsewhere as *"good money"* served to focus attention on the issue but I am not at all sure that it was helpful to the negotiation.

21. On 15th October, 2019 Ms. Kinsella circulated a document entitled *"Ward Cinema Group, Proposal regarding the Binding Heads of Terms signed in April, 2019."* Very

broadly, the vendors were prepared to contemplate a deferral of part of the agreed first tranche if the money paid to them was *"good money"*. Crowe's discussion document set out in some detail how the agreed payments might be restructured and proposed *"Revised Settlement Terms."* A further document was circulated by Ms. Kinsella on 25th October, 2019, in advance of a meeting which had been arranged for later that day.

22. It will be recalled that the deadline for payment of the first tranche of the consideration was 31st October, 2019. On 1st November, 2019 Mrs. Kennedy's and Mrs. O'Riordan's solicitors wrote to Mr. Ward's solicitors. They referred to the BHOT and continued:-

> *"You will be aware that the parties have been engaging collaboratively over the last couple of months through their respective tax advisers to ensure an orderly and efficient transfer of the shares.*
>
> *We understand that the parties have yet to conclude the steps required to arrange for your client's purchase of our clients' shares so in that context we have instructions to agree to a three week extension of the requirement to pay our clients the first stage payment of €25 million pursuant to clause 1.1.1(i) of the Heads of Terms.*
>
> *We trust the parties will work to ensure that a second extension is not required."*

23. Notwithstanding further engagement in the following three weeks, agreement could not be reached as to the terms on which the transfer of the shares might be completed or restructured.

24. On 22nd November, 2019 Mrs. Kennedy and Mrs. O'Riordan fired the first shot. Their solicitors wrote to Mr. Ward's solicitors (copying Mr. Ward directly) asserting that:-

> *"Your client has failed to comply with the BHOT to pay our clients the sum of €25 million and is therefore in breach of the BHOT. Accordingly, in accordance with*

clause 2.8 of the BHOT, your client is required to consent to judgment in the sum of €31.5 million together with a charging order in respect of his shares in the Companies (as defined in the BHOT) in that sum.

Take Notice that if the sum of €31.5 million is not paid directly by your client to our client account, the details of which are below, ***by 5.00 p.m. on Friday, 29th November 2019*** *our clients will take immediate steps to have this matter listed before the High Court in order to secure judgment and a charging order in accordance with clause 2.8 of the Agreement. For the avoidance of doubt, your client is not entitled to use monies from the Companies to discharge the sums due."*

25. The attentive reader will have recalled that the BHOT provided for payment of the consideration by four instalments over three years. I pause here to say that there is no cross-appeal by the plaintiffs against the finding of the High Court that the BHOT did not provide for the sooner payment of the later instalments in the event of a default in the payment of the initial instalment.

26. Mr. Ward's solicitors replied to the demand for payment by letter dated 22nd November, 2019. They first asserted that the BHOT did not require Mr. Ward, personally, to buy the shares. The reason for the stipulation in the BHOT that Mr. Ward could appoint a nominee, they said, was to mirror previous transactions in which other shareholders had been bought out. Secondly, they said, clause 1.1.6 of the BHOT required the parties to structure the transaction in a way that worked for all parties, not just the vendors. Thirdly, they suggested that Mr. Ward had more than met his commitment in clause 1.1.6 to find a structure that would work for both sides. Fourthly, they suggested that the vendors' refusal to cooperate with Mr. Ward's proposals had disrupted and adversely affected the business. And finally, Mr. Ward's solicitors conveyed their instructions to issue proceedings to seek a

resolution one way or the other unless, within fourteen days, the vendors agreed to completion as per the BHOT.

27. The next significant step was that on 4th December, 2019 Mr. Ward co-opted or purported to co-opt his son, Mr. Lorcan Ward, as a director of several of the target companies, procured the withdrawal of sums amounting in total to €18.5 million of the cash reserves, and paid or procured the payment of several sums amounting €12.5 million into Mrs. Kennedy's personal bank account and several sums amounting in total to €6 million into Mrs. O'Riordan's personal bank account. All of this was done without reference or notice to the plaintiffs.

28. By letter dated 6th December, 2019 Mr. Ward's solicitors notified Mrs. Kennedy's and Mrs. O'Riordan's solicitors of what had been done and called, please, for a transfer executed by each as well as various closing documents, including letters of resignation as directors of the companies. It was suggested that any breach of the *"Heads of Terms"* in terms of delay had been brought about by the vendors' refusal to complete. The payments which had been made were said to have been made as a demonstration of Mr. Ward's good faith and clear wish to have completed tranche 1 within the period specified in the Heads of Terms. It was anticipated that the balance of the first tranche of monies payable to Mrs. O'Riordan would be paid to her by 20th December, 2019.

