Neutral Citation [2013] IEHC 265

THE HIGH COURT

[2012 No. 12487 P]

BETWEEN

ANCORDE LIMITED AND BARRY HARTE

PLAINTIFFS

AND

MIRINDA HORGAN, COLLETTE SWEETMAN AND ASHWOOD INVESTMENTS LIMITED

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 6th day of June, 2013.

Related proceedings

1. This judgment relates to two applications for interlocutory injunctive relief, the earlier in time having been brought in the above entitled proceedings and the later having been brought in proceedings entitled:

The High Court – Record No. 2012/12606P

In the matter of Ashwood Investments Limited T/A Horgan's Pharmacy Group

And

In the matter of the Companies Acts 1963 – 2012

Between

Ashwood Investments Limited, Miranda Horgan and Collette Sweetnam

Plaintiffs

And

Barry Harte, Damien Ryan and Ancorde Limited

Defendants

The earlier proceedings will be referred to as the Harte Proceedings and the later as the Horgan Proceedings. For clarity, the plaintiffs in the Harte Proceedings and the defendants in the Horgan Proceedings, other than Damien Ryan (Mr. Ryan) who took no part in the proceedings, will be referred to as the Harte Parties. The defendants in the Harte Proceedings and the plaintiffs in the Horgan Proceedings, other than Ashwood Investments Limited (the Company) in each case, will be referred to as the Horgan Parties. Insofar as it is necessary, the title to the proceedings will be amended by the substitution of "Collette Sweetnam" as the second defendant in the Harte Proceedings, to correct the spelling error in the title.

Factual backdrop

2. The Company is a limited liability company incorporated in this jurisdiction. It is a holding company which has a number of subsidiary companies through which it carries on business in the retail pharmacy sector. Currently, it owns and operates ten retail pharmacies, most of which trade as "Horgan's Pharmacy" and all of which are located within County Cork. According to its amended Articles of Association filed in the Companies Registration Office (CRO) in August, 2012, its authorised share capital is made up of ordinary shares and redeemable shares, the denomination of one of each such shares being €1.269738. At present, the issued share capital is seventy five ordinary shares, of which twenty five are owned by Mirinda Horgan (Ms. Horgan) and twenty five are owned by Ancorde Limited (Ancorde). The deponent on behalf of Ancorde in both proceedings has been Philomena Smith (Ms. Smith), who has averred that she is a director and a shareholder of Ancorde. Ms. Smith is the wife of Hilary Haydon (Mr. Haydon), who is a partner in Haydon Chartered Accountants, which firm acted as the auditors of the Company and its subsidiaries until it resigned by letter dated 30th November, 2012. In her second affidavit sworn on 4th January, 2013, Ms. Smith has averred that it is "simply untrue", as asserted by Ms. Horgan on affidavit, that Mr. Haydon is the beneficial owner of the shareholding in Ancorde of which she is the registered owner. There is a major conflict on the affidavit evidence adduced on the interlocutory applications as to who is the driving force in Ancorde. That conflict, like so many other conflicts manifested on the affidavit evidence, cannot be resolved on the interlocutory applications.

3. The dispute at the core of the Harte Proceedings and the Horgan Proceedings, which has given rise to the applications for interlocutory injunctive relief, is who is the owner of the remaining twenty five shares in the Company, whether it is Barry Harte (Mr. Harte) or Collette Sweetnam (Ms. Sweetnam). A subsidiary dispute, which is an offshoot of that dispute, is who are the current directors of the Company. Up until the events of November and December 2012 which precipitated the Harte Proceedings, there were two directors of the Company, Ms. Horgan and Mr. Harte. It is not disputed that Ms. Horgan effectively ran the retail pharmacy business and that she was the managing director of the Company, and indeed, continues in those roles. Mr. Harte maintains that he was the chairman of the board of directors. What happened in December 2012 is that Ms. Horgan endeavoured to procure the appointment of M. Sweetnam as a director, and Mr. Harte endeavoured to procure the appointment of Mr. Ryan as a director. Consequently, a dispute has arisen as to whether the directors of the Company are Mr. Harte, Ms. Horgan and Ms. Sweetnam or, alternatively, Mr. Harte, Ms. Horgan and Mr. Ryan. Mr. Ryan has not participated in these proceedings. The importance attached by Mr. Harte to his asserted position as chairman of the board is that he contends that he had, and continues to have, a casting vote.

4. The eventual outcome of those disputes turns on whether Ms. Sweetnam has validly acquired Mr. Harte's twenty five shares as a

consequence of action she took on foot of a Mortgage of Shares entered into on the 6th April 2009 (the Mortgage) between Mr. Harte, as mortgagor, and Arthur Sweetnam, who was the husband of Ms. Sweetnam and who died on 6th February, 2012, and Ms. Sweetnam (collectively referred to as the Sweetnams), as mortgagees. The Mortgage was executed after the execution of a Loan Agreement (the Loan Agreement), which was also dated the 6th April, 2009, and was made between Mr. Harte, as borrower, and the Sweetnams, as lenders. It is not disputed that Mr. Harte has been in serious financial difficulties for some time and, as Ms. Horgan averred, that he is "in NAMA".

5. The historic significance of Mr. Harte's financial difficulties in the context of his involvement with the Company is that it has impacted on the endeavours made on behalf of the Company to acquire additional pharmacies owned by an entity referred to as the Walsh Group, which is in receivership, from the Receiver of that entity. The tipping point in relation to what subsequently transpired at board of directors level and at shareholder level in the Company in November and December 2012 appears to have been an e-mail from Ms. Horgan to Mr. Harte dated 2nd November, 2012, in which Ms. Horgan informed Mr. Harte that she had reached agreement with the Receiver for the acquisition by herself and her husband of four pharmacies in the Walsh Group. The position of the Harte Parties is that, to obviate the difficulties created by Mr. Harte's financial problems, the acquisition being negotiated by Ms. Horgan was intended to result in an acquisition through another vehicle, being a corporate vehicle associated with the Company. Their position is that Ms. Horgan was in clear breach of her fiduciary duties to the Company in reaching such agreement with the Receiver of the Walsh Group. Ms. Horgan has averred that, as a result of complaints made by Mr. Haydon, she decided not to proceed with that purchase in her own name. In his grounding affidavit sworn on 10th December, 2012, on the application in the Harte Proceedings, Mr. Harte averred that since 6th November, 2012, the Company "has had no functioning Board of Directors" and he has asserted that the blame rests solely with Ms. Horgan and that her conduct was "purely motivated" by an agenda to acquire the four pharmacies in the Walsh Group for herself "at the Company's expense". Ms. Horgan's response in her first affidavit in reply to the application in the Harte Proceedings, which was sworn on 12th December, 2012, was to assert that Mr. Harte's allegations amounted to "an unwarranted attack" on her character and was "part of a concerted effort", conceived and orchestrated by Mr. Haydon and Mr. Harte, in an attempt to prevent control of the Company passing to its lawful majority shareholders, namely, herself and Ms. Sweetnam, and to damage and remove her as Managing Director, and to deprive Ms. Sweetnam "of whatever value she can salvage from her shareholding" in the Company.

6. The respective positions adopted by Mr. Harte and Ms. Horgan, as illustrated by the averments recorded in the preceding paragraph, are just one example of the level of factual controversy which emerges from the affidavits filed in relation to both applications. There is a myriad of factual disputes, not only in relation to what occurred in November and December 2012, but also in relation to previous matters. A number of examples will suffice to illustrate the range and depth of the factual conflicts and alleged conflicts of interest. First, Ms. Horgan has alleged that Mr. Haydon, who was not joined as a defendant in the Horgan Proceedings because he had resigned before those proceedings were initiated, had a conflict of interest in relation to the proposed acquisition of pharmacies from the Receiver of the Walsh Group. Secondly, Ms. Horgan has disputed that she gave her consensus to an amendment to the Articles of Association of the Company to the extent that they were amended in 2012 by the Company's then solicitors, O'Rourke Reid. Thirdly, Mr. Harte alleged that Ms. Horgan had "no entitlement" to instruct Peter Nugent & Co., the solicitors who are on record for the Company in these proceedings. This factor is given as the explanation by the Harte Parties for the joinder of the Company as a defendant in the Harte Proceedings, it having been averred by Mr. Harte in his grounding affidavit that the Company was joined as a defendant in the proceedings solely for the purpose of ensuring that the Company is bound by orders made by the Court.

Caveat

7. As frequently occurs, it is necessary to remind the litigants in these proceedings of the function of the Court on an application for interlocutory injunctive relief and to quote the following passage from the speech of Lord Diplock in *American Cyanamid v. Ethicon* [1975] 1 AC 396 (at p. 407):

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

That the hearing of these applications for interlocutory injunctions ran to a fifth day, of itself, points to the factual difficulties which the large volume of affidavits which were filed on the applications exposed and to the difficult issues of law which the parties sought to have the Court address.

