COMMERCIAL COURT

DUBLIN

HIGH COURT RECORD NO: 2011/5843P

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION), QUINN INVESTMENTS SWEDEN AB and LEIF BAECKLUND

PLAINTIFF

AND

SEAN QUINN, CIARA QUINN, COLETTE QUINN, SEAN QUINN JUNIOR, BRENDA QUINN, AOIFE QUINN, STEPHEN KELLY, PETER DARRAGH QUINN, NIALL McPARTLAND, INDIAN TRUST AB, FORFAR OVERSEAS SA, LOCKERBIE INVESTMENTS SA, CLONMORE INVESTMENTS SA, MARFINE INVESTMENTS LIMITED, BLANDUN ENTERPRISES LIMITED, MECON FZE, CJSC VNESHKONSALT, OOO STROITELNYE TEKHNOLOGII AND OOO RLC DEVELOPMENT, KAREN WOODS AND YANGTZE CONSULTING FZC, SENAT LEGAL CONSULTANCY FZ LLC AND MICHAEL WAECHTER

DEFENDANTS

APPROVED JUDGEMENT DELIVERED BY MR. JUSTICE HAUGHTON ON FRIDAY, 23RD FEBRUARY 2018 DAY 3 JUDGMENT DELIVERED BY MR. JUSTICE HAUGHTON ON FRIDAY, 23RD DAY OF FEBRUARY, 2018 AS FOLLOWS:

MR. JUSTICE HAUGHTON: This is my judgment in the Plaintiffs' interlocutory application in this matter.

RELIEFS SOUGHT

An interim order herein was made by Judge McGovern on 22nd January 2018. The Plaintiffs now seek interlocutory orders in similar terms in respect of the Defendant Mecon and the 21st to 23rd named Defendants, who I shall refer to as the Senat Defendants. And they seek these orders in aid of orders made previously in this jurisdiction in 2011 and 2012 and which orders were extended to apply to Mecon, but not to the Senat Defendants.

In the Notice of Motion an order is sought, firstly, for the appointment of Mr. Cathal MacCarthy solicitor as receiver over shares held by Mecon in an Indian company, Mack Soft Tech Pty. Ltd., including receivership over all the rights and entitlements to such shares arising.

Secondly, they seek an interlocutory order in aid of the earlier orders in respect of all proceeds or any monies that might be paid for or in respect of the Mack Soft shares or rights attaching thereto, including any dividend or payment payable in respect of Mack Soft shares on the liquidation of Mack Soft Tech Pty. Ltd.

Thirdly, they seek an order restraining the 21st to 23rd Defendants that's the Senate Defendants, who are not currently subject to injunctions and each of them restraining them from taking direct or indirect steps or assisting any person to assign or dispose of the scheduled assets.

Fourthly, they seek an order restraining those Defendants, their servants or agents from assigning, transferring or assisting in assigning assigning or transferring of any direct or indirect legal or beneficial or other interests in any of the scheduled assets or charging or encumbering them and so forth.

Fifthly, they seek an order requiring the 21st to 23rd Defendants, their servants or agents to disclose on oath documents relating to any actions taken by them or on their behalf for the purpose of placing any of the scheduled assets beyond the reach of IBRC.

PARTIES AND AFFIDAVITS

The Personal Defendants did not take any part in this hearing, although an affidavit was filed on their behalf sworn by Sean Quinn Junior. I have read and considered that affidavit. The Senat Defendants were represented by solicitors and counsel, and indeed a representative of Senat Legal, a Mr. Misra, was in court.

Two affidavits were sworn by Mr. Willem Smit. Unsworn versions of these were before the court, but counsel informed the court very directly that these were identical in wording to affidavits that were *actually* sworn by Mr. Smit. Mr. Smit is a Director of Mecon. He is also the principal or managing officer of Senat. I emphasise that these affidavits were sworn. They were relied upon and they were considered by this court.

However, on the second day of the hearing, the court was advised by counsel for Mecon and the Senat Defendants, Mr. Jarlath Ryan, that instructions had been sought from their client on certain matters that had arisen on day one and that these instructions had not been forthcoming and that his solicitors would be applying to come off record next week. In the circumstances, counsel was not in a position to make legal submissions, notwithstanding that written legal submissions had been prepared and had in fact been read by this court. No criticism is made of counsel or solicitors, who appear to have acted ethically and properly in so advising the court and in taking this position.

In support of the reliefs sought, the Plaintiffs relied on three affidavits of Mr. Wallace, one of the two joint special liquidators of IBRC two of these were by way of reply to Mr. Smit's affidavits an affidavit of Mr. Swapnil Gupta, an Indian lawyer, two affidavits of Mr. Robert Dix, the director of a number of Quinn International Property Group that's IPG companies, who was put into position in those companies at the behest of IBRC, and one of his affidavits is by way of reply to Mr. Smit. I have also considered an affidavit of Mr. Michael Turner, a computer expert and two affidavits of Mr. MacCarthy, the receiver appointed by the interim order and, finally, an affidavit of Arun Kathpalia, a senior advocate in the courts in Delhi.

HISTORY OF INTERLOCUTORY ORDERS

In these proceedings the claims again Mecon and the Senat Defendants sound in conspiracy and plead that they took actions on behalf of the Defendants, particularly the Personal Defendants, to place IPG assets beyond the reach of the Plaintiffs. There is a long history of interlocutory orders and the joinder of additional Defendants, including Mecon and the Senat Defendants, which do not need to be considered fully. Apart from the interim order made on 22nd January 2018 by Judge McGovern, there are no interlocutory orders applying directly to the Senat Defendants.

The main interlocutory orders that are relevant are, firstly, an order of Judge Clarke made on 20th July 2011 following an interim order

made on 27th June 2011. And in that order, injunctions were granted restraining the Defendants, their employees, servants or agents from, inter alia, taking any step directly or indirectly that may have the effect of transferring any of the assets of, and then there are various listed Quinn companies, to any third party, save to the extent that the same may be done in the ordinary course of business.

The other significant order is that of Kelly J. of 25th July 2012, and this was made following interim orders on 14th June 2012 which also enjoined Mecon as a party to these proceedings. And in those suite of orders, at no. 2 an order was granted that all the Defendants other than Mr. Quinn, the First Defendant, who was then in bankruptcy, *"and each of them be restrained, whether by themselves or by their respective servants or agents or otherwise, howsoever from taking any direct or indirect steps to assign, dispose, sell, discharge, transfer surrender the assets as defined in the schedule to the amended Plenary Summons ('the Scheduled assets'), in which they have direct or indirect legal or beneficial or other interest, whether or not in their own names or in the names of any other persons or entity, including, without prejudice to the foregoing, any direct or indirect legal or beneficial interest or other interest held through."*

Then there's other lists of nominees and children that I don't need to go into.

The third order provided that:

> *"All Defendants and each of them, whether by themselves or by their respective servants or agents or otherwise, be restrained from assigning or transferring any direct or indirect legal and/or beneficial and/or other interest in any of the assets, or alternatively, from charging, encumbering or otherwise dealing with or devaluing the assets or taking any steps calculated or intended to prevent or obstruct the first named Plaintiff from recovering debts due or enforcing security held by the first named Plaintiff."*

As far as scheduled assets are concerned, these are referred to and listed in the amended Plenary Summons, and that includes:

> *"Shares, to include all bearer shares, in the following companies and any assets of or rents or profits accruing to the companies or the value of any debts held by or on behalf of the companies."*

Then a long list ensues. And on the second page, under the heading "India", we see at item 41 "Q City", and an address is given, "*Hyderabad, India*".

This order of Kelly J. bound Mecon. Mecon is a company registered in the United Arab Emirates. It challenged the jurisdiction of the Irish courts, but lost that challenge and subsequently entered an unconditional appearance in these proceedings. Mr. Smit suggests in his affidavits that Mecon may not be bound by the July 2012 order. There is no basis for this suggestion. The order was made within jurisdiction in respect of a defendant, a defendant who has now filed an unconditional appearance and it is and always was binding on Mecon, its servants or agents.

