Neutral Citation [2015] IEHC 547

THE HIGH COURT

[2014/7900P]

BETWEEN

JOHN FLYNN

AND

BENRAY LIMITED

PLAINTIFFS

BRECCIA

AND

MICHAEL MCATEER

DEFENDANTS

JUDGMENT of Mr. Justice Haughton delivered on the 13th day of August, 2015

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Introduction

1. This case is one of a series of proceedings concerning disputes between shareholders in Blackrock Hospital Limited ("BHL"), and related matters. It is the first case in this series to have been heard at full hearing with oral evidence[1].

2. In these proceedings the first named plaintiff, as guarantor of borrowings of the second named plaintiff to purchase shares in BHL, and the second named plaintiff, as shareholder, seek various declarations in relation to that borrowing and the security for same, and in relation to the status of the second named defendant as receiver purportedly appointed by the first named defendant to enforce the security, and they seek damages for breach of a shareholders' agreement, breach of duty and conspiracy. The first named defendant has counterclaimed for certain declarations and judgment in respect of the borrowing.

3. At the outset it is appropriate to comment that these proceedings, and this judgment, will not have any impact on the day to day operation of the Blackrock Clinic which continues to provide hospital and health services which are to the forefront of Irish hospitals, and whose business, from the evidence put before the Court, continues to be run to a high standard and to show healthy profits year on year.

Parties

4. The first named plaintiff ("Mr. Flynn") is a businessman who resides in Florida and who is a director and shareholder of the second named plaintiff. The second named plaintiff ("Benray") is a private company limited by shares incorporated in the State. It is the holder of 8.02% of the share capital in BHL. BHL, together with its subsidiary Blackrock Clinic Ltd., controls and operates the private hospital known as the Blackrock Clinic.

5. The first named defendant ("Breccia") is a private unlimited company which holds 28.08% of the share capital in BHL. Its directors are Lawrence Joseph Goodman ("Mr. Goodman") and Catherine Goodman. It was not contested that Breccia is a company controlled by Mr. Goodman, and "Breccia" and "Mr. Goodman" are used interchangeably in this judgment.

6. The second named defendant ("the Receiver") is an insolvency practitioner and partner in the firm of Grant Thornton. He was purportedly appointed as Receiver over all of the property and assets of Benray by deed of appointment dated 11th August, 2014, which included its shareholding in BHL.

Background

7. In 1983, BUPA Insurance in conjunction with four doctors, namely brothers Joseph and James (Jimmy) Sheehan, George Duffy and the late Maurice Neligan, put together an investment package to build and develop the Blackrock Clinic. In 2005, BUPA offered for sale its shareholding of 55.92%. The surviving founders agreed to purchase BUPA's shareholding at approximately 0.91 cent per share, placing the total value of the clinic at the time at about €91 million. Financing for the purchase of the shares was obtained from Anglo Irish Bank ("Anglo"), now the Irish Bank Resolution Corporation ("IBRC"). Pursuant to the financing agreement, Anglo agreed to lend the promoting shareholders €51,125,000 in order to fund the purchase of the BUPA shares.

8. Under the financing agreement as proposed by Anglo, each shareholder would assume personal loans to finance the buyout. However, Mr. James Sheehan and Mr. George Duffy did not wish to assume any personal liability and accordingly, they arranged for third parties to purchase all or part of their allocation of the BUPA shareholding. As a result, Mr. Flynn through a special purpose vehicle, Benray, received 50% of Dr. Duffy's allocation and Mr. Goodman took up, via Breccia, 28.08% of BHL's shareholding which included Dr. James Sheehan's share allocation from the sale of BUPA's shares. Accordingly, the approximate shareholdings in BHL post acquisition were, as outlined in Table 2 of Schedule 3 of the Shareholders' Agreement dated 28th March, 2006 ("the Shareholders' Agreement"), as follows:-

Joseph Sheehan – 28.07%

Rosemary Sheehan – 12.38%

James Sheehan – 3.4%

George Duffy – 20.05%

Benray – 8.02%

Breccia – 28.08%

9. As an integral part of the purchase of the BUPA shareholding, the parties entered into the Shareholders' Agreement. In addition to all of the shareholders, Promoters to that Shareholders' Agreement included Irish Agricultural Development Company (as guarantor of Breccia), Mr. Flynn (as guarantor of Benray), BHL, and Blackrock Clinic Ltd.

10. Under the Shareholders' Agreement, it was agreed that an annual dividend would be declared which would be used to pay the interest on the Anglo loans under the facilities dated 28th March, 2006 until maturity in 2010 whereupon the entire facility would become immediately due and payable.

11. Benray borrowed €7,298,489 from Anglo under its first Facility, dated 28th March, 2006. This Facility was amended by a second Facility Letter dated 19th February, 2008 which provided for an increased borrowing of €2,010,000 to provide an equity release to fund equity contributions towards another clinic, the Hermitage Clinic, in which Benray had a shareholding and which was suffering trading losses.

12. Clause 8.1 of the Shareholders' Agreement provided in effect that for the first three years of the agreement no Promoter or

shareholder could dispose of their shares or grant any encumbrance over such shares (excluding the charge in favour of Anglo) without the "prior written consent" of the other Promoters, provided that this would not prohibit the creation of security over the shares in favour of "a bank".

13. Clause 8.2 of the Shareholders' Agreement dealt with transfers by shareholders after the initial three years, and provided generally for a right of pre-emption but also appeared to require prior written consent of each Promoter arising from clause 8.1.1. In other words, on one possible interpretation of these provisions, Promoters/shareholders continued to enjoy a right of veto over sales of shares by shareholders after the initial three year period.

14. In signed side letters also dated 28th March, 2006 all of the shareholders waived all pre-emption rights available to them in relation to shares held in BHL in respect of any assignment, transfer or sale by Anglo (therein referred to as "the Bank") of all or any shares in BHL on the enforcement by "the Bank" of any security held by it over the shares in BHL.

15. Under the terms of the Benray Facility, Anglo received a first legal charge over Benray's shares in BHL and also obtained a Guarantee and Indemnity from Mr. Flynn. Repayment was further secured by guarantees and indemnities (the " cross-guarantees") from Joseph Sheehan, James Sheehan, Rosemary Sheehan and George Duffy, supported by first legal charges over their respective entire shareholdings in BHL. This was intended to entitle Anglo to dispose of the entire shareholding of Benray and also the other shareholders in the event of a default by Benray, but upon the basis that Anglo should not be entitled to apply any proceeds of sale of such guarantors against amounts outstanding under Benray's loan Facility. Corresponding provisions appeared in the Facility Letters in respect of the other loans by Anglo.

16. Following the collapse of Anglo, Benray's loan agreement, along with the guarantees and share charges securing same, became vested in National Asset Loan Management Ltd. ("NALM"), a wholly owned subsidiary of National Asset Management Agency Ltd. ("NAMA"). This occurred pursuant to the NAMA Act, 2009, and was notified to BHL on 28th February, 2014. It is claimed that unbeknownst to the plaintiffs, Breccia made an offer to purchase the Benray loans at par value from NALM, which offer was accepted. It is not disputed that this loan acquisition was completed by way of a Loan Sale Deed dated 23rd May, 2014, and that the consideration for that purpose was €9,104,616.41, although the legality of this loan acquisition is challenged. As the loans were sold for par value, there was no requirement that the sale be made by way of public auction.

17. It is not disputed that on 8th August, 2014, Breccia purported to serve a demand notice for repayment on Benray for payment and discharge forthwith of €8,744,853 pursuant to the two loan agreements. In light of non-payment pursuant to that demand, on 11th August, 2014 Breccia purported to appoint the second named defendant as Receiver. This was notified by the Receiver to BHL by letter dated 12th August, 2014. On the same date, demand was made against Mr. Flynn on foot of his guarantee. As default on repayment of the loans continued, the Receiver sought a valuation of the shares and, by advertisement in the Sunday Business Post on 31st August, 2014, he sought expressions of interest in the shares.

18. It is not disputed that the only expression of interest received and apparently considered by the Receiver was contained in a letter dated 3rd September, 2014 from Yalart Holdings Ltd. ("Yalart"), a sister company of Breccia controlled by Mr. Goodman. It was incorporated on 7th January, 2014 and its directors are Mr. Goodman and Mr. Laurence P. Goodman and the company secretary is Mr. Declan Sheeran (who is also a director of Breccia). Its shareholders are Arlesse, a private unlimited company with share capital, whose directors are Mr. Laurence P. Goodman and Ms. Catherine Goodman, and whose company secretary is Mr. Declan Sheeran; and Tabarrow Ltd., a company with its registered address at St. Helier, Jersey. On 12th September, 2014 Mr. Declan Sheeran wrote on behalf of Yalart offering to acquire the Benray 8.02% shareholding in BHL for €6,750,000.

19. By letter dated 1st September, 2014 addressed to BHL, Mr. Flynn on behalf of Benray and Mr. Joseph Sheehan gave notice to BHL pursuant to clause 8.2.1 of the Shareholders' Agreement of their intention to sell all of the shares of Benray and Dr. Joseph Sheehan in BHL to Blackrock Inc. or its nominated company for an aggregate sale price of €59.4 million.

20. The plaintiffs claim that they were not alerted to the sale process undertaken by the Receiver and only became aware of it as a result of a letter received from Breccia dated 10th September, 2014. This led the plaintiffs to commence these proceedings and to apply to the Court *ex parte* for an injunction restraining the Receiver from offering for sale or effecting a sale of Benray's shares or any interest therein. An interim injunction was granted by Hogan J. on 12th September, 2014 returnable to 16th September, and extended to 30th September, 2014 on which date these proceedings were admitted to the Commercial List. The interlocutory motion was later adjourned to trial of the action on the basis that on consent the interim order would remain in place.

The Plaintiffs' Claims

21. The plaintiffs' fundamental claim in these proceedings is that there was an implied term in the Shareholders' Agreement that each of the shareholders owed one another a duty of good faith and fair dealing and/or that they would take no steps the effect of which would be to cause the shares of the other shareholders to be alienated save in accordance with the Shareholders' Agreement. As an alternative to that implied term, the plaintiffs asserted that as a matter of law the Court should imply a term that no party to the Shareholders' Agreement should act in a manner that would prevent the due operation of that Agreement. They claim that no shareholder could acquire and/or exercise the rights of a lending institution. They assert that the sole remedy that one shareholder had available to it in the event that another shareholder or Promoter was in default of its obligations under the Facility provided by Anglo was to exercise 'step in' rights under clauses 3.4.3 and 3.4.5 of the Shareholders' Agreement. In other words, the 'stepping in' shareholder could discharge the indebtedness to Anglo of the defaulting Promoter and if the defaulting Promoter failed to repay within the period of six months from demand allowed by clause 3.4.5, a forced sale of that Promoter's shares could proceed, but only subject to the pre-emption rights in clause 8.

22. The plaintiffs claim that in 2014 the first named defendant was in breach of the terms or implied terms of the Shareholders' Agreement in acquiring Benray's loan and associated security, in calling in the Anglo loan and appointing a Receiver, and in attempting to sell through the Receiver to a sister company of Breccia controlled by Mr. Goodman.

23. In amended pleadings, the plaintiffs also contended that the so called 'veto' in clause 8.1.1/8.2 did not require the holder of the charge over the shares to obtain the consent of any shareholder in BHL in order to transfer the legal and beneficial ownership of shares following an enforcement of security of the shares. This became important as various shareholders including Benray sought to refinance their borrowings with Anglo from 2008 onwards. The question arose whether such veto could be used by any Promoter/shareholder to prevent the enforcement/realisation of security over shares by any bank or other party providing refinancing subject to security. The plaintiffs asserted that Breccia, without actually exercising the power of veto, used the uncertainty over whether such a veto existed to inhibit/prevent the plaintiffs' efforts to refinance.

24. The plaintiffs challenge the validity of the Loan Sale Deed assignment by NALM to Breccia completed 23rd May, 2014, whether or not Benray was in default of its loans, and whether Breccia was entitled to demand or validly demanded payment on 8th August, 2014 and 12th August, 2014. They assert that Breccia was not entitled by its actions to circumvent obligations in the Shareholders' Agreement and in particular obligations contained in clauses 3.4.3 and 3.4.5 which they claim were owed by Breccia to both Benray and other shareholders. The plaintiffs also challenge the validity of the appointment of the Receiver, and all actions undertaken by the Receiver since that appointment. Furthermore, the plaintiffs claim that the Receiver was in breach of his duty of care in failing to advertise or market the sale of the shares in a proper or sufficient manner.

25. In the plenary summons, the plaintiffs also sought a declaration that Breccia conspired to adversely and prejudicially affect the property interests of the plaintiffs in seeking to enforce security over Benray's shareholding in BHL in alleged breach of the Shareholders' Agreement, and they *inter alia* sought damages for conspiracy. The conspiracy claims were considerably expanded in the amended Statement of Claim delivered on 11th December, 2014. This expansion of the claim concerned an attempted refinancing of the loans of Dr. Joseph Sheehan and Dr. Duffy, which by 2014 came to be vested in IBRC, together with the redemption and refinancing of Benray's loan (then vested in NALM). Finance was to be provided by an entity known as Talos Capital Ltd ("Talos"), a London based fund, via a special purpose vehicle company JCS Investment Holdings XIV Ltd. ("JCS") ("the Talos transaction"). It is claimed that Dr. Duffy was consenting to the Talos transaction which was being orchestrated by Dr. Joseph Sheehan with cooperation from the plaintiffs. At this time (March/April 2014), Dr. Duffy's shares in BHL were held by a company named Tullycorbett Ltd. ("Tullycorbett"). The Talos transaction was set to proceed in April pursuant to agreement executed by Talos and Dr. Joseph Sheehan on behalf of JCS on 17th March, 2014.

26. The plaintiffs allege that Breccia and Mr. Goodman/corporate entities connected with Mr. Goodman conspired with Dr. Duffy by providing lending arrangements to him/Tullycorbett which enabled Tullycorbett to redeem its loan with IBRC. Dr. Joseph Sheehan/Benray were then unable to complete the Talos transaction and lost the deposit amount already paid over to IBRC by Talos because Talos was only prepared to provide finance upon the basis that it also acquired Dr. Duffy's loan and the security over his shares.

27. The plaintiffs assert that what took place was a manifest breach of the Shareholders' Agreement, particularly in relation to the provisions of clause 8 concerning non-concealment of true ownership and the provision of information. They plead that the actions of Breccia together with Dr. Duffy constitute an actionable conspiracy designed to damage the plaintiffs, and have the effect of inflicting serious damage on the plaintiffs contrary to contractual obligations.

28. While no attempt was made to quantify these losses in evidence, in proceedings *Talos Capital Ltd v. Joseph Sheehan and John Flynn* [2015] IEHC 27, Ryan J. in a judgment delivered on 23rd January, 2015 made an order granting a judgment to the plaintiff against those defendants in the sum of €2.4 million in respect of the deposit which had been advanced by Talos and effectively released to the vendors, IBRC, on the 7th April, 2014.

29. In essence, the plaintiffs seek declarations from this Court in vindication of their claim. They seek damages for breach of contract as well as for conspiracy, and they seek further declarations that the actions of Breccia constitute a material breach of the Shareholders' Agreement such as to entitle the plaintiffs to have a Deemed Transfer Notice served which would have the effect of a sale of Breccia's shareholding in BHL under the pre-emption provisions of the Shareholders' Agreement.

Resolution of the 'Veto' Issue

30. Although mentioned in the original Statement of Claim, the 'veto' issue which arises on the construction of clause 8.2 of the Shareholders' Agreement was not directly pleaded, nor was any declaration sought. On the plaintiffs' application on 6th February, 2015, I granted leave to further amend the Statement of Claim to specifically refer to this issue and seek an appropriate declaration. However, as the Court pointed out to the parties at the time, any declaration that the Court might make in these proceedings would not necessarily be binding on other shareholders not party to these proceedings.

31. Subsequently, on 9th February, 2015 Dr. Joseph Sheehan initiated proceedings (High Court Record No.2015/27SP) which were a Construction Summons designed specifically to deal with the 'veto' issue. These proceedings named as defendants all parties who could be affected by the Court's decision. Those pleadings came on for hearing before me on 13th May, 2015. The Court by way of an order on consent made the following declaration:-

> "The Court doth declare that the provisions of the Shareholders' Agreement dated the 28th day of March 2006 (as 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 an enforcement of security over the Shares."

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.

Resolution of Claims against the Receiver

33. Also of significance to the issues that remain to be decided in these proceedings is a concession made by counsel on behalf of the plaintiffs on day 11 of the hearing. In light of the evidence that had been given up to that point, the plaintiffs accepted that there was no evidence of dishonesty or *mala fides* on the part of the Receiver. They withdrew the allegation of unlawful conspiracy between the Receiver and Breccia (although they continued to maintain that Breccia acted with *mala fides*).

34. Secondly, while the plaintiffs continued with a claim of breach of duty/negligence against the Receiver that aspect of the claim was resolved by agreement between the plaintiffs and the Receiver on the 12th day of hearing, and was announced in the following terms:-

> "The case of negligence between the Plaintiffs and the Receiver is resolved, without admission or concession by either side, on the following basis.

1) The Receiver will abide by the outcome of any determination made by the Court in respect of validity of his appointment by the First Defendant.

2) In the event the validity of his appointment is upheld, the Receiver will, within 14 days of judgment being delivered in the said action by the High Court, re-market the shares in question, re-advertise the shares in two national daily newspapers, prepare an information memorandum, if required, and allow a period of not less than 14 days for expression of interest.

3) The issue of costs as between the Plaintiffs and the Receiver shall be reserved until judgment is delivered in the proceedings herein."

35. On that basis, the Receiver was released from further involvement in the case save in respect of the issue of costs.

The Defence and Counterclaim

36. In its amended Defence and Counterclaim Breccia asserts that Benray was in default of its loan from Anglo at all material times after 13th January, 2011; that Benray's loan facilities and the underlying security interests were validly assigned to Breccia by NALM on 23rd May, 2014; and that Breccia then had a contractual right to call in Benray's loan facilities which they denied were "performing facilities". They assert that Breccia did not provide a Deed of Guarantee and Indemnity to Anglo in respect of their borrowing, but instead provided, as it was entitled to do, a Deed of Covenant.

37. Breccia deny that there was an underlying requirement of the Shareholders' Agreement that each shareholder would act in good faith or would not take steps which would facilitate the alienation of any other shareholder's shares. They deny that the rights of enforcement under clause 3.4.2 are limited to the rights of "Anglo" (or any other lending institution in substitution therefore) or that Breccia's sole remedy was to exercise the rights provided for in clause 3.4.3 or 3.4.5. Breccia dispute the plaintiff's interpretation of clause 3.4.1 to the effect that all shares had to be sold in the event of one shareholder/Promoter defaulting.

38. Central to the defence is a denial that there was an implied term in the Shareholders' Agreement that each of the shareholders owed one another a duty of good faith and/or would take no steps the effect of which would be to cause the shares of any other shareholder to be alienated save in accordance with the terms of the Shareholders' Agreement. Breccia deny that it was an implied term of the Shareholders' Agreement that they are precluded from seeking to purchase or otherwise assume the role or position of a bank vis-à-vis other shareholders. They denied that there was any basis for implying further terms into the Shareholders' Agreement for various reasons set out in para. 22 of its Defence. These included the contention that implied terms would impose on the parties far reaching obligations of a fundamental nature; that the Shareholders' Agreement was lengthy and comprehensive and expressly dealt with "restricted transactions"; that it was not "necessary" to imply such terms into the Shareholders' Agreement which was effective without them; and that the implied terms pleaded do not reflect the true intention of all the contracting parties. It further asserted that it would not be reasonable or equitable to permit the plaintiffs to invoke an implied duty of good faith against Breccia because the Plaintiffs did not act in good faith in failing to make full disclosure when applying *ex parte* for the interim injunction; in breaching the terms of the loan facility and Shareholders' Agreement; and by attempting to divert the payment of dividends by BHL to itself rather than NALM. Breccia contended that the duty of good faith which the plaintiffs sought to imply was characteristic of a fiduciary relationship whereas the Shareholders' Agreement was "an arm's length contract between sophisticated commercial parties who are co-shareholders in a commercial enterprise."

39. Breccia also relied on the loan facilities and security agreement, the construction of which was in no way affected by the terms of the Shareholders' Agreement; alternatively if the terms, expressed or implied, of the Shareholders' Agreement did have the effect of restricting or preventing one shareholder from acquiring the loans of another shareholder, it did not restrict, negate or qualify Breccia's rights *qua* lender to Benray.

40. Breccia denied that no proper opportunity was provided by it to allow for repayment of the loan, they denied that they were required by law to provide such opportunity, or that the appointment of the Receiver and all steps taken by him were invalid on that basis. The first named defendant argued that the steps taken by it to notify BHL of the appointment of the Receiver, to make the demand on Mr. Flynn for repayment on the basis of his guarantee and the decision to advertise the shares taken by the Receiver, were taken lawfully. It was denied that the provision of an indicative offer by Yalart was invalid or in any way a breach of duty by Breccia as mortgagee to exercise its powers in good faith.

41. Breccia also denied that 'the cure' provisions of the 2006 Facility Letter applied to the default event alleged against Benray, or if they did, Breccia had a discretion in the event of default to allow Benray a period of either 15 days or 30 days in which to remedy the default, but was not obliged to offer such a waiver or cure period.

42. Breccia denied breach of contract under the Shareholders' Agreement or breach of duty as mortgagee and denied any actionable conspiracy whether with the Receiver or with Tullycorbett or Dr. Duffy. In response to this conspiracy claim, Breccia pleaded that money was advanced to Tullycorbett on 4th April, 2014 and Breccia understood that such monies were utilised to discharge Dr. Duffy's debts to IBRC. While there was no written agreement completed in or around that date, on 5th October, 2014 Breccia entered into an agreement ("the Tullycorbett Agreement") with Tullycorbett and Xroon Ltd. ("Xroon") as guarantor to document the terms of the loan. Breccia asserted that it received no ownership or interest in Tullycorbett's shares in BHL via the Tullycorbett Agreement or otherwise.

43. Breccia further deny in respect of the Tullycorbett transaction that it was in breach of the Shareholders' Agreement, or that the actions of Breccia together with Dr. Duffy constituted any actionable conspiracy designed to damage the plaintiffs with the effect of inflicting serious damage on the plaintiffs.

44. Breccia further deny that its shares in BHL, whether pursuant to the provisions of clause 8.6 of the Shareholders' Agreement or otherwise, were deemed to be subject to a Transfer Notice, or that any such notice was irrevocable.

45. In their Counterclaim, Breccia repeats its defence and in reliance on the Loan Sale Deed and Deed of Transfer it alleges various defaults on the part of Benray as borrower and Mr. Flynn as guarantor, and it seeks firstly a declaration that the appointment of the Receiver was lawful, valid and effective. Secondly, it seeks judgment in the sum of €8,744,853 in favour of Breccia against Benray. Thirdly, Breccia seeks judgment in the same amount against Mr. Flynn on foot of the Guarantee and Indemnity entered into by him; and fourthly, interest pursuant to statute.

Defendants did not go into Evidence

46. At the close of the plaintiffs' case, counsel for Breccia indicated that they were not calling any evidence, despite the fact that witness statements had been filed. This of course was Breccia's prerogative. Save to the extent that aspects of those Witness Statements were dealt with by the plaintiffs' witnesses in their evidence or the extent to which they were commented upon resulting in evidence being put before the Court that falls to be considered, the Court ignores the contents of the first named defendant's Witness Statements. Similarly, the Court does not take into consideration the content of affidavits sworn on behalf of Breccia in response to the injunction proceedings save to the extent that their contents were the subject of evidence at the hearing or put to the plaintiffs witnesses' in cross-examination. However, in these circumstances, insofar as disputed facts are the subject of evidence from the plaintiffs' witnesses and either denied in the Defence/Counterclaim or contested in the course of cross-examination, it is clearly open to the Court in resolving such disputes to draw one or more inferences, where appropriate, from the absence of evidence from Breccia in respect of any particular piece of evidence or state of affairs. The extent to which this can be done will be considered later in this judgment.

47. In the result, while some issues of fact were left to be resolved by the Court, in truth there was relatively little dispute as to the acts and events central to the proceedings, and the main areas of conflict relate to the inferences to be drawn from the facts and the legal implications of those facts and inferences.

Issues

48. From the foregoing, it is apparent that some of the issues between the parties have been resolved. As between the plaintiffs and Breccia, the remaining issues for determination by the Court that emerge from the pleadings and legal argument may broadly be stated as follows:-

(1) How is the Shareholders' Agreement to be construed; and

- are any terms to be implied?

(2) What are the consequences of such construction/any implied terms? In particular:-

(a) Did Breccia validly acquire Benray's loan and the security over its shares in BHL and the benefit of the related guarantee of Mr. Flynn?

(b) Were the loan and guarantee validly 'called in'?

(c) Was the Receiver validly appointed?

(d) Is the Receiver entitled to sell Benray's shareholding in BHL on the open market?

(3) If there was breach of the Shareholders' Agreeement, should the plaintiffs be deprived of relief on equitable grounds?

(4) With regard to the redemption of the Dr. Duffy/Tullycorbett borrowing on 4th April, 2014 and the Tullycorbett Agreement, what was their effect in law and were they a breach of the Shareholders Agreement?

(5) To what damages, if any, are the Plaintiffs entitled for breach of contract?

(6) The Conspiracy Claim:-

(a) Is the plaintiff entitled to pursue the claim of conspiracy between Breccia and Dr. Duffy/Tullycorbett when they are not parties to these proceedings?

(b) If so, was there an actionable conspiracy by Breccia and Dr. Duffy/Tullycorbett?

(c) If so, what damage (if any) have the plaintiffs suffered?

(7) Did the acts or omissions of Breccia have the effect of triggering a Deemed Transfer Notice under the Shareholders' Agreement?

(8) Is Breccia entitled to succeed on its counterclaim for judgment for monies due under the Anglo Facilities?

(1) How is the Shareholders' Agreement to be Construed; and are any Terms to be Implied?

49. As this issue is central to these proceedings, it is appropriate firstly to refer to the main provisions of the Shareholders' Agreement as they were reduced to writing in the document dated 28th March, 2006 signed by or on behalf of the parties, and then to refer to the Anglo loan Facility, guarantees and related security documents.

The Shareholders' Agreement dated 28th March, 2006

50. Recital A states that the purpose of the Shareholders' Agreement is to facilitate the subscription for and redemption of circa 56% of BHL shares and the future management and development of Blackrock Clinic. It provides a description of the Blackrock Clinic as well as clinic buildings and related interests.

51. Recital B(a) refers to the issued share capital as being legally and beneficially earned in the manner set out in Table 1 of Schedule 1. This Table records the shareholdings of the Sheehan's, Dr. Duffy and BUPA.

52. Recital B(d) states that under the bonus issue of shares the Promoters would subscribe to new shares in the proportion as set out in Table 1, Schedule 3 so that the reconstituted shareholding in BHL would be as that detailed in Table 2 of Schedule 3. Recital C then provides that the Promoters agreed to enter the Agreement to regulate the relationship between them as the shareholders of

BHL, Mr. Flynn and the Irish Agricultural Development Company entered into the Shareholders' Agreement to procure performance by Benray and Breccia of their obligations, respectively.

53. Recital D states that the Shareholders' Agreement supersedes the provisions of all previous agreements relating to the companies and that all such Agreements would terminate and be of no effect from the completion of the proposed subscription and redemption.

54. In the operative part, clause 1 outlines the definitions utilised in the Shareholders' Agreement, some of which should be noted. "Connected person" is defined as "a person connected with the Promoters or Shareholders or any of them as defined in Section 26 of the Companies Act, 1990". Also, for the purposes of pre-emption rights, there is a detailed definition of the term "fair value". The basis of this is "…what a willing seller would accept and a willing buyer would offer for the Shares", and in the event of disagreement as to what constitutes fair value, the auditors of BHL would determine same, or if they are unprepared to determine value a firm appointed by the president for the time being of Chartered Accountants Ireland.