8. The passage from Lord Diplock's speech is quoted not merely as a reminder to the litigants but as a reminder to the Court of the caution it must exercise later in addressing what the evidence shows as to the manner in which Ms. Sweetnam claims that she has acquired and is now the legal and beneficial owner of the twenty five shares in the Company originally owned by Mr. Harte and the very difficult legal issues to which the evidence gives rise. However, before addressing those issues, I propose setting out the relief claimed on each application.

Interlocutory application in the Harte Proceedings

9. The plenary summons in the Harte Proceedings issued on 10th December, 2012. Apart from declaratory and injunctive reliefs, in the general endorsement of claim the plaintiffs, the Harte Parties, claim damages for breach of fiduciary duties, breach of contract and unlawful interference with the plaintiffs' economic interests. The declaratory and injunctive reliefs are directed to:-

> (a) alleged invalidity of a notice dated the 6th December, 2012, purporting to convene an EGM of the Company, for the purpose, *inter alia*, of passing a resolution to remove Mr. Harte as director;
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> (b) alleged invalidity of the "purported transfer" on the 26th November, 2012, of Mr. Harte's shareholding in the company to Ms. Sweetnam; and
>
> (c) in broad terms, Ms. Horgan's alleged breach of fiduciary duty.

10. The notice of motion was issued on the same day, 10th December, 2012, and in it the plaintiffs, the Harte Parties, sought on an interlocutory basis orders in the following terms which are still of relevance:–

> (a) restraining the defendants from removing Mr. Harte as a director of the Company;
>
> (b) restraining the defendants from impeding Mr. Harte in the performance and discharge of his duties as a director of the Company; and

(c) restraining the defendants from giving effect to the resolution of 26th November, 2012 purporting to transfer Mr. Harte's shareholding in the Company to Ms. Sweetnam and, if necessary, restraining the defendants from registering Ms. Sweetnam as a shareholder in the Company.

Interlocutory application in the Horgan Proceedings

11. The plenary summons in the Horgan Proceedings was issued on the 13th day of December, 2012. One of the reliefs which is claimed on the general endorsement of claim is a declaration that the previous Memorandum and Articles of Association of the Company is the correct and extant version, subject to the sole addition of amendments necessary to give effect to a share redemption scheme assented to by all of the members of the Company in 2012. A consequential order pursuant to s. 122 of the Companies Act 1963 (the Act of 1963) correcting the "Register of Companies" by the removal of the amended Memorandum and Articles of Association and the restoration of the previous Memorandum and Articles, with the addition outlined, is also sought, which, insofar as s. 122, which governs the rectification of the register of Members which the Company is obliged to maintain, is invoked is misconceived. The plaintiffs, the Horgan Parties, also seek, as against Mr. Harte, damages for negligence and breach of duty, including breach of fiduciary duty, and as against the Harte Parties, damages for intentional interference with economic relations.

12. In their notice of motion, which issued on 13th December, 2012, the plaintiffs in the Horgan Proceedings, the Horgan Parties, sought orders pending the trial of the action in the following terms:

(a) restraining Mr. Harte from holding himself out as a shareholder of the Company;

(b) restraining Mr. Harte from interfering with the management of the Company or any of its subsidiaries;

(c) restraining Mr. Harte from holding himself out as a director of the Company; and

(d) restraining Ancorde from invoking or relying upon Clauses 10, 18, 28(e) and 28(h) of the amended Articles of Association of the Company filed in the CRO in August, 2012.

Evidence as to change of ownership of Mr. Harte's shareholding

13. It is common case that Mr. Harte borrowed €2m under the Loan Agreement from the Sweetnams on the security of his shares in the Company in April 2009. As is recorded earlier, the Loan Agreement, which was signed by the three parties, was dated 6th April, 2009. The terms of repayment were set out in Clause 5, which was headed "Repayment and Prepayment" and contained the following provisions, the meaning of which is clearer if read in the following order:

(a) No demand for repayment could be made prior to the third anniversary of the date of the Loan Agreement unless an "Event of Default", as defined, had occurred (Clause 5.2). The happening of an "Event of Default", as outlined in Clause 9, followed, in every situation, "receipt of notice from the Lender" of either default in payment of any amount on its due date or in performing or observing the terms of the Loan Agreement.

(b) Mr. Harte might at any time repay the loan in whole or in part (Clause 5.3).

(c) The loan should be repayable on demand at any time after the third anniversary of the date of the Loan Agreement (Clause 5.1).

(d) Mr. Harte should repay 5% of the loan outstanding at the date of the Loan Agreement annually up to the date on which the loan would be repayable, in quarterly instalments in arrears of €25,000 each, starting on the 30th June, 2006 (Clause 5.4).

Only three payments of €25,000 each were made by Mr. Harte prior to the third anniversary of the date of the Loan Agreement, that is to say, 6th April, 2012.

14. The Loan Agreement contained specific provisions in relation to the giving of notice, or "other communication" thereunder, which obviously applied to a demand under Clause 5. A notice was to be in writing and to be given by hand or by prepaid post. Clause 11.2 provided that every notice or other communication should be deemed to have been received by the other party, if delivered by hand, on delivery and, if sent by prepaid post, "48 hours after its posting".

15. As has been recorded, the Mortgage between Mr. Harte, as mortgagor, and the Sweetnams, as mortgagees, was also executed on 6th April, 2009, and it was executed pursuant to the security requirement (Clause 10) of the Loan Agreement. The security over "the Shares" was created by Clause 3 of the Mortgage, "the Shares" having been defined earlier as "29 ordinary shares of €1 each". In fact, Mr. Harte was the sole owner of only twenty five shares, although in 2009 he co-owned with Ms. Horgan and Ancorde another thirteen ordinary shares, which were the subject of the share redemption referred to earlier, in respect of which Ms. Sweetnam, as surviving mortgagee, executed a deed of discharge in May 2012. In Clause 3, Mr. Harte –

(a) mortgaged and charged "by way of first fixed charge" the shares;

(b) mortgaged and charged and agreed to mortgage and charge, inter alia, all dividends, bonuses and other accretions to the shares; and

(c) covenanted that immediately upon the execution of the Mortgage he would deposit with the Sweetnams –

(i) undated blank transfers, or such other documents as might be necessary to transfer the title to the shares, duly executed by him, "blank" obviously indicating that the transferee or transferees would not be named in the transfer, and

(ii) any other documents relating to the shares that they should reasonably require, presumably, meaning share certificates and such like.

There was an express statement that the security created should be "an equitable mortgage" and there followed a proviso that no transfer of legal title to the shares or any part thereof would be made prior to the security created by the Mortgage becoming enforceable. The foregoing security was created to secure the "Secured Obligations", which expression was defined as meaning all obligations of Mr. Harte, as mortgagor, to the Sweetnams, as mortgagees, under the Loan Agreement. The covenant to pay (Clause 2) was consistent with Clause 3, in that Mr. Harte unconditionally and irrevocably covenanted that he would on demand by the Sweetnams "discharge and perform the Secured Obligations".

16. The Mortgage contained provisions in relation to the enforcement of the security thereby created including a power of sale and power to appoint a receiver (Clauses 9 and 10). However, in my view, those provisions are of no direct materiality to the issues on either interlocutory application, because, as the course of events outlined in this judgment indicates, neither the power of sale nor the power to appoint a receiver was invoked by Ms. Sweetnam at the relevant time, that is to say, in November 2012. While those provisions may be material in construing the Mortgage as a whole, I consider that it is not necessary to consider them in detail for present purposes.

17. In Clause 8 of the Mortgage, there was a covenant for further assurance. In Clause 8.1 Mr. Harte convented, *inter alia* as follows:

> ". . . forthwith upon demand to sign, seal, deliver and complete all transfers, renunciations, mandates, assignments, deeds, proxy forms or other documents as the Mortgagees may (reasonably) require to perfect their title to the Shares, to vest the Shares in the Mortgagees (or their nominees) to exercise or enable their 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 Deed."

Further, Clause 12 of the Mortgage, which was headed "Power of Attorney", provided as follows:

> "For the purpose of further securing the interest of the Mortgagees in the Security Assets and the performance of the obligations of the Mortgagor under this Deed, the Mortgagor hereby irrevocably and by way of security appoints the Mortgagees jointly and severally to be his attorney (with full power to appoint substitutes and to sub-delegate), on his behalf and in his name or otherwise, at any time and from time to time, to sign, seal, deliver and complete all transfers, renunciations, proxies, mandates, assignments, deeds and documents to give valid receipts and discharges, generally to file any claims or to take any action or institute any proceedings which may seem necessary or advisable to the Mortgagees for the purpose of putting into effect the intent of this Deed and to do all acts and things which the Mortgagees may, in their absolute discretion, consider to be necessary or expedient for enabling or assisting the Mortgagees to exercise any of their powers, rights or discretions hereunder or conferred by law or to do anything which the Mortgagor is obliged to do under this Deed. The Mortgagor shall ratify and confirm all transactions entered into, documents executed and acts and things done by or purported to be done by the Mortgagees by virtue of any power of attorney given by this Clause 12."