I note that in his judgment of 25th July 2012 Judge Kelly observed and I take this as extracted in paragraph 40 of the affidavit of Mr. Wallace he stated:

> *"There is a further significant element in the matters before me. The defendants have chosen not to file any replying affidavits at all. They were given ample opportunity to do so. They did not avail themselves of it. Thus, there is no denial, refutation or explanation of the large volume of evidence and exhibits which have been put before the court. Whilst the court does not and cannot at this stage of the proceedings make any final or binding determinations, it has to be said that all of the evidence before the court points in one direction.*
>
> *That is itself somewhat unusual in applications of this type. Normally the court has to deal with disputed facts and disputed evidence and has to adjudicate in the light of such disputes. On the evidence which is before me and which is not controverted, it appears that the Quinn family have created and operated a scheme of mesmeric complexity on a deliberate and premeditated basis which has cynically sought to achieve a twofold purpose. I regret to say that the scheme reeks of dishonesty and sharp practice. Its first object is to place assets which should be available to the plaintiff bank beyond that bank's reach. Its second is to feather the Quinns' own nests.*
>
> *Faced with this kind of conduct, any court worthy of the name and worth its salt would, if asked, make whatever orders it could legitimately make in order to bring an end to such wrongdoing and to frustrate the intentions of the wrongdoers."*

Q CITY AND NEW EVIDENCE

The Plaintiffs in this case now say that further evidence has come to light that shows that Mecon and the Senat Defendants, in conspiracy with the Personal Defendants, wrongly secured a controlling interest in and had extracted cash and asset stripped Mack Soft Tech Pty. Ltd., the company that owns and operates in Q City one of the assets named in the amended Plenary Summons schedule. Q City is a big technology business park, developed with the help of Quinn Group finance provided through a company, Quinn Finance, and it is a property which has achieved rentals of at least $36 million since January 2011.

It is appropriate to summarise some of the relevant inter company relationships before going further. The Second Named Plaintiff: is Quinn Investments Sweden AB and the Third Named Plaintiff: is Bankruptcy Receiver. So the company owns 100% in a company called Quinn Logistics Sweden AB, and that company in turn owns 100% in Quinn Logistics Private India. Now, Quinn Logistics Sweden AB is a company that has taken proceedings in India. Quinn Logistics Private India is actually a defendant in the Indian proceedings, along with another company, Quinn Lodgings Private India. These two companies between them hold, or did up until 22nd June 2011, 100% of the shareholding in Mack Soft, 98.9% of which was held by Quinn Logistics and 1.1% of which was owned by Quinn Lodgings. Mack Soft is also a defendant in the Indian proceedings and is the subject matter of insolvency proceedings in the Indian bankruptcy court. Quinn Finance, as I say, funded development in Mack Soft's development of Q City and in exchange received what are known as CCDs, which are debentures, which will feature later in my judgment.

On or about 22nd June 2011, following a resolution of Mack Soft allowing an increase in the authorised share capital this was in fact a substantial increase 376,301 shares were transferred to Mecon for approximately $90,000. This gave control of Mack Soft to Mecon. A small percentage of shares still held by the pre existing shareholders, Quinn Logistics, were subsequently transferred to a company called Logvis AG, which is registered in Switzerland. Having acquired control of Mack Soft, Mecon then appointed two men who, from the evidence, appear to be men of straw, effectively tame directors of Mack Soft.

The Plaintiffs say that the share transfers to Mecon were at gross undervalue and designed to give Mecon, and effectively the Quinns, control over Mack Soft. They say that some $15 million is identifiable as having been extracted to date from Mack Soft through bogus software contracts and fee payments and they apprehend further asset stripping.

Mack Soft is currently in the equivalent of what would be Irish examinership in the Indian bankruptcy court, but this will end, at the latest seemingly, on or before 9th May 2018 and this may happen sooner and whether it results in liquidation or results in the reversion of control of the company to Mecon, it is apprehended by the Plaintiffs that there will be the distributions to Mecon as a shareholder or further asset stripping.

In paragraph 22 of his first affidavit sworn on 17th January 2018, Mr. Wallace summarises the new evidence that is relied upon and its effect and he says at paragraph 3:

> *"The new evidence referred to above derives principally from two separate sources: (a) information disclosed pursuant to orders of the Hong Kong High Court of 24 October 2017 arising from an application for Norwich Pharmaceutical relief brought by the Plaintiff in respect of the corporate services provider and Company Secretary of Orient Guide Investments Ltd., a Hong Kong registered entity ('Orient'). The corporate service provider and company secretary were Heritage and Gold Kirin."*

Secondly then, the insolvency proceedings of Mack Soft currently before the National Company Law Tribunal in Hyderabad, India. And those are the Indian insolvency proceedings.

At paragraph 4 he says:

> *"The information obtained from the Mack Soft insolvency proceedings evidences that Mecon, as controlling shareholder and under the directorship of Willem Smit, also a director and principal of Senat Legal and advisor to the Personal Defendants, caused Mack Soft, whose shares and underlying property asset are scheduled assets to the 2012 injunctive orders to enter a number of bogus trance transactions with various entities."*

Then he lists those. They include Minerali two companies Isaad FZE and Cresco Legal Consultancy.

> *"The sole purpose of these transactions is, the Plaintiffs believe, to extract many millions of dollars from Mack Soft, effectively dissipating its assets and its value, contrary to the terms of the 2012 injunctive orders.*
>
> *5. The information obtained pursuant to the Hong Kong orders evidences the stripping of approximately US$12.5 million from Mack Soft, first to a bank account in Orient's name in Hong Kong and then on to a bank account in the name of a UAE company associated with Senat FZC, Isaad FZE, with the same address under the guise of bogus and concocted software licence agreements. Corporate searches in Dubai indicate that the e mail address provided by Isaad on incorporation on 31 October 2011 was mw@senat.ae, which is clearly an e mail address used by Michael Waechter, the 23rd Named Defendant herein. Searches also demonstrate that the company has not renewed its licence since October 2014 and it is likely that any funds transferred to Isaad have in turn been transferred to some other entity or bank account.*
>
> *6. The use of this concocted software licence to extract funds into Orient mirrors a signed agreement that the Plaintiffs unearthed on the server of the Russian IPG company, Finansstroy. The insolvency resolution practitioner appointed to Mack Soft ('the IRP') has reported that he has seen no evidence whatsoever that Mack Soft, a property owning company, received any software, less still software that might have cost US$12.5 million. The documents from the Hong Kong orders further evidences the role of the Senat Defendants and Orient in a scheme to denude IBRC of its security, which scheme is described extensively in the affidavits sworn in these proceedings and in the pleadings."*

THE COURT'S VIEW OF THE NEW EVIDENCE

I am satisfied from the Plaintiffs' affidavits that there is, for the purposes of this interlocutory application, a very strong body of evidence supporting this summary. Mr. Turner considered all of the Seekport software agreements in detail and concludes that, in his expert opinion, they are not authentic and that the sums paid or to be paid thereunder are grossly inflated. The reports of the Indian insolvency resolution practitioner, the examiner, also indicate that this software is of little or no use or benefit to Mack Soft.

In his supplemental affidavit sworn on 21st February of this year, Mr. Smit says at paragraphs 25 to 27:

> *"Orient Guide was a company requested by a client of Senat FZC" who the client was is not disclosed "and was incorporated through a corporate service provider in Hong Kong. The company was incorporated along the standard lines of CSP practice and then transferred to the client. The client was formally working alongside a Mr. Havermann, who worked for the UAE office of Seekport International Technologies GmbH, which originally developed the Seekmaster software."*

I am satisfied, having considered all of the evidence before the court, that the probability, indeed almost certainty is that the client was the Quinn family.

At paragraph 26 Mr. Smit says:

> *"Mr. Havermann subsequently started his own venture, Isaad FZE. Orient Guide was at the time given or to be given the distribution rights for the Seekmaster software in parts of Asia as the Asia agent of Isaad FZE. The client of Senat FZC, as the future signatory and director, required Senat FZC to set up Orient Guide for eventually executing the software related transactions between Orient Guide and Isaad FZE. Mr. Waechter, as top level management of Senat FZC, oversaw the setup of this company and handed it over to the client per the routine corporate services required of Senat FZC. On the issue of the Seekmaster software, Mecon FZC has neither directly bought nor sold this software. It is a commercial decision made by the management of the company, Mack Soft, in pursuant of its business strategy and operations. Mecon FZE does not run Mack Soft's day to day business and maintains routine corporate and operational arm's length distance between a parent and its subsidiary domiciled and operating in a different jurisdiction. The preceding notwithstanding, Mecon FZE submits that any examination over Mack Soft or its records in any court of law will reveal that the Seekmaster software is an existent functioning software which has been marketed, demonstrated*

and sold to clients, being maintained on a server which is regularly paid for by Mack Soft. There has been no finding or suggestion on record against Mack Soft that the Seekmaster software is a nonexistent or a non functional software. I beg to refer to a report on the Seekmaster software prepared by Mr. Havermann upon which marked with the letters 'WS11' I have signed my name prior to the swearing hereof."

Mr. Smit does not, in relation to those averments, state his source in relation to what he says about the operations of Mack Soft and its commercial decisions. No affidavit has been filed by Mr. Havermann. So beyond the assertion in those paragraphs, there is no evidence adduced to show that Seekmaster or Seekport is functioning software.

