THE HIGH COURT

(COMMERCIAL COURT)

Record No. 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 Robert Haughton delivered this 20th day of November, 2017

Paragraph Title

1. The following proceedings relate to the granting of an injunction by Noonan J. on 22 December, 2014, to the plaintiff restraining the first and second named defendants from calling in the plaintiff's loans or taking enforcement against in respect of his security. Breccia (the first named defendant to the substantive matter but the applicant in this application) claim that as a result of a judgment delivered by the Court of Appeal in related proceedings, there is no longer any *bona fide* case that permanent injunctions would be granted at the trial of the action and on that basis the injunctions should be discharged. The respondent, who is the plaintiff to the substantive proceedings, submits that a substantial part of his claim remains undisturbed by the decision of the Court of Appeal and asks that the injunction continue until the trial of the action.

Background

2. Blackrock Hospital Limited ("BHL") was incorporated in 1982 with BUPA Investments Limited ("BUPA"), the Plaintiff, James Sheehan, George Duffy and Maurice Neligan as shareholders. BHL owns the share capital of the Blackrock Clinic Limited ("BCL") which was founded in 1986 by the Plaintiff, James Sheehan, George Duffy and Maurice Neligan. In 2006, BUPA decided to sell it's 56% shareholding to the Plaintiff, the first named defendant, Benray (a company owned by John Flynn) and George Duffy. The purchasing of these shares was funded by Anglo Irish Bank plc ("Anglo") and the loans of the shareholders were cross-guaranteed. The plaintiff, James and Rosemary Sheehan, George Duffy, Breccia and Benray Limited then entered into a Shareholders Agreement dated 28 March, 2006.

3. The plaintiff entered into two facilities with Anglo; one on the 28 March, 2006, in the amount of €11,188,256 and one on the 12 November, 2008, in the amount of €6,342,000. These facilities fell due for repayment in December 2010 but payment was not demanded at that time.

4. By special resolution dated 3 October, 2011, Anglo became Irish Bank Resolution Corporation Limited ("IBRC"). Kieran Wallace and Eamonn Richardson were appointed as Special Liquidators to implement the winding up of IBRC. On 29 May, 2013, IBRC wrote to the plaintiff notifying him that the loan facilities were in default and that IBRC were reserving their rights. On 31 October, 2013, the plaintiff was notified that both the facilities of the plaintiff and of the fourth named defendant were to be sold. On 8 November, 2013, the plaintiff wrote to IBRC informing them that he wished to redeem his loans.

5. The plaintiff then began a process to buy his loans. He entered into negotiations with Talos Capital Limited ("Talos") for the purpose of financing the purchase, he also established two special purpose vehicles, Medfund Limited and JCS Investments Holdings

XIV Limited, which were to be used to acquire the loans. Talos offered to finance the acquisition which offer was contingent on Talos acquiring both the Plaintiffs loans and security, and the loans and security of the fourth named defendant. It is the plaintiffs case that he then entered into negotiations with the fourth named defendant in relation to the offer from Talos and that on the 3 April, 2014, he met with the fourth named defendant, who had supplied a consent to sale, to confirm the agreement.

6. The plaintiff also claims that during the course of these agreements, the fourth named defendant became privy to certain confidential information, such as, *inter alia*;

> a) Details of the plaintiff's loans with Anglo, including their value and performance;
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> b) Details relating to the proposed purchase of the plaintiff's loans, including the price and conditions of sale;
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> c) Details related to the financing of the loans, including the condition that both the plaintiff's loans and the fourth named defendants loans were to be acquired.

7. On 4 April, 2014, the loans of the fourth named defendant were purchased by the first named defendant. Shortly thereafter the plaintiff's loans were also purchased from IBRC by the first named defendant. Both of the plaintiffs loans were called in by the first named defendant by letter dated 18 December, 2014. The plaintiff was warned that if he failed to repay the sums which were due, the first named defendant was reserving their right to exercise the power of sale or appoint a receiver without further notice to the plaintiff. On 22 December, 2014, the plaintiff was granted interim injunctive relief as against the defendants and by consent, this injunction, which I shall term "the interlocutory injunction", was extended to remain in place until the hearing of the substantive proceedings.

Submissions on behalf of the first named defendant

8. The first named defendant, Breccia, is the moving party in this matter and is seeking to lift the interlocutory injunction granted to the plaintiff (who is the respondent in this application).

9. As a preliminary matter, Breccia address the issue of jurisdiction. They submit that the Court is entitled to discharge interlocutory orders and cite the Supreme Court decision in *Irish Commercial Society v Plunkett* [1986] ILRM 504. Although this matter is substantially different to the matter at hand as it relates to the discharge of a consent order where consent was given under a misapprehension, it is authority for the general principal that interlocutory orders, obtained by consent or otherwise, can be varied or discharged at the discretion of the Court. At pg 506, Henchy J. states:

> "It has for long been judicially accepted that where (as was the case here) a consent order was an interlocutory order, the court has a discretionary jurisdiction to set it aside or to vary it subsequently: see the judgment of Jessel M. R. in *Mullins v Howell* (1879) Vol II Ch D 763. More recently, Lord Denning said in P*urcell v F. C. Trigell Ltd* [1970] 3 All ER 671:
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> > "The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent." (at p. 675).
> >
> > ….Whether that jurisdiction should be exercised depends on the circumstances of the case."

10. In relation to the circumstances which give rise to the possibility of a variation and / or discharge of an injunction, Breccia again refer to *Irish Commercial Society* where an interlocutory order was discharged on the basis that new material facts and information had been discovered. In that case, new details of the Plaintiff's financial circumstances came to light which resulted in the Court discharging a security for costs order that had been granted. Breccia also refer to *IBRC v Quinn* [2015] IECA 84 which is authority for the proposition that a misapprehension relating to the willingness of the Plaintiffs to progress matters expeditiously is another ground for discharging an interlocutory order. In that matter, the receivers consented to an order for inspection which was later varied due to the persistent delay and lack of cooperation by the Quinn family.

11. Further grounds for the discharge or variation of an interlocutory order advanced by the applicants include where a fundamental breach of the Order or any written agreement has occurred, as in *AIB v Darcy* [2016] IESC 65, or where subsequent judicial decisions undermine the legal basis for the injunction, in support of which they cite a number of English authorities. In *Regent Oil v JT Leavesely* [1966] 1 WLR 1210, the plaintiff was a fuel supplier who alleged that the defendants, who were various motor garages, had breached a "solus" agreement. The plaintiff was granted an injunction on an ex parte basis restraining the defendants from selling fuel from other suppliers – the defendants later consented to the extension of the injunction until the trial of the action. Subsequently, two decisions were made by the Court of Appeal which essentially found that the agreement the parties had entered into was unenforceable, leaving the plaintiff without any *prima facie* case. Due to this change in the law, Stamp J. found that as the injunction was based on a position which was by that time wrong in law, it could no longer be continued and on this basis, he discharged the injunction. Breccia contend that the above jurisprudence supports the proposition that the Court has discretion to discharge interlocutory orders in a number of circumstances.

12. Finally, they submit that when a party obtains any sort of interlocutory injunction it is implicit that they must proceed with their action as expeditiously as possible and where there is delay on the part of the party who has obtained the injunction, that injunction can be discharged. They rely on *Walsh v Deloitte & Touche* [2002] LRC 545 which dealt with the delay of a plaintiff who had obtained a *mareva* injunction against a defendant and had not made any progress with the matter for over four years. Lord Hoffman discussed at great length the importance of proceeding expeditiously with matters which were the subject of interlocutory *mareva* relief.