29. Mrs. Kennedy's and Mrs. O'Riordan's solicitors replied on 10th December, 2019 asserting that there had been a clear breach of the unconditional obligation in to pay €25 million by the extended deadline of 21st November, 2019 and protesting that the use of monies from the target companies was not permitted, that the purported appointment of Mr. Lorcan Ward was invalid, and that the withdrawal and transfer of the monies appeared to breach the prohibition in s. 82(2) of the Companies Act, 2014 of a company giving financial assistance for the purchase of its own shares.

The claim

30. By summary summons issued on 19th December, 2019 the plaintiffs claimed judgment in the sum of €31.5 million, interest pursuant to statute, and costs. As it had been said in correspondence they would, the plaintiffs immediately issued a motion for admission to the commercial list and for summary judgment.

31. The special indorsement of claim set out what the plaintiffs contended were the relevant provisions of the BHOT and pleaded the defendant's default in paying the €25 million by the extended deadline. The payments made by the defendant on 4th December, 2019 were variously relied on as having been late and as having been invalid. At para. 28 it was pleaded that:-

> *"The plaintiffs were at all times ready, willing and able to perform our obligations under the BHOT. While that remains the case – in the sense that, for example, neither has alienated their shareholdings – it is the plaintiffs' case that the obligations now no longer arise under the terms of the BHOT on account of the defendant's breach."*

32. In other words, the plaintiffs' claim was that Mr. Ward was immediately obliged to pay the full price of the shares but was not entitled to a transfer of the shares.

33. There was no claim for a charging order.

34. The plaintiffs' motion for admission to the commercial list and for summary judgment was grounded on a reasonably short affidavit of Mrs. Kennedy. She referred to and exhibited all of the correspondence which had been exchanged between the parties' solicitors and tax advisors subsequent to the execution of the BHOT but the thrust of the case made was that the first instalment of the agreed consideration had not been made in time, that clause 2.8 was

engaged, that the *"balance outstanding"* on foot of the BHOT was €31.5 million, that the defendant had no defence, and that there should be judgment against the defendant in the sum of €31.5 million, plus interest and costs. Mrs. Kennedy identified the core issue or problem as the defendant's insistence on using funds in the target companies.

35. Mr. Ward, in a rather longer first replying affidavit, asserted that the plaintiffs had breached their obligations under the BHOT and had actively frustrated him in complying with his obligations by:-

(i) Refusing to transfer their shares to him or his nominee as, he said, they were obliged to under the BHOT;

(ii) Refusing to meaningfully engage with his efforts to agree a structure for the purchase of the shares as they were required to do under the BHOT;

(iii) Repeatedly asserting that the BHOT required that he should acquire the shares personally, rather than through group companies;

(iv) Unilaterally deciding that they would refuse to transfer the shares unless the funds were sourced in such a way as eliminated the slightest possibility of a less-than-optimal tax treatment from their own perspective, despite the fact that the BHOT contained no such condition and that *"it was always clear to everybody that the purchase money would have to come from the companies"*;

(v) Refusing to accept proposed solutions that would be likely to achieve an optimal tax treatment;

(vi) *"Now, extraordinarily, the plaintiffs have taken the position that, despite having already paid a sum of in excess of €18.5 million, I now owe them a simple debt of €31.5 million and their obligation to transfer the shares to me or my nominees has disappeared."*

36. The BHOT, it will be recalled, were signed on behalf of Mrs. O'Riordan by Mr. Gerry Carron, her attorney. Mr. Ward, in his replying affidavit, recalled that Mrs. O'Riordan did not attend the mediation but said that she was *"apparently represented by Gerry Carron"*. Startlingly, he deposed that he had only recently been informed of the basis on which Mr. Carron signed the BHOT. He went on to question Mrs. O'Riordan's capacity at the time the proceedings were instituted and the grounding affidavit sworn on her behalf as well as on the original agreed completion date and the extended completion date.

37. At para. 108 of his affidavit, which was sworn on 27th January, 2020, Mr. Ward deposed that he had serious doubts about whether Mr. Carron had the capacity to execute the BHOT on Mrs. O'Riordan's behalf. He sought to make much of the fact – he said – that he first knew about Mr. Carron's power of attorney when he read Mrs. Kennedy's affidavit and first had sight of it when he read the copy exhibited by Mrs. Kennedy. I am bound to say that I find this evidence incredible. Apart altogether from the fact that the uncontested evidence is that on 16th April, 2019, two days before the mediation, Mr. Ward's solicitors had been provided with a medical report as to Mrs. O'Riordan's capacity, it beggars belief that Mr. Ward might have participated in a mediation, agreed and signed the BHOT, and then – on his own case – done all that he could to implement the agreement, if he had any doubt as to Mr. Carron's authority, specifically by reference to Mrs. O'Riordan's capacity on the day of the mediation. Mrs. O'Riordan's capacity as of the completion date is another matter, which I will address in due course.

