THE HIGH COURT

COMMERCIAL

[2016 No. 7062 P]

BETWEEN:

JOSEPH SHEEHAN

PLAINTIFF

-AND-

TALOS CAPITAL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 20th day of June, 2018.

SUMMARY

1. This case involves a claim by the plaintiff, Dr. Joseph Sheehan ("Dr. Sheehan") in which he alleges that he signed a settlement agreement with the defendant, Talos Capital Limited ("Talos") based on a fraudulent representation by Talos, through its solicitors.

2. The settlement agreement between Dr. Sheehan and Talos related to the enforcement of a guarantee by Talos against Dr. Sheehan in respect of a loan by Talos to a company called JCS Investments Holdings XIV Limited ("JCS"). JCS was a special purpose company set up by Dr. Sheehan for the purpose of the purchase of loans by JCS from Irish Bank Resolution Corporation Limited ("IBRC"). The loan which Dr. Sheehan had guaranteed was a loan by Talos to JCS in the sum of €2.4 million and was the deposit for the purchase of those loans and it was duly paid by JCS to IBRC.

3. It was claimed on Dr. Sheehan's behalf (since Dr. Sheehan chose not to give evidence on his own behalf) that, at the time of the settlement agreement between Dr. Sheehan and Talos, Talos's solicitors had misrepresented to Dr. Sheehan's solicitor that JCS had *not* settled the claim that it had against IBRC for the return of the deposit.

4. Under the terms of the settlement agreement, Dr. Sheehan regained control of JCS from Talos, as up to that point Talos had controlled the shares in that company as security for Talos's loan of the deposit to JCS. After regaining control of JCS, it is claimed that Dr. Sheehan discovered that the claim that JCS had against IBRC for the return of the deposit of €2.4 million had in fact been settled. It is claimed on Dr. Sheehan's behalf that because of that misrepresentation (that JCS's claim against IBRC had *not* been settled), he entered into the settlement agreement in order to regain control of JCS and pursue that claim against IBRC, only to subsequently discover that the claim against IBRC for the deposit no longer existed as it had been settled several weeks previously by the payment of part of the deposit, a sum of €1.7 million, by IBRC to JCS. Upon receipt of this settlement sum of €1.7 million, JCS paid it to Talos since Talos had originally lent the full deposit of €2.4 million to JCS.

5. Under the terms of the settlement agreement with Talos, Dr. Sheehan discharged his obligations under his guarantee of JCS's obligations to Talos by paying, *inter alia*, some €2.4 million to Talos, plus interests and costs, in respect of the deposit that had been borrowed by JCS.

6. In addition to the foregoing claim by Dr. Sheehan of an alleged misrepresentation Talos, Dr. Sheehan also claims in these proceedings against Talos that under s. 17 of the Civil Liability Act, 1961, Dr. Sheehan should have benefited from the fact that Talos had received payment of €1.7 million arising from the settlement with IBRC. On this basis it is claimed that the sum of €2.4 million plus costs and interest, received by Talos from Dr. Sheehan pursuant to Dr. Sheehan's guarantee of JCS's obligations, should have been reduced by the sum of €1.7 million. As is noted in detail below, Talos was involved in the negotiations of this €1.7 million settlement between IBRC and JCS. Against this background, the claim under s. 17 depends therefore on whether the settlement of the claim with IBRC, in relation to the deposit, whereby IBRC returned €1.7 million to JCS on the one hand, and the settlement of the claim under the guarantee between Talos and Dr. Sheehan in relation to the deposit on the other hand, whereby Dr. Sheehan paid Talos €2.4 million plus costs and interests, is a case of concurrent wrongdoers such that s. 17 of the 1961 Act applies

7. This case therefore deals with first whether there was a misrepresentation by Talos which induced Dr. Sheehan to enter the settlement agreement with Talos in the first place and secondly whether in any case the payment made by Dr. Sheehan under that settlement agreement in relation to the deposit should be reduced by the payment made by IBRC under its settlement with JCS in relation to the deposit.

8. For the reasons set out in detail below, this Court concludes first that there was not a misrepresentation by Talos to Dr. Sheehan and secondly that this is not a case of concurrent wrongdoers, so s. 17 of the 1961 Act has no application. Accordingly, this Court rejects both of Dr. Sheehan's claims. As noted hereunder, the claim of misrepresentation is made under English law and so is considered in light of the Expert Reports obtained from two experts in English law.

Applicability of Isaac Wunder orders to all litigants

9. This Court was also provided with uncontroverted evidence of Dr. Sheehan's previous litigation in relation to the subject matter of this dispute, which has been described by the English High Court as 'outrageous'. In this regard, Isaac Wunder orders against parties who pursue vexatious litigation (which require them to seek Court consent before instituting future proceedings) have been applied on several occasions to lay litigants. Lay litigants who do not have financial resources to instruct lawyers and who engage in hopeless or vexatious litigation not only deplete court resources but also leave the winning party significantly out of pocket, since a costs order against such a lay litigant is often of no value.

10. Litigants with sufficient resources to engage in protracted litigation, simply because they can afford to pay the winning party's legal costs, whether in the Commercial Court or otherwise, are not immune from having Isaac Wunder orders made against them on application by an opposing party or by a court's own motion in appropriate circumstances. This is because unnecessary, vexatious and endless litigation depletes scarce public resources and deprives other litigants of timely access to the courts and for this reason, the Courts need to be alive not just to impecunious lay litigants (for whom a costs order is not a deterrent) but also to serial litigants with significant financial resources (who pursue private disputes or private agendas and for whom a costs order is also not a deterrent).

11. The factual background to this case is complex so it is first necessary to set out those facts in detail.

FACTUAL BACKGROUND

12. Talos is a finance company and is a subsidiary of a UK charity, called the Children's Investment Fund Foundation and is managed by TCI Fund Management Limited. Talos and TCI Fund Management Limited are part of the Talos group of companies ("Talos Group").

13. Talos agreed to lend up to €45 million to Dr. Sheehan, Mr. John Flynn ("Mr. Flynn") and Dr. George Duffy ("Dr. Duffy"), or to companies controlled by them, to purchase Dr. Sheehan's and Dr. Duffy's loans (the "Duffy Loans") held by IBRC and to redeem Mr. Flynn's loan, through his corporate vehicle, with National Asset Loan Management Limited ("NALM").

14. The three loans to Dr. Sheehan, Mr. Flynn and Dr. Duffy (or their corporate vehicles) related to their ownership of shares in Blackrock Hospital Limited ("BHL") and these loans were secured over, *inter alia*, 56% of the shares in BHL. The purpose behind Dr. Sheehan purchasing and redeeming the three loans was for him and Mr. Flynn and Dr. Duffy to take control of 56% of the shareholding in BHL, which owned Blackrock Hospital in Dublin, and thereby ensure that these three individuals or their corporate vehicles would control the ownership of Blackrock Hospital.

15. It was a condition of Talos lending the €45 million to Dr. Sheehan and Dr. Dufffy, that Dr. Duffy would sign an agreement (the "Framework Agreement"). Under this Agreement, the rights of the shareholders in BHL would be regulated regarding, *inter alia*, the payment of dividends. Since these dividends were to be used to pay interest on the loan from Talos, this meant that the execution of the Framework Agreement was a crucial aspect to the transaction since this was how Talos was to be paid interest on its loan of €45 million.

Deposit for Loan Sale Deed lent by Talos to JCS

16. The Facility Agreement for the €45 million borrowings was between Talos and the corporate vehicle being used on behalf of Dr. Sheehan *et al*, a company called Medfund. This Facility Agreement was signed on the 13th March, 2014 (the "Facility Agreement"). However after signing this Facility Agreement, Dr. Sheehan and Mr. Flynn advised Talos that Medfund would not be able to fund the deposit of €2.4 million (the "Deposit") which was required to purchase the loans from IBRC under the proposed loan sale deed with IBRC.

17. As a result, Talos agreed to lend the deposit of €2.4 million to JCS, a company controlled by Dr. Sheehan. Accordingly, Dr. Sheehan could proceed to enter the loan sale agreement with IBRC. The Facility Agreement was amended on the 17th March, 2014, to take account of the involvement of JCS and for all intents and purposes JCS became the borrower, rather than Medfund, under the Facility Agreement. The Loan Sale Deed dated 7th April, 2014 ("Loan Sale Deed"), was entered into between Dr. Sheehan, JCS, IBRC, the Special Liquidators of IBRC, Mr. Kieran Wallace ("Mr. Wallace") and Mr. Eamonn Richardson ("Mr. Richardson") of KPMG (the "Special Liquidators"), as IBRC had by that stage gone into liquidation. Under the Loan Sale Deed, IBRC agreed to sell Dr. Sheehan's and Dr. Duffy's loans to JCS.

18. Dr. Sheehan (along with Mr. Flynn) entered into a Deed of Guarantee dated 19th March, 2014 (the "Guarantee"), in favour of Talos in relation to all amounts due from JCS to Talos under the Facility Agreement and this included the Deposit plus interests and costs, although the maximum amount payable under the Guarantee was limited to €2.4 million, plus any accrued but unpaid interest payable under the Facility Agreement.

19. Dr. Sheehan also granted security to Talos over the shares in JCS. The Deposit was duly borrowed by JCS from Talos and paid to IBRC as the deposit for the purchase of the loans under the Loan Sale Deed, although the Deposit was paid directly by Talos to IBRC, but this was at the direction of JCS (whose money it was), since it had borrowed it from Talos.

Loan Sale Deed did not proceed

20. Shortly after the execution of the Loan Sale Deed, it came to the attention of Talos that the loans owed by Dr. Duffy to IBRC, which were the subject of the Loan Sale Deed, could not be sold since they had already been redeemed. This also meant that the Framework Agreement, which governed the payment of dividends to fund the interest on the €45 million loan, would not be executed. This all led to the Loan Sale Deed not being performed by IBRC and JCS and the retention of the Deposit by IBRC because of the failure of JCS to complete the purchase of the loans under the Loan Sale Deed. This also led to the claim that JCS was entitled to the repayment from IBRC of the Deposit (the "IBRC Claim").

Ironic that a misrepresentation by Dr. Sheehan leads to these proceedings

21. An email was produced to the Court from Maples and Calder dated 8th April, 2014, to Dr. Sheehan's American based lawyer, Mr. Dan O'Neill ("Mr. O'Neill") which provided uncontroverted evidence that Dr. Sheehan's lawyer was aware of the redemption of the Duffy Loans on Friday 4th April, 2014. Yet, on the 11th April, 2014, Dr. Sheehan sent an email to his contact in the Talos Group in which he misrepresented the status of that redemption by stating:

> "George is looking to redeem his loan now with other funds".

22. It is relevant to note that the Deposit was paid by Talos to IBRC, on the instructions of JCS, on the 7th April, 2014. It is clear therefore that at this time Dr. Sheehan's lawyer was aware that the Duffy Loans had been redeemed and Dr. Sheehan misrepresented the position and that Talos lent to a special purpose company (JCS), a company with no assets or function apart from acquiring the loans from IBRC, the sum of €2.4 million which funded the Deposit to IBRC. More significantly from Talos' perspective, was the fact that because the Duffy Loans had been redeemed and so could not be part of the Loan Sale Deed this meant that the transaction could not proceed in the manner envisaged (and in particular Talos would not have the security of knowing that the dividend from BHL would be paid to Talos to pay the interest on the €45 million loan, including the Deposit). Even more significantly, under the terms of the Loan Sale Deed, IBRC retained the Deposit of €2.4 million under the terms of the Loan Sale Deed, as the transaction was not going to proceed.

23. It is ironic therefore, that in these proceedings in which (as noted in detail below) Dr. Sheehan claims that Talos *allegedly* misrepresented to Dr. Sheehan that the IBRC Claim was extant in order to induce him to sign the settlement agreement with Talos on the 19th November, 2015 (referenced below, the "Talos/Sheehan Settlement Agreement"), that the reason that the Loan Sale Deed did not proceed in the first place (which led to IBRC retaining the Deposit and ultimately led to the Talos/Sheehan Settlement Agreement the subject of these proceedings) was because Dr. Sheehan *actually* misrepresented to the Talos Group that the Duffy Loans had not been redeemed.

24. It seems clear therefore that if Dr. Sheehan or his lawyer had advised Talos that the Duffy Loans has been redeemed instead of allowing Talos to lend the Deposit of €2.4 million to JCS, that there would not have been any need for the Talos/Sheehan Settlement

Agreement, which Dr. Sheehan is seeking to rescind in these proceedings.

Talos demanded return of Deposit from JCS and Dr. Sheehan
25. On the 6th May, 2014, Talos sought repayment of the €2.4 million from JCS and it demanded payment of this sum from Dr. Sheehan under the terms of the Guarantee. Talos also enforced its security over the shares in JCS, and on the 6th May, 2014, Talos took effective control of JCS. Proceedings were issued by Talos on the 28th May, 2014, against Dr. Sheehan on foot of his failure to honour his obligations under the Guarantee.

Talos demanded return of Deposit from IBRC
26. On the 17th April, 2014, a letter was sent on behalf of Talos, by its UK solicitors Clifford Chance, to the Special Liquidators of IBRC in which Talos demanded "*repayment of the Deposit*" to Talos on the basis of its claim that the Special Liquidators knew that the Duffy Loans had been repaid but did not provide this information to Talos but allowed it to fund the Deposit on the understanding that the transaction covered the Dr. Sheehan loan and the Duffy Loans, even though the Duffy Loans had been redeemed.