55. "Family member" in relation to Promoters is defined as "(a) his spouse; (b) his children or any of them; (c) his grandchildren or any of them; (d) any trust established for the benefit of any of the persons in (a), (b) and (c); and (e) any body corporate wholly owned by any of the Promoter[s] and any of the persons (a), (b), (c) and (d)."

56. "Shareholder" is defined as "the beneficial owner of any Share or Shares", and "Shares" is defined as "the Shares in each of the Companies and "Share" shall mean any of them."

57. "Termination Date" means "with respect to a Promoter, the date any Promoter ceases to be a shareholder of the Company. Where a Promoter has unconditionally sold his shares and has received full payment therefor, he shall be deemed to have ceased to be a Shareholder."

58. "Transfer Notice" is defined as "the notice to be given by a member of the Company pursuant to Clause 8 hereof", and is the notice which triggers the pre-emption provisions.

59. Clause 3 is critical in these proceedings:-

> **"3 AGREEMENT FOR FUTURE REGULATION OF BHL/BCL,**
>
> 3.1 Agreement to co-operate
>
> The Promoters hereby agree to co-operate as provided in this Agreement for the purpose of the operation and development of Blackrock Clinic as a first class medical facility aspiring to best medical practice in accordance with its mission statement as revised from time to time and approved by the Board.
>
> 3.2 The Companies
>
> Co-operation shall be such that:
>
> 3.2.1 BHL will deal in and with the Clinic as provided herein,
>
> 3.2.2 BCL:
>
> (a) will be the manager and operator of the Hospital; and
>
> (b) for this purpose may enter into any management agreements with an experienced hospital operator, as the Board of BHL shall decide;
>
> (c) will also: arrange in conjunction with Rock for the management of the common areas of the Clinic Building subject to the payment by the owners of suites in the Clinic Building of a service charge relating to the maintenance and repair of the common areas therein….
>
> 3.4 Financial Obligations of the Promoters
>
> 3.4.1 Each of the Promoters will mortgage their shares in BHL as security in respect of various loans advanced to them or to third parties on their behalf by Anglo Irish Bank Corporation Plc (hereinafter called "Anglo"). In addition by way of further security each of the Promoters have granted or will grant Anglo a right by way of Guarantee and Indemnity or otherwise whereby Anglo will have recourse to each Promoters shares only in BHL for the purpose of a sale of the Shares in the event that a Promoter is in default of his loan but to the intent that the proceeds of sale of each Promoters shares shall only be applied against his/its indebtedness to Anglo.
>
> 3.4.2 Each Promoter covenants with the other Promoters to perform its obligations as set out pursuant to any facility made available by Anglo (or any other lending institution in substitution therefore) as set out in clause 3.4.1 above.
>
> 3.4.3 If and whenever a Promoter does not perform his obligations pursuant to a loan as set out in this Clause, one or more of the remaining Promoters may perform such obligations and the remaining terms of this Clause shall apply accordingly.
>
> 3.4.4 If and whenever a Promoter breaches his obligations under this Agreement then the Promoter shall indemnify and keep indemnified the other Promoters from and against all loss or damage and all actions, proceedings, costs, damages, expenses, claims and demands in respect of such breach.
>
> 3.4.5 If and to the extent a Promoter(s) (the Overpaying Promoter(s)) pursuant to the provisions hereof or by virtue of being called on by Anglo or any other lending institution to pay monies or incurs expenditure which should have been paid or incurred by another Promoter (the Underpaying Promoter) then;

(a) the Overpaying Promoter(s) shall be entitled to recover such amounts it has paid from the Underpaying Promoter, and the Underpaying Promoter shall be obliged to pay such amounts to the Overpaying Promoter, on demand of the Overpaying Promoter, as a simple contract debt;

(b) where the Underpaying Promoter does not pay the amount(s) demanded under paragraph (a), interest at 2% above the standard personal overdraft rate of Bank of Ireland (or if there is no such rate or the Underpaying Promoter disputes what such rate is, the rate which is 10% above the one-month base interest rate set from time to time by the European Central Bank) shall accrue on the demanded amount(s) from the time of demand to the date of payment and shall be payable by the Underpaying Promoter;

(c) where an Underpaying Promoter does not pay the amount demanded under paragraph (a) together with all interest accrued thereon within 6 months of the demand under paragraph (a), then at midnight at the end of that 6 month period, there shall be deemed to have been served a Transfer Notice in respect of all Shares of that Promoter, his Family Members and affiliates and the Specified Price (hereinafter defined) in respect of the Shares shall be the Fair Value of such Shares;

(d) the Specified Price (as defined in Clause 8.2.1) in respect of the Shares shall be the Fair Value of such Shares and the Company shall pay the sale proceeds of the Underpaying Promoter's Shares to the Overpaying Promoter, to the extent required to reimburse the Overpaying Promoter.

(e) for the avoidance of doubt any transfer of shares which are the subject of a mortgage to Anglo shall be subject to the consent of Anglo."

60. Clause 5.5 deals with the "Constitution of the Board". Clause 5.5.1(a), by reference to different classes of shares, has the effect that Joseph Sheehan and Breccia, by virtue of their shareholdings were each entitled to appoint two directors to the Board of BHL, and James Sheehan, Dr. Duffy and Benray were each entitled to nominate one director. Clause 5.5.5 listed out the directors of the new Board. These were:-

1. Patrick Molloy (Chairman)

2. Bryan Harty (CEO)

3. Joseph Sheehan

4. James Sheehan

5. Laurence Goodman (Breccia)

6. George Duffy

7. John Flynn

8. A.N. Other (2nd nominee of Joseph Sheehan)

9. A.N. Other (2nd nominee of Breccia)

61. Clause 5.6.1 provides that any director could at any time in writing to the Board appoint any other director or any other person to be his "alternate" with entitlement to receive notice of meetings and, in the absence from the Board of the director appointing him, the right to attend and vote at meetings of the board.

62. Clause 5.6.1(b) allows the Board to invite observers to meetings, and 5.6.1(c) provides that "in addition Benray may appoint a person to observe the meetings of the Board for so long as John Flynn remains a director such person to be subject to the approval of the Board such approval not to be unreasonably withheld or delayed".

63. This special provision concerning Mr. Flynn related to the fact that he was resident in the USA, and more often than not he was represented at Board meetings by his son James Flynn as his "alternate".

64. Clause 5.8 under the heading "Information" provides:-

"The Company shall keep each Promoter, for as long as such Promoter is the holder of 8% or more of the nominal value of the issued share capital, fully informed of the progress of its business and furnish to such extent and in such form and detail as it may from time to time reasonably require particulars of any matter concerned with or arising out of the activities of any Company, and in particular, but without limiting the generality of the foregoing shall furnish to the Promoters at the cost of the Company…"

65. Under clause 5.10 each Promoter so long as they hold 8% or more of the nominal value of the issued share capital, also enjoys the right at all reasonable times to full and free access to inspect and examine the books of the companies, and free and full access to the properties and buildings of the companies and the companies' professional advisors including their auditors.

66. Clause 5.11 headed "Restricted Transactions" in its opening paragraph states:-

"Each of the Promoters undertake with the other Promoters he/it will at all times (save as may be required by law) exercise all voting and other rights and powers available to him/it from time to time so as to procure that each Company shall not without the prior written consent of each Promoter or combination of Promoters for so long as such Promoter or combination of Promoters hold not less than 25% of the nominal value of the issued share capital of the Company take or agree to take any of the following actions…"

67. There follows a list of actions 5.11.1 to 5.11.14. Of the listed actions that require prior written consent of all other Promoters two are relevant. Thus, each Promoter cannot:-

"5.11.2 pay or make any dividends other than in accordance with the Dividend Policy or other distribution"; and

"5.11.14 alter the ethical principles of the Company from time to time, being not to engage in any procedure or practice which is not consistent with the teaching of the Roman Catholic Church from time to time…"

68. Clause 5.12 provides that "[u]nless otherwise agreed between the Promoters in writing" *inter alia* "the bankers to the Company shall be Anglo Irish Bank Corporation Plc. and AIB Plc" (clause 5.12.2) and "the lawyers to the Company shall be Sheehan & Company" (clause 5.12.6)[2].

69. Clause 7 headed "Publicity" is not of particular relevance, although it may be noted that clause 7.2 "Confidential Information" provides that "…any information of a confidential nature relating to the business or affairs of the Company or of the Promoters…" is to be "…considered confidential information and shall not be disclosed by any party hereto or to any third party without the prior written consent of the Promoters or except in accordance with the provisions of clause 7.3 [dealing with Compulsory Disclosure] save where such information has come into the public domain otherwise as a result of a breach of this clause."

70. Clause 8 headed "Transfer of Shares" contains pre-emption rights and also plays a significant role in these proceedings. It is a lengthy clause, it will suffice to quote parts of it and make reference to other parts:-

"8.1 Restriction on Share Transfers

8.1.1 No Promoter/Shareholder shall on, or before 3 years from the date hereof sell, assign, transfer, give, donate, or otherwise dispose of or grant an Encumbrance over any of its Shares in the Companies (excluding a charge in favour of Anglo Irish Bank Corporation Plc in respect of a loan to facilitate the subscription for new shares in the Company) or any portion thereof or any right or interest therein now held or hereafter acquired, unless:

(a) each of the other Promoters give their prior written consent,

(b) the transferee enters into a deed of adherence pursuant to clause 8.4 below: and

provided that this shall not prohibit the creation of security over the Shares in favour of a bank.

8.1.2 The Board may, notwithstanding compliance with this clause 8 generally, decline to register a transfer of Shares where the transferee would, in the reasonable opinion of the Board breach or imperil;

(a) the ethical principles to apply to the Hospital, as adopted by the Board of the Hospital Company from time to time;

(b) any legal authorisation required for the conduct of the hospital's activities,

(c) the commercial integrity of the Company by virtue of the Transferee being a competitor or having a material interest in a competitor to the Company.

8.2 Transfer Generally

If and whenever after the 3 years from the date hereof a Shareholder wishes to sell his Shares, subclauses 8.1.1(a), and (b) and 8.1.2 and the following provisions apply:

8.2.1 Transfer Notice

If any Shareholder of the Company desires to transfer any Shares (referred to in this clause 8.2 as the "Vendor") he shall give to the Company notice in writing ("the Transfer Notice") specifying the Shares he wishes to sell ("the Specified Shares"), and a specified price for the Specified Shares ("the Specified Prices") and the identity of any proposed or contemplated buyer (if any) of the Specified Shares and shall at the same time deposit with the Company the share certificate(s) in respect of the Specified Shares. Any such Transfer Notice shall constitute the Company as agent of the Vendor for the sale of the Specified Shares, subject to clause 8.2.2, in one or more lots at the discretion of the Directors to the members, other than the Vendor at that specified price. A Transfer Notice may contain a provision that unless all the Shares comprised therein are sold by the Company pursuant to this clause, none shall be so sold and any such provision shall be binding on the Company.

8.2.2 Board Discretion on Receipt of Transfer Notice

Forthwith upon the receipt by the Company of the Transfer Notice the Directors shall forthwith by notice in writing inform each member holding Ordinary Shares of that Class other than the Vendor of the number of Specified Shares and of the Specified Price and invite each such member to apply in writing to the Company within a period of not less than 21 days and not more than 42 days selected by them of the date of despatch of the notice (which date shall be specified therein) for such maximum number of the Specified Shares (being all or any thereof) as such member shall specify in such application. Any such application shall be irrevocable.

8.2.3 Offer Around

(a) If the said members shall within the said period of between 21 and 42 days apply for all or (except where the Transfer Notice provides otherwise) any of the Specified Shares, the Directors shall allocate the Specified Shares (or so many of them as shall be applied for as aforesaid) to or amongst the applicants and in the case of competition pro rata (as nearly as possible) according to the number of Shares of which they are registered or unconditionally entitled to be registered as holders, provided that no applicant shall be obliged to take more than

the maximum number of Shares specified by him as aforesaid.

(b) Where following the offer-around in paragraph (a) there remain Shares to be offered, they shall be offered by the Directors to the holders of Shares or other Classes para passu, on the basis of clause 8.2.2 mutatis mutandis.

8.2.4 Allocation of Shares

If the Vendor shall have specified in the Transfer Notice that unless all the Specified Shares are sold by the Company pursuant to this clause 8.2 none should be sold, the Directors shall not proceed with any allocation on foot of any applications pursuant to this clause 8.2 unless in pursuance of such applications the Directors shall allocate all the Specified Shares. Subject as aforesaid the Directors shall in accordance with the terms hereof allocate so may of the Specified Shares as shall be applied for by the members to or amongst the applicants pursuant to the provisions hereof and in the case of competition pro rata (as nearly as possible) according to the number of Ordinary Shares of which such applicants are registered as holders, provided that no such applicant shall be obliged to take more than the maximum number of Shares specified by him as aforesaid."

71. Sub clauses 8.2.5 and 8.2.6 deal with notice of allocation and sale and purchase formalities, respectively.

72. Sub clause 8.2.7 then provides:-

"8.2.7 Power to Sell where Pre-Emption Right Declined

If the Directors do not dispose of all the Shares comprised in any Transfer Notice in accordance with the foregoing provisions of this clause 8.2 they shall so notify the Vendor forthwith and during the period of 120 days next following the despatch of such notice the Vendor shall be at liberty to transfer all or any of the Specified Shares which are not allocated by the Directors in accordance with clause 8.2.4 to any person on a bona fide sale at any price not being less than the Specified Price (after deducting, where appropriate, any dividend or other distribution declared or made after the date of the Transfer Notice and to be retained by the Vendor) provided that:

(a) if the Transfer Notice shall state that unless all the Specified Shares are sold none of them shall be sold, the Vendor shall not be entitled hereunder to transfer any of the Specified Shares unless in aggregate the whole of such Shares are allocated in accordance with the preceding provisions of this clause 8.2 or transferred under this clause 8.2.7.

(b) the Directors may require to be satisfied that such Shares are being transferred in pursuance of a bona fide sale for the consideration stated in the transfer without any deduction, rebate or allowance whatsoever to the Purchaser and if not so satisfied may refuse to register the instrument of transfer.

8.3 No Concealment of True Ownership

8.3.1 No Share or any interest in any Share shall be held by any member as a bare nominee for or sold or disposed of to any person unless a transfer of such Share to such person would rank as a transfer to a person permitted under this Clause 8.

8.3.2 If clause 8.3.1 is infringed the holder of such Share shall, if the Board so resolves be deemed to have served a Transfer Notice in respect thereof, with a Specified Price per Share equivalent to the original subscription price for the Share.

8.4 Adherence by a Transferee

A Shareholder may not conclude an agreement to transfer any Shares to a transferee who is not already party to this Agreement unless the proposed transferee has executed under seal in favour of and delivered to the Company and the other Promoters a deed of adherence in the form substantially set out in Schedule 10 whereby the transferee agrees to be bound by this Agreement as if he had been party to it.

8.5 Effect of Transfer in Breach

Any transfer or purported transfer made otherwise than in accordance with the provisions of this Agreement or the Articles, shall be void and of no effect whatsoever and the Company and each of the Promoters shall procure that the Board shall not register the same.

8.6 Deemed Transfer Notice

If:

8.6.1 a Promoter makes any voluntary arrangement or composition with its creditors;

8.6.2 in respect of a Promoter being a body corporate, an encumbrancer takes possession over all or any part of its assets or undertakings or an examiner is appointed to it or such Promoter enters into liquidation other than a voluntary liquidation for the purpose of a bona fide scheme of solvent amalgamation or reconstruction or there is a change of control in respect of such Promoter…or suffers in any jurisdiction an event or process analogous to any of the foregoing;

8.6.3 a Promoter or a Guarantor commits a material breach of this Agreement and in the case of a breach capable of remedy fails to remedy same within 21 days of receipt of a notice from any other Promoter requiring such remedy;

8.6.4 IADC ceases to be controlled by Laurence Goodman or the Goodman Family Trust established on 25 September 1991 or by any beneficiary of that trust who is a Family Member of Laurence Goodman;

8.6.5 Benray ceases to be controlled by John Flynn and his Family Members;

8.6.6 The provisions of Clause 3.4.5 are applicable

all Shares in the name of such Shareholder or beneficially owned by such Shareholder (or in the case of a breach by or change of control of a Guarantor, the shares of the Promoter the performance of whose obligations hereunder the Guarantor has covenanted to procure, and its Affiliates and family members) (including Breccia Limited or Benray, as the case may be) and any Affiliate or Family Member of such Promoter in question shall be deemed to have been the subject of a Transfer Notice, and the Specified Price in respect of the Shares shall be the Fair Value of such Shares. Such Transfer Notice shall be irrevocable."

73. Clause 8.7 concerns "Group Transfers". Clause 8.8 concerns "Family Transfers", and clause 8.8.1 provides "[a]ny Promoter may transfer his Shares to and among any one or more of his Family Members or to a Body Corporate wholly owned by him."

74. Clause 8.9 concerns the "Provision of Information". Under Clause 8.9.1 if and whenever control of a Promoter/Shareholder or Guarantor changes, the persons who have facilitated such change of control must disclose that fact and any relevant circumstances. Each party to the Agreement is to procure that he or it and any Affiliates and Family Member shall furnish any relevant information which such Affiliates or Family Members may have to the other parties.

75. Clauses 8.9.2-8.9.5 provide:-

"8.9.2 Each Promoter and each Guarantor ("the relevant Promoter/Guarantor") shall, on demand of any other Promoter or Guarantor ("the enquiring Promoter/Guarantor"), provide evidence as to:

(a) how an Affiliate or Family Member qualifies as such; and/or

(b) the net worth of the Promoter or Guarantor (by way of certified extract from the most recent audited financial statements or letter from the company's auditors confirming the net worth).

8.9.3 If and whenever a relevant Promoter or Guarantor refuses such information or wilfully delivers incomplete information, the enquiring Promoter or Guarantor may inform all the other Promoters and Guarantors o[f] such refusal or incomplete delivery.

8.9.4 Where following three months of the demand of the enquiring Promoter, the relevant evidence has not been furnished, a Transfer Notice shall be deemed to have been served in respect of all of the Shares of the relevant Promoter (in the case of information requested of a Guarantor, the Promoter whose obligations such Guarantor has covenanted to procure) and of its alleged and actual Affiliates and Family Members, and the Specified Price in respect of the Shares shall be the Fair Value of such Shares. Such Transfer Notice shall be irrevocable.

8.9.5 Each enquiring Promoter shall, subject to clause 7.3, keep confidential all information received in response to an enquiry under clause 8.9.2."

76. Certain provisions in clause 8 were the subject of questions raised in the Construction Summons to which I have referred and in respect of which the Court made an order on consent outlined above. The declaration is confined in effect to dealing with the extent of the veto contained in clause 8.1.1(a). The narrow confines of the declaration are such that it does not extend to a Shareholder wishing to sell his shares under 8.2. While it does not arise for a decision in this case, the question may arise in the future as to whether the veto still applies under clause 8.2 to a shareholder wishing to sell his shares in accordance with the pre-emption provisions of clause 8.2.

77. Clause 9 deals with "Dividend Procedures":-

"9.1 Dividend Policy shall be proposed and agreed by the Directors, subject only to compliance with the Companies' Act.

9.2 The Directors shall recommend the payment of four quarterly interim dividends, subject to the total annual dividend declared for the year.

9.3 Each Shareholder/Promoter shall use all their voting powers to approve and declare such dividends in accordance with the Dividend Policy and other distributions as the Directors may recommend.

9.4 (a) For the financial year ending 31st December 2006, the Directors shall procure that, unless otherwise agreed by the Shareholders with the prior written consent of Anglo it is required for the purpose of the maintenance of appropriate levels of reserves for ongoing capital expenditure requirements, [a total annual dividend of not less than €4,000,000] shall be declared[3]; and

(b) The Directors shall procure that, unless otherwise agreed by the shareholders with the prior written consent of Anglo it is required for the purpose of the maintenance of appropriate levels of reserves for ongoing capital expenditure requirements, the total annual dividend declared in future years shall increase at a level of 5% per annum above the previous year's total annual dividend."

78. Clause 10 contains various "General Provisions". Of particular relevance is clause 10.5 "Entire Agreement" wherein it is stated:-

"This Agreement, the Schedules to this Agreement and the documents referred to in this Agreement together embody the entire agreement and understanding between the parties hereto and supersedes and terminates all prior statements, representations, agreements, arrangements, employment and understandings relating to the Company, the subject matter of this agreement and the Business, and shall be amended or supplemented only by written agreement of all the parties

hereto. For the avoidance of doubt all previous agreements entered into by the shareholders of the companies are hereby terminated."

79. Clause 10.11 provides that the parties acknowledge that they were afforded the opportunity to take independent legal advice, that the parties understand the effect and implications of the Shareholders' Agreement and that they entered willingly.

> The "Execution Page" of the Shareholders' Agreement was signed by Mr. Jerry Sheehan, solicitor as attorney on behalf of Joseph Sheehan, James Sheehan, Rosemary Sheehan and George Duffy. Mr. Jerry Sheehan also signed as attorney on behalf of John Flynn as guarantor. The sealing on behalf of Benray was in the presence of and witnessed by John Flynn. The sealing by Breccia and IADC were undertaken in the presence of Laurence Goodman and Catherine Goodman.

The Loan Facilities

80. The loan facilities entered into for the purchase of the shares and the security documentation that supported them, and the Shareholders' Agreement entered into at the same time are clearly interdependent transactions. It was not disputed that they should be taken into account by the Court when interpreting the Shareholders' Agreement (although that is not to say that they should be read together). While there was no dispute as to the execution or content of this documentation, there was a dispute as to the extent to which Breccia could rely on it or undertake enforcement pursuant to its terms.

81. By the Facility Letter dated 28th March, 2006, Anglo offered to lend Benray €7,298,489 "to enable the Borrower to subscribe for new shares in Blackrock Hospital Limited and the entire shareholding of BUPA Investments Limited to be redeemed".

82. Under clause 3, the security required by Anglo may be summarised as follows:-

> 1. A first legal charge over Benray's shareholding in BHL.
>
> 2. A charge over a deposit account[4].
>
> 3. A guarantee and indemnity from Mr. Flynn "supported by but not limited to its entire interest in any shareholding in Blackrock Hospital Limited".
>
> 4. An assignment of Benray's interest in the subscription and redemption agreement in respect of BHL between BUPA and BHL, Joseph Sheehan, Dr. Duffy, Benray and Breccia, and related documents.
>
> 5. Cross-guarantees and indemnities provided by the other shareholders with the exception of Breccia "in respect of all the obligations of the Borrower pursuant to this Facility Letter with limited recourse to his entire shareholding in Blackrock Hospital Limited supported by a first legal charge over his entire shareholding in Blackrock Hospital Limited", together known as the guarantors:-
>
> > "to the intent that the Bank shall be entitled to dispose of the entire shareholding of each of the Guarantors in the event of a default by the Borrower and/or any demand is made under this Facility. However, the Bank shall not be entitled to apply any proceeds of sale of the shareholding of any Guarantor (other than the proceeds of any shares or any interest in same held by Benray Limited and/or John Flynn) against any amounts outstanding under this Facility".

83. Three points should be noted about this provision. It should be recalled that clause 3.4.1 of the Shareholders' Agreement required each of the Promoters to furnish additional security in respect of each others' loans from Anglo "by way of Guarantee and Indemnity *or otherwise*" (emphasis added). The words in italics came to be added into the final draft of the Shareholders' Agreement in circumstances that will be explored in greater detail later in this judgment. Breccia availed of this wording to conclude a separate arrangement with Anglo whereby it provided a Deed of Covenant rather than a cross-guarantee.

84. Secondly, it should be noted that Dr. James Sheehan signed 'cross' guarantees and indemnities even though his shares were unencumbered and he was not acquiring any further shares and was not borrowing any money from Anglo.

85. Thirdly, the security listed does *not* include the Letter of Waiver of Pre-Emption Rights dated 28th March, 2006 which will be mentioned later.

86. Clause 5 contained various conditions precedent, including that a dividend policy be put in place in BHL and Blackrock Clinic Ltd. in the agreed form. Although the dividend policy is not set out in the Facility Letter, it was agreed at the same time and is set out in clause 9 of the Shareholders' Agreement. This further demonstrates the interdependence between the Shareholders' Agreement and the Facility Letters entered into by the borrowing Promoters.

87. At clause 5(ix) it was a condition precedent to the Facility Letter that Anglo received each security document duly executed by the parties along with the original share certificates in respect of the shares, original share transfer forms executed by the borrower transferring the shares to "Anglo Irish Bank (Nominees) Ltd 733", evidence that the BHL books were updated to show that company entered into the register of members, and that "any other share certificates, title documents and consents relating to the assets charged by the Security Documents are to be delivered to the Bank".

88. As a further condition precedent at clause 5(xv) Benray had to provide "[a] letter of waiver from the Borrower waiving all pre-emption rights in relation to the Shares on any sale by the Bank on the enforcement of the Security."

89. Under clause 6 the interest rate of the loan was to be "the aggregate of 1.75% (the "Margin") above three month Euribor plus RAC" and this was to be debited to Benray's account at the end of each calendar quarter, although it was left open to Benray to request Anglo to fix the interest rate on the facility for a fixed period.

90. Clause 7 headed "Repayment" provided as follows:-

> "(a) All interest due and payable pursuant to this Facility shall be repaid [quarterly] from dividends paid on the Shares, such dividends to be paid by direct debit by Blackrock Hospital Limited to a deposit account in the name the Borrower charged in favour of the Bank;

(b) The Facility shall be repaid on or before the 30th December 2010. In the meantime interest is to be funded on a quarterly basis at the end of each calendar quarter;

(c) This Facility shall become immediately due and payable and all Security granted hereunder shall become enforceable in the event that a default occurs under any of the following facilities and/or any security granted in respect thereof;

- Facility Letter to George Duffy dated 28th March 2006 as same may from time to time be amended.
- Facility Letter to Joseph Sheehan dated 28th March 2006 as same may from time to time be amended.
- Facility Letter to Breccia Ltd dated 27th March, 2006 as same may from time to time be amended.

(together with this facility letter the "Facility Letters")

(d) This Facility shall become immediately due and payable and all Security granted hereunder shall become enforceable on the occurrence of an Event of Default as set out in clause 9."

Accordingly, a default by only one borrower entitled Anglo to enforce against all borrowers and guarantors.

91. Clause 9 headed "Events of Default" so far as is relevant states that:-

"Each of the following shall be an event of default (each an "Event of Default"):-

(a) If in respect of sums due and owing under or in connection with this Facility Letter, the Borrower fails to pay any sum due from it within 14 days of the due date in each case at the time, in the currency and in the manner specified in this Facility Letter.

(b) If any representation or statement made by any of the Borrower and/or the Guarantors ("Obligors") in this Facility Letter and/or any Security Document or in any notice or other document, certificate or statement delivered by him/it pursuant thereto or in connection therewith is or proves to have been incorrect or misleading; or

(c) If any Obligor fails to duly perform or comply with any obligation expressed to be assumed by him/it in this Facility Letter and where such failure is, in the absolute discretion of the Bank, capable of remedy is not remedied within 30 days of any of the Obligors aware of the occurrence thereof…"

Further events of default are set out in subpara.s (d)-(w). These are not particularly germane or surprising, but they do constitute a very comprehensive range of events of default. Under clause 9(d) in the event that certain defaults are capable of remedy, Anglo could allow 30 or 15 days for remedy (or an extension) in its absolute or sole discretion. This is the 'cure' provision.

92. The last event of default is that set out in subpara. (x):-

"If any demand for payment is made and/or any event of default occurs under any of the Facility Letters;

then in any such case and at any time thereafter, and notwithstanding any other provision to the contrary contained in this facility letter and/or the security documents, the Bank may, by written notice to the Borrower:-

(i) declare all sums due and pursuant to this Facility to be immediately due and payable and call for repayment thereof whereupon the same shall become so payable together with accrued interest thereon and any other sums then owed by the Borrower under this Facility Letter and/or the Security Documents; and/or

(ii) call upon the Borrowers to immediately perform all their obligations under this Facility Letter and/or the Security Documents whereupon the Borrowers shall immediately perform such obligations; and/or

(iii) declare that the Facility is cancelled, whereupon the same shall immediately be cancelled; and/or

(iv) declare that the Security Documents have become enforceable immediately in accordance with their terms, whereupon the same shall be immediately enforceable; or

(v) withdraw any such declarations with effect from such date as it may specify in such notice."