38. It is not necessary or useful to dwell on all of the detail in the affidavits which, as the High Court judge observed, were almost exclusively directed to the events after the execution of the BHOT and the parties' subjective belief as to their entitlements.

The High Court judgment

39. For the reasons given in a comprehensive written judgment delivered on 22nd March, 2022 [2022] IEHC 158 Quinn J. concluded that the plaintiffs were entitled to summary judgment for the first tranche of the consideration but declined to find that the plaintiffs were relieved of the obligation to transfer the shares.

40. The judge rejected Mr. Ward's argument that the BHOT amounted only to an agreement to agree.

41. The judge found that neither the provision in the BHOT for the transfer of the shares to Mr. Ward *"or his nominee(s)"* nor the provision in the BHOT that the parties would use their best endeavours to ensure that the sums paid would be structured in a tax efficient manner, entitled Mr. Ward to require that the cash reserves of the target companies should be used to pay the first tranche of the consideration.

42. The judge found that the payments made in December, 2019, apart from being late, had not been made in accordance with the BHOT and that Mr. Ward was obliged to consent to judgment in the outstanding balance.

43. As I have previously said, the judge found that in the absence of a valid acceleration clause, the outstanding balance was limited to the amount which was in arrears.

44. The High Court judge identified the fundamental issue of disagreement as Mr. Ward's determination to use the cash reserves of the target companies to pay the agreed consideration and the plaintiffs' opposition to that. That disagreement, as the judge said, was not only about tax efficiency but concerned the entitlement of Mr. Ward to use the cash reserves of the target companies to fund the consideration.

45. The judge accepted that Mr. Ward's *"nominee"* in the BHOT could include the target companies but said that it was one thing to introduce the target companies as his nominees and quite another to unilaterally insist that the consideration be sourced from their cash

reserves. Mr. Ward not having been entitled to insist that the target companies cash reserves be used to fund the payment, it followed that the plaintiffs were not – as had been alleged – in breach of the BHOT by refusing to agree to it.

46. At paras. 115 to 116, the judge addressed *"The obligation to transfer shares"*. He said:-

> *"115. The plaintiffs have asserted that by reason of the failure to make the payments and the operation of Clause 2.8, they are under no continuing obligation to transfer the shares to the defendant or his nominees. I cannot agree with this submission. Again, as a matter of basic construction of the BHOT, if the parties had intended that the plaintiffs could obtain summary judgment for the unpaid consideration and also be relieved of the obligation to transfer shares to the defendant or his nominee, such a provision would have been stated, even in such a basic form of agreement. The essence of clause 1.1.2 of the agreement is that the plaintiffs agree[d] to procure that title in the shares will be transferred to the defendant or his nominee 'upon payment of the first tranche of the consideration'.*
>
> *116. I have considered whether this assertion, with which I disagree, means that the plaintiffs have gone too far and therefore whether I should refuse judgment for the amount of the consideration on that ground. My conclusion is that the overstatement of this element of the case by the plaintiffs is not such as would justify a refusal to grant judgment."*

47. Having heard further argument, the judge directed that the issue of Mr. Ward's entitlement to a transfer of the shares should be the subject of a counterclaim. He placed a limited stay on the execution of his order in the event of an appeal but refused an application for a stay pending the determination of Mr. Ward's counterclaim.

The appeal

48. Mr. Ward promptly appealed against the judgment and order of the High Court. The grounds of appeal – from which the note in Form 6, requiring that the grounds be listed concisely, as 1, 2, 3 etc. was deleted – run to twelve pages. There are eleven grounds. I count 37 sub-grounds and 33 sub-sub grounds. The grounds of appeal are – as the respondents' notice protests – prolix and repetitive. I would add that they are argumentative. They are calculated to fuel the respondents' argument that the appellant is generating – or attempting to conjure – complexity in an attempt to resist summary judgment. The form and prolixity of the grounds of appeal precipitated a respondents' notice running to ten pages, with 56 paragraphs and 39 sub-paragraphs. This approach helps no one, is bad advocacy, and courts the danger that a good point buried in the morass may be overlooked.

49. The appellant's written submissions reduced the grounds of appeal to six points, although it must be said they largely repeated the arguments made in the High Court without engaging with the manner in which the High Court judge dealt with them.