27. On the 23rd December, 2014, Talos wrote to the Special Liquidators of IBRC seeking the deposit that had been paid on behalf of JCS. In this letter Talos states that "*Talos considers that the Deposit should be repaid to Talos as soon as possible*". This letter claims that the Special Liquidators should have disclosed to Talos the redemption of the Duffy Loans and it alleges that the Deposit was being "*wrongfully held by the Special Liquidators and should be repaid immediately to Talos.*"

28. It is important at this juncture to note that in general saying something does not make it so. Thus, while JCS paid the Deposit to IBRC (in the sense that it was JCS' money after it had borrowed that money from Talos and JCS directed Talos to pay it to IBRC), yet in these letters Talos is seeking this Deposit to be '*repaid*' to Talos, this does not mean that there is any entitlement on the part of the Talos to the repayment of the Deposit which was JCS' money (in the sense that any repayment of the Deposit would have to be to JCS). The Deposit did not become Talos' money, nor did Talos become entitled to its repayment, by the act of Talos laying claim to its repayment in these letters. In this sense Talos saying something does not make it so.

29. In any case, Maples and Calder replied on 29th April, 2014, to Clifford Chance's letter of the 17th April, 2014, by making the perhaps obvious point that Talos should take the matter up with JCS and not IBRC, presumably since IBRC had entered the Loan Sale Deed with JCS and *not* with Talos:

> "[The Special Liquidators of IBRC] took specific steps to make [JCS] and [Dr Sheehan] specifically aware of the fact that Mr Duffy had discharged his indebtedness under his Facility before the Deposit was paid and the Loan Sale Deed was deemed executed and delivered. We suggest your client [Talos] take up any issues that it has regarding the terms of any funding with [JCS/ Dr Sheehan] and its advisers."

Settlement negotiations between Talos and IBRC
30. Nonetheless, Talos continued to pursue the Deposit from IBRC/Special Liquidators and in his evidence Mr. Hal Livingstone ("Mr. Livingstone"), legal counsel in the Talos Group, used the expression seeking to 'broker' a deal with IBRC on behalf of JCS to describe Talos's role. This deal brokering approach on behalf of JCS by Talos to getting back the €2.4 million was understandable from a purely commercial perspective because Talos had security over JCS's shares and so controlled that company and so any money recovered by JCS could be procured by Talos to be paid by JCS to Talos.

31. In pursuit of this aim, Talos entered discussions with IBRC/Special Liquidators in January, 2015 and on the 28th January, 2015, Mr. Livingstone recorded in an internal email that the Special Liquidators:

> "have agreed to pay EUR 1.7m of the EUR 2.4m they are holding (applying the remaining amount to cover their costs)".

32. Confirmation on the part of KPMG that a deal was agreed in principle on that figure is recorded in an email exchange between Mr. Richardson and Mr. Wallace of KMPG and the Special Liquidators of IBRC of the one hand, and Mr. Livingstone on the other hand. Mr. Livingstone stated in an email to them on the 29th January, 2015, that "*Talos would be willing to settle at EUR 1.7m.*" This email is headed '*without prejudice*'. Mr. Wallace replied to Mr. Livingstone by email on the 30th January, 2015 that "*we would be comfortable to conclude matters on that basis.*" Significantly, Mr. Wallace adds that:

> "This is on a without prejudice basis until the documents are signed."

33. It is clear therefore that there is no binding agreement as legal documentation needed to be drafted and signed. It is also significant that the very same day, Maples and Calder, solicitors to IBRC/Special Liquidators, sent an email dated 30th January, 2015, to Mr. Livingstone which stated:

> "Technically, I think the agreement must include JCS the purchaser company and provide that the monies are paid through them."

34. It seems to this Court therefore that on the day when the settlement figure was agreed in principle, and on a without prejudice basis, it was made absolutely clear to Talos by IBRC/Special Liquidators that the settlement which was being negotiated by Talos was a settlement legally with JCS, and not with Talos, for the very simple reason that it was JCS which had provided the Deposit to IBRC and so it seems to this Court that IBRC were making the obvious legal point that the Deposit must be repaid to JCS, which was what actually occurred when, as noted hereunder, the settlement agreement was eventually signed on the 28th September, 2015, some eight months after this agreement in principle was reached (the "IBRC/JCS Settlement Agreement").

35. It seems clear to this Court that implicit in this email from Maples and Calder is the assertion that while JCS could, after receiving the settlement monies, pay same to Talos (i.e. 'monies […] paid *through*' JCS to Talos), the settlement and the payment of the monies could not legally be with and paid to Talos but must be with and paid to JCS. This is because JCS, and not Talos, had paid the Deposit to IBRC (or more accurately, the Deposit had been paid by Talos to IBRC at the direction of, and for the benefit of JCS).

Judgment obtained by Talos against Dr. Sheehan under the Guarantee
36. The proceedings which had been issued by Talos against Dr. Sheehan to get him to comply with his obligations under the Guarantee of JCS' obligations, to repay borrowings, costs and interest due by JCS to Talos, were finalised on the 23rd January, 2015, when judgment was granted to Talos against Dr. Sheehan. The judgment was perfected on the 30th January, 2015, with an Order in the sum of €2.4 million with interest, being a total of €2,788,671.53 (the "Judgment Amount") plus costs.

Letter of 25 March, 2015 from Dr Sheehan's solicitors to Talos in relation to JCS
37. By letter dated 25th March, 2015, Mr. Larry Brennan ("Mr. Brennan") of Arthur McLean Solicitors acting for Dr. Sheehan wrote to Mr. Gavin Simons ("Mr. Simons") of AMOSS Solicitors, who acted for Talos, in relation to Dr. Sheehan's interest in regaining control of JCS, in order to pursue the IBRC Claim. This letter states:

> "Dear Gavin
>
> We refer to our correspondence in respect of the judgment which your client has obtained against our client Joseph Sheehan and write to you in respect of one aspect thereof in respect of which we seek your urgent response.
>
> As you are aware, as the events unfolded in April 2014 and more particularly in the period between the 3rd and 7th April 2014 your client, Talos Capital Limited released a sum of €2,400,000.00 through your clients' English Solicitors, Clifford Chance, into an account held by the Special Liquidators of IBRC. As you are probably also aware the €2,400,000.00 paid as aforesaid was retained by IBRC notwithstanding the fact that that entity was not, on the date of the completion of the Loan Sale Deed in a position to sell, transfer or convey the Assets (as defined) which it had agreed to sell, transfer and convey to JCS Investments Holdings XIV Limited ("JCS").
>
> You will well appreciate that our clients wish to recover €2,400,000.00 wrongly retained by IBRC and believe that the entity with possibly the best cause of action to do so is JCS Investments Holdings XIV Limited. This is particularly so given the careful drafting of the Loan Sale Deed which attempts to exclude certain causes of action on behalf of some of the parties to that Deed.
>
> We understand that your client, on foot of a Share Charge, removed the previous Directors of this Company and it is for this reason that we write.
>
> Having regard to the fact that your client has now obtained a judgment against our client and is in the process of executing same, we believe there is little purpose in your client retaining its control over JCS in circumstances in which that entity might in fact recover the monies paid by your client to IBRC. We have assumed for the purposes of this communication that your client has no appetite to take the proceedings which our clients are currently considering.
>
> We should also say, that our clients have no objections to your client retaining its share charge over the assets of JCS.
>
> We will therefore be obliged if you will please take your client's immediate instructions to ascertain whether they may be prepared to permit our client appoint new Directors to the Board of JCS with the intended purpose of instructing this firm to institute proceedings on its behalf in the manner aforesaid. We should say, that there is an urgency to this issue. As you are probably aware, the special liquidators of IBRC published Notices on the 30th September 2014 which provide that all claims for unsecured creditors must be made on or before the 31st March next at 10.30 a.m.
>
> Having regard to the fact that the legal term ends on Friday the 27th and the fact that it is necessary for us to obtain consent of the Court before instituting proceedings against IBRC, we will be obliged if you will please revert to us in respect of the issues during the course of the day.
>
> You will appreciate, that if your client does not accede to what we believe to be a reasonable request, that our client will be obliged to consider other causes of action open to them."

38. To this Court, it does seem somewhat naïve of Dr. Sheehan, through his lawyers, to suggest in this letter to Talos, which as noted below was owed approximately €5 million on aggregate by Dr. Sheehan and JCS at this juncture, that just because Talos had obtained judgment against Dr. Sheehan for part of the amount owed, some €2.78 million, that Talos would have '*no appetite*' for retaining control of Dr. Sheehan's corporate vehicle (JCS), to take proceedings to recover further sums from IBRC in order to reduce the €5 million indebtedness. Indeed, Mr. Marc Hickey of Downes Solicitors ("Mr Hickey"), who took over from Mr. Brennan in acting for Dr. Sheehan did state in his evidence that when he subsequently asked Mr. Simons on behalf of Dr. Sheehan by email on the 4th August, 2015, for the return of control of JCS without paying any more than the Judgment Amount of €2.78 million, that he did not expect to be given back control of JCS so easily and that this was just the opening of negotiations. This view is reinforced by the fact that, as noted below, Talos did exactly this – it retained control of JCS until JCS recovered a settlement sum of €1.7 million from IBRC in respect of the Deposit.

39. Despite this, it seems that Dr. Sheehan thought that the funder (Talos) of his corporate vehicle (JCS) would simply hand back the benefit of its security over the shares in JCS to allow Dr. Sheehan, through JCS, to pursue IBRC, even though it was being proposed that only €2.78 million of the €5 million approximately due to Talos was to be repaid.

40. In this regard, the letter from Arthur McLean did not contain any undertaking that Dr. Sheehan would use any funds so obtained by Dr. Sheehan from IBRC to pay off his indebtedness, or that Dr. Sheehan would procure that JCS paid off its indebtedness, to Talos. It was no great surprise therefore that AMOSS Solicitors on behalf of Talos replied on the same day, the 25th March, 2015, rejecting the proposal and noting:

> "your proposal provides no comfort to our client that Dr. Sheehan either accepts his liability on foot of the Judgment or that he intends to discharge same or have JCS Investments Holdings XIV Limited repay this amount."

Relevance of this letter to the alleged misrepresentation by Talos
41. Dr. Sheehan's lawyers put a considerable amount of emphasis on this letter of the 25th March, 2015, from Arthur McLean Solicitors and the fact that some eight months later, on the 16th November, 2015, when Mr. Gavin Simons of AMOSS Solicitors issued his email of that date to Dr. Sheehan's solicitor at that stage, Mr. Shannon ("Mr. Shannon") of Shannon & O' Connor Solicitors (the "16th November Email" which is set out below), that Mr. Simons should have been aware that Dr. Sheehan's purpose in regaining control of JCS on the 16th November, 2015, was to sue IBRC, as stated in this letter of the 25th March, 2015. Particular relevance is attached by Dr. Sheehan to the 16th November Email which is allegedly the main act of misrepresentation by Talos, and accordingly, it is set out later in this judgment in full.

42. Because of the relevance attached to the letter of the 25th March, 2015, from Arthur McLean Solicitors, it is proposed to consider in detail at this juncture the terms of that letter and the events which followed it. For present purposes, it is relevant to note that it is alleged by Dr. Sheehan that because Talos knew from the letter of 25th March, 2015, that Dr. Sheehan's purpose in

acquiring JCS was to pursue the IBRC Claim, it misrepresented through its solicitors in the 16th November Email that the IBRC Claim was extant, since otherwise Dr. Sheehan would not have agreed to discharge JCS's costs and expenses in order to regain control of JCS, which as noted hereunder he did pursuant to the Talos/Sheehan Settlement Agreement.

43. It is relevant at this juncture to consider the terms of that letter in some detail and subsequent events, before resuming the factual background.

44. First, it is noteworthy that there was an urgency to the request from Mr. Brennan because of a deadline for submission of claims against IBRC on or before 31st March, 2014, and an implicit threat of litigation from Dr. Sheehan if the proposal that he be given back control of JCS was rejected by Talos.

45. In this regard, it is noteworthy that after the rejection of the proposal by Talos through Mr. Simons of AMOSS Solicitors, there was no follow up on the implicit threat of litigation by Mr. Brennan of Arthur McLean Solicitors. It is also relevant that the deadline passed and Talos heard nothing further about Dr. Sheehan having as his purpose for acquiring JCS the pursuit of the IBRC Claim between 25th March, 2015, and the issue of the email of 16th November, 2015 (which is referenced below).

46. After the letter of 25th March, 2015, Mr. Hickey of Downes Solicitors began acting, in place of Mr. Brennan, for Dr. Sheehan in relation to the refinancing of Dr. Sheehan's borrowings with Talos with another lender, a company called HIG Bayside Capital ("HIG"). For this purpose, Mr. Hickey made contact with Mr. Simons of AMOSS Solicitors at the end of July 2015 in order to ascertain the level of indebtedness with Talos that needed to be paid off before Talos would release its security over Dr. Sheehan's shareholding in BHL, which was to be granted as security to the new lender, HIG.

