[2018] IEHC 182

THE HIGH COURT

COMMERCIAL

[2014 No. 10087 P.]

BETWEEN

CARLO TASSARA ASSETS MANAGEMENT SA

PLAINTIFF

AND

ÉIRE COMPOSITES TEORANTA, WILLIAM COSTELLO, PATRICK FEERICK, CONCHUR Ó BRÁDAIGH AND THOMAS FLANAGAN

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 2nd day of March, 2018

Introduction

1. The plaintiff ("CTAM") is a private company limited by shares and incorporated in Luxembourg. At all material times up until 2014 it was part of the Carlo Tassara Group of Companies. CTAM was a shareholder in the first named defendant ("Éire") up and until the point in 2014 that the defendants converted a Loan Note held by CTAM into shares in Éire. The shares in Éire were then sold to the fifth named defendant. CTAM claims that these transactions were unlawful and challenges the validity of the conversion of the Loan Note into shares in Éire and the subsequent sale of its shares in Éire to the fifth named defendant.

2. In addition, CTAM is also suing the second, third and fourth named defendants pursuant to personal guarantees entered into on 5th November, 2009 and it seeks various orders pursuant to s. 842 of the Companies Act 2014.

3. Éire is a limited liability company incorporated in 1998 which specialises in the design, manufacture and testing of lightweight high performance composite material for the aerospace, marine and auto sectors. It carries on business from its registered office at Údarás Industrial Estate, An Choill Rua, Indreabhan, County Galway.

4. The second, third and fourth named defendants were at all material times shareholders in and directors of Éire. The fifth named defendant states that at a date prior to November 2014 he purchased the entire shareholding in Éire and became a director of Éire. The manner in which this occurred is the subject matter of these proceedings.

Background

Carlo Tassara SpA Investment in Éire

5. Éire was engaged in developing cutting edge materials and technology and it was in constant need of money to fund the development of its technology. Its bank, AIB Plc, (AIB) initially advanced a number of loans. Éire subsequently came under considerable pressure from AIB. This became a critical problem in 2009 and later in 2013. Údarás na Gaeltachta were prepared to offer limited support to the company but Éire required a joint venture partner to invest significant sums of capital in the company rather then simply providing loan finance.

6. In 2007, Éire found a partner who was prepared to invest in its enterprise. Carlo Tassara SpA was part of a group of companies based in France, Luxembourg and Italy referred to as the Carlo Tassara Group. The major shareholder in the Carlo Tassara Group was Mr Romain Zaleski, a reputed billionaire. In 2007 the shareholders in Éire entered into a Shareholders' Agreement with Carlo Tassara SpA. Carlo Tassara SpA invested €3.3 m for 74,830 ordinary shares in Éire pursuant to a Shareholders Agreement dated 16th January, 2007. Clause 8.1.1 of the agreement provided:-

> *"For the purposes of this clause, where any person is unconditionally entitled to be registered as the holder of a share, he and not the registered holder of such share shall be deemed to be a member of the company in respect of that share."*

7. Clause 8.8 provided:-

> *"No shares shall be transferred save as provided in this clause 8. A transfer of shares to a company wholly owned by a shareholder or to a wholly owned subsidiary or affiliate shall not be considered a transfer for purposes hereof and the provisions of this Clause 8 shall not apply to any such transfer, provided, however, that the transferee shall agree to be bound by the terms of this agreement."*

8. The shareholders' agreement included a clause described as a Drag Along clause. As it is central to the dispute in these proceedings, I set out the provisions in detail:-

> *"8.3.1 If it is proposed by one or more of the shareholders (excluding any of their successors or assigned) to transfer all of their shares as part of a bona fide arms length transaction and where those shareholders together holding a minimum of 50% of the issued shared capital in the company, those shareholders (the selling shareholders) shall have the option (the drag along option) to require all the other holders of shares to transfer their shares as beneficial owners, on the same terms and conditions (including price and payment terms) to any party wishing to take a transfer of such shares (the third party purchaser) or as the third party purchaser shall direct in accordance with this Clause 8.3.*
>
> *8.3.2 The selling shareholders may exercise the drag along option by giving notice to that effect (a drag along notice) to the other shareholder(s) (the called shareholder) at any time before the transfer of shares to such third party purchaser. A drag along notice shall specify that the called shareholder is required to transfer all his shares (the called shares) pursuant to Clause 8.3.1 to the third party purchaser, the price at which the called shares are to be transferred, the proposed date of transfer and the identity of the third party purchaser.*
>
> *8.3.3 Any drag along notice shall also state:-*

(i) all conditions to the acceptance by the selling shareholders (or any of them) of the offer by the third party purchaser for their shares;

(ii) the price per share offered to each of the selling shareholders by the third party purchaser for their shares (expressed as a numerical price per share);

(iii) any other form of consideration (whether in cash or kind) payable by or on behalf of the third party purchaser to the selling shareholders in connection with the sale of their shares.

8.3.4 The called shareholder shall be obliged to sell the called shares at the price specified in the drag along notice which shall attribute an equal value to all shares and for the avoidance of doubt, the third party purchaser may purchase the called shares at the same price and on the same terms as offered by the third party purchaser to the selling shareholders for their shares.

8.3.5 Subject to compliance by the selling shareholder with the foregoing provisions of this Clause 8.3, the called shareholder shall on service of the drag along notice be deemed to have irrevocably appointed each of the selling shareholders severally to be his attorney to execute any stock transfer and to do such other things as may be necessary or desirable to accept, transfer and complete the sale of the called shares pursuant to this Clause 8.3. Any rights of pre-emption and other restrictions contained in this agreement shall not apply to any sale and transfer of shares to the third party purchaser named in a drag along notice."

9. Clauses 12.3 and 12.9 of the agreement provided:-

"12.3 Variation

This agreement may not be released, discharged, supplemented amended, varied or modified in any manner except by an instrument in writing signed by each of the shareholders."

"12.9 Assignment

None of the parties hereto may assign his rights or obligations in whole or in part hereunder without the prior written consent of the other parties hereto".

10. Despite the investment of €3.3m by Carlo Tassara SpA in Éire in January 2007 by the end of 2007 Éire required a further injection of funds. Carlo Tassara SpA agreed to lend Éire the sum of €2m. The terms of the loan were governed by a Loan Note Instrument issued by Éire and accepted by Carlo Tassara SpA dated 17th December, 2007. The Loan Note was a convertible Loan Note. The terms of the Loan Note and the operation of same and the purported conversion of the Loan Note into ordinary shares in Éire are central to the dispute, the subject matter of the proceedings herein.

11. The Loan Note bore interest at a fixed rate of 7% per annum, accrued monthly and to be payable on each anniversary of the date of issue of the Loan Note. The principal amount of the Loan Note was to be repaid five years from the date of issue. The Loan Note could, at the discretion of the holder of the Loan Note, be converted into ordinary shares in Éire. This requires the holder to serve on the issuer a conversion notice, defined in the deed as *"a notice of conversion in the form set out in the third schedule hereto which may be served by the holder in accordance with the provisions of Clause 4.1"*. Carlo Tassara SpA is described as the holder of the note and Éire is described as the issuer of the note. By Clause 2.5, Éire covenanted as follows:-

"The issuer hereby covenants with the holder that it will comply with the provisions of this instrument in all respects and that the Loan Note shall be held subject to this instrument which shall be binding upon the issuer and the holder and in all persons claiming through or under them respectively."

12. Clause 4 provides:-

"4.1 Conversion

(a) In the event that the issuer fails to pay to the holder the principal sum outstanding on the Loan Note on or before the date set out in Clause 3.2, the Loan Note may, in the holder's sole discretion, be converted into ordinary shares in the capital of the company such conversion shares to be issued to the holder at the subscription price and equal in number to 45,352 ordinary shares, without prejudice to the obligation to pay interest accrued as of the redemption date. All shares issued by way of conversion to the holder shall be credited as fully paid.

(b) The right of conversion shall be exercisable by the holder at its option for a period of ninety (90) days following the date set out in Clause 3.2, by completing the conversion notice and depositing the same together with the Loan Note certificate at the registered office of the issuer, such deposit to be deemed effective by the giving of notice in accordance with the provisions of Clause 6.3.

…

(d) If the Loan Note and the conversion notice duly completed has been duly lodged at the registered office of the issuer as aforesaid, the issuer will, not later than fourteen days after receipt of such conversion notice allot and issue to the holder the number of shares in the capital of the issuer credited as fully paid to which the holder shall be entitled by virtue of the conversion and such allotment and issue shall be in full satisfaction and discharge of the sum outstanding represented by the Loan Note.

(e) The issuer shall not later than 28 days after such allotment and issue as aforesaid send free of charge to the holder a certificate for the shares resulting from the conversion."

13. Clause 6.2 provides that the Loan Note may not be assigned or negotiated except to an affiliate of the holder and Clause 6.3 states that any notices required or permitted hereunder, including any conversion notice, may be made by registered mail, return receipt requested, hand delivery against acknowledgement of receipt, or by fax confirmed by registered mail or hand delivered.

Investment in Naero Composites Ltd
14. In addition to investing in Éire, Carlo Tassara SpA agreed to become involved in a joint venture between Éire, Carlo Tassara SpA and the second named defendant, through the Costello Partnership. Arising from this, two new companies were incorporated: Naero Composites Limited ("Naero"), which in turn was the owner of Greenblade Gmbh (Greenblade), a company registered in Germany. The shares in Naero were held by Éire (51%) The Costello Partnership (35%) (the second named defendant's family partnership) and Carlo Tassara SpA 15%. €2,550,000 of the issued share capital in Naero was unpaid. Naero owned 100% of the shares in Greenblade.

15. Greenblade was given a grant of €1,597,502 by the Investitionbank des Landes de Brandenburg ("ILB"), a business promotion bank for the State of Brandenburg, to develop a 13 meter blade for wind turbines. The grant was guaranteed by Naero. It obtained a second grant from Finanzamt in July 2008 in the sum of €1,611,021. Greenblade rented 50% of a premises from Reber Park GmbH, a company controlled by the second named defendant which he referred to as "my" company, though the directors and shareholders were never formally established. The rent due by Greenblade to Reber Park Gmbh and the unpaid share capital in Naero subsequently gave rise to disagreements between CTAM and the second named defendant in particular.

Assignment of Loan Note and Transfer of Shares in Éire and Naero
16. Carlo Tassara SpA decided to assign its shares in Éire, Naero and its interest in the Loan Note issued by Éire to an affiliate company within the Carlo Tassara group, CTAM. On 6th October, 2008 Carlo Tassara SpA executed a transfer and assignment of the shares in Éire, Naero and the Loan Note to Carlo Tassara France SAS. This was an error. Carlo Tassara SpA never intended to transfer these assets to this company within the Carlo Tassara Group and Carlo Tassara France SAS never intended to become the owner of the shares and the Loan Note. Accordingly, on 12th November, 2008, Carla Tassara France SAS transferred its interests in the shares in Éire and Naero and the Loan Note to CTAM.

17. The defendants argued that CTAM has not proven that it was ever the holder of the Loan Note, the subject matter of these proceedings. They also contend that it never became the registered owner of the shares in Éire which remained registered in the name Carlo Tassara SpA. On this basis, the defendants have argued that CTAM has no *locus standi* to bring these proceedings. I consider this issue further below.

18. Pursuant to the Loan Note of December 2007 Éire was obliged to pay interest in the amount of €140,000 to Carlo Tassara SpA on or before 17th December, 2008 and the company accrued further interest in the amount of €35,000 from the period 17th December, 2008 to 17th March, 2009. No interest was paid by Éire to Carlo Tassara SpA or CTAM

2009 Agreements
19. In late 2009 the company urgently required further financial support. Údarás na Gaeltachta was prepared to support Éire by investing €500,000 in Éire upon certain terms. The shareholders in Éire entered into a Share Purchase Agreement on 4th November, 2009. CTAM and not Carlo Tassara SpA was recorded as the holder of 35% of the shares in Éire represented by 74,830 ordinary shares. At Clause 4.2 it was expressly noted that the benefit of the Loan Note was assigned to CTAM on 12th November, 2008 and it was agreed that the interest in the sum of €175,000 due on the Loan Note was to be waived in consideration of the issue of ordinary shares in Éire to CTAM. The agreement was executed *inter alia* by CTAM and it received 8,750,530 shares in Éire for the interest due on the Loan Note up to 17th March, 2009.

20. On 5th November, 2009 Údarás na Gaeltachta, Éire and the shareholders in Éire entered into a Preference Share Subscription and Shareholders' Agreement. CTAM executed the agreement as one of the shareholders in Éire. Pursuant to the agreement, Údarás na Gaeltachta agreed to pay €500,000 for 500,000 preference shares in Éire. It was a term of the investment by Údarás na Gaeltachta in Éire that the preference shares should be redeemed in priority to the repayment of shareholders' loans. CTAM agreed to the subordination of its Loan Note to the preference shares for Údarás na Gaeltachta and to deferring any interest payment for two years after the date of the investment by Údarás na Gaeltachta. The agreement defined Carlo Tassara SpA as an affiliate of CTAM and defined Carlo Tassara France SAS as an affiliate of both Carlo Tassara SpA and CTAM and *"the original Assignee of the Loan Note Instrument from Carlo Tassara SpA*". CTAM is defined as "*the share holder in the company … and the assignee of the holder of the Loan Note instrument.*" The Loan Note instrument is defined as:

> *"the Loan Note instrument dated the 17th day of December 2007 entered into between the company and Carlo Tassara SpA as assigned by Carlo Tassara SpA to Carlo Tassara France SAS on 6th October 2008 and by Carlo Tassara France SAS to Carlo Tassara Asset Management on 12th November, 2008 pursuant to which a loan of €2,000,000 was advanced by Carlo Tassara SpA to the company…"*

21. In the first schedule CTAM is listed as the shareholder of 8,825,362 ordinary shares. This reflects the initial shareholding purchased by Carlo Tassara SpA and the shares issued to CTAM in respect of the interest due on the Loan Note. In the fifth schedule, the signatories to the agreement, including the second, third and fourth named defendants, warranted that the information set out in the recitals and the first schedule was true, complete and accurate in all respects and was not misleading in any respect. They warranted that the authorised and issued share capital of Éire immediately prior to the subscription by Údarás na Gaeltachta was as set in Part I of the second schedule and immediately after the subscription by Údarás na Gaeltachta will be as set out in Part II of the second schedule i.e. the shareholder is CTAM, not Carlo Tassara SpA.

Guarantees of Second, Third and Fourth Named Defendants.
22. As stated above, CTAM agreed to waive the payment of €175,000 in interest on the Loan Note in consideration for the issue of ordinary shares in Éire pursuant to the Share Purchase Agreement dated 4th November, 2009. However, further interest was due in the amount of €105,000 on 17th December, 2009 ("the first tranche") and €140,000 on 17th December, 2010 ("the second tranche"). It was a condition of the agreement with Údarás na Gaeltachta that both the first and second tranche interest payments be deferred and rolled up such that the first tranche and the second tranche and interest payable thereon (totalling €267,806)(the "Liabilities") were to be repaid by Éire on a date two years after the subscription by Údarás na Gaeltachta of the preference shares.

23. The second, third and fourth named defendants entered into an Interest Agreement with CTAM to guarantee the payment of the Liabilities by Éire to CTAM. The second, third or fourth named defendants agreed to deposit in full, into a designated bank account, monies equal to the first and second tranche of interest on the dates the interest became due under the Loan Note as security for their guarantee of Éire's obligation to pay these sums at the end of the two years. Failure to deposit the specified amounts on the specified dates was an event of default under Clause 3.4 of the Loan Note.

24. In conjunction with the Interest Agreement, the second, third and fourth named defendants entered into a guarantee in favour of CTAM on 5th November, 2009 for the Liabilities. It was a term of the guarantee that CTAM could call upon the guarantee at any time after 5th November, 2011 or on the second anniversary of the date of subscription of the preference shares, whichever is the later, in the event that Éire had not discharged the Liabilities on or before that date or, in the alternative, immediately in the event of the failure of the guarantors into deposit in full the amounts required as security. By clause 1.6 the guarantors were required to lodge to a designated bank account the sum of €105,000 on 17th December, 2009, the sum of €147,350 on 17th December, 2010 and the sum of €15,456 on 4th November, 2011. The personal guarantees were executed by the second, third and fourth named defendants and it is common case that no monies were lodged to the designated account on the specified dates.

2009 - 2013

25. Despite the investment in 2007 and the further investment in late 2009, Éire and Naero continued to struggle financially. Éire continued to develop its product and in particular a mould for making a large composite wind blade. The company made progress in attracting potentially very important customers both for the wind blade and for other precision tooling. Bombardier was one such company contracting with Éire.

Advanced Composites Engineering Limited

26. In or about 22nd September, 2011 the second, third and fourth named defendants established a company, outside of the Éire Composite Group structure, Advanced Composites Engineering Limited ("ACE"). They were the shareholders and the directors of ACE according to the returns filed in the Companies Registration Office. Neither CTAM nor its director on the board of Éire, Mr Claude le Monnier, were aware of the fact that ACE had been incorporated.

27. On 14th March, 2012 Éire granted ACE an exclusive licence to manufacture, develop, market, use, offer for sale, sell or otherwise supply the licensed patent rights for the manufacture of 13m and 14m wind turbine blades for a period of 20 years. This was despite the fact that Greenblade had been established and had received grants to develop a 13m wind turbine blade in Brandenburg. There was no licence fee payable by ACE to Éire for its intellectual property. The agreement was signed by the third named defendant on behalf of Éire and by the fifth named defendant on behalf of ACE.