50. The oral presentation by Mr. Fanning S.C. was more focussed.

51. By way of *mise-en-scène*, Mr. Fanning correctly recalled the old days when motions for summary judgment came first before the Master and then into the Monday list when they were almost invariably dealt with extemporarily on the affidavits and brief oral submissions. He moved from there to the fact that the High Court in the instant case had been compelled to reserve judgment, and that the judgment when it came ran to 149 paragraphs in 35 pages. I will come immediately to the substance of the arguments but I want to say first that long affidavits and arguments – no less than notices of appeal – may be just as consistent with noise and smoke as they are with substance. Similarly, the burden imposed on a court to deal with convoluted arguments is no measure of the substance of the arguments. In this case, for

example, the High Court judge engaged closely with Mr. Ward's evidence of what he thought, and what Mr. Ward said that the plaintiffs must know known, before concluding that it amounted to no more than evidence of subjective intention, which was not material to the correct construction of the written agreement which he had signed. The judge's careful consideration of the evidence and arguments on both sides is no yardstick of the necessity to have sent the case to plenary hearing.

52. The appellant's central ground of appeal is that the BHOT, properly construed, did not impose on Mr. Ward an obligation to pay money *simpliciter*. Rather, it is submitted, the agreement was intended to create and did create reciprocal obligations, so that the plaintiffs' claim ought never to have been considered as apt for summary judgment.

53. Without going further – and I will come to what the respondents have to say about it – it seems to me that that there is considerable force to Mr. Ward's argument. On a straightforward appeal from the judgment of the High Court, I might have confined myself to saying that it was arguable but having regard to the plaintiffs' belated concession that Mr. Ward is entitled to a transfer on payment of the money in accordance with the BHOT, I find it difficult to see what answer there could be.

54. The claim as formulated and as argued below was that Mr. Ward, having failed to pay the €25 million on the extended due date, became immediately liable to pay the €31.5 million and forfeited any entitlement to a transfer of the shares. However commercially surprising that claim might have been thought to have been, it was perfectly logical. The claim was that Mr. Ward was obliged to pay the money and the plaintiffs were not obliged – or were no longer obliged – to do anything in return. However, it seems to me that the rejection by the judge of the argument that the plaintiffs had been relieved of their obligation to transfer the shares – and *a fortiori* the plaintiffs' acceptance, now, that Mr. Ward is or will be entitled to a

transfer on payment of the money – undermines the logic of the proposition that the claim is for a debt or liquidated demand .

55. As I will come to, I see considerable force in the argument that there was default in payment, that Mr. Ward was not entitled to insist that recourse could be had the cash reserves, and most of all, that he was not entitled, against the opposition of the plaintiffs, to help himself to the cash reserves. But once the completion date and the extended completion date had passed, he was at the very least arguably a purchaser who has failed to complete.

56. Recalling that the limited stay on execution of the High Court order is limited to the determination of the appeal, Mr. Fanning points to the logical and legal outcome of the High Court order, and any refusal of the appeal. The plaintiffs, he says, will be entitled to execute their judgment before there is a determination of Mr. Ward's entitlement to a transfer. And supposing, he says, the money is paid and Mr. Ward is later found to be entitled to a transfer and the plaintiffs are not in a position to comply?

57. It is now, eventually, acknowledged by Mr. Ward that the document entitled *"Binding Heads of Terms"* was intended to be, and was, binding. At the same time, it is submitted that there was more to be agreed if the transaction was to work. So, I suppose, the submission is that the BHOT is binding as it stands but unenforceable in the absence of further agreement.

58. Mr. Fanning identified a number of what he called examples of matters remaining to be agreed: the nominees, the tax structure, and third party pre-emption rights. I do not see what further agreement might have been required as to nominees. The BHOT expressly provides that the shares might be transferred to Mr. Ward's nominees and I see no restriction on who he might nominate. Nor do I see what further agreement might have been required as to third party pre-emption rights. The BHOT expressly provided that if, notwithstanding the parties' best endeavours, the pre-emption rights could not be circumvented, the price would be reduced *pro tanto*. The argument that the tax structure remained to be agreed is difficult to

reconcile with Mr. Ward's insistence that he was entitled as of right to have recourse to the cash reserves of the target companies, *a fortiori* with his insistence that he was entitled to take control of the target companies before completion. No less to the point, I agree with the High Court judge that the mutual obligation to strive for a tax efficient structure did not carry with it an entitlement on the part of Mr. Ward to insist on a structure for which he had not bargained and which had not been agreed.