13. In this particular case, Breccia submit that there are ample grounds for the discharge of the interlocutory injunction, namely;

> a) The decision of the Court of Appeal in *Flynn and Benray Limited v. Breccia* [2017] IECA 74 ("the Flynn proceedings") has dealt with the substantive issue raised by the respondent in this case i.e. that there is no implied term of good faith and fair dealing in the Shareholders Agreement. This means that there is no longer a legal basis for the interlocutory injunction.
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> b) The respondent no longer has a *prima facie* case as a result of the Flynn proceedings which could result in the granting of a permanent injunction at the hearing of the matter.
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> c) Breccia consented to the injunction under the apprehension that the matter would be tried expeditiously and that the respondent would not delay the trial by, for example, failing to comply with discovery.

d) The delay of the respondent is a fundamental breach of their obligation to progress matters expeditiously which was the basis of Breccia's consent to the injunction.

e) The delay of the respondent and failure to comply with the Court's discovery orders are in of themselves sufficient reason for discharging the injunction.

14. In relation to the first ground – that there is no legal basis for the injunction as a result of the decision of the Court of Appeal in the Flynn Proceedings – Breccia submit that the basis of the injunction was that there had been a breach of the implied term of good faith and fair dealing of the Shareholders Agreement. Breccia submit that identical arguments were made in the Flynn proceedings and were unsuccessful. In response to the respondent's contention that the complaints relating to the Duffy transactions were not part of the Flynn proceedings, Breccia state that this is not the case and that these complaints were fully aired during the course of the Flynn proceedings. Breccia submit that this evidence was in fact given by the respondent who took to the stand for nearly a day during the course of the Flynn hearing, however this Court did not find that a *prima facie* case of conspiracy was made out and on this basis Breccia state that the respondent has no legal basis for the interlocutory injunction.

15. Breccia further submit that although the respondent in his grounding affidavit makes reference to the George Duffy redemption, he does not purport to submit that such complaints relating to the redemption are sufficient grounds for the injunction in question. They submit that the additional complaints relating to the misuse of confidential information are examples of the breach of the implied term of good faith and fair dealing and are not complaints in and of themselves. Essentially, Breccia submit that the respondent's case is hinged on this alleged breach of the Shareholders Agreement which is no longer a valid argument in view of the Court of Appeal decision in the Flynn proceedings.

16. Even if the complaints of misuse of confidential information as part of a conspiracy are complaints in of themselves, Breccia submit that there is no *prima facie* case made out and no fair issue to be tried. They submit that no confidential information is directly identified by the respondent and that furthermore, any information which has been identified as allegedly being passed on to the other defendants to this action during the course of the alleged conspiracy was information which was widely available during the course of the sales process. As the sales process used a data room, Breccia submit that information relating to the respondent's loans was available to anyone who used that forum and therefore such information cannot be deemed to be confidential. During discussion with the Court, counsel for Breccia conceded that although the information that was uploaded to the data room was widely available, the identity of the bidder was not disclosed or the amount of their bid.

17. Breccia further submit that the complaints in relation to the incorrect redemption figures are not sufficient to ground injunctive relief. First, Breccia state that such complaints were not made until five months after the injunction was granted. Second, the trial in relation to the redemption figures has already taken place (this was a modular hearing in these proceedings, in respect of which I gave judgment on 5th February, 2016, which is under appeal by Breccia) and it is therefore submitted that they cannot now be referred to as grounds for an injunction. Third, such a complaint would not be a basis for a permanent injunction at the trial of the action. Finally, the only remedy available in this regard would be a correct determination of the redemption figures which has already occurred.

18. In oral submissions, counsel for Breccia also submitted that the legality of the acquisition of the loans of the respondent is not affected by any alleged illegality in a separate transaction, that is, the Duffy transaction. Counsel submitted that even if some case of conspiracy was proved in relation to the acquisition of the Duffy loans, this could not be held to taint the lawful acquisition of the plaintiff's loans and, therefore, there was nothing which could impede Breccia in exercising its rights in relation to those loans, including their enforcement.

19. In response to submissions by the respondent on the inadequacy of damages that he was being deprived of property rights, the applicant submitted first that this issue only comes into play once the basis for an injunction exists. Second, it was submitted that the shares were not in fact a property right as they were shares bought with loans which the respondent has not paid. This, it was submitted, amounted to a deprivation of property rights of the applicant who had validly acquired loans yet could not obtain repayment or enforce security against the respondent.

20. In relation to the second ground, Breccia claim the injunction should be discharged as the respondent no longer has a *prima facie* case which would give him any right to a permanent injunction at the trial of the action. They submitted that if they were to call in the respondents' loans or enforce security against the respondent, no identifiable legal right of the respondent would be breached. This alone is submitted as being grounds for discharging the injunction.

21. However, following from this, they submit that there is no possibility of anything more than damages being awarded at the trial of the action. They submit that the test as set out in *American Cyanamid* [1975] AC 396 and adopted in *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] IR 88, requires that a plaintiff must have a real prospect of succeeding in obtaining a permanent injunction at the trial of the action. The main complaints of the respondent relate to economic torts such as conspiracy and misuse of confidential information. Even if the respondent was to succeed on these grounds, Breccia submit that the most this could amount to is an award of damages by the Court. Furthermore, they submit that damages would be an adequate remedy for the above complaints advanced by the respondent. They note the affidavit of Joseph Sheehan dated 14 January, 2015, in which he sets out his claim as being one of damages. On these grounds, Breccia submit that there is no *bona fide* case that the respondent is entitled to a permanent injunction and further, that even if there was a fair issue to be tried, damages would be an adequate remedy. They also submit that if an application was being made at that time by the respondent for injunctive relief, they would not have been granted the injunction on the basis of the pleadings now before the Court.

22. The last three grounds all seem to be making much the same argument, that is that the delay of the respondent in the prosecution of these proceedings is grounds for discharging the injunction. In the affidavit of Declan Sheeran dated 26 April, 2017, he avers that the defendants only consented to the injunction as they believed the action would be determined quickly. In taking the proceedings in the Commercial Court, it was submitted by the respondent that this application was urgent and that obtaining an early trial date was of utmost importance. The matter was listed in the Commercial Court and directions were given to the effect that pleadings would be closed and discovery motions made returnable by 20 April, 2017. Breccia submit that there was a duty and obligation on the respondent, both as a result of the proceedings being admitted to the Commercial list and the fact that they had obtained interlocutory relief, to progress matters as expeditiously as possible.

23. In relation to the delay, Breccia claim that the respondent's failure to comply with discovery orders is the main reason for the lengthy delay which has occurred in these proceedings. Although it is conceded that part of the delay from January to May of 2016 is attributable to the illness of George Duffy, they submit that the remainder of the delay is the result of erroneous and incomplete discovery on behalf of the respondent. In support of this, Breccia further submit that the respondent agreed to bear the costs of the

further and better discovery motions taken by the defendants to the substantive action. It is claimed that this is essentially a concession that the respondent is responsible for the delay in discovery.

24. Breccia further submit that the respondent has delayed matters by both amendments to his Statement of Claim, and the initiation of various sets of proceedings against both parties in the current litigation and parties involved in separate actions involving the Galway Clinic. In written submissions, Breccia expressed concern that the respondent would be unable to pay damages to them in the event that he is unsuccessful at trial. This matter, however, was not pursued by Breccia during the course of the hearing.