93. The facility thus offered was further on the terms and conditions set out in the General Conditions, amended only by the deletion of sub clause 12(iii) under the heading "negative covenants". The last two lines of the Facility Letter states:-

"If there is any conflict between the terms of the Facility Letter and the General Conditions the terms of the Facility Letter shall prevail."

It was signed by two bank officials on behalf of Anglo, and acceptance of the Facility Letter and Anglo's General Conditions were signed by Mr. Jerry Sheehan and Mr. Flynn on behalf of Benray.

94. Also annexed were "Guarantors Acceptances" signed by the other shareholders, with the exception of Breccia, and Mr. Flynn as guarantor in the following terms:-

"I have read the facility letter of 27th March 2006 to Benray Limited and the Bank's General Conditions which form part of the agreement between the Borrower's and the Bank ("the Agreement") and confirm that I fully understand the terms of the Agreement and acknowledge that I am guaranteeing the performance of the Borrower's of their obligations under the Agreement to the Bank. I acknowledge that I have been given due opportunity to take independent legal advice on the effect of the Agreement and have …waived…the opportunity to take such legal advice."

95. Anglo's "General Conditions Corporate Loans" were incorporated into the loan agreement represented by the Facility Letter. Some of these are relevant:-

> "4.1 Notwithstanding that repayments of the Facility are to be made over or within a specified period or on or before a specified date (as set out in the Facility Letter), the Facility is and shall at all times be repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason therefor....
>
> 16.1 No failure, delay or other relaxation or indulgence on the part of the Bank in exercising any power, right or remedy shall operate as a waiver thereof nor shall any single or partial exercise or waiver of any power, right or remedy preclude its further exercise or the exercise of any other power, right or remedy. Any right or power which may be exercised or any determination which may be made under the Security Documents by the Bank may be exercised or made in its absolute and unfettered discretion and it shall not be obliged to give reasons therefor….
>
> 16.5 Any notice or demand to be given under the Agreement shall be in writing and shall be effective and shall be deemed to have been duly given (a) if sent by hand or by courier, immediately upon dispatch or (b) if sent by prepaid ordinary post, to the address specified on the front cover of the Agreement or such other address as may be advised in writing to the Bank, at the expiration of two Business Days from the date of posting….
>
> 19.2 The Bank may at any time transfer, assign or dispose of the benefit of the Agreement and the Security Documents to any person on such terms as the Bank may think fit whether as part of a loan transfer or securitisation scheme or otherwise without notice to the Borrower or any other person."

"Security Documents" are defined in clause 22.2 to include the security documents set out in the Facility Letter.

Mr. Flynn's Guarantee

96. The Facility Letter executed by Benray was then supported by a longer form Deed of Guarantee and Indemnity between Mr. Flynn and Anglo dated 28th March, 2006, executed on Mr. Flynn's behalf by Mr. Jerry Sheehan as his attorney. This refers to the Facility Letter from Anglo to Benray dated 28th March, 2006, and contains a guarantee in a standard form of wording under which Mr. Flynn guaranteed the "prompt payment or discharge to the Bank of (and undertakes on written demand by the Bank to pay or discharge) all monies and liabilities which may now or hereafter from time to time (and whether on or after demand) be due, owing or incurred to the Bank" by Benray (clause 2.1).

97. The other terms of the guarantee are the standard sort of terms that may be expected in a modern contract or deed of guarantee.

Mortgage of Shares

98. Benray also executed a "Mortgage of Shares" dated 28th March, 2006, charging its shares in BHL to Anglo. The operative part in clause 3.1 states:-

> "The Mortgagor [Benray] as legal and beneficial owner to the intent that the charge hereby created shall be a continuing security for the payment and discharge of all the Secured liabilities and other monies and liabilities hereby agree to be paid or discharged by it or otherwise hereby secured HEREBY:-
>
> (a) mortgages and charges by way of first fixed charge to the Bank and with the intent that until the Bank or its nominee shall be registered as the holder of the Shares in the register of shares of the Company in which the Shares are held or where the Bank, in its absolute discretion, agrees that no such registration is required, this security shall take effect as an equitable mortgage to the Bank of, all of;
>
> (i) the Shares and all right title and interest of the Mortgagor therein present and future;
>
> (ii) any allotments, accretions, offers and rights deriving from or incidental to any of the Shares including all stocks, shares and other securities, rights, monies and other property accruing, offered or issued at any time by way of bonus, redemption, exchange, purchase, substitution, conversion, preference, option or otherwise in respect of the Shares;
>
> (iii) all dividends, interest or other income deriving now or at any time hereafter from or incidental to the ownership of the Shares and the income deriving from any investment of any such dividends, interest or income; and,
>
> (iv) any monies, income and amounts received from the redemption of all or any part of the Shares or of any of the Security Assets.
>
> (b) charges, all right, title and interest to and in the Account;
>
> (c) assigns to the Bank all right, title and interest of the Mortgagor in and to the Shareholder Agreements; and
>
> (d) assigns to the Bank all right, title and interest of the Mortgagor in and to the Transaction Agreements; and
>
> (e) covenants that immediately upon the execution of this Mortgage (or upon becoming possessed thereof at any time hereafter) it will:-
>
> (i) execute such instruments as the Bank may request transferring all deeds, bearer instruments, certificates and other documents constituting or evidencing title to the Shares or any part thereof into the name of the Bank or the Bank's nominee;
>
> (ii) register the name of the Bank or the Bank's nominee as the owner of the Shares in the register of members of the Company; and
>
> (iii) execute any other documents relating to the Shares as the Bank shall reasonably require;

to the intent that the security hereby created shall be a legal mortgage of the Shares."

99. Clause 10 under the heading "Enforcement of Security" provides that where at any time monies secured by the shares have become payable and the mortgagor has defaulted in payment or the security has otherwise become enforceable, Anglo is entitled to put into force and exercise all powers conferred by the Mortgage, including the power, "to sell all or any part of the Security Assets in any manner permitted by law upon such terms as the Bank shall in its absolute discretion determine".

100. Clause 11 of the mortgage headed "Receiver" provides as follows:-

> "11.1 (a) In addition to the powers conferred above, at any time after the security hereby created shall have become enforceable the Bank may appoint in writing a receiver or a receiver and manager (hereafter a "Receiver") of all or any part of the Security Assets and remove any Receiver so appointed and appoint another in his stead and may from time to time fix the remuneration of any such Receiver.
>
> (b) The Bank may by instrument in writing delegate to any such Receiver all or any of the rights, powers and discretions vested in it by this Mortgage.
>
> (c) The Bank shall not be responsible for misconduct or negligence on the part of such Receiver.
>
> (d) Such Receiver shall be the agent of the Mortgagor and the Mortgagor shall be responsible for his acts, defaults and reasonable remuneration and liable on any contracts made by him.
>
> (e) All monies received by the Bank or any Receiver in respect of the Security Assets after the security has become enforceable shall be applied by the Bank in or towards payment of the Secured Liabilities in such order as the Bank sees fit."

101. In addition to the foregoing under clause 12 headed "Remedies", at clause 12.1 the Mortgagor authorises Anglo:-

> "…to sell or otherwise to dispose of all the title to and interest in all or any part of the Security Assets or…the whole or part of the equitable interest divested of the legal title for such consideration…upon such terms and generally in such manner as the Bank may, in its absolute discretion, think fit, and so that the Bank shall not be liable for any loss or damage occasioned by such sale or disposal, unless caused by the Bank's own gross negligence or wilful default …"

Further, in support of these provisions under clause 13 "Power of Attorney", the mortgagor, for the purpose of further securing the interest of Anglo in the security assets, irrevocably appointed Anglo to be its attorney and to sign, seal and deliver and complete all transfers, renunciations, proxies, etc. The mortgage empowered Anglo to do all acts and things which it may have, in its absolute discretion, considered to be necessary or expedient for enabling or assisting Anglo to exercise any of its powers, rights or discretions or conferred by law to do anything which the mortgagor is obliged to do under the mortgage.

Waiver of Pre-Emption Rights

102. The final document of importance executed by Mr. Jerry Sheehan on behalf of Benray is in the form of a letter dated 28th March, 2006 addressed to Anglo which reads as follows:-

> "In consideration of the Bank advancing loan facilities to the Company [Benray] to facilitate subscription for shares in Blackrock Hospital Ltd the Company hereby waive(s) all pre-emption rights available to the Company in relation to all shares in BHL held by me including but not limited to all shares, stocks, bonds, debentures and other instruments ("shares") issued by BHL from time to time and legally or beneficially owned by the Company or any nominee of the Company's at the date hereof or at any time hereafter, whether in certificated, dematerialised or uncertificated form whether or not held jointly with any other person…howsoever arising on the assignment, transfer or sale by the Bank of all or any of the shares in BHL on the enforcement by the Bank of any security held by it over any shares in BHL."

Similarly worded letters were signed by all of the Promoters/shareholders. These waivers were required as a condition precedent to the loan by virtue of clause 5(xv) of the Facility Letter.

103. One issue that arises in these proceedings is whether this waiver of pre-emption rights by Benray addressed to Anglo and expressed to be in favour of "the Bank" can be relied upon by Breccia if it is entitled to sell Benray's shares by way of enforcement of the security of those shares.

Legal Principles - Interpretation

104. Both parties rely on the statement of the principles to be applied by a court in construing a contract referred to in the Supreme Court decision in *Analog Devices BV v. Zurich Insurance Co. Ltd.* [2005] 1 IR 274, where Geoghegan J. approved Lord Hoffman's dicta in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896, at p. 912 as follows:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as

the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945).

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

> "…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""

105. In *Viridian Power Ltd. & Anor v. Commission for Energy Regulation* [2012] IESC 13, McKechnie J. in his dissenting judgment again cited with approval Lord Hoffman's principles and added:-

> "25. The purpose of such an interpretive exercise is to ascertain what contractual rights and obligations the parties have bound themselves to. The more formal the contractual context the more a court can be satisfied that, the concluded document, signed up to by the parties, reflect what their bargain is. Not simply in a factual sense but also as to the manner in which they seek to have the underlying events regulated by law. When a dispute arises, quite frequently, either one or all of the parties, disavow what might appear to be the obvious and manifest meaning of the document in issue. Positions are therefore stood on, impasse prevails and litigation follows.
>
> 26. In performing the function called upon, the court will firstly consider the document and any and all other documents, properly attached to or incorporated within it: each clause, part, chapter or section will be looked at individually, and if required, collectively. (*The People (Attorney General) v. Kennedy* (No.1) [1946] 1 I.R. 517 at 536). Its nature and purpose will form part of the background. Where the parties have defined or described a term, which is used in the document, that meaning will be ascribed to it and not any other, either ordinary or otherwise. This is to reflect the freedom of choice expressed by the parties. In addition, such interpretation is designed to ascertain what meaning the document has, for a reasonable person who has a knowledge of and an interest in the subject area covered by the document. Or, as Lord Hoffman said in I.C.S., "he who will have" of all the background, reasonably available. This input into construction is critical as otherwise it may be impossible to read the document in its proper context. In addition however, the actual words used, must never be lost sight of and must never be forced to yield to speculation or conjecture.
>
> 27. These principles are those which generally apply to commercial contracts negotiated freely in both the public and private sector. I have not considered any subsidiary aids to interpretation or examined any exceptions which may be available: it has not been necessary to do so. Although the relationship between the parties in the instant case did not crystallise in what may loosely be described as the free market place, nonetheless I see no reason why such rules should not equally apply here. Notwithstanding the fact that the licensor is a statutory body, that the terms are in statutory form and that the market place is regulated, all participating generators are fully aware of these matters at the time of their contract. Having chosen to enter the sector against such background, which is public knowledge, I see no reason to depart from the standard interpretative rules above mentioned. In fairness it should be said that the court has not in any substantive way been invited to do so."

106. In a later decision of *Marlan Holmes Ltd v. Walsh & Anor* [2012] IESC 23 McKechnie J., this time for the majority, had cause to further elaborate on the court's function in interpreting contracts. At para.s 51-52 he made the following statement of principle:-

> "It is important however to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.
>
> The boundary between what is permissible and not in this context is captured by the following quotation from *Charter Reinsurance v. Fagan* [1997] A.C. 313 where at p. 388 Lord Mustill stated:-
>
> > "There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."
>
> I would respectfully agree with this passage."

107. Counsel on behalf of Breccia cite authorities that suggest caution in the use of "business common sense" in the interpretation of commercial contracts. They refer to *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 where Lord Clarke at para. 21 stated that:-

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge that would reasonably have been available to the parties in the situation which they were at the time of the

> contract, would have understood the parties to have meant. In doing so, the court must have regard to all of the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

Lord Clarke went on to say at para. 23 "[w]here the parties have used unambiguous language, the court must apply it". It should be noted that Rainy was a case that concerned purely commercial contracts between the purchasers of newly constructed ships and the funding bank. Breccia asserts that the agreements under consideration in the present case are purely commercial ones, that these principles apply, and that there is no ambiguity in the meaning of the relevant documents.

108. I respectfully agree with the approach to construction advocated by McKechnie J., based as it is on the *dicta* of Lord Hoffman. It seems to me that Lord Clarke's approach in the *Rainy* case is not inconsistent with this. I note in passing that these pronouncements were in the context of purely commercial contracts. In *Veridian* McKechnie J. was dealing with a dispute involving participants in electricity generation which concerned the licensing regime, but as he stated in para. 27 of his judgment he saw no reason to depart from "standard interpretive rules". In *Marlan* the court was concerned with interpretation of purely commercial land development agreements.

109. If the "matrix of fact" that gives context for the written agreements, and the terms of the written agreements themselves, indicate that the relationship between the parties was not purely commercial, or not 'at arms length', or if the objectives of the transactions included non-commercial aims, then this is something that should be taken into account in construing the contract. In such circumstances, the approach advocated in the cases cited above still applies, but the reasonable person addressing the contract terms, and being aware of the background facts, will take into account the non-commercial aspects.

Legal Principles - Implied Terms

110. It is appropriate at this point to consider the circumstances in which terms may be implied in the construction of contracts. This is relevant to the plaintiffs' contention that Breccia is not entitled to simultaneously assume and independently exercise and enjoy the rights of both a shareholder and a mortgagee in possession of shares in BHL where to do so would fail to honour, or cause a conflict in, or breach of the terms of the Shareholders' Agreement. They assert that Breccia has attempted indirectly or directly to increase its shareholding in BHL otherwise than in accordance with the terms of clause 3 and/or clause 8 of the Shareholders' Agreement. It is averred that Breccia's actions are contrary to an implied term of that Agreement that each of the shareholders owed one another a duty of good faith and/or a duty to take no steps the effect of which would be to cause the shares of any other shareholder to be alienated save in accordance with these clauses.

111. Counsel for the plaintiffs rely principally on the ground breaking judgment of Leggatt J. in *Yam Seng Pte Ltd. v. International Trade Corporation Ltd.* [2013] 1 CLC 662. That case concerned a dispute between the plaintiff, a Singaporean company, and the defendant, a UK company, in relation to an agreement for the distribution of certain fragrances which were branded to show an association with a well known football team. The relationship between the parties broke down, and the plaintiff sued for breaches of the agreement and argued that it was owed a duty implied by the agreement that the parties would deal with each other in good faith. While the full facts are not germane, it should be noted that the parties were involved in a purely commercial relationship.

112. Leggatt J. considered the question of an implied duty of good faith in commercial contracts at length in para.s 120-154. His starting point was that while there was a general view among commentators that in English contract law there was no legal principle of good faith of general application, no decision of an English court was cited in which the question had been considered in any depth. He noted that in *Walford v. Miles* [1992] 2 AC 128, the House of Lords considered that a duty to negotiate in good faith is "inherently repugnant to the adversarial position of the parties when involved in negotiations", and "unworkable in practice", but Leggatt J. observed that that case was concerned only with the position of negotiating parties and not with the duties of parties who have entered into a contract and undertaken obligations to each other. He noted that three main reasons had been giving for the traditional English hostility towards the doctrine of good faith:-

> 1. The preferred method of English law was to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles;
>
> 2. English law seeks to embody an ethos of individualism where parties are free to pursue their own self interest in negotiating and performing contracts;
>
> 3. There is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty.

113. Leggatt J. felt that this refusal to recognise any general obligation of good faith "would appear to be swimming against the tide". At para. 125 he stated that:-

> "As noted by Bingham LJ in the Interfoto case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems – including those of Germany, France and Italy."

He also referred to Unfair Terms in Consumer Contracts Regulations, 1999, which give effect to a European directive (which also applies in this jurisdiction and in respect of which there are parallel regulations). He referred to several other examples of legislation implementing EU directives which use the same concept and are mentioned in *Chitty on Contracts* (31st edn.), Vol. 1 at para. 1-043. Leggatt J. referred to further attempts to harmonise contract law of EU member states and concluded:-

> "There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase."

114. He drew further support from the position in the United States, stating at para. 126 that:-

> "The New York Court of Appeals said in 1918: "Every contract implies good faith and fair dealing between the parties to it": Wigand v Bachmann-Bechtal Brewing Co. 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". Similarly, the Restatement (Second) of Contracts states in section 205 that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement".

Paragraph 127 of his judgment states:-

> "In recent years the concept has been gaining ground in other common law jurisdictions. Canadian courts have proceeded cautiously in recognising duties of good faith in the performance of commercial contracts but have, at least in some situations, been willing to employ such duties with the view to securing the performance and enforcement of the contract or, as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into: see e.g. Transamerica Life Inc. v. ING Canada Inc. (2003) 68 OR (3d) at 457, 468."

115. In para. 128, Leggatt J. referred to the position in Australia were a contract or duty of good faith is well established but the precise limits of which remain unsettled. He referred to the New South Wales Court of Appeal decision in *Renard Constructions (ME) Pty v. Minister for Public Works* (1992) 26 NSWLR 234, where Priestley J.A. said that:-

> "…people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

116. He also referred to the House of Lords decision in *Smith v. Bank of Scotland* [1997] SC (HL) 111 which he characterised as "strong authority for the view that Scottish law recognises a broad principle of good faith and fair dealing". Leggatt J. then stated that:-

> "132. Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.
>
> 133. Traditionally, the two principal criteria used to identify terms implied in fact are that the term is so obvious that it goes without saying and that the term is necessary to give business efficacy to the contract. More recently, in Attorney General of Belize v Belize Telecom Ltd. [2009] 1 WLR 1988…the process of implication has been analysed as an exercise in the construction of the contract as a whole. In giving the judgment of the Privy Counsel in that case, Lord Hoffmann characterised the traditional criteria, not as a series of independent tests, but rather as different ways of approaching what is ultimately always a question of construction: what would the contract, read as a whole against the relevant background, reasonably be understood to mean?
>
> 134. The modern case law on the construction of contracts has emphasised that contracts, like all human communications, are made against a background of unstated shared understandings which inform their meaning. The breadth of the relevant background and the fact that it has no conceptual limits have also been stressed, particularly in the famous speech of Lord Hoffmann in Investors Compensation Scheme Ltd…
>
> 135. Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement.
>
> 136. A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust. Yet it is seldom, if ever, made the subject of an express or contractual obligation. Indeed if a party in negotiating the terms of a contract were to seek to include a provision which expressly required the other party to act honestly, the very fact of doing so might well damage the parties' relationship by the lack of trust which this would signify.
>
> 137. The fact that commerce takes place against a background expectation of honesty has been recognised by the House of Lords in HIH Casualty v Chase Manhattan Bank [2003] 1 CLC 358. In that case a contract of insurance contained a clause which stated that the insured should have "no liability of any nature to the insurers for any information provided". A question arose as to whether these words meant that the insured had no liability even for deceit where the insured's agent had dishonestly provided information known to be false. The House of Lords affirmed the decision of the courts below that, even though the clause read literally would cover liability for deceit, it was not reasonably to be understood as having that meaning. As Lord Bingham of Cornhill put it at [15]:
>
> > "Parties entering into a commercial contract…will assume the honesty and good faith of the other; absent such an assumption they would not deal".
>
> To similar effect Lord Hoffmann observed at [68] that parties "contract with one another in the expectation of honest dealing", and that:
>
> > "…in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly".
>
> 138. As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.
>
> 139. In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in a contractual

document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable".

140. Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract. That principal is well established in the modern English case law on the interpretation of contracts: see e.g. Rainy Sky SA…It also underlines and explains, for example, the body of cases in which terms requiring cooperation in the performance of the contract have been implied: see Mackay v Dick (1881) 6 App Cas 251, 263; and the cases referred to in *Chitty on Contracts* (31st edn), Vol 1 at paras. 13-012-13-014."

117. In para. 142 Leggatt J. observed that "[w]hat good faith requires is sensitive to context" and discussed what this meant in terms of disclosure of information. In para. 143 he stated:-

"…While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties to which they make a substantial commitment. Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements."

118. He went on to state that:-

"145. Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in Royal Brunei Airlines v Tan [1995] 2 AC 378 at pp. 389-390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.

146. Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts…"

119. In addressing the reluctance of English law to recognise an implied duty of contracting parties to deal with each other in good faith he stated the following:-

"148. First, because the content of the duty is heavily dependent on context and is established, through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.

149. Second, as the basis of the duty of good faith is the presumed intention of the parties and the meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.

150. Third, a further consequence of the fact that the duty is based on the parties' presumed intention is that it is open to the parties to modify the scope of the duty by the express terms of their contract and, in principle at least, to exclude it altogether. I say "in particular at least" because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly.

151. Fourth, I see no objection, and some advantage, in describing the duty as one of good faith "and fair dealing". I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression "good faith" is used.

152. Fifth, in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the Interfoto case as "playing fair" "coming clean" or "putting one's cards face upwards on the table", this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.

153. Sixth, the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation."

120. In addressing this decision counsel for Breccia submitted that it should not be followed or applied by this Court in the present case. Firstly, they point out that Leggatt J. expressly rejected the position that an implied duty of good faith was to be employed into all commercial contracts, and that such a duty would have to be implied "following the established methodology of English law for the implication of terms". Secondly, the scope of the "good faith" terms ultimately implied by the court were narrow, being limited to the finding that one party would not knowingly provide false information where he knew the other party to the contract would rely on it; and that one party would not approve a retail price for any product for any domestic market which was lower than the duty free retail price for the product agreed by the other party.

121. It was also argued that the decision on its facts was distinguishable because Leggatt J. justified the implication of the term on the basis of the absence of any detail in the written agreement, or specific expressed terms, and a background assumption which applied to the industry – none of which factors exist in the present case. It was also urged that his decision should not be followed by the Irish courts, insofar as Leggatt J. was advocating a shift away from orthodox English rules on implied duties of good faith, and that his judgment blurred the distinction between commercial and fiduciary contracts.

122. In support of these contentions counsel relied on the decision of the Supreme Court in *Sweeney v. Duggan* [1997] 2 IR 531 setting out the accepted test for the implication of terms. The principles are set out by Murphy J. at p. 538:-

> "There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known case, *The Moorcock* (1889) 14 P.D. 64 where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in *Shirlaw v. Southern Foundries* (1926) Ltd. [1939] 2 K.B. 206 at p. 227 in an expression, equally memorable, in the following terms:—
>
> > "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'."
>
> In addition there are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract but deriving from the nature of the contract itself. Indeed in analysing the different types of case in which a term will be implied Lord Wilberforce in *Liverpool C.C. v. Irwin* [1977] A.C. 239 preferred to describe the different categories which he identified as no more than shades on a continuous spectrum.…Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract and furthermore it may be difficult to infer a term where it cannot be formulated with reasonable precision."

123. Counsel also relied on the decision of O'Higgins J. in *Meridian Communications & Anor v. Eircell Ltd.* [2002] 1 IR 17, where after a review of the case law in Ireland and England, he distilled the following principles on the implication of contractual terms:-

> "- before a term will be implied in a contract it must be necessary to do so, and not merely reasonable;
>
> - the term must be necessary to give business efficacy to the agreement;
>
> - it must be a term which both parties intended, that is, a term based on the presumed common intention of the parties;
>
> - the court will approach the implication of terms into a contract with caution;
>
> - there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms;
>
> - if the term sought to be implied cannot be stated with reasonable precision, it will not be implied."

124. Counsel emphasised the cautious approach, also relying on an *obiter dictum* of Fennelly J. in the Supreme Court decision in *Dakota Packaging v. AHP Manufacturing* [2005] 2 IR 54, at p. 106:-

> "…I think it desirable to state that the cases on the topic - indeed the cases which were very properly cited by the trial judge - do not warrant at least some of the language used in the judgment. In particular, the courts do not have "a broad discretion" to imply terms. It is not enough that a term to be implied is "fair and reasonable." It is true that the trial judge went on to hold that the term must also be necessary, but it is important to bear in mind that the courts will not lightly infer terms."

125. Counsel further emphasised this by reference to the Privy Counsel decision in the *Belize* case, a decision referred to by Leggatt J. in *Yam Seng* quoted above. There, Lord Hoffmann, in the context of construing a company's articles of association, stated the following at p. 1993:-

> "The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fair or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed….
>
> The question of implication arises when the instrument does not expressly provide what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or another of the parties, the loss lies where it falls.
>
> In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

126. Lord Hoffmann proceeded at para.s 26-27 to endorse a unitary test for the implication of contractual terms, approving the statement of Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 180 CLR 266 who said that the following conditions, which may overlap, should be satisfied before a term can be applied:-

> "(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that "it goes without saying"

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract…"

127. Lord Hoffmann added that:-

"The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

128. I note that Lord Simon's five principles, which seem to encapsulate the 'traditional approach' of the courts to implying terms in contracts, are recited in McDermott's *Contract Law* (2001) at p.311, where the author adds:-

"[7.53] Whilst this may not be an exhaustive test, it does provide a useful structure for analysing the case law. However it should be noted that there are few hard and fast rules when it comes to the implication of terms and in the words of Cooke P, "Discussions of the subject are legion, and it may be doubted whether tabulated legalism will ever produce an exhaustive or a rigidly discrete classification" [*Vickery v. Waitaki International Ltd* [1992] 2 NZLR 58 at 64.]"

129. Counsel for Breccia argued that the Court should assess whether any term is to be implied in the light of Lord Simon's five tests. They argued that they are not met in relation to any of the terms that the plaintiffs seek to imply into the Shareholders' Agreement. Counsel cites, as a correct application of these principles, the decision of the Court of Appeal in *Re Coroin Ltd* [2012] BCC 575. In that case the court refused to imply a term into a shareholders' agreement to prevent shares from being transferred through a change in control of a holding company upon the basis that it was "…difficult to conclude with any confidence that it was not foreseen by the parties" and that it was "an apparently obvious omission from the provisions of a clause whose very function was directed to the type of change of control that has in fact happened" (Rimer L.J. at para. 54). The court accordingly, wearing its hat as a "reasonable man", was unable to conclude that the exclusion was a mere drafting mistake when it could possibly have been simply the outcome of exchanges in the course of negotiations between the parties.

130. In closing submissions counsel for the plaintiffs in response to this relied on comments of Chadwick L.J. in *Bromarin v. IMD Investments Ltd*. [1999] BTC 74 where he stated that:-

"The difficulty with that approach is that it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.

It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event "A", and they did not contemplate event "B", their agreement must be taken as applying only in event "A" and cannot apply in event "B". The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event "B", which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. *It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee."* [Emphasis added]

I regard the words emphasised above as particularly helpful as summarising the correct approach to the construction of the Shareholders' Agreement. I also note that in *Coroin* the shareholders' agreement does not appear to have had any 'step in' provision such as that contained in sub clause 3.4.3 in the present case. *Coroin* was also a case concerned with a purely commercial venture related to the acquisition and operation of certain prominent London hotels.