47. During this period, when Mr. Hickey was acting for Dr. Sheehan, it is relevant to note that he did not state to Mr. Simons orally or in writing that despite the passing of the deadline in the letter of 25th March, 2015, Dr. Sheehan still wished to retain control of JCS in order to pursue the IBRC claim.

48. Indeed, Mr. Simons might well have got a very different impression from Mr. Hickey, since Mr. Hickey stated on the 12th November, 2015, only days before the 16th November Email and the execution of the Talos/Sheehan Settlement Agreement on the 19th November, 2015, that he was not dealing with JCS's costs and expenses as he only had instructions to deal with the Judgment Amount. At this stage therefore, not alone did Dr. Sheehan not state through his solicitors his purpose for acquiring control of JCS, he appeared to have no interest in acquiring control of JCS at all since it was not part of his instructions to his solicitor.

49. The next matter of relevance regarding Dr. Sheehan's alleged desire to acquire control of JCS and his alleged purpose for so doing, is that on the 13th November, 2015, Mr. Shannon of Shannon & O'Connor Solicitors took over, as the solicitor advising on the re-financing of Dr. Sheehan's borrowings, from Mr. Hickey. He also did not state or write to Mr. Simons that it was Dr. Sheehan's intention to acquire JCS in order to pursue a claim against IBRC.

50. As is noted hereunder, Dr. Sheehan entered into the Talos/Sheehan Settlement Agreement on the 19th November, 2015, whereby he agreed to pay the sums contained in the Judgment Amount, plus costs and additional interest. This Agreement also provided for Dr. Sheehan to pay off all the costs and expenses of JCS and he thereby regained control of JCS under the terms of the Talos/Sheehan Settlement Agreement.

51. However, it seems to this Court that this was not because Dr. Sheehan had a sudden change of mind, regarding whether he would acquire JCS, from his stated position on the 12th November, 2015, when Mr. Hickey stated he had no instructions from Dr. Sheehan to acquire JCS. This is because (as noted below) it was Talos who insisted, after an approach was made by Dr. Sheehan's refinancing company HIG to Talos, on ensuring that all of Dr. Sheehan's and JCS's borrowings with Talos were going to be cleared by the re-financing transaction. This meant that not only the Judgment Amount would be discharged by Dr. Sheehan but also JCS' costs and expenses due to Talos and therefore it seems to this Court that this was why it was necessary for Dr. Sheehan to procure the discharge of JCS' costs and expenses and thereby acquire JCS, if he wanted to proceed with his re-financing with HIG. In addition of course, and somewhat curiously, Dr. Sheehan chose not to give any evidence in these proceedings and thus there is no evidence regarding his state of mind at this time.

52. It is also relevant to note that Mr. Simons gave evidence that at the time of his writing of the 16th November Email to Mr. Shannon, he did not cast his mind back to a letter received eight months previously on the 25th March, 2015, not from the previous solicitor acting in the matter (Mr. Hickey), but the prior solicitor again (Mr. Brennan), regarding a proposal to acquire JCS for the stated purpose of suing IBRC, which proposal was time-sensitive and was, not surprisingly, rejected out of hand by Mr. Simons on behalf of Talos at that time. In this Court's view, in light of those factors, it is no great surprise that Mr. Simons would not have recalled this letter from March 2015, and the purpose stated therein, in November 2015. The evidence of Mr. Simons, which is accepted by this Court as entirely plausible, was that he was not aware in November 2015 some eight months after the 25th March 2015 letter, when Talos insisted on Dr. Sheehan discharging not just the Judgment Amount but also JCS' costs and expenses, that the return of control of JCS to Dr. Sheehan which would result from this repayment, was being undertaken by Dr. Sheehan in order to pursue the IBRC Claim (as alleged on behalf of Dr. Sheehan)

53. Finally, it is also relevant to note that Mr. Brennan gave evidence that if he, rather that Mr. Shannon, was the solicitor acquiring back JCS on behalf of Dr. Sheehan in November, 2015, he would have made '*some form of inquiry*' about JCS, which it seems clear to this Court would have been to ensure that the company being acquired back, after a period of 18 months under the control of Talos, had the asset that Dr. Sheehan expected it to have (the IBRC Claim) and perhaps also did not have any unexpected liabilities which might reduce the value of the company. In contrast, and somewhat curiously in this Court's view, Mr. Shannon was of the opinion that he did not need to seek any warranties or indemnities regarding JCS from Talos, whether in relation to the existence still of the IBRC Claim or indeed tax or other liabilities which might reduce the value of the asset he was acquiring for his client, Dr. Sheehan, even though JCS had been under the control of Talos, rather than Dr. Sheehan, shareholders and directors for a period of 18 months.

54. Although as noted hereunder, it is not determinative of this Court's decision in this case, this Court would conclude based on the foregoing evidence that despite the existence of the letter of 25th March, 2015, Mr. Simons was not aware, and could not be expected to have been aware, when he wrote the 16th November Email that Dr. Sheehan's alleged purpose at that time in November 2015 in acquiring JCS, was to pursue the IBRC Claim.

IBRC/JCS Settlement Agreement signed on the 28th September, 2015

55. It took from the 30th January, 2015, when agreement in principle was reached between Talos and the Special Liquidators, until the 28th September, 2015, for the IBRC/JCS Settlement Agreement between IBRC, the Special Liquidators, JCS and Talos to be finalised and then signed. Under the terms of the IBRC/JCS Settlement Agreement, it is expressly stated that €1.7 million is to be paid

to JCS by IBRC and in consideration JCS waives any claim it has against IBRC, as well as Talos waiving any claim against IBRC. Section 2.1 of the Agreement states:

> "In consideration of the entry into this Deed and [IBRC] and [the Special Liquidators] returning the sum of €1,700,000 to [JCS], which sum forms part of the Deposit paid by [JCS] under the Loan Sale Deed, it is agreed as follows:
>
> (a) [JCS], Talos […] hereby waives […] all claims […] against [IBRC]."

The funds of €1.7 million in discharge of the return of the Deposit claim were duly received by JCS from IBRC and were then paid by JCS to Talos on the 3rd November, 2015, since as previously noted the full Deposit of €2.4 million had been borrowed by JCS from Talos.

Negotiation of Talos/Sheehan Settlement Agreement - July to November 2015

56. As previously noted, Dr. Sheehan was involved in seeking to re-finance with HIG his borrowings with Talos in respect of which judgment had been entered on the 30th January, 2015. In order to arrange any re-financing, Dr. Sheehan required Talos to release its security for those borrowings, i.e. its charging orders over, *inter alia*, Dr. Sheehan's shares in BHL. For the purposes of organising this third party finance, Dr. Sheehan needed to know how much he had to pay Talos to get the release he required.

57. The first contact in this regard between Dr. Sheehan's then solicitor (who at that stage, was no longer Mr. Brenann of Arthur McLean Solicitors, but was Mr. Hickey of Downes Solicitors) and Talos's solicitors (Mr. Simons of AMOSS Solicitors) was made by Mr. Hickey at the end of July 2015. This contact elicited a response from Mr. Simons by email of 31st July, 2015, which indicated that the sum due in respect of the Judgment, as of 31st July, 2015, was €2,788,671.53. Mr. Hickey then replied by email on 4th August, 2015, asking:

> "Gavin,
>
> Can you confirm that your client will transfer control of JCS to our clients on receipt of cleared funds in the Judgment amount set out [in your email of 31st July, 2015]".

Mr. Hickey admitted in his evidence that if Talos were to reject this proposal it would not have come as a surprise since he did not expect Talos to transfer its security over the shares in JCS (Dr. Sheehan's corporate vehicle) back to Dr. Sheehan when JCS' indebtedness to Talos was (as noted hereunder in the email of 22nd September, 2015) over €2.18 million in addition to the Judgment Amount of €2.78 million, just because Dr. Sheehan was proposing to discharge his personal indebtedness to Talos of €2.78 million, which would be considerably less than the *circa* €5 million owed to Talos by Dr. Sheehan and JCS (i.e. €2.18 million and €2.78 million).

58. It was no great surprise therefore when AMOSS Solicitors rejected that suggestion on the 6th August, 2015, and made it clear that it would be necessary for Dr. Sheehan to discharge JCS's indebtedness before he would regain control of JCS:

> "Dear Marc,
>
> The original sponsors could only ever be entitled to a transfer back of JCS once all secured obligations under the Talos loan have been paid; not just the judgement amount. The secured obligations includes all costs and expenses that have been incurred in connection with the enforcement process. Talos are in the process of compiling a spreadsheet summarising these and will send across once finalised."

The amount of JCS' indebtedness is then outlined in a spreadsheet attached to the next email between the solicitors on the 22nd September, 2015 (the "22nd September Email") from Mr. Simons to Mr. Hickey.

The 22nd September Email

59. This email was forwarded to Mr. Shannon of Shannon & O'Connor Solicitors on the 5th October, 2015, by Mr. Hickey, as Mr. Shannon also acted for Dr. Sheehan in relation to other matters, albeit that Mr. Hickey was dealing with refinancing at this stage and not Mr. Shannon. This email first outlines the amounts due under the judgment dated 30th January, 2015, against Dr. Sheehan along with interest from the judgment and an estimate of legal costs giving a total of €3,082,307.21 for the Judgment Amount as of this date.

60. In addition Mr. Simons details the costs and expenses due from JCS to Talos under the Facility Agreement, an aggregate of €2,180,295.31. This amount was due from JCS to Talos because under Clause 17.3 of the Facility Agreement JCS was obliged to pay the costs incurred by Talos in enforcing and preserving its rights under the Facility Agreement. This had been a very expensive and involved process, as proceedings had been issued in the UK and Ireland in relation to the breach by JCS of the Facility Agreement. For this reason, the spreadsheet outlining JCS's costs and expenses which were owed to Talos included a significant number of invoices, 45 invoice entries in total, most of them from law firms in Ireland and the United Kingdom.

61. The body of the email therefore states that the Judgment Amount is €3,082,307.21 and that the attached spreadsheet outlined that JCS's costs and expenses due to Talos were €2,180,295.31. Thus, this email and attachment make clear that the total sum due to Talos on the 22nd September, 2015, was €5,262,602.52 or to put it another way, to clear the indebtedness of Dr. Sheehan and JCS to Talos would require a payment of €5,262,602.52:

> "Marc,
>
> On foot of the Orders of the High Court and Court of Appeal, the following is due;
>
> Judgment amount 2,788,671.53
>
> Courts Act Interest from 31/01/15 at 8% 143,635.68 235 days calculated on a simple interest basis
>
> Costs 150,000.00 estimate-subject to
>
> and without
>
> prejudice to taxation

3,082,307.21 estimate

> You also sought confirmation that upon payment of the Judgment amount, interest and costs JCS would be returned to your clients. I cannot confirm this as there are further amounts due by JCS pursuant to the amended and restated Facility Agreement. In particular, clause 17.3 provides for the costs incurred in enforcing/preserving rights being for the account of JCS. I attach a spreadsheet setting out the current schedule of outstanding costs, which includes some of the costs estimated at €150,000 above.
>
> I am instructed to proceed to enforce the charges over your clients' shares."

Spreadsheet attached to the 22nd September Email

62. While the spreadsheet contained 45 entries of mostly legal and professional fees, some seven entries are in respect of legal costs incurred by Talos' UK law firm Clifford Chance and payable by JCS and these seven entries are listed below along with the totals of all 45 entries. While the total of the legal costs from these seven invoices, or UK legal costs, come to €1,703,161.20, the total of all the invoices is €2,180,295.31:

"Description Amount Invoice No. Payee

Legal Fees 224,831.32 857010139834 Clifford Chance

[…]

Legal Fees 222,672.86 857010137260 Clifford Chance

Legal Fees 61,251.52 857010138113 Clifford Chance

Legal Fees 325,000.00 857010139831 Clifford Chance

[…]

Legal Fees 1609.12 857010147892 Clifford Chance

[…]

Legal Fees 747,412.07 8570101450 18 Clifford Chance

Legal Fees 120,384.46 334296189(draft) Clifford Chance

_____

Total Euro 2,180,295.31"

The 11th November Email

63. The next relevant email during the negotiation of the Talos/Sheehan Settlement Agreement is an email of the 11th November, 2015, from Mr. Simons to Mr. Hickey (the "11th November Email"). This email was forwarded that day to Mr. Shannon by Mr. Hickey, although Mr. Shannon does not take over dealing with the re-financing on behalf of Dr. Sheehan until the 13th November, 2015. In the 11th November Email, Mr. Simons states:

> "Marc,
>
> The amounts required to be paid in discharge of the Judgment and JCS's liabilities in order to return JCS to your clients' control are as follows;

Judgment amount 2,788,671.53

Courts Act on Judgment (until 30/11/15) 185,809.57

Costs 150,000.00 (estimate)

Contractual interest under Loan

(net of Courts Act Interest) 325,882.07

Additional costs and expenses of JCS

(net of 150k above) 516,505.42

Additional costs to be incurred

up to date of full redemption To be determined.

> I attach a breakdown of the costs and interest calculations."

64. It is clear when one considers this email in the context of the 22nd September Email, that as regards the Judgment Amount and costs, the figure is much the same, with one change, namely a reference to additional costs up to the full redemption of that amount (which are stated 'to be determined').