28. The precise terms upon which the fifth named defendant became involved with ACE was unclear and remains so. The fifth named defendant said that ACE was established to ring fence his investment in the 13m blade project as the finances of Éire were "uncertain". His evidence was that in October and November 2012 he lent ACE €100,000 at a rate of 8% per annum and in return he was to receive a 5% shareholding in ACE as well as repayment of the loan plus interest. The €100,000 advanced remained a loan by him to ACE.

29. In 2011 Éire was due to receive payments under a programme described as the ALCAS programme, but Éire required funds before the payment was due. On 6th May, 2011 the fifth named defendant agreed to lend Éire £50,000 sterling pending the payment due to Éire under the ALCAS programme. In 2013 the ALCAS payment to Éire had still not come through and the loan to the fifth named defendant was still outstanding. The fifth named defendant indicated in February 2013 that he would like to see the loan due by Éire to him converted into shares in ACE. On 12th February, 2013 the third named defendant confirmed the loan due by Éire could be immediately converted into shares in ACE. He proposed calculating the number of shares to be issued to the fifth named defendant in ACE on a *pro rata* basis as the "*€100,000 you already have in ACE.*" (emphasis added). The fifth named defendant replied to this e-mail correcting the figures in the e-mail of the third named defendant but not the suggestion that he already held shares in ACE. In addition to the loan due to him by Éire he proposed to transfer "*€55,395.15 = £47,581.82 to take the total to €120k for another 6% of ACE*". (emphasis added). The fifth named defendant intended to invest €120,000 directly in ACE in return for a 6% share holding in that company. Part of the payment for the shares in ACE was the conversion of a loan due by Éire to the fifth named defendant. It was never explained how this was to be effected. Further, the fifth named defendant maintained in evidence that his loan of €100,000 to ACE advanced in 2012 formed part of his investment in Éire in 2014.

30. The defendants explained that Éire granted ACE the licence on 14th March, 2012 in order to give comfort to the fifth named defendant in relation to his investment in ACE. It is not clear why he required this comfort in March 2012. The accounts for ACE for the y/e 30th June, 2012 show that only 57 ordinary shares had been allotted and they were allotted to the second, third and fourth named defendants. The total creditors (excluding the directors) only came to €36,400. It is difficult to discern from the accounts filed with the CRO that the fifth named defendant had any involvement at all in ACE in 2012, whether as a creditor or shareholder. Mr McPartlan, on behalf of Éire, explained in evidence that the accounts were inaccurate.

Crisis in Éire

31. Between 2011 and 2013 Éire was in a very precarious financial situation. It could not pay its debts as they fell due. There were substantial loans due to AIB and to CTAM which it could not repay. Judgments were obtained against it. It could not pay substantial arrears of rent due to Údarás na Gaeltachta. The company could not pay its employees their wages at the end of some months.

32. The second, third and fourth named defendants and Mr McParlan all gave evidence that Éire urgently needed new funds in Autumn/Winter 2013. AIB would not lend further monies. As discussed below, Údarás na Gaeltachta was prepared to offer to advance a further sum of €250,000 on certain conditions.

November 2013 – Éire

34. On 11th November, 2013 the second named defendant, as the managing director of Greenblade, informed the directors and shareholders of Éire that Greenblade was to be placed in liquidation. The creditors of Greenblade were ILB who were owed €1.65m, Finanzamt who were owed €1.5m, Reber Park GmbH who were owed €340,000 and Naero who were owed €8.5m. There was also €23,000 due in respect of VAT. The directors and shareholders of Éire were informed that this could have a serious and possibly devastating effect on Éire because of the impact this would have on the balance sheet of Éire.

35. At a meeting of the board of directors of Éire on 25th November, 2013, it was proposed that all of the directors' loans to Éire be converted to ordinary share capital, including the Loan Note. At the time the sum due to CTAM on the Loan Note, inclusive of interest, was €2,598,452, to the second named defendant was €106,703, to the third named defendant was €316,942 and to the fourth named defendant was €43,176. Thus, this would have the effect of adding approximately €3m to the balance sheet of the company which would help to repair the effect of the write-down resulting from the imminent liquidation of Greenblade. M le Monnier on behalf of CTAM said that he would have to bring the question of converting the Loan Note into shares in Éire to the board of CTAM. Mr McPartlan informed the board of an offer from Údarás na Gaeltachta to put an extra €250,000 in new preference shares into the company if this was matched by extended credit facilities of €250,000 from AIB and the promoters of Éire invested €250,000 in new shares in the company . The second, third and fourth named defendants informed the meeting that they were not in a position to supply this new equity. M le Monnier said that he would bring the request for further investment to the board of CTAM for consideration. The second named defendant agreed to explore whether the fifth named defendant would be interested in investing in

Éire.

Prior Involvement of the Fifth Named Defendant in the Affairs of Éire
36. The fifth named defendant is an engineer. For a number of years prior to the events the subject matter of these proceedings, he worked as an engineer in the oil industry in Angola and subsequently in Norway. He was acquainted with the second named defendant and his brother was an employee of Éire. From 2011 he became involved in the affairs of Éire. In May 2011 he lent Éire £50,000 sterling as I have already described in the context of his involvement in ACE. The fifth named defendant said that he had advanced the sum of £80,000 sterling equal to €100,000 by way of a loan between the 22nd October and 1st November, 2012 to Éire. In fact, the sums were paid by him into the account of a company controlled by the second named defendant, Belmont Farms Limited. No documentation was adduced to show how money went from Belmont Farms Limited into Éire or any company associated with Éire. Further, the fifth named defendant claimed that interest in the sum of €29,764 was due to him in respect of these loans. No documentation was provided which established the obligation of Éire to pay any interest or the rate of interest on these advances.

37. In January 2013 the fifth named defendant purchased a small shareholding in Éire from a shareholder, Mr. Paul Kellett. Thus, in November 2013 the fifth named defendant was a shareholder (though not entered on the register as a shareholder in the case of ACE) and apparently a creditor of both Éire and ACE and he was actively considering investing further in both Éire and ACE.

November, 2013 – the Fifth Named Defendant
38. On 21st November, 2013 a composite 13m blade was produced from a mould that Éire had developed in its premises in Galway for ACE. The fifth named defendant emailed the seconded named defendant saying that he had some thoughts "*about how to inject some cash*" and asked the second named defendant to call him that night. Early the following morning he emailed the second, third and fourth named defendants and Mr McPartlan in a jubilant mood about the blade that had been produced. While he noted that there were a few minor issues to fix, "*as I see it, we now have a license (sic) to print money…I am looking into a few avenues for injecting about 50k into EC/ACE.*" He was making no distinction between investing in Éire and ACE.

39. At a date prior to 25th November, 2013 (when there was a board meeting of Éire) the fifth named defendant met a representative of Údarás na Gaeltachta and the third named defendant at Éire's factory. He was aware of the fact that Údarás na Gaeltachta was prepared to invest a further €250,000 on condition, *inter alia*, that AIB advanced a further €250,000 to Éire and the promoters invested a further €250,000 by way of shares in Éire. He was given a copy of Éire's business plan and he had some discussion relating to the business of Éire with Mr. Mc Partlan and the third named defendant.

40. After this meeting and after seeing the factory and the work in respect of Bombardier and the moulds in the factory, the fifth named defendant was interested in investing in Éire.

November, 2013 – ACE
41. At the same time, the fifth named defendant was actively involved in drafting a brochure to be issued by ACE to potential investors. On 26th November, 2013, he and the other personnel involved in ACE were finalising the brochure The brochure described ACE as a spin out company from Éire. The team comprised the second, third, fourth and fifth named defendants and Mr McPartlan. The business of ACE is identified as being based upon a patented mould. This is the intellectual property of Éire that was licensed to ACE the previous year for no fee in respect of 13m blades. The brochure states:

> *"ACE is in a unique position to generate additional revenues by licensing the technology to other wind turbine manufacturers….A strategic decision has been taken by ACE to focus on blades below 30m in length and to license manufacturing of larger blades to existing market leaders."*

This latter idea would involve a further licence from Éire as the existing licence to ACE was confined to 13m and 14m blades.

December 2013
44. On 13th December, 2013 M le Monnier e-mailed Mr McPartlan that the board of CTAM would not invest new funds in Éire. There was no decision on the request to convert the Loan Note. Mr McPartlan responded, informing M le Monnier that the offer from Údarás na Gaeltachta must be accepted by 27th December or it will lapse:

> *"We are in a very serious position regarding payment of wages and other bills and must decide if we are going to continue in business and if so for how long on Friday" [20th December].*

In a further e-mail, he stated that in the absence of an investment of €250,000 by CTAM, the fifth named defendant or an alternative source, Éire would have to be placed into insolvency.

45. On 18th December, 2013 Mr McPartlan e-mailed M le Monnier and the second, third and fourth defendants with the agenda for the meeting of the board of directors on 20th December, 2013. The agenda comprised a review and approval of the minutes of the meeting held on 25th November, 2013, the proposed conversion of loans into share capital, the proposed investment of €250,000 by CTAM and to finalise how the company would proceed in the future. M le Monnier was asked to confirm that the board of CTAM had approved the loan conversion and the investment of €250,000.

46. Two days before the meeting, on 19th December, 2013, CTAM wrote to the directors of Éire stating that the requests had been passed to Carlo Tassara SpA as the indirect controlling shareholder of CTAM. The letter stated:

> *"Please note that pursuant to agreements entered into with the banks financing Carlo Tassara SpA and its affiliated companies, your request will require an additional waiver from such banks.*
>
> *We shall inform you in due time of the decision of Carlo Tassara SpA and of the waiver of the financing banks, with respect to each of your requests."*

The letter was signed by both M le Monnier and Ms Mireille Gehlen. On 19th December, 2013 Mr McPartlan stated that he understood that M le Monnier must await permission from Carlo Tassara SpA and their banks for the approval of the loan conversion and equity investment.

47. On 20th December, 2013 the company accepted Údarás na Gaeltachta's offer to invest €250,000 in Éire for additional preference shares despite the fact that there was no commitment from any shareholder or third party to invest €250,000 in the company or from AIB to extend the company's facilities by a further €250,000. The defendants said they acted because the offer would lapse on 27th December, 2013 if it was not accepted.

Meeting of the Board on 21st December, 2013
48. In the event, the board of directors of Éire met on 21st December, 2013. The second, third and fourth named defendants, Mr Kevin McPartlan and M le Monnier were present. M le Monnier denied that any agreement was reached to convert the Loan Note into shares in Éire. The second, third and fourth named defendants and Mr McPartlan completely disagreed and said that agreement had been reached. The defendants said that their position was reflected in the minutes of the meeting. This is an issue to which I shall return.

49. On 23rd December, 2013 M le Monnier e-mailed the second, third and fourth named defendants and Mr McPartlan noting that "t*wo contemplated solutions of the problems of Éire and Naero had not yet succeeded*". He stated that if by close of business on 24th December, 2013 no satisfactory solution was to be found and agreed, he "*would notify the directors of both companies to take as 26th December, 2013 any and all measures to protect the companies (including their employees, their creditors and their shareholders) under the insolvency procedures available in Irish law, requiring as necessary the advice of Irish counsel*".

50. The fifth named defendant made an offer on 24th December, 2013 to the shareholders of Éire. He offered €100,000 for 100% of Éire and undertook to invest €250,000 equity in the company. The offer was conditional upon all of the directors' loans (including the Loan Note) being converted into shares. The total value of his offer to CTAM was €46,000.

51. Ultimately, the fifth named defendant made three separate offers in respect of the shares of Éire and the Loan Note. The second, third and fourth named defendants accepted his offer of 22nd May, 2014 on 13th June, 2014. CTAM never accepted any of the offers made by the fifth named defendant.

January to April 2014
52. In all the communications between CTAM or representatives of Carlo Tassara SpA and the defendants between 8th January, 2014 and April, 2014 it was never once asserted that agreement was reached by M le Monnier on behalf of CTAM to convert the Loan Note into shares in Éire at the meeting of 21st December, 2013. All communications from CTAM proceeded on the basis that CTAM had not agreed to convert the Loan Note into ordinary shares in Éire.

(1) On 8th January, 2014 Ms Gehlen e-mailed the fifth named defendant regarding his proposal, requesting further information "*regarding the repayment of the €2 million and the related interest*". This is inconsistent with a prior agreement to convert the Loan Note into shares and the subsequent purchase of all the shares in Éire by the fifth named defendant.

(2) On 10th January, 2014 Mr McPartlan e-mailed Ms Gehlen, M le Monnier and the second, third and fourth named defendants. He stated:

> *"(c) You also stated that the new board of CTAM would be holding a meeting this week and that they would consider the proposal to convert the loan into share capital, the new investment and that you would present the new offer to them…*
>
> *(d) The offer from Údarás is contingent on a similar investment of €250,000 by the shareholders and bank finance of €250,000. The bank have indicated that our application will only be considered if the loans were converted into share capital thereby giving the balance sheet a positive value. You seem to be saying that it will take up to several months to get this approval by the CTAM Board/Italian banks …" (emphasis added)*

(3) On 10th January, 2014 Ms Gehlen e-mailed the fifth named defendant referring to the "*contemplated conversion into equity of the loan held by CTAM*" and stated that this requires "*the consent of both the Italian ultimate shareholder of CTAM and the Italian banks … and that such consent will take several weeks or months to be obtained and we are not able to anticipate the position which will be taken. In the interest of time, we shall recommend you to submitting an offer that includes such loan as it is at the present time.*"

(4) On 12th January, 2014 the fifth named defendant confirmed that he had offered €100,000 for all the shares in Éire and that he will inject €250,000 fresh equity. His offer is only on the basis that all the existing shareholder loans are converted to equity.

(5) On 10th January, 2014 the third named defendant e-mailed M le Monnier saying that in order to get the additional necessary finance from Údarás, AIB and the fifth named defendant, the balance sheet of Éire had to be improved by the shareholders' loans being converted to shares. He said that they had to "*find the way to have the board of CTAM and the relevant bankers make a decision on this offer.*" (emphasis added)

(6) On 14th January, 2014 he again e-mailed M le Monnier asking him to confirm that he had received his e-mail of 10th January and when he might expect to receive a decision from CTAM.

(7) On 14th January, 2014 he again e-mailed M le Monnier saying "*as you aware the loans have to be converted to shares so that the balance sheet will be improved and the bank will release additional funds… I know you are dependent on the board of CTAM to make the decision and in addition the bankers will have to approve the deal, but there must be some way that a decision can be got in a shorter time-frame.*" (emphasis added)

(8) On 20th January, 2014 the fifth named defendant e-mailed Ms Gehlen saying that his offer to buy Éire was contingent on the Loan Note being converted into an increased shareholding by CTAM. He said that he was offering CTAM €46,000 to write off the loan and the interest and to sell their shares in Éire to the fifth named defendant.

(9) On 12th February, 2014 the fifth named defendant made a second formal offer to CTAM to purchase its shareholdings in Éire, Naero and the convertible loan and accrued interest for the total sum of €37,000. The letter stated that share transfer documentation for both Éire and Naero and the transfer of the loan and accrued interest will be hand-delivered to M le Monnier. He also offered to indemnify CTAM against all current and future claims brought by all parties against any of the companies of the Éire Composites Group.

(10) In an e-mail of 5th March, 2014 from Ms Gehlen to the fourth named defendant, she pointed out that the repayment of the Loan Note is senior to any reimbursement of the shareholders. The offer from the fifth named defendant even in its

revised form writes off the Loan Note, in spite of its importance.

(11) By e-mail dated 10th March, 2014 the fourth named defendant stated that Éire needed to convert shareholder loans to equity and "*this was our first request to CTAM and [we] need to do this immediately*."

(12) On 19th March, 2014 there was a meeting of the board of directors of Éire. In relation to the offer from the fifth named defendant, CTAM indicated that they had three problems with the offer, including the fact that the loan reimbursement was not enough. The second named defendant "*again proposed*" that all the loans be converted into ordinary share capital but M le Monnier stated that "*this proposal was refused by the board of CTAM.*" It was not recorded anywhere that anyone present suggested that an agreement had already been reached on 21st December, 2013 to convert the Loan Note into shares in Éire.

(13) Mr McPartlan e-mailed M le Monnier the following day, on 20th March, 2014, attaching minutes of the meeting of 19th March, 2014 and a summary of "*the options available to the company depending on the decision of the board of CTAM on whether to convert the loan into ordinary shares.*"

(14) On 28th April, 2014 the third named defendant emailed the second and fourth named defendant, M le Monnier, and Mr Martin O'Gorman about a proposed board meeting to be held on 5th May, 2014. Item 3 on the agenda was

"Approval of shareholders loans conversion for 2014 audited accounts (agreement has been given by all shareholders for this with the exception of CTAM)" (emphasis added).