131. Apart from more general Irish authorities relating to the circumstances in which the court may imply terms in contracts, counsel referred to relatively few Irish decisions dealing with an implied term or an obligation to deal in good faith. Perhaps surprisingly the issue of a general implied term of good faith is not considered as a central feature in any of the Irish cases. The Court was referred to *Triatic Ltd. v. Cork County Council* [2006] IEHC 111, where Laffoy J. endorsed the decision of Lord Ackner in *Walford v. Miles*, and identified at para. 78 of the decision practical difficulties in enforcing an obligation to negotiate or deal in good faith:-

"The breach alleged is that the defendant was not entitled to disengage other than for *bona fide* and valid reasons and none such existed. But, if the dealings between the parties had not taken the turn they took in September, 1997 and negotiations had continued and if the parties were unable to reach consensus on the acquisition price, how could it be said that one or other party could not withdraw? If the defendant persisted in an asking price of £500,000 and the plaintiff considered that the property was worth only half that price, would the plaintiff not have been entitled to withdraw? If there was to be a contract on the lines suggested by the plaintiff, both contracting parties would have to be locked into it. If either party withdrew because it considered the acquisition price proposed by the other to be unsatisfactory, to adopt the terminology of Lord Ackner, how could a court be expected to decide whether a proper reason existed for termination? Given that on the plaintiff's case an obligation to deal in good faith is to be implied in the alleged agreement, which must be assumed to bind both contracting parties, a subjective, rather than an objective approach would be required in making that decision. In my view the court would be faced with an impossible task."

132. The plaintiffs' counsel sought to differentiate this case on the basis that it was concerned with a duty to conduct and continue negotiations in good faith rather than the importation of an implied term of good faith into an existing agreement. In my view it is distinguishable on that basis. *Walford v. Miles* was also confined to deciding that there was no implied duty to carry on negotiations in good faith – a proposition with which Leggatt J. in Yam Seng did not disagree. I do not accept the contention on the first named defendant's behalf that these cases or their reasoning is of more general application, and Laffoy J. expressly noted at para. 73 of her decision that:-

> "[n]o authority has been cited in which that concept [viz. Walford] was applied to negotiations, although McDermott does refer to extra-judicial and academic comment on the topic."

133. In the *Triatic* case, Laffoy J. referred to McDermott's *Contract Law* (op. cit.), para.s 7.41-7.44 inclusive, and two Irish cases referred to in the text as examples of the Irish courts being prepared to enforce an express or implied obligation to use reasonable efforts to achieve some stipulated result; these being Rooney v. Byrne [1933] IR 609; and *Fluid Power Technology Co. v. Sperry (Ireland) Ltd.* (unreported, High Court, Costello J., 22nd February, 1985). The first of these concerned a contract for the purchase of a house subject to the purchaser getting a mortgage. It was held that the purchaser was bound to make reasonable efforts to secure the necessary advance. However, there is no discussion in that case of any general term to be implied as to good faith. Rather, it is a decision on the facts as to what was in the contemplation of the parties at the time of the agreement.

134. *Fluid Power* concerned the exercise of a power to terminate a distributorship agreement in the context of an application for an interlocutory injunction. Costello J. held that the plaintiff had made out a fair case and that there was an implied obligation to exercise the termination power in a *bona fide* manner, which he explained as meaning:-

> "...that when they gave reasons for termination these reasons must not be spurious ones, but it also means that if they honestly believe them to be valid, then even if they are subsequently proved to have been wrong the notice is valid. So, if honestly dissatisfied with the plaintiffs as distributors, this would mean that the notice of termination could be given".

135. Again, that is not a case in which there was any general discussion of the possibility of importing a general term of good faith into commercial contracts, but it is an example where the court was prepared to accept that there could be a fair case for implying such an obligation in the context of exercising a power of termination. It should be noted that such a power is essentially a discretionary one.

136. Of more relevance to this question is the prescient manner in which the subject was dealt with by McDermott, writing in 2001, at para. 7.41 in his text:-

> **"Good faith and fair dealing**
>
> 7.41 There is a developing debate as to whether in certain types of contract the law implies in a term as to good faith and fair dealing. The obligation of contracting parties to deal with each other in good faith has long been a feature of continental law, but has normally been assumed not to be present in the common law of contract as applied in England and Ireland. However the development of doctrines such as equitable estoppel and the attitude of the courts to exemption clauses has led to the possibility that the continental view may be encroaching upon the common law here. In *Livingstone v Roskilly* [[1992] 3 NZLR 230] Thomas J stated that he would not "exclude from our common law the concept that, in general, the parties to a contact must act in good faith in making and carrying out the contract." The former Chief Justice of Australia, Sir Anthony Mason, has made the following contribution to the debate:
>
> > "Good faith and fair dealing concepts are already substantially in place under our general law, though not in contract negotiation. In that area, the application of specific good faith and fair dealing duties, based on the reasonable expectations of the parties, might advance the interests of justice. Moreover, recognition of good faith and fair dealing concepts would bring greater coherence and unity to the varied array of principles which are presently available in the area of contract performance. Some commentators suggest that the United States experience shows that good faith and fair dealing doctrines have generated ambiguity and uncertainty. Even if there is a measure of truth in this statement, the experience does not appear to have been unduly detrimental to commerce in that country. Finally, the criticism of those doctrines may be no more than the reluctance to accept unconscionability as a basis for relief; in other words, the reluctance is in truth an objection to the application by courts of generalised concepts and standards instead of rigid rules." [Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 94]."

137. While these observations predate the decision in *Yam Seng* by some twelve years it points to the very reasons that prompted Leggatt J. to decide that the time had come to imply into the commercial contract with which he was concerned a term of good faith and a fair dealing.

138. Counsel for Breccia argued that *Yam Seng* should not be followed because it has received a lukewarm reception, has not been fully considered by the UK Court of Appeal or Supreme Court, and has been referred to in only a handful of other English High Court decisions, giving it limited precedential value. The *Yam Seng* decision, it was pointed out, has been considered in six cases, and others in passing, and only one of these adopts it while the rest, including a Court of Appeal decision, applied it restrictively. Counsel argued that no court here or in the UK has decided that there is a general duty of good faith to be imported into commercial contracts. In light of the importance of this issue, it is appropriate to review this case law.

139. In *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200 the Court of Appeal was considering a commercial contract that included the following provision:-

> "3.5 The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract. At all times in the performance of the Services, the Contractor will co-operate fully with any other contractors appointed by the Trust or any Beneficiary in connection with other services at the Location."

140. At para. 105 in the principal judgment of the court delivered by Lord Justice Jackson, he states:-

> "In addressing this question, I start by reminding myself that there is no general doctrine of "good faith" in English

> contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see Horkulak at paragraph 30 and *Yam Seng*…at paragraphs 120-131. If the parties wish to impose such a duty they must do so expressly."

141. Lord Justice Beatson was not so categorical. He stated that:-

> "150. The recent decision in *Yam Seng*…decided since the judge's decision, was relied on by Mr. Howe QC. In that case, Leggatt J gave extensive consideration to the question of implying a duty of good faith into a contract. His discussion emphasised that "what good faith requires is sensitive to context", that the test of good faith is objective in the sense that it depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people, and that its content "is established through a process of construction of the contract"… Those considerations are also relevant to the interpretation of an express obligation to act in good faith."

142. While the judgment of Jackson L.J. espouses the traditional approach, nonetheless the value of the decision in *Yam Seng* is not doubted. Furthermore, *Mid Essex Hospital Services* was a case that concerned the interpretation of an express good faith provision in a contract, and so was not concerned with the more general question of whether such a term should be implied.

143. In *Hamsard 3147 Ltd. v. Boots UK Ltd*. [2013] EWHC 3251 (Pat) Norris J. considered a claim concerning termination of a supply contract in which it was claimed *inter alia* by the plaintiff that there was an implied term that the parties should at all times act in good faith towards one another in the operation of the contract. The plaintiff relied on *Yam Seng.* Norris J. held:-

> "85. I would hold that there is no "good faith" term of the type contended for to be implied into this interim arrangement.
>
> 86. I would maintain that view even if the arrangement between Boots and Hamsard is to be regarded as some sort of nascent joint venture in the course of negotiation. I do not regard the decision in *Yam Seng*…as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith". I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I do not accept that there is to be routinely implied some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party. Boots was not obliged as a matter of "good faith" to order from Hamsard goods that it did not want (the so called "transitional AW10 stock") simply because if it had done so the nascent joint venture would have been more profitable."

144. Norris J.'s decision was limited to the "nascent joint venture in the course of negotiations" that he was considering. In commenting on *Yam Seng*, he limits his remarks to there being no routine or general obligation of good faith to be implied into commercial contracts. This is no more than Leggatt J. himself stated in *Yam Seng*.

145. Thirdly, counsel for Breccia referred to the decision of Henderson J. in *Carewatch Care Services Ltd. v. Focus Caring Services Ltd. & Ors* [2014] EWHC 2313 (Ch). The context was an application by the claimant for injunctive relief against a former franchisee, Focus, and two individuals who were directors of Focus, relating to the provision of domiciliary care in three of the claimant's franchise territories in East Anglia. The defendants sought to imply into the franchise agreement various specific implied terms, the last of which was a term that the parties would conduct themselves as franchisor and franchisee in good faith and so deal with each other fairly. Henderson J. expressly agreed with the observation of Norris J. in *Hamsard* quoted above, and he added the following comment:-

> "109. In the light of these principles, the first point to make about the Norwich agreement is that it contains very detailed express terms, dealing with all aspects of the franchised business from its inception to its termination. The agreement is for a commercial relationship, from which both parties hoped to profit, and where both sides had interests of their own to protect. I can find no "clear lacuna" in the detailed provisions of the agreement which has to be filled if the agreement is to work commercially, let alone by terms framed in such wide and imprecise language as those which are pleaded."

146. Henderson J. went on to find that the proposed implied terms would in many cases be inconsistent with express provisions in the agreement. In rejecting the defendant's submissions in relation to implied terms, Henderson J. effectively applied the traditional test, following the decision of the Privy Counsel in *Belize*, and the judgment of Lord Hoffmann in that case.

147. Counsel also referred to the case of *Greenclose Ltd. v. National Westminster Bank Plc*. [2014] EWHC 1156 (Ch). That case concerned whether the defendant bank had validly exercised its contractual right to extend the term of a five year interest rate "collar" transaction for a further two years by giving notice to the claimant, a hotel operator. This involved construing the provisions of "section 12 of the 1992 ISDA Master Agreement (Multi Currency – Cross Border Form)", and was a case in which the Court itself acknowledged that the issue "of construction is bound to have ramifications beyond this case".

148. Andrews J. again applied the test for implying terms as set out by Lord Hoffmann in *Belize*, and addressed the assertion that there should be an implied term of good faith in para. 150:-

> "So far as the "Good Faith" condition is concerned, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between *two sophisticated commercial parties negotiating at arms' length.* Leggatt J's judgment in *Yam Seng*…on which Greenclose heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognized at [147] of that judgment, the implication of an obligation of good faith is heavily dependent on the context. Thus in some situations where a contracting party is given a discretion, the Court will more readily imply an obligation that the discretion should not be exercised in bad faith or in an arbitrary or capricious manner, but the context is vital. A discretion given to the board of directors of a company to award bonuses to its employees may be more readily susceptible to such implied restrictions on its exercise than a discretion given to a commercial party to act in its own commercial interests." [Emphasis added]

149. Andrews J. does not appear to exclude the possibility that in certain contracts it may be appropriate to imply a term of good faith, and she acknowledges Leggatt J.'s acceptance that such a term is not to be implied in all commercial contracts. A question arises from *Greenclose* as to whether in the current case the parties to the Shareholders' Agreement ought to be regarded as "sophisticated commercial parties negotiating at arms length".

150. Counsel for Breccia argued that the plaintiffs cannot simply rely on the fact that three of the shareholders were doctors, because as far as Benray and Breccia were concerned this was a commercial dealing involving hardnosed businessmen. It was also

argued that relevant to this consideration is the complexity of the Shareholders' Agreement, its detail and the fact that it went through seven drafts upon which they received legal advice from Mr. Jerry Sheehan.

151. Counsel for Breccia also referred to the decision of Akenhead J. in *TSG Building Services Plc. v. South Anglia Housing Ltd.* [2013] EWHC 1151 (TCC). This concerned a dispute between a contracting company providing building and maintenance services, and a housing association. In their agreement they agreed to:-

> "…work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and in all matters governed by the Partnering Contraction they shall act reasonable and without delay."

152. Having considered the decision in *Yam Seng*, Akenhead J. at para. 46 stated that:-

> "Because cases and contracts are sensitive to context, I would not draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts. I do not see that implied obligations of honesty or fidelity to the contractual bargain impinge in this case at all. There is certainly no suggestion or hint that there has or might have been any dishonesty in the decision to terminate. So far as fidelity to the bargain is concerned, that depends upon what the bargain actually was. In any event, fidelity to the bargain is largely already covered by the expressed terms of Clause 1.1 and, at least to that extent, does not have to be implied as well."

153. Returning to this theme at para. 51 he stated that:-

> "I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of "trust fairness and mutual cooperation" and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed."

154. The decision in TSG is distinguishable because there were express provisions dealing with trust and fairness, and acting reasonably within the spirit of the contract, in the light of which it was not considered appropriate for the court to imply a general term of good faith and fair dealing. Nonetheless, the decision may be interpreted as giving some qualified support to Leggatt J.'s judgment.

155. Counsel also very properly referred the Court to the case of *Bristol Groundschool Ltd. v. Intelligent Data Capture Ltd. & Ors* [2014] EWHC 2145 (Ch) which is a decision of the UK High Court that adopts and applies the principles enunciated by Leggatt J. This was a copyright dispute at the heart of which were two agreements made between the claimant and the first named defendant relating to materials prepared for training courses for pilots for the UK Civil Aviation Authority and for the EU Joint Aviation Authority. The defendants relied on the implication of a term of good faith in the contracts on the basis of principles enunciated by Leggett J. in *Yam Seng*. Mr. Richard Spearman QC (sitting as a judge of the Chancery Division) held that the second agreement under consideration "was a "relational" contract of the kind referred to by Leggett J in the YSP case at [142]." He went on to hold:-

> "196…(ii). The 2001 Agreement did contain an implied duty of good faith. Although the Court of Appeal in the Mid Essex case made only passing reference to the judgment of Leggatt J in the YSP case, and, moreover, did not focus on the implication of the duty of good faith in contracts outside the categories mentioned by Leggatt J at [131], I detect no element of disapproval of that judgment in the judgments of the Court of Appeal. Moreover, I respectfully agree with Leggatt J's analysis. I consider that the cases relied on by Mr Hicks are either not directly in point (because they do no more than recognise that such a duty is to be implied in, for example, contracts of employment) or are earlier decisions at first instance which, to the extent that they conflict with the judgment of Leggatt J in the YSP case, now need to be reviewed in the light of that judgment.…
>
> (iv) It is clear from the judgment in the YSP case (at [135]-[140]) that good faith extends beyond, but at the very least includes, the requirement of honesty.
>
> (v) The relevant test is that of conduct that would be regarded as "commercially unacceptable" by reasonable and honest people in the particular context involved: that this is the test for dishonesty appears from Royal Brunei Airlines Sdn v Tan [1995] 2 AC 378, and Beatson LJ appears to have used the same test for good faith more generally in the Mid Essex case at [150]."

Discussion

156. In general terms it is desirable that parties who reach agreement should thereafter conduct their relations under that agreement in good faith and with fair dealing. This is asking no more than that the parties to an agreement act honestly and in accordance with the spirit of that agreement to be gleaned from the wording used and construed in the context in which it was reached. It is consistent with the idea that the parties should be faithful to their original bargain, and should not be permitted to act unconscionably. It must be accepted that if a term is to be implied, this is to import certain values and standards into the operation of contract terms. This is only to reflect what Leggatt J. in *Yam Seng* describes as the "shared values and norms of behaviour" that the court objectively presumes to be the intentions of the parties.

157. As was pointed out by Leggatt J., the imposition of duties of good faith on contractual dealings has been happening incrementally under legislation. One example is the Unfair Contract Terms Directive (93/13/EEC) which implants the concept of good faith firmly into Irish consumer contract law, although the EC (Unfair Terms in Consumer Contracts) Regulations, 1995 SI no.27/1995 expressly do not apply to contracts relating to the organisation of companies and/or partnerships. The wider existence of a doctrine of good faith and the performance of contracts in civil law jurisdictions with whom Ireland is aligned under the European Union also argues in favour of such an implied term.

158. I also find persuasive the commentary of Sir Anthony Mason quoted in McDermott's *Contract Law*, noting in particular that good faith and fair dealing doctrines adopted in the United States have not generated such ambiguity or uncertainty as to be unduly detrimental to their commerce. It was also recognised by the House of Lords in *HIH Casualty and General Insurance Ltd. v. Chase Manhattan Bank* [2003] UKHL 6 that commerce takes place against a background expectation of honesty, "parties entering into a

commercial contract…will assume the honesty and good faith of the other; absent such an assumption they would not deal" (Lord Bingham of Cornhill, at para. 15).

159. The case for a wider implication of a term of good faith and fair dealing in ordinary commercial contracts based on the presumed intentions of the parties put forward by Leggatt J. in *Yam Seng* is persuasive, and on the level of principle there is much to recommend his approach. While it has certainly not received universal acceptance in the UK High Court, it has not been rejected by any clear cut authoritative decision of a higher court, and it appears to have some support from the Court of Appeal.

160. In principle, but with certain caveats that Leggatt J. enunciates, I see no reason why this Court should not follow his lead in an appropriate case. Implying such a term is heavily dependent on context, and may only be appropriate in a "relational" type contract where there is a long term commitment. I also agree with Andrews J. in *Greenclose* where she said that such a term will be more readily implied in a situation where a contracting party is given a discretion such that "the discretion should not be exercised in bad faith or in an arbitrary or capricious manner". This is consistent with the approach taken by Costello J in *Fluid Power* when considering the termination of a contract.

161. The first limitation to note is that an implied term of good faith does not apply at the negotiation stage. This indeed was the position taken by Laffoy J. in *Triatic* who followed the reasoning of Lord Ackner in *Walford v. Miles* outlined above, particularly in relation to its repugnancy to the adversarial nature of negotiations.

162. Secondly, the parties may expressly exclude a term of good faith, or expressly modify it, or limit its scope e.g. to particular terms of a contract. It is a recurring theme of the case law opened to the Court by counsel for Breccia that where there is an express term relating to good faith or cooperation within a contract the court will construe it in a manner that limits it to its context within the agreement, and the courts are reluctant to treat it as importing a general term of good faith and fair dealing. A more limited intention of the parties as expressed in their agreement may thus negate the possibility that they intended a term of general application.

163. Thirdly, the duty is properly described as one of good faith and fair dealing which does not involve the court imposing its view of what constitutes fairness on the parties. What constitutes fair dealing is defined by the contract and those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. Thus, the application of the term or duty is an objective one that takes into account the context and the other terms of the contract.

164. Fourthly, Leggatt J. makes it clear in para. 143 of his judgment that such a term is appropriate where the context in which the contract came into being involves "a longer term relationship between the parties to which they make a substantial commitment". He notes that such "relational" contracts may require a high degree of communication, cooperation, predictable performance based on mutual trust and confidence, and an expectation of loyalty which may not be expressed in the contract but are implicit in the parties' understanding. Such implied terms would be necessary to give business efficacy to the arrangement.

This is important, because it is correspondingly less likely that a court would be willing to imply such a term in a contract of short duration, or where the longer term commitment is absent, or where the other "relational" features identified by Leggatt J. are weak or absent. However, this does not mean that there must be a fiduciary relationship between the parties before such a term may be implied.

165. Accordingly, at the level of principle, there will be contracts into which it is appropriate to imply a duty of good faith and fair dealing between the parties. I do not accept the first named defendant's submission to the contrary. I shall consider the application of the *Yam Seng* principles to the facts of this case later in this judgment.

Implied Term not to Take Steps Preventing Performance of the Contract

166. As an alternative to implying a term of good faith, the plaintiffs also sought to rely on certain authorities for the proposition that there may be implied into the Shareholders' Agreement a term that each shareholder would take no steps, the effect of which would be to cause shares of any other shareholder to be alienated, save in accordance with the terms of the Shareholders' Agreement. They relied in particular on certain passages from Lewison *The Interpretation of Contracts* (5th edn., 2011) for the proposition that a party cannot voluntarily create conditions which would prevent the performance of a contract. At p. 315 the author states:-

> **"In general, a term is necessarily employed in a contract that neither party will prevent the other from performing it.**
>
> Both parties to a contract are taken to contract on the footing that they wish the contract to be performed, and accordingly must be taken to have agreed that neither will actively prevent performance. It is possible that the duty does not rest upon the implication of a term, but may be a positive rule of the law of contract that conduct of either the promisor or the promisee, which can be said to amount to himself of his own motion bringing about the impossibility of performance, is itself a breach of contract. However, since ultimately the rule of law (if such it is) depends upon the intention of the parties, it is submitted that it may properly be categorised as an implied term. The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. The classic formulation of the implied term is that of Cockburn C.J. in *Stirling v Maitland* [(1864) 5 B. & S. 841]:
>
> > "I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative."
>
> This formulation has been applied many times. In *Ogdens Ltd v Nelson* [[1903] 2 K.B. 287; affirmed by HL: [1905] A.C. 109] Lord Alverstone C.J. said:
>
> > "It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he as undertaken to discharge.""

167. At p. 317 of the text, Sir Lewison states that:-

> "In addition the principle applies to a contract made between more than two parties. In such a case one party to a contract may not take steps to prevent performance by a second party to the same contract of an obligation owed to a third party to that contract".

168. For this proposition the author relies on the decision in *F&C Alternative Investments (Holdings) Ltd. v. Barthelemy* [2011] EWHC 1731 (Ch) para. 267. The author also opines (p. 317) that "the implied term is limited to the active prevention of performance, and probably does not extend to passivity in the face of the action of some third party."

169. The plaintiffs also relied on the decision of Devlin J. in *Mona Oil Equipment & Supply Co. Ltd. v. Rhodesia Railways Ltd.* [1949] 2 All ER 1014 where it was stated that:-

> "In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it is not necessarily the most important, and it is certainly not the only matter."

170. In further support of this submission the plaintiffs relied on the judgment of Barron J. in *Royal Trust Company of Canada (Ireland) Ltd. v. Kelly* (unreported, High Court, 27th February, 1989). In that case the staff of the plaintiff bank enjoyed a preferential mortgage rate. When the bank closed the staff claimed there was an implied term in the mortgage contracts that they could not be terminated by reason of the voluntary act of the bank closing its operation. Barron J. outlined the general rule in the following terms (p. 13):-

> "… a party to a contract cannot voluntary create conditions which will prevent the performance of the contract. So where A contracts with B to catalogue his library, he cannot sell his books before B commences work. Where A agrees to assign a leasehold interest to B and to obtain the necessary consent of the lessor, he cannot refuse to seek such consent. The rule is analogous to the rule in property law that a grantor cannot derogate from his own grant."

171. While the first named defendant did not make any submissions contesting the legal principles thus propounded by the plaintiffs' counsel in respect of such an implied term, reliance was placed on the general principle that the implication of such a term was not necessary to give business efficacy to the Shareholders' Agreement. It was also argued that in other respects they did not pass the traditional tests laid down by Lord Simon in *BP Refinery*, as restated in this jurisdiction by Murphy J. in *Sweeney v. Duggan*, at p. 538, and O'Higgins J. in *Meridian Communications*. Counsel for the first named defendant also urged caution in the implication of terms relying *inter alia* on the passage from the judgment of Lord Hoffmann in the Belize case quoted above. They also cited Maguire C.J. in *Ward v. Spivach* [1957] 1 IR 40 for the suggesting that there must be "something approaching certainty" that the parties would have agreed to the implied term, and Fennelly J. in the *Dakota Packaging* case where he stated *obiter* that "the courts will not lightly infer terms".

The Approach of the Court

172. In the light of the foregoing, I consider that the correct approach by the Court in this case is:-

> 1. To set out further the background/context/"matrix of facts" in the light of which the Shareholders' Agreement and related documentation are to be construed.
>
> 2. To construe the Shareholders' Agreements and related documents in that context.
>
> 3. To consider whether any term should be implied that no party can take steps that may prevent performance of the contract.
>
> 4. To consider whether a duty of good faith or fair dealing between the parties should be implied into the Shareholders' Agreement.

Findings as to Context

173. I have already adverted to some of the undisputed facts comprising the context for the Shareholders' Agreement. The following additional findings and detail are also relevant.

174. When Blackrock Clinic was established in 1983, BUPA, a not for profit organisation, provided the finance and the other promoters contributed equity. The hospital was subsequently built and BUPA appointed the administrative staff.

175. The more immediate background and context of the Shareholders' Agreement was the decision by BUPA in 2005 to sell its circa 56% shareholding in BHL, and its offer to sell this to the other shareholders Joseph Sheehan (who then held circa 16%), James Sheehan (circa 16%) and George Duffy (circa 13%), who were the remaining founders of BHL, and who placed a bid through Warren Private Clients (Mr. Kevin Warren).

176. Although funding to enable such a purchase was initially offered by AIB, on 29th April, 2005 Anglo issued a Term Sheet offering €51,125,000 to fund the purchase of the BUPA shares.

177. In arranging the purchase of BUPA shares I am satisfied that in the lead up to 28th March, 2006, the three 'founding' doctors, Drs. Joseph and James Sheehan and Dr. Duffy, shared a desire to maintain continuity of three aspects of the Blackrock Clinic, namely its aim to be at the forefront of clinical excellence in Ireland, its adherence to a Roman Catholic ethos, and the payment of dividends by BHL to fund borrowings from Anglo. As part of the clinical excellence they also shared a desire to continue to carry out capital improvement of the hospital. Thus, while Dr. James Sheehan and Dr. Duffy did not want to take up their entire allocation of BUPA shares, they wanted to bring in investors who would subscribe to these key principles for the foreseeable future. While this was a continuing business from which these founding doctors wished to profit, they had strong motives other than profit, providing a legacy for their families being one such motive. Mutual trust, cooperation and expectations of loyalty over a long period also characterised the relationship between these doctors.

178. Minutes of a meeting held at Mr. Kevin Warren's office on 1st March, 2005, attended by Dr. James Sheehan, Dr. Duffy, Mr. Goodman, Mr. Sean Mooney (a client partner in KPMG and advisor to Mr. Goodman) and Mr. Warren, record early discussion leading to

the purchase of the BUPA shares. It is minuted that under an existing shareholders' agreement, which contained an "offer around" clause:-

> "…the BUPA stake of 56% would be apportioned 20% to JS [Dr. James Sheehan], 20% to Joe [Dr. Joseph Sheehan] and 16% to GD [Dr. George Duffy]". JS said that under his deal with LG [Mr. Goodman] the latter was entitled to half any shares which might become available to him. A similar arrangement applied to his brother, Joe. JS would not be keen to take up any of the BUPA shares and he would like his full 20% to be taken up by LG. LG would also under the deal with Joe be entitled to half Joe's 20%. GD said he had arrangements with Mr. Flynn...".

The "deal" mentioned above is referred to further below.

The minutes also record that the Blackrock Clinic's capacity for borrowing was fully utilised by the need for "3 new floors, considerable refurbishment and a new car park". Paragraph 8 notes:-

> "JS gave further details on the expenditure of €30m to be spent on the Clinic. €20m of this expenditure would relate to the three new floors to be built onto the Clinic. This would cover practically the entire cost but some extra equipment would be needed. The remaining €10m would be spent on the car park and additional land. An extra piece of land costing €3.8m had been purchased and a car park with 360 slots would cost €4.5m."

Minute 10 is also relevant:-

> "LG said that he would support the buy-out of BUPA provided there was no dissension either now and, for the future, arrangements were such that dissension between the shareholders on proprietorial matters could not arise. If arrangements were left up in the air then this would permit trouble in the future and he had no interest in being involved."