65. However, in the covering email the '*costs and expense* of JCS' were then reduced dramatically to €516,505.42 from the figure of €2,180,295.31 in the 22nd September Email and it is plain when one looks at the attached schedule that the reason for this reduction

is that there were then only five invoices, in contrast to the previous 45 invoices outstanding on the 22nd September, 2015. In addition, it is also plain when one looks at the spreadsheet that (as noted in the extract set out below from this spreadsheet), that one of these five remaining invoices is stated to be '*part paid*' which helps explain the dramatic reduction. The reduction in the '*costs and expenses of JCS*' between the 22nd September Email and the 11th November Email is a reduction of €1,663,789.89 which, it is to be noted, approximates to the €1.7 million which was received on the 3rd November, 2015 by Talos from JCS arising from the payment to JCS under the IBRC/JCS Settlement.

Spreadsheet attached to the 11th November Email
66. The spreadsheet attached to the 11th November Email states, inter alia:

Description Amount in Euro Payee Paid

Legal Fees 517,659.67 Clifford Chance Part Paid

Legal Fees 109,062.49 Clifford Chance UNPAID

Prof Fees 3,539.78 Cafico International UNPAID

Prof Fees 2,490.03 Cafico International UNPAID

Legal Fees 33,753.45 Amoss Solicitors UNPAID

666,505.42

Total Euro invoices (including irrecoverable VAT) 666,505.42

Less: Cost and Expenses payable under

guarantee judgment -150,000.00

Net Costs 516,505.42

Interest on Loan 900,363.17

Less: Judgment Amount Court Interest - 388,671.53

Post Judgment Court Interest - 185,809.57

Net Interest 325,882.07

Grand Total 842.387.49

Thus, this spreadsheet contains a breakdown of the '*costs and expense of JCS*' of €516,505.42. It also contains a total figure of €842,387.49 which is not limited to JCS' costs and expenses but also includes interest on the loan. While the 22nd September Email indicated that the overall 'price', to use that expression, to clear the indebtedness of Dr. Sheehan *and* JCS to Talos was €5,262,602.52, now on the 11th November, 2005, the overall 'price' has reduced significantly to €3,966,868.59 which drop was accounted for by the fact that JCS' costs and expenses dropped from €2,180,295.31 on the 22nd September, 2015, to €516,505.42 on the 11th November, 2015.

Other emails on the 11th and 12th November, 2015
67. Mr. Hickey replied to this email from Mr. Simons with an offer by email on the 11th November at 16:48, which related only to the Judgment Amount, namely the payment of €3,080,000 by the following Monday:

> "I calculate that Courts Act interest is accruing on the Judgement amount at €611.22 per day. On that basis, I calculate that the total amount due to satisfy the Irish Judgements and your costs up to and including Monday 16th November 2015 is €3,124,481.10.
>
> On the basis that my client will be repaying by next Monday and enforcement and taxation of costs is avoided, will your client be willing to accept €3,080,000.00 in final settlement of this? The JCS costs shall be dealt with at a later stage."

It is relevant to note that JCS's costs and expenses were at this stage not being pursued by Dr. Sheehan, since Mr. Hickey stated that this will be dealt with 'at a later stage'.

68. On the 12th November, 2015, at 10:19, Mr. Simons replied to Mr. Hickey as follows:

> "The only basis on which my client will consider accepting anything less than the €3,124,481.10 is if your clients enter into a full and final settlement, non-litigation agreement so that this would bring to an end to all hostilities in whatever guise in all jurisdictions."

69. On the 12th November, 2015, at 10:26, Mr. Hickey replied to that email from Mr Simons as follows:

> "I only have instructions to resolve the Irish judgement and costs of this stage. In the circumstances, and with reference to our telephone conversation last evening, can you confirm that your client will execute the attached letter of redemption on their own headed notepaper in the amount of €3,115,824.02, such amount to cover the Judgement, Courts Act interest up to the 16th November 2015 and the estimate of costs at €150,000? As discussed, the amount is €3,124,481.10 less €8,557.08 (being 14 days at €611.22 per day).
>
> If your client is happy with that figure, could they execute and return a scanned copy of the document before midday?"

70. It is relevant to note that at this stage, on the 12th November, 2016, Mr. Hickey goes further than his email of 11th November, 2015, since he states, not that he will deal with JCS's costs and expenses at a later stage, but rather that at that point, he only had

instructions to deal with the Judgment Amount.

71. However, before Mr. Simons replied to this email from Mr. Hickey, it is clear that there have been some developments on Talos' side. This is because an approach had been made earlier in that day (at 11:08 on the 12th November, 2015) by Mr. Ahmed Hamdani the managing director of HIG, which was the third party funder providing the refinancing to Dr. Sheehan. He sent an email to a contact of his in the Talos Group in which he stated:

> "We are funding an irish borrower against his hospitals. Understand [Talos] worked with these guys a couple years ago and had a poor experience. I'm trying to arrange funding so that [Talos] can get its money back is there someone on your end who can confirm what the final amounts owing are and we can close this in the next couple of days?"

72. Evidence was provided by Mr. Livingstone that, as a result of this approach, Talos decided that it should clear all its borrowings with Dr. Sheehan and his corporate vehicle JCS and so this explains the email from Mr. Simons to Mr. Hickey on the 12th November, 2015, at 14:35 to the effect that Talos now wanted to have all its indebtedness to Dr. Sheehan and JCS cleared as part of its release of the security over the BHL shares to enable Dr. Sheehan pursue his re-financing with HIG:

> "Marc,
>
> I am now instructed that my client is not willing to sign anything unless the JCS liability is also dealt with.
>
> Please let me know how you wish to proceed."

73. It is clear therefore that, at this stage on the afternoon of the 12th November, 2015, the reason that the discharge of JCS's costs and expenses, which would have led to the return of JCS to Dr. Sheehan (since Talos would no longer require security over JCS after being paid off), is now part of these negotiations (and subsequently forms part of the Talos/Sheehan Settlement Agreement), is not at Dr. Sheehan's instigation, but rather because Talos makes clear that it will only release its security (i.e. the redemption letter/form of release) over the BHL shares to enable Dr. Sheehan to obtain his financing from HIG, if all monies owed by JCS and Dr. Sheehan are paid to Talos - not just the Judgment Amount but also JCS' costs and expenses. This is acknowledged by the email date the 13th November, 2015, from Mr. Shannon (who took over the case from Mr. Hickey on the 13th November, 2015) to Mr. Simons which is set out in full below, but which states, *inter alia*, that:

> "We note that your client is unwilling to sign the requested form of release until such time as all of the costs incurred against our client/by JCS are addressed."

The 13th November Email

74. As previously noted, the reason this email to Mr. Simons is from Mr. Shannon, and not Mr. Hickey, is because two days after the 11th November Email was received, on the 13th November, 2015, Mr. Shannon took over acting for Dr. Sheehan from Mr. Hickey, in relation to the re-financing of Dr. Sheehan's borrowings. The next relevant email therefore is this email from Mr. Shannon to Mr. Simons on the 13th November, 2015, in which he states in full:

> "Gavin,
>
> Further to our telephone conversation this morning, I confirm that I act on behalf of Joseph Sheehan in relation to his current refinancing transaction.
>
> You will be aware that as part of same we are trying to discharge Joseph's creditors, of which Talos is one. We note that your client is unwilling to sign the requested form of release until such time as all of the costs incurred against our client/by JCS are addressed. Accordingly, in order for our client to seek additional funding from his lenders to do so we need to know the exact amount being sought by your client on the basis that they will be repaid on or before 30th of November 2015. Given our need to seek this additional amount we will need an exact amount.
>
> Accordingly, can you please confirm by return email the amount required to be paid to your client having regard to a payment date of 30th of November and the return of JCS to client."

75. In the replying email of the 13th November, 2015, from Mr. Simons to Mr Shannon ("13th November Email"), Mr Simons states, in almost identical terms to Mr. Shannon, that which he had stated in the 11th November Email to Mr. Hickey regarding what was owed to Talos. However, a figure for €10,000 now appears under the heading of additional costs to be incurred prior to redemption in place of the wording '*to be determined*' in relation to those costs in the 11th November Email. This email states in full:

> "Eamonn,
>
> I confirm that the total payments required to be made to Talos to discharge all sums due on foot of the judgment and all sums required to be paid to return control of JCS are as follows;

Judgment amount 2,788,671.53

Courts Act on Judgment

(until 30/11/15) 185,809.57

Costs 150,000.00

Contractual interest under Loan

(net of Courts Act Interest) 325,882.07

Additional costs and expenses of JCS

(net of 150k above) 516,505.42

Additional costs to be incurred

up to date of full redemption 10,000.00

I attach a breakdown of the costs and interest calculations."

Spreadsheet attached to the 13th November Email
76. The attachment to this email is in the exact same form as the attachment to the 11th November Email and thus sets out a breakdown of the '*costs and expense of JCS*' of €516,505.42. It also contains the total figure of €842,387.49 which includes along with JCS' costs and expenses some additional interest on the loan.

The 16th November Email
77. The next relevant email between the parties is the 16th November Email from Mr. Simons to Mr. Shannon at 14:08. In it Mr. Simons states:

> "Eamonn,
>
> I have taken instructions and confirm that under the UK proceedings my client obtained costs certificates in respect of the following amounts:
>
> • £436,285.74 for the main claim and summary judgment as against Dr Sheehan, JCS and others on a joint and several basis;
>
> • £184,722.04 for the anti-suit injunction proceedings as against Dr Sheehan, JCS and others on a joint and several basis.
>
> Please see attached. The Euro equivalent of these amounts in €878,262.89 (based on today's spot-rate as per www.xe.com).
>
> My client's intention is, for so long as the amounts due thereunder are outstanding, to enforce these costs certificates in this jurisdiction before releasing the existing charging orders. My client will accept payment of €842,387.49 in full and final settlement, subject to entering into a mutual settlement agreement. However, this would need to be dealt with at the same time as payment of the €3.1m approx. judgment amount.
>
> I have been instructed to ask you to confirm that the above has been sent to Dr Sheehan's new lender so that there is no uncertainty as to what action my client will take id this matter is not dealt with. To the extent not confirmed, my client will forward on to the new lender directly."

Attached to the email were two Default Costs Certificates (the 'UK Costs Certificates') both dated 10th July, 2015, issued by the English High Court in respect of costs in favour of Clifford Chance, one in the sum of £436,285.74 and one in the sum of £184.722.04, both against JSC, Dr. Sheehan *et al*. As noted in the body of the email, the euro equivalent at that time, of the aggregate of these two sums, was €878,262.89.

78. Particular significance is attached on behalf of Dr. Sheehan to the expression '*amounts due thereunder*' in the email, which refers to the release of the charging orders which Talos held over Dr. Sheehan's shares in BHL, i.e. the statement that:

> "my client's intention is, for so long as the amounts due thereunder are outstanding, to enforce these costs certificates in this jurisdiction before releasing the existing charging orders".

79. It is this Court's view that one can infer from the difference between the 22nd September Email on the one hand and both the 11th November Email and the 13th November Email on the other, i.e. the reduction from seven Clifford Chance invoices to two Clifford Chance invoices, and indeed from the wording of the 11th and 13th November Emails ('*Part paid*') which is not in the 22nd September Email, that some of the UK Costs Certificates payable to Clifford Chance had been paid by the 11th November, 2015.

The alleged misrepresentation
80. Nonetheless, Dr. Sheehan alleges that this wording ('*amounts due thereunder*') in the 16th November Email is a clear representation by Mr. Simons not, (as claimed by Mr. Simons) that so long as the balance, whatever that may be, of the UK Costs Certificates is outstanding, that Talos will not release its security over the BHL shares, but rather this wording is a clear representation that the sum of €872,262.89 is outstanding from JCS to Talos in respect of UK Costs Certificates and thus that all the UK Costs Certificates are outstanding and indeed that none of them have been part paid. This is the nub of the representation allegedly made by Mr. Simons as claimed by Dr. Sheehan in this case.

Other emails on the 16th November, 2015
81. In a second email dated 16th November, 2015, from Mr. Simons to Mr. Shannon at 15:29, Mr. Simons states:

> "Eamonn,
>
> Given that my client has Judgment for the €878,262.89 it is not prepared to discount by €150,000 but would be prepared to discount to €842,000."

It is to be noted that this figure of €842,000 appears to be a rounding down of the figure of €842,397.49 from the 13th November Email, which was made up of JCS's costs and expenses of €516,505.42 plus interest on the loan. As previously noted, this figure of €516,505.42 was a reduction of €1,663,789.89 in JCS's costs and expenses from the figure of €2,180,295.31 in the 22nd September Email.

82. It seems clear to this Court from this email that Mr. Shannon understands that the €842,000 refers to JCS's costs and expenses, since he distinguishes it from the Judgment Amount of €3.1 million in his reply on the 16th November, 2015, at 17:01 to Mr. Simons:

> "Gavin,

> Further to your email [of 15:29], it's my understanding that your client is agreeable to a full and final settlement of all claims and liabilities for which our client is or may be liable for (in all jurisdictions), to your client upon payment of the sum of €3,958,536 (inclusive of €842,000 together with payment of the €3.1m approximate judgement amount). I also understand that in consideration of the foregoing, your client will return ownership and control of JCS to our client. You might please confirm that the foregoing is correct."