25. During the course of submissions, Breccia also stated that despite persistently stating to the Court that he wished to redeem his loans, the respondent had not made any attempt to do so since obtaining the injunction. Breccia submits that the respondent first indicated that he would be in a position to redeem his loans in July of 2016 and that he had obtained financing for that purpose, however he has not redeemed them and offers no explanation to the Court as to why.

26. The Court questioned Breccia in relation to correspondence in 2016 which seemed to suggest that a charge over the respondents shares in favour of another funder for the purpose of loan redemption would breach the terms of the Shareholders Agreement. It was put to Breccia that the Court had already dealt with this issue in previous proceedings and if Breccia were taking this position, it would be of some significance to the present proceedings. Counsel for Breccia submitted that the particular issue as to whether a second charge over the shares by another funder would breach the terms of the Shareholders Agreement had not been dealt with. Counsel further stated that there was nothing on affidavit from the respondent to suggest that this was why he had not redeemed his loans and that in the absence of such an averment, the Court was entitled to infer that the respondent has no intention of redeeming his loans.

Submissions of the Respondent

27. At the outset, the respondent concedes that the Court has a discretion to discharge and/or vary any interlocutory order even if such order is made by consent. The respondent further agrees that the circumstances in which a Court may revisit an interlocutory injunction include a change in circumstances, such as a subsequent judicial decision, delay in the prosecution of proceedings and where the order was made under a misapprehension or mistake.

28. In relation to the first submission by the applicants that the decision in the Flynn proceedings has effectively dealt with the substantive matter raised by the respondent in this case, the respondent submits that the applicants have greatly overstated the effect of this decision and that although the case in question deals with part of the claim advanced by him, a substantial part of his claim remains unaffected. The respondent submits that the claims in relation to conspiracy and misuse of confidential information have been pursued since the beginning of the within proceedings. Counsel for the respondent refers to the affidavit of the respondent sworn on 21 December, 2014, in which he avers that the defendants misused confidential information in order to frustrate the respondent's attempt to acquire his loans. The respondent submits that the injunction was not just granted on the basis of the alleged breach of the Shareholders Agreement but was granted on the basis of all averments contained in the affidavit of the respondent, including those relating to misuse of confidential information, conspiracy and breaches of the Constitutional rights of the respondent.

29. It is further submitted on behalf of the respondent that the Statement of Claim details complaints relating to the misuse of confidential information, the inducement by the first and/or second named defendants of the fourth to sixth named defendants to divulge confidential information, breaches of various Constitutional rights of the respondent, inducement to breach contract by the first/second named defendants, conspiracy and the intentional interference with the respondents economic interests. The respondent submits that all of the above issues are yet to be resolved and are the legal basis upon which the injunction was granted.

30. Furthermore, counsel submitted that these claims are not in any way contingent on the success of any arguments relating to the Shareholders Agreement but are separate, independent claims. Counsel also cited clauses 7.2 and 7.3 of the Shareholders Agreement, which state that all information relating to the business or affairs of the company or promoters is confidential. This, it is submitted, is an express term of the Shareholders Agreement unrelated to the implied term of good faith and which is the basis of an entirely separate claim.

31. During the course of oral submissions, the Court was referred to 'the springboard principle' which is the basis for an injunction in situations where confidential information has been misused. The purpose of the springboard injunction is to prevent the party who has gained an advantage from misusing confidential information from enjoying the advantage gained from their illegality. It is also used to prevent future misuse and its purpose is to put the parties into the position they would have been in if no misuse occurred. Counsel for the respondent submits that this principle is applicable to the current set of facts in that the parties would be in entirely different situations if the misuse of confidential information had never occurred. It is submitted that the position they would be in would be one where the respondent had redeemed both his own and Mr Duffy's loans using finance obtained from Talos.

32. Specifically in relation to the conspiracy claim, the respondent submits that this was not dealt with sufficiently in the Flynn proceedings. It is submitted that not only was this claim only briefly referred to in the judgment of this Court, but also that the claim was not borne out in the Flynn proceedings as Mr Duffy, the relevant defendant, was not party to the proceedings and was therefore not called to give evidence. In those circumstances, it was not possible for the Court to draw any inferences in relation to the conspiracy claim. It is submitted that in these proceedings, such deficits do not arise and the conspiracy claim will be fully resolved at hearing. On these grounds, the respondent submits that his claim is not bound to fail, as submitted by the applicants.

33. The respondent also submits that many of the findings of this Court were not appealed or overturned by the Court of Appeal. Notably, comments relating to the conduct of the defendants being motivated by an intention to gain a controlling interest in BHL and other general comments relating to their conduct are, it is submitted, supportive of the respondent in these proceedings. The respondent further submits that the transactions giving rise to the within proceedings cannot be viewed in isolation, they must be viewed in light of all the circumstances, including the portions of the judgment of this Court which were not appealed or overturned by the Court of Appeal.

34. In relation to damages being an adequate remedy, the respondent submits that there is no principle in law which promulgates that damages are the only remedy available, particularly in cases of conspiracy or where there is misuse of confidential information. Furthermore, in terms of the balance of convenience, the respondent submits that what is being litigated is not just a claim for damages but a property right, that is, a right to a shareholding in the BHL company. The respondent submits that the *status quo* is to allow him to retain his shareholding until the determination of the substantive proceedings. To refuse injunctive relief would be to extinguish the respondent's rights as a shareholder, a loss which would not be adequately remedied by damages. On the other hand, the respondent submits that any damage to the applicants is readily quantifiable and will be remedied by damages after the hearing.

35. During the course of oral submissions, counsel for the respondent also submitted that injunctive relief is frequently sought in cases where there is no possibility of a permanent injunction at the trial of the substantive matter. In support of this, counsel cited Anton Pillar orders, *quia timet* injunctions and *Mareva* injunctions as examples of injunctive relief used at the interlocutory stage without being sought as a relief in the substantive hearing. Counsel submitted that the question is not whether one can be granted a permanent injunction at the substantive hearing but whether the right one seeks to protect would be adequately compensated by damages at the trial of the substantive action. Counsel also submitted that what is being protected here is in fact a property right and therefore damages would not adequately compensate the respondent at the trial of the action.

36. Counsel further submitted that the Court has a residual discretion in granting injunctions. They relied on the decision in *Báinne Álainn v Glanbia* [2014] IEHC 482 in which Barrett J. discusses the flexibility which must be exercised in cases where injunctive relief is sought. Barrett J. further stated that the Court should not be constrained by rigid guidelines and rules when deciding whether or not to grant an injunction and instead should approach the issue in a manner appropriate to the circumstances at hand. It is submitted that in light of this decision, the Court can choose not to be constrained by whether or not permanent injunctions can be granted at the trial of the action and instead should look at what is fair in all the circumstances.