59. It is common case that there are substantial cash reserves in several of the Ward Cinema Group companies. The fundamental disagreement between the parties identified in the judgment of the High Court is whether the cash reserves can be used to at least partially fund the payment of the consideration. That is generally correct but I believe that it may be more correct to say that the disagreement is whether the cash reserves can be used for completion. The cause for the disagreement, in practical terms, is the tax liability or tax risk which would be incurred if the plaintiffs' shares were to be purchased by the target companies. By the plain terms of the BHOT, Mr. Ward, whether by himself or his nominees, was to have a transfer of the shares in the target companies on payment of the first tranche of the consideration. Once the money was paid and the transfer competed, he would have control of the companies, including their cash reserves. Like the judge, I cannot see how Mr. Ward can insist on having control of the target companies before the transfer, and he clearly is not entitled to a transfer before he pays the money.

60. In the High Court, and on the appeal, it was argued that the plaintiffs were in breach of the BHOT by their insistence that the defendant purchase the shares personally, and not through nominees. By reference to the correspondence and affidavits, I see the argument but the real dispute appears to me to have been not whether Mr. Ward could put up a nominee but whether he could nominate the target companies, specifically with a view to the use of the cash reserves to complete. That said, it is the fact that the plaintiffs, by their advisers, tried to

forestall the tax risk which would arise if Mr. Ward wished to use the cash reserves by insisting that the BHOT provided for the acquisition of the shares by Mr. Ward personally – which it did not – rather than identifying the real issue, which was whether Mr. Ward could properly insist on the use of the companies' reserves to fund the completion of the transfers.

61. In the High Court, and on the appeal, it was submitted that because the BHOT did not expressly prohibit the use of the cash to fund the completion, it followed, or at least that it was arguable, that Mr. Ward was entitled to insist that it could be. I see no error in the distinction which the High Court judge drew between the entitlement of Mr. Ward to nominate the target companies as the transferees of the shares, on the one hand, and his claimed entitlement to insist that the consideration would be paid by them, on the other. The real issue was the provenance of the money rather than the destination of the shares. If Mr. Ward had been willing to pay *"good"* money, I cannot see that the plaintiffs could or would have objected to any nomination that he might have made. Conversely, I cannot see how Mr. Ward could have had access to the cash reserves in the target companies before he had control of the companies, and I cannot see how he could have legitimately had control of the companies before the shares were transferred.

62. There was a rather circular argument based, again, on the proposition that in the absence of an express prohibition on what was proposed, it was to be inferred, or a term might be implied to the effect, that it was permitted. It was, it was said, always Mr. Ward's intention to complete using the cash reserves in the target companies and the plaintiffs knew that, or must have known that, or must be taken to have known that from the fact that the target companies' balance sheets showed the cash reserves, and from the fact that a previous shareholder had been bought out using cash reserves. I am not persuaded that the High Court judge erred in his conclusion that Mr. Ward's case was built on subjective intention that the

purchase should be completed in a manner which he had not bargained for. However, the appeal falls to be decided on the issue whether the order for summary judgment can stand.

63. A further alleged breach of the BHOT was what was characterised as the plaintiffs' attempt to renegotiate the terms. The fact of the matter was that when the potential tax problem was identified there was engagement between the parties' advisers as to how it might be overcome. As the High Court judge said, the evidence was that Mr. Ward's tax adviser, Mr. O'Callaghan, invited the plaintiffs to indicate what alternative structure might be available or palatable to them and the Crowe proposal was their response to that invitation. If Ms. Kinsella's insistence that the BHOT required the acquisition of the shares by Mr. Ward personally was incorrect, it was Mr. O'Callaghan, on behalf of Mr. Ward, who first suggested that *"an element of pre-sale restructuring"* might be necessary. It seems to me that the engagement between the parties was correctly characterised in the plaintiffs' solicitors' letter of 1st November, 2019 as a collaborative engagement to ensure an orderly and efficient transfer of the shares. Moreover, in my view, it ill behoves a purchaser who on any view was late and short in payment of the first tranche and who proposed that the vendors should make do for the moment with what they had been paid, to complain that the vendors had earlier been trying to renegotiate.

64. As he had in the High Court, Mr. Howard S.C., for the plaintiffs, made much of the payments made by Mr. Ward on 4th December, 2019. He submitted, variously, that the steps taken by Mr. Ward in order to have recourse to the cash reserves were invalid, and that the fact that the payments had been made showed that the money had fallen due for payment.