Talos/Sheehan Settlement Agreement executed on the 19th November, 2015
83. At this stage, on the 16th November, 2015, there was agreement in principle between Talos and Dr. Sheehan regarding their settlement agreement and there then followed an exchange of draft documentation which culminated with the execution of the Talos/Sheehan Settlement Agreement between Talos and Dr. Sheehan on the 19th November, 2015, in which, *inter alia*, Talos released its interest in the shares in BHL. Payment was duly made by Dr. Sheehan to Talos of the sum of €3,958,536, being €3.1 million approximately in respect of the Judgment Amount and €842,000 approximately in respect of JCS' costs and expenses and interest on the loan.

84. JCS was transferred back into the control of Dr. Sheehan after the execution of the Talos/Sheehan Settlement Agreement on the 19th November, 2015, and then on the 29th January, 2016, Dr. Sheehan received from Cafico International, the corporate service providers to JCS, the company secretarial and other legal documentation for JCS, which included a copy of the IBRC/JCS Settlement Agreement.

These proceedings issued on the 3rd August, 2016
85. It is claimed on behalf of Dr. Sheehan that the discovery by him of the IBRC/JCS Settlement Agreement led to these proceedings issuing on the 3rd August, 2016. In these proceedings, it is claimed that Talos, through its solicitor, Mr. Simons, *impliedly* misrepresented (as outlined hereunder) to Dr. Sheehan, through his solicitor Mr. Shannon, that the claim by JCS against IBRC was still in existence on the 16th November, 2016, when in fact it had been settled under the terms of the IBRC/JCS Settlement Agreement which was executed on the 28th September, 2015.

Dr. Sheehan claims that Talos misrepresented that IBRC Claim was extant
86. It is claimed that Talos effected this misrepresentation by misrepresenting, through its solicitor Mr. Simons, in the 16th November Email that all the UK Costs Certificates were outstanding and that none of them had been paid or part paid.

87. It is claimed on behalf of Dr. Sheehan that if Mr. Shannon had not been so misled and had been made aware that some of the UK Costs Certificates had been paid, or indeed if he had been made aware that any of JCS' costs and expenses due by JCS to Talos had been discharged, this would have led Mr. Shannon to enquire about the source of the funds to reduce JCS' costs and expenses. It is argued that this would have led him to discover that the funds had come from the settlement of the IBRC Claim, which would have alerted him to the fact that the IBRC Claim had been settled.

88. This, it is claimed on behalf of Dr. Sheehan, would have meant that there was no reason for Dr. Sheehan to acquire JCS, since it is claimed that his sole purpose in so doing, was not to comply with Talos' requirement that Dr. Sheehan discharge all monies due to Talos from Dr. Sheehan and JCS before releasing its charge over the shares in BHL (and it charge over the shares in the Galway Clinic in which Dr. Sheehan also has an interest), but rather it is claimed on behalf of Dr. Sheehan that his sole purpose in acquiring JCS was to pursue the IBRC Claim.

89. On this basis, it is claimed on behalf of Dr. Sheehan that he was induced to enter the Talos/Sheehan Settlement Agreement by this misrepresentation. It is a curiosity of this case that in a claim that Dr. Sheehan acted to his detriment on the basis of a misrepresentation, that Dr. Sheehan has chosen not to give any evidence as to whether he did so act to his detriment.

THE MISREPRESENTATION CLAIM

Is the 16th November Email a misrepresentation under English law?
90. It is important to note that under Clause 33 of the Facility Agreement, that the Facility Agreement, and all non-contractual obligations arising out of or in connection with it, are governed by English law. Accordingly it is common case that this Court must decide the issue of whether there has been actionable misrepresentation by Talos to Dr. Sheehan, as a matter of English law.

91. Therefore, this Court is required to consider under English law, and in reliance on the expert opinions of Mr. Patrick Lawrence QC ("Mr. Lawrence") and Mr. Richard Salter QC ("Mr. Slater"), whether Talos, through its agents, misrepresented to Dr. Sheehan's agents, that the claim by JCS against IBRC for the return of the Deposit had *not* been settled.

92. The Court was provided with an Expert Report by Mr. Lawrence, who was engaged by Talos, and an Expert Report by Mr. Slater, who was engaged by Dr. Sheehan. The Court was also provided with a third Expert Report by Mr. Lawrence, and the Court was advised that the terms of the third Expert Report had been agreed by Mr. Salter.

93. Mr. Slater states in his Expert Report that the:

> "category of misrepresentation by silence has no application on the facts of the present case".

Accordingly, it seems to this Court that the question of whether there has been misrepresentation by Talos in this case comes down primarily to the meaning and effect of the 16th November Email from Mr. Simons to Mr. Shannon and indeed the thrust of the case made on behalf of Dr. Sheehan was that this was the most significant piece of evidence in their case alleging misrepresentation.

94. In deciding whether the contents of this email were such as to amount to a misrepresentation that the IBRC Claim was extant, it is necessary to consider the email in its context and in particular in light of the previous emails that had been received by Mr. Shannon. This is because, as noted below, Mr. Slater makes clear that all the circumstances of the alleged misrepresentation must be considered.

Not a direct misrepresentation
95. It is relevant to bear in mind that what is being alleged on behalf of Dr. Sheehan is not a direct misrepresentation by Talos that the IBRC Claim was extant, but rather an implied representation that it was extant – the claim being that the 16th November Email by allegedly representing that the all UK Costs Orders were still outstanding thereby implied that no money had been received by Talos

for the benefit of JCS from any outside source, which if it had been received would have suggested that JCS had settled its claim with IBRC. On this basis, it is alleged that Mr. Simons impliedly misrepresented that the IBRC Claim was extant.

96. In relation to implied representations, Mr. Slater quotes in his Expert Report from the English Court of Appeal case of *Property Alliance Group v. Royal Bank of Scotland* [2018] EWCA Civ 355 at para. 132, that:

> "there must be clear words or clear conduct of the representor from which the relevant representation can be implied".

He also notes that in that case, it was stated by the English Court of Appeal that the court "*should not be too ready to find an implied representation*".

97. However, Mr. Slater also notes that where there is deliberate concealment during pre-contract negotiations then "*if a word, a single word, is dropped which tends to mislead the vendor*" (quoting from para 4.23 of Spencer Bower & Handley, *Actionable Misrepresentations* (5th ed, Lexis Nexis, 2014), this could be sufficient to find actionable misrepresentation under English law.

98. Mr. Slater also expressly referred to the following statement from Colman J.'s judgment in *Geest Plc v. Fyffes Plc* [1999] 1 All ER (Comm) 672 at 683:

> "Where there is no express misrepresentation, the first question to ask is whether there has been any implied misrepresentation at all and, as with any other type of contract, the essential issue is whether in all the circumstances relating to the entering into of the contract of guarantee or indemnity, including in particular (a) the nature of the contract between the beneficiary and the principal debtor, (b) the conduct of the beneficiary and (c) express representations made by him to the surety, it has been impliedly represented to the surety that there exists some state of facts different from the truth. In evaluating the effect of the beneficiary's conduct a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it"

Against this background, this Court must consider if the 16th November Email, in all the circumstances of the engagement between Talos and Dr. Sheehan, amounted to an implied misrepresentation that the IBRC Claim was extant.

Mr. Shannon was not acting as solicitor when certain emails were received

99. While Mr. Shannon did in fact receive the 22nd September Email, the 11th November Email and the 13th November Email, he gave particular focus to the 16th November Email. He sought to put particular emphasis on the 16th November Email by his evidence that he had no recollection of opening the attachments to the 22nd September Email, the 11th November Email or the 13th November Email – which evidence might initially appear to assist his client Dr. Sheehan's claim of misrepresentation, since it seeks to concentrate on the effect of the 16th November Email on Mr. Shannon when viewed in isolation.

100. In relation to the 22nd September Email and the 11th November Email, it is important to note that Mr. Shannon was copied on these emails, although he was not acting for Dr. Sheehan in relation to the re-financing until the 13th November, 2015. In relation to both those emails, Mr. Shannon has no recollection of opening the spreadsheets attached to both emails and he justifies this apparent omission by stating that he was not acting for Dr. Shannon at that time.

101. It is true that upon receipt of those two emails, Mr. Shannon might not have been expected to carefully read the correspondence (whether letters with enclosures, or emails with attachments) since he was not the solicitor dealing with the re-financing for Dr. Sheehan at that time. However, once Mr. Shannon took over responsibility for the refinancing on the 13th November, 2015, he would be expected to carefully review the pre-existing file before proceeding with the re-financing, particularly in this case where the file amounted to only a few emails.

102. Despite this, Mr. Shannon, cannot say whether he ever opened any of the spreadsheets attached to the emails of 22nd September and 11th November at any stage but he is definite he did not carry out a detailed analysis of them.

103. More significantly, once he was instructed to deal with the re-financing on the 13th November, 2015, Mr. Shannon accepted in his evidence that he did not go back and review these emails carefully and their attachments.

Mr. Shannon was acting for Dr. Sheehan on receipt of the 13th November Email

104. In relation to the 13th November Email, Mr. Shannon was by then acting for Dr. Sheehan in relation to the refinancing and so he would have been expected to carefully read that email and its attachment upon its receipt, but by his own admission he does not recall even opening it and he accepted that he certainly did not do a detailed analysis of it.

105. The only reason proffered by Mr. Shannon for this omission was that on a transaction like this he might receive between 100 and 200 emails during the course of the day and so he implied that he was too busy to carefully read attachments to emails.

106. It is this Court's view that under English law, this Court is obliged to consider the 16th November Email '*in all the circumstances*' of the representation and this should be interpreted as meaning, in this case, as taking account of all the correspondence between the parties. In particular this Court is required to take account of the contents of the 22nd September Email, the 11th November Email and the 13th November Email and their attachments, in assessing whether there was a misrepresentation in the 16th November Email, irrespective of whether Mr. Shannon chose to read those emails and their attachments, at all or carefully. This means that Dr. Sheehan cannot benefit in his claim of alleged misrepresentation against Mr. Simons from the fact that his solicitor, Mr. Shannon, failed to carefully read correspondence that was sent by Mr. Simons to him and to the solicitor (Mr. Hickey) acting prior to him in relation to the re-financing transaction.

Did Talos represent that all the UK Costs Certificates were outstanding?

107. Having concluded that Mr. Shannon cannot benefit his client, Dr. Sheehan, from Mr. Shannon's failure to carefully read correspondence, the next step in deciding whether Talos impliedly misrepresented to Dr. Sheehan that the IBRC claim was extant, is deciding whether Talos expressly represented that all the UK Costs Certificates were still outstanding.

108. It is clear from the evidence of the English law experts, that for there to be actionable misrepresentation there must be reliance on the alleged misrepresentation of Mr. Simons that all the UK Costs Certificates were outstanding. In this regard, it is to be noted that since Dr. Sheehan chose not to give evidence of his reliance on the alleged misrepresentation, his case relies on the notion that Mr. Shannon relied on this alleged misrepresentation, in the sense that if he had known that all the UK Costs Certificates were *not*

outstanding, this would have led him to conclude that money had been sourced from somewhere by JCS, to pay Talos the costs and expenses JCS owed Talos, and it seems that this would have prompted him to enquire about the status of the IBRC Claim to see if the settlement of this claim was the source of these funds.

109. However, reliance will only become an issue, if there has been an misrepresentation made on behalf of Talos, which primarily comes down to the 16th November Email from Mr. Simons of AMOSS solicitors. It follows that Dr. Sheehan's claim will stand or fall on the basis of whether this Court concludes that the 16th November Email from Mr. Simons amounted to a misrepresentation by him to Mr. Shannon that all the UK Costs Certificates, which that email stated amounted to €878,262.89, were outstanding.

110. Since, as previously noted, '*all the circumstances*' surrounding the alleged misrepresentation need to be considered, the 16th November Email cannot be viewed in isolation as one piece of correspondence, between Talos's solicitor and Dr. Sheehan's solicitor, but it must be viewed in the context of the preceding emails and all the other circumstances, in order for this Court to determine whether it amounted to a misrepresentation that the UK Costs Certificates were all outstanding.

Meaning of 16th November 2015 Email if read in isolation
111. In this regard, it is true to say that if the 16th November Email was read *in isolation*, it is *possible* that the recipient of the 16th November Email *could* read the following words in the email as meaning that JCS's costs and expenses in relation to the UK Costs Certificates came to a total of €878,262.89 and these were all still outstanding:

> "I have taken instructions and confirm that under the UK proceedings my client obtained costs certificates in respect of the following amounts:
>
> • £436,285.74 for the main claim and summary judgment as against Dr Sheehan, JCS and others on a joint and several basis;
>
> • £184,722.04 for the anti-suit injunction proceedings as against Dr Sheehan, JCS and others on a joint and several basis.
>
> The Euro equivalent of these amounts is €878,262.89 (based on todays' spot rate as per www.xe.com).
>
> My client's intention is, for so long as the amount due thereunder are outstanding, to enforce these costs certificates in this jurisdiction before releasing the existing charging orders."

