[2017] IEHC 387

THE HIGH COURT

(COMMERCIAL COURT)

Record No. 2017/32 SP

BETWEEN:

BLACKROCK HOSPITAL

Applicant

-and –

JOSEPH SHEEHAN, JAMES SHEEHAN, ROSEMARY SHEEHAN, GEORGE DUFFY, ROSALEEN DUFFY, TULLYCORBETT LIMITED, BRECCIA UNLIMITED COMPANY, BENRAY LTD, IRISH AGRICULTURAL DEVELOPMENT COMPANY UNLIMITED COMPANY, JOHN FLYNN, AND BLACKROCK CLINIC LIMITED

Respondents

Judgement of Mr Justice Robert Haughton delivered this 14th day of June 2017

INTRODUCTION

1. The applicant ("BHL") brings these proceedings as the owner of the premises comprised in and known as the Blackrock Clinic by way of Special Summons asking the court to construe certain provisions of a Shareholders' Agreement dated 28 March, 2006 ("the Agreement"). BHL and all of the respondents, other than the sixth named respondent, Tullycorbett Limited, were parties to the Agreement. The first named respondent owns 28.07% of the shareholding in BHL and the second, third, fifth, sixth, seventh and ninth named respondents are currently the other shareholders. The fourth named respondent, George Duffy, held shares at the time of execution of the Agreement but his shares are now held by the fifth and sixth named respondents. The tenth named respondent John Flynn was and remains a party to the Agreement but is not a shareholder or promoter. The eleventh named respondent is a wholly owned subsidiary of BHL and is identified with and supports BHL in these proceedings.

2. The question posed for the determination of the court is the following: –

> "Whether, having regard to the provisions of the Shareholders' Agreement dated the 28th day of March 2006 to which the applicant and each of the respondents are parties, and to the provisions of the applicant's constitution within the meaning of Part 2 of the Companies Act 2014, the applicant and each of the respondents must execute a deed of adherence in the form of Schedule 6 to the Shareholders' Agreement before the applicant may proceed to register a Family Transfer of shares by entering the name of a proposed transferee in the register of members of the applicant."

3. This question is posed in the context of two transfers. On 15 September, 2015, BHL was notified by the second named respondent that following a meeting with his financial advisers it had been recommended that he transfer the shares held by him and his wife, the third named respondent, to Dornway Limited, a family holding company. On 20 September, 2015, BHL was notified by the fourth named respondent on behalf of Tullycorbett Limited that that company wished to transfer a number of its shares to Xroon Limited. The Board of directors of BHL ("the Board") approved the Dornway Limited transfer on 28 July, 2016, and approved the Xroon Limited transfer on 25 October, 2016, by a majority, the first named respondent objecting. BHL's view is that the Agreement requires that the deeds of adherence in respect of the two proposed transfers are required to be executed by all parties, but certain parties disagree and assert that only the transferee must execute the deed of adherence.

PRELIMINARY OBJECTION

4. Preliminary objection is taken by and on behalf of the first named respondent to the court determining this issue on the basis that BHL has no standing or entitlement to bring these proceedings having regard to certain provisions of the Agreement.

5. Reliance was placed on clause 5.11 of the Agreement, headed "Restricted Transactions" which provides, so far as relevant: –

> "Each of the Promoters undertake with the other Promoters he/it will at all times (save as may be required by law) exercise all voting and other rights and powers available to him/it from time to time so as to procure that each company shall not without the prior written consent of each Promoter or combination of Promoters for so long as such Promoter or combination of Promoters hold not less than 25% of the nominal value of the issued share capital of the company take or agreed to take any of the following actions:

5.11.8 commence any legal or arbitration proceedings (other than routine collection of trade debts) or settling any proceedings taken against it."

In this clause the reference to "company" is a reference to BHL, and the reference to "Promoter" includes shareholders such as the first named respondent. BHL is not a "Promoter".

6. Counsel for the first named respondent characterised this provision as a promise to shareholders willing to invest in the purchase of 25% or more of the share capital of BHL that the other promoters would not take certain decisions at Board level, including a decision to commence proceedings such as the present Special Summons in the face of opposition from the first named respondent. Counsel then relied on in clause 5 headed "COVENANTS CONCERNING THE COMPANY", and in particular clause 5.2: –

> "5.2 **Necessary Actions**
>
> Each of the parties hereby covenants with each other that he or it shall take all necessary actions and exercise all such voting rights as he may have from time to time so as to procure (insofar as lies within his or its power of procurement individually or collectively with others) that the Companies shall comply in full with the provisions of this Agreement."