179. A further meeting was held at Mr. Warren's office on 27th April, 2005, attended *inter alia* by the existing shareholders (other than BUPA) of BHL and intended new investors Mr. Goodman, Mr. Flynn's representative his son Mr. James Flynn, and solicitor Mr. Jerry Sheehan. I am satisfied that this meeting was critical to agreement in principle on progressing the purchase of BUPA's shareholding, the borrowing from Anglo, the new division of shareholding in BHL (although the figures agreed later changed marginally), due diligence, and legal aspects including the necessity for a shareholders agreement to be signed before the purchase of BUPA's shareholding. Relevant minutes of this meeting are referred to below.

180. Following these meetings and the putting in place of finance, Dr. Joseph Sheehan assumed an allocation of some 22% of BUPA's shareholding, representing approximately 12.29% of BHL, which when added to his existing shareholding gave him a BHL shareholding of 28.07%. He required a loan from Anglo and pledged his entire shareholding to Anglo by way of security.

181. Dr. Duffy required help to finance his portion of the share purchase, but he did not want to assume any personal liability. He was a friend of Mr. Flynn. Accordingly, Dr. Duffy offered the opportunity to Mr. Flynn to take up some 50% of his shareholder allocation, in return for Mr. Flynn assuming personal guarantees relating to his borrowings, subject to a second charge over his newly acquired shareholding. Thus, Dr. Duffy subscribed to 13.41% of the BUPA holding, representing around 7.50% of BHL's shareholding, and he ended up with approximately 20.05% of the shares in BHL.

182. The proportion of Dr. Duffy's allocation that Mr. Flynn agreed to take up was taken up by Benray, a Flynn family corporate entity. Mr. Flynn/Benray were invited to participate in the share purchase because of a number of connections with the founding shareholders of BHL. Mr. Flynn's daughter married a son of Dr. Maurice Neligan. Mr. Flynn became neighbours with Dr. Duffy upon purchasing his house in Foxrock in 1998 and also employed a son and daughter of Dr. Duffy. He was acquainted with Drs. Joseph and James Sheehan.

183. Mr. Flynn, originally from Ardee, was by training a quantity surveyor who had become successful in the construction industry and moved on to other business interests. Although residing in the USA most of the time, Mr. Flynn spent a number of months of the year living in his home in Foxrock. In 2005, Mr. Flynn had particular contact with Dr. Duffy in his capacity as Head of Nuclear Medicine in BHL, in the context of supplying a PET scanning machine to the Blackrock Clinic. This developed into a suggestion by Dr. Duffy that Mr. Flynn consider investing in BHL. This conversation was described by Mr. Flynn on day 3 of the hearing (pp. 158-159), and he recalled that Dr. Duffy said:-

> "I need to put up equity, I'm being asked to commit to a third of the shares there. It's too much for me, you know, I would share the equity with you if you would cover my downside or cover the risk for me".

184. Referring to his decision to become involved Mr. Flynn stated that:-

> "We did it, I suppose, knowing nothing about hospitals in particular, but it was an area that we had an interest in and he was a friend and the funding that we put up, it was done on a handshake, it was substantial funding but it was done on a handshake. There was nothing signed between us. That was the relationship that we went into, if you like, the investments in the hospital on …it was basically family and friends. That is really how it was."

185. Accordingly, Benray acquired 14.35% of the BUPA holding, representing 8.02% of the shares of BHL. Benray drew down borrowings from Anglo under the Facility Letter dated 28th March, 2006 for this purpose.

186. Breccia acquired the balance of 50.24% of the BUPA holding, representing 28.08% of the shares of BHL. Breccia borrowed €25.55m approx. from Anglo for this purpose.

187. With regard to the cross-guarantees that were to be entered into by all the shareholders, Mr. Flynn was asked on day 3 (p. 162 Q. 37):-

> "Q. And had you any problem with the provision of cross-guarantees by all the shareholders in respect of each other?
>
> A. No, none at all. Actually what was happening was, that the…almost very altruistically, the founding shareholders were providing equity to the incoming shareholders for the purpose of funding the actual purchase, the reason being because they didn't have any borrowings on their original shareholding which was 44% and they were putting up that shareholding to the benefit of all and the ones that benefited most out of it actually were Larry Goodman and Benray, ourselves".

188. Mr. Flynn also had a prior connection with the shareholders of BHL, and Mr. Goodman, through their involvement in the Hermitage Clinic.

189. Dr. James Sheehan did not take up his allocation of BUPA shares and instead these were allocated to Breccia, the special purpose vehicle company incorporated on behalf of Mr. Goodman for the purpose of holding the shares in BHL. Whilst it was suggested in cross-examination that this was because Dr. James Sheehan did not wish to assume personal borrowings, I am satisfied that the primary reason was as related by Dr. Joseph Sheehan in his evidence. Dr. Joseph Sheehan states at para. 16 of his Witness Statement, which was adopted as part of his evidence, that:-

> "…I say that Mr. Goodman was not "invited" by my brother and I to invest in Blackrock Clinic. Instead, his investment was literally a last hour precondition for providing investment funds for the Galway Clinic and by which I would have no choice but to give Larry Goodman the right to invest in 50% of any new healthcare facility in which I was involved in the future (tab 6). This later led to Larry Goodman, at a meeting in Kevin Warren's office on 27 April 2005, demand more of the BUPA Blackrock Clinic shares, the purchase of which was then being considered. I refused to give in and so Jimmy had to. (tab 7)."

190. Tab 6 referred to by Dr. Joseph Sheehan in his evidence is an agreement dated 11th June, 2004 made between Dr. James Sheehan, Dr. Joseph Sheehan and Parma Investments Ltd., a company controlled by Mr. Goodman. The origins of this agreement were an investment by Mr. Goodman in the completion of the development of the Galway Clinic. This came about at the invitation of Dr. James Sheehan after the original contractor left the site mid-construction creating something of a financial crisis for the two doctors who had invested significantly, in the order of €2 million each, and cross-guaranteed the investment of other tax investors. Clause 2 of the agreement so far as is relevant states:-

> "2. Each of the Sheehans agrees that if any member of the Sheehan Group enters into or proposes to enter into any contract, transaction, arrangement, understanding or agreement in relation to the acquisition of an interest in, or the construction or the development of a medical clinic or hospital in Ireland or Northern Ireland and (in respect of James Sheehan only) the UK (Proposed Transaction) during the period commencing on the date hereof and ending on the tenth anniversary of the date hereof, the Sheehans shall procure that Parma (for so long as Parma is Controlled by Mr Laurence Goodman or any member of his immediate family, that is, his spouse, children or grandchildren) shall have first option to participate in such Proposed Transaction on the following terms:-
>
> > (a) the Sheehans should procure that Parma (and/or its nominee(s)) shall be invited, in writing, on a first refusal basis, to become a party to the Proposed Transaction, in the ratio Sheehan Group 50: Parma 50, on terms and conditions no less favourable than those applicable to the Sheehan Group in respect of such proposed transaction…".

191. Breccia became the nominee of Parma Investments Ltd./Mr. Goodman for the purposes of the investment by Parma Investments Ltd./Mr. Goodman in BHL.

192. Tab 7 referred to by Dr. Joseph Sheehan in his evidence is a record of the "Minutes on Blackrock Clinic Meeting" dated 27th April, 2005 at the office of Mr. Warren already mentioned above.

193. These minutes corroborate in large part Dr. Joseph Sheehan's account in recording that:-

> "LG [Mr. Goodman] expressed his desire to have a higher shareholding, as this was his previous understanding (he was previously told a 30% shareholding would be available). Joe Sheehan confirmed that he has always wanted to acquire more shares and does not want to fall below the 26% level. After some discussion, Jimmy Sheehan said that he was willing to offer LG a further 6% of his shares, which was accepted by LG and all those present."

194. In his oral evidence (day 10, p. 60) Dr. Joseph Sheehan said the minute was inaccurate in that Mr. Goodman said at the meeting that "I was promised 40%". Dr. Sheehan repeated "I know he [Mr.Goodman] required 40%" and added that he "never felt as sorry for my brother in my life because he, this 20% of his was being taken from him…". Dr. Joseph Sheehan added:-

> "…I wasn't going to give over my 20% and I was very adamant about it. I said: "I do not want this hospital turned into a bicycle factory and I want to keep 25% of my shareholdings there". And I turned to Jerry Sheehan and I said: "Jerry, is it correct that 25% is necessary to maintain the Hospital as a hospital." Remember, we're doctors. We don't know these things. So I wanted to be sure that what we had lived through, because, remember, for the first 12 years or so of the Hospital, I never got any dividend, never a repayment and I ploughed in quite a lot of my money, all came from America".

195. No defence witness was called to refute this evidence and I accept it as accurate. Its relevance is not to the negotiations but rather to the context in which Breccia came to acquire 28% of the shares in BHL, and Dr. James Sheehan did not increase his shareholding.

196. Dr. Joseph Sheehan gave evidence that Dr. James Sheehan's attitude at and after this meeting ultimately enabled compliance with the commitment given in clause 2 of the Galway agreement of 11th June, 2004. As Schedule 3 of the Shareholders' Agreement shows, Mr. Goodman's nominated special purpose vehicle Breccia ultimately acquired 50.24% of the BUPA holding and ended up with a holding of 28.08% of the shares of BHL.

197. It is apparent therefore that Breccia's involvement in acquiring 28.08% of the shares in BHL from BUPA was predetermined by this prior written agreement. Although Mr. Goodman provided funding for the Galway Clinic at the request of Dr. James Sheehan, which may well have resulted from their acquaintance and friendship, the subsequent acquisition by Breccia of shares in BHL has the character of a business acquisition from the perspective of Mr. Goodman/Breccia.

198. It should also be noted from these minutes that it was agreed that the due diligence to be carried out on BHL/Blackrock Clinic prior to purchase was to be carried out by KPMG, notwithstanding that they were auditors to BHL. As noted, Mr. Sean Mooney, a partner in KPMG, was advising Mr. Goodman. The minutes note:-

> "It was noted that no commercial due diligence (e.g. overall review of health care market discussions with VHI etc.) would be done by KPMG. This point was accepted by the new investors."

This was a departure from what would be regarded as the norm in an acquisition by any third party of significant shareholdings in a

company.

199. The special position of Mr. Jerry Sheehan is also an important part of the background to the Shareholders' Agreement. He was a cousin of Drs. James and Joseph Sheehan. He was standing solicitor to BHL, and in attending the meeting at Mr. Warren's office it was minuted:-

> "***Legal Issues***: Jerry Sheehan went through the major legal documents and a summary of the legal issues that may come up in the legal due diligence. All parties were happy with Jerry's summation."

200. It was not disputed that by agreement Mr. Jerry Sheehan was retained by all parties as their solicitor in handling all legal aspects of the purchase of the BUPA shareholding. This included acting for Breccia/Mr. Goodman in relation to the negotiation of the terms of Breccia's borrowing from Anglo. He was also engaged by all parties in relation to the preparation of the Shareholders' Agreement and related documentation. The extent of his involvement is further demonstrated by the fact that he was granted powers of attorney enabling him to execute the Shareholders' Agreement and associated documentation on behalf of Dr. Joseph Sheehan, Dr. James Sheehan and his wife Rosemary Sheehan, Dr. Duffy, and Mr. Flynn. While there were also obvious practical reasons for this, it does also demonstrate the trust placed by all parties in Mr. Jerry Sheehan.

201. However, Breccia/Mr. Goodman in addition to using Mr. Jerry Sheehan involved other solicitors (A & L Goodbody) to advise them very shortly prior to the finalisation and execution of the Shareholders' Agreement and loan documentation. This fact was certainly known to Mr. Jerry Sheehan at the time. This is evident from an exchange of emails on 14th March, 2006 which shows that at Mr. Sean Mooney's request on behalf of Breccia/Mr. Goodman Mr. Jerry Sheehan copied various drafts including the revised draft 6 of the Shareholders' Agreement and loan security documentation to A & L Goodbody solicitors who in turn advised Breccia/Mr. Goodman and engaged directly with Anglo just before the Shareholders' Agreement and borrowing were finalised.

202. By emailed letter dated 23rd March, 2006 from Ms. Barbara Cotter, partner in A & L Goodbody, to Anglo, which was copied to Mr. Sean Mooney and Mr. Jerry Sheehan, Ms. Cotter set out Breccia's legal difficulty with the proposed loan facility:-

> "What we have at the moment is a Facility Letter that has many cross references to the other borrowers (in particular in the events of default) and a guarantee to be given by Breccia in respect of the others – although it is limited recourse and there is a reference to the effect that the proceeds of the sale of the Breccia shares would not be applied against any other loan. These default provisions and the provision of the guarantee present a real difficulty for Breccia. Breccia is part of a group of companies many of whom have banking facilities with cross default provisions which would catch the calling of the guarantee (to trigger the sale) and any default under this Facility Letter. Therefore it is not acceptable to give a guarantee or to have any default provision in the facility letter which is outside the control of Breccia.
>
> What we suggest is this:-
>
> 1. There would be a charge over the shares in respect of Breccia's own obligations under the Facility Letter. There would be no guarantee in respect of the other borrowers. In the Facility Letter Breccia would covenant that where it receives notice from Anglo that there has been a default under another Facility Letter and allowing for a time period (to be agreed) in which Breccia would have an opportunity to assess the situation and consider alternatives, it would sell its shares, it would sell its shares along side with the other shares. A Power of Attorney could be given in the Facility Letter to support this. It would be an event of default if Breccia were to breach this covenant."

203. Other suggestions were made by A & L Goodbody that it is not necessary to set out. Suffice it to say that this intervention led to the fact that Breccia was not required by Anglo to execute and did not in fact execute cross-guarantees in respect of borrowings by other shareholders. Instead it was required to and did execute a Deed of Covenant with Anglo dated 28th March, 2006. Under clause 2 Breccia covenanted with Anglo:-

> "…that for as long as any of the Other Shareholders remain under any liability whatsoever to the Bank pursuant to the Other Facility Letters, in the event that there is any demand for payment made by the Bank under any of the Other Facility Letters and/or any event of default occurs under any of the Other Facility Letters or any security granted in respect thereof becomes enforceable after the expiration of 45 days from receipt of notice from the Bank of such demand for payment, occurrence of an event of default or the enforceability of security as aforesaid and provided such demand for payment remains outstanding, event of default remains unremedied or not waived and/or such security remains enforceable as aforesaid, Breccia shall immediately (and at Breccia's cost) do all such acts or things as the Bank may direct or stipulate in order to give effect to any sale or disposal of the Shares or any part thereof and/or the sale of any other shares held by the Other Shareholders in Blackrock Hospital Limited…".

204. Mr. Flynn asserted that there was some ulterior motive for Breccia entering into a Deed of Covenant instead of a cross-guarantee. It is clear to the Court from the contemporaneous legal advice to Breccia that its primary motivation was to protect other companies in the Goodman group from any adverse effect that might have been visited upon them by their own lenders had Breccia executed a cross-guarantee, and had that been called in by Anglo due to default by another shareholder of BHL. In my view, the legal advice upon which Breccia acted could be described as prudent advice.

205. However, the wording in the Deed of Covenant suggests a second motivation. As framed it effectively afforded Breccia a 45 day breathing space protecting its own shareholding from a forced sale by Anglo in the event of default by another borrowing Promoter. This was not an advantage enjoyed either by the other shareholders (whether borrowers or not) or Mr. Flynn as a guarantor in the event that they were 'performing' but another shareholder defaulted. Given that Anglo were likely to be interested in a sale of 100% of the shares in BHL in any situation of default it meant that during this 45 day period of grace Breccia would effectively enjoy an enhanced opportunity to utilise the 'step in' provisions in clauses 3.4.3/3.4.5 of the Shareholders' Agreement. Further, this Deed of Covenant was to last "for so long as any of the Other Shareholders remain under liability whatsoever to the Bank" – so that even if Breccia repaid its own loan, it could still rely on the notice and 45 day grace provision.

206. I also accept the evidence of Mr. Flynn that he and other shareholders were unaware of the fact that Breccia obtained independent legal advice until it emerged on discovery in March, 2014. While an emailed letter dated 24th March, 2006 sent by Mr. Jerry Sheehan to all the incoming and existing shareholders mentions that "When in A & L Goodbody's office this morning I took a call from Sean Mooney and Larry Goodman" there is nothing in that email or any other evidence before the Court to suggest that Mr. Flynn was aware that A & L Goodbody were giving separate advice to Breccia/Mr. Goodman, or that Mr. Jerry Sheehan was cooperating in that process.

207. I also accept Mr. Flynn's evidence that he did not actually become aware that Breccia had not executed a cross-guarantee until 2009. The Shareholders' Agreement went through seven drafts. The sixth draft of clause 3.4.1 contained the sentence "In addition by way of further security each of the Promoters have granted or will grant Anglo a Guarantee and Indemnity…". For the first time in the seventh (and final) draft circulated by Mr. Jerry Sheehan and dated 28th March, 2006 (the day of execution) this was changed to the final wording which reads "In addition by way of further security each of the Promoters have granted or will grant Anglo a right by way of Guarantee and Indemnity *or otherwise*…" [Emphasis added.]

208. It is not surprising that this alteration, which allowed Breccia to enter into the Deed of Covenant in lieu of a cross-guarantee, was not spotted by Mr. Flynn or the other shareholders. What emerged from the plaintiffs' evidence is that neither Breccia (nor anyone on its behalf), nor Mr. Jerry Sheehan, brought either this change in the final draft, or the intention to execute a deed of covenant instead of a guarantee, to the attention of Mr. Flynn or the other shareholders – although it should be noted that Mr. Jerry Sheehan did not give evidence. Mr. Jerry Sheehan executed the Shareholders' Agreement on behalf of Mr. Flynn as guarantor, although Benray executed through Mr. Flynn as a director, witnessed by Mr. Jerry Sheehan. While the Court accepts that Mr. Flynn was not actually aware at the time that Breccia was not executing a cross-guarantee he could, in theory, have ascertained this information because the word "otherwise" appeared in the final document. However, in reality, because his guarantee was executed by Mr. Jerry Sheehan as his attorney, he could not reasonably have known at the time unless it had been expressly brought to his attention – something that I am satisfied did not happen. This may well have resulted from Mr. Jerry Sheehan having a conflict of interest between his role as solicitor to the plaintiffs and attorney for Benray/Mr. Flynn on the one side and obligations of confidentiality to Breccia in respect of the advice received from A & L Goodbody on the other side.

209. The plaintiffs must accept, however, that under clause 10.11 of the Shareholders' Agreement they, in common with Breccia, acknowledged that they had been afforded the opportunity to take independent legal advice prior to entering into the Agreement and that they understood the effect and implications of the Agreement. This means firstly that they must be taken as having contemplated that Breccia might obtain independent legal advice, and that they must be taken as having accepted that it had such an entitlement. Secondly, it means that the plaintiffs must accept clause 3.4.1 in its final form, and that Breccia was entitled to enter into the Deed of Covenant acceptable to Anglo in lieu of a cross-guarantee.

210. It is instructive that from June, 2005 to 28th March, 2006 Mr. Jerry Sheehan shepherded the shareholders through six drafts of the Shareholders' Agreement before the text was finalised. Generally during this process all the parties were circulated with the latest draft, advised of changes (with the notable exception just mentioned) and invited to comment. The first draft drew largely on the wording of a shareholders' agreement prepared by another firm of solicitors for the Hermitage Clinic. On 9th March, 2006 there was a meeting at Mr. Jerry Sheehan's office attended by most of the shareholders to discuss the latest draft (as well as documentation to implement the various agreements with BUPA, the facilities and security with Anglo, and powers of attorney for execution). Following a further meeting between Mr. Jerry Sheehan and Mr. Sean Mooney on behalf of Breccia on 14th March, 2006, Mr. Jerry Sheehan emailed all shareholders attaching the latest revised draft and advised, *inter alia*:-

> "Following my discussion with Sean Mooney it was felt that in the unfortunate event of a Promoter being unable to discharge amounts due to the bank that the other Promoters should be entitled to make such payments and in the event that such Paying Promoter is not refunded within 6 months that Shares would be transferred by the Non-Paying Promoter in accordance with the mechanisms set out in the Agreement.
>
> All except Joe Sheehan have signed up to a similar provision in the Hermitage and I wish to draw it to your attention now, for approval."

211. This was the genesis to inclusion of the 'step-in' provision contained in clauses 3.4.3 and 3.4.5 of the Shareholders' Agreement, and it is notable that it was introduced at the behest of Breccia.

212. The only recorded response to this proposal came in an email dated 17th March, 2006 from Mr. Flynn stating:-

> "Clause 3.4.5 This refers to and requires a transfer of ALL shares in the event of a default by a Promoter. Wouldn't this be fairer if it related only to the amount and value of the underpayment and not capture the totality of someone's shares. It seems a bit like "kicking someone when they are down". Also the clause refers to "overpaying Promoter" (singular). Should that not be plural and should not all the promoters have the opportunity to pick up the shares in default "pari passu" to their shareholding?"

213. This was put to the shareholders by Mr. Jerry Sheehan (along with other issues) in a follow-up email of 21st March, 2006. Following this the 'step-in' provision was duly included in the sixth draft, and in the executed agreement, with unchanged wording save that "Promoter" in the earlier draft was changed to "Promoter(s)".

214. Accordingly, the 'step-in' provision that crystallised in clauses 3.4.3 and 3.4.5 was suggested by Breccia/Mr. Goodman, and not objected to in principle by any other Promoter.

215. It is also evident that the development of the BUPA purchase documentation, and the Anglo loan and security documentation, occurred in tandem with the development of the Shareholders' Agreement. As I have already found, they were clearly interdependent transactions. If there was no Shareholders' Agreement satisfactory to Anglo there would have been no borrowing and no purchase, as it was part of their security package. There are also numerous references to BUPA in the recitals and body of the Shareholders' Agreement, and in the Facility Letters, and specific references to Anglo in clause 3 of the Shareholders' Agreement, and references in the Facility Letters to BHL adopting a dividend policy are implemented in clause 9 of the Shareholders' Agreement. Accordingly, when considering the content and meaning of the Shareholders' Agreement it is appropriate to do so in the context of the related transactions and documentation of which it was an integral part.

216. Part of the accompanying documentation are the Waivers of Pre-Emption Rights in the event of enforcement by Anglo of its security over shares in BHL that were signed by each borrower in separate letters on 28th March, 2006. These Letters of Waiver are addressed to "Anglo Irish Bank Corporation Plc" and are made "[i]n consideration of the Bank advancing loan facilities to the Company". Nowhere in the letters is 'the Bank' defined and Benray's letter is not listed as security, but the provision of such a waiver is expressly provided for in its Facility Letter at clause 5(xv).

217. A further document signed only by Anglo also comprised part of the documentation signed on 28th March, 2006. This is a letter from Anglo addressed to all the new and existing shareholders, including Benray and Breccia, stating:-

> "Re: Shares held by each of you in the Capital of Blackrock Hospital Limited (BHL) (together the Shares)

Dear

We refer to the facilities made available by us to Joseph Sheehan, George Duffy, Benray Limited and Breccia Limited (the Facilities and each a Facility). We refer also to the arrangements that we have put in place with each of you so that where a default occurs under any of the Facilities, we shall have the right to sell all or part of the shares held by you in BHL at that time subject always to the intent that the proceeds derived from the sale of such shares shall, in the case of those of you who have a Facility, against your own Facility only and in the case of those of you who do not have a Facility, the proceeds shall be given to you.

We agree that where a default has occurred as aforesaid, save in respect of the defaulting borrower where we shall have absolute discretion, where we are arranging for some but not all of the remaining Shares to be sold, we shall do so on a pro rata basis, that is pro rata to your shareholdings one to another in the capital of BHL.

This letter is governed by Irish Law.

Yours faithfully,"

This letter had the effect of confining Anglo's rights only in the event that it chose not to sell the entire shareholding in BHL upon one borrower's default.

Construing the Shareholders' Agreement

218. The recitals demonstrate that the Shareholders' Agreement was for the purpose of facilitating the redemption and subscription of the BUPA 56% shareholding in accordance with agreed proportions set out in the Tables. Recital C states that the parties agreed to enter the Agreement in order to regulate the relationship between them.

219. While clause 3.4 deals with the "Financial Obligations of the Promoters", nothing in that clause, or the Shareholders' Agreement read as a whole, directly or indirectly addresses a situation where a shareholder or Promoter succeeds to the position of Anglo as lender. Nor was there anything in the "matrix of facts" to suggest that the parties ever contemplated such a situation.

220. Breccia relies on clause 1.2.4 which provides:-

> "Any reference to a person shall be construed so as to include any individual, firm, company, corporation, government, state or agency of a state or any joint venture, association, partnership, works council or employee representative body (whether or not having separate legal personality) and the successors, personal representatives and permitted assigns of the foregoing."

It is asserted that Anglo is "a person" and Breccia is its "permitted assign". Assuming that to be the case (and I consider the entitlement of Breccia to acquire Anglo's interest later in this judgment), this still does not address the situation where a Promoter is both lender/banker, with one set of rights and obligations, and Promoter/shareholder with another set of rights and obligations.

221. Moreover, clause 3.4.2 refers expressly to "Anglo (or any other lending institution in substitution therefore)". The parties clearly anticipated another bank or "lending institution" replacing Anglo, but the wording in this clause tends to confirm that they did not foresee another Promoter replacing Anglo.

222. Breccia is a private unlimited company. It is plainly not a licensed bank. Could it come within the description of a "lending institution"? Its Memorandum of Association lists its first two objects as:-

> "6. (a) To carry on the business of a holding company in all its branches, and to acquire by purchase, lease, concession or otherwise such businesses, lands, buildings, stocks and shares.
>
> > i. To invest any monies of the Company in such investments and in such manner as may from time to time be determined…"

So Breccia appears to be a holding company and investment vehicle. Nowhere in the Memorandum is the objective of banking listed. The Memorandum lists many other objects and powers of the sort that are normal in such a company, including:-

> "(n) To lend the funds of the Company with or without security and at interest or free of interest and on such terms and conditions as the directors shall from time to time determine."

This however is not so much an objective as a power of a standard type designed to ensure that the company can achieve its objectives.

223. The term "lending institution" in its natural and ordinary meaning refers to an institution, usually a bank, credit union, Building Society or Friendly Society, all of whom are by statute law authorised to lend money. It would include Anglo and IBRC; it would also include NAMA or one of the companies established under the NAMA Act, 2009 to carry out its statutory objective. It might extend to a licensed moneylender but not an individual (as opposed to an 'institution'). It does not, in the view of the Court, include a private company, even an investment company, whose principal business is not that of lending authorised by statute. This is not altered by the fact, evident from the Tullycorbett Agreement dated 5th October, 2014, that Breccia lent €8 million to Tullycorbett to redeem Dr. Duffy's borrowing (a subject that will be returned to later in this judgment).

224. Insofar as there is any ambiguity over the meaning of "Anglo (or any other lending institution in substitution therefore)" in clause 3.4.2, I consider that this should be construed restrictively for two reasons. First, the phrase is used in clause 3.4.2 of the Shareholders' Agreement in a context in which the drafter could have used just the word "Anglo" or the more normal phrase "Anglo (or its successors or assigns)". In fact this latter phrase is used in clause 10.8.2 which provides "This Agreement will bind the parties' personal representative, successors and assigns." This wording of course would have had a wider meaning. Secondly, consideration of the Shareholders' Agreement, together with the related documentation read as a whole, and the factual background to these transactions, demonstrates that the parties never contemplated that any Promoter would stand in the shoes of a bank.

225. I am satisfied therefore that in entering into the Shareholders' Agreement, the parties never foresaw, or provided express terms governing a situation in which one Promoter would acquire Anglo's loan/security in respect of another Promoter. Such a possibility

would not have been envisaged by ordinary individuals, business or professional persons, companies, or even banks, until after the collapse of the Irish economy post-September, 2008. It was also the plaintiffs' uncontroverted evidence, which I accept, that this was not in fact envisaged by them when entering into the Agreement.

