THE HIGH COURT

THE COMMERCIAL COURT

[2014/10816 P.]

BETWEEN

JOSEPH SHEEHAN

PLAINTIFF

AND

BRECCIA, IRISH AGRICULTURAL DEVELOPMENT COMPANY, BLACKROCK HOSPITAL LIMITED, GEORGE DUFFY, ROSALEEN DUFFY, AND TULLYCORBETT LIMITED.

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 6th day of June, 2019

1. This judgment relates to one module in these long running proceedings, the court having previously determined that the remaining issues in the proceedings be heard in three modules including this module. (See order of 4 May, 2018, of Twomey J. in *Sheehan v Breccia & Ors*). The long history and the acrimonious character of the disputes between the parties in this matter has been recited in the judgment of Twomey J. and in several other judgments of the court and it is not necessary to repeat it here.

2. The proceedings concern disputes between the shareholders of the Third Named Defendant, Blackrock Hospital Limited, ("BHL"), which owns and operates the private hospital in Dublin known as the Blackrock Clinic. The plaintiff, Joseph Sheehan, alleges that by certain transactions and conduct the defendants have been party to a conspiracy to damage his economic interests, (the "Conspiracy Claim" – Claim 3). The plaintiff also claims that a change of control has occurred in the ownership of Breccia, the First Named Defendant, which under the terms of the Shareholders' Agreement triggered an obligation on Breccia to offer its shares to all other shareholders, which it failed to do, (the "Change of Control Module" – Module 2).

3. Breccia counterclaims against the plaintiff for judgment in the amount of €26,862,530 together with interest, being the balance it alleges it is owed under loan agreements and a related guarantee for the purpose of funding the acquisition of shares in BHL in 2006, (the "Repayment Claim"), which will be heard together with the Conspiracy Claim, as Module 3.

4. In this Module 1, (the "Dividend Claim"), the plaintiff claims that as the holder and registered owner of a 28% shareholding in BHL, he is entitled to be paid directly all and any dividends declared on those shares. Breccia asserts that as the holder of a mortgage over the shares and dividends, it is the only party entitled to receive the dividends.

5. At the time of the hearing, the court was informed that a sum of approximately €4.1 million in dividends has been declared in respect of the years 2014 to 2017 inclusive, which is held in escrow pending the outcome of this module. BHL says that it is ready and willing to proceed with the payment out of these dividends once this module has been determined. It protests that it ought not to have been joined in these proceedings and that is not in a position to and does not have the authority or jurisdiction to definitively determine what is essentially a legal issue.

Background

6. The plaintiff was a founding shareholder and director of the hospital, and is still a director and shareholder.

7. In March 2006, BUPA Investments Limited., which was a subsidiary of British United Provident Association ("BUPA") sold its shareholding in the hospital to a number of the original shareholders, including the plaintiff, and to two new investors including Breccia.

8. The new shareholding was regulated by a Shareholders' Agreement made on 23 March, 2006, between James Sheehan and Rosemary Sheehan, the plaintiff, Dr. George Duffy, Breccia, Benray Limited and others.

9. The plaintiff and others financed their acquisition of the BUPA shares by way of loans from Anglo Irish Bank Corporation plc, as it then was (referred to in this judgment as "Anglo" or later, "IBRC" or the "Bank").

10. The original facility drawn by the plaintiff was for an amount of €11,188,256 million, stated to be for the purpose of enabling the plaintiff to subscribe for new shares in BHL and to facilitate the redemption of the shareholding of BUPA.

11. In addition to their loan obligations, the plaintiff, James Sheehan, Rosemary Sheehan and Dr. George Duffy entered into a Guarantee and Indemnity in favour of Anglo, guaranteeing the obligations of all the borrowers to the bank. Breccia, for its part, entered into a separate Deed of Covenant to co-operate in any sale of shares in BHL on the occurrence of default by any of the other shareholders.

12. The loan and the obligations under the Guarantee and Indemnity were secured by a Mortgage of Shares, Deposit Account and Assignment of Agreements ("the Mortgage"). The Mortgage is stated to create a charge, *inter alia*, over "Shares", "Dividends", and an "Account". The precise terms of the Mortgage and their meaning and effect are examined later in this judgment as they are central to the determination of the plaintiffs' claim in this module.

13. Also on 28th March 2006, the plaintiff gave notice to the secretary of BHL of the creation of the Mortgage and requested that all dividends that may become due from time to time or payable on the shares be paid directly into a designated account at AIB, being account number 1403/506743/01 ("the Account").

14. On 28th March 2006, BHL issued to Anglo Irish Bank Corporation plc. an "Acknowledgment of Charge" referring to the Mortgage and agreeing that all dividends and other sums referred to in the Mortgage in respect of the shares should be paid directly into the Account.

15. The Facility Letter to the plaintiff dated 28th March 2006 provided for a facility in the sum of €11,188,256 "*to enable the*

borrower to subscribe for new shares in Blackrock Hospital Limited. and facilitate the entire shareholding of BUPA Investments Limited to be redeemed." It provided for security comprising the following: -

A First Legal Charge over the Borrowers' shareholding in BHL being 28.07% of the total issued share capital as follows

Joseph Sheehan

Description of shares, (collectively, "the Shares"):

€49, 061,144 "D" Ordinary Shares

€891,479 "P" Priority Cumulative Ordinary Shares

€896,145 "M" Priority Cumulative Ordinary Shares

€62,920,676 "B" Ordinary Shares

€247,653 "Q" Priority Cumulative Ordinary Shares

"including but not limited to a charge over all dividends paid on those shares".

16. The Facility Letter also provided for a "Charge over a deposit account".

17. The Letter also required security in the form of assignments of interest of the plaintiff in the Shareholders' Agreement, a certain Tax Deed of Indemnity and a Competition Unwind Agreement with BUPA and other documents associated with the buyout of BUPA.

18. The Facility also provided for the creation of a Guarantee and Indemnity by the plaintiff in respect of all the obligations of the borrowers pursuant to the Facility Letter with limited recourse to his entire shareholding in BHL supported by a fresh legal charge over his entire shareholding in BHL.

19. A series of side letters of importance were exchanged also on 28 March, 2006, as follows: -

A. Notice of Charge

This is a letter addressed to the Secretary of BHL signed by "Jerry Sheehan, [solicitor] Duly authorised for and on behalf of Joseph Sheehan", in the following terms:

"Dear Sirs,

I refer to

(a) [description of 5 classes of shares issued to the plaintiff] (the "Shares") in BHL (the "Company") of which I am entitled to be the registered holder;

(b) A Charge of even date given by me to Anglo Irish Bank Corporation plc (the "Bank") in respect of the Shares (the "Charge") to secure the payment of certain monies.

We hereby request that all dividends that may become from time to time payable on the shares be paid directly by you into the following account:

[Account details] 1403/506743/01

This request is irrevocable.

Yours faithfully."

Jerry Sheehan is a solicitor and partner in Sheehan & Company Solicitors. He acted for BHL and for a number of the shareholders in connection with the March 2006 transaction. He is a second cousin of the plaintiff.