Naero and Greenblade

53. In addition to the difficulties in Éire, there were critical issues in Naero and Greenblade which required agreement between CTAM and Éire and the second named defendant. In 2013 and 2014, M le Monnier on behalf of CTAM disagreed with the treatment of the accounts for Naero for the year 2012. In 2011 he consulted with A &L Goodbody, solicitors to CTAM, concerning the proposed use of receivables due to Greenblade to pay the unpaid share capital in Naero. The second named defendant attended at the latter half of this meeting. At that time, there was €2,550,000 due by the shareholders in respect of unpaid issued share capital. Naero had guaranteed the liability of Greenblade to ILB in the sum of approximately €1.6 m. The second named defendant was advising that Greenblade was liable to go into liquidation. Greenblade owed its landlord, Reber Park GmbH, significant sums. Reber Park GmbH was owned and controlled by the family of the second named defendant. The second named defendant proposed to pay the balance of the unpaid issued share capital in Naero through the transfer of the debts due by Greenblade to Reber Park GmbH at a time when Greenblade was on the verge of liquidation. M le Monnier asserted that his advice was that this was impermissible as it amounted to preferential treatment of some creditors over others at a time when Greenblade was facing liquidation.

54. On 4th July, 2013 M le Monnier emailed Mr McPartlan saying that he did not agree with the draft Naero accounts showing the share capital as paid up. On the 5th July, 2013, Mr McPartlan met M le Monnier to discuss the accounts. The note of the meeting records that M le Monnier was to discuss with CTAM's lawyers whether money due from Greenblade could be used to pay the share capital in Naero.

55. On 26th November, 2013 the second named defendant emailed M le Monnier regarding Greenblade. He stated:

"Regarding the conversion of creditors of Greenblade (Costello, EC [Éire]) into share capital in Naero Ltd I also feel that this is the best way to proceed. I accept that the insolvency manager [of Greenblade] could overturn the transactions and follow the 3 shareholders for the unpaid share capital but this is the risk I feel we should take….I accept that the advice you got from Goodbodys' solr suggested that we were giving preferential treatment to the creditors (Costello and EC) by converting the creditors to capital in Naero Ltd. Solicitors are usually ultra cautious so we need to make a commercial call and I discussed this at our meetings.

The worst case scenario is that the insolvency manager in Germany follows EC, Costello and Carlo Tassara for the 2.5 million but as all our financial positions are very weak he will have very little hope of getting money. I don't feel that this can lead to a criminal action."

56. On 2nd December, 2013 the second named defendant was considering ways in which to improve the appearance of the balance sheet of Éire. He emailed M le Monnier, Mr McPartlan and the third and fourth named defendants suggesting that Éire arrange a further audit for the 31st December, 2013 and present a revamped balance sheet for Éire's banks and Bombardier, its most important customer. He explained that the new balance sheet may impress Bombardier sufficiently to look upon Éire as a good safe customer and to give Éire proposed new orders.

"By auditing at 31st/12/2013 (six months after last audit) we are creating more space between our capital conversion in Naero Ltd so it may be less suspicious for the Germans (emphasis added)

Please confirm that the write down regarding the investment in Naero is also taking account of the 1,050,000 increase in capital due to the conversion of the creditor position in Greenblade".

57. Aditionally, on the 2nd December, 2013 the minutes for meeting of the Board of directors of Naero of the 5th March, 2013 were drafted. Contrary to the emails from July 2013 to the 2nd December, 2013 - which suggested that no agreement had been reached regarding the treatment of the accounts of Naero for 2012 and in particular in relation to the unpaid share capital - the minutes state that it was "*agreed by all present that the amounts owed by Greenblade GmbH to Éire Composites Teoranta and the Costello partnership be used to pay the unpaid share capital in Naero Composites as follows:*

Éire Composites Teoranta 1,300,500

Carlo Tassara 382,500

Costello 867,000

M. le Monnier, representing Carlo Tassara, requested that their contribution be paid out of the balance owing to the Costello partnership TCP and, to facilitate this, that Carlo Tassara would reduce their shareholding to 10% and increase Mr. Costello's to

39%".

58. On the 24th January, 2014 Finanzamt, on behalf of the Department of Finance in Brandenburg, demanded repayment of the full amount of the grant advanced to Greenblade plus interest in the sum of €2,068,408. The amount was due by the 28th February, 2014 and if Greenblade did not repay the sum in full by that date it had a further two weeks in which to register for insolvency.

59. In addition, ILB had advanced a grant to Greenblade. They stated that they would demand the return of their grant of €1.6 million plus interest if the Finanzamt demanded their part of the grant aid. Thus, the demand by Finanzamt was liable to trigger a demand by ILB for payment by Greenblade of a sum in excess of €1.6 million. Naero had guaranteed the liability of Greenblade to ILB. Insofar as it could not pay on foot of the guarantee there was a risk that the shareholders could be called upon to repay the balance due on the unpaid issued share capital so long as it remained unpaid.

60. On the 27th February, 2014 the second named defendant emailed the third and fourth named defendants, Mr McPartlan and M le Monnier informing them of the fact that Greenblade would apply for insolvency on the 14th March, 2014. He indicated that the insolvency manager who would be appointed to Greenblade might try to recover from Naero pursuant to the guarantee given by Naero to ILB. He stated "*the issue regarding our increase in share capital of Naero Ltd which could be construed as "preferential treatment" of creditors (see Goodbody opinion) could be problematic but I feel that there will not be an appetite on the part of the insolvency manager to follow the individual shareholders of Naero Ltd because a quick investigation of all three shareholders will show*" that they are all in a very weak financial position.

61. This email treats the payment of the share capital in Naero in the accounts for 2012 as a *fait accompli*.

62. Twelve days later on the 11th March, 2014, Mr McPartlan emailed M le Monnier "*can we review and approve the 2012 accounts for Éire Composites, Naero Composites and CTL at next Tuesday's meeting? I will also have the draft accounts for 2013 for discussion.*" In fact, the accounts for Naero for the year 2012 were signed by the second and fourth named defendants on the 13th of August, 2013 and filed in the Company's Registration Office on the 14th August, 2013. The accounts showed the share capital of 8.5 million as fully paid up as of 31st December, 2012.

63. The fact that the accounts have been filed in August 2013 came to CTAM's attention in March 2014. M le Monnier emailed the second named defendant on the 4th April, 2014 protesting strongly that this had occurred without any formal approval of the accounts by the board of Naero or the shareholders of Naero on behalf of CTAM. He informed the second named defendant that CTAM would continue to challenge the treatment of the accounts as not being compliant with Irish accounting and legal rules.

64. On 13th April, 2014 M. le Monnier discussed the issues surrounding the accounts with the fourth named defendant. On the 10th April, 2014 the fourth named defendant emailed M. le Monnier stating that the second named defendant was willing to consider buying the shares in Naero belonging to Éire and CTAM at a nominal price and signing a letter of guarantee protecting Éire and CTAM from "any exposure to the Greenblade/Naero situation". The issue was linked to the conversion of the Loan Note and sale of shares in Éire as follows:

> *"[Éire] is willing to go ahead and have audited accounts produced to June 30th 2012 and June 30th 2013 with a note to the accounts stating that the directors PJ Feerick, Dr. Conchur O'Bradaigh and Billy Costello and Carlo Tassara Asset Management have agreed to convert the loans and accrued interest into ordinary share capital.*
>
> *In return, [Éire] wishes to close out its 2014 accounts by the end of April so that we can present a more stable balance sheet to Bombardier, the banks, Udaras and potential investors. This would include the conversion of loans and accrued interest in the 2014 accounting period.*
>
> *In consideration of Billy Costello accepting points 1 and 2 above, Carlo Tassara Asset Management agree to sell their shareholding in Éire Composites Teoranta for a nominal amount to a nominee, who is willing to invest €250,000 in additional share capital as requested by Udaras Na Gaeltachta in the letter of offer dated 10th December, 2013. This transaction will occur simultaneously with [Mr Costello buying the shares and providing the guarantee referred to.]"*

Alleged Agreement to Convert the Loan Note

65. By the end of April 2014 an empasse had been reached between CTAM on the one hand and the second, third and fourth named defendants on the other hand in relation to Éire and Naero. The second, third and fourth named defendants decided to consult a solicitor, Mr Brian O'Callaghan, to act on behalf of Éire. On the 12th of May, 2014 he wrote to M le Monnier as the managing director of CTAM and to the secretary of Carlo Tassara SpA. The letter identified CTAM as the shareholder in Éire though it addressed Carlo Tassara SpA as the shareholder in Éire. The letter stated:

> *"I note that an agreement was agreed between all shareholders of my company client on the 20th December, 2013 which, as insisted by you, was evidenced by follow on email to you from my client on the 24/12/2013. I am instructed that you, your servants or agents have either refused, failed or neglected to comply or implement the agreement…I confirm that my company client has proceeded and is proceeding as follows;*
>
> > *1. To have, without any further recourse to you, the aforesaid agreement completed as per the terms agreed between the shareholders whereby inter alia all shareholders loans in my company client have been converted into equity in the company as of 20th December, 2013. As previously advised to and noted by you, the net result of this agreed conversion is that Carlo Tassara Asset Management is a 47% shareholder in the company.*
> >
> > *2. That the company is implementing the terms of the agreed Flanagan Investment Scheme for the company, noting that you previously refused the opportunity or option of a similar investment by you in the company.*
> >
> > *3. That my company client should notify the relevant authorities immediately of your breach of your aforesaid fiduciary and legal duties owed to my client.*
> >
> > *4. That all company accounts for the year ending 30/06//2014 which reflect the terms of the aforesaid agreement will be completed and filed in the company's office.*
> >
> > *5. That my company client shall reserve it's (sic) position regarding the possible issuing of proceedings against you*

both and/or each of you to recover any losses sustained by the company resulting from your aforesaid conduct."

This was the first occasion that it was suggested that a binding agreement by CTAM to convert the Loan Note had been reached at the board meeting on 21st December, 2013.

Alleged Exercise of Drag Along Provision in the Shareholders' Agreement
66. Ten days later on the 22nd May, 2014 Éire wrote to M le Monnier as follows:

> *"This is to formally make you aware of an approach which has been made to Éire Composites Teoranta by a Third Party, Dr. Thomas Flanagan, to purchase the entire Issued Share Capital of the company and, if such offer is acceptable to the shareholders, to conclude the deal as soon as possible.*
>
> *The terms of the Offer are as follows:*
>
> > *(1) €0.0015 per Ordinary Share of the total Issued Ordinary Shares of 33,034,529. This is the total number of Shares Issued following the conversion of the Loans and Loan Interest accrued in the Balance Sheet to Equity. As you are already aware Carlo Tassara Asset Management owns 15,568,409 or 47.13 % of this total.*
> >
> > *(2) An immediate Cash Investment of €250,000 in Éire Composites Teo as requested in the Údarás Offer letter dated 10th December, 2013*
> >
> > *(3) An additional Cash Investment of €100,000 for use as Working Capital into Éire Composites Teo*
> >
> > *(4) The Personal Guarantees for the Éire Composites and CTL bank loans and overdraft, which are currently provided by the Directors, are to be provided by Dr. Flanagan to the satisfaction of the bank.*
>
> *The Executive Management of the company wish to bring this offer to your attention so that Carlo Tassara Asset Management may have one final opportunity to present a counter proposal.*
>
> *Should we not hear from CTAM within 7 working days, we will assume that CTAM is not interested in putting forward a counter offer and will proceed accordingly. Be aware that should more than 50% of the equity owners agree to accept Dr. Flanagan's offer the remaining Equity owners are obligated and compelled as per Paragraph 8.3 of the "Drag Along" conditions in the Shareholders Agreement of 16th January, 2007, to also sell their shares to Dr. Flanagan on the same Terms and Conditions as the majority of the shareholders have agreed to."*

67. By letter dated the 23rd May, 2014 CTAM wrote to Mr O'Callaghan strongly disagreeing that any agreement on the fifth named defendant's offers had ever been reached by either the shareholders and/or directors of Éire or Naero, be it orally or in writing. The letter stated that CTAM considered the allegation that such offer had been accepted and was being implemented to be unlawful and potentially fraudulent. The letter stated that no one can require the holder of a Loan Note to convert its loan into equity without its consent.

68. On the 2nd June, 2014 CTAM wrote to Mr O'Callaghan in relation to the letter of the 22nd May, 2014 from Éire. The letter expressly stated:

> *"CTAM has never agreed in any manner whatsoever to any kind of conversion into shares of the Loan Note held by CTAM against Éire Composites. Such conversion is at the hand of the holder of the loan (CTAM) and requires a positive specific decision that has never been taken by CTAM.*
>
> *The statement made by your client that CTAM would own 15,568,409 shares representing 47.13% of the company's share capital is therefore factually inaccurate….*
>
> *Therefore the Drag Along provisions referred to in your client's letter only refers to the shares owned by CTAM in the company but does not include either the Loan Note nor the shares of the company resulting from the would be conversion. Under no circumstances CTAM shall be deprived from (sic) the benefit of this Loan Note."*

The letter also objected to the proposed transaction on the basis that there was no evidence that it was a *bona fide* arms length offer made by a third party as there had been no information provided to show that the proposal was made on his own account and that he was not acting as the agent for another person.

69. On the 5th June, 2014 the directors of Éire, other than M le Monnier, met in the company's premises in Galway. The agenda for this board meeting did not state that the minutes of the board meeting of the 21st December, 2013 were to be considered and approved. No draft minutes of that meeting were circulated in advance. On the 5th June, 2014 the fourth named defendant produced a typed version of the minutes of the 21st December, 2013 and presented it to the directors present on the 5th June, 2014 for their approval. It was signed by those present.

70. On the 13th June, 2014 the second, third, fourth and fifth named defendants, Mr Kevin McPartlan, Mr Martin O'Gorman and Ms Anne Marie O'Bradaigh signed a hand written document stating:

> *"The following shareholders of Éire Composites Teoranta have agreed to accept the proposal of Dr. Thomas Flanagan [the fifth named defendant] and agree to proceed with the Drag Along clause in the shareholders' agreement. Dr. Flanagan acquires the entire shares in the company for €35,000 €45,000. This is subject to Dr. Flanagan investing €250,000 in share capital (as required in the Udarus offer) and €100,000 in working capital.*

Purported Implementation of the Fifth Named Defendant's Offer

Investment by the fifth named defendant
71. On the 30th June, 2014 Éire and the fifth named defendant entered into a convertible Loan Note. The agreement recited that by resolution of the board of directors of Éire on the 30th June, 2014, Éire resolved to create and issue a convertible Loan Note of

€645,559. Éire then issued the convertible Loan Note in that amount in favour of the holder of the Loan Note, the fifth named defendant. The interest payable on the principal was 6% per anum. The Loan Note was repayable three years from the date of issue. Éire had the right to redeem the convertible Loan Note or any part thereof prior to the date of redemption. In the event that Éire failed to pay to the fifth named defendant the principal sum outstanding following fourteen days after the receipt of a redemption notice served by the fifth named defendant on Éire, the convertible Loan Note will be converted into ordinary shares in the company.

72. The fifth named defendant stated that any monies he advanced to Éire prior to the 30th June, 2014 were loans and not equity. By issuing the Loan Note to the fifth named defendant both parties were acknowledging this fact. Specifically, the money was not used to subscribe for shares in Éire or to purchase shares from the existing shareholders in Éire. The fifth named defendant explained that the Loan Note was created to improve the balance sheet of Éire. While the monies remained repayable as loans, they were convertible at the instance of Éire into ordinary shares in Éire and therefore could be treated as equity in the accounts of Éire.

73. The evidence regarding the funds allegedly provided by the fifth named defendant to Éire was hotly contested, unsatisfactory and inconclusive for a number of reasons. Firstly, most of the documentary evidence on which the fifth named defendant ultimately relied at the hearing of the action was not discovered prior to the commencement of the action. This meant that CTAM's expert witness, Mr James Luby, accountant, could not confirm from the documents produced by the defendants on discovery that the alleged investment of €250,000 was in fact ever made to Éire. This evidence was not challenged by the defendants in cross-examination. Mr Luby's evidence was that the alleged investment (if any) of the fifth named defendant which purportedly saved Éire was small and piecemeal.

74. Secondly, counsel for CTAM objected to the defendants' subsequent attempts to introduce evidence to rebut that of Mr Luby and I heard the evidence de bene esse. It was submitted that it was a fundamental requirement of fairness that a party must put its case to a witness on cross-examination. CTAM relied upon *Browne v. Dunn* (1893) 6 I.R. 67 to the effect that if a party fails to put its case to a witness the court has a discretion as to whether to admit the contradictory evidence. In general, however, it will not be admitted unless the witness is recalled and the evidence is put to him or her and the witness is given an opportunity to comment upon it. CTAM urged that the further evidence of the alleged investment by the fifth named defendant in Éire should not be admitted.

75. The principle that a party must put its case to a witness on cross examination is central to the conduct of a fair trail. This evidence was not put to Mr Luby when he gave evidence on behalf of CTAM. Éire was represented at trial by experienced counsel and solicitor and there is no reason why the first named defendant should be entitled to depart from this core principle.

76. The difficulty is that the fifth named defendant represented himself (as did the second, third and fourth named defendants in relation to the personal claims against them). The fifth named defendant struggled to understand his role in the proceedings, given the fact that no relief was sought directly against him. Some of the documents upon which he sought to rely were not within his power or possession and therefore could not have been discovered by him. I have concluded that the trial would be unfair if I did not permit him to introduce this evidence notwithstanding the principle in *Browne v. Dunn*. Counsel for CTAM did not ask that Mr Luby be recalled and the new documents put to him in cross-examination. He was in a position to cross examine the fifth named defendant in relation to his evidence regarding the provision of funds to Éire.