Counsel emphasised the opening reference to "Each of the parties…" included BHL as a party to the Agreement, and therefore BHL had an obligation to comply "in full with the provisions of [the] Agreement". Counsel argued that BHL breached this covenant in bringing these proceedings in the face of opposition from the first named respondent as the holder of 28.07% of the shares. In support of his contention that a shareholders' agreement could override the freedom of the board of directors to make a decision in the exercise of their business judgment to authorise the bringing of proceedings, or take other decisions in the best interests of the company, counsel relied on *dicta* from *Fulham Football Club & Others v. Cabra Estates* [1994] 1 BCLC 363 and *Ontario Inc v Platinum Wood Finishing Inc* 96 O.R. (3d) 467. Counsel further argued that as any one of the shareholders could have issued a construction summons asking the court to determine the issue, the bringing of these proceedings by BHL was not a "necessary action".

7. While these proceedings undoubtedly constitute "legal…proceedings (other than the routine collection of trade debts)", the court does not consider that there is any substance or merit to this preliminary objection for a number of reasons.

8. Fundamentally the objection conflates the issue of whether this court has jurisdiction to hear the case, with an alleged breach by BHL of the Agreement. In clause 10.7.1 the Agreement expressly provides that it is to "… be governed by and construed in accordance with the laws of Ireland and the parties hereto agree to submit to the exclusive jurisdiction of the Irish courts." Under Order 3 of the Rules of the Superior Courts instituting proceedings by special summons may be adopted in certain classes of claims including –

> "7. The determination of any question of construction arising under any deed…"

This procedure allows the High Court (or the Master in cases which he may decide) to determine such proceedings on affidavit in accordance with Order 38. As BHL is a party to the Agreement it clearly has sufficient interest to bring these proceedings. There is no provision in the Agreement that ousts the jurisdiction of this court to hear and determine these proceedings. There is a provision allowing for arbitration of disputes (clause 10.7.2), but this is couched in terms of "… may be referred" and accordingly the parties cannot be obliged to resort to arbitration. This court therefore has jurisdiction to hear and determine these proceedings.

9. Taken at its height - and assuming that the jurisprudence relied upon by the first named respondent would be accepted by an Irish court - the objection is that BHL *may be* in breach of the Agreement in bringing these proceedings. Any such breach is denied by BHL, but even if there was a breach it is trite law that it does not necessarily give rise to any right to damages or other relief. In any event whether there is any such breach, or whether it may give rise to any right to relief, are not questions that are before this court or that it is required to decide.

In this regard it should be noted that although the first named respondent objected to the institution of these proceedings at a meeting of the Board on 25 October, 2016, and in correspondence, and at some length in the affidavit which he swore herein on 6 March 2017, he never sought an injunction to prevent this case proceeding. If that path was open to him he should have taken it in a timely fashion following the issue of the special summons and not waited to pursue his objection until the substantive hearing when all parties were assembled and ready to proceed.

10. In any event I'm quite satisfied that having regard to the nature and history of the dispute the bringing of these proceedings constitutes a "necessary action" within the meaning of clause 5.2 of the Agreement. First, it is instructive to consider the conflicting positions taken by the parties to the question raised, and to the two Deeds of Adherence: –

- BHL (and Blackrock Clinic Limited) take the view that the signatures of all parties are required, and that they have an obligation under the Agreement to execute the deeds of adherence.

- The first named respondent agrees that all parties need to sign. He is willing to sign the Dornway Limited deed of adherence, but when pressed indicated through counsel that he is not happy to sign the Xroon Limited deed of adherence which he asserts does not relate to a "Family Transfer" within the meaning of the Agreement.

- The second and third named respondents assert that only the transferee's signature is required and that as Dornway Limited has executed and duly stamped its transfer and also executed its deed of adherence, Dornway Limited should be registered by BHL as a shareholder, but they would welcome clarity on the issue.

- The fourth, fifth and sixth named respondents argue that only the transferee need execute a deed of adherence in the form set out in Schedule 6 before BHL may proceed to register the Family Transfer of shares.

- The seventh and ninth named respondents contend that only the transferee is required to sign a deed of adherence in respect of the Family Transfer of shares. In the alternative if all the respondents/shareholders are required to sign then there is an obligation to sign. In the further alternative a deed of adherence executed by the transferee alone becomes binding on all parties because of the maxim that "*equity regards as done that which ought to have been done*".

- The eighth and tenth named respondents desire clarity on the issue but submit that all shareholders are required to execute a deed of adherence.

11. Secondly, these differing positions reflect disagreement and impasse on the issue at board level. This is particularly evident from minutes of the board recording a meeting on 25 October, 2016. Notwithstanding that both transfers were "approved" by the board, no