226. The parties did however expressly contemplate and make provision for the situation in which a Promoter fails to perform their obligations under a facility made available by Anglo or any lending institution in substitution therefore, by providing the 'step in' clause in 3.4.3 under which another Promoter "may" perform such obligations. The use of the word "may" shows that in the circumstances envisaged by the parties, and on its natural and ordinary meaning, the intention of the parties was that this was not to be mandatory, it is a discretionary power.

227. The intention of clause 3.4.3 is clear: it was in a situation of default to provide a mechanism under which "Anglo (or any other lending institution in substitution therefore)" could be intercepted before enforcing its share security or, as it would be entitled to do, seeking to sell all the shares in BHL without regard for the pre-emption rights of shareholders. This intention is reinforced by the manner in which clauses 3.4.3 and 3.4.5 were introduced in to the Agreement at the instigation of Breccia. Thus, any performing Promoter had the right to protect their own shareholding from a forced sale by utilising clause 3.4.3 if they had or could raise the necessary finance. Under clause 3.4.5, if the defaulter did not repay on demand, the "Overpaying Promoter'" could recover the amount paid "as a simple contract debt". If it was not paid within six months of demand, the defaulter's shares could then be "offered around" to the shareholders at "Fair Value" as defined in the Shareholders' Agreement, and the pre-emption provisions of clause 8 would apply. The proceeds of sale would then be used to discharge the amounts paid by the "Overpaying Promoter", together with interest.

228. The further intention of the Promoters was therefore to keep the defaulter's shareholding within the fold of existing shareholders, and only to permit a sale outside existing shareholders "to any person on a bona fide sale at any price not being less than the Specified Price" (clause 8.2.7) as a last resort. This interpretation is also consistent with the reason given by Mr. Sean Mooney to Mr. Jerry Sheehan for the inclusion of the 'step in' provisions to which I have earlier referred. This interpretation is also consistent with the general context of the Shareholders' Agreement which was that of a joint venture involving Promoters some of whom were friends and acquaintances, where it was intended that the Promoters would give a long term commitment, and where for the most part the objectives of the venture were not purely commercial or entered into between hard nosed business men.

229. While clause 3.4.3 did not oblige any Promoter to 'step in', in my view, the context of the Shareholders' Agreement and its terms read as a whole require that it should be interpreted as conferring on *all* Promoters the right to do so. This right would be meaningless unless the Promoters also had the opportunity, if a fellow Promoter was in default, of stepping in. As a corollary, an "Underpaying Promoter" also enjoys the right to have the other Promoters consider discharging their indebtedness, thus triggering clause 3.4.5 – in which circumstance the defaulting Promoter would have six months to repay the rescuer before recourse could be had to their shares under the Deemed Transfer Notice procedure. This six month period of grace perhaps best exemplifies the different treatment by the Shareholders' Agreement of the relationship of shareholders *inter se* to the relationship of lending banks with borrowing shareholders. I therefore do not accept Breccia's contention that there was no benefit to an Underpaying Promoter from clauses 3.4.3 and 3.4.5.

230. That "Banks" were to be treated differently to shareholders is also evident from clause 8. In clause 8.1.1 the initial three year restriction on the transfer and charging of shares is stated not to apply to the creation of security over the shares "in favour of a bank". Also relevant is clause 8.2 relating to "Transfers Generally" after the three year period. Under this "a Shareholder" who "wishes to sell his shares" is bound by the subsequent provisions relating to pre-emption. "Shareholder" is defined as "the beneficial owner or any Share or Shares". In my view, the use of the first conjunction "or" in that quote makes no sense, and was clearly a typographical error and should be read as "of". Clause 8.2 therefore applies to a sale by a beneficial owner of shares who wishes to sell. It governs a voluntary sale by a shareholder as opposed to a forced sale by a bank, or one of the limited situations in which a "Transfer Notice" is "deemed to be served" (which can arise under sub clause 3.4.5, clauses 8.3, 8.6 or 8.9.4).

231. Clause 8.6.2 is significant. This provides expressly for a Deemed Transfer Notice when *inter alia* "in respect of a Promoter being a body corporate, an encumbrancer takes possession over all or any part of its assets or undertakings…". Benray is of course a Promoter that is a body corporate. "Encumbrance" is defined in clause 1.1 to include "any mortgage, charge, assignment…or security interest…". Accordingly, clause 8.6.2 is triggered where an encumbrancer who has a mortgage over shares takes possession of the corporate Promoter's shares. In those circumstances the encumbrancer can force a sale of such shares – but only at a Specified Price/Fair Value and otherwise subject to the pre-emption provisions of clause 8. This again shows the distinction made in the Shareholders' Agreement between a bank/lending institution that is not subject to pre-emption, and a (mere) encumbrancer to whom the pre-emption provisions apply.

232. So the pre-emption clauses 8.2.1-8.4 apply both to a shareholder, and to an encumbrancer in respect of a forced sale under clause 8.6. The Transfer Notice, or Deemed Transfer Notice, as the case may be, is served on BHL, specifying the shares and the price, and identifying any proposed or contemplated buyer, and the vendor must deposit the share certificates with BHL. This constitutes BHL as the agent for the vendor for the sale of the shares. Under clause 8.2.2 the directors are obliged forthwith by notice in writing to inform each member. All the shareholders then have an opportunity to apply – between 21 and 42 days of the date of the notice as decided by the directors – for an allocation for shares. This is the right of pre-emption. Under clause 8.2.3 headed "Offer Around" the directors are then obliged to allocate shares *pro rata* to applying members. Under clause 8.2.7 there is a power to sell where the pre-emption right is declined which arises where not all of the shares comprised in the Transfer Notice have been taken up. This sale outside of the shareholders must be *bona fide* and for not less than the Specified Price.

233. In essence therefore, once a shareholder wishing to sell has a buyer at a good price, or a Deemed Transfer Notice is served in relation to an encumbrancer or Overpaying Promoter at a "Fair Price" for the shares to be sold, they must first give other members the opportunity to buy the shares at that price and it is only in default of a full take up of that "offer around" that there can be a sale to a new or incoming member.

234. In the various situations envisaged by clause 8.6.1-8.6.6 where there is deemed to be a Transfer Notice, it is irrevocable. Thus, an encumbrancer seeking to sell is not alone bound by the pre-emption provisions of clause 8.2-8.4, but is irrevocably bound to go through with the sale; it cannot unilaterally purport to withdraw the notice.

235. Accordingly, under the Shareholders' Agreement, when read as a whole, and taking into account the context, it was envisaged that a Promoter's shareholding could only be sold in four circumstances:-

> (1) a forced sale by Anglo *qua* "bank" or any other 'lending institution' on foot of the Mortgage of Shares, in which case the pre-emption rights in the Shareholders' Agreement did not apply;

(2) a 'voluntary' sale by a Promoter of their shares under clause 8.2, in which case the pre-emption provisions of clause 8 applied;

(3) a forced sale resulting from an Overpaying Promoter choosing to 'step in' under clause 3.4.3, in which case after six months from demand a transfer notice is 'deemed' to be served under clause 3.4.5 and the pre-emption provisions of clause 8 apply; and

(4) other circumstances provided for in clause 8 (e.g. an encumbrancer taking possession of share security, bankruptcy or liquidation of a Promoter, or material breach by a Promoter) resulting in an irrevocable Deemed Transfer Notice, in which cases the pre-emption provisions also apply.

236. The terms of the Shareholders' Agreement therefore never envisaged a forced sale by a *Promoter* standing in the shoes of Anglo or a successor bank or lending institution, or otherwise operating outside of the pre-emption provisions. Such a process would be contrary to the presumed intention of the parties, established from the context and the words used in the Shareholders' Agreement, that all sales of shares by a Promoter would be subject to the pre-emption provisions, and allowing for a Promoter to 'step in' to cover the default of a borrowing Promoter.

237. For these reasons I conclude that the Shareholders' Agreement should be construed as firstly limiting a Promoter's right to recover monies pursuant to another Promoter's loan facility to the express powers conferred in sub clauses 3.4.3 and 3.4.5, and secondly, as limiting a Promotor's right to enforce a sale of another Promoter's shareholding to the terms of sub clause 3.4.5 and a Deemed Transfer Notice to which the pre-emption provisions of clause 8 apply.

Implied Term that no Party can Take Steps that may Prevent Performance of the Contract

238. In the amended Statement of Claim the plaintiffs assert implied terms as follows:-

"27. It was an implied term of the shareholders agreement that each of the shareholders…would take no steps the effect of which would be to cause the shares of any other shareholder to be alienated save in accordance with the terms of the Shareholders Agreement.

28. It was a further implied term of the shareholders agreement that the shareholders or any of them were precluded from seeking to purchase or otherwise assume the role or position of the bank vis-à-vis any of the other shareholders or to seek to purchase any of the shares in BHL otherwise than in compliance with the terms of the shareholders agreement."

239. As developed in argument, the plaintiffs sought to imply into the Shareholders' Agreement the term that a party cannot voluntarily create conditions which would prevent the performance of the contract, by reference to sub clauses 3.4.3 and 3.4.5.

240. The plaintiffs therefore seek to imply two terms which may be distilled as follows:-

(1) A term that no Promoter could acquire another Promoter's loan, or the security for that loan.

Alternatively, and in the event that a Promoter is entitled to acquire the loans/security of another Promoter:-

(2) A term that a Promoter cannot take steps to enforce recovery of another Promoter's Anglo Facility or enforce the sale of the other Promoter's secured shareholding otherwise than in accordance with sub clauses 3.4.3 and 3.4.5 of the Shareholders' Agreement.

241. These two possibilities will now be assessed in the light of the context of the Shareholders' Agreement and the presumed intention of the parties under the tests set out by Lord Simon in *BP Refinery*, repeated here for convenience, that to imply a term:-

"(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that "it goes without saying";

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract"

242. With regard to the first proposed term, I have already found it was not within the contemplation of the parties that one Promoter would seek to enforce the loan and security in respect of another Promoter's shareholding without regard to the pre-emption rights in clause 8. However, clause 19.2 of the General Conditions attaching to the Facility Letters expressly enable an assignment by Anglo of the loans and security. It does not therefore seem reasonable to imply a term that this should not happen. The suggested term also falls foul of the second element of the test. It is not "necessary" to give business efficacy to the Shareholders' Agreement that a term be imposed that no shareholder could ever acquire Anglo's interest. The Shareholders' Agreement is still effective without the imposition of such a term, insofar as it continues to govern all matters of importance between the shareholders in relation to the operation and management of the company and in dealing with their shares.

243. Moreover, when using the officious bystander test the implied term must be so obvious as to go without saying, and I am not satisfied that the suggested term would have been so obvious. An example of this rule is provided by the facts in *Sweeney v. Duggan* where Murphy J. held that the contention that a term as to insurance by the company of its risk to an employee or an obligation to warn the employee of the absence of such insurance could not be implied in pursuance of the officious bystander test. Matters that would have arisen in a debate before the hypothetical reasonable bystander would have included the value of such insurance for the employee (since it was primarily for the benefit of the employer) and whether or not the interest of the employee would not be better served by some other arrangement which would be of immediate and direct benefit to him.

244. In the present case the officious bystander would have debated the propriety of one shareholder acquiring or succeeding Anglo in relation to the loan Facility of another shareholder, but it is by no means obvious that the parties would then have agreed a prohibition on such acquisition.

245. There is a more fundamental reason why such a term should not be implied. Article 43.1.1 of the Constitution of Ireland recognises that "…man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods". That this right is also enjoyed not just by individuals but also by corporate entities is well established – see *Iarnród Éireann & Anor v. Ireland & Ors* [1996] 3 IR 321. Article 43.1.2 provides:-

> "The State accordingly guarantees to pass no law attempting to abolish the right to private ownership or the general right to transfer, bequeath, and inherit property."

246. In Article 40.3.2 the State pledges "…by its laws to protect as best it may from unjust attack…" *inter alia* the "property rights of every citizen". In considering the constitutional protection of property rights the courts have tended to the view that these articles mutually inform each other.

247. Article 43.2 allows the State to regulate property rights in accordance with the principles of social justice and to pass laws "… with a view to reconciling their exercise with the exigencies of the common good." This allows the State to pass laws curtailing for instance the acquisition or sale of property where that would be anti-competitive, or allowing a public authority to compulsorily acquire land.

248. Were this Court to imply a term rendering unlawful the acquisition by one shareholder of the loan/security of another, that would be a radical interference with the right of the first shareholder to acquire and hold another property interest. Absent an express contractual term, that is something that could only be legislated for in the interests of the common good, and in a proportionate manner, and in accordance with principles of social justice. While the courts may become concerned with "the exigencies of the common good", establishing the principles of social justice are matters for the legislators (the Oireachtas, and within the terms of the various EU Treaties, the European Union) rather than the judiciary.

249. There is a further reason for rejecting this claim. The Benray loan acquisition proceeded and Breccia paid NALM. If the suggested term were implied it would have the potential consequence of unravelling the Loan Sale Deed and the Deed of Transfer and compromising NALM, a party not before the Court. It would be inappropriate for the Court to determine third party rights in this fashion.

250. Accordingly, I find that there was no term or implied term in the Shareholders' Agreement that prevented Breccia purchasing and taking an assignment of Benray's loan from NALM, and acquiring the benefit of the Mortgage of Shares, Mr. Flynn's guarantee, and any other security for that borrowing.

251. I now turn to the second suggested implied term, namely that "a Promoter cannot take steps to enforce recovery of another Promoter's Anglo Facility or enforce the sale of the other Promoter's secured shareholding otherwise than in accordance with sub clauses 3.4.3 and 3.4.5 of the Shareholders' Agreement".

Applying Lord Simon's five point test:-

> (1) Such a term would be reasonable and equitable in the light of the background to the Shareholders' Agreement and the express terms. While Mr. Flynn and Mr. Goodman were businessmen this was not a simple commercial agreement between two "hard nosed businessmen". There were other parties who were first and foremost doctors, and whose motivation was a mixture of friendship, professional achievement, family investment and altruism. Although expressly not a partnership, this was a venture that was not purely commercial but was motivated in part by other considerations. It was intended to last in the medium to long term. Of particular note is that Dr. James Sheehan executed guarantees that allowed his unencumbered shareholding to become security for the borrowings of the other Promoters, although he himself had no borrowings.
>
> Secondly, the express 'step in' provision in clause 3.4.3 provided a mechanism for one shareholder to support a defaulting shareholder; and the Agreement also contains elaborate provisions, analysed above, in relation to pre-emption which I am satisfied the parties intended would operate in the event of any sale of shares by one of the Promoters. The implied term contended for here is both a reasonable, and a logical extension to these existing express terms.
>
> (2) Is such a term necessary to give business efficacy to the contract? If the Shareholders' Agreement is to be construed in the manner that I have previously determined, then it is not necessary to imply the term under consideration. However, if that construction of the Shareholders' Agreement is incorrect, then the answer to the question whether the implication of this term is necessary to give business efficacy to the contract must be "yes". Were it otherwise, and were a Promoter standing in the shoes of Anglo entitled to ignore clause 3.4.3/3.4.5, then other shareholders would be deprived of their right to 'step in'. Benray would be deprived of the possibility of rescue by another shareholder under those clauses, and Benray's shares could be sold without regard to any of the pre-emption provisions of the Shareholders' Agreement.
>
> A further reason why it is necessary is the position of a guarantor such as Mr. Flynn, who by his Guarantee and Indemnity signed on 28th March, 2006 guaranteed to Anglo and its successors and assigns the repayment of Benray's loan. If a Promoter avails of its right to 'step in' under clause 3.4.3 and the loan is repaid in full then this Guarantee is discharged (this is the effect of clause 2.1 of the Guarantee) and the guarantor is relieved of this particular guarantee obligation. It would be quite wrong if Breccia were able to avoid this result by seeking to enforce against Benray and Mr. Flynn as guarantor outside of the terms of the Shareholders' Agreement, as this is not contemplated by clause 3.4.5.
>
> It is therefore necessary to imply such a term.
>
> (3) Is such a term so obvious that it goes without saying? An officious bystander understanding the necessity for such an implied term would recognise a compelling case for it and the answer to this question must be that the parties would have agreed that it was obvious.
>
> (4) Is it capable of clear expression? Although it has been expressed in several different ways, I am satisfied that the distilled wording that I have adopted above expresses it clearly, and does so in a form that is no wider than is necessary.
>
> (5) Does such an implied term contradict any expressed term of the contract? As already stated such an implied term would complement the express provisions of the Shareholders' Agreement in clauses 3 and 8. One possible conflict is with clause 3.4.3 insofar as that provides that a Promoter "may" perform the outstanding obligations of a defaulting Promoter. Thus, it may be said that such an implied term makes it mandatory for the shareholder who is standing in the shoes of

Anglo to operate clause 3.4.3. On closer examination this possible conflict dissolves because one Promoter faced with another Promoter who is failing to perform under their loan still enjoys *the option* of invoking clause 3.4.3. It does not become mandatory. Even if the Promoter decides to perform the obligations of the defaulting Promoter's loan/security, *the option* under clause 3.4.3 remains open to them. It also remains open to other performing shareholders. Another possible conflict is with the 'Entire Agreement' provision in clause 15.5. For reasons given later in this judgment I do not consider this to apply.

Accordingly, the proposed implied term does not contradict any expressed term in the contract, or defeat the contract, and in fact it complements the existing terms.

252. I therefore make the finding that the Shareholders' Agreement should be read in the light of the second implied term considered above.

Implied Term of Good Faith

253. This is now considered as an alternative implied term propounded by the plaintiffs.

254. I am of the view that the Shareholders' Agreement, and the context in which it came to be executed, demonstrate the elements of a "relational" contract as contemplated by Leggatt J. in *Yam Seng*. It is worthwhile reprising some of these features:-

- the parties knew each other, in some instances well;

- two of the parties were brothers;

- three of the parties were doctors and founders of the Blackrock Clinic, and for them the continued operation and development of the Clinic and its ethos, standards and reputation for excellence were to the forefront of their minds in 2006;

- viewed in overall terms the acquisition of the BUPA shareholding, and the borrowing and the Shareholders' Agreement were in the nature of a joint venture;

- the founding Promoters were willing to put forward their existing shareholdings as collateral for the Anglo loans;

- all parties other than Breccia were prepared to enter into cross-guarantees, and in the case of Breccia a Deed of Covenant having similar effect, such that all parties were potentially liable to Anglo for a default by any one Promoter;

- the duration of the Shareholders' Agreement is open ended, and it is binding on the parties' personal representatives, successors and assigns;

- the supporting borrowing was for some five years;

- no shareholder could dispose of their shares (otherwise than by way of an enforced sale by Anglo) within the first three years (clause 8.1.1);

- the parties specifically agreed to cooperate for the purpose of the operation and development of Blackrock Clinic as a first class medical facility aspiring to best medical practice (clause 3.1), and this development was both ongoing, and in the pipeline when the agreement was entered into;

- the Shareholders' Agreement also facilitated transfers by any Promoter to family members or a body corporate owned by such shareholder or family members (clause 8.8), or by a corporate shareholder to an "affiliate" company;

- clause 8.9 incorporates a duty of disclosure as between Promoters of any change in control of a shareholder or guarantor, buttressed by clause 8.9.2 entitling each Promoter to seek evidence of such change including "the net worth of the Promoter or Guarantor (by way of certified extract from the most recent audited financial statements or letter from the company's auditors confirming the net worth)". The importance of this clause may be gauged by the fact that non disclosure under clause 8 could lead to a Transfer Notice being deemed to be served;

- the fact that the parties agreed to use Mr. Jerry Sheehan as their solicitor in the negotiations and preparation of the relevant documentation (albeit that Breccia sought its own legal advice as it was entitled so to do at the end of that process) also points to a "relational" type of contract;

- the fact that no commercial due diligence was undertaken on behalf of any party by any independent firm of accountants;

- the Roman Catholic ethos of BHL is also an important factor to be taken into account. Clause 5.11.14 of the Shareholders' Agreement restricts the alteration of the "the ethical principles of the Company from time to time, being not to engage in any procedure or practice which is not consistent with the teaching of the Roman Catholic Church...". This was a continuation of the pre-existing ethos. Clause 8.1.2 provides that the Board may decline to register a transfer of shares when of the view that it would "breach or imperil" *inter alia* "the ethical principles". Although this was more important to some of the parties than to others, Mr. Flynn being one of the latter, all parties were aware of the existing Roman Catholic ethos and that it was to continue, and that any incoming shareholder would be required to adhere to such ethos. Mr. Flynn's evidence was that while respecting this ethos his preference would be for a broader Christian approach. Whichever view is taken, the parties were aware that Christian values underpinned the hospital ethos, and concepts of acting towards other persons fairly and in a spirit of honesty and good faith are intrinsic to the Christian message. The Court can take judicial notice of this, and I reject the suggestion in the first named defendant's opening submission that the plaintiffs must point to some specific teaching of the Roman Catholic Church, or in "the letters of St. Paul, the discourses of St. Thomas Aquinis, or the encyclicals of 266 popes." To confine the application of this ethos to operative procedures undertaken by medical staff is also an unwarranted limitation on interpretation of the phrase "procedure or practice". In adopting this ethos, the parties were subscribing to "shared values and norms of behaviour" with expectations of honesty and fair dealing in their interactions with each other.

• the Shareholders' Agreement leaves Promoters certain discretions, of which the discretion in sub clause 3.4.3 is just one.

• the nature of the agreement is best exemplified by the provision in clause 3.4.5 under which the 'stepping in' Promotor must give six months grace to the Underpaying Promoter before a forced sale of shares can proceed.

255. This is precisely the type of "relational" contract into which the courts should be prepared to import an implied term of good faith and fair dealing. Such a term accords with what I consider to have been the presumed intention of the parties. Alternatively, it arises from the nature of the agreement. I am also of the view that it could not be contended that it was unreasonable.

256. Was such a term necessary to give business efficacy to the contract? It is not necessary if clause 3 is to be construed in the manner that I have previously indicated, or if there was an implied term that one Promoter could not recover from another Promoter in respect of their Anglo Facility or enforce a sale of that Promoter's shares otherwise than in accordance with sub clauses 3.4.3 and 3.4.5. If neither of those alternatives apply then it is necessary to imply a term of good faith and fair dealing. Absent such a term, the Promoters could exercise all discretions given to them under the Shareholders' Agreement in any manner they wished save to the extent that they are expressly constrained, e.g. in terms of voting at board meetings. This would permit unconscionable and capricious exercises of discretion contrary to the shared ethos and spirit of the venture.

257. Breccia argued that such an implied term would conflict with certain terms of the Shareholders' Agreement. Breccia relied on clause 10(5) headed "Entire Agreement" as embodying "the entire agreement and understanding between the parties" which "supersedes and terminates all prior statements, representations, agreements, arrangements…and understandings relating to the Company", and which "…shall be amended or supplemented only by written agreement of all the parties hereto." The difficulty with this is that there was never any actual or express agreement or understanding, or representation or statement, by or between the parties as to what would be the position as between shareholders if one shareholder purchased the Anglo loan and security of another; this situation quite simply was never contemplated by the parties and never addressed. It is therefore appropriate for the Court to consider the presumed intention of the parties and to imply terms where appropriate. This applies equally to the implied term considered earlier.

258. Secondly, it was suggested that such terms cannot be implied because clause 5.11 headed "Restricted Transactions" sets out express provisions restricting the Promoters' exercise of voting rights and other rights and powers. It contains no such term of good faith nor any term the effect of which would be to prevent one shareholder taking any steps that would cause the shares of any other shareholder to be sold otherwise than in accordance with the terms of the Shareholders' Agreement. However, the application of this sub clause is by its terms limited to the procurement of *acts by BHL or Blackrock Clinic Limited* by shareholders in the exercise of their powers – it is not related to actions of Promoters or shareholder *inter se*. The implied terms would not conflict with these express provisions, and one would not expect the implied terms to be expressed in this section.

259. A similar argument is raised in respect of clause 6, headed "Restrictions". When one looks at this more closely, clause 6.1 deals with no holding out (as having authority to act for the Company), 6.2 deals with certain competing activities (which, with specific exceptions, are temporally and geographically prohibited), and 6.3 concerns non-solicitation (of BHL's employees, product and custom), and it is agreed that these "taken separately and together, are not more onerous or extensive than is necessary to protect the value of the Shares and the ability of the Promoters to sell, or procure the sale of, the Shares or business of the Company…" (clause 6.5). Clause 6 is thus concerned with protecting the business activities of BHL and preventing the taking of its staff or property, and designed to ensure protection of the value of BHL shares. Again it does not seek to regulate actions of Promoters/shareholders *inter se*, and does not conflict with the implied terms.

260. Is such an implied term obvious? Breccia pleads in its Defence that the implied terms do not reflect the true intentions of the parties at the time, and it would not have agreed to them (para. 22(iv)). In other words Breccia/Mr. Goodman would not have agreed to a term requiring it to act in good faith and deal fairly, and would have refused to allow insertion of a term that prohibited it from acting in a manner which prevented the operation of the Shareholders' Agreement. The first difficulty with this is that it is a bare assertion – Breccia has not adduced any evidence or provided any cogent argument as to why it would have opposed such terms. It also conflicts with the fact that Breccia suggested the 'step in' provisions that are central in this case. I am satisfied, on an objective basis, that an officious bystander, considering the "matrix of fact" and the terms expressly agreed in the Shareholders' Agreement at the time, if asking the parties if they were agreeing to act in good faith and with fidelity to the Agreement, would have received the answer "of course".

261. I also reject the contention that the implication of this term should be declined on 'equitable' grounds. Logically this must be considered in the context of and at the time of the making of the Shareholders' Agreement. That is not to say that on equitable grounds a court cannot refuse to grant declaratory or injunctive relief; that is a different question which is addressed later in my judgment. Neither on cross-examination of the plaintiffs' witnesses nor in argument did the first named defendant try to suggest that any acts or omissions on the part of the plaintiffs *in the lead up to 28th March, 2006* were lacking in probity or were unconscionable in any way.

262. The fact, for instance, that Benray may have defaulted on its loan obligations at some date after 30th December, 2010 cannot be a basis for not implying terms the Court determines should be implied in the Shareholders' Agreement as on 28th March, 2006. This would be the same as saying, for example, that because Benray has behaved with impropriety, the terms that allow it to nominate one director should be excised or disregarded. Such a proposition could not be correct. For the same reason, Breccia's complaint that Benray breached the Shareholders' Agreement in attempting to divert dividends to itself rather than NALM as successor to Anglo cannot affect the issue of whether terms should be implied.

263. I also reject the contention that such a term cannot be implied because it cannot be expressed in clear terms. It is an implied term that the parties owe each other mutual duties of good faith and fair dealing. While it is by its nature broadly worded, its requirements are sensitive to context and the test of whether particular conduct amounts to a breach of faith is objective.

264. Accordingly, insofar as it is necessary to make such a finding it is my decision that it is implied in the Shareholders' Agreement that Breccia and Benray owed each other mutual duties of good faith and fair dealing.

(2) Consequences

265. The principal consequences of these findings as to the correct interpretation of the Shareholders' Agreement will now be addressed. The first point to make is that these do not differ significantly whether the Shareholders' Agreement is interpreted in the manner I have indicated or whether there are implied terms. Insofar as one possible source of breach of the Shareholders' Agreement

may be more relevant to a particular consequence, this will be highlighted.

(i) Breaches

266. Breccia's primary relationship and dealings with Benray/Mr. Flynn (and other Promoters/shareholders) is first and foremost as another Promoter and shareholder under the Shareholders' Agreement. The terms of the Shareholders' Agreement trump the powers of recovery and enforcement contained in the Facility Letters and Mortgage of Shares relating to Benray. Breccia cannot act positively in a manner that conflicts with the provisions of clauses 3.4.3 and/or 3.4.5 and clause 8 in relation to pre-emption, and prevent the operation of those provisions. The other shareholders cannot be prevented from availing of the option of 'stepping in' to cover Benray's loans which Breccia had acquired. Breccia could not seek to circumvent the pre-emption provisions of the Shareholders' Agreement by seeking to enforce and sell Benray's shares outside of its terms. In attempting to do so Breccia breached the Shareholders' Agreement.