77. The fifth named defendant gave evidence that he made one direct payment to the account of Éire on the 2nd April, 2014 for the sum of €49,786.03. He made two payments of £10,000 sterling on the 23rd and 27th April, 2014 into the bank account of a subsidiary of Éire, CTL Taisteal Teo. (CTL). These payments were made in sterling because the fifth named defendant's money was in a sterling bank account and payments were made to CTL rather than to Éire because CTL had a sterling bank account whereas Éire did not. This approach avoided foreign exchange costs. The fifth named defendant said that the £20,000 sterling paid to CTL should be treated as an investment by him of €25,000 in Éire. Thus he paid €75,000 (in round figures) for the benefit of Éire.

78. He said that the balance of his investment in Éire was made through at least three companies:

> (1) On 27th February, 2014 and 18th June, 2014 ACE paid two transfers of €50,000 each to Éire. He explained the source of the funds for the transfer of 18th June, 2014 as follows. He paid €50,000 into a company called Belmont Farms Ltd, a company controlled by the second named defendant, by way of two transfers of £10,000 sterling made on the 12th June, 2014 and one of £8,000 sterling on the 20th June, 2014. A payment of €15,000 was made on the 11th June, 2014. On the 13th June, 2014, Green Generation Ltd, another company controlled by the second named defendant, transferred €50,000 to ACE. On the 18th June, 2014 ACE transferred €50.000 to Éire. Thus, monies passed from the fifth named defendant to Belmont Farms Ltd, and it was said, though not proved, that Belmont Farms Ltd paid an equivalent amount to Green Generation Ltd, and Green Generation Ltd in turn paid an equivalent sum to ACE and then ACE paid an equivalent sum to Éire. This is said to represent an investment by the fifth named defendant of the sum of €50,000 in Éire in June 2014. No credible explanation was offered as to why the money could not have been advanced directly as had occurred previously on the 2nd April, 2014 nor was there evidence adduced in relation to these payments on behalf of these companies such as would entitle the court to trace the funds from the fifth named defendant to Éire. There was no comparable exercise carried out to explain how the transfer of €50,000 by ACE to Éire could be shown to be an investment by him in Éire.
>
> (2) Another company, owned and controlled by the second named defendant, Future Pigs Ltd, lodged €36,000 to the account of CTL on 16th January, 2014. There was no evidence to show how this represented an advance by the fifth named defendant to Éire through CTL.
>
> (3) Green Generation Ltd paid CTL €11,200 on 2nd April, 2014, €20,000 on 31st July, 2014 and €12,500 on 15th September, 2014. The fifth named defendant did not show how these payments could be regarded as advances by him to Éire through CTL.

79. In addition to this investment by way of a loan to Éire of €254, 486, the fifth named defendant said that he had invested a further €129,764 in Éire. Between the 22nd October, 2012 and the 1st November, 2012 the fifth named defendant transferred £80,000 sterling (which he equated to €100,000) into the account of Belmont Farms Ltd. He treated this as a loan to ACE. There was no documentation showing how these monies ended up in ACE or any other documentation to support or evidence the transaction. He said that interest in the sum of €29,764 had accrued on this loan so that the total sums due to him by ACE came to €129,764. He treated this loan to ACE, advanced in October and November 2012, as part of his investment in Éire in 2014. He explained this on day 16 of the trial:

> *"So Éire should have paid the money [it had received as a prepayment to develop the 13m blade] back to ACE, but it didn't have the money so it basically gave a bond to ACE. And ACE owed me money, so ACE gave a bond to me from Éire. So Éire owed me the money."*

80. In addition, it is not clear how the fifth named defendant paid for the total issued ordinary shares in CTAM or whether he provided an additional cash investment of €100,000 for use as working capital as was set out in the letter of 22nd May, 2014 and was accepted by the majority of the shareholders in Éire on the 13th June, 2014.

81. The entire process whereby the fifth named defendant invested in Éire can only be described as opaque and convoluted. Neither Mr McPartlan, the financial controller of Éire, nor the third named defendant, the managing director of Éire, both accountants by profession, could explain how the alleged investment in Éire occurred. Neither could it be traced in the books of Éire. There was no evidence to substantiate the investment by the fifth named defendant in Éire/CTL other than the three payments made directly by the fifth named defendant to the accounts of Éire and CTL.

82. The totality of this evidence does not establish, to my mind, that the fifth named defendant invested €250,000 in Éire in 2014 (whether before or after 13th June, 2014). On his own case, nearly all of the monies had left the accounts of the fifth named defendant before his offer of 22nd May, 2014 was accepted on 13th June, 2014. Insofar as he relies upon the advances to ACE in October and November 2012, there was no evidence to establish how this loan became an investment in Éire by the fifth named defendant other than his explanation that I have quoted above.

83. Cash did make its way into the accounts of CTL and Éire from Green Generation Ltd, Future Pigs Ltd and ACE but as there was no evidence regarding the liabilities of these companies or the reason for the transfers it is not possible to conclude that the funds can be traced from the fifth named defendant to Éire. They were, as described by Mr Luby, piecemeal and in the context of an alleged requirement of an additional €750,000 in December 2013 small.

Conversion of the Loan Note
84. On 17th July, 2014 the board of Éire (with the exception of M le Monnier who did not attend) resolved to accept the conversion of the shareholders' loans including the Loan Note into ordinary shares in Éire. It would appear therefore that the conversion of the Loan Note had not taken place prior to this date. The resolution specified that CTAM was the holder of a loan worth €2 million and that it would be converted into 5,079,324 shares. Mr McPartlan explained that Éire was formalising the agreement reached on 21st December, 2013. No documents purporting to implement the resolution were adduced in evidence. Éire filed its annual return for the year ended 31/03/2014 on 23 July, 2014 with the Companies Registration Office which showed CTAM as the holder of 5,079,324 Ordinary Shares in Éire and Carlo Tassara SpA as the holder of 8,825,360 Ordinary Shares in Éire, despite the fact that on the face of the resolution the Loan Note had not been converted into ordinary shares by 31st March, 2014.

85. On the 25th July, 2014 the fifth named defendant entered into a share purchase agreement with Éire. Clauses 5.2 and 5.3 provided:

> *"The Purchaser will invest €250,000 in the company as requested in the Letter of Offer from Údarás na Gaeltachta dated 10th December, 2013.*
>
> *The purchaser will advance €100,000 to the Company for its Working Capital requirements."*

The purchaser was identified as the fifth named defendant. Schedule 1 of the agreement identified the shareholders and shareholding held prior to the sale of shares. Carlo Tassara SpA is listed as the owner of 8,825,360 shares and CTAM as the holder of 6,768,199 ordinary shares. The shareholders who would be issued with a Drag Along provision pursuant to Clause 8.3.1 of the Shareholders Agreement were identified as Carlo Tassara SpA, CTAM, Professor Patrick Mallon, Christine Naylor, Kumar Saidha and UCG Research Applications Ltd.

Drag Along
86. Finally, on the 1st August, 2014 two Drag Along notices were issued by Éire to Carlo Tassara SpA and CTAM. The notice provided:

> *"The Selling Shareholders (Appendix A) of Éire Composites Teoranta, having on 13 June 2014 accepted the Purchase Offer by Mr. Tomas Flanagan (dated 22 May 2014), hereby exercise their right to require Carlo Tassara SpA to sell its Shareholding in Éire Composites Teoranta to Mr. Tomas Flanagan under the Drag Along provisions 8.3.1 of the Shareholders Agreement of 16 January, 2007.*
>
> *To: Carlo Tassara SpA*
>
> *The undersigned is the Managing Director of Éire Composite Teoranta, a company registered in the Republic of Ireland:*
>
> *1. The Drag Along Right is currently exercisable to sell a total of 14,602,765 Drag Along Shares, 8,825,360 of which are currently held by Carlo Tassara SpA.*
>
> *2. The undersigned Éire Composite Teoranta hereby exercises its right to require Carlo Tassara SpA to sell all of its shares pursuant to the Drag Along Right.*
>
> *3. Pursuant to this exercise of the Drag Along Right, Carlo Tassara SpA shall deliver to Éire Composites all the Éire Composites share certificates on or before 25/08/14 in accordance with the terms of this Drag Along Right.*
>
> *4. The Carlo Tassara SpA Drag Along Purchase Price is €13,328 calculated as 8,825,360 shares at €0.0015/share. €0.0015 is the Purchase Price per share offered by Mr. Flanagan and accepted by the Selling Shareholders."*

87. The Drag Along Notice identified the selling shareholders as those who accepted the offer on the 13th June, 2014. Erroneously, the fifth named defendant is described as a selling shareholder and so his 0.80% shareholding needs to be deducted, giving the selling shareholders a total of 52.65% of the shares in Éire.

88. The letter to CTAM is in the same terms save that it identifies CTAM as owning 5,079,324 shares in Éire. Clause 4 of the letter provides:

> *"The Carlo Tassara Assets Management SA Drag Along Purchase Price is €10,152 calculated as 5,079,324 shares, plus interest equivalent to 1,688,875 shares at €0.0015/share. €0.0015 is the share Purchase Price per share offer by Mr. Flanagan and accepted by the selling shareholders."*

89. Though the notices were dated 1st August, 2012 they were not posted until 12th August, 2014 and received on 18th August, 2014. On the 22nd August, 2014 CTAM replied again stating that neither Carlo Tassara SpA nor CTAM ever agreed in any manner whatsoever to any kind of conversion into shares of the Loan Note held by CTAM. The letter confirmed that only CTAM could convert the Loan Note and neither the borrower nor the shareholders of the borrower could do so and no decision to convert the Loan Note had ever been taken by CTAM. The letter also pointed out that the sole shareholder in Éire was CTAM and not Carlo Tassara SpA. The letter stated:

> *"The drag along provisions referred to in the so called "drag along notice" could not, under any circumstances, deprive CTAM of the benefit of this Loan Note."*

The letter also stated that CTAM did not consider the terms of the fifth named defendant's offer to be made on an arms length basis and therefore the so called Drag Along notice received was null and void. It said that no shares of Éire held by CTAM may be transferred to the fifth named defendant in this context. The letter concluded as follows:

> *"Any attempt to transfer, in connection with so called "drag along notice" dated August 1, 2014, the shares of the Company held by CTAM to a third party (whether Dr. Tomas Flanagan or any entity owned, managed or controlled by Dr. Tomas Flanagan or any person other than CTAM) or to deprive CTAM of its right as holder of the Loan Note, will trigger legal proceedings from CTAM, including criminal claims, against the persons involved in such matters."*

90. The fifth named defendant asserts that he has purchased 100% of the shares in Éire, including the shares issued to CTAM upon the conversion of the Loan Note and that CTAM has no further interest in Éire. CTAM rejects this position and says that it has unlawfully been deprived of its Loan Note and that the Drag Along by means of which its shares in Éire were purportedly sold to the fifth named defendant is null and void.

91. CTAM says that the guarantors were in breach of their obligations under the guarantees entered into on 5th November, 2009 and demanded repayment of the guaranteed sum in full. The second, third and fourth named defendants responded by denying that they are liable to CTAM under the guarantees.

92. In the event, CTAM instituted these proceedings on 28th November, 2014. The defendants raised a number of preliminary points by way of defence.

Holder of the Loan Note
93. The defendants maintained that there was insufficient evidence to show that the plaintiff was ever the holder of the Loan Note issued by Éire to Carlo Tassara SpA in 2007 and therefore the plaintiff had no *locus standi* to maintain the action insofar as it was based upon its alleged right to the Loan Note.

94. This argument is simply untenable. The plaintiff has adduced the original documents whereby Carlo Tassara SpA assigned its interest in the Loan Note to Carlo Tassara France SAS on 6th October, 2008 and the further assignment by Carlo Tassara France SAS to CTAM on 12th November, 2008. The provisions of the agreement between the shareholders in Éire, Éire and Údarás na Gaeltachta of December 2009 shows clearly that the Loan Note Instrument was assigned by Carlo Tassara SpA to Carlo Tassara France SAS on 6th October, 2008 and by Carlo Tassara France SAS to Carlo Tassara Assets Management SA on 12th November, 2008. Éire and the second, third and fourth named defendants each signed up to this agreement and warranted to Údarás na Gaeltachta that the information set out in the recitals and first and second schedules was true and accurate in all respects and not misleading. At all material times all parties treated CTAM as the holder of the Loan Note up to and including the purported exercise of the Drag Along provisions of the shareholders agreement on the 1st August, 2014.

95. Moreover, the defence is predicated upon CTAM being the holder of the Loan Note in 2013 and 2014. The basis upon which they assert that the Loan Note was converted into ordinary shares in Éire is an agreement reached with M. le Monnier whereby CTAM thereby agreed to convert the Loan Note into shares in Éire. No such agreement can be asserted if CTAM were not the holder of the Loan Note. When purporting to exercise the Drag Along provisions in the Shareholders Agreement, CTAM was treated as a shareholder in Éire in respect of the shares created following the purported conversion of the Loan Note into Ordinary Shares in Éire. If CTAM was not the holder of the Loan Note then the Drag Along sale in respect of these shares must be invalid.

Was CTAM a Shareholder in Éire?
96. CTAM was never entered on the register of shareholders for Éire as the owner of the shares originally issued to Carlo Tassara SpA in 2007. The defendants' case was this was because the transfer of the shares was subject to stamp duty and that until the stamp duty was paid CTAM could not be registered as the shareholder on the share register for Éire and Naero. It was not entitled to bring any proceedings predicated upon CTAM being a shareholder in Éire. Despite this argument, CTAM was in fact registered as the holder of the shares in Naero in succession to Carlo Tassara SpA.

97. Ultimately, CTAM's Irish lawyers, A & L Goodbody, filed a stamp duty return in respect of the shares transferred in Éire. This form stated that the vendor was Carlo Tassara SpA and the purchaser was Carlo Tassara Assets Management SA. The parties claimed relief on transfers between certain bodies corporate (S79 SDCA 1999) and the Revenue Commissioners issued a certificate on the 18th December, 2013 to the effect that there was no tax chargeable on the basis of the relief applicable to transfers between certain bodies corporate. While the certificate issued by the Revenue Commissioners was blank as to the purchaser, the document ID number 130086659K was the same as that filed by A & L Goodbody on behalf of CTAM. Accordingly, there is no doubt that as and from the 18th December, 2013 there was no impediment to the registration of CTAM as the shareholder in succession to Carlo Tassara SpA

98. I am satisfied that on the 12th November, 2008 CTAM was entitled to be entered on the register of shareholders as transferee of the Carlo Tassara SpA shares and certainly was so entitled after 18th December, 2013.

99. The position of CTAM was governed by the provisions of Clause 8.1.1 of the shareholders agreement which stated that:

> *"For the purposes of this clause, where any person is unconditionally entitled to be registered as the holder of a share he and not the registered holder of such share shall be deemed to be a member of the company in respect of that share."*

As of the 12th November, 2008 CTAM was unconditionally entitled to be registered as the holder of Carlo Tassara SpA's shares and therefore for the purposes of Clause 8 of the shareholders agreement CTAM is deemed to be the member of Éire in respect of these shares. As Clause 8 includes the Drag Along provisions, CTAM has *locus standi* to sue in respect of the purported invocation of these provisions in August 2014 in respect of the shares registered in the name of Carlo Tassara SpA in Éire.

100. Furthermore, it is clear that Carlo Tassara SpA, Carlo Tassara France SAS and CTAM are all companies within the Carlo Tassara group and were affiliates within the meaning of Clause 8.8 of the shareholders agreement of 16th January, 2007. Clause 8.8 provided that a transfer of shares to an affiliate company of a shareholder shall not be considered a transfer for the purposes of Clause 8 of the shareholders agreement provided that the transferee shall agree to be bound by the terms of the agreement. M le Monnier proved that CTAM was an affiliate of Carlo Tassara SpA and that Carlo Tassara France SAS was an affiliate of each of them. In oral evidence, Mr McPartlan on behalf of Éire accepted that there was no longer an issue that CTAM was an affiliate of Carlo Tassara SpA. The defendants argued that there was no evidence that CTAM agreed to be bound by the terms of the shareholders agreement and was treated as a shareholder of Éire by the directors of Éire and other shareholders.

101. This position is confirmed by the subsequent agreements and actions of the defendants (with the exception of the fifth named defendant). The Agreement of the 5th November, 2009 between the shareholders of Éire, Éire and Údarás na Gaeltachta stated the Carlo Tassara SpA means an affiliate of CTAM and that Carlo Tassara France SAS means an affiliate of Carlo Tasara SpA and CTAM. CTAM is listed as a shareholder in that agreement and executed the agreement as shareholder. Éire, the second, third and fourth named defendants warranted that the recitals were true, complete and accurate in all respects.

102. On 8th January, 2013, the fourth named defendant, as company secretary to Éire, wrote to CTAM notifying it of an offer by the fifth named defendant to purchase the shares of Mr Paul Kellett in Éire and offering it the opportunity pursuant to para. 8.1.4 of the Shareholders Agreement of 2007, to exercise its pre-emption right as an existing shareholder to purchase the shares instead. Thus, as of January 2013 CTAM was treated as the owner of the shares in Éire and afforded the pre-emption right of an existing shareholder to purchase the shares offered for sale by another shareholder. CTAM has relied upon the terms of the Shareholders Agreement in its dealings with all of the defendants and has sued upon the Agreement. It has therefore agreed to be bound by the terms of the Shareholders Agreement and the other agreements of 2009.