agreement could be reached on whether all parties to the agreement were required to sign the deeds of adherence which it was accepted had to be executed by each transferee pursuant to clause 8.4 of the Agreement. The legal advice of Arthur Cox, solicitors to BHL, before the meeting was to the effect that all parties must sign, but that there were three options open to the parties to deal with the conflict. The first was for all parties to execute the deeds of adherence. The second was that a supplementary deed would be executed by all parties amending the Agreement providing that all future deeds of adherence need only be executed by transferees. The third was that BHL would apply to court to construe the Agreement. Also before the meeting was a suggestion emanating from the first named respondent/board member James (USA) Sheehan recommending that BHL not get involved in further legal dispute and leave it to one of the shareholders to apply to court (this originated in an email of James (USA) Sheehan of 18 October, 2016, which was passed round all interested parties by BHL together with a Memorandum setting out the legal advice from Arthur Cox solicitors). It is noteworthy that the second named respondent suggested arbitration. He was joined in this by Breccia's representative Mr Declan Sheeran, who also suggested that the Board seek an opinion from an independent senior counsel. It is interesting to note the position taken by the first named respondent: – "Joseph Sheehan said that, unless a decision was reached in the Courts, parties would not agree. Declan Sheeran asked if he was telling the company to go ahead and incur the expense. Joseph Sheehan replied that Dr Duffy and Jimmy Sheehan should take this matter to the Courts and not the Clinic."

12. Thirdly, following this board meeting letters dated 25 October, 2016, were sent to the parties by Blackrock Clinic Limited setting out the background to the issue and Arthur Coxes' legal advice, and restating the options together with the Board's recommendation that the parties seek to resolve the matter without the necessity for recourse to the High Court, together with the deeds of adherence executed by the transferees and a request that they be executed by the parties. A draft deed of variation was also enclosed for consideration. Sadly these letters did not achieve any consensus.

13. Following this meeting and correspondence BHL was left with only two options – to apply to court or do nothing. In the court's view the latter was not a realistic option in light of section 94 of the Companies Act 2014 which empowers and obliges a company to make entries on its register of members reflecting a transfer of shares. Under subsection (3) a transferor of shares is "deemed to remain the holder of the share until the name of the transferee is entered in the register in respect thereof".

Subsection (7) provides –

> "On application of the transferor of any share or interest in a company, the company shall enter in its register of members, the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee."

Quite apart from BHL's obligations under section 94, an up to date register of members is necessary in order to ensure dividends are paid to the appropriate parties, and to regularise attendance and voting at meetings and the exercise of other shareholder rights or obligations arising under the Agreement, the Articles of Association, or otherwise in law.

14. I am quite satisfied that BHL took all appropriate steps to resolve the impasse before instituting these proceedings as a last resort. These proceedings were "a necessary action" within the meaning of clause 5.2.

15. It should also be stated that in taking the preliminary objection the first named respondent has acted inconsistently, at least in part, with the statements made by him and/or James (USA) Sheehan by email or at the board meeting on 25 October, 2016, where they repeatedly argued that "a judge should decide". It is hard to discern any good reason for pursuing this objection at full hearing where all parties agreed that clarity was desirable, and where, if the objection had succeeded, the result would only have been to delay a decision on the substantive issue. If the true reason was that BHL would incur costs that might have been avoided if a transferring shareholder had applied to court (as occurred on a previous occasion when an issue arose as to the construction of the Agreement), then that is a matter that could always be addressed at a costs hearing. It seems to the court more likely that the preliminary objection was pursued for the purpose of delay or obstruction. I have set out these matters at some length because they are relevant to the court's reasons for rejecting the preliminary objection, but may also have a bearing on the court's approach to the costs of these proceedings.

ADDITIONAL ISSUE

16. It should also be mentioned at this point that counsel for the first named respondent asked the court, if considering the substantive issue, to also consider whether, if a deed of adherence requires all parties to sign, they have an obligation to sign. This was raised in the particular context of the first named respondent casting doubt over whether the transfer of shares to Xroon Limited is truly a "Family Transfer" as contemplated by the Agreement, counsel observing that if it is not a "Family Transfer" then the parties are not obliged to sign the deed of adherence until the "Offer Round" provisions of clause 8 of the Agreement have been followed. The first named respondent thus sought to raise, indirectly, whether the transfer to Xroon Limited is a "Family Transfer".

17. This broadening out of the case was opposed as this is not a question raised before the court in the Special Summons. Counsel for the first named respondent suggested that the court could and should address this as an issue arising, and that it could do so under Order 38 rule 8 which provides –

> "8. If at any stage during the course of proceedings instituted by special summons it shall appear to the Court that the determination of some question or questions of fact is necessary for the proper decision or ruling as to the relief to be granted in such proceedings or as to any matter arising therein, the Court may determine such question or questions of fact either by directing the trial of the issues in regard thereto or in such other manner (whether summary or otherwise) as may seem convenient for doing justice between the parties; and evidence as to the set question or questions of fact may be given either orally or by affidavit or partly orally and partly by affidavit as the Court may in the circumstances think proper."

While the court might have availed of this provision I am not satisfied that it should do so in circumstances where the validity of the Xroon Limited Family Transfer was not addressed in the affidavit evidence adduced by the plaintiff, by the first named respondent in the affidavits which he swore on 6 March, 2017, and 8 May 2017, by Mr Declan Sheeran on behalf of Breccia/IADC, and in circumstances where no affidavits were filed on behalf of the fourth, fifth and sixth named respondents in respect of whom this further issue would seem to be most relevant. Furthermore although written legal submissions were filed on behalf of all parties none of them addressed this issue.