65. As to the argument that there was more to be agreed before the BHOT could be completed, Mr. Howard pointed to Mr. Ward's then solicitors' letter of 6th December, 2019 which notified the making of the payments of €12.5 million into Mrs. Kennedy's bank account and €6 million into Mrs. O'Riordan's bank account, promised the payment of the

balance of €6.5 million to Mrs. O'Riordan, and asked for (1) a transfer executed by each of the vendors, together with the share certificates or in the case of any lost certificate an indemnity in lieu, (2) a certificate of the kind described in s. 980 of the Taxes Consolidation Act, 1997, (3) PPS numbers to facilitate the stamping of the stock transfer forms, and (4) all relevant letters of resignation as directors/secretary of the Companies. The simplicity of the completion documents requested, it was said, gave the lie to the argument that there was any complexity. And the fact that Mr. Ward was able to say what documents he required gave the lie to the argument that there was anything more to be agreed.

66. There is considerable force in the submission that the arguments now made as to the complexity of the transaction and the need for further agreement on the structure of the transaction are inconsistent with the position previously taken in correspondence. However, I cannot agree that the payment of the €12.5 million and the €6 million went to the issue as the whether the obligation to pay was independent of the entitlement to a transfer of the shares.

67. In the first place, Mr. Ward's subjective understanding or misunderstanding of his obligation could not in principle have gone to the obligation created by the BHOT. Secondly, if it is there at all, I do not see in the letter of 6th December, 2019 any clear acknowledgement of a free-standing obligation to pay money. The bank lodgements, as I have said, were made on 4th December, 2019 without notice to the plaintiffs. The first the plaintiffs knew of the payments was from the letter of 6th December, 2019. They were then told that the payments had been made as part of the consideration and as *"Tranche 1 of the completion monies"* and they were asked, in return, to provide the specified closing documents. Thirdly, the letter identified the provenance of the money which, on the plaintiffs' case, had been improperly abstracted from the companies in purported reliance on invalid resolutions, and probably in breach of s. 82 of the Companies Act, 2014.

68. I cannot accept that the payments made or procured by Mr. Ward evidenced or acknowledged a debt. It seems to me that the height of any acknowledgement was an acknowledgement of an obligation to complete the purchase, and even that was tempered by an assertion or insistence that the purchase could be completed in the manner proposed.

69. Mr. Howard undertook a detailed analysis of the correspondence, pin pointing what he said were numerous inconsistencies in the position adopted from time to time by Mr. Ward and his son, Mr. Lorcan Ward, and identifying repeated requests for information and copy documents which, it was said, were ignored. Not least, much was made of the fact – and it appears to be uncontested – that the plaintiffs were not provided with copies of the minutes of the purported meetings of which they had not been given notice or of the resolutions purportedly passed at those meetings which were relied on as having implemented the step plan by which the cash reserves came to be used to make the payments to the plaintiffs.

70. Again, I will not dwell on the detail which is not material to the issue which must be decided on the appeal. The various complaints and criticisms on the plaintiffs' side are rooted in their uncontradicted objection that the resolutions were purportedly passed at purported meetings of which they were given no notice. Mr. Ward's justification for what he did appears to be based on the proposition that the plaintiffs were bound to have agreed to something which, on his own case, had not been agreed, and that their refusal to agree to what he wanted to do somehow entitled him to do it unilaterally.

71. Mr. Fanning attempted to justify the manner in which the companies' monies were used by Mr. Ward by reference to the assertion in the plaintiffs' solicitors letter of 3rd December, 2019 that he had lost any entitlement to call for a transfer of the shares and their threat to sue for the entire €31.5 million. That position, described as draconian, was said to have been why Mr. Ward very quickly responded by arranging for the two payments of €12.5 million and the €6 million. I cannot accept that. First, the payments were made on 4th

December, 2019 following, in the case of Mrs. Kennedy, seven alleged steps through the corporate labyrinth. The seven step plan relied on does not give any dates and was never vouched and it appears to be to have been unlikely in the extreme that it was conceived and executed in one day. Secondly, if, for the sake of argument, the position taken by the plaintiffs' solicitors had been correct, Mr. Ward's forfeited right could not have been restored by the late payment of part of the money. If what was behind the argument was a suggestion that an unreasonable demand by the plaintiffs somehow justified the doing of something that would not otherwise have been permissible, I know of no authority for such a proposition.

72. However, the rights and wrongs of what was done later do not go to the fundamental issue on the appeal: which is whether it is clear beyond argument that Mr. Ward can properly be ordered to pay for the shares before they are transferred to him or his nominees.