B. Acknowledgement of Charge

This is a letter, again signed by Jerry Sheehan "For and on behalf of Blackrock Hospital Limited" addressed to Anglo Irish Bank Corporation plc., as follows: -

"Dear Sirs,

We refer to the Mortgage of Shares dated the 28 March, 2006, entered into between Joseph Sheehan of the one part and Anglo Irish Bank Corporation plc ("the Bank") of the other part a copy of which we acknowledge having received ("the Mortgage").

The terms defined in the Mortgage will have the same meanings when used herein as therein.

In consideration of the sum of €1 receipt of which is hereby acknowledged we agree, that notwithstanding any provision to the contrary in the Articles of Association of the Company that all dividends and other sums referred to in the Mortgage in respect of the shares shall be paid by us directly into the Account.

We further confirm and acknowledge that any monies advanced to the Mortgagor by the Bank will be advanced in reliance on our agreement herein before contained."

C. A "Concession Letter"

This is a letter to the plaintiff signed by Mr. Sean Tobin, Manager, Lending Ireland, of Anglo as follows:-

> *"Re: First fixed charge over the Shares of the Borrower in Blackrock Hospital Limited and Dividends of the Borrower derived from those shares.*
>
> *Dear Mr. Sheehan,*
>
> *We confirm that the Bank holds a first fixed charge over all the shares held by you in Blackrock Hospital Limited, together with all the dividends derived from those shares.*
>
> *We hereby confirm that the Bank will release to you any monies standing to the credit of the Account (as defined in the Mortgage Over Shares, Dividends and Assignment of Agreements dated 28th day of March 2006) each quarter, after all capital and interest payment obligations have been made, in respect of any facilities granted by the Bank to you, provided that in respect of any facilities granted by the Bank to you: -*
>
> > *(i) No demand for repayment has been made;*
> >
> > *(ii) No default has occurred;*
> >
> > *(iii) The bank has not taken any steps to enforce any security in respect of such facility;*
> >
> > *and*
> >
> > *(iv) All payments due by you in respect of any obligations and/or liabilities owed by you to the Bank, including but not limited to capital and interest repayments have been made in full and in a timely fashion.*
>
> *Notwithstanding anything contained in this letter, the Bank will at all times retain absolute control over the Account".*

20. The Facility Letter also provided in clause 7 for repayment as follows: -

> "(a) All interest due and payable pursuant to this facility shall be repaid [quarterly] from dividends paid on the shares, such dividends to be paid by direct debit by Blackrock Hospital Limited. to a deposit account in the name of the borrower, charged in favour of the Bank.
>
> (b) The Facility shall be repaid on or before the 30th December 2010. In the meantime, interest is to be funded on a quarterly basis at the end of each calendar quarter".]

21. A separate "Dividend Mandate" letter was written by the plaintiff to BHL on 21 June, 2006, as follows: -

> *"Dear Sirs,*
>
> *Until further notice in writing from me, I hereby authorise you to pay all future dividends due to me to Anglo Irish nominees.*
>
> *To enable you to calculate future dividends, I also authorise you to obtain from Anglo Irish Bank, details of interest payments due to them on the loan taken out by the shareholders in Blackrock Hospital Limited to purchase shares from BUPA".*

22. Although the Mortgage provides for the registration of the Bank or its nominee as the holder of the Shares in the Register of Shares of BHL, no such registration was effected.

23. The Chief Executive Officer of BHL, Mr. James O'Donoghue, gave evidence that in May 2009, BHL took the necessary steps to assist in perfecting the Bank's security. He said that BHL was never furnished with an executed share transfer for the plaintiff's shares and that therefore, the plaintiff remained the registered shareholder.

24. In 2009, the hospital undertook a redesignation of the shareholding, being an internal shareholder reorganisation. This is of importance in that it was contended in this module that the effect of the redesignation of shares was that the "Shares" which were the subject of the Mortgage are no longer in issue and that any dividends declared since 2009 are not dividends deriving from the shares the subject of the Mortgage. No new share mortgage was ever executed in respect of the redesignated shares, although on 6th November 2009, the Bank's solicitors, Byrne Wallace, issued a letter to BHL's solicitors, Sheehan & Company, stating as follows: -

> *"The Bank consents to the passing of the written resolutions … in relation to (a) the redesignation of certain shares in Blackrock Hospital Limited. and the consequential amendments to the Articles of Association and (b) the amendments to the existing articles as set out in the notes on the shareholders' resolution and new articles as attached to that letter – subject to a charge being granted by each of the shareholders over all shares held by them after redesignation and along with a deposit of the share certificate(s) relating to same, once they had been issued, and a signed share transfer form in favour of an Anglo Irish Bank Corporation Limited nominee.*
>
> *I understand that a meeting of the shareholders is being held on Monday 9th November and I would be grateful if you would contact me afterwards in order to arrange completion of documentation and handover of share certificates etc."*

25. Mr. O'Donoghue also gave evidence that after the redesignation of the shares, BHL provided the registered shareholders, including the plaintiff, with new share certificates for the redesignated shares and blank share transfer forms. The registration of the nominee of the bank in the register of members in respect of the plaintiffs' shareholding in BHL did not take place. In his evidence the plaintiff conceded that the Bank and now Breccia have a right to have their nominee entered on the register.

26. In later letters, Byrne Wallace, on behalf of IBRC, request the return of original share certificates and stock transfer forms

following the 2009 share redesignation.

Payment of Dividends Before 2011
27. Following the transaction of 28 March, 2006, BHL declared and paid dividends in accordance with dividend procedure provided for in the Shareholders Agreement and policy agreed by the board of directors. Dividends applicable to the plaintiff's shareholding were paid, not by direct debit, but by way of cheques sent to Anglo Irish Bank addressed to "Joe Sheehan c/o Anglo Irish Nominees". On receipt Anglo split the dividend payment by allocating the amount required to meet quarterly interest payments against the loan account and the balance was lodged to the plaintiff's deposit account. This procedure continued before and after the 2009 redesignation.

28. The repayment date under the facility of 31st December 2010 passed without the principal amount being discharged by the plaintiff.

Dividend Splitting
29. On 30 June, 2011, the plaintiff gave an instruction to BHL to "split" the manner of payment of the dividends as follows: -

> *"Re: Dividend Payments,*
>
> *Dear Sirs,*
>
> *I refer to the shareholding in Blackrock Hospital Limited, currently registered in the name of Mr. Joseph Sheehan.*
>
> *I refer to my previous instructions to you, to pay the dividend due in respect of this shareholding to my account with Anglo Irish Bank.*
>
> *In respect of the dividend due to me on 30th June 2011, in the amount of €358,297.08, please draw a cheque made payable to Mr. Joseph Sheehan in the amount of €108,000 and pay the balance of €250,297.08 directly to my account with Anglo Irish Bank.*
>
> *Until further notice in writing from me, please pay all future dividends due to me to Anglo Irish Bank.*
>
> *Yours faithfully,*
>
> *Joseph Sheehan".*

30. BHL complied with this instruction.

31. On 27th September 2011, the plaintiff issued a similar instruction in respect of the dividend due on the 30th September 2011 in the amount of €358,297.08 requesting a cheque payable to Mr. Joseph Sheehan in the amount of €170,000 and to "pay the balance of €188,297.08 directly to my account with Anglo Irish Bank". He concludes: "Until further notice in writing from me, please contact me before paying any further dividends due to me to Anglo Irish Bank."