18. Apart from the limits imposed by the pleadings and affidavits, the court is not willing to adjudicate indirectly on whether the Xroon Limited transfer is a valid "Family Transfer" for a further reason. Clause 8.8.1 of the Agreement allows a "promoter" to transfer his

shares to or among any one or more of his family members or to a body corporate wholly owned by him. Under clause 8.8.2 where such body corporate ceases to be wholly owned by him then six months later that body corporate is deemed to have served a "Transfer notice" which triggers provisions that require an "Offer Round". Clause 8.9.1 obliges persons who have facilitated change in control of a promoter/shareholder to disclose that fact and relevant circumstances and family members must provide relevant information, and under clause 8.9.2 the promoter must provide certain evidence, and further provisions of clause 8.9 provide for the consequences of a refusal to provide complete information. The court was informed in the course of argument that the first named respondent has not to date availed of these provisions to seek information or evidence related to the transfer to Xroon Limited, and this was not refuted by counsel on behalf of the first named respondent. In principle it seems to the court that a shareholder questioning the validity or *bona fides* of a "Family Transfer" should first avail of clause 8.9 to obtain all relevant facts and circumstances (if not already known) before mounting a challenge or asking the court to adjudicate.

19. However, the question posed in the Special Summons asks whether each of the respondents "must" execute a deed of adherence where there is a Family Transfer. Although asked primarily in the context of whether this is a requirement before BHL may register the transferee, the question may also be read as raising the issue of whether there is a legal obligation on all the parties to execute a deed of adherence in respect of a valid "Family Transfer". In view of the history of disputes between shareholders, and the appetite for an answer to this question that was evident at hearing, and the fact that this issue is one upon which the court was addressed (particularly in submissions made on behalf of the seventh and ninth named respondents), the court will address this further aspect of the question raised.

THE PRIMARY ISSUE

20. The issue arises because of the wording adopted in clause 8.4 of the Agreement, and the Schedule to which it refers. Clause 8.4 reads: –

> "8.4 **Adherence by a Transferee**
>
> A Shareholder may not conclude an agreement to transfer any Shares to a transferee who is not already party to this Agreement unless the proposed transferee has executed under seal in favour of and delivered to the Company and the other Promoters a deed of adherence in the form substantially set out in Schedule 10 whereby the transferee agrees to be bound by this Agreement as if he had been party to it."

Thus clause 8.4 expressly provides that the transferee must execute a deed of adherence but does not contain any express provision requiring that it be signed by the other shareholders and parties to the Agreement.

21. There are only six schedules to the **a**greement, and it was common case that the reference to Schedule 10 was a drafting mistake and that it should be read as Schedule 6 because that is a template for a deed of adherence. That schedule reads:

"SCHEDULE 6

THIS DEED OF ADHERENCE is made on 2005
BETWEEN

1 JOSEPH SHEEHAN ("Joseph Sheehan")

2 MR JAMES SHEEHAN and MRS ROSEMARY SHEEHAN ("Mr Sheehan")

3 BRECCIA LIMITED ("Breccia")

4 DR GEORGE DUFFY ("George Duffy")

5 BENRAY LIMITED ("Benray")

6 IRISH AGRICULTURAL DEVELOPMENT COMPANY ("I.A.D.C")

7 MR JOHN FLYNN ("Mr Flynn")

8 BLACKROCK HOSPITAL LIMITED ("BHL")

9 BLACKROCK CLINIC LIMITED ("BCL")

10 ("the Hospital Company")

11 [name] ("the Purchaser")
RECITALS:

> A By Shareholders Agreement relating to the Blackrock Clinic dated [] March 2006 made between the parties of the first ten parts ("the Main Agreement") the Promoters (therein defined) agreed to subscribe for Shares and enter into guarantees and entered into other related agreements.
>
> B The Purchaser has agreed to purchase Shares in the Companies and must enter into this Deed of Adherence in order to comply with the Main Agreement.

NOW IT IS AGREED as follows:

> 1 **Definitions**
>
> 1.1 Unless the context otherwise requires, words and expressions defined for the purpose of the Main Agreement shall have the same meaning in this Deed.

1.2 This Deed and the Main Agreement shall be construed together as one document.

2 **General Covenants**

2.1 The Purchaser hereby covenants with and undertakes to the parties to the Main Agreement and each of them to comply with the provisions on the part of "the Promoters/Shareholders" contained in the Main Agreement.

2.2 Each of the parties to the Main Agreement covenant and undertake to the Investor to comply with their respective obligations under the Main Agreement.

In witness of which the parties have executed this deed under seal on the date first herein stated:"

22. It will readily be seen that on its face the form in Schedule 6 contemplates all of the shareholders and other parties to the Agreement joining in and executing the deed of adherence along with the purchaser of the shares, notwithstanding that there is no provision in the body of the Agreement expressly requiring that they join in and execute, but there is an express provision requiring the transferee to execute. This is at the heart of the dispute.