37. In response to accusations of delay, the respondent first acknowledges the general duty of a plaintiff to progress matters expeditiously once interlocutory relief is granted. However, the respondent states that the applicant has greatly misrepresented the alleged delay which has occurred and gives a very different account of such delay. It is worth setting out the chronology given by the respondent in full as found in page 12 of his written submissions:

> "(a) The original date for the exchange of discovery as directed by the Court on the 5th June 2015 was the 17th September 2015. None of the parties (including the first named defendant) were in a position to proceed with the exchange of discovery on that date. This has not been acknowledged by the first named defendant in its submissions.
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> (b) The plaintiff was ready to proceed with an exchange of affidavits of discovery in September 2015 and wrote to the Defendants in those terms. However, an exchange was not possible at that time as the defendants were not in a position to proceed with the exchange of discovery.
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> (c) The first named defendant delivered its Affidavit of Discovery in respect of category M on the 7 September 2015.
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> (d) The first named defendant did not confirm that it was in a position to deliver its Affidavit of Discovery in respect of the other categories until the 16 December 2015.
>
> (e) The parties agreed to exchange Discovery in January 2016. However an exchange was not possible due to the ill health of the fourth named defendant.
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> (f) The fourth named defendant was only in a position to comply with the Order and exchange affidavits of discovery on 23rd May 2016.
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> (g) None of the delay that arose between the 5th June 2015 and the 23rd May 2016 is attributable to the Plaintiff.
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> (h) Thereafter, the solicitors for the various defendants raised issues in respect of the Plaintiff's affidavit of discovery from July 2016. The difficulties experienced by the Plaintiff in addressing these issues have been recited in detail in the Plaintiff's affidavit sworn in this application.
>
> (i) The Plaintiff ultimately fully complied with his discovery obligations by way of affidavits of discovery sworn in February & March 2017."

38. The respondent submits that solicitors for the applicant continue to raise issues relating to the formatting, presentation and scheduling of documentation but that the actual provision of the documents has been complete for some time now. The respondent contends that discovery has been complied with in full and that any deficiencies which have arisen relating to the formatting and scheduling are as a result of the complex nature of using electronic platforms and e-documents. The respondent takes full responsibility for these deficiencies and submits that a de novo affidavit of discovery was sworn for the purpose of correcting any errors which arose.

39. It is further submitted that the delay attributable to the respondent is not sufficient to ground a discharge of interlocutory relief. In support of this, the respondent cites the judgment of Steel J. in the UK Commercial Court in *A/S D/S Svendborg v Awa*da [1999] 2 Lloyds Rep 244 where it was held that even in circumstances of substantial delay, the Court would still have to take all the relevant circumstances of the case into consideration before deciding to discharge an injunction. Such circumstances include whether the delay was as a result of a deliberate decision of the plaintiff, any explanations put forward by the plaintiff and the degree of prejudice caused to the plaintiff by the discharge of the injunction.

40. In applying these factors to the present situation, the respondent submits that the delay was not due to any deliberate act on his behalf and that the reasons given by him for the delay are "candid and compelling" (page 14 of the written submissions for the respondent). The respondent further submits that the prejudice which he would suffer would far outweigh any prejudice suffered by the applicants who simply want to recover their loan. The respondent also submits following from this that damages at the hearing of the substantive matter would be sufficient to remedy any loss suffered by the applicants and so there is no prejudice to them in continuing the injunction.

41. In response to the redemption issue raised by Breccia, the respondent made a number of submissions. First, it was submitted that the injunction was never granted on the condition that the respondent redeem his loans. Of more significance, the respondent submits that after judgment was delivered in the redemption hearing (5 February, 2016) the respondent had funding in place for the purposes of redemption. Correspondence passed between the parties relating to this funding which ultimately resulted in solicitors for the applicant writing directly to the funder HIG Capital on 6 July, 2016, and threatening litigation if the funder proceeded with the transaction. The funding was withdrawn and the respondent did not redeem his loans. Although nothing was directly put on affidavit in relation to this, the Court was invited to read the correspondence (the earlier correspondence was exhibited in an Affidavit sworn by Ms. Ellen O'Connor on 13th June, 2017) and come to its own conclusions. It is the case of the respondent that the letter of 6 July, 2016 was a calculated move to deter HIG Capital from providing funding to him to redeem his loans.

42. A related issue raised by counsel is the motivation behind the calling in of the respondent's loans. The respondent submits that despite claims by the applicant that they simply want to recover the monies owed, the applicant's real motive is to acquire his shares

in BHL. It was submitted by counsel that continuous obstacles have been put in the way of the respondent to prevent him from redeeming his loans. The respondent submits that at the time when the redemption issue was being litigated, the applicant did not take any issue with a funder taking a second charge over the shares and that this issue was only raised when the redemption proceedings had concluded. The respondent also refers to earlier Construction Summons proceedings relating to the Shareholders Agreement, entitled *Sheehan v. Breccia and others* (unreported The High Court 2015/13 Com), to which all the shareholders were parties, which it was thought dealt with this issue. Counsel also referred to a number of findings related to the conduct of Breccia and their motivation behind calling in the respondent's loans, and in particular the finding of this court in its judgment delivered on 4 March, 2016, in these proceedings refusing (on terms of an undertaking from Dr. Sheehan to grant a second mortgage of shares to Breccia ranking behind the mortgage to any new funder) Breccia a stay on the order made in respect of the redemption module.

43. The respondent submits that in this respect, the applicants have not stated their true intentions to the Court and moreover, their conduct since the granting of the injunction can and should be taken into account by the Court. The respondent submits that this conduct is indicative of the fact that the applicants

have not come to Court with clean hands, therefore they cannot rely on equitable maxims, such as delay.

The Issues

Discretion of the Court to Vary/Discharge Injunctions
44. In relation to the varying and discharge of injunctions, I accept that the Court has a wide discretion. Counsel have suggested a number of circumstances in which the Court may vary an injunction, including where there has been a fundamental breach of an express agreement between the parties, where there has been inordinate delay on behalf of the party obtaining the injunction, or where there has been a subsequent judicial decision which alters the position of the law. However, there is authority for the proposition that the courts are not so limited in their approach to injunctive relief.

45. The legislative basis for granting interlocutory relief flows from s.28(8) of the Supreme Court of Judicature Act (Ireland) 1877 which was later transposed into Order 50, rule 6 of the Rules of the Superior Courts, which states:

> "50(6)(1) The Court may grant a *mandamus* or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.
>
> (2) Any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just."

The Order does not use restrictive language and clearly gives the Court significant latitude when approaching discretionary remedies such as injunctive relief. The underlying consideration is that the approach taken is that which the Court deems to be just or convenient.

46. Such an approach was also endorsed by Barrett J. in his decision in *Báinne Álainn v Glanbia* [2014] IEHC 482. In that case, Barrett J. discussed the principles applicable in granting injunctive relief, discussing the well-established "Campus Oil" test and the considerations set out in cases such as American Cyanamid v Ethicon [1975] AC 396. During the course of this analysis he stated:

> "Moreover, while there are obvious advantages to the court complying with such recognised guidelines as may be drawn from case-law in this area, not least in terms of ensuring certainty and avoiding arbitrariness, that case-law has long been informed by the common-sense recognition, evident in the just-quoted extract from the Rules of the Superior Courts, that the question as to whether or not to grant an interlocutory injunction is one in respect of which the court ultimately retains a degree of flexibility and discretion that is unconstrained by strict criteria, though subject of course to the rules of precedent. This necessary flexibility and discretion is reflective, at least in part, of the fact that the life of the law is not logic, it is experience, and experience teaches that even ostensibly similar facts can sometimes require entirely dissimilar treatment when viewed through the prism of context."

47. Furthermore, in *Irish Commercial Society v Plunkett*, Costello J. stated:

> "As pointed out by Lord Denning, MR in *Purcell v Trigell Ltd* [1971] 1 QB 358 at p. 364 the court always has control over interlocutory orders and it may in its discretion vary or alter them even though made originally by consent … Whether or not it should exercise it in a given case will largely depend on the circumstances in which the consent order was made and the reasons advanced for its discharge."