Meaning of 13th November Email if read in isolation
112. However, in this Court's view it is equally possible for the recipient of the 13th November Email, which was received only three days previously, to read the following words, combined with the spreadsheet attached thereto, as meaning that the total of JCS's costs and expenses, which clearly would have included all UK Costs Certificates, came to €516,505.42 and so this was the amount outstanding in respect of UK Costs Certificates. This is particularly so, since one listed invoice was stated to be '*part paid*' and so one could conclude based on reading this email and the spreadsheet in isolation that some of JCS's costs and expenses had been paid and thus all of the UK Costs Certificates were *not* outstanding. This is because this email stated, *inter alia*, that:

> "Additional costs and expenses of JCS (net of 150K above) 516,505.42
>
> […] I attach a breakdown of the costs and interest calculations"

The spreadsheet attached then lists five invoices, which *inter alia*, stated:

Description Amount in Euro Payee Paid

Legal Fees 517,659.67 Clifford Chance Part Paid [Emphasis added]

Legal Fees 109,062.49 Clifford Chance UNPAID

Prof Fees 3,539.78 Cafico International UNPAID

Prof Fees 2,490.03 Cafico International UNPAID

Legal Fees 33,753.45 Amoss Solicitors UNPAID

666,505.42

Total Euro invoices (including irrecoverable VAT) 666,505.42

Less: Cost and Expenses payable under

guarantee judgment -150,000.00

Net Costs 516,505.42

Interest on Loan 900,363.17

Less: Judgment Amount Court Interest - 388,671.53

Post Judgment Court Interest - 185,809.57

Net Interest 325,882.07

Grand Total 842.387.49

Conclusions about 13th Nov Email in context of 22nd Sept and 11th Nov Emails
113. Furthermore, while one could interpret the 13th November Email *in isolation* as stating that some of JCS's costs and expenses had been paid, and in particular that the legal costs of Clifford Chance and therefore some of the UK Costs Certificates had been paid, the likelihood of such an interpretation is even greater when one considers the 13th November Email *in the context* of the 11th November Email and the 22nd September Email.

114. Upon receipt of the 13th November Email, this Court has concluded that Mr. Shannon should have carefully read the 22nd September Email, the 11th November Email as well as the 13th November Email and their respective attachments. On this basis, and when the 13th November Email is considered with the 22nd September Email and the 11th November Email in the round, one can make the following conclusions in relation to how much of JCS's costs and expenses were outstanding:

(i) Reduction in 'price' of transaction of €1.3 million
There was a reduction from the 22nd September Email, from a Judgment Amount of €3,082,307.21 plus JCS's costs and expenses of €2,180,295.31 giving a total of €5,262,602.50 to, in the 11th November Email, a Judgment Amount of €3,450,363 plus JCS's costs and expenses of €516,505.42 giving a total of €3,966,868.43, which is a reduction from €5.2 million to €3.9 million in what was the combined indebtedness of Dr. Sheehan to Talos (i.e. the Judgment Amount and the indebtedness of JCS to Talos in relation to its costs and expenses).

To put this another way, in the space of five weeks the 'price' which Dr. Sheehan had to pay to clear these debts, in order to refinance his borrowings with HIG, had dropped by €1.3 million – a very significant sum for any professional dealing with a transaction for his client and something which this Court concludes should have jumped out at any solicitor carefully considering the emails and attachments.

It is also relevant to note that, after the 22nd September Email was received from Mr. Simons by Dr. Sheehan's solicitor at that stage, Mr. Hickey, the very next email from Mr. Simons to Mr. Hickey was the 11th November Email, so Mr. Hickey has only to compare the 11th November Email from Mr. Simons to the immediately preceding email from Mr. Simons, which was on the 22nd September, and thus it should have been relatively fresh in his mind and so easy to locate and compare.

(ii) Reduction from 45 invoices to five invoices
The next conclusion one can make when comparing these emails is that JCS' costs and expenses on the 13th November, 2015, consisted of just *five invoices* with an aggregate gross value of €666,505.42 and an aggregate net value of €516,505.42 (once the costs and expense of the Judgment Amount are deducted), compared to the 45 *invoices* outstanding on the 22nd September with an aggregate value of €2,180,259.31 – a very significant reduction in the number of invoices from 45 to five, or a long list of invoices for JCS' costs and expenses to a very short list, which should be obvious to a solicitor who does even a cursory comparison of the two spreadsheets.

(iii) Reduction from seven to two UK costs invoices
Another conclusion is that in the context of UK Costs Certificates for legal costs in the UK (since this is the focus of the misrepresentation which Dr. Sheehan claims is contained in the 16th November Email), there are now only *two invoices* listed in the 13th November Email as outstanding from the UK law firm Clifford Chance (with an aggregate gross value of €626,722.16 being payable to Clifford Chance) compared to *seven invoices* from this UK law firm which were outstanding in the 22nd September Email (with an aggregate value of €1,703,161.20 payable to Clifford Chance) – again a very significant reduction in the number of invoices from seven to two from this UK law firm indicating a very significant reduction in the UK Costs Certificates which should have been apparent to a solicitor who carefully considered the emails and attachments regarding the amount of UK Costs Certificates outstanding

(iv)_Reduction of €1.5 million in JCS' costs and expenses
Similarly JCS' costs and expenses on the 13th November, 2015, had a net value of €516,505.42 compared to the value of JCS' costs and expenses on the 22nd September of €2,180,259.31 – again a very significant reduction of €1,513,753.89 which should have been obvious to a solicitor carefully considering the total amount of JCS' costs and expenses outstanding.

(v) Reduction of €1m payable to UK law firm
Also, since one is dealing with an allegation that all the UK legal costs were misrepresented to be still outstanding, the value listed in the 13th November Email of the UK law firm's (Clifford Chance) invoices is stated to be €626,722.16 compared to €1,703,161.20 payable to Clifford Chance in the 22nd September Email – a significant reduction in the amount payable to the UK law firm of €1,076,439.04 which should also have been obvious to a solicitor carefully considering the emails and attachments.

(vi) A part payment of UK law firm's invoice is flagged
Finally, in the context of whether there had been a payment from any source of JCS' costs due to Talos, such as to put Mr. Sheehan on enquiry, invoice no. 8750101450 18 from Clifford Chance (listed in both the 22nd September Email spreadsheet and the 11th/13th November Emails spreadsheet) had reduced in value from €747,412.07 to €517,659.67 in the period from the 22nd September to the 11th November. In addition, in the spreadsheet attached to the 11th/13th November Emails this invoice is expressly stated to have been *'part paid'* – so even if Mr. Shannon was looking at the spreadsheet attached to the 11th/13th November Emails in isolation (had he not received the 22nd September Email, which of course he had), he would have seen that JCS's costs to a UK law firm had been part paid.

Conclusion about 16 Nov Email in context of 22 Sept, 11 Nov and 13 Nov Emails
115. It is also important to consider the 16th November Email in the context of the 22nd September Email, the 11th November Email and the 13th November Email. This is because Mr. Shannon claims that in the 16th November Email, Mr. Simons misrepresented to him that the figure for UK Costs Certificates, which made up JCS's costs and expenses in that email, were in the sum of €878,262.89 and were all outstanding.

116. Upon receipt of the 16th November Email, this Court has concluded that Mr. Shannon should by that stage have carefully read the 22nd September Email, the 11th November Email and the 13th November Email and their respective attachments. On this basis, the following additional conclusions should have been made by him on the 16th November, 2015:

(vii) Discrepancy between €878,262 and €516,505 in two emails
Looking at the totals of JCS' costs and expenses in the 16th November Email compared with the total of JCS' costs and expenses in the 13th November Email, Mr. Shannon would have seen in the 13th November Email a total of JCS' costs and expenses of €666,505.42 gross, less costs under the Judgment Amount, giving a net figure for JCS' cost and expenses of €516,505.42. In contrast the total of JCS' costs and expenses, just three days later, in the 16th November Email is €878,262.89 *if* one was to interpret the

16th November Email the way Mr. Shannon says he interpreted it i.e. as meaning that all the amounts in the two UK Costs Certificates attached to that email were still outstanding.

If Mr. Shannon interpreted Mr. Simons in this way, namely that €878,262.89 was outstanding in respect of UK Costs Certificates, it would have meant that there was an apparent conflict between the two emails only three days apart, which should have led him to ask Mr. Simons to clarify how much of the UK Costs Certificates were *actually* outstanding, *if* this was his interpretation of the 16th November Email.

To put it another way, if the alleged failure on the 16th November by Mr. Simons to tell Mr. Shannon that the UK Costs Certificates had been partly paid was, as alleged by Mr. Shannon, so significant that it led him not to enquire about the source of the funds for the part payment of the UK Costs Certificates, then it should also be the case that the differential between the €516,505.42 figure in the 13th November Email and the €878,262.89 figure in the 16th November Email, combined with the reference in the 13th November Email to Clifford Chance's invoice having been '*part paid*' (both of which emails were received by him when he was acting for Dr. Sheehan in relation to the refinancing), should have led Mr. Shannon to make the same enquiry (he says he would have made) about the source of the funds which reduced the JCS' costs and expenses to €516,505.42.

At the very least the different figures in the 13th November Email and the 16th November Email should have led Mr. Shannon to make an enquiry clarifying the actual amount outstanding in respect of UK Costs Certificates in light of what he now implies, by his alleged interpretation of the 16th November Email, are two contradictory emails.

While it was noted earlier that the 16th November Email *could* be read in isolation as meaning that all the UK Cost Certificates in the sum of €878,262.89 were outstanding, however when it is read in the context of the 13th November Email, which states that the total of JCS' costs and expenses come to a total of €516,505.42, which is significantly less than the figure of €878,262.89 contained in the 16th November Email, it is also the case that this discrepancy *could* have led Mr. Shannon to interpret the 16th November Email as referring to UK Costs Certificates being outstanding in the sum of €516,505.42 (which he denies).

(viii) Very precise figure of €842,387.49 was reference back to earlier email
It is also relevant to note that the 13th November Email sets out JCS' costs and expenses as €516,505.42, but that Mr. Simons then added to that figure the amount due for interest to give a 'gross' figure of €842,387.90. Only three days later, in the 16th November Email, Mr. Simons indicated that Talos "*will accept payment of €842,387.49*", this exact same amount to the cent, in full and final settlement. It should have been obvious to Mr. Shannon, if he had considered the 16th November Email, in light of the 13th November Email, that:

> •this very precise figure of €842,387.49 was not picked out of the blue, but represented a combination of JCS' costs and expenses of €516,505.42 and interest as set out in the email from only three days previously;
>
> • the 'net' figure for JCS' costs and expenses of €516,505.42 in the 13th November Email (upon which the €842,387.90 figure is based) was different from the UK Costs Certificates figure of €878,262.89 mentioned in the 16th November Email; and,
>
> • even if one looked in isolation at the 'gross' and very precise figure of €842,387.49 referred to in the 16th November Email (and thus unlikely to be some kind of rounding up or down figure), this was different from the UK Costs Certificates figure of €878,262.89 mentioned in the same email

All of these eight factors would in this Court's view indicate to Mr. Shannon that the UK Costs Certificates of €878,262.89 was not in fact outstanding.

Conclusion regarding misrepresentation
117. If Mr. Shannon failed to reach the foregoing eight conclusions, which this Court regards as either directly apparent from the terms of the emails and attachments, or could be readily deduced from a comparison of the various emails, this is because he did not read the emails and attachments at all, or carefully. For this reason, he did not reach the conclusion that funds had been received by Talos to discharge part of JCS' costs and expenses (which conclusion he suggests he would have reached if he had been told in the 16th November Email that, of the UK Costs Certificates of €878,262, only €516,505 were still outstanding).

118. It is this Court's conclusion that the fact that some of JCS's costs and expenses had been discharged should have been obvious to Mr. Shannon if he had carefully reviewed the emails. In particular, this Court concludes that Mr. Shannon cannot rely on his failure to carefully read emails and attachments as a basis for alleging that Mr. Simons misrepresented the position regarding the UK Costs Certificates since to be a misrepresentation the alleged misrepresentation must be considered in all the circumstances and not in isolation. It is this Court's view that when the 16th November Email is considered in this context, it does not amount to a misrepresentation.

119. This conclusion of this Court therefore runs contrary to the claim in para. 22 of Mr. Shannon's Witness Statement in which he stated:

> "I believe that the email of 16th November 2015 falsely misrepresents the full amount of the two U.K. costs orders as remaining outstanding. I believe that such cannot be the case, as I am *now* aware that invoices of the Defendant's U.K. solicitors (Messrs Clifford chance) were discharged from the €1,700,000 settlement monies received from IBRC. The invoices specified therein include very substantial matters that would inevitably fall within the parameters of the two UK costs orders" [emphasis added]

120. Before considering this statement, it is relevant to consider the very serious consequences of this claim for Mr. Simons, which are contained in para. 25 of the Witness Statement, where Mr. Shannon goes on to state that:

> "I must also regrettably conclude that the decision to incorrectly allege that the entirety of the UK costs Orders liability remained outstanding was made for the purpose of ensuring that both myself and the Plaintiff remained in ignorance of the settlement monies that had been paid by IBRC."

121. It is clear from these statements that Mr. Shannon's claim of misrepresentation, and thus Dr. Sheehan's claim in these proceedings, rests on the fact that Mr. Shannon claims that he only became aware of the fact that U.K. Costs Certificates were discharged *after* the Talos/Sheehan Settlement Agreement was signed by Dr. Sheehan.