The so called report of Mr. Havermann is exhibited and it is not signed, it is not dated. It appears to be more of the nature of web advert material and its format suggests a certain amount of cut and paste. On the fourth page there is a comment that says:

"Yahoo bought a search technology with similar functionality like X Info Management, together with a news portal for the Arabic market. X Info Management was a competitor of Mac 2 in the sales discussion with Yahoo but failed to win the bid, mainly because Seekport in Germany went bankrupt end of January 2009 and could not finance the demo setup required."

On its own terms, therefore, that document seems to be saying that the software was developed by Seekport in Germany by a company that went bankrupt in January 2009. As I say, Mr. Havermann has not sworn any affidavit, even though he appears to control Isaad FZC, the company that, on the evidence, ultimately received some $11.2 million under the scheme in the year 2012, which money has never been accounted for.

The timing of events and payments evidenced by the Plaintiffs and not contested by Mr. Smit is instructive. Shortly before the first order of Clarke J. on 27th June 2011, on 20th June Mr. Peter Quinn met Michael Waechter in Dubai. On 21st June the Quinn family paid €65,570 to Mecon from an account in the name of Neala McPartland, the infant child of two of the Personal Defendants. This sum equates approximately to $90,000 and it is clear that it was used on 22nd June to buy the 376,301 shares in Mack Soft which had newly been issued as a result of an EGM of Mack Soft organised by Stephen Kelly and Niall McPartland, two of the Personal Defendants, and this was clearly organised through Quinn entity activities and in particular Quinn Logistics India. It was this that gave Mecon control of Mack Soft, and in September 2011, Mecon appointed the two men of straw as directors, clearly to do its bidding and to sign documents as required. Also on 21st June, Mr. Michael Waechter bought Orient Hong Kong, a shelf company, and this was the company that would soon strip more than $12.5 million from Mack Soft. On 11th August, Quinn Logistics India allocated the remaining shares in Mack Soft to Logvis, which I am satisfied is a company registered in Switzerland which is connected to and controlled by the Senat Defendants. On 16th September, Mr. Smit, who is a Mecon director although this has only recently come to light received a copy of a letter from the Personal Defendants' then legal advisors to their Russian advisors enclosing copies of the orders of 27th June and 20th July 2011.

I find that Mr. Smit and Mecon from then on knew all about those orders and consciously helped the Personal Defendants and were party to an elaborate scheme designed to asset strip Mack Soft, one of the IPG companies, and that Mr. Smit and Mecon well knew that this would have the effect of indirectly transferring assets out of Quinn companies named in the orders and contrary to those orders. That they did this for reward is also evident from the Plaintiffs' affidavits.

It seems that the software agreements between Orient and Mack Soft were completed or signed in early December 2011. In his first affidavit, Mr. Wallace sets out a full chronology which it is not necessary to recite, but taking it up in December 2011 he says:

"In or around 27th December 2011 the Mecon Indian proceedings were instituted by Quinn Logistics Sweden AB seeking to set aside the transfer of shares to Mecon. On 5th January 2012 instructions were granted to the Indian proceedings restraining Mack Soft and Mecon from, inter alia, taking any steps to alienate their assets. On 11th January 2012 Mack Soft granted a charge over Q City to an Indian bank, HDFC, to secure a loan of approximately €11 million. When the existence of the charge was ultimately discovered, there was a difficulty proving that Mack Soft had been formally served with the orders. However, it was clear that Mack Soft knew of the existence of the orders and knew, through Senat Defendants, of the existence of the 2011 injunctions."

I accept that evidence. And so for the purposes of these interlocutory proceedings, I accept the evidence that the €11 million loan and charge went ahead notwithstanding that Mack Soft and Mecon and the Senat Defendants had knowledge of the Indian injunction granted on 5th January 2012 and the orders made by this court in June and July 2011. I also accept that the sum of $12.5 million was paid to Orient and that some $11.2 million was paid to Isaad FZC, some 10.2 million of that in February 2012 and a further million in June 2012. Notably, this latter payment was made after the order of Judge Kelly, which applied to Mecon.

It follows that I reject Mr. Smit's attempt to characterise the payments made by Mack Soft as having been made "in the ordinary course of business".

FAULTS DEBENTURES PUT IN EVIDENCE

There is one particularly disturbing feature of the evidence. Mr. Smit disputes that $90,000 was an undervalue for the shares, which the Plaintiffs maintain were worth at least $17 million. There are differing valuations. But Mr. Smit and the Defendants rely, inter alia, on the fact that the value must take into account CCDs held by Quinn Finance. These are convertible compulsory debentures and there are some seven of these held by Quinn Finance arising from 24th December 2007 to 4th October 2010 for total equity share allotments on conversion of some 14 billion, I think it is, rupees.

In his first affidavit, at paragraph 21, Mr. Smit says: *"Another overarching point that I wish to make on behalf of the 16th and 21st to 23rd Defendants is the existence of convertible compulsory debentures in favour of Quinn Finance. I attach the instruments in question marked 'WS3' upon which I have signed my name prior to the swearing hereof. These instruments operate, according to the present capital structure, so as to give a full and complete equity interest in Mack Soft in favour of Quinn Finance after the expiry of the tenure of these CCDs. The full extent and import of these CCDs is not in the present application and has never been explained to any Irish court and they would have formed a crucial component of any defence which would have been delivered under the previous schedule for the exchange of pleadings, which has, in any event, not been met and complied with by the Plaintiffs. I therefore say that it is non disclosure of material which would have influenced the mind of the court at the point at which it gave the interim orders on 22nd January and that such material was not placed before the court. The effect again of these instruments is that an entity controlled by or on behalf of the special liquidator ultimately gains a full controlling interest. Taken against the share base of Mack Soft at the time of issue of CCDs in Mack Soft at the expiry of the tenure of these instruments, in all proceedings in which Mecon has participated in India, which are compendious, the primacy of the instruments has always been conceded and emphasised by Mecon, it is inexplicable why the Plaintiffs have not fully set out and explained the effect and import of these CCDs."*

He then exhibits the CCDs. And turning just to one of these, we see it described as a debenture subscription agreement. The one that the court is looking at is dated 24th December 2007, but the other ones appear to be in similar terms. And in clause 1 there are various definitions, including the following definition of "tenure":

> *"Means the period commencing from subscription date and ending upon completion of 10 years from subscription date, which may be extended for a further period of 10 years at the sole discretion of the company completion date."*

So it could be from ten years to 20 years. Clearly, a debenture with a tenure of 10 years which has now expired and gives the holder an entitlement to convert and a controlling interest is far more valuable than a debenture which has another ten years to run. Conversely, the Mecon shares in Mack Soft, if held subject only to a ten year debenture, the tenure of which could be extended to 20 years, would be far more valuable.

However, in an affidavit sworn by Michael Waechter on 11th April 2013, he exhibits, at paragraph 12, a debenture of the same date and he says in paragraph 13:

> *"As will be seen from the terms of this convertible loan note document, it is envisaged that a date set out therein that when payment obligation will arise in favour of Quinn Logistics by Mack Soft. It was always the intention that Mack Soft would continually honour this payment obligation to Quinn Logistics. This payment obligation, which is set out and described in the convertible loan note agreement, is the principal reason why the ostensible purchase price of Mack Soft appears low. However, if one considers the existence of the payment obligation under the convertible loan note agreement, it is the case that the payment received by Quinn Logistics for the shares in Mack Soft is correct and appropriate. I can now say before this Honourable Court that Mack Soft is prepared and always has been prepared and Mecon is prepared and always has been prepared to honour the payment obligation in the convertible loan note agreement. It was never Mecon or Mack Soft's intention not to honour this payment obligation."*

What Mr. Waechter exhibits is then the debenture subscription agreement. And again I choose the one dated 24th November 2007 in which there is a different definition for "tenure". It is defined in this to mean:

> *"The period commencing from subscription date and ending upon the earlier of (i) the completion of 9 years and 11 months from subscription date, i.e. on the completion of the 11th month immediately succeeding the 9th anniversary of the subscription date; and (ii) any other date which the company may, at its sole discretion, stipulate after the date hereof."*

So it is the earlier of those two dates. And that version exhibited by Mr. Waechter is reflected by a version found by Mr. Dix on Quinn Finance's server when he was appointed a director on 14th April 2011. It is also reflected in an interview which Mr. Waechter gave to the Irish Times on 9th May 2014, an interview in which, incidentally, Mr. Waechter also said that the price paid by Mecon for the shares was "ridiculously low".