103. The objection that CTAM was not a transferee of the shares originally issued to Carlo Tassara SpA and was not the beneficial owner of the shares in Éire and entitled to be entered on the register of shareholders in respect of the shares originally issued to Carlo Tassara SpA is without merit.

Clauses 12.3 and 12.9
104. The defendants argued that the purported transfer of the shares in Éire by Carlo Tassara SpA to Carlo Tassara France SAS and then by Carlo Tassara France SAS to CTAM was governed by the provisions of Clauses 12.3 and 12.9 of the Shareholders Agreement, and not by Clause 8. There was no prior written consent by the other shareholders and therefore the purported transfers were in breach of the Shareholders Agreement. This is to misread the terms of the Shareholders Agreement. Carlo Tassara SpA (and later Carlo Tassara France SAS) were not assigning their rights or obligations under the shareholders agreement: they were transferring the shares in Éire. Quite clearly Clause 8 governs the transfer of shares by shareholders in Éire. Neither were they varying the terms of the Shareholder Agreement. Clause 12.3 is directed towards the terms of, not the parties to, the shareholders agreement. Therefore, the submissions based upon clause 12.3 and 12.9 are misconceived and must be rejected.

Was the Convertible Loan Note Ever Converted into Shares in Éire?
105. The terms upon which Carlo Tassara SpA lent Éire €2 million were set out in and are governed by the Loan Note Instrument. The rights and obligations of each party are governed by the terms of the instrument. Clause 4.1 of the Loan Note Instrument provided that in the event that the issuer [Éire] fails to pay to the holder [CTAM] the principal sum outstanding on the Loan Note on or before the date set out in Clause 3.2 that the Loan Note may in the holder's sole discretion be converted into ordinary shares in the capital of Éire. The right of conversion is exercisable by the holder at its option. It is exercisable for a period of ninety days following the date set out in Clause 3.2. It is exercised by completing the conversion notice and depositing the conversion notice with the Loan Note certificate at the registered office of Éire.

106. Under the Loan Note the issuer has no right to convert the Loan Note into shares. The holder of the Loan Note, CTAM, never completed a conversion notice and never deposited the conversion notice with the Loan Note certificate at the registered office of Éire. Thus, the requisite steps were never undertaken to convert the Loan Note into shares in Éire. In fact, no documentation of any kind was adduced to evidence the alleged conversion of the Loan Note into shares. It follows that the Loan Note was never validly converted into shares in Éire in accordance with the terms of the Loan Note Instrument.

Was There an Agreement by CTAM to Convert the Loan Note into Shares in Éire?

Minutes of the meeting of 21st December 2013
107. The lynch pin of the defence in this case was an assertion that there was a binding agreement on the 21st December, 2013 by CTAM, acting through M le Monnier, to convert the Loan Note into shares in Éire separate from the terms governing the conversion of the Loan Note set out in the Loan Note Instrument. The defendants' case was based upon their oral evidence and upon typed minutes of the board meeting dated the 21st December, 2013. In particular, they relied upon the final paragraph of the minutes which stated:

> *"The proposal to convert the Directors' and the Convertible loan and accrued interest was voted on and supported by all present, subject to M. le Monnier receiving Dr. Flanagan's proposal. He committed to replying to this having convened a meeting of the board of CTAM which will be held no later than January 7th, 2014."*

108. These draft minutes were never circulated to the members of the board for their consideration and approval in advance of the meeting, they were subsequently approved six months later. The minutes were never listed on the agenda for a subsequent board meeting for their consideration and approval. While they were signed by the directors who were present on the 5th June, 2014, they were never subsequently circulated to M le Monnier or to CTAM prior to the commencement of these proceedings.

109. The trial commenced with the defendants relying upon an unsigned typed copy of the minutes, that was first produced to CTAM after these proceedings had commenced.

110. It emerged in evidence during the trial that these minutes were not typed up until 5th June, 2014, after Éire's solicitor had written to CTAM on 12th May, 2014 asserting the existence of an agreement reached at the board meeting of 21st December, 2013. The fourth named defendant took manuscript notes at the meeting. He said that he had the manuscript notes when he produced the typed minutes. It was inferred that they formed the basis of the typed minutes. On 5th June, 2014 having typed the minutes, he copied the typed minutes onto a memory stick and went to Mr McPartlan's office at Éire's premises in Galway and asked Mr McPartlan to print the minutes. The minutes were not circulated by e-mail to the members of the board in advance in the usual way. The minutes were presented to those members of the board present on 5th June, 2014. M le Monnier was not present at that meeting and he was never asked to give his approval to these minutes or to sign them.

111. No reference to an alleged agreement was made between December 2013 and 12 May, 2014 by any of the defendants. Indeed, their statements and actions all pointed to the fact that no decision had been taken by CTAM to convert the Loan Note into ordinary shares in Éire. The defendants sought to explain their conduct after the 21st December, 2013 as "jollying" M le Monnier and CTAM along. They say that they had all agreed that an agreement had been reached but had no explanation as to why, even in emails to themselves, which were not directed to CTAM, no mention whatsoever of this agreement was made.

112. The first mention of the purported agreement is in the letter from the first named defendant's then solicitor, Mr Brian O'Callaghan, on the 12th May, 2014. The letter is riddled with inaccuracies. It is said that there was an agreement between all of the shareholders of Éire on the 20th December, 2013. All shareholders were not represented at the board meeting of the 21st December, 2013 and so this is factually incorrect. The letter then says that the agreement was evidenced by a follow-on email on 24th December, 2013. There is no reference to any agreement in an email of the 24th December, 2013. The letter stated that all shareholder loans in the company had been converted into equity as of 20th December, 2013. This is not so even on the defendants' case. It further states that as a result CTAM was a 47% shareholder in the company. The letter says that the company (Éire) is implementing the terms of the agreed Flanagan investment scheme for the company, but the fifth named defendant had not made an offer on the 21st December, 2013 when the alleged agreement was entered into. Further, the defendants maintain that the agreement which was implemented was pursuant to an offer made by the fifth named defendant on the 22nd May, 2014 and accepted on the 13th June, 2014, i.e. after the writing of the letter of the 12th May, 2014. The defendants had no explanation as to how such inaccurate instructions could have been given to the company's solicitor.

113. The defendants were required to make discovery which included any documents in or around the preparation of the minutes of the board meeting of the 21st December, 2013. Mr McPartlan swore the affidavit of discovery on behalf of Éire on the 23rd September, 2015 and the third named defendant swore the affidavit of discovery on behalf of the second, third and fourth named defendants on the same date. Éire discovered the minutes of the board meeting of the 21st December, 2013 which were in fact the typed, unsigned version. It also discovered, in the second schedule as a document no longer in the possession of Éire, a document described as "minutes of the meeting December 21st 2013". The third named defendant's personal affidavit of discovery was identical in this regard.

114. The defendants all swore supplemental affidavits of discovery on the 3rd and 4th of March, 2016. The fourth named defendant swore that there were no draft versions of the minute of the meeting of the 21st December, 2013. He said he believed he would have taken handwritten notes during the meeting, that he had conducted searches to locate any handwritten notes of the meeting, but that none could be located. The second schedule to his affidavit discovered "*handwritten notes of the board meetings set out*". He confirmed that this referred to the board meeting of the 21st December, 2013.

115. The first to fourth named defendants explained that in September 2015 they were preparing the affidavit of discovery which was to be a combined affidavit on behalf of Éire and the individual defendants, other than the fifth named defendant. The first affidavit of discovery sworn on behalf of the company by Mr McParlan made no reference at all to the hand written notes of the meeting of the 21st December, 2013, but the defendants now said that they were referred to in the second schedule. The third named defendant, who actually prepared the affidavit, was adamant that the reference to minutes in the second schedule was not to any handwritten notes of the meeting.

116. It is most important to note that while the second to fifth named defendants were not legally represented, there was a solicitor on record at all times for Éire and the solicitor was assisting Éire and the second, third and fourth named defendants in the preparation of the affidavit of discovery. On the 17th September, 2015 the third named defendant emailed the second and fourth named defendants stating that he needed all the documents that they considered to be relevant by tomorrow. The fourth named defendant replied to the third named defendant 20 minutes later stating:

> *"P.J., I have got all my emails and found another few documents – is it OK of (sic) I bring them with me to EC [Éire] on Monday morning?"*

The second named defendant replied asking the fourth named defendant to make a list of the documents that he had and to add them to a spreadsheet that he, the third named defendant, was preparing. The following day on the 18th September, 2015 the fourth named defendant emailed the third named defendant attaching two documents, the first was a scan of notes of December, 2014 (sic) a meeting. Pdf. The third paragraph of the email stated:

> *"I attach a scan of my notes on the all important meeting in December 2013, which I just found on Thursday when clearing out my office in Cork (it had been misfiled). Attached to the notes is a scan of the minutes of the previous meeting, which we all signed and Claude refused to sign that day. Maybe there's something new in the December meeting notes? I am not sure.*
>
> *Call me tomorrow …to talk"*

117. Half an hour later the third named defendant replied stating:

> *"I will add these to my list.*
>
> *…not sure about the notes I will talk to you sometime tomorrow about that."*

118. The affidavit of discovery was sworn three days later on the 21st September, 2015. The handwritten notes of the "all important meeting" of December 2013 were not discovered in the first part of the first schedule. Nor, according to the third named defendant, were they discovered in the second schedule. They were not added to the list. The handwritten notes were discoverable and had Éire's solicitor been asked to advise on the matter, I have no doubt that he or she would have advised that they should have been discovered. The effect of the failure to discover them was to suppress those notes which were crucial to the central issue in the case until after all of the evidence had been heard.

119. Following correspondence dated the 6th April, 2016, on the 11th April, 2016, the solicitors now acting for Éire sent the solicitors acting for CTAM the electronic copies of the minutes of the board meeting of the 21st December, 2013. The letter enclosed both a signed and the unsigned typed version. This was the first time a signed copy of the minutes was produced. The letter confirmed that the reference in the second schedule of Éire's original affidavit of discovery was a reference to the mislaid handwritten notes of the meeting prepared by the fourth named defendant (notwithstanding the evidence of the third named defendant to the contrary). CTAM's solicitors conducted a technical review of the electronic document that was enclosed in the letter of the 11th April, 2016 and they discovered that it appeared to have been prepared by the fourth named defendant on the 5th June, 2014. This had not been

mentioned in the letter of 11th April, 2016. They asked for confirmation that this was correct and for an explanation. Éire's solicitors responded on the 13th April, 2016 stating:

> *"Our instructions are that the minute was contained in contemporaneous hand written notes which Dr. O'Bradaigh later typed up on 5th June, 2014. The original has been mislaid and was dealt with in the original affidavits.*
>
> *The signed minute was only discovered when Mr. McPartlan conducted an extensive search this weekend for the electronic version of the minute. This minute was also signed on 5th June, 2014 as you can see from a technical review of the pdf of the signed minute… (emphasis added)*
>
> *Following further enquiries this morning we are informed that Mr. McPartlan has conducted extensive searches for the original minute but to no avail…"*

120. On the 24th June, 2016, during the course of cross-examination, the third named defendant, the managing director of Éire, confirmed that he had no objection to CTAM inspecting the computer system of Éire. On the 26th July, 2016, I made an order permitting CTAM's expert to take a full forensic image of Éire's hard drive and computers and to produce a report in respect of documents found relating to the generation of the minutes of the 21st day of December, 2013 and all documents relating to the meetings of 5th June, 2014 and 13th June, 2014.

121. On the 29th September, 2016, Mr McPartlan swore a third supplemental affidavit of discovery and discovered the signed typed minutes of the meeting of the 21st December, 2013 and, for the first time, the scanned notes of the meeting of December 2013 (erroneously described as December 2014 in the affidavit of discovery). The third and fourth named defendants and Mr. McPartlan each said that the manuscript notes were omitted from the earlier affidavits of discovery due to inadvertence and not as part of a deliberate tactic to suppress the documentation.

122. I would have some sympathy with the position of the defendants if this document was not so crucial and if it had not been so easily found. It was discovered by CTAM's expert taking an image of the hard drive and preparing an index. Furthermore, it is difficult to believe that the third and fourth named defendant forgot about the document over a period of three days between 18th and 21st September, 2015 when the original affidavit of discovery was sworn. The fourth named defendant had identified it as notes of the "all important meeting" of December 2013. The third named defendant says he has no recollection of reading the attachment but his email says that he is "not sure about it". It is clear that as agents of Éire, as well as defendants in their own right, they ought to have consulted with the solicitors for Éire prior to swearing the original affidavit of discovery. It amounts to a very significant dereliction of their discovery obligations.

123. This default was compounded by their approach to the conduct of the case. Up until the late discovery of the handwritten notes, all of the defendants stood over the typed version of the minutes of the 21st December, 2013 as representing a true and accurate record of what occurred at that meeting. Once the handwritten notes were discovered, it became clear that they differed in significant respects from the typed version. It is important to recall that the typed version was only prepared on the 5th June, 2014 after CTAM and the defendants were in dispute as to whether an agreement had been reached to convert the Loan Note.

124. The notes record at the third bullet point that:

> *"Board of Carlo Tassara SpA have had meeting. CT have to get permission from bank for waiver to convert shares [sic] (will be a new board in January and they will have to make another request)."*

This is a reference to converting the Loan Note into shares in Éire. On the second page the notes state:

> *"The board have decided to ask Thomas Flanagan to make an offer to Carlo Tassara for their shares and loan conversion." (emphasis added).*

The handwritten notes do not record any agreement by CTAM to convert the Loan Note into shares in Éire or to sell the Loan Note and its shares in Éire to the fifth named defendant. This is in marked contrast with the typed version of the minutes.

125. In evidence, the fourth named defendant stated that the handwritten notes were incomplete and he rejected the suggestion that the failure to record an agreement by M le Monnier on behalf of CTAM to convert the Loan Note reflected the fact that no such agreement was in fact reached at that meeting.

Assessment of the Evidence

126. I have concluded that I cannot accept the evidence of the second, third and fourth named defendant and Mr. McPartlan in relation to the alleged agreement at the meeting of the 21st December, 2013.

127. Firstly, there is the very serious manner in which they failed to discover the handwritten notes taken at the "all important" meeting of December 2013 until after the conclusion of the hearing of evidence in the case. They permitted Éire to defend the case on the basis *inter alia* that the minute of the board meeting of the 21st December, 2013 was *prima facia* a true record of what occurred at the meeting in circumstances where M le Monnier had never been afforded an opportunity to comment on the minutes and at the time only an unsigned copy of the typed version of the minutes was available. They implied in their instructions to the solicitor for Éire that the fourth named defendant typed the minute on the basis of the then existing contemporaneous hand written notes. The letter created the impression that the minute was a faithful reproduction of the handwritten notes, which it clearly is not. At best, it could be described as edited, though crucial matters were both inserted into and omitted from the typed minutes. The third named defendant confirmed in cross-examination that the typed minutes was a transcript of the handwritten notes when it clearly was not. Éire's solicitors believed that the lost handwritten notes of the meeting of the 21st December, 2013 were discovered in the original affidavit of discovery of September, 2015 in the second schedule as a document no longer in the possession of Éire. It subsequently emerged that the handwritten notes were not lost in September 2015 and that they could and indeed ought to have been discovered at that time. In any event, the third named defendant was adamant that the reference in the second schedule to a minute of the meeting of the 21st December, 2013 was not to the hand written notes. The second and fourth named defendants and Mr McPartlan did not agree with this.

128. Secondly, the detail of the evidence given regarding the alleged agreement was at times either inconsistent or frankly incredible. The third named defendant asserted that there was no inconsistency between his draft agenda sent by email in April 2014, stating that CTAM had not agreed to convert its Loan Note, and his assertion that they had agreed to this on the 21st December, 2013. The agreement asserted by the defendants was that as soon as M le Monnier received any offer from the fifth named defendant that

there would be a concluded agreement regarding the conversion of the Loan Note. However, he also accepted that neither M le Monnier nor CTAM was bound to accept the proposal of the fifth named defendant and that the fifth named defendant was free to withdraw his offer.

129. The third named defendant denied that he or Éire ever treated CTAM as the shareholder in Éire. This is completely inconsistent with all of the documentation from 2009 onwards, including the warranties in the preference share agreement given to Údurás na Gaeltachta. He continued to deny the fact that CTAM was the holder of the Loan Note from November 2008, while asserting an agreement reached with CTAM in December 2013 to convert the Loan Note into shares in Éire. He seemed not to appreciate the contradictory positions he adopted. He had no satisfactory explanation as to why so many documents, some authored by him, contradicted the evidence he gave to the court. I could not accept the accuracy, reliability or truthfulness of his testimony on disputed points, and in particular on whether CTAM agreed to the conversion of the Loan Note into ordinary shares in Éire. I reject his testimony that there was agreement by M le Monnier or CTAM to convert the Loan Note.

130. The second named defendant said that at the meeting of the 21st December, 2013 as a director of Éire (and, by implication, not CTAM) M le Monnier converted the loan and "*maybe he had to get it rubber stamped or something, but as the director that day he converted the loan with us*." He said that the reference in the typed minutes to "subject to M. le Monnier receiving Dr. Flanagan's proposal" had no effect on the agreement. His evidence was inconsistent with the handwritten notes which recorded that M. le Monnier had to get the approval of the board of CTAM and the Italian banks.