32. This instruction was again complied with by BHL.

33. The evidence on behalf of BHL was that at the time it complied with these instructions it had received advice to the effect that the registered shareholder was prima facie entitled to receive the dividends payable in respect of his shares and at that time, the BHL did not have notice to the contrary, being aware only of the shareholders own instructions to pay dividends to Anglo.

34. Another dividend was declared in December 2011.

35. BHL had become concerned that the practice of splitting dividends in this manner deviated from the practice which had prevailed since 2006. It made enquiries and received information from Jerry Sheehan.

36. Mr. Sheehan informed BHL of the existence of the notice of charge, the agreement in respect of dividends and the concession agreement in respect of dividends.

37. On 20 December, 2011, BHL wrote to the shareholders including the plaintiff, stating that *"all dividends must be paid in accordance with the instruction letters of March 2006, in respect of which we are now on notice unless the company has received specific instructions from Anglo authorising it to do otherwise*."

38. On 21 December, 2011, the plaintiff wrote to BHL with another "dividend splitting" instruction. This time the instruction was that of the dividend then due in the sum of €358,297.08, a sum of €185,000 should be paid by cheque payable to the plaintiff in the amount €185,000 and pay the balance "directly to my account at Anglo Irish Bank … It would be appreciated if the cheque to Joseph Sheehan can be deposited in the following account: AIB Tralee, Denny St., Tralee, Co. Kerry, [A/C no.]. Until further notice in writing from me, please contact me before paying any future dividends due to me to Anglo Irish Bank."

39. On 21st December 2011, the plaintiff replied to the letter of BHL protesting at the contents of its letter of 20th December 2011, and stating as follows: -

> *"Given the detrimental effect that this will have on me personally, I strenuously object to the contention that you will pay all of my dividend to Anglo. I find it very unsatisfactory and disappointing that you have sought to unilaterally make such a decision without proper investigation or prior reference to me, the board of directors or the shareholders. In addition, I was not put on notice of any meetings or inquiries at which these matters were purported to have been addressed".*

40. The plaintiff continued by requesting copies of letters on his behalf agreeing to pay dividends directly to the bank. He also referred to the Notice of Charge and the Acknowledgement of Charge, stating that they are defective.

41. The plaintiff continued that unless his dividends were paid to him in accordance with his instructions, he would instruct his solicitors to issue proceedings.

42. In response to this letter, on 22 December, 2011, Mr. Brian Harty, then Chief Executive of BHL, wrote that"*…it is incumbent upon the Directors, having been put on notice of the charge over your shares and the direction, to pay the dividends on your shares in BHL to Anglo Irish Bank (now IBRC)".* He continued "*We are also informed that the charge has been drafted so as to capture your current shareholding as it currently stands".*

43. Following this correspondence, extensive further exchanges took place between the plaintiff on the one hand, and BHL on the other hand, and the board sought advice and information initially from Jerry Sheehan, and also from Arthur Cox.

44. On 3rd January 2012, Mr. Jerry Sheehan wrote to Arthur Cox Solicitors outlining the background to the transaction of March 2006 and the structure of the transaction.

45. Mr. Sheehan explained initially that his firm represented BHL at the foundation of the Blackrock Clinic in the early 1980's and had maintained a close involvement with the affairs of the company "either through representing it directly, or in advising the founding shareholders from time to time". He continued, "In addition, I represented Joe Sheehan, who is based in Chicago, on the board as his alternate director for many years".

46. Mr. Sheehan stated as follows: -

> *"I was instructed to act in the Transaction, by all the current shareholders, and in addition, was further instructed to represent all current shareholders in relation to the drawdown of their respective loan facilities from IBRC (Anglo) although Breccia ultimately retained separate advisers prior to the completion. I held Powers of Attorney/ signing authority for all current shareholders (excluding Breccia).*
>
> *At the time I was also a director of BHL and Blackrock Clinic Limited."*

47. With reference to the security, Mr. Sheehan continued: -

> *"The security granted to IBRC (Anglo) was a first legal charge over the shares in BHL of each borrower, together with a charge over the dividend payments and the deposit account into which the dividend payments were to be paid by BHL. I repeat that our firm did not negotiate these terms/arrangements, rather they were agreed by the borrowers/Warren and Partners, directly with Anglo prior to our involvement.*
>
> *Indeed, had Anglo pursued the registration of its nominee company as the shareholder of all the shareholders in BHL, my understanding is that the dividends would initially be required to be paid to such nominee and the documents signed at the completion of the Transaction (referred to in the next paragraph) would not now be relevant".*
>
> *"Notices of charge/acknowledgements of charge.*
>
> *From my recent review of our file I believe that the above documents (Notices of Charge and Acknowledgements of Charge) which were completed in respect of all shareholders in similar terms were not circulated by the solicitor for Anglo in advance of a completion meeting on the 28th March 2006. This may have been due to the fact that the final designation of all shares was not determined until very late in the process.*
>
> *I was satisfied that the documents merely gave effect to the express commercial/financial terms agreed by the shareholders of Anglo as set out in their respective Facility Letters.*
>
> *All the original documents relating to the Transaction comprising the Anglo security were taken away by the bank lawyer on behalf of Anglo as is usual. The original notices to the secretary of BHL signed by me on behalf of each borrower client (excluding Breccia) together with the Breccia notice, should have been sent to the company secretary by Anglo. For the sake of completeness, I, as a director of BHL, should have sent copies of the Acknowledgements to the secretary and finance director also. Had this been done, I believe the current confusion could have been avoided.*
>
> *However, given that all shareholders had similar arrangements as Anglo and the fact that all dividends, so far as I am aware, have been paid into the relevant accounts in Anglo since 2006 in accordance with the express repayment provisions of each shareholder loan, I had assumed that all parties, including BHL (all shareholders or their representatives being directors) were fully aware of their repayment obligations to Anglo and were implementing them accordingly".*

48. The role of Jerry Sheehan was the subject of criticism by the plaintiff in his evidence to which I shall return later.

49. On 3rd January 2012, Arthur Cox on behalf of BHL confirmed to the plaintiff's solicitors, Messrs. Shannon and O'Connor, that the full dividend would be paid to IBRC (Anglo) in the absence of an instruction from them to the contrary.