73. I earlier disposed of so much of Mr. Ward's answer to the claim for summary judgment against him as was based on a challenge to the authority of Mrs. O'Riordan's attorney, Mr. Carron, by reference to the capacity of Mrs. O'Riordan at the time of execution of the BHOT. That issue was not pressed on the appeal. Mr. Fanning, however, did press the argument, which was supported by the evidence, that by the time of the completion date and the extended completion date, Mrs. O'Riordan did not have the capacity to have executed a transfer of the shares. That argument did not sit entirely comfortably with Mr. Ward's continued engagement with the plaintiffs' solicitors for the remainder of 2019 and the payments which were eventually made but perhaps the evidence was not entirely clear as to when Mr. Ward became aware of the deterioration in his sister's health.

74. As Mr. Fanning anticipated, the appeal does not turn on the point but for completeness I would say that it is not obviously without substance. As long as it was the plaintiffs' case that Mr. Ward forfeited his entitlement to the shares by reason of his failure to pay the first tranche, it would have been difficult to see how his position might have been so

fundamentally impacted by reason of his failure to complete on a date on which the plaintiffs were unable to complete. The foundation of the claim, after all, was that the plaintiffs had been ready, willing and able to complete on the completion date and on extended completion date. There may or may not have been an answer to the point in the fact that Mrs. O'Riordan had previously executed an enduring power of attorney in favour of Mr. O'Riordan which, although unregistered, was nevertheless, by s. 7(2)(a) of the Powers of Attorney Act, 1996, sufficient to have enabled him to execute a transfer on her behalf *"to prevent loss to the donor's estate"*: but it is not necessary to decide the point.

75. Finally, I mention that part of Mr. Ward's case is that although he is a man of very considerable financial substance, he did not have the liquidity to pay the first tranche of the consideration and his sisters knew it. Variously, the case was made that this meant that he was entitled to use the cash reserves in the companies to complete, and that any insistence that Mr. Ward should liquidate assets was, or would have been, a breach of what was said to be the mutual obligation to use best endeavours to ensure that the sums paid would be structured in a tax efficient way for the parties. I respectfully agree with the judge's conclusion that what was said as to the funding of completion went no further than evidence – if such it was – of Mr. Ward's subjective intention.

Conclusions

76. In principle, the parties to a contract are free to strike their own bargain and a court later asked to enforce the contract will not be concerned with the wisdom of the agreement. That said, it might be thought to be surprising that a purchaser of shares – or anything else – might have unconditionally bound himself to pay the agreed price without a corresponding obligation on the part of the vendor to transfer the shares or other property.

77. The contract in this case was a contract for the sale and purchase of shares. The money payable under the BHOT was payable as the consideration for the shares. It is at the very least arguable that the plaintiffs' belated acceptance that they remain bound to transfer the shares to Mr. Ward, if not necessarily to his nominees, fundamentally undermines the premise of the action, which was that the BHOT gave rise to a debt.

78. In my view, there is at the very least a substantial argument to be made that the requirement in clause 2.8 of the BHOT that Mr. Ward should consent to judgment in the event that the consideration was not paid in accordance with the terms of the agreement is to be read in the light of the requirement that he should also consent to a charging order in respect of his shares in the companies. If it is arguable that *"his shares in the Companies"* refers only to Mr. Ward's shares in the Companies other than the shares the subject of the BHOT, I am quite satisfied that it is no less arguable that that the intention was that the plaintiffs' right to payment of the consideration would be secured by a charging order over the shares in sale. A charging order over the shares which Mr. Ward already owned could have seen those shares sold to pay for the shares which he had agreed to buy.

79. It is instructive to look at the outcome of the High Court order. The order was that Mr. Ward should immediately pay substantially all of the agreed consideration, plus interest, and that his entitlement to the shares should be the subject of a counterclaim. The High Court judge retained seisin of the case and gave directions for the delivery of a counterclaim, for the raising and answering of any particulars, and for the delivery of a defence to counterclaim.

80. In accordance with the directions of the High Court, a counterclaim was delivered on 25th May, 2022 by which Mr. Ward claimed a number of declarations and orders for specific performance by the plaintiffs of their alleged obligations under the BHOT, not least to procure the transfer of the shares to the defendant or his nominee(s) upon receipt of the first instalment of €25 million. Following a fairly unilluminating response on 28th June, 2022 to a

fairly fastidious notice for particulars dated 8th June, 2022, a ten page, 44 paragraph, the defence to counterclaim was delivered on 13th July, 2022.