131. On 28th April, 2014 the second named defendant sent an email to the directors of Éire which clearly acknowledged that there was no agreement to convert the Loan Note concluded on 21st December, 2013. The email states:

> *"I appreciate that Claude [le Monnier] needs permission to make a decision so he should get approval or disapproval of the loan conversion prior to the meeting [of directors]"(emphasis added)*

He was cross-examined in relation to the proposed agenda for a board meeting circulated on 27th April, 2014, which listed as item 3 the approval of shareholders loans conversion and noted "[a]greement has been given by all shareholders to this with the exception of CTAM". He refused to accept that these emails were inconsistent with the proposition that there was an agreement reached in December 2013 by CTAM to convert the Loan Note. I find this testimony demonstrably incorrect.

132. The second named defendant said that Mr O'Callaghan, solicitor, advised Éire and the second, third and fourth named defendants in May 2014 on the basis of the minutes (meaning the typed minutes) of the meeting of the 21st December, 2013. However, this evidence had to be incorrect as the typed minutes were not produced until the 5th June, 2014, a month after the defendants (with the exception of the fifth named defendant) met Mr O'Callaghan.

133. In summary, I reject the testimony of the second named defendant that M le Monnier agreed to convert the Loan Note on 21st December, 2013.

134. The fourth named defendant stated at para. 26 of his written witness statement:

> *"We all left the meeting [of 21st December, 2013] under the firm impression that M. Le Monnier would be recommending an offer from [the fifth named defendant] to the board of Carlo Tassara and that he had accepted the conversion of the directors' loans." (emphasis added).*

This evidence is inconsistent with the notes he took at the meeting which do not record an agreement. I did not find his explanation for this discrepancy credible. He also had no credible explanation for the failure by any one of the defendants' to assert that agreement was reached at the meeting prior to May 2014. He had no credible explanation why the minutes of the meeting of 21st December, 2013 were only typed and approved in the manner I have described in June 2014. Further, he claimed that once any offer was made by the fifth named defendant then the alleged agreement to sell the shares in Éire to the fifth named defendant was binding on CTAM. However, he accepted that whatever offer the fifth named defendant made, M le Monnier would have to put it to the board of CTAM, presumably for their approval. His evidence in this regard was inconsistent with the position of the third and fifth named defendants . He made no distinction between an alleged agreement to convert the Loan Note and an agreement to sell CTAM's shares in Éire.

135. While I am critical of the evidence of the second, third and fourth named defendants, and I have rejected their evidence, I should record that I had considerable reservations about some of the evidence given by M le Monnier and, to a lesser extent, Ms Gehlen. I appreciate that they both gave evidence through a translator and that this presented additional difficulties. Nonetheless, there were numerous occasions when M le Monnier, who impressed me as an intelligent witness, appeared to deliberately misunderstand the question or obfuscate his answers. At times he was evasive and less than forthcoming in his answers. Occasionally he was dismissive of or impatient with the process of cross-examination. On a number of occasions, he altered his answers on cross examination, he gave two answers in French but only one was ultimately translated. His evidence tending to minimise his role as a director of CTAM and the provider of information about Éire to CTAM was not persuasive. On a frankly astonishing number of times he answered that he could not remember. He stated that he did not propose that Éire go into insolvency at the meeting of 21st December, 2013 but the handwritten notes of the meeting record that he did. The accounts of Carlo Tassara SpA for 2013 noted that the Éire Composites Group was to go into liquidation but he sought to wash his hands of any responsibility for this entry, despite the fact that he was the nominee director of CTAM on the boards of Éire and Naero. He led the defendants to infer that he had a written opinion from A & L Goodbody solicitors concerning the proposed use of receivables due to Greenblade to pay the sums outstanding in respect of the issued shares in Naero when, as he admitted under cross-examination, no written opinion was ever produced.

136. Ms Gehlen appeared to be in a position to give very little assistance to the court. She gave the impression of not having prepared for cross-examination by familiarising herself with the documents in the case in a manner one would have expected of a witness. There were many occasions when she simply stated that she could not remember or she did not know the answer to relatively simple questions. Her explanation that the matters occurred a long time ago was less than compelling.

137. Having recorded this, it is important that I should also state that these criticisms apply to matters which were not central to the issues for decision in this case. While I had some reservations about the totality of their evidence, on the essential issue whether there was ever agreement by CTAM to convert the Loan Note into ordinary shares in Éire, I accept their evidence as true and accurate. The doubts I had in relation to portions of their evidence did not undermine their evidence in that regard.

138. Despite the shortcomings I have identified, the evidence of CTAM in relation to the alleged agreement of the 21st December, 2013 is consistent. The conduct of both Mr le Monnier and Ms Gehlen after 21st December, 2013 is consistent with the fact that no

agreement had been reached. When the issue of an agreement was first raised it was immediately rejected. The evidence on the part of CTAM in this respect is coherent and consistent with all of the documents and actions, save for the typed minutes of the meeting of the 21st December, 2013.

139. Thirdly, quite apart from the inconsistencies in their evidence, the second, third and fourth named defendants' and Mr McPartlan's own evidence established that they knew that M. le Monnier did not have authority to bind CTAM to convert the Loan Note (though this was subsequently denied). They also knew that M le Monnier needed the approval of the board of CTAM, Carlo Tassara SpA and its banks (though this also was contested in cross examination). There was no evidence that Carlo Tassara SpA or its banks consented to the conversion of the Loan Note and, while it was hotly contested by the defendants, there was no actual evidence that the board of CTAM approved it either, though I was invited to infer that it had.

140. In light of all of the above, I do not accept that CTAM agreed to convert the Loan Note into shares in Éire in December 2013. In reaching this conclusion, I am rejecting the evidence of the second, third and fourth named defendants and Mr McPartlan for the reasons I have outlined. Their evidence is not credible and it is inconsistent with contemporaneous documents and actions of all parties. It was clear that before the meeting of 21st December, 2013, CTAM had informed the board of Éire that it required the consent of Carlo Tassara SpA for the proposed transaction and it required the waiver of its banks for such a transaction. This was acknowledged by Mr McPartlan and the defendants. At no stage was it ever suggested that the banks of Carlo Tassara Group agreed to the conversion of the Loan Note into shares in Éire. Secondly, M le Monnier and Ms Gehlens' position consistently was that no such agreement was ever reached, whether at the meeting of 21st December, 2013 or on any other occasion. Thirdly, the contemporaneous notes of the meeting do not record any such agreement. Given that this was the critical item on the agenda for that meeting, I find it difficult to believe that if agreement in respect of this critical matter had in fact been reached at that meeting that it would not have been recorded in the handwritten notes of the fourth named defendant. Furthermore, the notes are inconsistent with a binding agreement having been reached by CTAM to convert its Loan Note into ordinary shares. It is recorded that Carlo Tassara SpA will have to get permission from the bank and that there will be a new board of CTAM in January and that it will have to consider another request to convert the Loan Note. It is implicit in the decision of the board of Éire to ask the fifth named defendant to make an offer to Carlo Tassara for their shares and loan conversion that the loan has not yet been converted or agreed to be converted. Finally, and most importantly, after 21st December, 2013 and for some months thereafter all of the parties acted as if there had been no such agreement reached.

141. It follows that the defendants' argument that the Loan Note was converted by mutual agreement of the parties (CTAM as Loan Note holder and Éire as Loan Note issuer) must also be rejected.

Should the Loan Note be reinstated?

142. The primary relief sought is a declaration that the Loan Note remains valid and payable by Éire to CTAM. CTAM argues that it has both a contractual and a property right in the Loan Note and that it is entitled to have its property restored. Anything less would amount to permitting the first and fifth named defendants compulsorily to purchase the Loan Note for a nominal amount. The effect of this would be to extinguish CTAM's property right and vindicate the unlawful actions of the defendants.

143. The defendants argued that they could convert the Loan Note in circumstances whereby in late 2013/early 2014 it was effectively worthless. They stated that if the company had gone into liquidation at that time CTAM would have received nothing for the Loan Note. This was accepted by M le Monnier at the time. Indeed, they argued that he was anxious that Éire should go into liquidation and that he stated that his preferred option in December 2013 was insolvency. They argued that they could convert the Loan Note because it was the duty of the directors of Éire to save the company and this was the only way to save company. They were very critical of M le Monnier and said that he did not act *bone fide* towards Éire and he showed no interest in the affairs of Éire. They argued that CTAM was not prepared to invest further monies to save Éire and therefore they were entitled to take whatever steps were necessary to save Éire. They also said that CTAM had an interest in Éire failing as its investment in Éire had been written off in the accounts for 2013. They said that CTAM had done nothing to rescue Éire and it would be unjust, where the fifth named defendant had saved the company, for CTAM now to benefit by the restoration of the Loan Note. Separately, they also argued that the restoration of the Loan Note would have the effect of pushing Éire into liquidation. It was argued that CTAM ought to have applied for an injunction to restrain the conversion of the Loan Note or to have instituted proceedings under s. 205 of the Companies Acts 1963as amended (now s. 212 of the Companies Act 2014).

144. The objections of the defendants, which were maintained most passionately at trial, do not assist in determining the issue. Whether or not a creditor acts unreasonably in refusing to advance further sums to a debtor or to agree to the conversion of the debt into ordinary shares in a debtor company, does not entitle the debtor company to appropriate the debt and convert it into shares unless the creditor so agrees. There are many instances where creditors refuse to provide further financial support to debtors and undoubtedly this has resulted in the liquidation or bankruptcy of debtors. But it does not follow that the creditors have thereby acted unlawfully or that somehow they have forfeited their right to retain their loan as a loan, notwithstanding the fact that they may receive little or nothing in respect of the debt from the liquidation or bankruptcy.

145. CTAM was the holder of Loan Note. It was under no duty to either advance further sums to Éire or to consent to the conversion of the Loan Note into ordinary shares in Éire. It had no duty as a creditor to secure the continuance of Éire.

146. The fact that CTAM was also a shareholder in Éire does not alter this position. Shareholders are entitled to act in their own interest and are not required to act in the interests of either the general body of creditors or the company, subject of course to the provisions of the Companies Act regarding the protection of minority shareholders (which do not arise in this case as CTAM was a minority shareholder). The fact that M le Monnier, CTAM's representative on the board of Éire, as a director of Éire owed fiduciary duties to Éire qua director, does not mean that CTAM, the creditor and shareholder, owed fiduciary duties to Éire.

147. In effect the defendants sought to save Éire by what might be described as an *ad hoc* form of examinership. The critical point is that there was no legal authority to deprive CTAM of its rights in the Loan Note. The second, third and fourth named defendants gave scant, if any, consideration to examinership as a means of saving a part or all of the business and enterprise of Éire. This means that there was no legal basis upon which CTAM could be deprived of its rights under the Loan Note against its will.

148. A further matter to be taken into account is whether the declaration should be refused because this would unfairly prejudice the position of the fifth named defendant. The fifth named defendant had been working with the second, third and fourth named defendants since 2011 through ACE. He advanced £80,000 sterling to ACE in 2012. He subsequently purchased a small shareholding in Éire in January 2013 and he advanced money to CTL, the subsidiary of Éire.

149. In November/December 2013 he was interested in acquiring the entire issue share capital of Éire and he was invited to make an offer to purchase 100% of the ordinary share capital. He stated in evidence that the conversion of all of the existing shareholder

loans into shares was a precondition to his offer to acquire the shares in Éire. When Ms Gehlen emailed him on the 8th January, 2014 she stated that CTAM wanted proposals on repayment of the €2 million loan and interest. He therefore knew that CTAM had not agreed to convert its Loan Note into ordinary shares in Éire as of 8th January, 2014. On the 10th January, 2014 she suggested that the fifth named defendant make an offer including the loan as it was at the present time.

150. The fifth named defendant consulted with the second named defendant about his reply to Ms. Gehlen's email of the 10th January, 2014. The second named defendant suggested amendments to his draft and the fifth named defendant sent a reply which accepted these amendments. The second named defendant emailed the fifth named defendant, Mr McPartlan and the third named defendant advising the fifth named defendant to:

> *"Submit a formal letter of offer, including an offer of 100,000 euro for the loans. Also we must offer for their shares in Naero Ltd. The offer must include a warranty which excludes Carlo tassara (sic) from any blame for issues in the past (German insolvency).*
>
> *The board of [CTAM] meet on 26/2/2014 and will be able to consider the offer.*
>
> *I suggest we now offer 25k for shares [Éire], 1k for share Naero Ltd, 1K (sic) for loan in [Éire]".*

In evidence, it was confirmed that the 25k should in fact have read 35k. Between the 12th and 13th February, 2014 there was an exchange of emails between the defendants and Mr McPartlan in relation to his reply to Ms Gehlen. Mr McPartlan finalised the response which included the changes proposed by the second named defendant. The fifth named defendant's second offer to CTAM was on precisely the terms which had been agreed with Mr McPartlan and the second named defendant. It is clear therefore that the fifth named defendant was working very closely with the other defendants in relation to his proposed acquisition of Éire.

151. It is also clear that he was or ought to have been fully aware that CTAM had not agreed to convert the Loan Note and specifically had not agreed to the conversion on the 21st December, 2013. Ms Gehlen replied to his second offer stating:

> *"I would like to underline again that such a transaction…cannot be decided by the CTAM's Board of Directors without having the consent of both our Italian ultimate shareholder and the Italian bank's creditors (sic) of the CT group.*
>
> *Such a consent from the above mentioned Italian parties will take several weeks or months to be obtained and I cannot predict the result.*
>
> *We are not in a position to consider [the offer] favourably." (emphasis added)*

152. There was no further direct contact by the fifth named defendant with CTAM after this email. He made his third offer on the 22nd May, 2014 and it was accepted by all of the defendants that he was free to withdraw this offer until it was accepted by the selling shareholders on the 13th June, 2014. On the 23rd May, 2014 CTAM wrote emphatically denying that it had agreed to convert the Loan Note. Mr McPartlan said that the fifth named defendant was told CTAM's position in this regard on the 5th June, 2014.

153. The fifth named defendant's case is that he had advanced most if not all of his investment in Éire prior to the acceptance of his offer on the 13th June, 2014. There was no evidence of any terms upon which he advanced these monies. There was no documentary evidence setting out any terms and there were no invoices issued by Éire to the fifth named defendant. He stated that he had obtained legal advice in advance of the purchase of the shares in Éire but he did not conduct a due diligence investigation of the kind one would normally expect in advance of concluding a transaction of this nature. He cannot escape the consequences of this omission, particularly where, to his knowledge, the party whose Loan Note was allegedly converted into ordinary shares was vehemently objecting to and denying the validity of the conversion and who was then to be subject to a drag along provision, by definition against its will, in a shareholders agreement.

154. In all the circumstances, the fifth named defendant was not a bona fide purchaser of the shares in Éire for value without notice of the fact that CTAM denied that the Loan Note had been converted into ordinary shares in Éire. The fact therefore that the fifth named defendant may have advanced considerable monies and expended considerable energies subsequently in ensuring the survival of Éire as a going concern is not a reason to refuse CTAM the declaration sought in these proceedings.

155. Likewise, the fact that CTAM did not seek an injunction to restrain the conversion by Éire of the Loan Note into ordinary shares in Éire does not mean that it is not entitled to the relief it seeks in these proceedings. CTAM has not been guilty of egregious delay in bringing these proceedings. It is still not clear when the defendants say that the Loan Note was actually converted into ordinary shares. The evidence suggests that the conversion had not taken place by the 17th July, 2014, the date when the board of Éire resolved to accept the conversion of the Loan Note. However, earlier documentation suggests that the defendants were of the opinion that the conversion had taken place prior to that. Prior to the service of the Drag Along notices, there was no clear indication that Éire had acted upon the disputed agreement to convert the Loan Note. These proceedings issued three months later in November 2014. This cannot be considered as being a serious delay on the part of CTAM and the fact that the proceedings were admitted into the commercial list of the High Court indicates that there was no significant delay in instituting the proceedings. I therefore reject the suggestion that there has been laches or acquiescence on the part of CTAM such as would now disentitle it to the relief sought.

156. Likewise, the fact that CTAM chose to institute plenary proceedings rather than minority oppression proceedings can in no way disentitle it the relief it has chosen, if it otherwise is entitled to that relief.

157. *Prima facia* CTAM is entitled to the restoration of the Loan Note. No argument has been advanced which satisfies me that it is not entitled to this order and accordingly I will direct the restoration of the Loan Note.

Were the shares owned by CTAM in Éire validly sold to the fifth named defendant by means of the Drag Along notices of 1st August, 2014?

Precondition not met

158. The fifth named defendant made three offers to purchase the entire shareholding of Éire between the 24th December, 2013 and 22nd May, 2014. Each offer was premised on the conversion of directors' loans and the Loan Note into ordinary shares in Éire. While this is not clear from the first offer of the 24th December, 2013 quoted above, the fifth named defendant clarified in his email of the 8th January, 2014 to Ms Gehlen that all loans from shareholders were to be converted to equity including the €2 million loan from CTAM. The fifth named defendant replied to further queries from CTAM (on the suggestion of the second named defendant) in the

following terms:-

> *"I have offered €100,000 for all the shares in EC [Éire] and will inject €250,000 fresh equity. This offer is only on the basis that all existing shareholder loans are converted to equity." (12th January, 2014)*

If there were any doubt about the matter, on the 20th January, 2014 the fifth named defendant again emailed Ms Gehlen in reference to the CTAM Loan Note. He stated:-

> *"That loan will not be repaid, at least not by me. My offer to buy the company is contingent on the loan being converted to an increased shareholding by CTAM. Putting things another way, I am offering CTAM €46,000 to write off the loan and the interest and to sell me their share of Éire Composites".*

159. On the 12th February, 2014 the fifth named defendant wrote to Ms Gehlen saying that he had been persuaded to submit another offer to purchase CTAM's shareholdings in Éire and Naero. He offered €35,000 for the shares in Éire, €1,000 for the convertible loan and accrued interest and a €1,000 for the shares in Naero (i.e. €37,000 down from €46,000). He said that copies of the share transfer documentation for both Éire and Naero and the transfer of the loan and accrued interest would be hand delivered to M le Monnier.