It is to be noted that, while Ms. Sweetnam did invoke the power of attorney at the meeting of the 26th November, 2012 referred to later, the stock transfer form under which Ms. Sweetnam now claims to be the owner of Mr. Harte's shareholding was not executed pursuant to the power of attorney.

18. The requirement in relation to giving notice contained in the Mortgage differed from that contained in the Loan Agreement, in that it was provided in the relevant clause (Clause 15.10) that any notice or other communication to be given under or for the purposes of the Mortgage should be in writing and treated as properly served or given, if hand delivered or sent by registered post. The Court's attention was drawn by counsel for the Horgan Parties to Clause 4.3 of the Mortgage, which provided that neither the obligations of the Mortgagor nor the rights, powers and remedies conferred on the Mortgagees by law should be discharged, impaired or otherwise affected by, *inter alia*, "the making or absence of any demand on the Mortgagor, or any other person for payment". Notwithstanding the caveat which the court has issued to itself earlier, it has to be observed that, when read in context, that provision is unlikely to have absolved the Sweetnams, as mortgagees, from any requirement to give notice as a precondition to exercising a right under the Mortgage.

19. The transaction was further complicated by the execution by the parties to the Loan Agreement and to the Mortgage of a so-called "Put and Call Option" on 6th April, 2009. There were three options provided for in that Deed. In summary, the rights created by the Put and Call Option were as follows:

> (a) The first option was a call option exercisable by the Sweetnams in relation to the acquisition of Mr. Harte's shares for €2m, which was exercisable within the period from 6th May, 2012 to 5th July, 2012, subject to the second option and the third option not having been exercised.
>
> (b) The second option was also in the nature of a call option, under which Mr. Harte, on its exercise during the same period as the first option was exercisable, at a price (the Buy Out Price) set out in Schedule 1 thereto, could "discharge any entitlement" of the Sweetnams to acquire the shares under the first option.
>
> (c) The third option was a put option whereby the Sweetnams could require Mr. Harte to pay the Buy Out Price "to discharge any entitlement of the Sweetnams to acquire" the shares under the first option, which was conditional on the first option and the second option not having been exercised and was exercisable at latest by 5th September, 2012.

It was provided that the first option should cease to be exercisable in the event of the Sweetnams obtaining full repayment of the loan under the Loan Agreement, or enforcing their security, whereupon the second option and the third option would become exercisable immediately and should cease to be exercisable within three months from such date. There was an express provision that Mr. Harte should be free to dispose of the shares to a third party at any time and any payment of the Buy Out Price should be discharged from the sale proceeds.

20. It is unnecessary for present purposes to outline the provisions in the Put and Call Option in relation to the Buy Out Price. The fact is that none of the options was exercised within the periods specified and Ms. Sweetnam's position is that neither the first option nor the second option is exercisable any longer and the third option is only exercisable by her. The significance attached to the Put and Call option seems to be that it may be of assistance in interpreting the Loan Agreement and the Mortgage. Whether that is correct or not, is for another day.

21. Ronan Daly Jermyn, Solicitors, acted for Mr. Harte in his dealings with the Sweetnams in April 2009 and Babbington Clarke and Mooney, Solicitors, acted for the Sweetnams. In his second affidavit sworn on 14th January, 2013 in the Harte Proceedings, Paudie

O'Mahony, a solicitor in Babbington Clarke and Mooney, has averred that by September 2010 his clients had not obtained the share transfer executed by Mr. Harte or his share certificate in accordance with the agreement in April 2009 and he pursued the matter with Ronan Daly Jermyn. Towards the end of September 2010 he received the share certificate which certified that Mr. Harte was the owner of twenty five fully paid ordinary shares of €1.27 each in the Company. He also received a stock transfer form which was signed by Mr. Harte, but undated. It referred to twenty five shares and the consideration was expressed to be €1. The transferees were named as "Arthur & Colette (sic) Sweetnam". In other words, it was not a "blank" transfer, as envisaged in Clause 3 of the mortgage. Why that occurred is not a question which is required to be, or can be, determined on these applications.

22. In an earlier affidavit sworn on 8th January, 2013, Mr. O'Mahony had exhibited a letter of 15th November, 2012, which he had written on behalf of Ms. Sweetnam, demanding, in accordance with Clause 5.1 of the Loan Agreement, repayment of the loan which had become payable on demand anytime after the third anniversary of the Loan Agreement. He also proved postage of the letter by pre-paid ordinary post to Mr. Harte at 5.20pm on 15th November, 2012, at the address of Mr. Harte given in the Loan Agreement and also in the Mortgage, notwithstanding the obvious mistake in Clause 15.10 thereof in which the Sweetnam's address was put opposite Mr. Harte's name and vice versa. Mr. Harte's evidence was that he did not receive that letter.

23. Mr. O'Mahony's evidence, in his second affidavit, was that, as no reply to the letter of 15th November, 2012 had been received by 23rd November, 2012, Ms. Sweetnam instructed him on that date to have the stock transfer form stamped with the appropriate stamp duty and to lodge it with the secretary of the Company for registration of the ownership of the shares. Mr. O'Mahony averred that he inserted the date of 16th November, 2012 in the stock transfer form, being the date following the issue of the letter of demand by him. His evidence was that he delivered the stamped stock transfer form to Ms. Horgan, as the secretary of the Company, on 23rd November, 2012 together with the share certificate and Ms. Horgan acknowledged receipt on that day. The stock transfer form, as exhibited by Ms. Horgan in her grounding affidavit in the Horgan Proceedings, demonstrates that the only difference between the blank stock transfer form signed by Mr. Harte and the form presented to the Revenue Commissioners for stamping was that the date 16th November, 2012 had been inserted. The Stamp Certificate, which the Revenue Commissioners issued on 23rd November, 2012, gave the date of execution of the instrument as 16th November, 2012 and set out the consideration as €400,000, although the consideration expressed in the form itself is €1. The stamp duty paid was €4,000. Ms. Horgan also exhibited a folio from the register of members of the Company which showed Ms. Sweetnam as the owner of twenty five ordinary shares on foot of a transfer as of 26th November, 2012. In her third affidavit sworn on 9th January, 2013, Ms. Horgan has averred that the status quo, as reflected in the CRO and in the share register of the Company, is that Ms. Sweetnam is both a shareholder and a director. What emerges from the evidence is that the original register of members of the Company is missing and that, in order to register Ms. Sweetnam, as shareholder, Ms. Horgan had to reconstitute the register.

Articles of Association

24 On the basis of the reliefs sought by the Horgan Parties on their interlocutory application in relation to certain clauses of the new Articles of Association filed in the CRO in August, 2012, the clauses which Ms. Horgan submits should not be in the new Articles and their import are as follows:

(a) Regulation 10 which provides:

> "No share in the capital of the Company may be transferred without the approval of the directors who may, in their absolute discretion and without assigning any reason, decline to register any transfer of any share, whether or not it is a fully paid share."
>
> As counsel for Mr. Harte pointed out, there was a provision in the old articles (Regulation 5) which, in substance, was the same as Regulation 10.

(b) Regulation 18, which provides that no director shall be required to hold a share qualification but each director shall nevertheless be entitled to receive notice of and to attend and speak at every general meeting of the Company.

(c) Two paragraphs in Regulation 28, which deals with disqualification of directors and provides that the office of director shall be vacated *ipso facto* –

> (i) if the director is requested in writing by all his co-directors to resign (paragraph (e)), and
>
> (ii) if the director is in full-time employment of the Company, on termination of such employment, unless the directors otherwise determine (paragraph (h)).

The factual basis on which it is claimed that Ms. Sweetnam is a member of the Company

25. A meeting of the directors of the Company took place on 26th November, 2012. According to Ms. Horgan's account of what happened, both she and Mr. Harte were present, Mr. Harte claiming to be the chairman. Ms. Horgan informed Mr. Harte that she had received, as company secretary, a duly executed stock transfer form in favour of Ms. Sweetnam, that it appeared to be in order, and that she proposed that, as directors, they both resolve that Ms. Sweetnam be entered as a member on the register of members of the Company. When Ms. Horgan did not procure the consensus of Mr. Harte on that proposal, she informed him that Ms. Sweetnam was in the office and she proposed bringing her into the meeting "to exercise the vote in respect of her name being registered in the Company Register", under the power of attorney given to her by Mr. Harte. Ms. Sweetnam was brought in to the meeting and she stated that she did want her name registered as a member of the Company under the power of attorney. Ms. Horgan then confirmed the passing of the resolution. It is quite clear from Ms. Horgan's affidavit that the power of attorney which was being relied on was the power of attorney contained in the Mortgage, which I have quoted in full earlier. The Horgan Parties' position is that, as a result of the meeting of 26th November, 2012, Ms. Sweetnam is now a member of the Company, as the owner of the twenty five shares originally owned by Mr. Harte. The Harte Parties' position is that the "purported transfer" of Mr. Harte's shareholding is invalid and of no lawful force or effect. That proposition was advanced on the basis of a range of legal arguments which were premised on factual matters which I have already outlined, in broad terms, the manner in which Ms. Sweetnam exercised her powers as mortgagee, which will be considered later. However, two further factual grounds of alleged invalidity emerged on the affidavit evidence.