PRINCIPLES OF INTERPRETATION

23. In *Flynn and Benray v Breccia and another* [2017] I.E.C.A. 74, in an appeal from a judgment of this court relating to the same shareholders' agreement, Finlay Geoghegan J. in delivering the main judgment of the court confirmed that the principles applicable to the interpretation of the Agreement are those that derive principally from the oft cited approval by Geoghegan J. in the Supreme Court in *Analog Devices BV v. Zurich Insurance Company Ltd* [2005] 1 I. R. 274 of Lord Hoffmann's dicta in *Investor Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 912:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'."

24. The Court of Appeal also approved the statement of principle by McKechnie J. in the Supreme Court in *Marlan Holmes Ltd v. Walsh and another* [2012] IESC 23, at paragraph 51:

'It is important however to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.

The boundary between what is permissible and not in this context is captured by the following quotation from *Charter Reinsurance v. Fagan* [1997] A.C. 313 where at p. 388 Lord Mustill stated:-

'There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to

> substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.'

At paragraph 52 of her judgement Finlay Geoghegan J. also notes the *caveat* added by Fennelly J. in *ICDL v. European Computer Driving Licence Foundation* [2012] 3 IR 327, where having referred to Lord Hoffmann's five principles he added "emphasis on those admissible aids to interpretation should not, however, mislead us into forgetting what a contract is, in the first instance, composed of the words used by the parties".

25. Certain other principles are highlighted in the written submissions of Breccia/IADT. One of these that the court readily accepts is that words of a given clause must be *"construed in light of the terms of the entire contract in which it is contained"* per Finlay CJ, *O'Neill v. Beaumont Hospital Board* [1990] ILRM 419, at page 436.

26. Counsel for those parties asserting that only the transferee need sign the deed of adherence also referred the court to the principle that where words used in a contract are ambiguous, the court can resolve that ambiguity by considering which of the available constructions produces a more commercially reasonable result, and relied on the authority of Lord Reid in *L Schuler AG v Wickman Machine Tools Sales* [1974] AC 235, where he stated: –

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

Reliance for this proposition was also placed on *Rainy Sky v. Kookmin Bank* [2011] 1 WLR 2900 where Lord Clarke stated: –

> "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

THE MAIN ARGUMENTS

27. In written and oral submissions, counsel for BHL argued that all parties are required to sign the deed of adherence in accordance with Schedule 6 because this then constitutes a *'novation'* of the Agreement between the continuing parties and the transferee. They argued that if the deed of adherence was executed only by the transferee it would bind the transferee to the terms of the Agreement but would not necessarily confer on the transferee all of the rights and benefits deriving from the obligations of the other parties under the Agreement. In making this argument they rely on a number of academic works amongst which is ***The Law and Practice of Shareholders Agreements,*** Thomas, Ryan and Baylis (4th Edition, Lexis Nexis, 2014). At page 297 the authors state: –

> "8.121 The shareholders agreement as a contract is subject to the usual contractual rules on assignment, to the effect that the benefit but not the burden may be assigned in writing without the consent of the shareholders. It would make little sense, however, to permit assignments of rights under the agreement while establishing careful controls on the transfer of shares, and the usual practice is to prohibit assignments under the agreement except to third party transferees of shares. To ensure that the transferees are bound as well as benefited by the agreement, they may be required to enter into a deed of adherence, which has the effect of a novation. A novation creates a directly enforceable contract between the existing shareholders and the new shareholder. When the deed of adherence is delivered by the transferee and executed by the other shareholders (or by the company on their behalf depending on the structure) the transferee becomes in effect a party to the agreement with the rights and obligations of the transferring shareholder."

28. In their oral submissions counsel for the first named respondent supported the position taken by BHL on the question posed in the Special Summons and drew the court's attention to clause 10.5 of the Agreement which provides:

> "10.5 **Entire Agreement**
>
> This Agreement, the Schedules to this Agreement and the documents referred to in this agreement together embody the entire agreement and understanding between the parties hereto and supersedes and terminates all prior statements, representations, agreements, arrangements, employment and understandings relating to the Company, the subject matter of this agreement and the Business, and shall be amended or supplemented only by written agreement of all the parties hereto. For the avoidance of doubt all previous agreements entered into by the shareholders of the companies are hereby terminated."

Counsel argued that Schedule 6 must be read with and as part of the Agreement.

29. In the various submissions opposing the need for any execution of a deed of adherence otherwise than by a transferee, the central argument is that "Family Transfers" are exceptional and are not subject to the express restrictions on general transfers of shares, and that to require all parties to execute the deed of adherence before a Family Transfer could be validly effected would lead to absurd results and be contrary to business common sense.