50. This led to heated exchanges between Arthur Cox on the one hand and Shannon O'Connor on the other hand, and contentious discussions at meetings of the board of directors of BHL from January 2012 onwards. Initially, at the meeting of the board of directors on 9 January, 2012, the chairman, Mr. Molloy, indicated that the company had to adhere to the Notice of Charge in the absence of any variations supplied by Anglo. The plaintiff persisted with his assertion that dividends should be paid to him and not the Bank and repeated that it would be his intention if necessary to commence legal proceedings should the dividend payments be released in full to Anglo. These exchanges and discussions of the board continued from January 2012 onwards up to and even after the commencement of these proceedings. Ultimately, the position adopted by the board, by majority resolution, having taken legal advice, (including the advice of senior counsel) was that BHL itself does not have the capacity or the authority to determine the legal rights of the plaintiff on the one hand and Breccia on the other hand, to the payment of dividends attributable to the plaintiffs' shareholding in the company. Its position is that it will abide by any determination made by this Court as to the respective entitlements of those parties.

Liquidation of IBRC

51. On 7 February, 2013, the Minister for Finance made the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order 2013, for the winding up of IBRC and the appointment of the Special Liquidators Kieran Wallace and Eamon Richardson of KPMG.

52. On 29 May, 2013, the Special Liquidators issued to each of the borrower shareholders a "reservation of rights letter". (At the trial the court was referred to the letter received by James Sheehan, but it was accepted that each borrower had received such a letter).

53. By this letter, the Special Liquidators informed the borrowers, including the plaintiff, of their appointment and that the loan facilities in respect of BHL had expired and not been repaid, referring to this fact as "the Defaults".

54. On 21 June, 2013, IBRC applied a set off against the plaintiff's loan in respect of the amount of his deposit at the bank and the deposit account was then closed. By letter dated 17 September, 2013, Byrne Wallace, on behalf of the Special Liquidators, confirmed this position to Messrs. O'Neill & Co., lawyers advising the plaintiff and informed them that the current balance on the loan account was €15,784,895.72.

55. On 25 September, 2013, Byrne Wallace also informed BHL by letter of the appointment of the Special Liquidators and stated as follows: -

> *"As you are aware from previous correspondence with IBRC, IBRC holds security over the rights, title and interests in 100% of the issued share capital of BHL including a charge over dividends. The current status of IBRC in special liquidation has no effect on the security and for the avoidance of doubt, please be advised that dividend payments which have to date been paid directly to IBRC should continue to be paid as normal to IBRC".*

56. On 29 January, 2014, the plaintiff wrote to BHL in the following terms: -

> *"As you are aware, my original mandate to BHL was for the payment of dividends and shares held by me to an account in my name at Anglo Irish Bank. This account has since been closed by the Bank. As there is no longer an account for dividend payments to be lodged to, and in my case as I have revoked my mandate for such payments to the Bank, any dividend declared by BHL must be paid directly to my account, as the holder of the shares in BHL.*

I specifically withdraw any instructions which may have existed for you to make payments to any person other than myself. Be aware that any beach (sic) of this instruction will result in immediate legal action against the hospital and its officers and directors".

57. On 29 January 2014, Messrs. O'Neill & Co. wrote to BHL in similar terms, including a statement as follows: -

> *"I understand that you have received correspondence from Byrne Wallace acting for the Special Liquidators, claiming a right to such dividend payments. This is to inform you that we are of the opinion that no such right is conferred by the mortgage held by Anglo Irish Bank/IBRC and that the claim made by Byrne Wallace and the Special Liquidators is unsupported by law and is improper. Accordingly, on behalf of Dr. Sheehan, you are instructed to make no payment of any dividends to any person other than Dr. Sheehan".*

58. Further correspondence was exchanged between Arthur Cox and Byrne Wallace. In a letter of 17th February 2014, Arthur Cox requested extensive further information from Byrne Wallace. In doing so, they stated as follows: -

> *"Since your client is in liquidation and is no longer permitted to demand the continuation of arrangement regarding the making of deposits into a bank account of such payments are not required pursuant to the terms of Mortgage, it is essential that your client confirm that the Mortgage referred to in your letter included a fixed charge over all dividends payable in respect of Dr. Sheehan's shareholding in our client …*
>
> *We therefore request that you discuss this matter with the Special Liquidators, as it would appear to us from the information provided to our clients by its shareholders that your clients may not have a fixed charge over all dividends payable in respect of Dr. Sheehan's shareholding in our client and that the Acknowledgement of Charge constitutes nothing more than a deposit taking arrangement which has come to an end with the liquidation of IBRC. In these circumstances, the Special Liquidators should either (i) confirm to us in writing that the mortgage includes a fixed charge over all dividends payable in respect of Mr. Sheehan's shareholding in our client as well as confirming the exact arraignments which were provided for in the Mortgage in regard to how the dividend on Dr. Sheehan's shares are to be paid, or (ii) seek to perfect the security provided for in the Mortgage."*

59. In a further letter dated 28 February, 2014, Messrs Cox stated as follows: -

> "Dr. Sheehan's legal adviser has provided us with a copy of the Mortgage executed Sby him on 28th March 2006. In clause 3.1 (a) of the Mortgage, it is stated that until your client or its nominee shall be registered as the holder of the hares in the register of shares of BHL, the security conferred by the Mortgage shall take effect as an equitable mortgage to your client. As you know, and for the reasons explained further below, your client has yet to be registered as the holder of the shares, and therefore your client appears not to have a fixed charge over any dividend payments which may be made by your client in respect of the shares. If you disagree with this, please let us know".

60. On 13th March 2014, Byrne Wallace replied, asserting that "*the Mortgage of Shares Deposit Account and Assignment of Agreements dated 28 March, 2006, remains in full force and effect, and is valid and binding and had not been released*." They continued that the plaintiff had, "*…mortgaged and charged by way of first fixed charge to the bank inter alia all the shares held by him in BHL (the "Shares") including all of his rights title and interest therein present and future and all dividends, interest or other income deriving therefrom at any time".*

61. Byrne Wallace continued as follows: -

> *"Our client confirms that BHL is to continue to make any dividend payments due and payable in respect of the shares directly to IBRC (subject to the comments above regarding the Notice) as same have always been to date.*
>
> *We confirm on behalf of our client that your client's undertaking in the Acknowledgment in relation to payment of the said dividends will be satisfied by either: -*
>
> > *(a) submitting the payment of dividends by cheque made payable as before, directly to IBRC. BHL chose to comply with its obligations under the Acknowledgment by sending the dividends payable on the Shares directly to the bank by cheque, which was and continues to be acceptable to IBRC, and/or;*
> >
> > *(b) submitting the payment of dividends to the following account [Account details at Bank of Ireland given]".*

62. Byrne Wallace continued stating that they refuted that there were any deficiencies in the mortgage and with reference to the share reorganisation of 2009, they stated as follows: -

> *" Regardless of any documentation which is purported to have been given by your client to the shareholders as set out in your letter, the Bank made it clear that its consent to any reorganisation was subject to receipt of new security documents, new share transfer of forms, and the share certificates".*

63. As this correspondence continued, the contentious BHL board discussions continued. As part of these communications the plaintiff asserted that BHL and its directors were guilty of "theft" by withholding of payment of dividends to him. Even the question of whether there should be further time taken to obtain the opinion of senior counsel was the subject of this contentious correspondence and debate.