26. The first was the contention of the Harte Parties that, dating back to at least December 2008, there was an oral agreement in place between Mr. Harte, Ms. Horgan and Ancorde, as shareholders, under which it had been agreed that, if a shareholder wished to sell his, her or its shareholding in the Company, the other shareholders had pre-emption rights. Ms. Horgan has vigorously disputed the existence of any such agreement or pre-emption rights. That factual conflict cannot be resolved on this application.

27. The second was that by order of the High Court (O'Neill J.) made on 23rd May, 2011 in proceedings (Record No. 2009/489S) entitled Conor Phelan and Denise Phelan, as plaintiffs, and Mr. Harte and Richard Fitzgerald, as defendants, it was ordered that Mr. Harte's shares in, *inter alia*, the Company stand charged with payment to Conor Phelan and Denise Phelan of the sum of €1m, being the sum for which Conor Phelan and Denise Phelan have recovered judgment against Mr. Harte and Richard Fitzgerald jointly and severally, together with costs and interest. That the existence of the charging order impacted on Ms. Sweetnam's entitlement to enforce her security was disputed by the Horgan Parties. It would be wholly inappropriate for this Court to express any view on the issue of the priority as between the Sweetnams' equitable charge created by the Mortgage over Mr. Harte's shares, on the one hand, and the charging order in favour of Conor Phelan and Denise Phelan made by O'Neill J., on the other hand, for the obvious reason that Conor Phelan and Denise Phelan are not before this Court in these proceedings. Accordingly, neither that issue, nor any advice which the Company obtained from the solicitors in relation to it, can have any bearing on the court's determination of the issues before it.

The factual basis on which it is claimed that Ms. Sweetnam is a director of the Company.
28. On 26th November, 2012 Ms. Horgan, as secretary of the Company, gave notice of an extraordinary general meeting (EGM) of the Company to be held on 3rd December, 2012 to consider a number of resolutions, including the following:

> (a) that the members appoint Mr. Ryan as a director of the Company, which had been proposed in a notice to convene an EGM for 26th November, 2012 by Mr. Harte, which meeting did not take place, because Mr. Harte conceded that sufficient notice of the meeting had not been given;
>
> (b) that the members appoint Ms. Sweetnam as a director of the Company;
>
> (c) that Haydon Chartered Accountants be removed as the Company's auditors; and
>
> (d) that the registered office of the Company be changed, it having previously been the offices of Haydon Chartered Accountants in Dublin.

Mr. Harte's position is that he went along with the holding of the EGM on 3rd December, 2012, notwithstanding that the notice given was deficient.

29. At the EGM on the 3rd December, 2012, Ancorde was represented at the meeting by a proxy, John Carroll, a solicitor in the firm of Crowley Millar, the solicitors on record for both Ancorde and Mr. Harte, the Harte Parties, in both sets of proceedings. Ms. Horgan and Ms. Sweetnam were also in attendance. Mr. Harte also turned up. However, Ms. Horgan did not allow Mr. Harte to attend, although Mr. Carroll pointed out to Ms. Horgan that to refuse to allow him attend would be in breach of Article 18 of the Company's new Articles of Association filed in the CRO in August 2012.

30. Ms. Horgan's account of what occurred after the EGM had commenced was that she was appointed as chairman by a majority, that is to say, by herself and Ms. Sweetnam. The resolution to appoint Mr. Ryan as a director was defeated. The second resolution to appoint Ms. Sweetnam as a director was passed. It was agreed that the meeting would not deal with the third resolution concerning the removal of the auditors, although Ms. Horgan's position is that the letter of resignation dated 30th November, 2012 from Haydon Chartered Accountants was not received by the Company until 6th December, 2012. The resolution to change the registered office was passed by a majority. Mr. Carroll voted against all resolutions save the resolution in respect of the appointment of Mr. Ryan. Ms. Horgan's account is that Mr. Carroll then stated that he was objecting to the validity of the meeting on the basis that Mr. Harte was a shareholder and that Ms. Sweetnam did not have an entitlement to be present. Mr. Harte then entered the boardroom, having been absent when the resolutions referred to above were put to the meeting. Ms. Horgan's account is that he entered "for the purported second EGM as suggested by Mr. Carroll". Mr. Harte's account of what occurred then was that he proceeded, as chairman, with the "lawful" EGM of the Company in the presence of Mr. Carroll. Ms. Horgan refused to attend. It was resolved at that meeting that Mr. Ryan should be appointed a director of the Company.

31. In his grounding affidavit in the interlocutory application in the Harte Proceedings Mr. Harte has averred that on 6th December, 2012 a notice was issued by Ms. Horgan purporting to be a notice on behalf of the Company giving notice of an EGM of the Company's shareholders scheduled for 14th December, 2012, which stated that the business to be conducted was the removal by ordinary resolution of Mr. Harte as a director and the removal of the Company's auditors. That meeting did not take place, because both the Harte Proceedings and the Horgan Proceedings had been initiated by 14th December, 2012. However, the position which was adopted by Ms. Horgan in the affidavit grounding the application in the Horgan Proceedings was that Mr. Harte is no longer a shareholder and can no longer control the board of directors of the Company. She averred that all that would be required at an EGM would be a majority vote in favour of a motion to remove Mr. Harte as director and her understanding was that Ms. Sweetnam would support the motion, so that Mr. Harte would be removed as a director when the EGM would take place.

32. A CRO search put before the Court discloses that a Form B10 recording the appointment of Ms. Sweetnam as a director of the Company was registered in the CRO on 5th December, 2012.

General principles of law applicable to interlocutory applications
33. As has already been alluded to, the Harte Application and the Horgan Application were heard over a period of five days. The range of factual conflicts which was explored during the hearing and the range and degree of legal argument which the Court has had to address inevitably leads to the conclusion that the real function of the courts on the hearing of an application for interlocutory injunctive relief effectively has been lost sight of in the process. Therefore, it is apposite to revert to first principles.

34. In *Campus Oil Ltd. v. Minister for Industry & Energy (No. 2)* [1983] I.R. 88, O'Higgins C.J. explained the function of the courts (at p. 105and p. 106):

> "Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *statu quo* until the hearing. The application is made on motion supported by affidavit . . . In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the court must exercise its discretion (to grant interlocutory relief) with due regard to certain well-established principles. Not only will the court have regard to what is complained of and whether damages would be an appropriate remedy but it will consider what inconvenience, loss and damage might be caused to the other party, and will enquire whether the applicant has shown that the balance of convenience is in his favour."

Later, O'Higgins C.J. stated (at p. 106):

> "As I have already mentioned, interlocutory relief is intended to keep matters in *statu quo* until the trial, and to do no more. No rights are determined nor are issues decided."

That, of course, reflects what is stated in the passage from the speech of Lord Diplock in *American Cyanamid v. Ethicon* quoted earlier.

35. While there was consensus between the parties as to the criteria which the court has to apply in determining whether to grant injunctive relief, the first criterion being, as articulated by O'Higgins C.J. in the *Campus Oil* judgment (at p. 107), "whether a fair bona fide question has been raised by the person seeking the relief", in my view, there was a misunderstanding on the part of the Horgan Parties as to what the preservation of the *status quo* entails. It entails maintaining the situation which prevailed before the acts complained of by the parties seeking interlocutory injunctive relief, which it is alleged by that party are wrongful, commenced.

36. It was submitted on behalf of the Horgan Parties that the Court can, and ought to, take into consideration the relevant strength of the respective parties' position in deciding to grant or refuse the injunctive relief sought. In support of the argument that the court is entitled to take into consideration the relevant strength of the parties' cases at the interlocutory hearing, counsel for the Horgan Parties referred to two English decisions: the decision of the High Court, Chancery Division (Laddie J.) in *Series 5 Software v. Clarke* [1996] 1 ALL ER 853, and the decision of the House of Lords in *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.* [2009] 1 WLR 1405, and, in particular, the speech of Lord Hoffmann. The jurisprudence in this jurisdiction by which this Court is bound makes it clear that, in general, it is not open to the Court to have regard to the relevant strength of the parties' cases on the hearing of an interlocutory injunction. In *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151, Finlay C.J., having stated that he was satisfied that there was a fair question to be tried on the issues raised between the parties, continued (at p. 157):

> "Having regard to the decision of this Court in *Campus Oil v. The Minister for Energy (No. 2)* . . . in particular to the judgment of O'Higgins C.J. in that case, I am satisfied that once a conclusion is reached that the plaintiff seeking an interlocutory injunction has raised a fair question to be tried at the hearing of the action in which, if he succeeded, he would be entitled to a permanent injunction that the Court should not express any view on the strength of the contending submissions leading to the raising of such a fair and bona fide question, but should proceed to consider the other matters which then arise in regard to the granting of an interlocutory injunction."