In this regard reliance is placed on clause 8.2.3 which requires generally that in respect of a proposed transfer of shares there must be an "Offer Around" to existing shareholders at a "Specified Price", but this does not apply to "Family Transfers" by virtue of clause 8.8 which reads:

> "8.8 **Family Transfers**
>
> 8.8.1 Any Promoter may transfer his Shares to and among any one or more of his Family Members or to a Body Corporate wholly owned by him.
>
> 8.8.2 Where at any time any such body corporate ceases to be wholly owned as aforesaid, then unless within six months of that time the body corporate has become again wholly owned as aforesaid, the body corporate will be deemed to have served a Transfer Notice in respect of its Shares and the Specified Price in respect of the Shares shall be the Fair Value of such Shares."

In this respect "Family Member" is defined as a Promoter's spouse, children, grandchildren, any trust established for their benefit or any body corporate wholly owned by any of the Promoters or any of the said members of the Promoter's family. In support of this contention it is argued that the use of the word "*substantially*" in clause 8.4 means that the deed of adherence must not be identical to the form set out in Schedule 6 but can be adapted in the case of a "Family Transfer."

30. It is further contended that insofar as there is an inconsistency between the clear terms of clause 8.4, requiring the transferee to sign the deed of adherence, and Schedule 6 listing all the parties who are to execute the deed, that the court should give effect to the real intention of the parties, or the construction more consistent with common sense. Reliance is placed Lewison *The Interpretation of Contracts,* 5th Ed., (Sweet & Maxwell, 2011) in which the authors quote Wilde CJ. in *Walker v. Giles* (1848) 6 CB 662 :

> "And as the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected."

It is contended that the real intention of the parties to the Agreement was to ensure that shareholders could effect Family Transfers freely without having to go through the pre-emption regime and without requiring the consent of other shareholders and that to interpret the Agreement otherwise would be to afford a shareholder a veto where none was intended. It is further contended that requiring all parties to execute a deed of adherence would lead to a commercially unreasonable result.

31. Breccia/IADT make two alternative submissions. Firstly, to the extent that all parties are required to execute a deed of adherence, it is contended that they are legally required to do so, and that this follows from clause 10.10 of the Agreement which provides:

> "10.10 Further Assurance
>
> The parties hereto shall, and shall use their respective endeavours to procure that any necessary third parties shall, do, execute and perform all such further deeds, documents, assurances, acts and things as any of the parties hereto may reasonably require by notice in writing to the others to carry the provisions of this Agreement and the New Articles [of Association of the Company as set out in Schedule 4] into full force and effect."

32. Secondly it is contended in the alternative that all parties are bound by a deed of adherence even without formal execution on foot of the equitable maxim that "*equity regards as done that which ought to have been done*". I will refer to the authorities relied upon for this proposition later in this judgement.

DECISION

33. As some of the written submissions point out, the Schedule 6 form is inaccurate in some respects. On the first line it refers to the year 2005 when in fact the Agreement was made on 28 March, 2006. This is a minor discrepancy which is of no consequence. Secondly having listed relevant parties at numbers 1 – 9 it then refers to "10 ("the Hospital Company")", but no such party is mentioned in the Agreement. While this is infelicitous to the Agreement it appears to the court to be mere surplusage and of no consequence. Thirdly in clause 2.2 the form refers to "the Investor" when clearly the drafter should have referred to "the Purchaser". These are obvious minor errors about which no great point was made in argument. They are comparable to the mistaken reference in clause 8.4 to Schedule 10 instead of Schedule 6. Moreover clause 8.4 contemplates a deed of adherence "in the form *substantially* set out in Schedule [6]" (emphasis added) and these are precisely the kind of inaccuracies that would be corrected in the preparation of a deed of adherence for execution.

34. The clear effect of clause 1.3 is that Schedule 6 forms an integral part of the Agreement and has full effect as if incorporated in the body of the Agreement. Its terms should therefore be read and construed as if appearing alongside clause 8.4. It is not to be read as some appendix having subsidiary importance, although due regard must be had to the use of the word "substantially" in clause 8.4 in reference to the use of the form.

35. Read in this way it is expressly clear that the parties to the Agreement intended that the deed of adherence should be executed not only by the transferee but also by the parties to the Agreement.

36. This intention is reinforced by the terms of the "General Covenants" to which the parties to the Agreement sign up to by executing a deed of adherence, and in particular the covenant at paragraph 2.2: –

> "2.2 Each of the parties to the Main Agreement covenant and undertake to the Investor to comply with their respective obligations under the Main Agreement."

Thus the parties to the Agreement agreed that in the event of a transfer of shares – and in this respect no distinction is made in the Agreement between a transfer of shares to which the "Offer Round" applies, and a "Family Transfer" - they would execute the deed of adherence expressly promising and undertaking to the new shareholder that they would comply with their obligations under the Agreement. It is further reinforced by the express wording at the end of the form –

> "In a witness of which *the parties* have executed this deed under seal on the date first herein stated:" [emphasis added].