There are other differences between the two versions and these include, for instance, the fact that on the Waechter version the interest payment date is 30th September every year starting from 30th September 2015, whereas in the Smit version interest is only payable after ten years if the tenure is extended, and there is also a somewhat different interest rate.

So Mr. Smit relies on what appears to be a false document and asserts that all of the debentures are extendible for ten years. This is the direct subject of litigation in India. It also has great significance for the Indian bankruptcy proceedings, where Mack Soft has challenged the petition to wind up. Moreover, if Mack Soft comes out of the examinership in Mecon and relies on the false CCDs to challenge the entitlement to convert CCD shares at the present time, it will be in an advantageous position.

This casts an even deeper shadow over Mr. Smit's evidence. And these problems with his evidence were highlighted on day one. It seems instructions were sought from Dubai overnight but were not forthcoming, and this led to the intimation that Downes and Co, these Defendants' solicitors, would apply to come off record. It makes it difficult, if not impossible for this court to prefer Mr. Smit's evidence over that of the Plaintiffs in respect of any issue which is put in dispute.

Sufficient for the purposes of this application, I am satisfied on the evidence that it is not addressed in any meaningful way by Mr. Smit, in any case, that further asset stripping occurred by way of the following payments.

FURTHER ASSET STRIPPING PAYMENTS

Firstly, in relation to Cresco Legal, which is believed by the Plaintiffs, for good reason, to be one of the Senat Legal group and it is now known as Yangtze it is a company that was registered in Dubai and I note that it, as such, is not a company that would be qualified necessarily to give advice on Indian law that company was paid $770,000 between July 2016 and December 2016 for work done related to "co ordination of international litigation". The next payment was to the 21st Defendant, Senat FZC, for management consultancy and some $200,000 was paid between April 2015 and 31st August 2017. The next payment was made to Minerali Holding Private Ltd., an Indian company; a sum of $790,000 was paid purportedly for arranging a term sheet for sale of an asset, the sale of which stands injuncted. The next payment was to Minerali FZE, a Dubai company of which Mr. Rattan Kapur is the only registered officer, and it has been paid $700,000 for consultancy services. In addition, Mr. Kapur, a person who, on the evidence, is related to or known to and worked with the Quinn family since 2004, or at least for a good many years, has been paid by Mack Soft a sum of $295,000. And all these added up seem to exceed $14 million.

However, it does not stop there. Mr. Wallace's analysis and he is an experienced commercial accountant of the $36 million revenue generated from Q City from January 2011 until March 2017, and allowing for expenses and servicing of the HDFC loan of 11 million, that Mack Soft should have had cash surpluses in the order of $8 $10 million. Mr. Wallace expresses the view that further monies had probably been dissipated from Mack Soft.

Notwithstanding Mr. Smit's efforts to argue otherwise, clearly the asset stripping of Mack Soft has devalued that company and Mack Soft shares. Prima facie, this is in breach of the order of Judge Kelly of 25th July 2012. In further breach of the order, it involves "steps calculated or intended to prevent or obstruct IBRC from recovering debts due to enforcing security".

CONCLUSIONS ON THE EVIDENCE

While not making any final findings of fact, I am easily satisfied, on the basis of the new evidence adduced, that the Plaintiffs have demonstrated further fair questions to be tried both in relation to the conspiracy by Mecon and the Senat Defendants and in respect of proprietary or tracing claims in relation to Mack Soft shares and cash extracted from Mack Soft. Secondly, I am satisfied that there is a real risk that the Defendants will use any means and opportunity open to them to further strip Mack Soft assets or devalue its

assets and a real risk that this *will* happen if Mecon retains or regains control over Mack Soft through its shareholding, the validity of which is disputed in these proceedings and in Indian proceedings and/or through the shareholding of Logvis, which is a company I am satisfied is controlled by Mecon and the Senat Defendants and in which the remaining minority interest in Mack Soft is vested.

DAMAGES NOT AN APPROPRIATE REMEDY
Nor are damages an appropriate remedy, in circumstances where the evidence clearly demonstrates that Mecon and the Senat Defendants, their servants and agents are linked to the Personal Defendants and where the Personal Defendants have some mechanism that enables them to benefit from MECON's activities. What that is is at this stage unclear. They are also inappropriate in circumstances where Mecon and the Senat Defendants are central to the scheme to extract cash and asset strip Mack Soft and put these assets beyond the reach of the Plaintiffs and where no evidence is tendered as to what has become of $11.2 million that ended up with Isaad under the orchestration of the relevant Defendants. And no evidence is adduced to suggest that Mecon or the Senat Defendants have or will retain assets sufficient to discharge any damages that might be awarded against them. It is also of the nature of the wrongdoing evidenced by the Plaintiffs' affidavits, the very extraction and dissipation of cash, that damages would not be an adequate remedy.

NON DISCLOSURE ALLEGATION
Mr. Smit, in his affidavit, suggests that at the interim application there was non disclosure or lack of candour such that this court should refuse interlocutory relief. This is raised particularly in two respects; firstly, non disclosure of the CCDs or debentures in the context of the value of the shares in Mack Soft and whether Mecon bought at gross undervalue, and secondly, in relation to disclosure of the terms and extent of Indian court orders, proceedings and injunctions.

(1) WITH RESPECT TO THE CCDs
As to the first, Mr. Smit exhibits and deploys, in aid of his argument, at Exhibit WS3 "the instruments in question". But prima facie these are false, altered or forged documents or copies and this disentitles him to pursue any point based on such exhibits. Quite apart from this, I do not accept that there was material non disclosure. Mr. Wallace refers to Mecon acquiring the shares in Mack Soft at significant undervalue several times in his first affidavit see, for example, paragraph 44 and paragraph 65, the sixth bullet point of which wherein Mr. Wallace refers to the Plaintiffs' approximate valuation of Q City at $80 million in 2011.

The dispute in valuation cannot be determined by this court. But what Mr. Smit ignores is that the purpose of the share purchase was to gain control of Mack Soft to facilitate asset stripping and this purpose was achieved and it appears that some $15 million was extracted.

(2) INDIAN PROCEEDINGS ORDERS
As to the second matter, I am satisfied that the affidavits before Judge McGovern at the interim stage, those of Mr. Wallace and also, seemingly, Mr. Gupta and Mr. Dix, both of which were sworn on 19th January, made sufficient disclosure of the Indian proceedings and orders. Indeed, the application is in part based on the information obtained from the Indian bankruptcy proceedings before Hyderabad court and Mr. Wallace, at paragraph 65, records that on 27th December 2011 Quinn Logistics Sweden AB instituted proceedings seeking to set aside the transfer of shares to Mecon and, on 5th January 2012, "injunctions were granted in the Indian proceedings restraining Mack Soft and Mecon from, inter alia, taking any steps to alienate their assets."

Mr. Gupta's affidavit gives more detail in relation to the insolvency proceedings and Indian law. He notes the re call of the loan and the order made on 11 August 2017 in the corporate insolvency resolution process, or as I've described it, examinership, and the appointment of Mr. Bhatt as insolvency resolution professional, or examiner and the moratorium period that is in place and will run to 9th May 2018, and he also details the various appeals and motions that have ensued. Mr. Dix also addresses both sets of Indian proceedings in his affidavit see paragraphs six and 18 to 19.

EXTRA TERRITORIAL AFFECT AND RESPECT FOR THE INDIAN COURTS
I am, however, very conscious that while this court can make injunctions with extraterritorial effect, it should be careful to respect the comity of Indian courts and should avoid making orders that could have the effect of obliging a party or their servant or agent to take or refrain from taking steps that would cause them to breach any extant Indian orders.