It is clear from this passage that the Court's power to vary or discharge interlocutory orders is not constrained by the fact that such orders were made on consent and that the Court is entitled to vary or discharge the within injunction if it is appropriate in all of the circumstances.

Permanent Injunction at the Trial of the Substantive Hearing
48. The applicants in this matter contend that as the respondents are no longer seeking a permanent injunction as the substantive relief in these proceedings, that they cannot be granted any interlocutory injunctive relief. They rely on the test set out in *American Cyanamid* as adopted in *Campus Oil.* However, following from the above discussion of the court's discretion in interlocutory matters, it does not seem to follow from that reasoning that the court is so restricted when determining whether or not to grant such relief. As stated by Barrett J. in *Báinne Álainn*, the court is not constrained by such rigid rules as would lead to an unjust result.

49. The approach of Barrett J. is further supported by Keane J. in *McGilligan v O'Grady* [1999] 1 I.R. 346. In that matter, an application was made to restrain a company from removing a director until the hearing of a s.205 petition. Keane J. discussed the usual principles as set out in *Campus Oil* and concluded that the test is whether there is a serious issue to be tried, whether damages are an adequate remedy and if not, where the balance of convenience lies. He also discussed the relationship between interlocutory relief and permanent injunctions and found that the court was not so restrained in that regard. He stated:

> "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 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 the *American Cyanamid v. Ethicon Ltd.* [1975] A.C. 396 and *Campus Oil v Minister for Industry (No. 2)* [1983] I.R. 88, to preserve the plaintiff's rights pending the hearing of the s. 205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason why interlocutory relief should not be granted. To cite but one example, the relief granted in many *Mareva* cases is very often not the relief which is sought in the

substantive proceedings."

50. Furthermore, the Court was directed to *Okunade v. Minister for Justice* [2012] 3 IR 182. At paragraph 70, Clarke J, as he then was, distilled the Campus Oil test into the following limbs:

> a) The party seeking the injunction must show that there is a fair or *bona fide* or serious question to be tried.
>
> b) If that be established, the court must then consider two aspects of the adequacy of damages. First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.
>
> c) If damages would not be an adequate remedy for the plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.
>
> d) If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.
>
> e) If all other matters are equally balanced the court should attempt to preserve the *status quo*.

Nowhere in this analysis does he state that the requirement of a permanent injunction as a relief in the substantive proceedings is absolute. Moreover, he states that the courts are not only empowered but also required to adapt the test to suit differing issues which come before it. At paragraph 74 he states:

> "However, it is clear that those detailed rules derive from the courts' regular experience of having to deal with the day to day issues which are thrown up in deciding whether to put in place interlocutory orders in the context of commercial or property litigation so as to minimise the risk of injustice. In that context it does also need to be noted that the courts have had to evolve variations on the test or move accurately the precise implementation of the test in order to deal with the specific types of problems which arise in particular types of litigation."

51. This passage correlates with the reasoning of Barrett J., and indeed my own view, that the overriding principle in assessing whether or not to grant injunctive relief is what the Court considers to be just in all the circumstances. For the foregoing reasons, the Court does not feel that the inability of the respondent to obtain permanent injunctions at the substantive trial is a bar to them receiving interlocutory injunctive relief.

Legal basis for granting an Injunction

52. It is the position of the applicant that there is no longer a legal basis upon which the respondent is entitled to continue his injunction. There are various grounds advanced by the applicant as to why this is the case. First, it is contended by the applicant that the Flynn proceedings have effectively dealt with all matters raised by the respondent. Although the arguments in relation to the implied term of good faith and fair dealing have effectively fallen away following the Court of Appeal decision in Flynn, it cannot be said that there is no longer any fair issue to be tried in the present proceedings. After careful examination of the Statement of Claim, it is clear to the Court that a number of pleaded claims survive. Most notably, the conspiracy issue remains to be determined, as well as claims of misuse of confidential information. The claims for inducement to breach of contract and intentional interference with economic interests are also still live. It is not appropriate for the court on this application to assess the evidence that might support these claims, or the weight that might be attached to that evidence, or to express any view as to the prospects of success. It is sufficient for the court to conclude on the pleadings and affidavit evidence, as I do, that these claims are not bound to fail.

53. Furthermore, although the conspiracy issue was unsuccessful in the Flynn proceedings, this court gave a clear indication that a *prima facie* case was not made out primarily because Mr George Duffy was not a party to those proceedings and he was not called to give evidence. At paragraph 385 of that decision, after considering the judgment of Gilligan J. in *McCann & Dillon v. Hade* [2013] IEHC 652, I stated "In this instance what was in the mind of Dr. Duffy as of 4th April, 2014 is critical to these issues." By contrast, in these proceedings, Mr. Duffy is a defendant to the action and the applicants would be in a position to cross-examine him should he chose to give evidence, or ask the court to draw inferences or give added weight to other evidence if he did not give evidence. The court is not forming any views as to whether a *prima facie* case of conspiracy is made out, however, it is clear that as Mr Duffy is a defendant in the present case, there is a possibility that the applicant can make out a case of conspiracy at the substantive hearing.

54. Furthermore, the Court cannot agree, potentially at least, that a finding of conspiracy in relation to the Duffy transaction does not in any way taint the transaction the subject of the within proceedings. It is arguable that if the applicant had not, as is alleged, unlawfully frustrated the respondent's attempt to acquire Duffy's loans alongside his own (both being required in order to obtain finance from Talos Capital), the applicant would not have been in a position to purchase the respondent's loans and would not currently find himself in a situation where his shares are under threat.

Property right in shares

55. Furthermore, although the applicant claims that it simply wants to recover the monies which it is owed, the court remains of the view that its ultimate objective is the acquisition of the respondent's shares. For that reason, the court finds that the right that the respondent ultimately seeks to protect in these proceedings, and pending full trial, is a property right in his shareholding, which in turn is protected if the respondent is able to exercise his contractual right to redeem his loans i.e. if he is able to exercise his equity of redemption. The position of shares as a property right was explored by Laffoy J. in *Ancorde Limited & Ors v Miranda Horgan & Ors* [2013] IEHC 265. In that case, the interlocutory application sought an order restraining the defendants from purporting to transfer the applicant's shares to a third party and an order restraining the defendants from removing him as a director of the company. In relation to the adequacy of damages, Laffoy J. stated:

> "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 that 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 relief"

It is clear that shares are considered to be a property right and moreover, that at the interlocutory stage, property rights to which a party may be entitled should generally be protected.

56. The applicant made two ancillary submissions relating to the redemption issue and the misuse of confidential information claim. It was submitted that the complaint made in relation to redemption is not the basis for an injunction in and of itself. It is my view that this position was not being advanced by the respondent; rather he based his entitlement to interlocutory relief primarily on the conspiracy and misuse of confidential information claims. It was also submitted that the respondent has not identified confidential information that was disclosed. However, the respondent has on affidavit given examples of the type of information which he claims was misused, such as the fact that the funding of his loan purchase was contingent on Talos Capital also acquiring the Duffy loans. I do not find this point to be altogether persuasive and in all the circumstances I find that there remain fair issues to be tried and that there is a sufficient legal basis put forward for the continuation of the injunction.