This clearly expresses the intention of the parties to the Agreement. The court is reminded of the words of McKechnie J. in *Marlan Home* that "It is important however to note that where the parties have committed their responsibilities to written form in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law."

37. I also accept the submission that as a matter of law it is prudent for a deed of adherence to be executed not only by the transferee but also by continuing shareholders when a transfer of shares takes place. Whether this is properly characterised as a "novation" i.e. the extinguishment of an existing contract and its replacement by a new contract, may be an interesting academic question. The express wording of the deed of adherence in Schedule 6 is more consistent with preservation of the "Main Agreement" while providing for its extension to make it binding between the transferee and continuing parties to the "Main Agreement". However the important feature from the continuing shareholders' perspective is that this is essential in order to ensure that the incoming

shareholder is legally bound by the provisions of the Agreement. It is equally important from the transferee's perspective so as to ensure that the transferee enjoys the benefits, as well as the burdens, of the Agreement, can take all necessary steps to enforce against existing shareholders their respective obligations under the Agreement. A deed of adherence executed by all parties ensures that there is clarity on these issues of rights and liabilities.

38. For this reason it also cannot be said that it is not in accordance with business common sense that all parties should be required to sign a deed of adherence. While this may give rise to some administrative inconvenience and cause some delay it could not be said that such requirement approaches the level of being commercially unreasonable or absurd, even in the case of a Family Transfer. While the contention that a Family Transfer does not extinguish the Agreement, or replace it with another, may well be correct, it is also notable that nowhere in the Agreement is there any exemption from the requirement that a full deed of adherence be executed by all parties in substantial accordance with Schedule 6 in the case of such transfer.

39. I also cannot accept the contention that clause 8.4, insofar as it expressly requires that the proposed transferee execute a deed of adherence, is in conflict with the terms of Schedule 6. Clause 8.4 is clear in its requirement that the transferee execute the deed of adherence, but this does not necessarily exclude a requirement that other parties execute the deed of adherence. Schedule 6 is equally clear that all parties must execute the deed and thereby sign up to a promise and undertaking to the transferee to comply with their obligations under the Agreement. The maxim *expressio unius est exclusio alterius* has no application, or alternatively must yield to the broader principles of interpretation which require this court to ascertain the intention of the parties from the words they use and from consideration of the entire agreement.

RIGHT OF VETO OR OBLIGATION TO EXECUTE

40. I also cannot accept the suggestion that requiring all parties to execute a deed of adherence is a construction that gives an effective veto over a transfer to existing shareholders who might choose to decline to execute. Such a veto would be of such importance in the context of further restricting the right to transfer shares that it would have to be the subject of an express provision in the Agreement. In the absence of any such provision there is no such right of veto.

41. I accept the submission made by counsel for Breccia/IADT that where there is a valid Family Transfer and the transferor executes the requisite deed of adherence all parties are thereafter contractually obliged under the Agreement to execute the deed of adherence. This follows from the wording in Schedule 6 which includes all parties to the Agreement as parties to the deed of adherence and requires them to be executed in witness of their covenants to the transferee. All parties committed to this when they executed the Agreement.

42. This also follows from clause 10.10 of the Agreement under which all parties agreed that they-

> "… shall… do, execute and perform all such further deeds… to carry out the provisions of this Agreement… into full force and effect."

The wording of clause 10.10 is not limited to the parties using their reasonable endeavours to procure that any necessary third parties do, execute and perform all such further deeds, *et cetera,* as may be required. It is crystal clear from the words isolated in the above quote that it is in the first instance a personal contractual commitment by each party on their own behalf to execute all such further deeds as may be required. Moreover clause 10.10 is not confined to further assurances in the context of bringing the Agreement, or the new articles of association of the company set out in Schedule 4, into effect. Such a narrow interpretation would ignore the use of the phrase "the provisions of". The commitment of further assurance applies to carrying into effect all of the provisions of the Agreement which clearly include the obligation to execute a deed of adherence in respect of a transfer of shares, including a Family Transfer, under clause 8 of the Agreement.

43. In summary when presented with an appropriately drafted deed of adherence executed by a transferor pursuant to a valid transfer of shares/Family Transfer each party to the Agreement has a legal obligation to execute that deed.

DEED OF ADHERENCE ENFORCEABLE WITHOUT EXECUTION?

44. I turn next to the alternative submission of Breccia/IADT that all parties are bound by the deed of adherence even without formal execution on the basis that equity regards as done that which ought to have been done.

The written submissions rely on the familiar application of this maxim under the rule in *Walsh v*. *Lonsdale* (1882) 21 Ch D 9 which holds that parties who have acted on foot of an agreement for release are bound by the terms of the lease, even if the lease itself has never been formally executed – a rule which was recently applied by Hogan J. in *North Quay Developments v. Carty* [2014] IEHC 444. Concerning the circumstances in which the maxim may be applied, counsel referred the court, *inter alia,* to Meagher, Gummow and Lehane *Equity Doctrines and Remedies* (4th ed., Lexis Nexis 2002), on where at paragraph 3 – 205 the authors list five instances of its application and state –

> "The *fifth* instance is equity's attitude to contracts, where there maxim means that often equity treats a contract to do a thing as if the thing were already done. And thus, often equity will treat a person who, for valuable consideration, has agreed to take a lease as if he were a lessee: this is the doctrine of *Walsh v Lonsdale*…" .