81. The defence to counterclaim starts with a plea that the issues sought to be litigated in the counterclaim are *res judicata* in light of the High Court judgment. It goes on immediately to plead that the plaintiffs have acknowledged that the shares the subject of the BHOT will be transferred to the defendant on the payment *"by the plaintiff"* of the first tranche of €25 million, in accordance with the BHOT. The acknowledgement that the shares will be transferred *"to the defendant"* does not extend to Mr. Ward's nominees. The reference to the payment *"by the plaintiff "* is obviously a mistake but it is not altogether clear that what was intended was *"by the defendant"* (singular) or *"to the plaintiffs"* (which should have been plural). In the following paragraph, the plaintiffs plead that no obligation to transfer the shares has arisen in circumstances where *"the defendant"* has not paid the €25 million, *"much less has he done so in a tax efficient manner as required by clause 1.1.6 of the BHOT."*

82. Mr. Fanning, in argument, invited the court to suppose what might happen if, after the money had be paid, Mr. Ward established his entitlement to a transfer but the plaintiffs were unable to comply. If Mr. Fanning did not develop the argument, neither did Mr. Howard attempt to deal with it. The immediate consequence, of course, would be that Mr. Ward would be out of his money and would not have the shares. If it is now implicit in the plaintiffs' acknowledgement that the shares will be transferred on payment of the money that they will not deal with or dispose of the shares pending payment, they have not unequivocally said so. No less to the point, there is nothing in the High Court order to prevent them doing so. Similarly, there was no engagement as to who would be entitled to any income from the shares if defendant was ordered to immediately pay for them but the plaintiffs allowed to keep them *pro tem*.

83. While Mr. Fanning apprehended that Mr. Ward might be adjudicated bankrupt before his entitlement to the shares had been determined, neither side really engaged with the question of how the judgment might be executed, or how long that might take, or what might happen to any money realised by execution. It appears to be accepted that Mr. Ward is a man of significant, if illiquid, financial resources but there is no evidence of that. There is no evidence at all of the plaintiffs' resources, beyond the shares and their entitlement to be paid for them. It seems to me that the only practical purpose of the plaintiffs' insistence on payment before the counterclaim has been determined must be that they will be immediately entitled to use the money. If there is no evidential basis for the expressed concern, I think that Mr. Ward is entitled in principle to be heard to say that he ought not be ordered to pay the consideration until the dispute as to his entitlement – or the terms of his entitlement – to a transfer has been determined. The risk of injustice to the plaintiffs, if it is ultimately found that they have been kept out of their money, can be balanced against the availability of an award of interest.

84. Apart from the practical difficulties of implementing any later adjustment that may be found to be necessary in favour of Mr. Ward, it seems to me that the mere possibility that such an adjustment might be required is in principle irreconcilable with a final determination that he is immediately bound to pay for the shares.

85. The evidence and argument in the High Court ranged wide. Much of what was said went to whether the defendant had been justified in his failure to pay the first tranche of the consideration, or whether he had been entitled to have done what he did, or whether what he did amounted to substantial performance: all of which went to whether the defendant ought to have completed the purchase. But the core issue was whether the defendant was presently indebted to the plaintiffs such that the plaintiffs are entitled to summary judgment.

86. A significant plank, if not the foundation stone, of the plaintiffs' case was that the plaintiffs were under no continuing obligation to transfer the shares to the defendant or his nominees. The judge having – it is now accepted, correctly – rejected that submission, went on to consider whether the plaintiffs had gone too far and whether he should refuse judgment for the amount of the consideration on that ground. It is there, in my view, that the judge fell into error. The plaintiffs' insistence that the defendant had forfeited his entitlement to a transfer of the shares was not an *"overstatement"* which engaged the discretion of the court as to whether to grant summary judgment but went to the heart of the claim. It follows from the conclusion that the BHOT created mutual rights and obligations that it is at the very least arguable that the remedy was not a decree for the price of the shares which had not been transferred but an order for specific performance or damages in lieu. The plaintiffs' belatedly acknowledged obligation to procure the transfer of the shares on payment of the first tranche of the consideration is not reflected in the order of the High Court.

87. I have concluded for these reasons that the appeal must be allowed and the action adjourned for plenary hearing. I would direct the delivery of a statement of claim within twenty one days, a defence and any counterclaim within twenty one days, and any reply and defence to counterclaim within a further period of twenty one days. The action will be remitted to the Commercial List of the High Court for such further directions as may be appropriate.

88. As to costs, the defendant having been entirely successful in his appeal, my provisional view is that he is entitled to the costs of the appeal. As to the appropriate order as to the costs incurred in the High Court, the position appears to me to be complicated by the change in the plaintiffs' position as to the defendant's entitlement to a transfer of the shares and I think that it would be useful if there was an exchange of brief written submissions in advance of a further hearing as to costs and any other issues that may arise.

89. As this judgment is being delivered electronically, Barniville P. and Noonan J. have authorised me to say that they agree with it.