37. More recently, in analysing the criteria for the grant of interlocutory injunctions, in *AIB plc. & Ors. v. Diamond & Ors.* [2011] IEHC 505, Clarke J. considered a number of authorities from the United Kingdom, which had been noted by Kelly J. in *Shelbourne Hotel Ltd. v. Torriam Hotel Operating Co. Ltd.* [2010] 2 I.R. 52, in which an approach, which is based on assessing where the least risk of injustice would lie in determining whether to grant or refuse an application for an interlocutory injunction, was suggested. In a passage from that judgment relied on by the Horgan Parties, Clarke J. stated (at para. 5.7):

> "Finally, the balance of convenience is, perhaps, the factor that is most closely and directly associated with the risk of injustice. Where both plaintiff and defendant have established arguable cases for respectively the claim and the defence and where neither could be adequately compensated in damages, the court turns to the balance of convenience. In substance, the court has to assess how serious the consequences for the respective parties would be in the event that an injunction is granted which ultimately, again with the benefit of hindsight after a trial, should not have been granted or is refused where ultimately, with the benefit of hindsight after a trial, it is determined that it should have been granted. In both cases the parties will, on the hypothesis that leads to a consideration of the balance of convenience, be at risk of suffering consequences for which damages would not be an adequate remedy. There will, therefore, either way, be irremediable consequences of either the granting or refusal of the interlocutory order sought. The court has to form a view as to which of those consequences, on balance, would be the lesser."

38. Later, in *AIB plc v. Diamond*, Clarke J. specifically addressed the question of whether the court should have regard to the weight of the case on either side in determining whether to grant an interlocutory injunction and stated (at para. 5.14) that while that approach might have "a superficial attraction", the counter argument seemed to be much more weighty. Having outlined the practical disadvantages, if the court had to assess the weight of the case on either side, which could involve significant additional evidence being filed and the necessity for much more detailed legal submissions on the merits of the case, Clarke J. stated (at para. 5.15):

> "The superficial argument that the least risk of injustice might be ascertained by at least having some regard to the weight of the case is, in my view, not correct. That does not mean that there may not be particular categories of cases, such as the mandatory injunction jurisdiction to which I have already referred, where the court may not require a higher level of likelihood of a plaintiff succeeding before being prepared to take the risk of injustice inherent in particular types of orders. However, even in such cases there is a significant potential downside in requiring a detailed assessment of disputed facts as part of any attempt to determine the weight of the respective cases."

I respectfully agree with the views expressed by Clarke J. One aspect of the "potential downside" is illustrated by this case: the fact that it has taken this Court so long to deliver this judgment, which has been primarily attributable to the volume of work involved.

Application of principles of law: identifying the issues.

39. There is a certain overlap between the interlocutory reliefs sought in the Harte Proceedings and the interlocutory reliefs sought in the Horgan Proceedings. Therefore, in order to identify the issues which arise on the interlocutory applications, as distinct from in the substantive proceedings, as evidenced by the endorsements of claim on the plenary summonses, it is necessary to pare down the interlocutory reliefs. The result is as follows:

> (a) The reliefs sought by the Harte Parties restraining the removal of Mr. Harte as a director of the Company and the impeding of Mr. Harte in the performance and discharge of his duties as a director of the Company, in broad terms, give rise to the same issues as the reliefs sought by the Horgan Parties restraining Mr. Harte from interfering with the management of the company or its subsidiaries and from holding himself out as a director of the Company. I will refer to the questions which arise in relation to the underlying dispute as to those reliefs as the directorship issue.
>
> (b) The reliefs sought by the Harte Parties restraining the defendants from giving effect to the resolution of 26th November, 2012, approving the transfer of Mr. Harte's shareholding in the Company to Ms. Sweetnam and its registration, overlap with the relief sought by the Horgan Parties restraining Mr. Harte from holding himself out as a shareholder of the Company. I will refer to the questions which arise in relation to the underlying dispute as to those reliefs as the shareholder issue.
>
> (c) That leaves the reliefs sought by the Horgan Parties seeking to restrain Ancorde from invoking or relying on Clauses

10, 18, 28(e) and 28(h) of the amended Articles of Association of the Company. Clause 10 is entwined with the shareholder issue and, in any event, on a plain reading of it, in substance, it replicates Clause 5 of the original Articles of Association. Clause 18, which absolves a director from being required to hold a share qualification is entwined with the directorship issue and is a matter more properly addressed in the substantive proceedings. It is convenient to consider the issues raised in relation to Clauses 28(e) and 28(h) separately and in full at this juncture.

Determination in relation to Clause 28(e) and 28(h) of the new Articles of Association

40. In fact, it was on Clause 28(e) and Clause 28(h), the contents of which have been set out earlier, that counsel for the Horgan Parties focussed attention submitting that there were no equivalent provisions in the original Articles of Association and that Ms. Horgan had not agreed to those changes. One of the concerns expressed on behalf of Ms. Horgan is that those new provisions could be utilised to oust her as a director of the Company. The issue as to whether Ms. Horgan agreed to and is bound by those new provisions, which were introduced in the Articles of Association filed in August 2012, is a separate and distinct issue from the other issues on the applications for interlocutory relief before the court. As a standalone issue, in my view, the Horgan Parties have established that there is a *bona fide* question to be tried on the issue. Moreover, if it transpires that Ms. Horgan establishes that, as a matter of fact and law, she did not agree and is not bound by those changes to the constitution of the Company, clearly, for the reasons which will be elaborated on later, damages would not be an adequate remedy. In the circumstances, I consider that it is appropriate to grant interlocutory relief restraining not just Ancorde, but also Mr. Harte as a shareholder and a director of the Company from invoking or relying on Clause 28(e) and Clause 28(h) of the amended Articles of Association of the Company filed in the CRO in August 2012.

Core underlay of the issues

41. There is consensus between the parties that the directorship issue flows from the shareholder issue and that the core issue on the applications relates to whether Ms. Sweetnam has acquired Mr. Harte's one-third shareholding in the Company. That is undoubtedly correct. Given the complexity of the factual situation as exposed in the affidavits filed on both applications, it is useful at this juncture to identify the activities which have directly given rise to both of those issues and, consequently, given rise to the applications for interlocutory relief which are before the court.

42. The chronology is as follows:

15th November 2012:	Notice invoking Clause 5.1 of the Loan Agreement issued by Ms. Sweetnam's solicitor to Mr. Harte by prepaid post at 5.20pm.
23rd November 2012:	Date of 16th November 2012 inserted in stock transfer form. Stamp Duty paid on stock transfer form and Revenue certificate obtained. Stock transfer form furnished to Ms. Horgan, as secretary of the Company, together with Mr. Harte's original share certificate.
26th November 2012:	Meeting of directors of the Company at which Ms. Sweetnam, in reliance on the power of attorney contained in the Mortgage as giving her authority to act on behalf of Mr. Harte, as director, together with Ms. Horgan approved the transfer of Mr. Harte's shareholding to Ms. Sweetnam and her registration as a member of the Company. Notice of EGM of the Company to be held on 3rd December 2012 given by Ms. Horgan, as secretary of the Company.
3rd December 2012:	First EGM attended by Ms. Horgan, Ms. Sweetnam and Mr. Carroll, as proxy for Ancorde: resolution to appoint Mr. Ryan as director rejected; resolution to appoint Ms. Sweetnam as director passed. Second EGM attended by Mr. Harte and Mr. Carroll: resolution to appoint Mr. Ryan as director passed.
6th December 2012:	Notice issued by Ms. Horgan of an EGM of the Company to be held on 14th December 2012 to consider a resolution removing Mr. Harte as director.
10th December 2012:	Plenary summons in the Harte Proceedings issued.

43. The significance of that chronology is that it demonstrates that the actions which gave rise to the allegations of wrongdoing on each side in respect of which each side seeks interlocutory injunctive relief in relation to the directorship issue and the shareholder issue commenced on 15th November 2012. In particular, as regards the wrongs alleged by the Harte Parties against the Horgan Parties, the point at which one identifies the *status quo* is either -

(a) 16th November, 2012, the date inserted, for whatever reason, in the stock transfer form, or

(b) 23rd November, 2012, the date on which that date was inserted in the stock transfer form.

The same considerations apply whichever is the relevant date.