64. At a meeting of the board on 25th September 2014 it was agreed that an opinion would be obtained from senior counsel and that the plaintiff and others would have the opportunity to have any documentation they wished included in the instructions to counsel.

65. In response to this invitation, Mr. O'Neill wrote to Arthur Cox on 29th September 2014 and 8th October 2014. No documents were submitted but arguments as to the legal position were made in concise form by Mr. O'Neill.

Purchase of plaintiff's loans and security by Breccia
66. On 17 October, 2014, the Special Liquidators of IBRC entered into an agreement with Breccia as purchaser for the sale of the plaintiff's loans and related security. This transaction was completed by a Deed of Transfer on 10th December 2014.

67. On 10 December, 2014, the Special Liquidators notified the plaintiff of the transfer of his loans and securities to Breccia.

68. On 18 December, 2014, Breccia wrote to the plaintiff and notified him of the transfer of his loan and related security and made demand for immediate payment for the sum of €16,144,572 under the 2006 Facility and a sum of €6,734,852 pursuant to his guarantee of the loan of Benray Limited.

69. On 22 December 2014, these proceedings were commenced in which the reliefs sought include: -

> (a) a declaration that the plaintiff as the legal owner of his shares in the company is the person entitled to the dividends attributable to his shareholding; and
>
> (b) an order compelling the third named defendant (BHL) to pay to the plaintiff the dividends owed to him and attributable to his shares".

70. The contentious issue of payment of dividends continued to occupy the agenda at meetings of the directors and on 29th January 2015, the board resolved, by a majority, with the plaintiff dissenting, that dividends should be "withheld for the time being for legal reasons".

Plaintiffs' submissions
71. The plaintiffs' case may be summarised as follows: -

> (i) That the only party who is entitled to payment of a dividend at any given time is the registered owner of the shares and that the onus is on Breccia to establish its entitlement by contract or otherwise.
>
> (ii) That the Mortgage created only an equitable mortgage and that neither Breccia or its predecessor ever took steps to perfect the security.
>
> (iii) That the Shares subject to the Mortgage are only those designated in the schedule to the Mortgage, namely the five classes of shares referred to in that schedule and that the Mortgage does not on a proper construction of the document extend to the shares issued following the 2009 share reorganisation.
>
> (iv) That only dividends on the original shares are captured by the mortgage and therefore dividends declared after 2009 are not covered by the mortgage at all.
>
> (v) That when IBRC closed the Account in 2013, following the appointment of the Special Liquidators, that act had the effect that the undertaking given by the BHL regarding the payment of dividends to that Account ceased to have any effect and that this vitiated the charge on dividends, and;
>
> (vi) That the Notice of Charge and the Acknowledgement given by BHL made provision for remittance of dividends and retention of dividends by the Bank and now Breccia only for application against amounts of interest falling due from time to time.
>
> (vii) That the letter issued by Arthur Cox in February 2014 on behalf of BHL indicated that it did not regard the charge as creating a legal charge and therefore enforceable in the manner sought by Breccia.
>
> (viii) That the remedy of an equitable mortgagee is limited to applications to court for well charging orders and orders for sale of the shares or specific performance.
>
> (ix) That on a proper construction of the facility letters, including later facility letters (discussed below), the obligation to give a charge over the dividends had relaxed or been waived.

Breccia's submissions
72. Breccia claims: -

> (i) That it is clear from the terms of the Mortgage that the beneficial interest in the dividend income rests in Breccia and that it is the only party entitled to receive dividends under the terms of the Mortgage.

(ii) That because the loan is in default the respective entitlements of the parties are governed by clause 10.1 (c) of the Mortgage which confers on the Bank the right to receive the dividends.

(iii) That the proper definition of the word "shares" in the mortgage extends to the shares issued following the 2009 reorganisation.

(iv) That the Notice of Charge had the effect of putting BHL at all times on notice of the existence of the Mortgage.

(v) That on 13th March 2014, IBRC through Byrne Wallace, gave notice of the identification of a different account into which dividends should be paid, as they were entitled to do under the terms of the Facility.

(vi) That the Concession Letter only had effect for so long as no default had occurred.

Execution of Transaction Documents
73. During the course of his evidence, the plaintiff expressed a view that certain of the documents executed on 28th March 2006 were executed in "fraudulent" circumstances or that Mr. Jerry Sheehan had "doctored" certain of these documents. He also said that at the time of the transaction he had not been aware of the fact that although cross guarantees were being entered into by the shareholders, Breccia had not entered into a cross guarantee as such, but only a Deed of Covenant, said to establish a more limited obligation. In the pleadings and submissions, both written submissions and closing submission, it was conceded that, although the plaintiff held certain views about the circumstances of execution of the documents, no claim was being pursued as to the due execution of the documents, or as to the authority of Jerry Sheehan to sign the documents he signed. Nor was it contested that Breccia is the valid holder of such rights as accrued to Anglo under the transaction. Therefore, it was acknowledged that this module can be determined as a matter of the proper construction of the documents. It is therefore necessary now to focus on an analysis of the documents and their proper construction.

Mortgage Of Shares, Deposit Account and Assignment Of Agreements
74. Certain of the definitions in the Mortgage are of central importance, as follows: -

"The Account"
75. "means the deposit account in the name of the Mortgagor with the Bank with the account number 1403/506743/01, into which all dividends and other monies derived from the security assets will be paid".

"Secured liabilities"
76. *"…means all monies now or at any time hereafter and from time to time due or owing to the Bank by the Mortgagor, including any such monies due or owing to the Bank under or in respect of any Financing Agreement whether on the balance of any account or accounts of the Mortgagor or in any other manner including interest, interest discount, commission, etc".*

"Security Assets"
77. *"… means the Shares, the Shareholders Agreement, the Account, and all rights assets or property referred to in Clause 3.1."*

"Shares"
78. *"… means all the shares held by the Mortgagor in the Company (BHL) including but not limited to the shares specified in Schedule II part I, hereto together with all other shares, stocks, bonds, debentures and other instruments issued by the Company from time to time and legally or beneficially owned by the Mortgagor or any nominee of the Mortgagor at the date hereof or at any time hereafter, whether in certified, dematerialised or uncertificated form including without prejudice to the generality of the foregoing any interest of the Mortgagor in any such shares, stocks, bonds, debentures or other instruments of the Company whether or not held jointly with any other person."*

Covenant to Pay
79. Clause 2.1 contains a covenant by the plaintiff to pay the Secured Liabilities, without any deductions whatsoever.

Security
80. Clause 3.1 provides: -

> *"The Mortgagor, as legal and beneficial owner to the intent that the charge herby created shall be a continuing security for the payment and discharge of all the Secured Liabilities and other monies and liabilities hereby agreed to be paid and discharged by it or otherwise hereby: -*
>
> *(a) Mortgages and charges by way of first fixed charge to the Bank and with the intent that until the Bank or its nominee shall be registered as the holder of the Shares in the register of shares of the Company in which the Shares are held or where the Bank, in its absolute discretion, agrees that no such registration is required, this security shall take effect as an equitable mortgage to the Bank of, all of*

(i) the Shares and all right title and interest of the Mortgagor therein present and future.