So far as the Indian bankruptcy proceedings are concerned, I accept the expert evidence of Mr. Gupta as to the effect of the moratorium and the effect that any appointment of a receiver over Mecon shares in Mack Soft may have in relation to these proceedings. He deals with this in his affidavit at paragraphs 29 to 32. And he says at 29:

> *"In the event that the appeals are decided in favour of Mack Soft, the order of 11 August 2017 will be set aside and control of Mack Soft will be restored to the board of directors of Mack Soft as appointed by its shareholders, Mecon and Logvis. In the event the appeals are dismissed in favour of Quinn Logistics India, the CIRP will continue unaffected.*
>
> *30. In the event that the appeals are dismissed and the CIRP continues, however, no resolution plan is approved within the CIRP period, including a possible extension of 90 days, Mack Soft will be placed in liquidation in terms of Section 33 of the IBC. The liquidation process will be conducted in accordance with chapter 3 of the IBC and the proceeds of sale of the assets of Mack Soft will be distributed in accordance with the order of priority specified in Section 53 of the IBC.*
>
> *31. In view of Section 53, read with Section 60(5) of the IBC, in the event of liquidation of Mack Soft, Mecon may receive a distribution of surplus in insolvency against the shares held by it in Mack Soft. Under Section 60(5) the adjudicating authority would have the jurisdiction to decide 'any question of priorities' arising out of the liquidation proceedings. An order from this Honourable Court directing that any proceeds found payable to Mecon in the liquidation of Mack Soft be deposited with a receiver or appointing a receiver for the shares held by Mecon FZE and Mack Soft would have no bearing on the CIRP or the adjudicating authority's jurisdiction to decide any question of priorities arising in the course of liquidation proceedings.*
>
> *32. I say and believe and as a matter of Indian law the appointment by this Honourable Court of a receiver for the shares held by Mecon FZE in Mack Soft will not interfere with the CIRP process in India or with the liquidation process in the event that Mack Soft is placed in liquidation. I take those averments very seriously and they give me some comfort."*

I also accept the following brief averment from Mr. Dix in his second affidavit where, at paragraph 19, he said:

> *"In each of the possible outcomes" that's of the Indian bankruptcy proceedings "there is a likelihood of Mecon exercising control over Mack Soft and its affairs and/or deriving significant economic benefit from the Mack Soft asset, which, as in*

the past years, will continue to be irreversibly removed outside the reach of the Plaintiffs should they succeed in the present proceedings."

I also have the benefit of the opinion on affidavit of Mr. Arun Kathpalia, a Senior advocate in Delhi, and he has considered the injunction granted in India on 5th January 2012 and also the effect of the moratorium. His expert evidence is particularly relevant in the light of the receiver, Mr. MacCarthy's attempts since his interim appointment as receiver on 27th January to gain control of the Mecon and Logvis shares, and it is appropriate to refer to some of that correspondence before mentioning Mr. Kathpalia's report further.

On 25th January Mr. MacCarthy's solicitors, Blooms, wrote to Mack Soft notifying of his appointment and requesting co operation. Blooms also wrote to Mr. Smit and to the Mecon and Senat Defendants' solicitors, Downes Solicitors. And the first letter to which I will refer is that to Mr. Smit on that date, 25th January. And it notifies of the appointment and it said:

"It was ordered and made on my appointment that I be appointed on an interim basis until after 21 February 2017 or until such further order in the meantime as receiver in respect of all the proceeds of or any monies that might be paid for or in respect of the Mack Soft shares or the rights attaching thereto, including any dividend or payment payable in respect of the Mack Soft shares or the liquidation of Mack Soft Tech or otherwise to which Mecon might be entitled.

I call upon you within the next ten days: (a) to take steps necessary to have me entered into the register of members of Mack Soft with company registration" and that's given "as registered owner of Mack Soft shares; (b) to furnish a copy certified by the Secretary of Mack Soft of an extract from the register of members showing me as registered owner of Mack Soft shares; (c) to furnish share certificate showing me as registered owner of Mack Soft shares (the new share certificates); (d) to furnish the original share certificates of the Mack Soft shares (the share certificates); and (e) to furnish an affidavit confirming that both categories of the share certificates as sent to me are the originals and have not been pledged or given as security or any loans, borrowings or financing to any third parties."

And ten days was allowed for a response to that. A similar letter, as I say, was sent by Bloom Solicitors to Mack Soft, the only difference being that it called upon them to satisfy the first of the three requirements mentioned in the previous letter, but not the latter two. A further letter then was sent to Downes Solicitors, who replied on 5th February and they state I just will refer to some of the relevant parts:

"With respect to the shares held by Logvis AG, you will note that we neither act for that company nor is that company a party to the within proceedings. Further, we are instructed that despite the assertion to the contrary by the Plaintiffs in these proceedings, Logvis does not hold any shares in Mack Soft on behalf of our client and so our client is not in a position to take any steps to have you registered as owner of those shares."

Then there is reference to an appeal from the interim order which in fact was not pursued. Then they recite the various Indian court injunctions made on 5th January. And then they refer to a moratorium in the bankruptcy proceedings, and that reads:

"Subject to the provisions of subsections 2 and 3, on the insolvency commencement date the adjudicating authority shall, by order, declare moratorium prohibiting all of the following."

And they highlight (a):

"The institution of suits or continuation of pending suits or proceedings against the corporate debtor, including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority."

Then they recite the rest of that provision. And they state:

"We are advised by our client that the management of the company" that's to say Mack Soft "is governed by the Indian bankruptcy code. Anything related to the shares cannot occur pending a determination of that process, as set out in the above quoted section of the Indian bankruptcy code. In the circumstances, for our client or Mack Soft to comply with the requests set out in your letter of 25th January then they shall immediately breach orders of the Indian courts which have been binding since January 2012 and in breach of the moratorium. The conflicting nature of the orders granted by McGovern J. with those granted in India form one of the grounds of appeal for the reasons stated."

Bloom Solicitors responded to that on 6th February. They indicate that the terms of the order of 22nd January was based upon affidavit evidence and appointed Mr. MacCarthy as receiver over all the shares in Mack Soft held directly or indirectly, including the shares of Logvis. They state:

"In light of your contention, you are requested to furnish me all documentation that your client holds or is in a position to obtain which relates to the acquisition of shares of Mack Soft by Logvis and/or is being relied upon in support of your contention that Logvis does not hold any shares in Mack Soft on behalf of your client."

And that was requested to be delivered by Friday, 9th February. Further on in that letter then there is reference to the orders made in respect of Mecon in the 2012 proceedings and Bloom state:

"I am seeking advice under Indian law in respect of your client's assertion that the request to transfer the shares is inconsistent with injunctions existing in the Mecon 2012 proceedings. In the interim and subject to advice I receive, please confirm by close of business on Friday, 9th February that your client would be willing to transfer the title of the shares held by your client in Mack Soft into my name if appropriate directions or modifications of the order in India are obtained from the Indian court by the Plaintiffs in these proceedings."

The author then refers to the insolvency proceedings in India and says:

"I have taken legal advice in India on a number of issues. Without wishing to waive privilege over this advice, I am satisfied that the steps I intend to take as detailed below are not prohibited by the orders in the Mecon 2012 proceedings and the Act. I am further satisfied that your client is obliged to assist me and a failure to do so would be a breach of McGovern J's order of 22nd January 2018."

The next heading then is "Resolution of Mecon FZE":

> *"Pursuant to the powers given to me by the order of McGovern J., I hereby call upon your client to issue a formal authorisation to appoint me as its representative under Section 113 of the Companies Act 2013" that's to say the Indian Companies Act "for taking all actions on behalf of your client in respect of the shares. I enclose a copy of the resolution that I require your client to pass. I require a signed and certified copy of the resolution by 5 p.m. on Friday, 9th February."*

Then the author says:

> *"I am writing to Mr. ML Jain, who was, I believe, appointed resolution professional effective 31st January 2018" I should explain that Mr. ML Jain succeeded Mr. Bhat "requesting him to call an extraordinary general meeting of the members of Mack Soft under Section 100 of the Companies Act, with notice in accordance with Section 101 of the Companies Act and special notice under Section 169, read with Section 115 of the Companies Act to remove and replace the existing directors of Mack Soft. I am seeking to appoint two directors to replace Mr. Charag Ahmed and to replace Mr. Sabir Parvez to the board of directors."*

Again I should note that those are the two directors that were appointed by Mecon as soon as they took control of Mack Soft.