Undertaking given to the Court on 13th December 2012
44. The application in the Harte Proceedings was first listed before the court (Gilligan J.) on 13th December, 2012. At that stage, the grounding affidavit of Mr. Harte sworn on 10th December, 2012, and the affidavit of Ms. Smith sworn on the same day were available, as was the replying affidavit sworn on 12th December, 2012, by Ms. Horgan. Counsel for the Harte Parties and counsel for the Horgan Parties were present. An order was made by consent adjourning the application to the following week for the purpose of fixing a date for hearing and it was so adjourned on an undertaking given to the court in the following terms:-

> "On the undertaking of the [Horgan parties] not to remove [Mr. Harte] as a director of the Company…and on the basis that no director's meeting shall take place in respect of [the Company] pending further Order of this Court.

45. The undertaking not to remove Mr. Harte as a director has remained in place. In the interim, both sides, sensibly, have reached accommodation as to dealing with important practical issues, such as the appointment of new auditors of the Company. The parties have submitted to case management to bring the substantive proceedings, which have been consolidated, to plenary hearing as soon as possible. The action is listed for hearing on the 15th July, 2013, and a judge has been specifically assigned to hear it.

Shareholder Issue
46. Subject to the qualification referred to later, the proponents on the shareholder issues are, primarily, Mr. Harte and Ms. Sweetnam. I say primarily because counsel for the Harte Parties has pointed to the fact that the names of both of the Sweetnams appear on the stock transfer form, suggesting that the estate of the late Arthur Sweetnam may have an interest in the shares the subject of the Loan Agreement and the Mortgage. There is no basis on which the Court can form a view as to whether that is so or not, but obviously, it is a factor which the legal advisers of Mr. Harte and Ms. Sweetnam should consider. The qualification is that, aside from any pre-emption rights which may exist, whether the transfer, if it is valid, is approved, as required by whichever version of the Articles of Association of the Company is applicable, is a matter for the validly appointed directors of the Company. It is only in respect of that element of the issue, the approval of the transfer and its registration in the registration of members, that parties with whom the main proponents are aligned, Ancorde in the case of Mr. Harte, and Ms. Horgan in the case of Ms. Sweetnam, have an interest and standing in relation to the shareholder issue. However, the Court heard only one voice from each side on the shareholder issue, which I will continue to refer to as the Harte Parties and the Horgan Parties.

47. Before considering the three main criteria to be applied in determining whether interlocutory relief should be granted in this case (whether there is a fair issue to be tried, whether damages are an adequate remedy, and where the balance of convenience lies), following on from the previous paragraph, it is important to point to potential conflict of interest within each party alliance. As has been emphasised, leaving aside any interest which the estate of Mr. Sweetnam may have, the question of the ownership of Mr. Harte's shareholding in consequence of the enforcement, or attempted enforcement, of the Mortgage is essentially a matter between Mr. Harte and Ms. Sweetnam. That question is part of a larger issue as to the respective rights and liabilities of Ms. Sweetnam and Mr. Harte under the three documents executed on 6th April, 2009, including how the ownership of Mr. Harte's shareholding on the enforcement of the security, if it occurred, impacts on Mr. Harte's personal liability for repayment of the monies due under the Loan Agreement. This, I fear, may be a case of, as the saying goes, the parties not "being able to see the wood for the trees", the wood being the totality of rights and obligations created by those three documents.

Fair issue to be tried?
48. Contrary to what was submitted on behalf of the Horgan Parties, the relief sought by the Harte Parties in relation to the core issue, that is to say, whether Mr. Harte's shareholding was validly transferred to Ms. Sweetnam and whether she was validly registered as a member of the Company, is not mandatory in character. As well as being formulated in a prohibitory manner, the orders sought are also prohibitory in character and substance. The Harte Parties' position is that the transfer was invalid and that Ms. Sweetnam's registration as a member of the Company is invalid. In essence, the relief sought by the Harte Parties are orders to restrain the Horgan Parties, pending the trial of the action, acting as if both actions were valid. Therefore, the test laid down by the Supreme Court in the *Campus Oil* case, whether a fair *bona fide* question has been raised by the party seeking the interlocutory injunctive relief, applies.

49. Counsel for the Harte Parties advanced the following bases for contending that the transfer of Mr. Harte's shareholding to Ms. Sweetnam was not validly effected and Ms. Sweetnam's registration as a member of the Company was consequently invalid:

> (a) that Ms. Sweetnam, as mortgagee, was not entitled to enforce the security created by the Mortgage over Mr. Harte's shareholding when she purported to do so, because due notice had not been given in accordance with the security documents requiring repayment of the monies due on the Loan Agreement and default by Mr. Harte when Ms. Sweetnam purported to enforce the security by transferring Mr. Harte's shareholding to herself;
>
> (b) that under the security documents, Ms. Sweetnam, as mortgagee, did not have power to transfer ownership of Mr. Harte's shareholding to herself, which, as she purported to do, was tantamount to foreclosure without court approval, as distinct from exercising the powers specified in the Mortgage, for example, the power of sale, if it had become enforceable, which, for the reasons set out at (a), it was contended it had not; and
>
> (c) that, as a matter of law, Ms. Sweetnam had no authority to exercise Mr. Harte's powers and duties as a director of the Company as she purported to do, wrongfully relying on the power of attorney, which could not have conferred such authority on her, in purporting to approve her registration as a member of the Company on 26th November, 2012.

50. A further basis advanced by the Harte Parties was identified by counsel for the Horgan Parties in the helpful written submissions which were furnished to the Court in the course of the hearing of the interlocutory applications, namely, that, notwithstanding that no pre-emption rights are provided for in whichever version of the Articles of Association is relevant and there was no shareholder's agreement in existence, Ancorde, by virtue of an oral agreement would have a right of pre-emption on the sale of Mr. Harte's shareholding, including on a sale if the security created by the Mortgage was properly enforced, which it was contended it was not. The existence of such pre-emption rights was raised in the affidavit evidence put before the court by the Harte Parties and in particular, it was specifically averred by Ms. Smith that the registration of Ms. Sweetnam as a member of the Company was in breach of a pre-emption agreement. The addition of that complexity to the already extremely complex factual and legal grounds for seeking interlocutory injunction relief would only be relevant, if a hypothesis, which the Harte Parties rejected, namely, that Ms. Sweetnam was entitled to transfer Mr. Harte's shareholding to herself was correct. While I appreciate that the issue may arise at the hearing of the action, in my view, it is sufficiently remote to justify the court in not expressing any view on either the contention of the Harte Parties that an oral agreement exists, which is contested by the Horgan Parties and is a contest which cannot be resolved on the affidavit evidence before the Court, or the response of the Horgan Parties that, if an oral agreement exists, which is denied, it would

be unenforceable by virtue of s. 2 of the Statute of Frauds (Ireland) 1695.

51. Similarly, I do not consider it necessary to express a view on another ground identified by counsel for the Horgan Parties in their written submissions as having been relied upon by the Harte Parties, namely, that the Put and Call Option agreement was an obstacle to the recognition and completion of the transfer of Mr. Harte's shareholding to Ms. Sweetnam. In replying to the submissions by counsel for the Horgan Parties, counsel for the Harte Parties acknowledged that the Put and Call Option has limited relevance, which I understand a mean to the broad issues in the substantive action. The Court is not required, on the hearing of the applications for interlocutory relief, to consider or express a view on the manner in which that document might be of relevance. Accordingly, I propose concentrating on the three bases outlined above in order to determine whether the first criterion has been met.

Service of notice on Mr. Harte adequate?
52. While I have expressed the view earlier that Clauses 9 and 10 of the Mortgage are not material, because neither the power of sale nor the power to appoint a receiver was invoked by Ms. Sweetnam at any time, Clause 9 may be material to the limited extent that it indicates when the security created by the Mortgage would become enforceable by providing as follows:-

> "When at any time after the monies hereby secured shall have become payable whether pursuant to Clause 2 hereof or otherwise and the Mortgagor shall have defaulted in the payment of any part thereof…the Mortgagees shall be entitled to put into force and exercise immediately as and when they may see fit any and every power possessed by the Mortgagees by virtue of this Deed…"

53. The nub of the submission made on behalf of the Harte Parties is that Ms. Sweetnam is relying on the letter dated 15th November, 2012 as the demand for repayment, that it was sent by prepaid ordinary post, not by registered post as was provided for in the Mortgage, and, in accordance with the provision of the Loan Agreement referred to earlier, it would be deemed to be received 48 hours after its posting, that is to say, 48 hours after 5.20pm on 15th November, 2012. However, the date which was inserted in the stock transfer form, 16th November, 2012, occurred before the demand was deemed to have been received, and, in any event, was never received by Mr. Harte. Although counsel for the Horgan Parties pointed to earlier events, for present purposes the focus must be on the letter of 15th November, 2012, the specific purpose of which was to demand repayment of the loan pursuant to Clause 5.1 of the Loan Agreement. Relying on Clause 9 of the Mortgage, it was submitted on behalf of Ms. Sweetnam that her entitlement to enforce the security arose on 15th November, 2012. However, if the letter of that date was a necessary prerequisite to the monies secured by the Mortgage becoming payable, then that clearly is not the case, because effective service on Mr. Harte would have been necessary. There is another feature, of course, in that, for whatever reason, the date which was inserted in stock transfer form was 16th November, 2012, although this was not done until 23rd November, 2012. Even if it were appropriate for the Court to do so, it would be utterly impossible to form a definitive view as to when, if at all, Ms. Sweetnam's powers as mortgagee had become enforceable. Accordingly, a question mark hangs over whether such powers had become enforceable. In the circumstances, the court has no option but to find that it is a question that requires to be resolved at the hearing of the substantive action, so there is a fair issue to be tried in relation to it.