> *(ii) any allotments, accretions, offers and rights deriving from or incidental to any of the Shares including all stocks, shares and other securities, rights, monies and other property accruing, offered or issued at any time by way of bonus, redemption, exchange, purchase, substitution, conversion, preference, option or otherwise in respect of the Shares.*
>
> *(iii) all dividends interest or other income deriving now or at any time hereafter from or incidental to the ownership of the Shares and the income deriving from any investment of any such dividends, interest or income; and,*
>
> *(iv) any moneys income and amounts received from the redemption of all or any part of the Shares or any of the Security Assets.*
>
> *(b) charges, all rights, title and interest to and in the Account.*

(c) assigns to the Bank all right title and interest of the Mortgagor in and to the Shareholder Agreements; and

(d) assigns to the Bank all right title and interest of the Mortgagor in and to the Transaction Agreements; and

(e) covenants that immediately upon the execution of this Mortgage (or upon becoming possessed thereof at any time hereafter) it will: -

(i) execute such instruments as the Bank may request transferring all deeds, bearer instruments, certificates and other documents constituting or evidencing title to the Shares or any part thereof, into the name of the Bank or the Banks' nominee;

(ii) register the name of the Bank or the Banks' nominee as the owner of the Shares in the register of members of the Company.

(iii) execute any other documents relating to the Shares as the Bank shall reasonably require.

To the intent that the security hereby created shall be a legal mortgage of the shares."

81. Clause 5.1 contains a negative pledge as follows: -

"The Mortgagor hereby covenants that without the prior written consent of the bank it shall not nor shall it agree or purport to: -

(a) create, extend or permit to subsist any Encumbrance over any of the Security Assets.

…

(e) take or so far as it is able, permit the taking of any action whereby the rights attaching to the Shares are altered or further shares in the Company are issued."

82. Clause 6 contains certain representation and warranties including: -

"6.1 The Mortgagor hereby warrants and represents and undertakes that (b) at the date hereof it is the registered legal and beneficial holder of the Shares in each Company as more particularly described in Schedule II part I hereto".

83. Clause 8 governs voting rights and dividends, it contains a provision as follows in 8.2:-

"Notwithstanding that the moneys hereby secured shall not have become payable, to the extent that the mortgagor receives or is entitled to receive any interest or dividends or other monies derived from the Security Assets then the Mortgagor shall procure that all such sums shall be paid forthwith by the Company to the Account and the Mortgagor shall procure that the Company shall accept and consent to the payment of such dividends and interest and other monies in such manner and shall execute the form of letter set out in Appendix A".

84. The copy of the Mortgage did not have a form of letter in "Appendix A", but it was accepted that this was the Notice of Charge.

85. Clause 9 contains a standard further assurance clause. Clause 9.1 reads: -

"The Mortgagor shall from time to time, at the request of the Bank and at the Mortgagor's cost, execute in favour of the Bank, or as it may direct, a legal mortgage transfer or assignment of the Shares or such further or other assignments transfers charges, applications, notices or other documents as in any such case the Bank shall stipulate in respect of the Security Assets for the purpose of more effectively providing security to the Bank on the terms of this Mortgage and for the payment or discharge of the Secured Liabilities and the Mortgagor hereby covenants forthwith upon demand to sign seal deliver and complete all transfers, renunciations, mandates, assignments, deeds, proxy forms or other documents as the Bank may require to perfect its title to the Shares, to vest the shares in the Bank (or its nominees) to exercise or enable its nominees to exercise all rights and powers attaching to the Shares, or to give effect to any sale or disposal of the Shares pursuant to the provisions of this Mortgage". [emphasis added]

86. Clause 10 provides for Enforcement of Security. Clause 10.1(c) is of the utmost importance in determining the claim made in this module: -

"10.1 When and at any time after the monies hereby secured shall have become payable whether pursuant to Section 2 hereof or otherwise, and the Mortgagor shall have defaulted in the payment or any part thereof, or, the security herein contained shall otherwise have become enforceable the Bank shall be entitled to put into force and exercise immediately as and when it may see fit any and every power possessed by the Bank by virtue of this deed and, without prejudice to all or any statutory and other powers of the Bank under the Conveyancing and Law of Property Act, 1881, ("the Conveyancing Act") and so that any statutory power of sale shall be exercisable without the restrictions contained in ss. 19 and 20 of that Act and in particular (without limitation) the Bank shall be entitled: -

(a) to sell any or all part of the Security Assets in any manner permitted by law upon such terms as the Bank shall in its absolute discretion determine;

(b) to collect, recover or compromise and give a good discharge for any monies payable to the Mortgagor in respect of the Security Assets or in connection therewith;

(c) to have the right to receive and to enforce and procure payment thereof *and the Mortgagor shall if required pay or procure the payment to the Bank of, any and all interest or dividends or other monies paid or payable in respect of the Security Assets (notwithstanding that such amounts may have accrued in respect of an earlier period) and apply the same in discharge of the Secured Liabilities in such order as it may determine"*. [emphasis added]

87. Clause 13 contains a power of attorney clause in favour of the Bank.

88. Under "Further Provisions", Clause 17.5 provides as follows: -

> *"… the rights of the Bank in relation to this security (whether arising under this Mortgage or under the general law) and the terms of this Mortgage shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing signed by an officer of the Bank".*

Conclusion regarding the Mortgage

89. As to the effect of the Mortgage in this module, I have concluded as follows: -

(i) The definition of "Shares" is not limited to the five classes of shares referred to in Schedule II, being the shares issued to the plaintiff as part of the transaction of 28th March 2006, but extends, as the definition states, to "all other shares . . . issued by the company from time to time, and legally or beneficially owned by the mortgagor . . .". This includes shares held after the 2009 reorganisation.

(ii) Clause 3.1 (a)(ii) refers also to rights *"deriving from or incidental to any of the shares including all stocks, shares and other securities, rights, monies, and other property accruing, offered or issued at any time by way of bonus redemption, exchange, purchase, substitution, conversion, preference, option or otherwise in respect of the shares."*

The attention of this court was not drawn to the mechanics of the shares reorganisation of 2009. However, the court was informed that this was essentially a "redesignation" exercise, from which I infer that the newly issued shares were issued at least by way of "exchange" or "substitution". Without the documents evidencing that reorganisation this of itself could not be treated as conclusive but Clause 3.1(a)(ii) is at least informative of the scope of the charge.

(iii) It was submitted on behalf of Breccia that the precondition of registration of the Bank or its nominee or shareholder can only be relevant to the status of the mortgage on the Shares themselves and not that of the mortgage on the dividends. In my view, Clause 3.1 (a) very clearly stipulates that the parties agreed that the charge on the assets referred to in Clause 3.1 (a)(ii) to (iv), including the dividends, was an equitable charge pending registration of the Bank in the share register. Accordingly, the charge on dividends is an equitable charge, but nonetheless effective as between the parties and for the determination of the claim made in this module. See paragraphs 90 and 91 below.