160. The third offer was communicated by letter from Éire dated the 22nd May, 2014 to CTAM. The fifth named defendant offered to purchase the entire issued share capital of Éire following the conversion of the loans and loan interest. The letter stated that CTAM owned 15,568,409 shares or 47.13% of the total shares in Éire. This figure for the shareholding of CTAM in Éire was calculated by reference to the shares owned by CTAM and shares representing the conversion of the Loan Note and accrued interest (notwithstanding the fact that the board of Éire only resolved to accept the conversion of the Loan Note on 17th July, 2014).

161. Any offer the fifth named defendant made to purchase the shares of Éire was conditional upon all loans including the Loan Note being converted into ordinary shares. He confirmed this in evidence. The offer of 22nd May, 2014, which was the offer that was accepted, was to purchase all of the shares in Éire "following the conversion of the Loans and Loan interest." The fifth named defendant was not prepared to purchase the company burdened by the outstanding loans due to the existing shareholders. It is thus clear that the conversion of the loans and the sale of the shares were interlinked and, in light of my finding that the Loan Note was not converted into ordinary shares in Éire, that the precondition of his offers to purchase the shares in Éire was never fulfilled.

Terms of Clause 8 not met

162. Clause 8.8 of the Shareholders Agreement of 16th January, 2007 stated that no shares should be transferred save as provided in Clause 8. Clause 8.1.1 provided that for the purposes of this Clause (Clause 8) any person unconditionally entitled to be registered as a holder of a share shall be deemed to be a member of the company in respect of that share and not the registered holder of such share. As I have held above, CTAM was unconditionally entitled to be registered as the holder of the shares originally issued to Carlo Tassara SpA even though it was not the registered holder of those shares.

163. When shareholders holding a minimum of 50% of the issued share capital in Éire proposed to transfer all of their shares as part of a *bona fide* arm's length transaction, those shareholders, referred to as the selling shareholders, have the option to require all the other holders of shares to transfer their shares as beneficial owners on the same terms and conditions, including price and payment terms, to any party wishing to take a transfer of the shares or as that party may direct. This is referred to as the Drag Along option and the shareholders are referred to as the selling shareholders or the called shareholders respectively.

164. Clause 8.3.2 requires the selling shareholders to exercise the Drag Along option by giving notice to the called shareholders. The called shareholder is obliged to sell the called shares at the price specified in the Drag Along Notice. The called shareholder is deemed to have irrevocably appointed each of the selling shareholders severally to be his attorney to execute any stock transfer and to do such other things as maybe necessary to complete the sale of the called shares pursuant to Clause 8.3 upon service upon it of the Drag Along Notice.

165. In this case, on the 1st August, 2014 two Drag Along Notices issued to Carlo Tassara SpA and CTAM. By virtue of the provisions of Clause 8.1.1, the Drag Along notice issued to Carlo Tassara SpA ought to have been issued to CTAM. Therefore, that Drag Along Notice is invalid as there has been a failure to comply with the provisions of Clause 8 in respect of those shares.

166. This failure in turn invalidated the Drag Along notice served upon CTAM on the 1st August, 2014. It is an express requirement of Clause 8.3.2 of the Shareholders Agreement that the Drag Along Notice shall specify that the called shareholder is required to transfer all his shares pursuant to Clause 8.3.1 to the third party purchaser. In this case, the Drag Along Notice did not require CTAM to transfer all of its shares to the fifth named defendant. A Drag Along Notice in respect of only some of the shares of an individual shareholder is not a valid Drag Along Notice as it does not comply with the express terms of the Shareholders Agreement. It is essential that there must be strict compliance with the requirements of the Shareholders Agreement as the Drag Along provision is in effect a form of appropriation.

167. Furthermore, and separately, the Drag Along Notice addressed to CTAM is invalid as it purports to refer to shares arising from the conversion of the Loan Note and the interest arising on foot of the Loan Note. As the Loan Note was in fact never lawfully converted into shares, this Drag Along Notice purports to purchase shares which did not in fact exist.

Was this a bona fide arms length transaction?

168. The selling shareholders in this case purported to rely upon the Drag Along provisions set out in Clause 8.3 of the Shareholders Agreement. The first requirement was that the proposed transfer be part of a bona fide arm's length transaction. CTAM maintained that the purchase by the fifth named defendant of the shares in Éire was not part of such a *bona fide* arm's length transaction.

169. As explained earlier, the fifth named defendant was involved with Éire and ACE from 2011. In February 2013 the fifth named defendant discussed with the third named defendant the possibility of converting the loan he had advanced to Éire in May 2011 into shares in ACE. The second, third, fourth named defendants and Mr McPartlan explained that the licence agreement granted by Éire to ACE in March 2012 was to afford the fifth named defendant comfort with regard to the sums he had advanced to ACE (though as I have stated, this is not apparent from the accounts filed in the CRO). In November 2013 the fifth named defendant was helping to prepare the brochure for ACE. He treated the loan he advanced to ACE in 2011 as part of his investment in Éire in 2014. In November 2013 he paid £30,000 into the sterling account of CTL (a subsidiary of Éire) for ACE. It is quite clear that all the defendants and Mr McPartlan had an input in and advised the fifth named defendant on his dealings with CTAM and, in particular, in his responses to the emails from Ms Gehlen and in crafting the second offer of February 2014. The clearest illustration of the close connection between the fifth and second named defendants in particular, but also the third and fourth named defendants and the first named defendant, was the manner in which he said he actually advanced €250,000 by way of investment in Éire. Other than €75,000, all of this was

through corporate vehicles controlled by the second named defendant or through ACE.

170. While the fifth named defendant was working closely with the representatives of Éire, CTAM had almost no knowledge of his involvement in Éire. CTAM was unaware of the existence of ACE, its business and the involvement of the fifth named defendant with the second, third and fourth named defendants and Mr McPartlan. It was unaware of the fact that a licence of Éire's intellectual property had been granted to ACE for a period of 20 years with no licence fee payable. It was unaware that the fifth named defendant was being advised with regard to his communications with CTAM in relation to his offer to purchase the shares in Éire and Naero and the Loan Note. It was unaware of the existence of the business of ACE which gave rise to such a jubilant email in November 2013 and which Mr. Luby valued at €1.25 million.

171. CTAM urged the court to conclude that the sale of the shares in Éire (and Naero) to the fifth named defendant was not an arms length transaction within the meaning of Clause 8 of the shareholder's agreement and accordingly it was not open to the selling shareholders to invoke the Drag Along provisions of the clause. There was no real debate at the trial as to the parameters or limitations on a sale of shares in Éire (and Naero) if it were to be regarded as an arms length transaction. It would be reasonable to suppose that a certain degree of communication between an intending purchaser and the shareholders would not offend this clause. An intending purchaser of the shares would require information regarding the company and its business prior to committing to purchasing 100% of the shares of the company. The Drag Along provision envisages the sale of 100% of the shares of the company in circumstances where the majority but not all of the shareholders are willing to sell. It is therefore predicated upon a disagreement between shareholders but it is also designed to ensure that recalcitrant minority may not obstruct a sale of the shares with which the majority agree. Essentially, the requirement that the transaction be an arms length transaction is to protect the original shareholders in circumstances where their minority position could be open to abuse. Quite where the dividing line between what is permissible and impermissible lies is a matter which would require further debate than that which occurred at the trial of this action. In view of the fact that a decision on this point is not required in order to resolve this case, I shall leave to another day the issue whether or not the transaction was an arms length transaction within the meaning of Clause 8.

Illegal transaction
172. I have held as a matter of fact that CTAM did not consent to the conversion of the Loan Note into ordinary shares in Éire. All of the defendants knew or ought to have known this prior to the purported exercise of the Drag Along provisions of the Shareholders Agreement in August 2014. They all knew or ought to have known that insofar as the Drag Along Notices applied to shares attributed to the conversion of the Loan Note these Notices were tainted with the illegality of the wrongful conversion of the Loan Note. Simply put, it was not possible lawfully to exercise the Drag Along provisions of the shareholders agreement based *inter alia* upon the purported conversion of the Loan Note into ordinary shares in Éire.

Declaration that the Drag Along Notices Were Null and Void
173. The defendants said that CTAM should not be granted a declaration that the Drag Along Notices dated 1st August, 2014 were null and void and of no effect on the same grounds that they argued against a declaration that the Loan Note had not been converted into ordinary shares in Éire. I have discussed these arguments above and concluded that there is no reason why CTAM should not be granted a declaration that the Loan Note remains valid and payable by Éire to CTAM. For the same reasons, I am of the view that CTAM is entitled to a declaration that the Drag Along Notices dated 1st August, 2014 issued pursuant to Clause 8.3 of the shareholder's agreement dated 17th January, 2007 are null and void and of no effect.

The Guarantee Claims
174. On the 5th November, 2009, CTAM and the second, third and fourth named defendants entered into the Interest Agreement and a personal guarantee by the second, third and fourth named defendants. By Clause 2.1 of the Interest Agreement between CTAM and the second, third and fourth named defendants, the second, third and fourth named defendants (the guarantors) guaranteed the payment and/or discharge to CTAM of the Liabilities and covenanted that they would pay on demand in writing made to them the Liabilities or such of them as remained unpaid to CTAM in accordance with the terms of personal guarantees attached to the Interest Agreement.

175. The second, third and fourth named defendants each entered into a guarantee in favour of CTAM to pay or discharge the Liabilities as defined up to a maximum of €267,807 to be repaid by Éire as principal on or after the second anniversary of the date of subscription by Údarás na Gaeltachta of the preference shares on the same date. The Liabilities related to the interest due on the Loan Note which CTAM agreed to defer as a condition of the investment in Éire by Údarás na Gaeltachta. CTAM required the guarantors to lodge €105,000 in a designated account on the 17th December, 2009, €147,350 on the 17th December, 2010 and €15,456 on the 4th November, 2011. Failure to deposit in full into the designated account the monies required as security constituted an event of default under Clause 3.4 of the Loan Note instrument.

176. The guarantee provided:

> *"In consideration for [CTAM] executing the Údarás Share Subscription Agreement and approving the transactions set out therein, the Guarantors hereby guarantee the payment and/or discharge to [CTAM] of the Liabilities in accordance with the Interest Agreement and covenant that they will on demand in writing made to them pay and/or discharge the Liabilities or such of them that remain unpaid to [CTAM].*
>
> *[CTAM] may call upon this guarantee (i) at any time after the 5th November, 2011 or the second anniversary of the date of subscription of the Preference Shares, whichever is later (the "Interest Payment Date"), in the event that the Principal [Éire] has not discharged the Liabilities on or before this date, or (ii) immediately in the event of the failure of the Guarantors to deposit in full the amounts required as security under Clause 1.6 below.*
>
> *The Guarantors' liability hereunder shall not be discharged, impaired or otherwise affected by:*
>
> *(i) Any time or other indulgence given or agreed to be given by [CTAM] to, or any composition or other arrangement made with or accepted from*
> *(a) the Principal in respect of the Liabilities or any of them;*
> *(b) any person in respect of obligations under any security relating thereto;*
>
> *(ii) Any insolvency proceeding being filed by or in respect of the Principal.*
>
> *This Guarantee is a guarantee of payment and not of collection so that in the event of the failure of the Principal to pay*

the full amount of the Liabilities upon demand, the Guarantors shall be required to pay to [CTAM] immediately upon notice demand (sic) the full amount of the Liabilities upon demand without any requirement that Carlo Tassara initiate legal action or otherwise take any further action to collect against the Principal."

177. Clause 1.6 of the guarantee recorded that any monies lodged in the designated account were security for the obligations of the guarantors under the agreement.

178. The guarantors (the second, third and fourth named defedants) each accepted that they executed the guarantees and that the monies were not paid into the designated account. They said that the guarantee was procured by duress. Éire desperately needed the extra funds at the time and the investment by Údarás na Gaeltachta was essential to the survival of Éire. The guarantee was sought by CTAM three days before the transaction was due to close and the requirement that monies be deposited in the designated account in support of the guarantee was only sought the day before the transactions were due to close. In the circumstances, they contend that they had no alternative but to sign. They say this means the guarantee was procured by duress and therefore they are not bound to pay the sums claimed on foot of the guarantee.

179. They say that they immediately protested to CTAM for requiring them to enter into the Interest Agreement and the guarantee. They referred to email exchanges in December 2009. On the 8th December, 2009 the second named defendant emailed M le Monnier stating:

"I appreciate that all three of us directors signed an extra agreement demanding this payment [the deposit of the first tranche of interest into the designated account] prior to the receipt of Carlo Tassaras (sic) signature for the acceptance of the stability funding from Údarás. I wish to make it very clear to you that we did sign this document under duress as the company was in an extremely dangerous position due to lack of funding. We worked very hard to keep the company solvent during this period. We did not discuss this request with Carlo Tassara at the time as we could not risk the result of any delay. Despite the fact that 35% of the shareholding is owned by Carlo Tassara the urgency of the situation did not seem important…in this context and also bearing in mind that [the third and fourth named defendants] have not been paid their salaries for the last months due to cash shortages at the company we feel that it is disingenuous of Carlo Tassara to make such demands. In the current situation we feel that the agreement to lodge monies to the escrow account be discontinued. Please consider this situation and reply as soon as possible."

180. In response to this email, CTAM's lawyers, August & Debouzy Avocats, emailed the solicitor acting for Éire and the guarantors in the transaction, McGowan solicitors, on the 16th December, 2009, as follows:

"In early October, CTAM was asked to forgo payment of interest on its convertible loan to Éire Composites in connection with the proposed Údarás na Gaeltachta preference share issue. CTAM made it very clear that its board of directors could only alter the terms of the loan subject to a number of conditions, including complying with restrictions imposed upon it by its own creditors. Those conditions were set out in CTAM's initial proposal made on 6th October, 2009…

It is CTAM's view that it was induced to make concessions in order to meet the requirements imposed by Údarás on the basis of the express undertaking by [the second, third and fourth named defendants] to make reciprocal concessions, including depositing in escrow the amount of interest foregone by Carlo Tassara. They have agreed to these undertakings after having had many weeks to consider them, with the assistance of their legal counsel, and CTAM therefore rejects any suggestion that they were agreed under duress.

In the light of these circumstances, CTAM cannot accept any change in the agreed provisions and must insist that the [second, third and fourth named defendants] comply with their obligations under the guarantee."

181. In response, the third and fourth named defendants decided to write to Mr Romain Zeleski on the 10th December, 2009. They stated:

"Carlo Tassara introduced a side agreement between Carlo Tassara and [the second, third and fourth named defendants] on the day before the investment was to close. Given the pressure that the company was under financially, we felt we had no choice but to sign this side agreement, in order to protect our investment, and also the investment of Carlo Tassara in Éire Composites. We truly felt that we were placed under duress by Carlo Tassara's aggressive stance and its brinkmanship in this matter…

We believe that this agreement is fundamentally unfair and unjust, and is discriminatory in that the [Loan Note] interest is being treated differently to other Directors' Loans in the company. We feel that we were taken advantage of by Carlo Tassara at a time when the company was vulnerable, in a manner that damages the company and undermines the trust between the shareholders."

182. Mr Zeleski did not reply but August & Debouzy Avocats wrote to McGowan Solicitors on 16th January, 2010 in relation to the earlier email of 16th December, 2009. He conveyed the concern of the Board of Directors of CTAM regarding the failure by the second, third and fourth named defendants to comply with the obligation to pay the monies due into the escrow account. On behalf of their client, they requested a response and explanation from the second, third and fourth named defendants and asked for a proposal to remedy the default under the agreements.

There matters lay until relations between CTAM and the defendants broke down completely in the latter half of 2014. On the 8th October, 2014 CTAM's solicitors wrote to each of the guarantors. They said that the interest due under the Interest Agreement in respect of the Loan Note had not been discharged and they called upon each of the guarantors to discharge the interest due. They asked for payment proposals no later than the 17th October, 2014.

183. On the 10th October, 2017 the third named defendant stated that he signed the guarantee in order to prevent Éire going into liquidation. He also stated:

"when signing the guarantee I understood that in the event of default my liability was to transfer an equivalent value of my shares in Éire Composites to Carlo Tassara at the price stated in the guarantee. As I no longer own any shares in Éire Composites I can no longer do this."

184. The second named defendant emailed the solicitor acting for CTAM on the 10th October, 2014 and he stated:

"(1) We were forced to sign the guarantee or CTAM would not accept the Údarás money and Éire Composites would have closed.

(2) We understood that the penalty of non payment was the dilution of our shareholding.

(3) [CTAM and its lawyers] were fully aware that we did not have the 105,000 to put on deposit on 17/12/2009 and it was never spoken about since by [M. le Monnier]

(4) As CTAM were (sic) rewarded with shares at the agreed price for their 2 million loan and interest we feel that the guarantee is not binding anymore."