Power of Ms. Sweetnam to transfer charged shares into her own name?
54. Counsel for the Harte Parties emphasised that the security created by the Mortgage was an equitable mortgage of Mr. Harte's shareholding which gave the Sweetnams no legal interest in the shares. The action of Ms. Sweetnam in attempting to acquire ownership of the shares by virtue of the stock transfer form was characterised as being an attempt at foreclosure without the approval of the court, which approval, it was submitted, was necessary insofar as the foreclosure remedy applied in this jurisdiction. It was submitted that what Ms. Sweetnam attempted to do was realise the security by vesting it in herself and that was something she had no power to do at law.

55. The reference to foreclosure and necessity of the leave of the court for it to be effective, in my view, may have distracted the parties from the real issue, which is the identification of the rights of Ms. Sweetnam, as mortgagee, under the Mortgage, bearing in mind that the Mortgage is an equitable mortgage of shares given as security for a loan on the terms set out in the Mortgage. While counsel for the Harte Parties referred to *Lingard's Bank Security Documents* (5th Ed.) at para. 11.1, which states that "a right of foreclosure (or in other words, to forfeit the asset charged) with the leave of the court" is one of the remedies which a security document over shares provides for, that is to say, in the United Kingdom, as is pointed out in Wylie on *Irish Land Law* (4th Ed.) at para. 13.13, foreclosure was never granted in practice in Ireland in modern times. Nonetheless, later (at para. 13.63) Wylie explains the remedy of foreclosure by stating:-

> "Foreclosure was a judicial proceeding by which the mortgagee sought to have the mortgagor's equitable right to redeem the property declared to be extinguished so that the mortgagee became the full owner of the property."

56. Wylie explains that when the principal money secured by the mortgage had become due, the mortgagee could bring foreclosure proceedings and the initial order was a decree *nisi*, which directed that accounts be taken to establish the amount due and whether any other encumbrances affected the land and which provided that unless (*nisi*) the mortgagor redeemed the mortgage by a date fixed by the court, usually three to six months hence, the order would become absolute and the mortgagor was then foreclosed, which meant that the equity of redemption was extinguished. It stands to reason, in my view, that the court's intervention should be necessary before a mortgagee could extinguish the equity of redemption, although it may be of no particular relevance for present purposes.

57. For completeness, it is to be noted that the court has been referred by counsel for the Horgan Parties to the commentary on equitable mortgage of shares contained in Donnelly on *The Law of Credit and Security* (at para. 17-69 *et seq*) and the commentary on the same topic in Courtney on *The Law of Companies* (3rd Ed.) at para. 9.036 *et seq*. Counsel for the Harte Parties agreed that those commentaries contain correct statement of the law.

58. As I have stated, the real issue is what power Ms. Sweetnam had under the Mortgage to transfer the shares and, in particular, how she might properly use the undated blank stock transfer form, or more correctly, the undated stock transfer form which was supposed to be executed in "blank" by Mr. Harte, and Mr. Harte's share certificate. It was submitted on behalf of the Harte Parties that the stock transfer form was provided by Mr. Harte as a "blank" transfer in accordance with the provisions of Clause 3.1(c) of the Mortgage in September 2010 and that Mr. Harte had averred that he executed the "blank" transfer pursuant to his contractual obligations. It was further submitted that the attempt to extend or seek to vary and make the security he furnished to the Sweetnams something which it is not, that is to say, something which entitles Ms. Sweetnam to beneficial ownership of the shares, is unjustified.

59. There is no doubt that a fair *bona fide* question has been raised by the Harte Parties as to whether Ms. Sweetnam had any authority under the Mortgage or any of the other security documents to transfer ownership of the shares on which the loan, the

subject of the Loan Agreement, is secured to herself or to treat the stock transfer form, on which the names of the Sweetnams appeared as in entitling her, in the events which happened, to legal and beneficial ownership of Mr. Harte's shareholding. That is a serious question which falls to be determined having regard to the provisions of the security documents, in particular, the provisions of the Mortgage, and the application of fundamental principles of law.

Whether Power of Attorney extended to the exercise of Mr. Harte's functions as director?
60. It was submitted on behalf of the Harte Parties that the power of attorney conferred on the Sweetnams, as mortgagees, in the Mortgage is not wide enough to cover the actions which Ms. Sweetnam purported to take on the 26th November, 2012, and that, even if it did, the power of attorney could not be used to exercise the discretion which is vested in Mr. Harte as a director of the Company. Counsel referred the Court to a passage from Palmer on *Company Law* (Palmer R. 123: November 2009) to the effect that the office of director is a personal responsibility and can only be discharged by the person holding that office, except to the extent that a company's Articles of Association otherwise make explicit provision. This is elaborated on in a footnote in Palmer, which states that, "[t]hus, the power to act as director cannot be delegated under a power of attorney", citing an Australian case – *Mancini v. Mancini* [1999] 17 A.C.L.C. 1570, which was a decision of the Supreme Court of New South Wales. Moreover, Counsel for the Harte Parties submitted that Ms. Sweetnam could not, pursuant to the power of attorney, have been appointed as an alternate director under Article 27 of the Articles of Association of the Company filed in August 2012, citing a more recent decision of the Supreme Court of New South Wales, in which the Mancini decision was followed: *Cheerine Group (International) Pty Limited v. Yeung* (4893/06, 2006 NSWSC 1047).

61. The response on behalf of the Horgan Parties was that the present case can be distinguished from the *Mancini* line of authority because, in this case, there was a specific power of attorney, the exercise of which ensured compliance with Mr. Harte's legal obligation, which was identified as that, as a transferor of shares, he is obliged to take the necessary steps to ensure that the transferee is registered, as a member of the Company, including by voting as necessary at the directors' meeting in favour of registration of the transfer. In this connection, counsel relied on a number of authorities including a decision of the High Court (Kenny J.) in *Lee & Company (Dublin) Limited v. Egan* (Unreported, 7th April, 1978), which was approved of by the Supreme Court in *Walls v. P.J. Walls Holdings Limited* [2008] I.R. 732.

62. It should, perhaps, be made clear that counsel for the Horgan Parties relied on the decision in *Lee & Company (Dublin) Limited v. Egan* and other authorities initially in support of their contention that Mr. Harte was not entitled to refuse to approve the transfer of shares when it was presented to the board of directors of the Company in the context of what was identified as a specific issue arising on the applications, namely, whether Mr. Harte was entitled to refuse to approve of registration of Ms. Sweetnam as a member of the Company pursuant to the stock transfer form which he had executed. It is undoubtedly the case that it was held in the *Lee* case that a transferor, who is a director, is obliged to vote in favour of the registration of the transferee as a member of the Company. However, reliance by the Horgan Parties on that authority is premised on the stock transfer form executed by Mr. Harte being a valid transfer of his shareholding, which ignores what, in my view, is the core issue, which is whether Ms. Sweetnam had power to treat the stock transfer form as transferring Mr. Harte's shareholding to her pursuant to the powers conferred on her as mortgagee under the Mortgage.

63. There is undoubtedly an issue as to the propriety of Ms. Sweetnam being invited into a board meeting of the Company by Ms. Horgan and, in reliance on the power of attorney contained in the Mortgage, participating in a decision which, under the original Articles of Association of the Company, was at the absolute discretion of the directors, on the basis that she was acting as attorney for Mr. Harte. However, it is a hypothetical issue, unless and until it is established that the stock transfer form, which was supposed to be "blank", executed by Mr. Harte in favour of the Sweetnams transferred Mr. Harte's beneficial, as well as legal, interest in his shareholding in the Company to Ms. Sweetnam, when it was dated and stamped in November 2012. Accordingly, it is not necessary, and it would not be appropriate, to consider the issue any further at this juncture.

Shareholder issue: conclusion on fair issue criterion
64. In the light of the foregoing analysis of the grounds on which the Harte Parties contend that Mr. Harte's shareholding in the Company has not been validly transferred to Ms. Sweetnam, I am satisfied that there is a fair issue to be tried on the shareholder issue.