(iv) The charge in Clause 3.1 (b) over the Account is a standalone charge. Subject to the right reserved by the Bank to nominate a different account (see (v) below), that charge can only be effective on the original Account so far as there were funds standing to credit. When the Account was closed, this element of the security became ineffective. That does not limit the fundamental of Clause 3.1 (a)(iii) which is a separate and distinct charge over dividends. If the position were otherwise, the provisions referred to at (v) below would be redundant.

(v) Clause 9 is the further assurance clause which entitles the Bank at any time to require the borrower to execute any transfers renunciations, or "mandates," which would enable the bank to exercise all rights and powers attaching to the shares.

(vi) Whilst a clause of this nature would on first reading appear be designed to enable the Bank to effect a sale of the shares, it seems to me that, although this Clause was not recited in the letter written by Byrne Wallace on 12 February, 2014.

(vii) That letter was in fact a form of exercise of the further assurance requirement. The plaintiff submitted that the language of the negative pledge in 5.1 (e), and of the representations and warranties in 6.1 (b), is such that a clear distinction is made between rights attaching to the "Shares" and "further shares". This is an interesting submission in relation to 5.1 (e) but I am not persuaded that it operates to limit the fundamental of the definition of Shares contained in the definitions section of the Mortgage. As regards 6.1 (b), the representation and warranty as to the Mortgagor being the holder of the Shares "more particularly described in Schedule II Part I" can only have been intended to have effect in respect of the shares at that time issued to and held by the plaintiff, namely the shares referred to in Schedule II. Such a warranty related to the then existing state of affairs and could not have applied to future acquired shares.

(viii) In relation to clause 10.1, "Enforcement of Security" the first point is that, although at one stage in his evidence the plaintiff sought to indicate that he had not been aware of the fact of a default, it is not denied that, at least when the principal amount has not repaid on its maturity date of 30 December, 2010, that loan was in default. Therefore, Clause 10.1 applied from, at least, 13 January, 2011, (see Clause 9(a) of the Facility Letter which defines Events of Default). From that date onwards, the respective rights of the Mortgagor and the Bank to receive dividends were governed by Clause 10.1 (c).

Clause 10.1 (c) provides that in such event the Bank shall be entitled "*to receive and to enforce and procure payment to the Bank of any and all interest or dividends or other monies paid or payable in respect of the Security Assets (notwithstanding that such amounts may accrued in respect of an earlier period) and apply the same in discharge of the Secured Liabilities in such order as it may determine."*

90. The mortgage is first and foremost a contract between the parties thereto. The language of this clause could not be clearer in conferring on the Bank the right, after a default, to receive all dividends payable by BHL and to apply them in discharge of the secured liabilities.

91. As a general rule, the question of whether a charge on a debt, somewhat akin to an assignment of a debt, is legal or equitable informs such considerations as whether the holder of the charge or the assignee is entitled to sue and enforce in its own name or is required to join the assignor or, in the case of insolvency, ranking and priority issues. But the distinction between legal and equitable charges can distract from the basic contract by which the respective rights of the parties in respect of dividends are regulated, particularly in a case where, as here, the paying party, namely BHL, has stated its willingness to pay and the only matter for determination by this Court is which of the parties entitled to receive the dividends. For all the other arguments that have been made in this case, it seems to me that it is not necessary to look further than the clear and unambiguous terms of Clause 10.1 (c).

92. Before leaving this question it is appropriate to note that in *Re Keenan Brothers Limited* [1985] I.R. 401 at p. 401 Keane J. – albeit in the context of a different controversy about fixed and floating charges on debts, but on a point on which he was not overturned – had no hesitation in finding that although the charge in that case was in his view a floating charge, its

"… effect was to vest the debts in the bank the moment they came into existence and to give the bank the right to collect them (on giving notice to the debtors); and the company (borrower) at the date of execution of the deeds, ceased to have any interest in the debts whatsoever."

Notice of Charge and Acknowledgement of Charge
93. The Notice of Charge served two purposes. Firstly, it clearly put BHL on notice of the existence of the charge. Secondly, it contained the plaintiff's instruction to pay dividends to the Account. When the Account was closed this instruction was rendered inoperative. That did not undermine the remaining provisions of the Mortgage.

94. It was suggested that because the Acknowledgment of Charge contained a statement to the effect that terms defined in the Mortgage would have the same meaning when used "herein" or "therein" and because that statement did not appear in the Notice of Charge, the definition of Shares in the Notice of Charge could only have referred to the five clauses of Shares mentioned specifically in the Notice of Charge, I am not persuaded by this submission, and clearly the word "Shares" has the meaning assigned to it in the definition section of the Mortgage.

Dividend concession letter dated 28th March 2006
95. Reliance was placed by the plaintiff on the terms of the separate letter issued on the 28th March 2006 by Mr. Tobin of the Bank to Mr. Sheehan (quoted at para. BLANK above). It was submitted that this letter meant that the Bank was only entitled to retain dividends remitted to the Account so far as they were necessary for the discharge of interest payments accruing.

96. It is beyond doubt, based on a simple reading of the letter of 28 March, 2006, that this concession only applied so long as no default had occurred and it has not been contested that the failure to repay the facility in its entirety by 31 December, 2012, constituted a default.

Facility letters
97. The plaintiff submits that although the original facility letter of 28 March, 2006, (the "First Facility Letter"), provided for the granting of security over the shares and dividends, subsequent facility letters did not contain the requirement for security over the dividends, and that the effect was that the Bank no longer maintained this requirement.

Second Facility Letter: 7 June, 2006
98. This was a further facility to the plaintiff in the sum of €4.125,000. The stated purpose of this facility was (a) €2,115,000 to renew an existing facility, and (b) €2,010,000 "to provide an equity release to borrower as approved by the bank and capitalise the arrangement fee thereon". The security provisions differed in that they provided, as did the first letter, for a first legal charge over the shareholding of the plaintiff in BHL, including a charge over a deposit account, but contained no reference to a charge over the dividends. Secondly, this Letter provided for the granting of a fresh legal charge over a property at St. Josephs, Ballyheigue, Co. Kerry.

99. This Facility was stated to be "not a replacement of and is in addition to the Banks' Facility Letter to the Borrower dated 28th March 2006".

100. It is relevant that 14 days later, on 21 June, 2006, the plaintiff issued a letter to BHL authorising it to pay all future dividends to the Bank. Clearly, he did not regard himself at that point as released from obligations in respect of dividends, although this submission relies more on the next Facility Letter.

Third Facility Letter: 25 October, 2007
101. This facility was for three amounts, namely Facility A €11,190,000, Facility B €2,115,000, and Facility C, €3,001,5000. The stated purpose of these facilities was to "renew the existing facilities".

102. The requirement for security, like the Second Facility Letter of 7 June, 2006, was for a legal charge over the shares in BHL and a fresh legal charge over a property at Ballyheigue, Co. Kerry. No reference was made either to the Account or to dividends.

103. This letter is stated to "rescind and supersede all previous Facility Letters issued by the Bank to the Borrower".

104. The plaintiff relies on this letter in support of an argument that its effect was to rescind previous facility letters and waive the requirement for any security over dividends.