Accompanying that letter then was a draft resolution pursuant to the provisions of the Companies Act mentioned by the letter writer. Downes replied on 7th February, saying in the third paragraph:

> *"We note your confirmation that compliance by our client with the order of McGovern J. would amount to a breach of the pre existing continuing order of the Indian courts, particularly IA 78 of 2012 as correctly identified by you."*

This, of course, was not what was said in Bloom's letter, and that is taken up in the reply to this letter. Then Downes Solicitors went on to say:

> *"For that reason and in order to circumvent the unavoidable breach of either the existing Indian order of the conflicting recently obtained orders of the Irish courts, we note your suggestion that in the circumstances it is now necessary to make an application to the Indian courts for appropriate directions or modifications of the order of IA 78 of 2012.*
>
> *We note your suggestion that the plaintiffs to the Indian proceedings, as distinct from the separate Plaintiffs in the Irish proceedings, would make such an application to the Indian courts. Please confirm whether you have liaised with those plaintiffs, and if so, please advise what their attitude is to making the application, which you have identified as being necessary, so as to remedy the manifest conflict which we agree exists. Please revert to us as soon as you can in relation to this before we seek instructions.*
>
> *Separately, we note you have indicated that you are taking further actions, including seeking for our client to appoint you as its representative under Section 113 and seeking Mack Soft's IRP to call an EGM to remove and replace directors. In order for us to respond fully and properly to your request, our client will need to instruct us further to seeking Indian law advice as to whether these steps are permissible under Indian law and are compliant with the extent orders and the Hyderabad court process.*
>
> *In the meantime, please confirm by return you are in possession of Indian law advice to the effect that the resolution of Mecon FZE you have sought to be executed and your request to Mr. Jain are not in conflict with any extant court orders in India, the IBC 2016 Act or any other Indian law."*

Blooms replied promptly on 8th February. At 1:

> *"As my letter of 6th February makes clear, I have not taken any position regarding the conflict alleged by you concerning the order passed by the Indian courts pending legal advice from my Indian lawyers. Therefore, it is entirely incorrect to suggest that there has been any confirmation from me that compliance by your client with the order of Judge McGovern of 22nd January 2018 would amount to a breach of the Indian court orders or that I agree to the existence of a manifest conflict.*
>
> *My request was clear that, pending receipt of this advice, I sought confirmation from your client regarding its willingness to transfer the title of the shares held by it in Mack Soft into my name if appropriate directions or modification of the order of IA 78 of 2012 are obtained from the Indian court by the Plaintiffs to those proceedings."*

In this letter and earlier letters the reference to IA 78 is incorrect and should be IA 77.

Secondly:"*additionally, my letter asks you to take three additional steps in compliance with McGovern J's order, each of which are independent of and in addition to the transfer of shares held by your client in Mack Soft in my favour. These steps do not violate or conflict with the Indian court orders or the Indian insolvency and bankruptcy code. I can confirm that I have received Indian law advice on this and I reiterate the steps requested by your client below."*

And those are then reiterated. Downes replied on 9th February and, in relation to the shares on Logvis, stated:

> *"Consistent with what our client has said previously, Mecon FZE denies that Logvis AG holds shares on its behalf."*

And they effectively repeat their position and say *"the plaintiffs in the within proceedings have the burden of proof with respect to this allegation at the trial of the matter*." And they say that there's "*no negative burden on Mecon FZE to disprove that Logvis AG holds shares on its behalf."*

"I should say at this point that I am satisfied that Mecon and the Senat Defendants do indeed control the shareholdings of Logvis AG and Mack Soft."

Over page they state:

> *"Mecon FZE asserts that the deposit of physical share certificates of Mack Soft and a request to transfer title in the shares are both equally and unequivocally prohibited by the express terms of the injunction in IA 7(7) of OS no. 2(1) of 2012, the terms of which have been clearly set out in our letter of 5th February 2018."*

As will be seen, I disagree with that observation; the reference to IA 77 is correct in that paragraph. The authors then state:

> *"At the risk of repetition and for the avoidance of doubt, IA 77 injuncts our client 'from transferring, alienating or creating any right, title or interest in respect of 376,301 shares in Mack Soft or any part thereof to or in favour of any third party'.*
>
> *A right, title or interest includes within its scope the creation of a possessory right or interest. Mecon FZE cannot run the considerable risk of committing contempt of the orders passed under IA 77 which have been made in proceedings in India in 2012 and which our client has continuously abided by."*

Then the author deals with the orders in the Mecon 2012 proceedings:

> *"Mecon FZE asserts that any suggested modification of IA 78" I think it should be 77 "of 2012 would not cure the existing injunction prohibiting the transfer of shares of Mecon FZE and Mack Soft, as the transfer, alienation or creation of right, title or interest over those shares is outside the scope of IA 78 of 2012.*
>
> *Our client further asserts that any attempt to even initiate steps towards modifying the injunctions would be a breach of the spirit and terms of the insolvency and bankruptcy code 2016, including a breach of the moratorium under Section 14, which, for the avoidance of doubt and again at the risk of repetition prohibits the continuation of pending suites of proceedings against the corporate debtor, in view of which prohibition Mecon FZE cannot run the considered risk of committing or instigating the commission of such a breach of statute in India, especially so in the course of an interlocutory application."*

Then over page there's some further material that it's necessary to refer to: "*Mecon FZE has been advised to the contrary*" this relates to the bankruptcy proceedings.

> *"Mecon FZE has been advised to the contrary that the issue of shares that our client holds in Mack Soft is conditioned and controlled by and not independent of the insolvency and bankruptcy code by, inter alia, (1) the status of IBC proceedings before the Hyderabad court and the Delhi court; (2) the moratorium under Section 14; (3) the bar on jurisdiction to any other civil court under a Section 2(3) run, in addition to the override provision of Section 238 subordinating any other law or instrument having effect by virtue of law or for the time being in force."*

I pause at this stage to refer to the Indian law advice that is referred to by Mr. Smit in the proceedings. An independent expert Indian law opinion has not been presented to the court by Mr. Smit. He does, however, exhibit at, firstly at "WS4", the briefs and opinion of a Ranjana Roy Gawai. But these are briefs and submissions to the Indian courts, they are not the opinions of an independent expert lawyer prepared for *this* court. Secondly, at exhibit "WS7" he exhibits the opinion of a former Chief Justice of India, S. Balasubramanian, dated 9th February 2018. Obviously that is something, coming from such a source, that this court must consider carefully. But when you look at it, it is not in fact in point. It opines, firstly, that the shares valuation for allotment to Mecon was proper; secondly, that the valuation of shares transferred by Quinn Logistics India to Logvis AG was proper; and thirdly, that motive for the valuation of the allotment cannot be challenged "*as I am advised the company was in need of funds*." So it doesn't relate to the interplay between orders that this court may make and the existing injunction or other orders of the Indian courts.

At paragraph five of that letter from Downes Solicitors, under the heading "Resolution of Mecon FZE", the authors state:

> *"In the absence of any prior and established right under Indian law to your appointment as representative of Mecon FZE under Section 113 of the Companies Act, Mecon cannot make such an appointment, particularly where such appointment would arise as the outcome of an interim or interlocutory application. The receivership orders, which have been passed on an ad interim basis, lack finality and, being a foreign judgment, under the Code of Civil Procedure 1908, are not conclusive under Indian law and cannot be acted upon nor executed within the territory of the Republic of India."*

Well, of course, if this court makes interlocutory orders, that particular point falls away.

> *"Additionally, there is no reciprocal treaty between India and Ireland where such interim order can be affected without following the proper procedure of laws laid down in India. No steps can be taken under Section 113 of the Companies Act 2003 that arise from orders which, by their very nature, are not legally recognised or implementable under Indian law. The foregoing is in addition to the injunction orders passed in OS no. 21 of 2012 which prohibit the shareholder, Mecon, from 'transferring, alienating or creating any right, title or interest in respect of 376,301 shares in Mack Soft or any part thereof to or in favour of any third party'."*

And so forth. Then on 15th February Bloom Solicitors write back, noting the contents and noting their clients', the Defendants Senat and Mecon unwillingness to comply with the requests and indicating that the correspondence would be brought to the attention of the court.

I mentioned that letters were sent by Blooms to other parties. There is one other reply that should be mentioned. There was a reply from Mack Soft, the company, and it is signed by Mr. Rao, in house counsel, Legal and Compliance, of Mack Soft and notes the request to take the various steps mentioned. On page two the author says:

> *"Mack Soft is unable to take any of the steps identified for you for the following reasons: (1) Mack Soft is not a party to any proceedings before any court falling within the jurisdiction of the Republic of Ireland and cannot act on any letter that purports to have been issued to it arising out of the authority of such court and proceedings to which it is not a party. Otherwise, also there is no reciprocal treaty between India and Ireland where such an interim order can be effective without following the proper procedure of law as laid down in India. (2) otherwise, also in India, where Mack Soft is registered, there are substantive and procedural requirements under company law and various regulatory agencies or authorities before which any of the steps outlined and required by you in the form of (a), (b) and (c) as mentioned herein previously and in your letter of 25th January 2018 has to be complied with. (3) your letter appears to be acting on the authority of a court order which has been passed ad interim and lacking finality."*

And the same point is made. And again I have mentioned that if this court makes an order, that point falls away. Fourthly:

> *"In addition to the foregoing, the following injunctions are in operation arising out of proceedings OS 2(1) of 2012 pending before a Ranga Reddy District Court, Hyderabad, preventing the fulfilment of the steps outlined and required by you and*

identified as (a), (b) and (c) herein and in your letter of 25th January 2018."