Damages as an Adequate Remedy
57. The applicant in this matter argues that damages would be an adequate remedy for the complaints made by the respondent. It was submitted that the majority of the claim relates to economic torts which can be remedied in damages. However, as referenced above, it is the respondent's position that what is at stake in these proceedings is in fact the protection of a property right, that is, the respondents right to, and his interest in, his shares, including his right to vote and to dividends and his associated equity of redemption in respect of his loans and the mortgage of shares. As already stated, the Court agrees with the submissions of the respondent that what he is seeking to protect is in fact a property right. The court adopts the following succinct statement from Kirwan *Injunctions: Law and Practice* (Second Ed. Roundhall, 2015), at para.6.38:

> "…when property rights are concerned, the starting point for consideration of an application for interlocutory relief is, in the main, that damages would not afford an adequate remedy to someone whose property rights are being vitiated."

I am satisfied that if the Court were to discharge the interlocutory injunction at this juncture it is highly probable that the applicant would seek to enforce security against the respondent and a receiver would be appointed to sell his shares. In reaching this conclusion the Court also takes into consideration the broader picture that has emerged from the various sets of litigation which have come before the Court in relation to BHL, and the conduct of the applicant throughout this litigation, which will be discussed in more detail below. What is indisputable is that Breccia appointed a receiver over the shares of Benray Limited following demand by Breccia in respect of its loan, and that Breccia also indicated in its letter of 18 December, 2014 its intention to appoint a receiver over the respondent's loans, prompting the initial application for an interim injunction.

58. I also give considerable weight to the fact that the respondent is a medical doctor and a founding member of BHL/the Blackrock Clinic, and has been actively involved as a director and shareholder for over 30 years (even though he lives and practices abroad). I am satisfied that the shares in BHL have more than mere monetary value to the respondent and in this respect the losses which the respondent would suffer if the injunction were to be lifted, and his shares sold, would not be adequately remedied in damages.

Adequacy of respondent's undertaking as to damages
59. By contrast, if as has been submitted on its behalf, the applicant's true motive is the repayment of debt owed (rather than acquiring the respondent's shares), the Court can see no prejudice to the applicant in the continuance of the injunction until the trial of the action. In this regard even though Breccia would be delayed in recovering its debt (and it is not disputed that ordinary interest continues to accrue) damages would be an adequate remedy for the applicant. Breccia did not suggest otherwise, and did not contest evidence adduced by the respondent in his replying affidavit sworn on 16 May, 2017, where he deals with the adequacy of his undertaking as to damages at para.s 28-35. Suffice it to say that taking the least favourable view of the respondent's own valuation of the value of his shareholding in BHL, combined with his entitlement to cash dividends and his own valuation of a beneficial interest which he controls in the Galway Clinic, his assets far exceed the debt due to Breccia – even when surcharge interest and litigation costs (both of which this court in the redemption hearing found were not due, which finding is under appeal) are added. While the applicant's opinions are neither independent nor expert, his evidence was not disputed and must therefore carry some weight and be determinative of this aspect.

Balance of convenience
60. Where damages are not an adequate remedy for the party seeking an injunction, the Court must consider the balance of convenience and maintenance of the *status quo*. Laffoy J. analysed the balance of convenience where a possible right to shares exists in *Ancorde Limited*, and in that regard she stated:

> "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"

61. I am of the view that maintenance of the *status quo* in this matter involves the continuance of the interlocutory injunction. Taking the claim of the respondent at its height, if the court finds that there was misuse of confidential information and/or the existence of a conspiracy in some form or other, the lawfulness of the applicant's acquisition of the respondent's loans could be called into question. If the court at this juncture lifts the injunction, the respondent if he is successful at the substantive hearing, will be more limited in his ability to obtain a remedy for the damage caused by the applicant. The shares will probably be gone and then the only redress that could be sought would be damages without the possibility of redemption. As BHL is a private company it would not be possible to acquire shares on the stock market. Further the applicant could thereby obtain advantage from misuse of confidential information which could not be reversed. The balance of convenience clearly favours the respondent.

Delay and Equity
62. Although the ground of delay made up a significant part of the written submissions, it was not pursued at any great length during the course of oral submissions, due no doubt in part to views expressed early on by the court during the course of argument. In essence, the applicant claims that as the respondent enjoys the benefit of injunctive relief and had the matter admitted to the Commercial list, there is a duty on him to progress matters expeditiously. Though it is accepted that there is such a duty, the Court does not accept that the delay in question is sufficiently lengthy to be deemed inordinate. In *Lismore Homes v Bank of Ireland* [2006] IEHC 212, the delay which was deemed to be inordinate was much greater than the present case, amounting to a total of 16 years.

63. Moreover, the Court also does not accept that the responsibility for the delay should fall solely at the respondent's doorstep. The

manner in which delay is illustrated by the applicant differs greatly from that in which it is portrayed in submissions/timeline of the respondent, which submissions the court prefers. In fact, it appears that the process of discovery was delayed not only by the illness of Mr Duffy, but also by unnecessary to-ing and fro-ing by solicitors of the applicant and respondent in relation to discovery. The applicants rely on *Quinn v IBRC* [2015] IECA 84, however the Court finds this case of little assistance. That matter related to actions of the plaintiffs which were deliberately obstructive and evasive and which prolonged discovery unnecessarily. Such a stance has not been taken in the present matter. In this case, it appears from correspondence that discovery was effectively complied with early on but that the process was drawn out as a result of formatting and scheduling issues. None of this was deliberate or the result of prevarication by the respondent or those preparing the discovery on his behalf. Moreover some considerable delay was occasioned by the applicant's claim to surcharge interest and legal costs, which led the respondent to amend his pleadings so that these issues could be determined – as they were in the redemption hearing. In all the circumstances, it seems that all parties must bear some degree of responsibility for the delay and it would be inappropriate for the Court to discharge injunctive relief on this basis.

Applicant's conduct/lack of candour

64. Furthermore, as an injunction is an equitable remedy, the Court is entitled to assess whether the conduct of these parties is such as would disentitle them to seek equitable relief, or the lifting of the undertakings. In this regard, and in line with views expressed by me in my judgment on the redemption issue (February, 2016), in one notable respect Breccia has not come to Court with clean hands in making this application, and there has been a lack of candour. Despite repeated assertions (also made in the redemption hearing) that Breccia simply wishes to recover the debt owed, this court is confirmed in its view that the real target of the proceedings is the acquisition of the respondent's shares following on receivership.

65. Four matters lead me to this view. After the redemption hearing Breccia sought a stay on my order pending appeal. In refusing to grant a stay, subject to an undertaking from Dr. Sheehan to grant Breccia a second charge, I stated:

> "23. In both judgments I also emphasised the importance of the right that a mortgagor has to redeem the mortgage, which I found was coterminous with the right to redeem the loans (see paragraphs 206 and 207 in the *Sheehan* judgment). I accept the submissions made by counsel for the plaintiffs that in pursuing its present application Breccia is acting, as it has done in the past, in a tactical manner designed to put further obstacles in the paths of the plaintiffs with a view to furthering its own desire of obtaining ownership of the shares in Blackrock Hospital Limited held by Dr. Sheehan and Benray. I regard this probable design and tactic as a further reason for refusing the stays sought, or the imposition of a requirement of payment of monies into escrow."