122. However, as is clear from the foregoing evidence, Mr. Shannon had been provided with sufficient information, in emails and attachments prior to the 16th November, 2015, to conclude that the UK Costs Certificates had been previously part paid (or more generally, that JCS's costs and expenses had been part paid) prior to the execution of the Talos/Sheehan Settlement Agreement, but he either did not read those emails and attachments or did not read them carefully. In this Court's view, it is not now open to Mr. Shannon to seek to benefit his client, Dr. Sheehan, by relying on his own failure to carefully read emails and attachments and by so doing allege that another solicitor had misrepresented the facts to him, which is a very serious allegation to make against any professional.

123. More generally, it seems clear to this Court that, when all of the emails and attachments are viewed in the round, it would have indicated to Mr. Shannon, if he had read them at all, or indeed carefully which a solicitor would be expected to do, the very thing which he complains he was not told, namely that some of the UK Costs Certificates and/or some of JCS's costs and expenses had been paid, would have been obvious to him.

124. Since English law requires this Court to consider the alleged misrepresentation in '*all the circumstances*' of the case, this Court cannot see how the 16th November Email can be read in isolation. When all of the correspondence is considered, this Court concludes that there has been no representation by Mr. Simons or Talos on the 16th November, 2015, or on any other date that the UK Costs Certificates were all outstanding (after they had been part paid) and therefore there was no misrepresentation that some of JCS's costs and expenses had *not* been paid and accordingly there was no misrepresentation that the IBRC Claim had not been settled.

125. In particular, this Court cannot see how Mr. Shannon can claim that the 16th November Email amounted to a misrepresentation to him that the UK Costs Certificates (in the sum of €878,262.89) were all outstanding, when only three days previously, the 13th November Email stated that the only costs and expenses outstanding for JCS totalled €666,504.42 made up of five invoices, two of which were from the UK law firm Clifford Chance, and one of which was stated to be 'part paid' and the total of those two invoices from Clifford Chance alone only came to €626,722.16.

126. The only way in which a claim for misrepresentation could even have a chance of success, in this Court's view, is if the *only* email that was sent by Mr. Simons was the 16th November Email and if there never had been the 22nd September Email, the 11th November Email and the 13th November Email. However, this was patently not the case.

Absolutely no question of fraudulent misrepresentation by Mr. Simons

127. The proceedings in this case are based on an alleged misrepresentation by Talos through its agent, its solicitor, Mr. Simons. This alleged misrepresentation centres on the contents of the 16th November Email, sent by Mr. Simons. In the Plenary Summons issued by Dr. Sheehan, he makes very serious allegations of deceit and fraudulent misrepresentation against Talos, which was acting through its agent, Mr. Simons.

128. As noted in detail hereunder, this is not the first time that Dr. Sheehan has made outrageous allegations against professionals. Uncontroverted evidence was provided to the Court that Dr. Sheehan issued proceedings in New York alleging that Talos had breached the Facility Agreement and that Talos and others, including Arthur Cox had conspired to defraud him, which proceedings were eventually dismissed. Not only were those allegations false, but there is uncontroverted evidence before this Court that one of the reasons that the Facility Agreement did not proceed was, not because of any default by Talos, but rather because of Dr. Sheehan's own misrepresentation that Dr. Duffy's loan had not been redeemed.

129. Against this background, while this Court does not accept that the 16th November Email on its own amounted to a misrepresentation, it is also patently clear to this Court that the fact that Mr. Simons specifically referred to the part payment of JCS's legal costs in the 13th November Email completely undermines any suggestion that Mr. Simons was *deliberately* seeking to mislead Mr. Shannon that all the UK Costs Certificates were still unpaid. If this was Mr. Simons' intention, as alleged by Dr. Sheehan, the last thing he would do is send an email just three days earlier which indicated that the UK Costs Certificates had been 'part paid' and it would make even less sense for him to confirm in that 13th November Email and attachment a reduction of €1,663,789.89 in the amount of JCS' costs and expenses from the 22nd September Email.

Fraudulent misrepresentation claimed against a solicitor without expert opinion

130. In this regard, it is also relevant to note that if proceedings had been instituted against Mr. Simons, as distinct from against Talos, for mere negligence (because he innocently but negligently misrepresented the facts), it would have required independent expert legal opinion to support such a claim before proceedings could have issued against Mr. Simons, as a *defendant*, in light of the principle set down in the Supreme Court case of *Cooke v. Cronin* [1999] IESC 54 at 4.

131. There Denham J. (as she then was) relied upon the statement of Kelly J. (as he then was) in *Connolly v. Casey*, unreported, High Court, 12th June, 1998, at p. 19 in a case involving a professional negligence action against a solicitor that:

> "I have no difficulty in endorsing the views of Barr J. that the commencement of proceedings alleging professional negligence is irresponsible and an abuse of process of the Court unless the persons advising such proceedings have reasonable grounds for so doing"

In practice this means that there should be an independent expert opinion to support claims against a professional before they are instituted, where the professional is a defendant in the proceedings. To quote Denham J., the reason for this is obvious:

> "To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice."

132. It seems to this Court that it is just as detrimental, if not more detrimental to a solicitor's professional reputation and practice to be accused of fraudulent misrepresentation, than it is to be accused of negligence. However, as the law currently stands, where a professional is a defendant in proceedings, allegations of mere negligence cannot be made against him which call his professional reputation into doubt, unless the plaintiff has obtained an independent expert legal opinion in support of such a claim. Yet, if the professional is not the defendant in proceedings, but is an adviser to a defendant, he can be accused of fraudulent misrepresentation in open court and have his professional reputation called into doubt, without the requirement of an independent expert legal opinion to support such a claim.

133. However, it does seem to this Court that the underlying rationale for the principle in *Cooke v. Cronin* implies that, at a minimum, particular care should be taken by litigants and their professional advisers before making serious allegations against a professional who is not a party to the litigation. This is particularly so where, in the words of Denham J., one is dealing with the ventilation of such

allegations in '*open Court*' which are likely to be '*detrimental to his professional reputation and practice*'. In this Court's view, the failure to take reasonable care regarding the truth of serious allegations against a professional could amount to an abuse of process, even where the professional is not a defendant in the proceedings, because the consequences of unfounded allegations made in open court can be very serious for professionals, whether they are defendants in the litigation or not.

134. In this case, this Court has concluded for the reasons set out above that there were no grounds for the very serious allegations of misrepresentation made by Dr. Sheehan against Mr. Simons, who is not a defendant in these proceedings and therefore was the subject of these unfounded allegations which had the potential to be detrimental to his professional reputation and practice.

CIVIL LIABILITY ACT CLAIM

135. The second claim made by Dr. Sheehan in these proceedings is a claim under s. 17(2) of the Civil Liability Act, 1961. Dr. Sheehan claims under this heading that, when on the 19th November, 2015, Talos settled, pursuant to the Talos/Sheehan Settlement Agreement, the judgment claim against him as guarantor in respect of the Deposit of €2.4 million borrowed by JCS from Talos, Dr. Sheehan should have benefited from the fact that Talos had received a payment of €1.7 million from JCS in respect of the Deposit of €2.4 million arising from the IBRC/JCS Settlement Agreement signed a short time previously on the 28th September, 2015. Dr. Sheehan claims that his right to receive the benefit of the earlier €1.7 million payment arises as a result of s. 17(2) of the Civil Liability Act, 1961.

136. Section 17, insofar as relevant states:

> "(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
>
> (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest."

137. In essence therefore, Dr. Sheehan is claiming that he and IBRC are concurrent wrongdoers vis-à-vis Talos and that the payment by IBRC of €1.7 million in respect of the Deposit of €2.4 million should have reduced Talos' claim against Dr. Sheehan in respect of his guarantee of the obligations of JCS to Talos, which included the repayment of the Deposit.

138. A wrongdoer is defined in s. 2(1) of the 1961 Act as '*a person who commits or is otherwise responsible for a wrong*' and a wrong is defined as:

> "a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional".

139. The key issue in this case is whether it is a case of concurrent wrongdoers so as to fall within the terms of the 1961 Act. Section 1(1) of the 1961 Act defines a '*concurrent wrongdoer*' as follows:

> "For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them."

Thus, to use neutral terms initially, A and B are concurrent wrongdoers in relation to C where they are both responsible to C for the same damage whether or not judgment has been obtained against A and/or B. Thus, if C is a passenger in a car which is being negligently driven by A and it crashes into a car that is being negligently driven by B, if C settles his claim against A for €10,000, the claim against B is reduced by €10,000 pursuant to the principle set out in s. 17(2) of the 1961 Act.

140. It is quite clear from the language of s. 1(1) that for this principle to apply there must be only one injured party or plaintiff. This is entirely logical since one is dealing with the 'same damage'. It cannot be the same damage if it is caused to two different persons since damage caused to C and damage caused to D could not be the 'same damage'.

141. Yet, in this instance, one does not have A and B causing damage to C, but rather it is on the one hand, A (IBRC) causing damage to C (JCS), by its failure to return the Deposit under the terms of the Loan Sale Deed, and on the other hand, B (Dr. Sheehan) causing damage to D (Talos) by his failure to honour his guarantee to pay the borrowings of JCS from Talos under the Facility Agreement, which included its borrowing of the funds to pay the Deposit. Yet, because the subject matter of the claims are similar, relating as they do to the Deposit, it is claimed by Dr. Sheehan that this is a case of concurrent wrongdoers.

142. To support his claim, Dr. Sheehan alleges that the substance of the first claim, which will be referred to, for present purposes, as JCS v. IBRC, is in fact a claim by Talos against IBRC, and so since the second claim under the Guarantee also has Talos as the plaintiff against Dr. Sheehan (which, for present purposes, will be referred to as Talos v. Sheehan), that it follows that these two claims do in fact satisfy the requirements of the 1961 Act, that there be one plaintiff or injured party (i.e. Talos), and in this way Dr. Sheehan is a concurrent wrongdoer with IBRC vis-à-vis Talos.

143. This Court does not find this argument persuasive. This is because first the original payment of the Deposit under the Loan Sale Deed to IBRC which led to the JCS v. IBRC claim (which Deposit was repaid, less costs, by IBRC pursuant to the IBRC/JCS Settlement Agreement) was made, not by Talos, but by JCS. Talos' only role in this original payment was as the lending institution which provided the funds to JCS to make the Deposit. Nothing turns on the fact that the Deposit was paid by Talos directly to IBRC, since it is clear that the Deposit was borrowed by JCS from Talos and was simply being paid by Talos to IBRC on the instruction of JCS since it was JCS' money. In legal terms therefore it is clearly a case of JCS having paid the Deposit to IBRC.

144. Secondly, as well as JCS having paid the Deposit to IBRC, it is also the case that IBRC repaid the Deposit (less costs) to JCS and not to Talos. The email from Maples and Calder, solicitors to IBRC/Special Liquidators, dated 30th January, 2015, to Talos stated:

> "Technically, I think the agreement must include JCS the purchaser company and provide that the monies are paid through them."

It is implicit in this email that the payment had to be made to JCS, quite simply because legally it could not be paid to Talos, since the claim which was being settled, was a claim which JCS (and not Talos) had against IBRC for the return of the money.

145. This fact goes to the very heart of the matter and indeed the purpose of s. 17 of the 1961 Act. Its purpose is to ensure that a plaintiff/injured party does not get double recovery for the same claim/damage, where he settles with one wrongdoer and then claims against another wrongdoer for the same damage. The fact that, after receiving the €1.7 million, JCS paid that sum to Talos is neither here nor there. The crucial fact is that Talos was not the plaintiff nor the injured party in the claim against IBRC. What a plaintiff/injured party decides to do with the money is not the focus of s. 17 of the 1961 Act and so it is irrelevant that JCS used the money, it had received from IBRC, to partially discharge JCS's obligations to Talos to repay money it had borrowed from Talos.

146. Clearly the matter would be different *if* IBRC had settled a claim, that Talos had against IBRC for the repayment to *Talos* of the Deposit, by paying €1.7 million *to Talos*. But this is not the case here, since there is no legal basis for a claim that Talos would be entitled to be repaid a Deposit which it had never paid in the first place. In the foregoing unlikely scenario, then and only then would Dr. Sheehan be in a position to claim that his payment of a sum of €2.4 million in respect of the Deposit to Talos under the Guarantee, should be reduced by the *hypothetical* receipt by Talos of €1.7 million from IBRC in settlement of claim that Talos had against IBRC for the repayment of *someone else's* deposit.

147. This Court cannot conclude that just because Talos negotiated or brokered the settlement between IBRC and JCS, that it should be treated as a matter of law under s. 17 of the 1961 Act as if it was the injured party or plaintiff that had suffered the loss (of the Deposit) that was being repaid in part under the IBRC/JCS Settlement Agreement.

148. On this basis, this Court rejects Dr. Sheehan's claim to be entitled to have the benefit of the €1.7 million settlement between IBRC and JCS, in his settlement of Talos's claim against Dr. Sheehan under the Guarantee pursuant to which he paid Talos €2.4 million.

DR SHEEHAN'S 'OUTRAGEOUS' LITIGATION TO DATE

149. As well as these proceedings which were issued by Dr. Sheehan against Talos in Ireland, Dr. Sheehan also sued Talos in New York in relation to the subject matter of these proceedings and this resulted in Talos having to issue proceedings against him in England, both of which will now be referenced.