185. When the proceedings issued CTAM sued each of the second, third and fourth named defendants on a joint and several basis for the sum of €267,807 on foot of the guarantee of the 5th November, 2009.

186. In evidence, the second named defendant accepted that he had executed the guarantee. It was said that he and the third and fourth named defendants had no choice but to agree to the guarantee and to the obligation to place the monies in an escrow account as CTAM would not otherwise agree to the agreement terms with Údarás na Gaeltachta. He said the demand was made to his solicitors three days before the agreement with Údarás was due to sign. He felt that this amounted to blackmail but they signed the guarantees and interest agreement "to keep the company alive".

187. The third named defendant advanced three grounds of defence to the claim on foot of the guarantee. He said that CTAM did not have the right to demand that they execute the guarantee on the 5th November, 2009 as CTAM was not then the holder of the Loan Note because the transfer from Carlo Tassara SpA to CTAM had not been completed. Secondly, he argued that CTAM had not demanded payment of the interest from Éire prior to demanding payment on foot of the guarantees from the second, third and fourth named defendant and accordingly the demands were not valid demands. Thirdly, he said that the second, third and fourth named defendants had agreed under extreme duress to enter into the Interest Agreement and guarantee as without the investment from Údarás na Gaeltachta the company would become insolvent and would have to close. He explained the failure to reply to the email of the 26th January, 2010 on the basis that they could not comply with the obligation to pay the monies into the escrow account and therefore did not answer. It was on that basis that there was no further correspondence and no reference was made to the agreement, "it was assumed that it was no longer required". He accepted that McGowan Solicitors acted as solicitors to the second, third and fourth named defendants in relation to the transaction. He also acknowledged that he had previously guaranteed Éire's liabilities to its bank, AIB.

188. The fourth named defendant stated that many of the directors and management were owed substantial amounts of back salaries at the time, including himself. At the very last minute M le Monnier on behalf of CTAM demanded that the second, third and fourth named defendants give a personal guarantee in respect of the interest due on the Loan Note to CTAM and required that they place money in an escrow account, failing which CTAM would withhold its consent to the agreement with Údarás na Gaeltachta. He said:

"as this would have put the company into liquidation, I felt I had no choice and couldn't let the company go under with the loss of my own job and those of over 40 employees. I also needed to get my back salary paid to me, and missed a mortgage payment at that time, which created a lot of problems for me personally with my own bank. I signed this personal guarantee under pressure, in an effort to save the company, and to alleviate my own financial situation."

189. He explained that at the same time that CTAM demanded the Interest Agreement and the guarantee, Éire's bank had emailed the company "threatening to turn back wages and threatening to call in our personal guarantees". At that time, they amounted to approximately €600,000. He said that he had invested everything in Éire and had remortgaged his house to do so. He did not have the money to put into the escrow account and CTAM, through M le Monnier, knew this. He said that if he had not signed the Interest Agreement and guarantee, AIB would not have paid the wages, the company would have closed and 40 people would have lost their employment, the shareholders would have lost their entire investment, the second, third and fourth named defendants would have lost their loans to the company, CTAM would have lost the benefit of its Loan Notes and the bank could have called in the personal guarantees of the second, third and fourth named defendants for approximately €600,000.

190. The fourth named defendant also agreed with the argument of the third named defendant that CTAM had not demanded interest from Éire and that therefore its demand for payment on foot of the personal guarantees was not a valid demand.

Discussion

191. The argument of the third named defendant that CTAM was not entitled to seek a guarantee from him (or the second or fourth named defendants) in November 2009, on the grounds that it was not the holder of the Loan Note and, therefore, not entitled to the interest due on foot of the Loan Note is without merit for the reasons I have explained above. Therefore, this ground of defence must fail.

192. Equally without merit is the argument that no valid demand was made of the guarantors because the interest had not previously been demanded from the principal, Éire. Clause 1.2 of the guarantee provides:-

"[CTAM] may call upon this Guarantee)

(i) at any time after 5th November, 2011, or the second anniversary of the date of subscription of the preference share, whichever is later (the 'Interest Payment Date'), in the event that the Principal has not discharged the Liabilities on or before this date, or

(ii) immediately in the event of the failure of the Guarantors to deposit in full the amounts required as security under Clause 1.6 below."

193. It is clear from the terms of the guarantee that no prior demand upon the principal is required. CTAM may call upon the guarantors at any time after the interest of payment if Éire has not discharged the Liabilities. Éire has not discharged the Liabilities and, therefore, as of 5th November, 2011 CTAM was free at any time to call in the guarantees.

194. In addition, CTAM was entitled to call in the guarantee immediately in the event that the guarantors failed to deposit in full the amounts required as security to be placed in the designated account. There was no dispute that no interest at all had been paid by Éire to CTAM and it was accepted that the guarantors had not paid any monies into the designated account. It follows that under either provision, CTAM was entitled to call upon the guarantors when it did and that a prior demand of Éire to discharge the interest

was not a precondition to this right.

195. The clause I have quoted above makes it clear that the guarantors are required to pay the Liabilities to CTAM insofar as they have not been discharged by Éire. It is not the case that the only "*penalty*" that they would suffer if they failed to lodge monies into the designated account, was to accelerate the right of CTAM to require the conversion of the Loan Note Instrument into ordinary shares in Éire. This was an additional term set out in Clause 1.6 of the guarantee. The primary obligation under the guarantee was to secure the payment and/or discharge to CTAM of the Liabilities in accordance with the Interest Agreement.

196. The principal ground upon which the second, third and fourth named defendants resisted judgment was that of economic duress. In *ACC Bank v. Dillon* [2012] IEHC 474, Charleton J. in the High Court had to consider a similar argument. The first and second named defendants were directors of a construction firm. During the economic recession, the company fell into difficulty and the terms of three loans had expired. The plaintiff bank indicated that unless it received personal guarantees from the directors, it would appoint a receiver over the company. This was a dire prospect for the directors since it could lead to the loss of potentially lucrative building contracts and the loss of 250 jobs. Initially, the directors resisted the bank's request for personal guarantees. Eventually, they agreed to sign them. The directors claimed that the circumstances in which they entered into the guarantees amounted to duress.

197. Mr. Dillon, the first named defendant in that case, whom the judge described as an honest person, stated at para. 5.4:-

> *"There was no choice. The repercussions were a huge. Leave me out of it and you take 60 staff, wives, kids, families, mortgages. You take all the suppliers and subcontractors, just save four, five, six hundred of them and loans, they were all going to get burned because of this."*

198. At para. 5.5, Charleton J. stated:-

> *"Absent from this vivid account was any allegation of overbearing conduct or of the directors being subjected to interrogation-type pressures. The plaintiff bank stood to lose, at the then apparently existing property prices, about €1 million. In the event, the probable loss to the bank would now be of the order of €4 million. The first and second defendants stood to lose their business and the hope of recovery from the position they were in. In the context of a difficult situation, the bargaining power of the plaintiff bank was stronger. It was lawful for the plaintiff bank to appoint a receiver over Cordill Construction and it was lawful to seek to bargain out that final step by the directors seeking further time to pay or by the bank giving further time in return for a personal guarantee [from] the directors. The circumstances of negotiation were certainly fraught but that does not of necessity always amount to illegitimate pressure. Further, the first and second defendants were advised by the financial controller of Cordill Construction, time was allowed to pass before a final decision was made and the decision was entered into on both sides in the expectation that the end [had] not yet come for the overheated residential property market. All of that is within the level of appreciation that must be allowed in commercial bargaining. It is not duress."*

199. It must be borne in mind that CTAM was under no obligation to enter into the transaction with Údarás na Gaeltachta in November 2009. If it did not, it stood to lose the value of its investment and its loan, an amount in excess of €5.5 million. The second, third and fourth named defendants likewise stood to lose their investment in Éire and any prospect of repayment of their personal loans to Éire. The third and fourth named defendants were at risk of losing their employment and all three were at further risk of having their personal guarantees to Éire's bank called in.

200. It was lawful for CTAM to negotiate the Interest Agreement and the guarantees. In the words of Charleton J., undoubtedly the negotiations were fraught, but that does not amount to an illegitimate pressure by CTAM. It was accepted by the second, third and fourth named defendants that they had solicitors advising them in relation to the transaction. They had previously given guarantees to Éire's bank and so were fully aware of what giving personal guarantees entailed. They had a short period of time in which to decide on whether to reject the requirement of CTAM. They, no doubt, shared the view of Mr. Dillon in *ACC Bank v. Dillon* that this was no choice at all, but it was the hope of all parties that the investment of Údarás na Gaeltachta would enable the business of Éire to survive and thrive. In my opinion, from a legal perspective, the situation they faced was legally the same as that faced by the first and second named defendants in *ACC Bank plc v. Dillon*. The pressure came within the level of appreciation that must be allowed in commercial bargaining and did not amount to economic duress. As such, it is not sufficient to vitiate their consent to give the guarantee to CTAM and does not afford them a defence to the claim for judgment on foot of the guarantee.

201. This conclusion is in line with the decision of O'Neill J. in *Rogers v. Iaralco Limited* [2007] IEHC 130, where O'Neill J. stated:-

> *"[T]he factors put forward by the plaintiff as constituting duress or intimidation could not amount to that. The fact that the plaintiff was under the pressure of having to pay wages could not fairly be viewed as a duress exercised by the defendants. In commercial life the pressure of having to pay wages is universal. Of course, in certain circumstances and because of the fragility of a business that pressure may be greater than in other circumstances. However the pressure to pay wages must be the most common factor underlying all commercial arrangements." (emphasis added)*

For this reason, he rejected the ground that the contract in that case was voidable on the grounds of economic duress.

202. In those circumstances, I am satisfied that the guarantee entered into by the second, third and fourth named defendants on 5th November, 2009, is valid. The Liabilities secured by the guarantee, the interest payable pursuant to the Loan Note, were never discharged by Éire. CTAM was entitled to demand payment of the Liabilities secured by the guarantee on 8th October, 2014. The second, third and fourth named defendants have failed to pay the amount claimed and CTAM is entitled to judgment on a joint and several basis against the second, third and fourth named defendants in the sum of €267,806.

Disqualification

203. CTAM sought orders pursuant to s. 160 of the Companies Act 1990, now s. 842 of the Companies Act 2014. Section 842, provides:-

> *"On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied—*
>
> > *(a) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors,*
> >
> > *(b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner*

of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner,

(c) …

(d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company."

204. An application for an order under s. 842 may be brought by a member or creditor of a company pursuant to the provisions of s. 844(4) in respect of a person who has been an officer of the company or who has been, or is concerned, or taking part in the promotion, formation or management of a company.

205. CTAM submitted that it was a creditor of the company in respect of the claim and would otherwise have been a member or creditor of the company had it not been for the wrongful conversation of the Loan Note into shares in Éire and the wrongful application of the Drag Along provisions of the Shareholders Agreement to enforce sale of the shares owned by CTAM in Éire to the fifth named defendant.

206. While it is accepted that CTAM has *locus standi* to bring this application and indeed, orders of this kind may be made by the court of its own motion, it would be normal for applications pursuant to s. 842 to be brought either by the liquidator of a company or the Director of Corporate Enforcement. A liquidator or the Director of Corporate Enforcement would normally have access to all of the books and accounts and records of the company. They would be in a position to analyse all of the affairs of the company and to obtain explanations in relation to any anomalies or matters of concern arising from an examination of the books and records and accounts of the company.

207. Neither Mr Wallace nor Mr Luby, both very experienced insolvency practitioners with considerable experience in applications of this kind, were requested to carry out any such exercise in respect of either Éire, Naero, CTL or ACE. The court has piecemeal rather than comprehensive evidence in relation to the manner in which the affairs of these companies were conducted while the second, third and fourth named defendants were directors of some or all of these companies.

208. Notwithstanding the limitations of the evidence available to the court, certain matters of considerable concern have emerged. It was accepted by Mr McPartlan that the accounts filed on behalf of ACE were incorrect. The fifth named defendant was entitled to shares which apparently had never been issued and returns were filed in the CRO on the basis that he was not a shareholder. Mr. Wallace was instructed for the purposes of this case that ACE paid the sum of €398,000 to Éire. However, the accounts filed by ACE show that the creditors for that year were €167,000 and therefore either this instruction or the accounts were incorrect.

209. The manner in which Éire conducted its affairs gives cause to considerable alarm. There were no relevant documents, records or accounts for all of the transactions considered by the court in this judgment. Even taken at its most benign, it is deeply worrying that the financial controller (Mr McPartlan) and the managing director (the third named defendant) of Éire could not explain the manner in which it was said the fifth named defendant provided monies to Éire between January and July 2014. If, as it was contended, the money was provided as equity, no shares were ever issued to the fifth named defendant in respect of this investment. If the money was advanced as a loan, there were no loan documents produced evidencing this or recording the terms up until the 30th June, 2014. The debt owed by ACE to the fifth named defendant became part of the Loan Note issued by Éire to the fifth named defendant in June 2014. Aside from the fact that the loan to ACE was said to have been converted to shares, Mr McPartlan could not explain how this conversion occurred. Mr Wallace was told that the fifth named defendant was collapsing the business of ACE into Éire but it would appear that he was never told that the fifth named defendant was not the 100% shareholder (or indeed the holder of any shares) in ACE. Mr Luby was unable to see any money advanced by the fifth named defendant in the books of Éire which were discovered to him that reflected an investment by the fifth named defendant in Éire. CTAM argued that there was an utter failure on the part of the second, third and fourth named defendants to keep proper records both in relation to its accounts and in relation to agreements reached with ACE or agreements between Éire and CTL or other parties. From the evidence adduced at trial, I would have to agree.

210. Having carefully considered the evidence in this case, I have reached two conclusions in relation to the application for disqualification orders against the second, third and fourth named defendants pursuant to s. 842 of the Companies Act 2014. Firstly, there are significant grounds for concern as to the manner in which the affairs of the companies Éire, CTL, Naero and ACE have been conducted. The facts disclosed may be such as would justify the court in finding one or more of the second, third or fourth named defendants or indeed all of them to be unfit to be concerned in the management of a company. However, I am also quite clear that this court is not in a position to adjudicate fairly on the matter. The court has incomplete evidence. The affairs have not been considered by an independent expert, such as a liquidator or the Director of Corporate Enforcement, in a comprehensive manner. The defendants were representing themselves in extremely difficult circumstances in a very complex case which ran for twenty days in the High Court. Their attention was not focused upon this aspect of the case and, in truth, neither was it the central focus of the case advanced by CTAM either.

211. I, therefore, will decline to make an order in respect of either the second, third or fourth named defendants pursuant to s. 842 of the Companies Act 2014 on the grounds that their conduct as directors and managers of the relevant companies requires further examination. I direct that the matter should be referred to the Director of Corporate Enforcement for his consideration. It will then be a matter for him to determine whether he believes it would be appropriate to bring an application based on access to all of the books and records of the relevant companies before the court.

Conclusion

212. It is evident that the second, third and fourth named defendants and Mr McPartlan care very deeply about the survival and success of Éire. They can truly be said to have had the courage of their convictions in supporting the company. The third named defendant invested his life savings in the company. The fourth named defendant re-mortgaged his house in order to support the company. On more than one occasion, the third and fourth named defendants and Mr McPartlan were not paid their monthly salaries. Each of them and the second named defendant gave personal guarantees to AIB in respect of Éire's obligations to the bank. The second, third and fourth named defendants entered into the Interest Agreement and guarantee in November 2009 in favour of CTAM. Their support of Éire has come at a very great personal cost and they have made many sacrifices which they may well feel was to no avail. They were passionate in their defence of these proceedings and are very bitter at what they regarded as the betrayal of Éire and themselves by CTAM and M le Monnier.

213. Unfortunately, their view of matters was gravely skewed and partial. There was in effect a culture clash between their passionate devotion to the company and the position of CTAM. CTAM at all times was an investor in the company and it provided

very real support to Éire. The figures speak for themselves in this regard. It has received no return on its very substantial investment and loan and no interest has been paid on the loan. It had a real interest in the success of the company, regardless of the dissatisfaction of the defendants with the attitude of CTAM's nominee director on the board. Yet this has not been acknowledged by the second, third and fourth named defendants.

214. Further and crucially, the second, third and fourth named defendants fundamentally failed to appreciate some of the essentials of company law and the implications this had for their relationship with CTAM. As a general proposition, a creditor is not obliged to continue to provide credit or support to a struggling debtor. A shareholder does not owe fiduciary duties to the company as contended repeatedly by the defendants. It is not obliged to sacrifice its interests in order to ensure the continued survival of the company. The remedy for the difficulties faced by Éire in December, 2013 was not to take unilateral steps against a creditor or minority shareholder (as occurred here).

215. The appropriate remedies in law where there is a company struggling with debt and an independent third party investor willing to support the enterprise of the company include examinership. Quite why this was not properly explored in late 2013 when the fifth named defendant indicated that he was prepared to purchase the entire shareholding of Éire on the proviso that all of the directors' loans and the Loan Note were converted into shares has remained a mystery. It was a missed opportunity and for that the defendants are now paying the price. The steps they adopted were not lawful and breached the property and contractual rights of CTAM. For the reasons I have outlined, I will grant the declarations sought and enter judgment against the second, third and fourth named defendants on foot of the guarantee of 5th November, 2009. I will hear the parties further on the form of the order.