Fourth Facility Letter: 12 November, 2008,
105. This facility was for a total amount of €6,3140,000. The stated purpose was to renew existing facilities and provide the borrower with an "open bridging facility to fund professional fees". Again, this facility refers to the requirement for a legal charge over the plaintiff's shareholding in BHL and this time "a Charge over deposit account (Held) and a legal charge over the property at St. Josephs, Ballyheigue, Co. Kerry. No reference is made to the charge over dividends. Of importance in relation to this letter however, is that it states the following: -

"This Facility Letter is in replacement of, and not in addition to, the Banks' Facility Letter to the borrower dated 7th June 2006, 16th February 2007, 25th October 2007, and 22nd May 2008.

However, this facility is not a replacement of and is in addition to the banks' Facility Letter to the borrower dated 28th March 2006".

106. The plaintiff submitted that the letter of 25th October 2007 rescinded or purported to rescind the letter of 28 March, 2006, and that it is artificial to treat the Fourth Facility Letter as "reviving" the First.

107. Whilst the Facility Letters are always of central importance in understanding loan terms and conditions, including security requirements, and can serve as an aid to construction of related documents, the essence of the security retained by a lender is to be found in the security instrument itself. In this case the Mortgage contains a standalone covenant to pay (Clause 2) and the operative security provision in Clause 3.1 *states that the charge thereby created "shall be a continuing security for the payment of discharge of all the secured liabilities and other monies and liabilities hereby agreed to be paid or discharged by it or otherwise hereby secured."* It is frequently overlooked that the "covenant to pay" coupled with the grant of security defined in a charging instrument is more important as an operative obligation than the terms of facility letters. In the absence of an express release of the distinct charge over dividends, I find that these letters do not amount to a waiver of requirement for a charge over the dividends.

108. It was also pointed out by Breccia that only the First and Fourth Facility Letters were pleaded by the plaintiff. That of itself would not have been sufficient to defeat the arguments made by reference to later facility agreements, but it is of some importance.

The Arthur Cox correspondence
109. Reliance has been placed by the plaintiff on the fact that in the initial stages of the contentious letters, Messrs. Arthur Cox on behalf of BHL appeared to indicate that they were unconvinced of the exact scope or nature of the plaintiffs' security and at the outset stated that dividends would be paid to the registered shareholder. It was submitted that only under pressure from the Bank did they adopt a more qualified position.

110. In this same correspondence, Arthur Cox indicated that they required further information, and were considering the matter with their client. The concluded position taken by the board of BHL after further consideration of the matter both with Arthur Cox and with senior counsel, was that it was not within the jurisdiction or authority of BHL itself to determine the legal question which is now before this Court. The resolution of the board to that effect was appropriate, and I cannot find that the statements made by Arthur Cox in the course of the prior correspondence, when the matter first became contentious and was being investigated by both Arthur Cox and the board of BHL, has the binding effect now contended for by the plaintiff.

Remedies of Equitable Mortgagee
111. Reliance was placed by the plaintiffs on a judgment of Laffoy J. in *Ancord v. Horgan & Ors* [2013] IEHC 265 in which the court granted interlocutory orders restraining a mortgagee of shares from taking certain steps to enforce its mortgage including the removal of the mortgagor as a director and from giving effect to a resolution purporting to approve the transfer of mortgaged shares, in that case to the mortgagee herself. This was a foreclosure case and the court held that the court's intervention would be necessary before a mortgagee could extinguish the equity of redemption. The court held that there was a fair and *bona fide* question to be tried as to the respective rights of the parties pursuant to the mortgage and in particular whether the mortgagee had authority under the mortgage to treat the stock transfer form in that case as entitling her to legal and beneficial ownership of the mortgagor's shareholding. It was argued by the mortgagor that the measures being pursued by the mortgagee amounted to a form of foreclosure, a remedy not typically recognised under Irish law. The plaintiff has contended, partly in reliance on this judgment, that an equitable mortgagee's remedies are limited to those which can be granted by the court, such as a well charging order and/or an order for possession and sale, or the remedy of specific performance. The judgment in that case was particular to the measures being invoked by that mortgagee and does not mean that an equitable mortgagee's rights are limited in the manner the plaintiff contends.

112. The majority of disputes concerning the rights of equitable mortgagees as against either the mortgagor or third parties arise in the absence of a definitive charging instrument governing those rights. This is no such case, and the parties chose to regulate their respective rights by the Mortgage, and their rights as regards dividends following default by Clause 10.1 (c) thereof.

113. The validity and enforceability of an equitable mortgage on shares was upheld by Budd J. in *Re. Patrick J. Morrissey* [1961] IR 8442. In that case the borrower had deposited with the Bank of Ireland share certificates as collateral and continuing security for all monies from time to time due to the bank. On the bankruptcy of the borrower the Official Assignee sought orders declaring that as of the date of the bankruptcy the shares were in the possession order and disposition of the bankrupt "as reputed owners" and as the true owners of the shares and accordingly that they formed part of the estate of the bankrupt.

114. Mr. Justice Budd said:

> *"The way I see the matter is this: the fact that a shareholder's name is on the register of shareholders gives him the reputation of ownership of the shares; even after the shares have been pledged that reputation of ownership still continues if nothing more be done even though the pledgee becomes the equitable owner.*
>
> *The company is the only body that the pledgee can effectively deal with to state his interest. By doing so the pledgee therefore takes the only step he can to perfect his title. It seems to me to follow that by thus giving notice to the only other interested party he as true owner thereby indicates, in the only way open to him that he does not consent any longer to the pledgor having that reputation of ownership that being on the register would otherwise give him, with the result that henceforth such shares cannot properly be said to be in the reputed ownership and order and disposition of the pledger with the consent of the true owner."*

115. Budd J. held that since the Bank had given notice, in that case of the "hypothecation" of the shares, the bankrupt was no longer in possession of the share with its consent, and accordingly, the equitable ownership of the Bank prevailed, notwithstanding that the bankrupt's name remained on the register.

Conclusion
116. I have concluded that

1. The definition of shares in the Mortgage extends to shares in issue after the 2009 reorganisation of BHL,

2. The plaintiff charged to the Bank inter alia the Shares (as defined), the Account (as defined) and all dividends. These are charges on distinct things and the charge on dividends stands as a continuing charge. Its effect is to irrevocably confer on Breccia a clear proprietary interest in dividends declared by BHL.

3. The closure of the Account which had been established for receipt of dividends as part of the 2006 Transaction terminated that particular mechanism for securing payments to the Bank but did not have the effect of vitiating the charge on dividends,

4. By Clause 10.1 (c) of the Mortgage the plaintiff contracted that after a default, which has occurred, the right to receive and retain dividends paid by BHL, vests in the Bank, and now Breccia.

117. I shall refuse the reliefs sought by the plaintiff in paragraphs 15 and 19 of the Plenary Summons, and declare that Breccia is the party to whom BHL should pay dividends. I shall hear counsel as to any other orders to be made.