The author then sets out those orders and it is only IA 7(7) that has any relevance to Mecon, the others all relate to Mack Soft, Mack Soft directors. Fifthly then the author says:

> *"Lastly, there is an ongoing moratorium arising out of Section 14 of the Insolvency and Bankruptcy Code in proceedings initiated against Mack Soft" and he gives the reference "which prevents any continuation, including modification of the aforesaid civil proceedings in OS 2(1) of 2012, as well as their injunctions, which, as they presently stand, prevent the taking of the steps outlined and required by you and identified at (a), (b) and (c) herein and your letter of 25 January."*

Finally then I note that Bloom Solicitors, further to that correspondence, wrote on 15th February 2018 to Mr. ML Jain, the current IRP, and again notified him of his appointment as interim receiver and requisitioning, he requisitioned an extraordinary general meeting for the removal of the two Mecon directors and the appointment of new directors. And enclosed with that, or perhaps by way of a separate letter of the same date there is a formal requisition for an EGM and a special notice.

MR. KATHPALIA'S EXPERT EVIDENCE ON INDIAN LAW AND ORDERS BEING CONSIDERED BY THIS COURT

Again I go through that correspondence at some length, because it raises issues that this court has considered and needs to consider. And I find, in addition to the evidence of Mr. Gupta, very helpful expert evidence given in the affidavit of Mr. Kathpalia. And in effect, his opinion satisfies me that all of the concerns raised in that correspondence by the company and by the Mecon and Senat Defendants are not an impediment to the court making the orders sought. And it's perhaps appropriate to highlight certain parts of Mr. Kathpalia's affidavit.

In paragraph six of his affidavit he usefully sets out Section 113 of the Companies Act 2013 under which a resolution may be passed by a company, such as Mecon, authorising a person to represent it at a meeting of a company in which it has a shareholding. And at paragraph seven the deponent says:

> *"Section 113 binds a company to recognise a person authorised by a member being a body corporate as a representative of the member and to grant such representative the same rights as would be granted to an individual member.*
>
> *8. The order IA 77 of 2012 is the only direction passed against Mecon. This direction, and indeed any of the aforesaid injunctions, do not prevent Mecon from exercising its rights as a member of Mack Soft, including the right to attend general meetings of Mack Soft and to authorise representatives to attend those meetings.*
>
> *9. Under the Companies Act 2013 and under the predecessor enactment, Companies Act 1956, a company is required to hold an AGM within six months from the end of each financial year. I am informed and understand that Mack Soft has held such a meeting since 5 January 2012, i.e. the date of the injunction orders, and in ordinary course Mecon would have attended such meetings through an authorised representative.*
>
> *10. Therefore, there is no bar in terms of the injunction orders passed in OS 2(1) of 2012 and referenced above for Mecon to provide the receiver with the resolution under Section 113 of the Companies Act 2013 as requested by the receiver."*

Then at paragraph 11 Mr. Kathpalia addresses the moratorium, which he has viewed, and the restrictions contained in such moratorium. He says:

"I am familiar with the provisions of the IBC. At the time of admitting the petition for insolvency, the following order of moratorium was passed by the NCLT" that is the Hyderabad court "*'Therefore, we admit the present company petition/application filed under IBC with the following directions: (a) we declare a moratorium by prohibiting the following actions'."*

He then sets out the five terms of that order. In the next paragraph, 12, he states:

> *"The moratorium, which is in consonance with Section 14 of the IBC, does not in any manner suspend the rights of a shareholder of a corporate debtor to attend a general meeting of the company and/or the right to call such a meeting. Section 17(1) of the IBC provides that the 'powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional'. There is no corresponding provision in the IBC that provides for suspension of the rights or powers of a shareholder.*
>
> *13. Whenever the IBC seeks to impose any restriction on the powers or rights of a shareholder, creditor or management of a company in insolvency it makes an express stipulation in this regard. For instance, reference is invited to Rule 39 of the Insolvency and Bankruptcy Board of India regulations 2016" the CIRP regulations "where a specific restriction on the rights of shareholders has been provided in respect of the approval of a resolution plan. As stated above, there is no general suspension of the rights or powers of shareholders or the body of shareholders.*
>
> *14. In view of the above, in my opinion the request by the receiver to execute an authorisation under Section 113 of the Companies Act 2013 in his favour is not in conflict with either the injunction orders granted in OS 2(1) of 20120 or the provisions of the IBC or any order of moratorium in respect of Mack Soft."*

Mr. Kathpalia then addresses his second query, which is:

> *"Is the request by the receiver to deposit the physical share certificates with him in conflict with (a) any of the instructions granted in OS 2(1) of 2012, or (b) the provisions of the IBC and any order of moratorium in respect of Mack Soft?"*

At paragraph 15 he states:

> *"The scope of the injunction order passed on IA 77 of OS 2(1) 2012 is limited to 'transferring, alienating or creating any right, title or interest in respect of' the shares of Mack Soft held by and on behalf of Mecon. Deposit of the physical share certificates with the receiver without any intention to transfer the right, title or interest in the shares and only for the purpose of securing Mack Soft shares by making the shares custodia legis would not in any way conflict with the said injunction orders."*

He then cites some further authority for the propositions and opinions that he provides. And moving on then to paragraph 20, he says:

> *"In the present case, as I understand, the purpose for seeking possession of the physical share certificates by the receiver would be protection of the property, i.e. making the Mack Soft shares held by Mecon custodia legis. Thus, in my opinion, mere deposit of physical share certificates without any intention to transfer or create any interest therein would not conflict with the injunction orders. In my opinion, the request to deposit the physical share certificates also does not conflict with the provisions of the IBC and any order of moratorium in respect of Mack Soft. The moratorium applies to the property and assets of Mack Soft. The shares held by Mecon are assets of Mecon and are not assets of Mack Soft and are, therefore, are not subject to the moratorium."*

He then deals with the third query put to him:

> *"Does the moratorium subsisting in respect of Mack Soft under Section 14 of the IBC prevent an application by the Plaintiffs in OS 2(1) of 2012 from seeking a modification of interim orders passed against Mecon?"*

And, having referred to Section 14, he answers at paragraph 23:

> *"Upon Mack Soft being admitted to the CIRP, an order of moratorium in terms of Section 14 of the IBC has been passed by the NCLT Hyderabad, being the concerned adjudicating authority.*
>
> *24. The moratorium prevents the continuation or institution of proceedings against the corporate debtor, including proceedings for execution of a decree against a corporate debtor. The moratorium does not prevent the institution or continuation of proceedings or execution of decrees against the shareholders of the corporate debtor. Therefore, proceedings can be maintained and continued in respect of Mecon without in any manner contravening the moratorium."*

And again he cites authority to support his opinion in that regard. Then at paragraph 27 he states:

> *"Insofar as a request for modification of the order passed in IA 77 of 2012 to allow the transfer of shares in the name of the receiver is concerned, such a request can be made by the plaintiffs to the proceedings, as the request does not concern the corporate debtor and only concerns Mecon."*

He then refers to a decision supporting this. And at paragraph 29:

> *"For the reasons set forth above, since the moratorium declared in respect of Mack Soft does not apply to proceedings against Mecon, a request to modify the order passed against Mecon in IA 77 can be made without in any manner contravening the moratorium."*

He then deals with query no. 4:

> *"Do the provisions of the IBC or the moratorium in respect of Mack soft prevent the transfer of shares held by Mecon in the name of the receiver?"*

Paragraph 30:

> *"The purpose of the transfer of shares, as I understand, is to protect the shares in terms of the receivership order. The provisions of the IBC do not per se prohibit the transfer of shares during the period of the moratorium. No such prohibition is found in Section 14. On the other hand, Section 28 of the IBC is permissive and permits the resolution professional to record a change in the ownership interest of the corporate debtor with the approval of the committee of creditors."*

He then deals with query 5:

> *"Does the appointment of a receiver by the High Court in Ireland in respect of the shares of Mecon and Mack Soft interfere with the CIRP initiated in India?"*

At paragraph 31 he answers:

> *"The corporate insolvency resolution process under the IBC is to protect the assets of the corporate debtor and seek a resolution of the insolvency by reaching an arrangement acceptable to the creditors. As I have already noticed above, the CIRP process does not abridge the right of ownership of the shares, as the shares are assets of the shareholder and not the assets of the corporate debtor.*
>
> *32. Therefore, in my opinion the appointment by the this Honourable Court of a receiver for the shares held by Mecon directly and/or indirectly in Mack Soft will not interfere with the CIRP process in India."*

Based on this opinion, I am satisfied that I can make the orders sought in relation to the receiver, together with the express statements and directions as requested by Mr. MacCarthy at paragraph 24 of his affidavit sworn on 9th February 2018. And what he requests there is that the court would make and state expressly the following:

> *"(a) that I am entitled to transfer title to the Mack Soft shares into my own name and to have my name entered into the register of members of Mack Soft, subject to me complying with Indian law requirements; (b) that I am empowered to require Mecon to issue a formal authorisation to appoint me as its representative under Section 113 of the Indian Companies Act 2013 for taking all actions on behalf of Mecon in respect of the shares; and (c) that I am empowered to call an EGM of the members of Mack Soft and to exercise voting rights in respect of the Mack Soft shares at the EGM so as to remove existing directors and appoint new directors."*

I am satisfied that those are appropriate matters to be included in an order, on the basis that the receiver is *custodia legis* in relation to the shares and share certificates. But I am very clearly of the view that this is on the basis that the receiver will preserve the shares and certificates and any distributions received from Mack Soft pending the determination of these proceedings without further order of the court.