267. This conclusion does not leave Breccia without options: it means that if and insofar as Benray fails to perform its obligations under the Facility Letters, Breccia has the option of doing nothing, acquiring the Benray loan/security and taking no further steps, or invoking clause 3.4.3. This may not seem ideal, but before it acquired the Benray loan Breccia should have considered the possible constraints of the Shareholders' Agreement and must be taken to know its terms, including implied terms. Breccia could not simply ignore clause 3.4.3. Under that provision it could have performed Benray's obligations i.e. discharged Benray's loan, and then followed the procedure mandated by clause 3.4.5. While this would have relieved Mr. Flynn of his principal Guarantee obligation in respect of Benray's loan, Breccia's right to recover the amount paid from Benray as a simple contract debt, and ultimately to force a sale of Benray's shareholding in BHL under the Deemed Transfer Notice procedure and the provisions of clause 8, would be preserved. It would also not prejudice Mr. Flynn and Benray's obligations under the cross-guarantees. Thus, if no (other) shareholder wished to buy Benray's shares in BHL at 'the offer around' then Breccia could have lawfully purchased Benray's BHL shares at the specified price (or if there were offers from other shareholders then shares would have been allocated *pro rata*) – and if no offer was made, Breccia could have sold them on the open market at the Specified Price. The net proceeds of sale would then be paid by BHL to Breccia and received by it in discharge or part discharge of Benray's debt.

268. It follows that even though Benray was in default of the terms of the loan, until Breccia performs Benray's obligations under the Facilities i.e. discharges the Benray loan, it is not entitled to demand repayment from Benray under clause 3.4.5, or seek to recover by way of a simple contract debt and/or after six months seek the sale of Benray's shares through the Deemed Transfer Notice process. As a further consequence, the demands made by Breccia on 8th August, 2014 and 12th August, 2014 for payment from Benray and Mr. Flynn respectively lack the validity necessary to ground the counterclaim – a subject to which I return later in this judgment.

269. Accordingly, the appointment of the Receiver was invalid as between Breccia and Benray/Mr. Flynn. It follows from this that the Receiver was not entitled to attempt to sell Benray's shares in BHL, and a sale by the Receiver to Yalart would be void.

270. Furthermore, Breccia cannot rely on the Waiver of Pre-Emption Rights dated 28th March, 2006. This is because Breccia as a Promoter/shareholder is bound to uphold the pre-emption provisions and allow them to operate, and cannot, by its unilateral act of acquiring the Anglo loan and security, seek to sell the shares on the open market.

271. It is not therefore necessary to decide the further question whether upon its true construction the term "the Bank" in the Letters of Waiver signed by all of the Promoters can apply to any successor of Anglo, or any person or body that is not a "bank".

(ii) Non-Breach

272. In other respects I do not find that the there was any breach of the Shareholders' Agreement or the implied terms.

273. Firstly, the placing of a bid by Breccia with NALM on 1st April, 2014 to purchase Benray's loan/security, and the acquisition by Breccia from NALM of that loan and security for €9,104,616.41 on 23rd May, 2014, were lawful, and were not a breach of the Shareholders' Agreement. Notice of the assignment of the loan and security were sent on 23rd May, 2014 to all the shareholders including Benray, and to Mr. Flynn, and to BHL on 28th May, 2014, and these were valid notifications.

274. The fact that earlier in May, 2014 Mr. Goodman failed to admit to this purchase in the telephone conversation with Mr. Flynn demonstrates a lack of fair dealing, but this was not a material breach of the Shareholders' Agreement in that it did not prejudice the plaintiffs or give rise to any loss.

275. Secondly, pursuant to clause 7(a) of the Facility Letter as successor to Anglo/IBRC/NALM Breccia became entitled to require the payment by direct debit by BHL to "a deposit account in the name of the borrower charged in favour of the Bank" of the dividends from BHL to which Benray was primarily entitled.

276. Breccia, as successor to Anglo, under clause 3.1(a)(iii) of the Benray Mortgage of Shares acquired security over all such dividends payable in respect of Benray's shareholding in BHL. Under clause 8.2 this security extended to monies/dividends which "shall not have become payable" but are derived from the shares. Under clause 3.1(b) this entitlement extended to monies in Account no. 1403/506762/01 with Anglo/IBRC, being the nominee account into which Benray's dividends from BHL were to be paid.

277. Breccia was therefore entitled to include in its letter of notification to Benray and Mr. Flynn dated 23rd May, 2014 the statement that "[w]ith effect from the date of receipt of this notice all payments due to the Assignor in respect of the Assigned Assets shall be paid to the Assignee."

278. However, there are limitations on Breccia's right to receive the dividends. Its entitlement commenced with effect from 23rd May, 2014. It did not have any retrospective effect in relation to dividends declared and *paid over* by BHL to Benray prior to that date. Secondly, it was limited to the monies if any in "the Account" specified in the Mortgage of Shares on 23rd May, 2014, or deposited there after that date. Breccia bought the loan and security with express notice of this because in response to a pre-purchase query in relation to "the Deposit Account referred to in the letter of loan security", by letter dated 21st May, 2014, Matheson as solicitors for NAMA informed Breccia's solicitors B. Vincent Hoey & Co:-

> "(d) NAMA understand that the deposit account referred to was frozen by the special liquidator of IBRC, that there is no money in that account and that no replacement account exists."

279. By Notice of Assignment dated 23rd May, 2014 Benray and Mr. Flynn were formally notified of the assignment of the loan and

security, and para. 4 stated "[w]ith effect from the date of receipt of this notice all payments due to the Assignor in respect of the Assigned Assets shall be paid to the Assignee. The details of the Assignee's account for those purposes are as follows…" and there followed details of a bank account in Barclays.

Although the account holder name is not given it may be presumed that it is Breccia. By letter dated 22nd July, 2014 Matheson solicitors now acting on behalf of Breccia noted that under clause 13.1 of the Mortgage of Shares Breccia was exercising its power of attorney as attorney for Benray, and further notified BHL of the assignment and furnished details of the same account with the request that all Benray's dividends be paid into this account.

280. In my view, there can be no doubt that under the terms of the Mortgage of Shares (under clause 9 containing an obligation to provide "Further Assurance" and/or under the power of attorney provision in clause 13), Breccia was entitled to open and nominate a new bank account to receive Benray's dividends, and to direct that further payments be made directly by BHL to that account. It follows that with effect from receipt of the notification dated 23rd May, 2014 the Benray dividends should have been paid directly by BHL to the new account and Breccia enjoyed security over same.

281. I find that Benray was in breach of the terms of the Facility Letter from 13th January, 2010. Anglo/IBRC chose not to call in the loan, presumably because it continued to receive dividends against interest. Certainly there was no sound basis upon which the plaintiffs could maintain that the Benray loan was "performing" at least from the date it was acquired by Breccia. Consequently, and as a matter of fact, Benray was in breach of the covenant to other Promoters in clause 3.4.2 of the Shareholders' Agreement "…to perform its obligations as set out pursuant to any facility made available by Anglo…".

282. It follows that Breccia, after the assignment of the loan on 23rd May, 2014, also became entitled under clause 7(a) of the Facility Letter to demand and receive Benray's dividends insofar as they were necessary to discharge the interest on the loan.

283. There is no basis for finding Breccia in breach of the implied term of good faith in obtaining separate legal advice prior to completion of the Shareholders' Agreement. At the negotiation stage, Breccia was clearly entitled to obtain independent legal advice – indeed that participants should have this opportunity is expressly recognised in clause 10.11. It is of the nature of legal advice that it is generally sought and given on a confidential basis, and there is no basis upon which the plaintiffs can assert that the fact of obtaining independent legal advice, or the content of that advice should have been disclosed in March, 2006. Breccia was also entitled to require that Mr. Jerry Sheehan, as its legal advisor who was also privy to Breccia obtaining the independent advice from A & L Goodbody, maintain confidentiality over obtaining this advice and the content of the advice, and this is the probable explanation for Mr. Jerry Sheehan's non-disclosure to the other shareholders.

284. It is also hard to see how the plaintiffs could claim any damage to have flowed from Breccia obtaining independent legal advice. As already determined, Breccia was entitled to enter the Deed of Covenant in lieu of cross-guarantee, and did so for legitimate commercial reasons. No difference in terms of the security thereby given to Anglo, or the benefit afforded to other shareholders (other than the 45 days grace that the Deed grants to Breccia which does not appear to be material) is discernible. The plaintiffs suggested that the absence of a cross-guarantee from Breccia prejudiced their ability to re-finance their Anglo borrowing, but this claim is not made out, and I am satisfied that the real impediment to re-financing was the perceived 'veto'.

285. I am satisfied that Breccia deliberately failed to disclose the Deed of Covenant to the plaintiffs and to the other parties to the Shareholders' Agreement. I also accept that Mr. Jerry Sheehan refused to disclose this document to the plaintiffs, and that the reason for this was client confidentiality arising from his relationship with Breccia. I am far from satisfied that this constituted a material breach of the Shareholders' Agreement. Even if it did, no evidence has been adduced to show any loss consequential on withholding disclosure.

286. With regard to Breccia's attitude at Board meetings to the delay or non-payment of dividends, annual dividends of €4 million euro were paid in 2006 and thereafter the dividends paid increased by 5% year on year, with dividends of €5,360,383 paid in 2012, in accordance with the Shareholders' Agreement (as amended). These were paid quarterly. It was in 2013 that in light of the increasingly burdensome hospital loan facility with AIB that management in BHL – guided by James O'Donoghue, Head of Finance, and with firm advice and backing from CEO Brian Harty and Chairman Pat Molloy – recommended a review of the dividend policy. They wanted payment to be based on affordability, and to keep within AIB lending limits as BHL had covenanted not to exceed the 2012 level of dividend without AIB's prior approval, and had agreed various other accounting based limits. They also wanted to switch to payment half yearly. The Board was divided and a decision on payment of dividend for 2013 was deferred at a number of meetings until the decision was recorded in the November, 2013 meeting minutes not to declare any dividend for that year. Notwithstanding this record, it appears that at the Board meeting of 13th February, 2014, a decision was made to declare an interim dividend for 2013 of €2 million.

287. I am satisfied that the deviation from the dividend policy stated in the Shareholders' Agreement (as amended) resulted from the proposals and recommendations of management and commercial decisions taken at Board level after appropriate debate and at a time when BHL had significant borrowings arising from the refurbishment and improvement of the hospital. This was acknowledged by Mr. Flynn who accepted that BHL owed in the order of €70 million in 2013, and Mr. James Flynn actually supported the Board decision because dividend payments could put stress on the balance sheet. The independent chairman, Mr. Molloy, also supported the decisions. It is a general principle that dividends should be paid out of profits available for distribution, and not out of capital.

288. Beyond concluding that no material breach of a duty of fair dealing has been demonstrated, it is not appropriate for this Court to determine in these proceedings whether the right commercial decisions were taken. Moreover, this particular complaint, even if made out, is one that could have been addressed in a more timely manner by Benray bringing appropriate proceedings to enforce clause 9 of the Shareholders' Agreement, or for 'minority oppression' under s. 205 of the Companies Act, 1963.

(3) If there was Breach, should the Plaintiffs be Deprived of Relief on Equitable Grounds?

289. The first named defendant asserts that the plaintiffs should not be entitled to a permanent injunction or declaratory reliefs having the effect of preventing the Receiver from selling the Benray shares because it is argued that the plaintiffs have come to court otherwise than "with clean hands"; a principle recently reaffirmed by Finlay C.J. in *Curust Financial Services Ltd. & Anor v. Loewe-Lack-Werk Otto Loewe GmbH & Co. & Ors* [1994] 1 IR 450 at p. 467. In that case the court held that the plaintiff's wrong – the assessment of his sub-contract without the required prior written consent – was not sufficiently serious to prevent the granting of injunctive reliefs.

290. It is submitted that the Court can and should refuse equitable relief where one party has culpably misled the court or another party. Reliance is placed on *Armstrong v. Sheppard & Short* [1959] 2 QB 384 where Lord Evershed M.R. found "other good grounds"

for refusing the plaintiff an injunction where he had misled the defendants and sought to mislead the court in relation to a conversation that he never claimed he had with the defendants. Lord Evershed M.R. approved the following passage from Kerr on *Injunctions* (6th edn.), p. 30:-

> "After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."

291. Reliance was also placed on the decision of Lynch J. in *Ardent Fisheries v. Minister for Tourism* (unreported, High Court, 19th January, 1987) in which an injunction restraining the defendant from enforcing a condition attached to a C-Fishing license was refused because the plaintiff had dishonoured representations given when applying for the fishing license that it would operate from Irish ports. To similar effect, the first named defendant relied on the decision of Charleton J. in *Kelly v. Simpson* [2008] IEHC 374 where he stated:-

> "A court exercising a jurisdiction in equity to grant a remedy such as the specific performance of a contract must look beyond the legal form of transactions to the elements of conscience that may impact on whether it is fair to grant the remedy. The responsibility to do equity is that of the court. If one party, for instance, has taken advantage of the distress or recklessness of the other, such an unconscionable dealing should be left without a remedy should a court order be sought. Similarly, parties are not entitled to come to equity seeking a remedy that will enable them to profit through their bad faith."

292. In support of this submission the first named defendant asserted that the plaintiffs had misled the court at the *ex parte* stage; that Benray had diverted dividends rightfully the property of Breccia to its own use; that they had given knowingly dishonest testimony; that they were guilty of hypocrisy in bringing a case alleging illegality in respect of the purchase of the Benray loan/security when they themselves were weeks earlier party to an attempt to purchase from IBRC the loans of Dr. Joseph Sheehan and Dr. Duffy which (it was suggested) they intended to use to force a sale of 100% of the shares in BHL; that they had attempted to knowingly rely on stolen information; and that they had made repeated wild and untrue allegations against the defendants and others. These issues shall be considered in their turn.

Lack of Candour

293. It is suggested that there was a lack of candour and/or non-disclosure on the part of Mr. James Flynn in the affidavit which he swore on 12th September, 2014 in support of the *ex parte* application for an injunction. In that affidavit Mr. James Flynn referred to the demand dated 8th August, 2014 (a Friday) made by Breccia to Benray for repayment of the loan, and the appointment of the second named defendant as Receiver on 11th August, 2014. Then in para. 17 Mr. James Flynn averred:-

> "Over the course of the weekend, there would be no opportunity to obtain finance in the amount requested from any Financial Institution. I say and believe that the Plaintiffs are of substantial means and would have taken any demand seriously if it was in turn a serious demand. However, it is clear from the nearly automatic appointment of the Second Defendant that the calling in or demand of the indebtedness under the Loan Agreement triggering the enforcement provisions of the security document and the appropriation of the Plaintiffs' property rights was an absolute contrivance."

The complaint made of this averment is that it showed lack of candour in that the plaintiffs were not in a position to discharge their indebtedness at all, and that their previous efforts to raise finance to redeem their Anglo borrowing had been unsuccessful.

294. In that Mr. Flynn, and in particular Mr. James Flynn, in their evidence before this Court admitted that there was no real prospect of raising the money to discharge that indebtedness as of August, 2014; they blamed the existence of the perceived 'veto' as preventing the refinancing of the Anglo loan. However, counsel for the first named defendant pointed out that the real position, and the blame more recently attributed by the Flynns to the 'veto' as the reason for not being able to raise finance, were not matters brought to the attention of Hogan J. on affidavit or otherwise at the *ex parte* stage.

295. In reference to the first two sentences of para. 17 of Mr. James Flynn's affidavit, I am satisfied having heard his evidence that the plaintiffs did indeed have little or no realistic opportunity to obtain finance over the weekend in question. I am further satisfied from the limited evidence adduced on this issue (bearing in mind that no evidence to suggest otherwise was adduced by the first named defendant) that he/his family *may* at that time have been of substantial means in the sense that they may have had assets even though those assets may not have been readily realisable. Moreover, the broader point made by Mr. James Flynn in para. 17, and developed in para. 18 and subsequent paragraphs of his affidavit, was that by acquiring Benray's loan/security and calling in the indebtedness so abruptly and appointing a Receiver, Breccia was contriving to acquire Benray's shareholding in BHL without pursuing the provisions of the Shareholders' Agreement. This, it seems to me, was the thrust of the relevant averments rather than suggesting to the court that Benray or Mr. Flynn could pay off the indebtedness. As will be seen later in this judgment, I accept that the thrust of those averments was well founded.

296. Secondly, it may be said that the affidavit of Mr. James Flynn sworn on the 12th September, 2014 running to some 20 pages was, given the short space of time allowed for preparation and the complex matters with which it dealt, a relatively full affidavit. The question of previous attempts to refinance Benray's borrowing and the difficulties encountered with the perceived 'veto' were raised in a replying affidavit by Mr. Sheeran on 22nd September, 2014, and he suggested at para. 5 that there were "important matters that Mr. Flynn neglected to disclose in his affidavit…".

297. Mr. James Flynn addresses the suggested deficiencies in his affidavit of 26th September, 2014 (para.s 56-62), and in that affidavit he also dealt with certain previous attempts to refinance and the use of the 'veto' (para.s 16 and 19). In para. 65 of that affidavit Mr. James Flynn refers to the undertaking as to damages that had been given on the plaintiffs' behalf to Hogan J., and which had been referred to in his original affidavit. He stated:-

> "While it is admitted that the plaintiffs hold borrowings other than those connected with the within proceedings, they equally hold substantial assets and investments apart from the shares which I believe considerably exceed these borrowings and accordingly do not threaten, but rather enhance, the plaintiffs' ability to meet the undertaking as to damages."

298. Again, it was suggested that there was a lack of candour in relation to this averment. A further round of affidavits occurred, including two affidavits sworn by the second named defendant, but I am satisfied that this averment has not been demonstrated by the first named defendant to be incorrect or lacking in candour

299. In the Court's view, any suggested or perceived lack of candour in the original grounding affidavit of Mr. James Flynn had been sufficiently remedied by the time the case was ready for an interlocutory hearing. Moreover, prior to any interlocutory hearing, the defendants had a full opportunity to present all the information needed to support any submission that they might make to the court that an interlocutory injunction should be refused for lack of candour, in the event the interlocutory application did not proceed to a contested hearing. This was a choice made by the first named defendant, who could have opted to proceed. Instead, the parties agreed that the injunction should remain in place pending the trial of the action in the Commercial Court. In these circumstances, I do not consider that there was any material lack of candour, and insofar as there was any lack of candour it was not such as would justify the refusal of relief to the plaintiffs when balanced against matters concerning the conduct of Breccia to which I will refer later in my judgment,

300. It is also noteworthy that the reason given on behalf of the first named defendant for not contesting the interlocutory application (see letter dated 7th October, 2014 from their solicitors, Matheson, to the plaintiffs' solicitors) was that even if interlocutory relief was successfully resisted, there would be no particular benefit to the first named defendant as "any disposal of the shares over which the second named defendant stands appointed as receiver would be conditional upon the outcome of the plenary aspect of the case". This was a pragmatic approach, and demonstrated a realistic view that the issue of these proceedings in itself was sufficient to raise a doubt in the minds of potential purchasers over the validity of the Receiver's appointment and the sale of Benray's shares in BHL such that any disposal would be problematic until the proceedings were finalised. In this respect the lack of candour suggested and relied upon may be said to be of little or no significance.

301. Further, it was submitted on the plaintiffs' behalf that in the first named defendant's replying affidavits their deponent company secretary, Mr. Sheeran, (no affidavit was sworn by Mr. Goodman) failed to disclose the amount of the indicative offer made by Breccia's sister company Yalart to the Receiver for the purchase of Benray's shareholding in BHL. It was also claimed that this only came to light following discovery in these proceedings. Given that Breccia appointed the Receiver, and the Receiver under the Deed of Mortgage of Shares was deemed to be acting as agent for Benray, this in my view demonstrated some lack of candour on the part of the first named defendant in bringing before the Court all relevant material at the interlocutory stage.

Diversion of Dividends

302. As we have seen, pursuant to the Anglo Facility in 2006 a Benray nominee deposit account was opened with Anglo into which dividends were paid directly by BHL to discharge the interest due under the loans. If there was a surplus after payment of the loan interest Benray, rather than withdraw it, tended to use it to pay back some of the capital.

303. On 28th February, 2014 NALM notified BHL in writing that pursuant to the NAMA Act, 2009 the Benray loan and share mortgage including the right to dividends had been assigned to NALM. However, the nominee account for Benray appears to have become dormant and was empty when the transfer to NAMA/NALM took place.

304. It was alleged by the first named defendant that thereafter dividends were wrongfully diverted by Benray to its own use. This could only be a reference to the interim dividend for 2013 declared by the Board at its meeting on 13th February, 2014.

305. Mr. Flynn's evidence (day 4, p. 89) was that:-

> "…the last dividend payment we got, it was the only one that we used elsewhere because we were in surplus in terms of interest charge, we used for legal fees to support Benray's litigation. And that's the only, I suppose, cheque that was not used in either fully to pay down or to pay interest on the Benray loan. There was no withdrawals from the Benray loan."

He added (day 4 p. 95):-

> "…the Benray account in NAMA was in surplus in terms of interest so that there was no particular urgency in relation to it, plus, the loan was being redeemed as well."

Mr. Flynn also confirmed the view expressed by him to the Chairman at a further BHL Board meeting on 24th February, 2014 that "the only undertaking the Clinic gave was to pay the dividends into a bank account in IBRC. This account no longer exists and it is therefore impossible to pay the dividends into that account…in those circumstances Benray Limited was entitled to receipt of the dividend."

306. That meeting was shortly followed by the NALM notification of assignment dated 28th February, 2014. However there is no evidence before me that NALM was actively or specifically demanding payment directly to it of dividends. At the Board meeting in March, 2014 the Chairman took the view that the onus was on NAMA (NALM) to prove its right to receive the dividends. The record also indicates doubt as to whether NALM enjoyed a fixed charge over the dividends, which was not resolved by the advice at the meeting from Mr. Stephen Hegarty solicitor of Arthur Cox. The result was a decision to send letters raising queries to NALM and Benray's solicitors.

307. It appears that it was only following this process that the dividend was paid directly to Benray. The precise date of payment and amount were not given in evidence, but critically this all predated the acquisition of the Benray loan/security by Breccia by some two to three months. It was only on 23rd May, 2014 that Breccia advised Benray that Benray's dividends should now be paid to them, to a new named account; there is no evidence that any dividend was 'diverted' to Benray after that date.

308. I am also satisfied that when the dividend was paid to Benray there was a genuine dispute at Board level as to whether the dividends were subject to a fixed charge, or whether NALM enjoyed the right to be paid directly. This persisted even after 23rd May, 2014. In June, 2014 Arthur Cox solicitors' advice was sought by BHL on the issue of whether dividends to which Benray was entitled should now be paid directly to Breccia, and Arthur Cox advised that they should. BHL management decided, in view of the differing views, to instruct Arthur Cox to obtain Counsel's opinion. In an email dated 2nd August, 2014 Mr. Flynn on behalf of Benray opposed any payment of dividends directly to Breccia.

309. Moreover, as Breccia did not call any witness, there was no evidence before the Court to contest Mr. Flynn's assertion that Benray's account was 'in surplus' with regard to the payment of interest. A rough tot of figures given in evidence shows that the dividends paid into the Benray nominated account with Anglo exceeded by some €800,000 the amount of interest, and Mr. Flynn's evidence was that this was used to reduce the capital. I also accept that Benray was actively working to redeem its loan – and this became one element of the Talos transaction in March, 2014. It should also be noted that no claim for recovery of dividend alleged to have been wrongfully paid to or received by Benray is made in the Counterclaim

310. In these circumstances the proposition that Benray wrongfully diverted dividends to its own use in 2014 is at best doubtful and was not proven by the first named Defendant.

Misleading Accounts in Relation to Involvement with JCS/the Talos Transaction

311. The first named defendant alleges bad faith on the part of the plaintiffs in giving deliberately misleading accounts in relation to several aspects of Mr. Flynn's involvement in the Talos transaction. It is necessary to set out further details and evidence relating to the Talos transaction that has not been outlined above by way of background in order to understand this contention.

The Talos Transaction

312. The Talos transaction involved an attempt that was ultimately unsuccessful by Dr. Joseph Sheehan and Mr. Flynn, with the consent of Dr. Duffy, to purchase from IBRC the loans of Dr. Joseph Sheehan and Dr. Duffy, and to redeem Benray's loan with NALM. It is common case that following the collapse of Anglo Dr. Joseph Sheehan and Dr. Duffy's loans remained vested in IBRC and never transferred to NAMA. The Talos transaction became the subject matter of Summary Summons Proceedings entitled *Talos Capital Ltd. v. Joseph Sheehan and John Flynn* in which Ryan J. awarded judgment to the plaintiff in the sum of €2.4 million plus accrued interest.

313. The background to the Talos transaction is that in early 2014, IBRC was in the process of selling loans of Dr. Joseph Sheehan and Dr. Duffy (part of "Project Stone Tranche 14"). Dr. Joseph Sheehan acted initially through a Cayman Island registered company named Medfund and subsequently through JCS. At the first stage of the Tranche 14 sale, Dr. Duffy was deemed ineligible to bid, but Dr. Joseph Sheehan was eligible. Dr. Joseph Sheehan placed a successful bid on the loans. From Mr. Flynn's evidence to this Court it emerged that Breccia was the unsuccessful under bidder. Dr. Joseph Sheehan had arranged finance through Talos, and the "Talos Term Sheet" was signed by Dr. Sheehan and Mr. Flynn on 2nd March, 2014. Talos then entered into a Facility Agreement with Medfund on 13th March, 2014, and subsequently into an amended Facility Agreement with JCS on 17th March, 2014. As stated previously, the loan was to be used to purchase the debts of Dr. Joseph Sheehan and Dr. Duffy, and to refinance Benray's loans with NALM, and so to this extent, Mr. Flynn and Benray became intimately involved in the Talos transactions. Assuming that the Talos transaction had proceeded, Talos would then have held security over approximately 56% of the shares of BHL.

314. Mr. Flynn's evidence was that Dr. Duffy was supporting the Talos transaction, and in particular on 20th March, 2014, on hearing of Dr. Joseph Sheehan's successful bid, Dr. Duffy sent a text message to Mr. Flynn stating "Great news!!! Dan was also on to confirm. I and Rosaleen had signed and dated the letter to Ciaran Scally and had it delivered to KPMG. Sounds as if I was not required. Rosaleen and Tully are players in (sic) the team. Will give you a call tomorrow. Regards, George". To put this in context, "Dan" refers to Dan O'Neill, the US lawyer acting on behalf of Dr. Joseph Sheehan, and also Mr. Flynn and Benray; "Rosaleen" is a reference to Dr. Duffy's wife; "Ciaran Scally" is a reference to an employee of KPMG, the accountancy firm appointed and acting on behalf of the Special Liquidators of IBRC in respect of the sale of the loans in question; and "Tully" is a short reference to Tullycorbett.

315. IBRC required a deposit of 10% (€2.4 million), and Talos had agreed in the Term Sheet dated 2nd March, 2014 to lend this money on foot of personal guarantees of Dr. Joseph Sheehan and Mr. Flynn. Talos paid over this money to its solicitor's account on 4th April, 2014, and in their hands it was subject to an undertaking to pay it to IBRC solicitors as the deposit. That was a Friday. The deposit was in fact paid over by Talos's solicitors to IBRC's solicitors on 7th April, 2014.

316. However, the Talos transaction did not proceed because of the combined actions of Breccia and Tullycorbett explained in a letter dated 2nd December, 2014 from Matheson solicitors for the first named defendant to the plaintiffs' solicitors:-

> "On 3 April 2014, our client [Breccia] offered to discharge Mr Duffy's debts to IBRC. The Special Liquidators did not accept payment of the relevant sum from our client. On 4 April 2014, our client provided a loan (the "Loan") to Tullycorbett Limited ("Tullycorbett"), which our client understands was utilised to discharge Mr Duffy's debts to IBRC. Our client does not have details of the arrangements between Mr Duffy and Tullycorbett Limited. On 5 October 2014, our client entered into an agreement (the "Agreement") with Tullycorbett and Xroon Limited with regard to, amongst other matters, the repayment of the Loan (a copy of the Agreement is enclosed with this letter)."