66. Secondly, during the course of this application, counsel for Breccia asserted that they simply wanted to be repaid monies owed. However, correspondence which passed between the parties after the redemption hearing suggests that this is not the case. Breccia became aware during the course of that hearing that the respondent had signed a facility letter with HIG Capital in order to redeem/refinance his loans. Following correspondence between the parties solicitors in which the applicant's solicitors suggested that clause 8.3 of the Shareholders Agreement prevented the granting of a first charge over shares to raise fresh finance, the applicant's solicitors then wrote *directly* to HIG Capital threatening the initiation of litigation against them in the event that they did in fact provide funding to the respondent. The relevant parts of this letter dated 6 July, 2016, state as follows:

> **"Proposed financing arrangement**
>
> We understand from statements made by counsel, on behalf of Dr Joseph Sheehan, before Mr Justice Haughton in the proceedings entitled *Joseph Sheehan v Breccia*…and correspondence between us and Arthur McLean Solicitors, that you have agreed in principle, to provide funding to Dr Sheehan on condition (amongst others, we assume) that you are granted a "first priority charge over the shares held by Dr Sheehan in BHL together with all deliverables pursuant thereto."
>
> (Clause 8.3 of the Shareholder Agreement is then set out)
>
> In our client's view, the effect of Clause 8.3 of the Shareholders' Agreement is to (a) render any charge, which may be created in your favour invalid; and (b) any refinancing, which you may provide on foot of such charge, would therefore be a breach of the Shareholders' Agreement.
>
> …
>
> Accordingly, Breccia has instructed us to proceed to commence proceedings against Dr Sheehan for, *inter alia*, a declaration that any security granted by Dr Sheehan to you would breach Clause 8.3 of the Shareholders' Agreement.
>
> **Your position**
>
> We hereby call upon you to let us know, within seven days of the date of this letter, that you will not allow, do, cause and/or procure anything to be done, or taken any step which, in Breccia's view would cause a breach of the Shareholders' Agreement to grant security in your favour over his shareholding in BHL.
>
> Take notice that, in the event that you do not respond to this request to the satisfaction of Breccia acting in its sole discretion, within seven days of the date of this letter, Breccia reserves all of its rights to take any and all such steps as it considers appropriate in order to preserve and vindicate its position, whether under the Shareholders' Agreement and/or howsoever arising under the law, including but not limited to issuing proceedings seeking the following declarations.
>
> …
>
> In case there is any doubt about it, Breccia reserves its right to join you as a party to any such proceedings,
>
> This letter together with previous correspondence will be used to ground an application for costs should such action prove necessary."

67. I pause to note here that in the proceedings brought by Special Summons entitled *"The High Court Joseph Sheehan v Breccia and others 2015/13 Com"* Dr. Sheehan asked the court to construe clause 8 of the Shareholders Agreement to obtain a definitive ruling on whether it afforded a veto to a shareholder over the proposed transfer of their shares. All the shareholders and the BHL were parties. By Order made on consent of all parties on 13 May 2015 I made the following declaration:

> "**The Court doth declare** that the provisions of the Shareholders' Agreement dated the 28th day of March 2006 (as may

> have been amended, varied or supplemented from time to time) between the shareholders of BHL and in particular clause 8 thereof do not require a holder of a charge over the Shares (as therein defined) to obtain the consent of any other Shareholder (as therein defined) in BHL in order to transfer the legal and beneficial ownership of the Shares following enforcement of security over the Shares"

In my later judgment in the Flynn proceedings (13 August 2015) I observed:

> "32. The effect of that declaration, which is binding on all existing and future shareholders of BHL, is that since 28th March, 2006 it has been possible for the holder of a charge over shares to transfer the legal and beneficial ownership in those shares following enforcement of security over such shares without the consent of all or any other shareholder. While this matter remained one of uncertainty for several years, it has now been resolved and has the effect that a new lender taking security over shares will not face a 'veto' from any shareholder if seeking to enforce a security. This in turn has the effect of enabling any shareholder with borrowings secured on shares to seek refinancing safe in the knowledge that any body considering refinancing can be assured that security over the shares will be enforceable. It means that any shareholder with borrowings, whether in default or not, can now seek refinancing."

While Breccia was successful in its appeal from my finding of an implied term of good faith and fair dealing in the Shareholders Agreement, this observation, which admittedly was *obiter dicta*, was not challenged. While it might have been thought that this observation was the last word on the matter, clearly Breccia take a different view in their correspondence March-July 2016. Why did they wait until then? In particular, why did they not raise this further point in relation to clause 8.3 at or in advance of the hearing of the Special Summons? And why did they not, apparently, raise it as an objection before the Court of Appeal when they appealed my judgment (4 March, 2016) and orders (finalised 12 April, 2016) on the stay application? The *ex tempore* judgment of Finlay Geoghegan J. delivered on 21 June 2016, affirming my decision refusing a stay, notes that –

> "Counsel for Breccia has emphasised that this application was not intended to prevent the redemption of the loans, and as it follows, the charges on the shares by the Plaintiffs."

There is no mention of any clause 8.3 objection. Yet just over two weeks later their solicitors wrote to HIG Capital raising such objection.

68. If Breccia's primary objective was indeed to recover the debt it would have welcomed the refinancing of the respondent by HIG Capital. It could reasonably have expected to receive payment in early to mid-2016. Regrettably, the court can see no other purpose to the approach taken by Breccia in the correspondence March-July 2016, and in particular the uninvited sending of the letter of 6 July, 2016 to HIG Capital, except to deter HIG Capital from funding the redemption of the respondent's loan. This conflicts with the repeated submissions by the applicant that they simply want to be repaid. In this the application lacked candour and the applicant did not come to court with clean hands.

69. Thirdly, in paragraph 7 of his first replying affidavit the respondent avers to "[Breccia's] aspiration to enforce those securities and ultimately to acquire for himself the shares". This averment is not contested by the applicant's director and company secretary and sole deponent, Mr. Declan Sheeran, in his supplemental affidavit sworn in response to the respondent's replying affidavit.

70. The fourth reason relates to averments in the respondent's first affidavit at paragraphs 36 to 38 where he refers to the fact that after the Court of Appeal decision in the Flynn proceedings the applicant appointed a receiver over the shareholding of Benray Limited in BHL. By way of background the significance of the Benray Limited indebtedness is that on 28th March 2006 the respondent and each other shareholder executed a "Guarantees and Indemnity" in respect of their Anglo loans, including that of Benray Limited. Under this the bank's recourse to a guarantor's shares in respect of a principal debtor was limited such shares "to the intent that the Bank shall be entitled to dispose of the Security Assets but shall not be entitled to apply any proceeds of sale of any of the Security Assets against any Indebtedness of the Principal Debtor." In Breccia's letter of demand dated 18 December, 2014, to the respondent it demands payment firstly of the respondent's indebtedness under his Anglo loans (€16,144,572), and secondly €6,734,852 under the guarantee in respect of Benray's Anglo loan. The respondent disputes that the Guarantee and Indemnity as properly construed allowed Breccia to make this second demand – this is dealt with in his second affidavit. Leaving that aside, at para.s 37 and 38 of his first affidavit the respondent avers:

> "37. [Breccia]'s appointed receiver proceeded to advertise the "Benray" shareholding for sale; these advertisements appeared in the National newspapers and there was every appearance that the Receiver was progressing towards the sale of the "Benray" shareholding for the purposes of discharging the indebtedness under the related loans.
>
> 38. Subsequently however, the first named Defendant has decided to stand down the Receiver that it appointed over the Benray shareholding. The "sales process" is apparently at an end. *I have no doubt that this has been done for the purposes of "preserving" the Flynn/Benray indebtedness so as to enable the first named Defendant to include that sum in any demand that it shall seek to make of this deponent. This is of significance in that it illustrates that the motivation of [Breccia] is its desire to exercise security entitlements rather than to secure repayment of the loan, I do not know why this was not disclosed to the court*. As is clear from the affidavit of Mr. Sheeran, one of the two course[s] of action Breccia seeks to be allowed to take (and so seeks the lifting of the injunction for this purpose) is to appoint a Receiver over my shares. Yet he has manifestly discharged the Receiver previously appointed by Breccia in relation to shares held by Benray. I appreciate that this has occurred since Mr. Sheeran swore his affidavit but I believe it was incumbent upon [Breccia] to ensure the Court was notified of its actions in respect of standing down its Receiver."[Emphasis added]

71. Mr. Sheeran swore a replying affidavit on 25th May, 2017 and it might have been expected that he would address para.s 36-38, and in particular the passage emphasised above, but he did not avail of that opportunity to do so. One explanation for standing down the Receiver is that offered by the respondent. In the absence of any sworn denial the court is entitled to infer for the purposes of this application that Breccia's primary desire is indeed to exercise its security entitlements with a view ultimately to acquiring the respondent's shareholding.

Non-redemption

72. The applicant also argued that the respondent had failed to advance any reason as to why redemption had not occurred as of the date of hearing the application. The Court finds this to be a somewhat hollow submission in light of the correspondence considered earlier in this judgment. Although counsel for the applicant submitted that the respondent could not put forward any propositions in relation to this issue which was not put on affidavit, the Court finds that that correspondence, which was properly exhibited before the Court, illustrated a series of events which it may be inferred led to the loans not being redeemed after the redemption hearing. This series of events evidences some interference on behalf of the applicant with the respondent's attempt to redeem his loans.

73. The applicant has also asserted that the respondent at the time of this interlocutory hearing had not given any indication, or put forward any evidence, to demonstrate whether funding was being sought to redeem his loans. This was submitted as being an example of inaction on behalf of the respondent. Again this is a hollow argument in light of my findings as to candour. At the time of the redemption hearing, the respondent divulged information in relation to his proposed funding arrangement; the applicant being now aware of the identity of this funder, thereafter by its solicitor's letter dated 6 July, 2016, threatened to initiate litigation against *inter alia* HIG Capital if they followed through on this funding arrangement. The proposition by the applicant that the respondent should now disclose details as to any alternate funding arrangement or efforts to obtain funding is therefore untenable. I find that in declining to disclose any such details, which in my view attract the protection of commercial secrecy as between the respondent and the applicant, the respondent is acting reasonably.

74. The Court is also not convinced that a failure to redeem should be a reason for the interlocutory injunction to be discharged. The purpose of the injunction is to preserve the current state of play between the parties. If between now and the hearing of the substantive matter the respondent does redeem his loans the injunction effectively becomes moot. Until that time however, the redemption issue is not something which should impact on the injunctive relief.

75. The court is also concerned that the applicant may continue to put obstacles in the way of the respondent which may prevent him from redeeming his loans. This concern arises from a view of the applicant's conduct expressed earlier in this judgment, but also stems from that fact that during the course of submissions counsel for the applicant was directly asked by the court as to whether or not it would remain Breccia's position that a second charge could not be taken on the shares for the purpose of funding which would allow the respondent to redeem his loans. Counsel did not answer this question, instead focusing on the fact that nothing was put forward on affidavit by the respondent which stated that the conduct of the applicant, or its contention that a *second* charge could not be taken over the shares of the respondent, was the reason that the loans had not been redeemed. It remains unclear to this Court whether the respondent will continue to contend that a second charge cannot be taken over the shares of the respondent, thus preventing him from securing funding to redeem his loans. It would be unfair to penalise the respondent for non-redemption when any ongoing or further attempt to redeem may continue to be blocked by a position adopted by the applicant which may or may not be based on a correct application of law but which creates uncertainty that would foreseeably deter a third party from offering refinance.

76. **Summary**

a) The court has the power to vary or discharge interlocutory injunctions even if made on consent. This jurisdiction arises *inter alia* where there has been breach of agreement between the parties, change of circumstance or inordinate delay. The principles applicable to granting an interlocutory injunction guide the court, but the relief is discretionary and flexible, the court is guided by equitable principles, and ultimately the court must do what is "just and convenient" and best designed to minimise the risk of injustice in all the circumstances.

b) I am satisfied that there remain fair, serious and *bona fide* issues to be tried, in particular but not limited to the respondent's pleas of conspiracy and misuse of confidential information.

c) The inability of the respondent to now obtain permanent injunctions in relation to the appointment of a receiver at the substantive trial is factor that the court must consider, but I find that it should not be a bar to the continuation of the interlocutory injunction in this case. In large part this is because refusal of interlocutory relief would probably lead to the loss of proprietary rights namely the respondent's right to his shares in BHL and the attendant right to vote and receive dividends and rights arising under the Shareholders Agreement, and, in the first instance, the concomitant right to redeem the loans. This would do potential significant injustice to the respondent if he were to succeed in his claims of conspiracy or misuse of confidential information, because the applicant would then potentially benefit from its own wrongdoing and could conceivably, through the receivership process, acquire the secured shares, and the respondent would be deprived of his opportunity to redeem and his equity of redemption.

d) For the same reasons *viz*. probable loss of proprietary/shareholder rights, damages would not be an adequate remedy for the respondent. Also relevant to this are the fact that the respondent is a founding doctor of the BHL/ the Blackrock Clinic, with 30 years of involvement as a director/shareholder.

e) There is no evidence that, absent an injunction, the applicant would suffer meaningful loss and damage apart from loss of interest on the debt. If, as the applicant asserts, its main objective is to recover the debt owed, damages would be an adequate remedy, and further interest accruing on the loans will compensate for any delay in obtaining payment.

f) As to the adequacy of the respondent's undertaking as to damages, this is established by the respondent's uncontested evidence as to his assets and their value.

g) As to the argument that the respondent has failed to progress this matter in the Commercial court, I am not satisfied that such delay as occurred was inordinate. Secondly, responsibility for delay in making discovery and otherwise bringing the remaining issues to trial does not rest solely with the respondent, and is not attributable to any deliberate act or prevarication on his part. Further Breccia has not shown any appreciable prejudice by reason of the delay – such prejudice or loss as it may have suffered can be compensated by interest or damages, and does not compare to the prejudice that the respondent could suffer if this application succeeded. In all the circumstances the delay is not such as to defeat the entitlement to interlocutory relief.

h) For reasons outlined above the balance of convenience clearly favours the continuing of an injunction that preserves the *status quo*. This, in the words of Clarke J.(as he then was) in *Okunade*, minimises the risk of injustice.

i) Further the applicant has not come to this application with clean hands, and has shown a lack of candour. While repeatedly asserting that its primary objective is to recover the debt due and not to prevent redemption by respondent, it is the court's view, for a number of reasons explained more fully earlier, that this is not so, and that the primary objective of the applicant is to appoint a receiver and ultimately acquire the respondent's shareholding in BHL. In these circumstances is it unreasonable to require the respondent to prove or disclose commercially sensitive details of arrangements for any proposed refinancing that may or may not be in place, or indeed to require that redemption must occur prior to the trial.

j) The interlocutory injunction originally granted on consent will therefore remain in place.