BALANCE OF CONVENIENCE
In relation to the balance of convenience, I am satisfied that this favours the Plaintiffs. This application was properly brought as a matter of some urgency to protect the assets, or the value of the assets to which the Plaintiffs may have recourse to satisfy any judgment ultimately obtained in these proceedings. Moreover, I am satisfied that the effect of the orders will not unduly prejudice Mecon or the Senat Defendants. The shares and any legitimate distributions will be preserved pending final determination. There is no evidence that Mecon will thereby suffer any loss, let alone any "potentially millions of euros" loss suggested by Mr. Smit. Bearing in mind MECON's investment of only $90,000, this is, in any case, fanciful.

FORTIFIED UNDERTAKING AS TO DAMAGES
Mr. Smit seeks a fortified undertaking as to damages by lodgement of funds in court having regard to the fact that IBRC is in special liquidation and that the second Plaintiff is a Swedish company in insolvency and that Mr. Baecklund is its bankruptcy receiver. I am not prepared to accede to this. True it is that Peart J., on 6th August 2013, in these proceedings required the Plaintiffs to lodge €5 million to fortify their undertakings to the Personal Defendants as a condition of the injunctions continuing. However, that money was lodged from liquidation receivables. I am far from satisfied that any or any substantial damage can be anticipated so far as Mecon or the Senat Defendants are concerned or that the quantum of any such suggested damage can indeed be estimated at all. As I have pointed out, Mecon only invested €90,000 in Mack Soft and its shareholding is to be preserved by the receiver. I am not satisfied that the Plaintiffs would not be good for the usual undertaking offered in this instance.

I am also entitled to take into account *all* the circumstances, the history of these proceedings, the judgments of Judge Kelly and Judge Dunne and the events and wrongdoing identified in this judgment on a *prima facie* basis in respect of the debentures deployed by Mr. Smit on behalf of Mecon and the Senat Defendants.

It is clear from Judge Peart's decision and established jurisprudence that the court has a discretion in relation to an undertaking. For the reasons given, I will only require the Plaintiffs to give the usual undertaking as to damages.

THE COURT'S POWERS
Further, as to this court's powers, the written and oral submission of Mr. Gallagher, counsel for the Plaintiffs, confirm my jurisdiction to make the receivership and injunction orders sought. And again I think it is important to briefly refer to these, because there is, I think, some importance in having the court's reasoning for the exercise of its jurisdiction in this case recorded lest it be required for the benefit of any Indian courts or any other parties.

The starting point is the Supreme Court of Judicature (Ireland) Act 1877. And Section 28, subsection 8 of that Act provides:

> *"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."*

And that provision is reflected currently in the Rules of the Superior Courts 1986 and in particular Order 50, rule 6.

Thus, that the court has the power and jurisdiction to make orders that cover extraterritorial assets is clear from the decision in *Deutsche Bank v Murtagh, 1995, 2 Irish Reports, 122*. And at page 131, Judge Costello stated:

> *"I am satisfied that the plaintiff is entitled to the relief it claims. In my opinion, the Court has jurisdiction to restrain the dissipation of extraterritorial assets where such an Order is warranted by the facts. The basis upon which a Mareva injunction is granted is to ensure that a defendant does not take action designed to frustrate subsequent orders of the Court. It is well established in England that a Mareva injunction may extend to foreign assets and I believe that the Irish courts have a similar power in order to avoid the frustration of subsequent orders it may make. The Court has ancillary powers also and in suitable cases it may grant a disclosure order requiring a defendant to swear an affidavit in respect of assets outside the jurisdiction (see Derby & Co. v Weldon Nos. 3 and 4, 1989, 2 WLR, 412."*

I emphasise the last sentence of that extract in relation to the ancillary power to require defendants to swear an affidavit of disclosure, which is, of course, one of the reliefs sought by the plaintiffs on this application.

Referring then to *Derby & Co. v Weldon* and in particular the report at 1990, First Chancery, 65 and the judgment of Lord Donaldson, at page 79 he states:

> *"In my judgment, the key requirement for any Mareva injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale upon which Mareva relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely, that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If, for the achievement of this purpose, it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to the ordinary principles of international law. When the Vice Chancellor said that special circumstances had to be present to justify such an exceptional order, I do not understand him to have been saying more than that the court should not go further than necessity dictates, that in the first instance it should look to the assets within the jurisdiction and that in the majority of cases there will be no justification for looking to foreign assets."*

Well, this is very clearly a case in which it is appropriate and necessary for the court to look to foreign assets. And of course, this has already occurred in particularly the orders made by Kelly J. in July 2012.

In relation to the question of enforcement, Lord Donaldson said at page 86:

> *"In this situation, I do not understand why the order that the assets vest in the receiver should only take effect if and when the order was recognised by the Luxembourg courts. True it is that CMI" one of the parties to that case "is a Luxembourg company, but it is a party to the action and can properly be ordered to deal with its assets in accordance with the orders of this court, regardless of whether the order is recognised and enforced in Luxembourg. The only effect of non recognition would be to remove one of the potential sanctions for disobedience."*

Neil LJ agreed and restates the same propositions at page 95 of the judgment. I was also referred to the UK Court of Appeal decision in *JSC BTA Bank v Ablyazov No. 3,* which is reported at 2011, Business Law Review Digest, 119. And it is a case that involved freezing orders and extraterritorial effect and also the making of a receivership order. And its facts bear some comparison to the facts of this case in general terms. And in the headnote on page 120 it is recorded that:

> *"Morris K. LJ, giving the judgment of the Court of Appeal at paragraphs 14 to 18 below, held that it had been appropriate to make a receivership order and that the appeal should be dismissed. The judge had been correct to reject the submission that there had to be evidence that the defendant had breached or was about to breach the terms of freezing order made against him. There might be other circumstances, including inadequate disclosure of his assets, which justified the finding and that there was a measurable risk that the defendant would act in breach of the freezing order and that a receivership order was necessary."*

And in the present case I am, as I have stated already, satisfied that there is a significant and measurable risk of further dissipation unless the orders sought are made.

Finally, I am satisfied that my orders in relation to the receiver should afford him the maximum scope possible to undertake his receivership effectively and that he should not be constrained by the terms of the existing Irish orders. And accordingly, I and, gentlemen, I will hear you further in relation to the precise terms of the orders, but by reference to the Notice of Motion, I propose to do the following: I propose to make the orders sought at 1 and 2 of the Notice of Motion, but immediately after the orders at 1 and 2 there will be added the following proviso, this would be no. 3:

> *"For the avoidance of doubt, any steps taken by the receiver on foot of his appointment shall be permitted notwithstanding the orders of the Irish High Court made herein on 27th June 2011, 20th July 2011, 14th June 2012, 25th July 2012 and 31st July 2012."*

Further then, in what will become the fourth order, I will make declarations and give directions in accordance with the last paragraph in Mr. MacCarthy's affidavit. And I will speak those now. So I will "Declare and direct that the receiver is

> *(A) entitled to transfer title to the Mack Soft shares into his own name and to have his name entered into the register of members of Mack Soft, subject to him complying with Indian law requirements; (B) that he is empowered to require Mecon to issue a formal authorisation to appoint him as its representative under Section 113 of the Indian Companies Act 2013 for taking all actions on behalf of Mecon in respect of the shares; and (C) that he is empowered to call an EGM of the members of Mack Soft and to exercise voting rights in respect of the Mack Soft shares at the EGM so as to remove existing directors and appoint new directors".*

I will then grant and obviously the numbering will follow on sequentially the orders sought in the Notice of Motion at 3, 4 and 5 so they will now become, I think, is it 5, 6 and 7. But they will be renumbered accordingly the last order being that related to the requirement of the 21st to 23rd Defendants to "*disclose on oath all documents relating to any actions taken by them or on their behalf for the purpose of placing any of the scheduled assets beyond the reach of IBRC*." But I will hear counsel further in relation to the orders.