Fair issue to be tried on the directorship issue?
65. Section 182 of the Act of 1963, which deals with removal of directors, provides in subs. (2) that extended notice within the meaning of s. 142 shall be required for any resolution to remove a director under that section. In a case in which s. 142 applies, not less than 28 days notice of the meeting at which the resolution is to be moved must be given. Clearly, those provisions were not complied with in the case of the notice issued by Ms. Horgan on the 6th December, 2012, calling the meeting for the 14th December, 2012, to remove Mr. Harte as a director. However, that point is moot now, because the meeting never took place and the undertaking outlined earlier was given by the Horgan Parties to the Court on the 13th December, 2012.

66. As to what might happen between now and the determination of the Harte Proceedings and the Horgan Proceedings, it was submitted on behalf of the Horgan Parties that the decision of the Supreme Court in *McGilligan v. O'Grady* [1999] 1 I.R. 346 does not apply to the situation in this case and that the Horgan Parties should not be precluded from seeking the removal of Mr. Harte as a director pending a determination of the proceedings. In this context, counsel for the Horgan Parties relied on the statement in Courtney on the *Law of Companies* (3rd Ed.) (para. 13.082) in which it is stressed that it will not be every case in which the shareholders' statutory right to remove a director will be restricted by injunction and that the Supreme Court's decision would appear to be confined to an injunction the source of which is ancillary relief in a petition under s. 205 of the Act of 1963.

67. The basis on which the Supreme Court in *McGilligan v. O'Grady* did not follow the decision of this Court in *Feighery v. Feighery* [1999] 1 I.R. 321, was explained by Keane J. at (p. 362) as follows:-

> "Why then should the court, on an application for interlocutory injunction, be unable to restrain the company from removing a director pending the hearing of a petition under s. 205, where he has established that there is a serious question to be tried as to whether his exclusion from the affairs of the company constitutes conduct which would entitle shareholders to relief under. s. 205? It should be noted that in *Bentley-Stevens v. Jones* [1974] 1 W.L.R. 638, there did not appear to have been proceedings in existence under the English equivalent of s. 205 at the time the application for an interlocutory injunction was made. However, apart from that consideration, I am bound to say, with all respect, that I do not understand why it should be thought that, because the relief sought in the interlocutory proceedings is not the same as the relief which will be ultimately be sought in the s. 205 proceedings, an interlocutory injunction should not be granted on that ground alone. If it is desirable, in accordance with the principles laid down in . . . *Campus Oil v. Minister for Industry (No. 2)* . . ., to preserve the plaintiffs' rights pending the hearing of a s. 205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason by interlocutory relief should not be granted."

68. Given that the Horgan Parties' objective is to remove Mr. Harte as a director of the Company on the basis that Ms. Sweetnam is now the legal and beneficial owner of his shareholding in the Company and between them the Horgan Parties have the capacity to vote him out of office, and the Court has determined that there is a fair issue to be tried as to whether, in fact and in law, Ms. Sweetnam has acquired Mr. Harte's shareholding, it would not be appropriate at this interlocutory stage to find other than that, in substance, this case is not distinguishable from *McGilligan v. O'Grady* and the rationale of that decision equally applies to the circumstances of this case.

Directorship issue: conclusion on fair issue criterion
69. Accordingly, there must be a finding that there is a fair issue to be tried on the directorship issue.

Adequacy of damages as a remedy?
70. In *Westman Holdings Limited v. McCormack* [1992] 1 I.R. 151, Finlay C.J. stated in his judgment, following the passage quoted earlier, that identifying the question as to the adequacy of damages raises two separate issues potentially in every case: whether damages would be an adequate remedy; and whether there is a defendant liable to pay such damages who is able to do so. Both elements must be considered here as regards the Harte Parties' application.

71. On the first element, the question which has to be considered is whether a remedy other than damages would be necessary to afford justice to Mr. Harte, if he were to succeed the trial of the action on what is his essential contention in the case, namely, that his shareholding has not been validly acquired by Ms. Sweetnam, so that he remains the owner thereof and is personally entitled to exercise the rights and privileges to which such ownership gives rise, for example, to be a director of the Company, if voted into that position by the members of the Company. The Horgan Parties focused on factual matters which form the backdrop to the essential factors in the case in support of their assertion that damages would constitute an adequate remedy for Mr. Harte. Their reliance on the contention that Mr. Harte is destined to lose his shareholding in any event, as the basis for their submission that damages must be an adequate remedy for Mr. Harte, is misconceived. Even if one were to conclude that, as a matter of probability, Mr. Harte is destined to lose his shareholding in the Company, and further that Ms. Sweetnam must, inevitably, become the beneficial owner thereof, in my view, it is not open to the Court on the application by the Harte Parties to look beyond the allegations of wrongdoing which form the basis of the Harte Parties' claim in applying the test as to the adequacy of damages. If Mr. Harte were to succeed in his claim, irrespective of the wider picture, he would be entitled to a permanent injunction to protect his ownership of the shares and the rights and privileges attaching thereto; in short, to protect his position in the Company. His ally, Ancorde, seeks to benefit from that outcome.

72. A similar approach has been adopted in arriving at the finding indicated earlier that damages would not be an adequate remedy for Ms. Horgan, if she were to succeed in her claim that Clause 28(e) and Clause 28(f) should not have been included in the new Articles of Association filed in August 2012. In that eventuality, in order to protect her rights, Ms. Horgan would require a form of relief, whether by way of declaration or permanent injunction, which would ensure that those provisions would not bind the Company and its members so that Ms. Horgan would not be exposed to the risk of which she is concerned – of being ousted as a director of the Company. Her ally, Ms. Sweetnam, seeks to benefit from that outcome.

73. Because of the overlap between the two applications before the Court, it seems to me that this issue is another aspect of the issues for the Court's determination where it is difficult to "see the wood for the trees". By way of general observation, I think it is important to emphasise that, as regards both the shareholder issue and the directorship issue, essentially the only remedy which would be adequate for the successful party is the protection of his or her ownership of the shares and the rights and privileges attaching to them. It is for that reason that I find that damages would not be an adequate remedy for the claimants on each application for interlocutory injunctive relief.

74. In relation to the second element, the question of the ability of the party liable therefor to meet an award of damages has only been raised here as regards the undertaking as to damages already proffered by the Harte Parties. While it is acknowledged that Mr. Harte is insolvent, the position of the Harte Parties is that the undertaking is jointly proffered by Ancorde and Mr. Harte so that, if necessary, the Horgan Parties can have recourse to Ancorde on the undertaking. That, in my view, is a sufficient answer to the question, because, as is the case with Ms. Horgan, Ancorde is the owner of one third of the issued share capital of the Company, so that the undertakings proffered by Ancorde and Ms. Horgan must be regarded as being of equal adequacy.

Balance of convenience?
75. Once again, in determining whether the balance of convenience lies in favour of granting or refusing injunctive relief, the Court must have regard to the specific wrongs alleged by the party seeking an injunction and how best to avoid injustice having regard to the imponderability at this juncture of the outcome of such allegations. In this connection, the guidance given by Clarke J. in *A.I.B. v. Diamond* (at para. 5.7), which has been quoted earlier, is particularly helpful. Given that, in this case, the interest which is sought to be protected by interlocutory relief is the ownership of shares in the Company and the entitlement to exercise the rights and privileges attaching to the shares and, having found that damages would not be an adequate remedy if those interests were not protected pending the trial of the action, I have come to the conclusion that the lesser risk of injustice and, accordingly, where the balance of convenience lies, is in protecting those interests by an interlocutory injunction. That determination preserves the status quo pending the determination of the substantive action, which is the objective of granting interlocutory injunctive relief.

Orders
76. Noting the undertaking as to damages given by the Harte Parties, there will be injunctions restraining the Horgan Parties from –

(a) removing Mr. Harte as a director of the Company;

(b) impeding Mr. Harte in the performance and discharge of his duties as a director of the Company; and

(c) giving effect to the resolution of the 26th November, 2012, approving of the transfer of Mr. Harte's shareholding in the company to Ms. Sweetnam;

until the trial of the action or further order.

77. Noting the Horgan Parties undertaking as to damages, there will be an order restraining the Harte Parties from invoking or relying upon Clauses 28(e) and 28(h) of the amended Articles of the Association of the Company filed in the CRO in August 2012.

78. At all times during the hearing, the position adopted by Counsel for the Harte Parties was to acknowledge that it was not open to the Harte Parties to submit that, while the Court should maintain the status quo by restraining the removal of Mr. Harte as a director, at the same the Court should direct that Mr. Ryan continue to act as a director. As I have stated Mr. Ryan took no part in the

proceedings. The foregoing orders have been made on the assumption that it is accepted by the Harte Parties that Mr. Ryan will not act as a director of the Company pending the determination of the proceedings or until further order.