New York Litigation

150. Uncontroverted evidence was provided to the Court that Dr. Sheehan issued proceedings in New York alleging that Talos had breached the Facility Agreement and alleging that Talos and others, including the Dublin law firm, Arthur Cox, had conspired to defraud him, which proceedings were dismissed.

151. As is now clear, not only were these allegations false but, as already noted there was uncontroverted evidence before this Court that the reason the Facility Agreement could not proceed was because the Duffy Loans had been redeemed, despite Dr. Sheehan's misrepresentation to the contrary.

152. It is also to be noted that Dr. Sheehan chose not to give any evidence in this litigation, even though the substance of his claim in these proceedings is that he was induced to enter the Talos/Sheehan Settlement Agreement by the misrepresentation of Talos.

English litigation

153. As the Facility Agreement contains an English exclusive jurisdiction clause, this meant that before the New York proceedings were dismissed, Talos and the other defendants sought a declaration in the English High Court that they were not liable in respect of these claims brought by Dr. Sheehan in the United States and they brought an anti-suit injunction seeking to force Dr. Sheehan to withdraw the New York proceedings.

154. On the 26th June, 2014, an anti-suit injunction order was granted on a temporary basis by Blair J. in the English High Court, prohibiting Dr. Sheehan from pursing the New York proceedings. At the substantive hearing on the 21st November, 2014, Flaux J. granted an anti-suit injunction order and held that Talos' actions were in compliance with the Facility Agreement. In the English High Court Flaux J. (*Talos v. JCS, Flynn, Sheehan et al* [2014] EWHC 3977 (Comm), held, *inter alia*, that:

> "Secondly, again in view of the outrageous allegations in the United States, for which there is not even now a shred of evidence put forward, the claimants clearly had a more than arguable case for the negative declaratory relief they seek. Despite Mr. Tolley's suggestion that it serves no useful purpose now that his clients are no longer plaintiffs in New York, I disagree. A declaration by this court would give rise to issue estoppel or collateral estoppel in the United States, according to Mr. Houck, a partner of Clifford Chance who has put in a witness statement. So if the judgment serves no other purpose, it will prevent the second defendant from raising these vexatious, oppressive and unfounded allegations elsewhere in the United States." (para 48)

> "To say that the claim made [by Dr. Sheehan *et al*] was an astounding one would be an understatement. The claim was founded on the assertion that [Dr. Sheehan *et al*] entered into the facility agreement but that [Talos *et al*] were using the facility agreement as a fraudulent scheme to take over control of BHL." (at para 12)

Flaux J. also noted the response of Dr. Sheehan's lawyer in the US and the response of Dr. Sheehan to the receipt of the Anti-Suit Injunction Order:

> The immediate response of [Dr. Sheehan *et al*], through Mr. O'Neill [Dr. Sheehan's US based lawyer] to the service of the court order was: "We shall ignore this order". (at para 19)

> "The position, as I say, at present, is that only [Dr. Sheehan] is pursuing the New York proceedings but he continues to do so in breach of the injunction." (at para 26)

No evidence was provided on behalf of Dr. Sheehan to contradict the English High Court's finding that Dr. Sheehan was in breach of a court order. However, this is not by any means the only litigation in which Dr. Sheehan has been involved.

Amount of litigation by Dr. Sheehan et al against IBRC

155. Mr. Wallace, IBRC's Special Liquidator, gave evidence in relation to the very litigious nature of Dr. Sheehan and other parties connected to him, since he stated that that IBRC had been sued more times by Dr. Sheehan and connected parties than by others in the entirety of the liquidation of IBRC:

> "Being frank, it was total frustration and having to deal with these issues with these parties… We had sold over 22 billion of loans in IBRC. We had been sued more times by some of these parties than we had been in the entirety of the entire liquidation. It was taking up an inordinate amount of time for the size of the loans themselves…"

Half-year of court time already involving Dr. Sheehan's Blackrock Hospital dispute

156. The proceedings before this Court today relate to the funding of the loans for the purchase of shares to control Blackrock Hospital. This Court has previously had reason to comment on the amount of litigation involving Dr. Sheehan (and other parties) in relation to other aspects of what is essentially a private dispute over the ownership of Blackrock Hospital (*Sheehan v. Flynn* [2018] IEHC 188). This Court noted, with considerable concern in light of the strain on limited court resources, that Dr. Sheehan's dispute regarding the ownership of Blackrock Hospital had already reached the stage where it required 10 judgments of the High Court and Court of Appeal and a full half year of court time.

157. As this Court was only dealing with a preliminary application in *Sheehan v. Flynn* [2018] IEHC 188 regarding whether the substantive trial regarding the ownership of Blackrock Hospital would be heard as a modular trial or a unitary trial, this Court did not apportion blame between Dr. Sheehan and the other parties to that litigation for this state of affairs and for the huge amount of court time expended in the private dispute over the ownership and financing of the ownership of Blackrock Hospital.

158. However, it was clear to this Court that, even before hearing the present proceedings (which ran for almost two weeks in the Commercial Court) that one had reached the stage where Dr. Sheehan and the parties he is in dispute with regarding Blackrock Hospital are monopolising large periods of the time of the High Court and Court of Appeal, while at the same time there are large backlogs in both courts and thus other litigants are having their right of access to the courts delayed.

Isaac Wunder orders

159. In *Sheehan v. Flynn*, this Court made specific reference to the fact that habitually vexatious litigants have in the past been subject to *Isaac Wunder* Orders, which orders usually require such litigants to seek leave before instituting further proceedings. Such orders do not breach a person's constitutional right of access to the courts, since as noted by Eagar J in *Rooney v Ireland* [2017] IEHC 270 at para 38, this constitutional right is not an unfettered right;

> "In imposing a Wunder order the court is required to strike a balance between the constitutional right of the individual of access to the courts and the desire of the courts to prevent vexatious litigation and litigation which is an abuse of process. A restriction imposed by a Wunder order is in the public interest."

For this reason this Court in *McMahon v. Bank of Scotland* [2017] IEHC 438 at para 52 has previously described the imposition of an Isaac Wunder order as a "*filter*" rather than a barrier to the constitutional right of access to court as it does not prevent a party from bringing further claims, rather these claims are filtered by the requirement to seek leave and thus there is no prohibition on claims which are meritorious.

160. In practice Isaac Wunder orders are necessary as a very small percentage of litigants engage in never ending vexatious litigation. In the case of a small number of lay litigants a costs order against them is often not a deterrent to pursuing endless litigation and wasting court resources in the process, see *McMahon v. Bank of Scotland* [2017] IEHC 438 and *Sfar v. Minister for Agriculture* [2016] IEHC 348 and [2017] IEHC 368. This can be because they do not have the financial resources to pay a costs order so the threat of a costs order against them has no deterrent value.

General applicability of Isaac Wunder orders

161. However, that is not to say that just because a litigant has the means to pay a costs order (not to mention to engage solicitors and counsel), that he or she should be immune from the prospect of an *Isaac Wunder* order in appropriate cases. This is particularly relevant at the moment since as noted by Kelly P. "*Ireland has the lowest number of judges per capita in the OECD*" (speaking extra-judicially in the *Bar Review* (2018) Vol 23 No. 1 at page 12). It is therefore important for judges to be alive to the abuse of scarce court resources. For this reason, this Court is cognisant of the fact that while an adverse costs order against an impecunious litigant is often not a deterrent to such a party as there is little prospect of such an order being enforced, it is also true that for some litigants the threat of a costs order against them is not a sufficient deterrent to the institution of proceedings because of their wealth. All of this means that just as '*the only people who can litigate in the High Court are paupers or millionaires*', (per Kelly P. *ibid,* page 11), so too it seems that the abuse of court processes is also the preserve of paupers and millionaires for whom costs orders are of little deterrent value.

162. In this context it is relevant to refer to the recent judgment of Keane J. in *Martins v. Minister for Justice and Equality* [2018] IEHC 268 at para 115 et seq where reference is made to the relevance of the scarcity of court resources to the approach of the courts to the abuse of those resources. In that case he quoted from the judgment of the English High Court in *R (Akram) v. Secretary of State for the Home Department* [2015] EWHC 1359), where Leveson L.J. referred to the obligation on courts to:

> "ensure that the time of the Court (not to say public and private funding of such litigation) is not wasted"

Of particular relevance in Ireland, Leveson J.L. referred to:

> "The need for this warning to be taken seriously increases as the resources available to the Courts to act efficiently and fairly decreases. If the time of the Court and its resources are absorbed dealing with utterly hopeless and/or unprofessionally prepared cases, then other cases, that are properly advanced and properly prepared, risk not having devoted to them the resources they deserve"

Although the *Akram case* concerned immigration and asylum law in England and Wales, Keane J determined that the foregoing principles identified by Leveson L.J. were of general application to immigration and asylum law in Ireland.

163. For this Court's part, it is of the view that these principles are of general application to all matters before the Irish courts, since the shortage of judges and the strain on resources is felt across all the courts. Thus, it is the duty of the courts to be alive to such abuses by all litigants, whether impecunious or wealthy, and where appropriate to consider placing a filter on the issue of proceedings by such litigants, namely the requirement for the consent of the President of the High Court, because of the history of the litigant to

date.

Commercial court litigation is not exempt from Isaac Wunder orders
164. It should be obvious, but is nonetheless worth noting, that just because one is dealing with a dispute which has a value of €1 million or more (and so has been admitted to the Commercial Court) as in this case, does not mean that the parties should not be subject to the same principles that apply to other litigants regarding the abuse of court processes, including the imposition of *Isaac Wunder* orders, where necessary.

165. Indeed, in commercial court cases where the parties will often have significant resources, the courts need to be particularly alive to the risk that the amount of court time being expended on such disputes may relate to the fact that some or all of the parties can afford the considerable expense of High Court litigation, rather than the amount of time actually necessary to resolve the dispute. In the present proceedings, the dispute (which relates to the loans for purchase of the shares in Blackrock Hospital) ran for almost two weeks in the High Court, while it has already been noted that the dispute regarding the ownership of Blackrock Hospital is likely to occupy a full half year of court time. This is a huge amount of court time and this court was also advised during this hearing that proceedings related to the Galway Clinic have also been recently instituted by Dr. Sheehan (*Blackrock Medical Partners Limited & Joseph Sheehan v. Galway Clinic Doughiska Limited & Parma Investments Limited* [2017 No. 2108 P]).

166. Court resources are meant to be available for all citizens, irrespective of wealth, and this Court has an overriding duty to see that court resources are not wasted. Accordingly, litigants with sufficient financial resources to instruct lawyers to run disputes in the Commercial Court, and risk the expense of a costs order being made against them, are not immune from Isaac Wunder orders.

No public register of Isaac Wunder Orders
167. It is however noteworthy that one of the flaws with Isaac Wunder orders (and Disqualification Orders of McKenzie Friends – see the case of *Smith v Ireland* [2017] IEHC 642 in which such an order was made against a McKenzie Friend) that there is currently no public register of litigants or McKenzie Friends against whom such court orders have been made.

168. This means that one is, somewhat ironically, relying on the better nature of persons, who have abused court processes to such a degree as to justify such an order in the first place, to then refrain from abusing court processes in the future. This is because third parties (who were not party to the litigation which gave rise to the Isaac Wunder/Disqualification Order) have no way of checking to see if such persons are subject to restraining orders. The case of *Smith v. Ireland* is an example of how easy it is for a litigant to ignore an Isaac Wunder order and continue to abuse court resources by instituting further proceedings (albeit in that case the litigant was deliberately breaching her mistaken understanding of the Isaac Wunder order). This is likely to remain the case until there is a public register for such orders.

Conclusion regarding Isaac Wunder order
169. In conclusion therefore, in cases where a litigant is monopolising court resources for a half year or more to endlessly pursue a private grievance (or indeed where wealthy litigants use the high cost of litigation, as a form of coercion against a person or business of modest means, to seek to pursue his or her private agenda), it is this Court's view that, whether on its own motion or on the application of a third party, the Court should not hesitate to impose *Isaac Wunder* orders on such litigants in appropriate circumstances.

170. This is because the traditional view, that the threat of having a costs order against a litigant operates as a *sufficient* deterrent to the pursuit of such litigation, may not be the case with certain wealthy litigants, for whom the value of a costs order is insignificant to their wealth.

171. Since Irish judges preside over a judicial system which has the lowest number of judges in the OECD, it is particularly important at present that judges are alive to the effect of serial litigants on the court system. If they fail to do so, the majority of citizens, who are not serial litigants, will have their right of access to courts compromised by those who are monopolising scarce public resources.

172. This is a case where uncontroverted evidence has been provided to the Court of Dr. Sheehan's engagement in what the English High Court has described as '*outrageous*' litigation and a breach by him of a court order. This Court does not believe that it can ignore this evidence in relation to a litigant simply because that litigant has the financial resources to afford to pay the costs of litigation which he pursues and loses, because unnecessary and vexatious litigation is imposing a considerable strain on scarce court resources.

173. However, no application has been made by any party for an Isaac Wunder order in this case and this Court does not propose at this stage, and of its own motion, to impose an *Isaac Wunder* order in this instance. However, if such an application were made in the future, this Court would be required to consider whether there is sufficient evidence to justify such an order, in light of the submissions of the parties at that stage. It is of course the case that any such *Isaac Wunder* order, if granted, would only apply to future proceedings proposed to be issued and not to existing proceedings.