This passage was cited with approval in *HR Trustees Limited v Wembley Plc (in liquidation)* [2011] EWHC 2974 (Ch) where four out of five trustees had signed an amendment to an employee pension scheme designed to provide for increases in pension in line with statutory provisions to be found in section 51 of the Pensions Act 1995. The non-signing trustee had attended a meeting at which she had agreed to the alteration of the scheme, but she failed to attend a subsequent meeting and as a matter of administrative oversight was not asked to sign the amendment. Mr Justice Vos stated: –

> "66. Here it seems clear to me that the trustees exercised their discretion to amend the rule in the way contained in the amendment. They were obliged, having done so under clause 16, to make an appropriate declaration in a particular form. They could have been compelled on behalf of the members, who are not volunteers, to specifically perform their exercise of the power. Not to make a valid declaration was a breach of the terms of the definitive deed. Thus, in my judgement, this is a classic case in which the maxim of equity can and should properly be applied."

45. They also cite a recent English case of *Kynixa v Hynes* [2008] EWHC 1495 (QB). In that case it was a term of a shareholders agreement that any new shareholder would sign a deed of adherence to the shareholders agreement. The first named defendant was an employee of the claimant company and was offered an opportunity to purchase shares on the condition that a deed of adherence was executed. He completed the purchase of the shares, but never executed or agreed to execute the deed of adherence. In the context of the disputes in that case his counsel argued that he was not bound by the shareholder agreement. He lost on this point. Mr Justice Wyn Williams stated at paragraph 95:

> "95 It is also the case, in my judgement, that the parties to the shareholder agreement intended and agreed that a person acquiring shares in the Claimant would become bound to it by signing the deed of adherence. Indeed the shareholder agreement imposes obligations upon the parties to the agreement to ensure that the Deed is signed. It does not seem to me, however, that this uncontroversial proposition leads to the conclusion that a person acquiring shares cannot be bound by the terms of the shareholder agreement unless he/she signs the Deed of Adherence. No principle of the common law or statutory provision was advanced to support that conclusion. Such a conclusion flies in the face of the well established principle of the law of contract which is to the effect that contracts can be made without the need for formality (in the absence of any statutory provision to the contrary) provided the essential rules relating to offer, acceptance, the intention to create legal relations and the provision of consideration are met."

46. At the level of principle the maxim may apply to a situation where a party for valuable consideration has committed by act or otherwise to entering a contract, and wrongfully declines to comply with the formalities required to complete that contract. In *Kynixa v Hynes* the court was concerned with a failure by the employee/transferee of shares to sign the deed of adherence, but of course the transferee as an employee had a contractual relationship with the transferor that involved valuable consideration. It was the converse of the situation presently under consideration in which existing shareholders have no privity or contractual relationship with the incoming transferee.

47. The decision in *HR Trustees Limited* also does not assist. It was made in the context of a pension trust rather than a contractual and business context. Moreover it concerned very different facts, where a willing trustee was inadvertently and through administrative error simply not asked to execute the requisite document at the appropriate time and there was a statutory imperative behind the objective that the trustees were seeking to achieve.

48. There is no relevant Irish authority cited that would lead this court to extend the application of this equitable maxim beyond the circumstances in which parties have acted on foot of an agreement for a lease and may therefore be held to be bound by the terms of the lease, or the similar circumstances that prevailed in *North Quay Developments v. Carty.* While it may be accepted that the maxim has a wider application, a significant feature of the deed of adherence in the present case is that it contains a positive covenant and undertaking by the continuing parties to comply with their obligations under the Agreement. Another significant feature is the contractual commitment in clause 10.10 of the Agreement to provide "Further Assurance" and to execute deeds that may be required. This express provision provides an avenue for enforcement against a recalcitrant party, and it is not therefore necessary to call in aid the intervention of the equitable principle. The court therefore rejects this further submission.

CONCLUSION

49. The court therefore determines, having regard to the provisions of the Shareholders' Agreement dated the 28 March, 2006, to which the applicant and each of the respondents are parties, and to the provisions of the applicant's constitution within the meaning of Part 2 of the Companies Act 2014, that the applicant and each of the respondents must execute a deed of adherence substantially in the form of Schedule 6 to the Shareholders Agreement before the applicant may proceed to register a Family Transfer of shares by entering the name of a proposed transferee in the register of members of the applicant.

50. The court further determines that the applicant and each of the respondents have a legal obligation under the Shareholders' Agreement dated 28 March, 2006, to execute such deed of adherence in respect of a valid Family Transfer of shares.