317. The agreement dated 5th October, 2014 records that "[o]n the 4th of April 2014 Breccia advanced a loan of €7,439,735.94 to you and Tullycorbett (Loan 1)" and that on the signing of the agreement Breccia would "advance a further loan of €560,265.06 to Tullycorbett (Loan 2)". Both loans, totalling €8 million, were repayable on demand but if not demanded were repayable on 31st December, 2016, and carried interest at 7% per annum. The agreement shows that Xroon was the beneficial owner of the entire issued capital of Tullycorbett which confirmed it held 8% of the issued shares in BHL and that they were unencumbered. Under the agreement, Xroon guaranteed repayment of the two loans to Breccia, and agreed to secure this guarantee on its shareholding in Tullycorbett.

318. I will return later in this judgment to comment further on the Talos transaction and the Tullycorbett loans, but suffice to say for the purpose of the 'bad faith' argument being made by the first named defendant, I am satisfied that the effect of the discharge of Dr. Duffy's debts to IBRC in this fashion was that the Talos transaction did not proceed as Dr. Duffy's loan and shareholding could not be delivered. Furthermore, I am satisfied that the detail and information disclosed by Matheson in their letter of 2nd December, 2014, and the accompanying Tullycorbett Agreement of 5th October, 2014, did not come to the attention of the plaintiffs prior to 2nd December, 2014.

Mr. Flynn's Involvement in JCS

319. Arising out of these events, Mr. Flynn and Dr. Joseph Sheehan became embroiled in various proceedings before the US Courts, and in particular Case 13-12159-CSS before the U.S. Bankruptcy Court for the District of Delaware. An "Objection by John Flynn SR. to Sale of Blackrock Loan Assets" was filed by Mr. Dan O'Neill on behalf of Mr. Flynn on 9th May, 2014, in which Mr. Flynn was attempting to prevent the sale of the loans by IBRC otherwise than by auction. Counsel asserted that there were wholly misleading statements in this Objection document, and pointed to the following:-

> "Flynn and Dr. Joseph Sheehan initially were participants in a consortium bidding on the Blackrock Loans. This bidding consortium formed acquisition vehicle JCS…to bid on the assets and consummate the sale pursuant to a Loan Sale Deed drafted by the Debtor and presented to JCS…";
>
> "After JCS was named the prevailing bidder, however, Flynn's equity ownership in JCS became known to the Special Liquidator…"; and

> "In direct response to the fact that Flynn owned an interest in JCS..."

320. It was argued that this was entirely in conflict with the evidence that Mr. Flynn gave in the current proceedings when he said "[n]o, hold on, I was not a part of JCS and it was Dr. Joseph Sheehan's company…" on day 6, p. 175 of the transcript. On the following day when Mr. Flynn was asked for a second time if he was ever part of JCS and answered no, and on day 7, p. 8, a third statement was made by Mr. Flynn that "whatever the intention might have been at the beginning, or what Joe may have requested of me, I did not proceed in relation to JCS, I was never a part of it."

321. Counsel also asserted that this is in conflict with senior counsel's opening of the current case that "the loan was going to be taken out by the JCS vehicle, the vehicle for John Flynn and Joseph Sheehan."

322. Mr. Flynn explained this under cross-examination on day 7 (p. 14):-

> "it was…I did not have the ownership, I wouldn't say it was a lie, it was intended that I would have an ownership and that had been agreed with Dr. Sheehan."

323. When asked whether he was completely comfortable with his previous evidence to the Delaware Court he replied "[n]ot particularly, but that was the situation".

324. There are a number of difficulties with the submissions of the first named defendant based on this evidence. The Objection referred to by counsel appears to be more in the nature of a pleading, it is not a sworn statement. Moreover, a similar Objection filed in Dr. Joseph Sheehan's name makes it clear that he was the preferred bidder in respect of the IBRC loans. In that sense, Mr. Flynn's involvement in those proceedings may not have been strictly necessary. Also, while it is correct that Mr. Flynn had no equity ownership in JCS, I accept the evidence given by Mr. Flynn in the present proceedings that while he did not have ownership of any interest in JCS, it was intended that he would have an ownership which had been agreed with Dr. Sheehan if the Talos transaction proceeded. This was an agreement in principle only, and based on trust. It is also not disputed that Mr. Flynn was throwing in his lot with the Talos transaction in that Benray's borrowing was to be redeemed, and refinanced through JCS. He also showed some remorse in admitting that he was not particularly comfortable with the statements that had been made in his Objection to the Delaware Court. It may be said therefore that nothing of substance turned on the difference between the somewhat misleading statements made in the Objection to the Delaware Court and his evidence before this Court on this point.

325. In a similar vein, counsel on behalf of the first named defendant relied on other contradictions in evidence that appeared on their face to be irreconcilable. Thus, on day 7 at p. 15 in the context of the Objection before the Delaware Court, Mr. Flynn said that:-

> "[t]here was an agreement between Dr. Sheehan and myself that I would have an equity ownership and I assumed it. But it actually was stopped by the IBRC liquidators…"

However, earlier in his evidence on that day (p. 6) Mr. Flynn had stated "I was originally invited by Dr. Sheehan to be part of it, but I declined". The difficulty with this submission is that Mr. Flynn may very well have declined to be part of JCS *originally*, yet had agreed with Dr. Joseph Sheehan then or subsequently that, in consideration for him allowing the redemption of the Benray loans under their Talos transaction, and the granting of a new charge to Talos over the Benray shares, he would acquire some interest or participation in JCS. The two positions are not necessarily inconsistent. It is also the fact, and I so find, that Mr. Flynn signed the Talos Term Sheet. This is cogent evidence that it was intended that he be part of the Talos transaction.

Signing of the Talos Term Sheet

326. Counsel pointed to a third suggested inconsistency in Mr. Flynn's evidence as to his involvement in the Talos transaction and JCS. On day 7 at p. 7 of the transcript Mr. Flynn was being cross examined by Mr. Gleeson S.C. on behalf of the first named defendant:-

> "Q. Well, let me help your recollection. Did you sign the original Term Sheet with Talos on the 12th/13th March?
>
> A. The original Term Sheet?
>
> Q. The Term Sheet with Talos. Did you sign it?
>
> A. On behalf of JCS?
>
> Q. On behalf of JCS?
>
> A. Not to my knowledge, no, I don't believe I did. I don't know.
>
> Q. Did you sign it in any capacity?
>
> A. What I signed was, what I signed up to was the purchase…the redemption, rather, not the purchase, the redemption of my loans in NAMA. It may very well have been that Dr. Joseph Sheehan would have liked me to participate with JCS, but I didn't want to do that, for different reasons, and I didn't participate in anyway in JCS except for the provision of the shares. Or, sorry, the provision of, yes, they were taking a charge on the Benray shares. That was a new charge, they weren't buying the loan from NAMA. In other words, they weren't, if you like…(INTERJECTION)
>
> Q. Mr. Flynn, I have to put it to you that you did sign the original Term Sheet and that it is in the papers that are before the Court in the other proceedings?
>
> A. Maybe. I don't recollect it.
>
> Q. We will produce it.
>
> A. That's okay. But whatever the intention might have been at the beginning, or what Joe may have requested of me, I did not proceed in relation JCS, I was never a part of it.
>
> Q. I have to put it to you that that is a misleading answer, and that you were in fact involved with JCS and took some

formal steps to maintain your interest in that entity?

A. No"

327. Counsel suggested in argument that this showed that when Mr. Flynn was first asked whether he signed the Term Sheet he denied having done so. However, as the transcript shows he was uncertain about this and in his initial answer ended by saying "I don't know", and in his subsequent answer he stated "maybe. I don't recollect it." Later in cross-examination on day 7, p. 17, the Talos Term Sheet was put to Mr. Flynn, and Mr. Flynn acknowledged his signature on it.

328. I am satisfied from the manner in which Mr. Flynn delivered his evidence that initially he was genuinely unsure as to whether he had signed the Talos Term Sheet, and that his hesitation was simply due to poor recollection. He readily accepted that he had signed it when the document was presented to him.

329. Accordingly, I do not find that Mr. Flynn's evidence before this Court in relation to his involvement in the Talos transaction was deliberately untruthful or misleading in the particulars suggested by counsel in cross-examination and in argument, or that his answers constitute a sound basis upon which the Court should refuse reliefs on an equitable basis. In saying this, the Court accepts that the plaintiffs, and Benray's loan and shareholding in BHL were constituent parts of the Talos transaction. The Court also accepts that Mr. Flynn signed the Term Sheet for the Talos loan, that Mr. Flynn provided a personal guarantee for JCS borrowings, and that Mr. Flynn and Dr. Joseph Sheehan were both represented by Mr. Dan O'Neill, US Attorney. I also bear in mind that Dr. Joseph Sheehan was the principal moving party who took the initiative with Medfund, laterally JCS, and took the principal role in bidding for the purchase of loans from IBRC and obtaining finance from Talos.

Advice of Mr. Dan O'Neill/Hypocrisy

330. Counsel for the first named defendant next relied upon the fact that the plaintiffs had been given written advices by their US Attorney, Mr. O'Neill, supporting the lawfulness of the Talos deal but pointing out the dangers, whereas in the current proceedings, the plaintiffs challenge the validity of the steps taken by the first named defendant vis-à-vis Benray which are similar to those that could or would have been taken by JCS/Talos under the Talos transaction. It was asserted that the plaintiffs cannot both approve and disapprove of similar transactions with the same suit, and that this offends equity. It was further argued that the plaintiffs were silent in relation to the advice obtained from Mr. O'Neill when it came to their ex parte application before Mr. Justice Hogan. It was also submitted that there were flaws and contradictions in the evidence about the date and circumstances of the receipt and relaying of Mr. O'Neill's advice that demonstrate bad faith. I will deal with these in turn.

331. The advice of Mr. O'Neill is contained in a letter bearing the date 15th April, 2014, signed by "Lawrence Daniel O'Neill" and addressed to Mr. Flynn. It is common case that Mr. Flynn forwarded a copy of this to the other shareholders on 10th May, 2014. Mr. O'Neill commences his advice with the words:-

> "In our discussion yesterday you asked that I review all of the collateral being transferred from Anglo Irish Bank/IBRC to JCS Investment Holdings XIV Limited as part of the sale of Project Stone Tranche 14. In particular, you requested my opinion regarding the cross guarantees and the status of the shares pledged as collateral vis-à-vis those guarantees."

332. Mr. Flynn confirmed that the reference to a discussion was a conversation that he had had with Mr. O'Neill the day before the advice was given. Mr. O'Neill firstly advised that "upon closing JCS should have, registered in its name, 100% of the shareholding in [BHL], the right to collect all dividend payable on those shares, and the absolute right to sell all or part of those shares as surety over Dr. Sheehan's debt."

333. He advised that:-

> "[a]fter the conclusion of the loan sale transaction, JCS will stand in the shoes of, and have all of the rights of Angle Irish Bank/IBRC with regard to the security listed above [Mr. O'Neill listed the mortgages of shares executed by all of the Promoters]. Specifically, clause 3.1 of the mortgage requires all shareholders to:
>
> > 1. Surrender all of the shares in BHL to JCS and assure that JCS is registered in the shareholders register of BHL as owner of the shares."

334. Referring to clause 4.1 of the Mortgage of Shares, Mr. O'Neill advised that "[t]he payment by any one shareholder of their obligations does not extinguish that shareholder's obligations under the mortgage. (See attached Share Mortgage of Breccia Limited which is identical to all of the others)."

He then advised that:-

> "[u]pon closing JCS most likely will:
>
> 1. Notify all of the BHL shareholders, the Board Chairman and the Company Secretary of its interest in the share mortgage;
>
> 2. Require, pursuant to Clause 3.1 (e) of the share mortgage, the transfer of all shares in BHL to JCS, and that JCS be entered into the share register of BHL as the owner of such shares, this includes having the Breccia shares reissued and recorded in JCS's name."

335. Finally of note, Mr. O'Neill advised:-

> "Upon the default of any borrower on the loan, JCS may enforce a security pursuant to Article 10 of the share mortgage. In particular, pursuant to the mortgage, JCS may sell all or any part of the shares in BHL to a third party. The proceeds of that sale will pay the outstanding loan debt and the balance, if any, will be distributed to the BHL shareholders. I note that Anglo Irish Bank did undertake in a letter to the Mortgagors dated 28th of March 2006, to apply to proceeds of any sale to the debts of each mortgagor, or, if no debt existed, to pay over the proceeds directly. I am unsure of the continuing validity of this letter and believe that [its] affect may have been extinguished by the loan sale under the IBRC Act, as this letter is not amongst the transferred documents."

336. Counsel for Breccia argued that this advice was correct and meant that JCS, once it purchased the Sheehan/Duffy loans, could

enforce its security and sell 100% of the shares in BHL and that "[t]here was nothing the other shareholders could do about it…even if they had paid off the loans" (first named defendant's Closing Submission, para. 126). Counsel argued that the plaintiffs' involvement in the Talos transaction meant that they were involved in or at least facilitated the attempted purchase of the loans of one shareholder, Dr. Duffy, by another shareholder (Dr. Joseph Sheehan and/or Mr. Flynn through JCS), and that this was a transaction involving one shareholder succeeding to Anglo/IBRC and exercising the rights under the Facility Letters. It was argued that their attempt to purchase these loans and the security for them involved the acquisition of loans and transfer of shares otherwise than in accordance with the mechanism provided for in clauses 3.4 and 8 of the Shareholders' Agreement. Further, it would result in the use of the cross-guarantees and Breccia's Deed of Covenant to force the sale of the entire shareholding of BHL without the consent of the other shareholders (Breccia and Dr. James Sheehan). In these circumstances, they argued that it would be unconscionable for the Court to grant reliefs against the first named defendant in the context of Breccia's acquisition of the Benray debt and security. Indeed, they went further and suggested that on these grounds the Court should refuse to imply a term into the Shareholders' Agreement because it would not be reasonable or equitable to do so, citing the decision of Fennelly J. in *Dakota Packaging v. AHP Manufacturing* – a proposition that I have already rejected. In summary therefore, it was argued that the plaintiffs could not have it both ways. They could not pursue a course of acquisition that they were advised was lawful, and could lead to the sale of all of the shareholding in BHL, and yet in these proceedings ask the Court to condemn comparable transactions undertaken by Breccia.

337. This line of argument is predicated on the correctness of Mr. O'Neill's advice, but of course it could not have taken into account the construction of the Shareholders' Agreement pronounced by this Court, or the implication of a term that invalidates any attempt by one Promoter standing in the shoes of Anglo and attempting to enforce their security over the shares of another Promoter otherwise than in accordance with sub clauses 3.4.3 and 3.4.5 of the Shareholders' Agreement. Once this interpretation is taken, giving as it does precedence to the rights of the Promoter/shareholders under clause 3.4.3, then the force of the argument made on behalf of the first named defendant drops away.

338. Moreover, in rendering his advices, Mr. O'Neill failed to address the possibility that if JCS had acquired Dr. Joseph Sheehan's and Dr. Duffy's loans, and redeemed Benray's loan, and mortgaged their shareholdings in BHL to Talos, in a situation of default it would still be open to any other shareholder to exercise their 'step in' rights under clause 3.4.3, thereby avoiding an enforced sale of 100% of the shareholding in BHL. Thus, hypothetically Breccia could have avoided a forced sale of 100% by stepping in under clause 3.4.3, redeeming the Talos loan, and (if not paid by the shareholders) ensuring that the 56% of BHL shares were sold through the pre-emption provisions of the Shareholders' Agreement. This possibility also undermines the first named defendant's argument that it was acting to protect its own shareholding from a hostile sale in lending to Tullycorbett to redeem Dr. Duffy's loan, and later in buying Benray's loan.

339. Counsel also argued that Mr. O'Neill's advice, to the effect that JCS could enforce its security and sell 100% of the shares in BHL, was accepted by Dr. Joseph Sheehan in his evidence, and that this was the real intention behind the acquisition of the IBRC loans. By this argument the first named defendant was suggesting the Talos transaction was designed and intended to lead directly to a forced sale of the entire shareholding in BHL, and this would have included a forced sale *inter alia* of Breccia's shareholding on the open market. While I accept from Mr. Flynn's evidence that that is something that he would not have objected to, upon the basis that it would have maximised the value of Benray's shareholding, I am far from satisfied that this was the intention behind the Talos transaction. In particular, I am not satisfied that it was in Dr. Joseph Sheehan's mind that the Talos transaction would result in a sale on the open market of the entire shareholding in BHL. I believe this was the very opposite of what he intended, his desire being to refinance and thereby secure his position in the context of the sale by IBRC of his and Dr. Duffy's loans. Dr. Joseph Sheehan in his own evidence, which I accept, characterised the advice from Mr. Dan O'Neill as being the "worst case scenario" (day 10, p. 154).

Circumstances of Receipt of Mr. Dan O'Neill's Advice

340. As to the date and circumstances of the receipt of Mr. O'Neill's advice, the first named defendant argued that it could not have been given on 15th April, 2014, but must have been given prior to the redemption of Dr. Duffy's IBRC loan on 4th April, 2014. The Court was asked to draw this inference from words such as "[a]fter the conclusion of the loan sale transaction…" and "[a]t present we have been informed by KPMG…". It was argued that if the advice did precede the redemption of Dr. Duffy's loan, Mr. Flynn's evidence that Mr. O'Neill's advice was trying to "warn" Mr. Flynn and Dr. Joseph Sheehan of what was most likely to happen if Talos acquired security over BHL shares cannot be the truth. As such, it was argued that the true purpose of JCS as a mechanism to enforce the sale of 100% of the shareholding in BHL became undeniable. They rely on the fact that Mr. Flynn was unable to produce the original email from Mr. O'Neill at hearing as supportive of their contention that the advice preceded 4th April, 2014.

341. There was indeed conflicting evidence from Mr. Flynn as to when Mr. O'Neill's advice originated. The email from Mr. Flynn to the other shareholders and Mr. Goodman is dated 10th May, 2014, and includes Mr. O'Neill's advice as an add-on to that email but without reference to the date 15th April, 2014.

342. Having listened carefully to the evidence on this issue only one fact can be stated with certainty and that is that on 10th May, 2014 Mr. Flynn relayed by email to all of the shareholders the advice of Mr. O'Neill as it appears in that email of 10th May, 2014. In view of the deficit of concrete evidence, it is difficult for the Court to make any findings, as a matter of probability, as to when the advice of Mr. O'Neill was first given. I do not accept that the wording of the advice is such that the Court can or should draw an inference that it predated the redemption of Dr. Duffy's loans on 4th April, 2014. This is because, in the aftermath of the 4th of April redemption disputes were ongoing as between Dr. Joseph Sheehan/the plaintiffs and IBRC (this is evident from correspondence between Mr. O'Neill and IBRC's solicitors, and between Dr. Joseph Sheehan and Mr. Flynn/Benray on the one side and Talos on the other). In circumstances in which Dr. Joseph Sheehan and Mr. Flynn may still have been hoping to proceed with a revised Talos transaction, it is plausible that Mr. Flynn might have sought and Mr. O'Neill might have given the advice in his letter post 4th April, 2014.

343. I also tend to the view that Mr. Flynn's naivety in forwarding Mr. O'Neill's advice to all of the other shareholders on 10th May, 2014 was not consistent with that advice having predated the redemption of Dr. Duffy's loan.

344. Accordingly, while Mr. Flynn did give conflicting evidence on this issue it is not a basis upon which the Court can draw the inferences that the first named defendant invites, or form a basis for the contention that he did not come to Court with clean hands. I also reject the suggestion that failure to exhibit this letter at the ex parte stage showed lack of candour.

The Use of 'Knowingly Stolen Documents'

345. In eight separate paragraphs of his Witness Statement, Mr. Flynn refers to details of various companies, meetings, transfers and other matters which of their nature appear to be private to sister companies of Breccia. The first named defendant submitted that these details, and the documents referred to, were confidential, and were not matters or documents to which Mr. Flynn had any

lawful entitlement. They also asserted that they were irrelevant to the issues in the case, and inadmissible upon various grounds. It was submitted that the use of the documents undermined the plaintiffs' *bona fides* and credibility.

346. Although these matters were referred to in the Witness Statement, no reference whatsoever was made to these documents in the direct evidence given by Mr. Flynn, or Mr. James Flynn. Indeed although Mr. Flynn acknowledged his Witness Statement as his document, he was not asked to adopt it has his evidence as would normally happen. Nor were any material submissions made on the plaintiffs' behalf based on any of these documents. They were in fact only raised by the first named defendant in cross-examination. Mr. Flynn was asked "how did you get those documents?" He answered:-

> "In relation to the documents, they were dropped in, in a brown envelope, to the letterbox in Cooldrinagh [his Foxrock home] sometime in I think it was maybe around Christmas time and I got them in…the mail is sent to me [in the USA] once a week and when I received it, they were in the mail…" (day 7, p. 49).

347. Mr. Flynn colourfully added "…I'd say there is a God, and that's what I said when I got it…I have strong ties to the Ardee area, I was born there, and somebody put an envelope, and I don't know who, in my letterbox". Later in his evidence he said that the envelope containing the documents was sent intact to him in the USA and that just "John Flynn" was written on the envelope but that he didn't keep it. When it was suggested to him that they were "clearly stolen documents", he simply responded "…somebody sent me these documents. I openly admit I welcomely accepted them".

348. There was no evidence put before the Court to back up the suggestion that these documents, or copied documents, were stolen, or even that they were confidential. Moreover, although certain documents were referred to in Mr. Flynn's Witness Statement, these documents were not actually put in evidence. It is also notable that no application was ever made to the Commercial Court, in advance of the hearing before me, to strike out these parts of the Witness Statement on the basis that they were confidential, irrelevant or inadmissible. I accept as plausible evidence given by Mr. Flynn as to the circumstances in which he came to receive these documents – sent to him anonymously by post. I do not accept the submission that Mr. Flynn made an improper use of the documents, and I have been careful to disregard those paragraphs of the Witness Statement of Mr. Flynn in which references are made to details or documents sourced in that letter, and to disregard the documents (which I have not read). I also take into account the general context of Mr. Flynn's evidence in reaching the conclusion that the mere mention of these documents in the Witness Statement does not disentitle the plaintiffs to relief.

Unsupported Criticism of the Receiver

349. It was submitted that Mr. Flynn was vehement in his criticism of the Receiver, in a manner that was so unjustified that he was forced to abandon his claim for conspiracy by the Receiver and Breccia. It was argued that this claim had no basis in evidence because it emerged from the cross-examination of Mr. Flynn by Mr. Ferriter S.C. on behalf of the Receiver that Mr. Flynn was not in a position to demonstrate any dishonesty on the part of the Receiver. It was further argued that Mr. Flynn wrongly pursued a claim that the Receiver was attempting to sell Benray's shares in BHL at an undervalue when he/Benray did not adduce and was never in a position to adduce any expert evidence to suggest that the valuations obtained by the Receiver of Benray's shareholding in BHL, and of the proposed sale price to Yalart (which fell between the two valuations obtained by the Receiver) were under market value. It was pointed out that Mr. James Flynn in his evidence admitted that he had not even read the Receiver's valuation reports. Reliance was also placed upon the fact that after the plaintiffs' counsel opened the case an application was made on behalf of the Receiver to dismiss the conspiracy action against him on the basis that there was no prima facie evidence. This was vigorously opposed on the plaintiffs' behalf and that after a full day of legal argument the case was permitted to proceed.

350. It is certainly the case that Mr. Flynn used florid language in characterising the putative sale by the Receiver to Yalart as "an orchestrated sham of a sale", in suggesting that the Receiver was "dishonestly dancing to [Breccias] tune", and that the Receiver's actions were "outrageous" and in his "opinion…unacceptable behaviour morally." It is also the case that Mr. James Flynn accepted that he could not point to evidence of dishonesty. This was acknowledged to the Court by the plaintiffs on day 11 of the hearing when the allegation of actionable conspiracy between the Receiver and Breccia was withdrawn.

351. I found Mr. John Flynn to be educated, intelligent and experienced in business, and no stranger to the courts. He ought to have appreciated the importance that courts attach to the requirement that a party adduce cogent evidence when allegations are made of dishonesty, and in particular allegations reflecting on the honesty of a professional person in the carrying out of their professional obligations. Unfortunately the loose and thoughtless manner in which at times he gave his evidence in relation to this aspect of the case did not reflect well on his self-control. To some extent, Mr. Flynn's overzealous evidence was ameliorated by his counsel's statement to the Court, upon withdrawal of the conspiracy claim, that "they accept there is no evidence of dishonesty or mala fides on the part of the Receiver". Indeed, I believe that this was not a claim pursued with any great enthusiasm by Mr. Flynn's legal team, and I believe Mr. Flynn must accept primary responsibility for pursuing this claim to the extent that he/Benray did. On the other hand, unjustified though these claims were, I except that Mr. Flynn believed that there was a conspiracy between Breccia and the Receiver; while he overstated his case, the inability to prove any dishonesty was quickly exposed by Mr. Ferriter S.C.'s cross-examination. While Mr. Flynn deserves to be rebuked, and this is an aspect of the case that could well be revisited when the Court comes to consider questions of cost, I do not regard it as being of such significance as to warrant disentitling the plaintiffs to reliefs to which they are *prima facie* entitled.

The Conduct of Breccia

352. In considering this defence it would be wrong to assess the submission that the plaintiffs do not come to equity with clean hands in isolation from conduct of the first named defendant that is central to the complaints made by the plaintiffs. This is particularly so where the plaintiffs' witnesses were extensively cross-examined, and where the thrust of much of that cross-examination was to establish a lack of 'clean hands', yet the first named defendant did not go into evidence and its witnesses were not exposed to cross-examination. In such circumstances, the Court should be slow to exercise its discretion to refuse relief on equitable grounds without looking at the wider picture and balancing the 'equities'.

353. It is appropriate to examine conduct on the part of Breccia/Mr. Goodman in several key areas: (i) in using the threat of the 'veto' to prevent Benray and other shareholders refinancing their Anglo borrowings; (ii) in acquiring Benray's loan, demanding payment and within days appointing the Receiver; (iii) in attempting to sell Benray's shares through the Receiver to Yalart, a company owned and controlled by Mr. Goodman; and (iv) in funding Tullycorbett to redeem Dr. Duffy's loan with IBRC and thereby frustrating the Talos transaction and, the plaintiffs argued, pursuing an ambition on the part of Breccia to acquire a controlling interest in BHL.

(i) The 'Veto'

354. With regard to the so called 'veto', it has now been established in the Construction Summons proceedings that no shareholder could use the veto to prevent the realisation of security over shares held by a charged holder. However, there was a belief as to its existence that was common to all shareholders. It was first raised by AIB when they were approached in 2008 by Mr. Flynn and Dr. Joseph Sheehan who were exploring the refinancing of their Anglo loans.

355. It was used on only one occasion – by Mr. Flynn/Benray in 2013 to prevent Dr. Duffy refinancing his loans. I am satisfied that, while it was not actually used on any occasion by Breccia/Mr. Goodman, the possibility that they would use it was raised and had the effect of preventing the plaintiffs and Dr. Sheehan refinancing their loans with funding that they were able to obtain from financially sound US, UK or European based private equity funds interested in investing in healthcare projects.

356. The plaintiffs' evidence, corroborated by the BHL Board minutes, show that on the part of the borrowing Promoters other than Breccia, which redeemed its Anglo loan early in 2008, there was increasing disquiet over the perceived 'veto' as successive attempts to refinance failed and the maturity date of the Anglo loans (30th December, 2010) came and went. A Senior Counsel's Opinion put before the Board on 29th July, 2010 doubted the existence of the 'veto', but Breccia's representative on the Board, Mr. Declan Sheeran, indicated that Breccia had separate legal advice that it did exist – although Breccia declined to disclose this advice. Discussion by the Board of BHL continued, assisted by a third party NCB (whose neutrality as an intervener was questioned by the plaintiffs), over a period of some two years, and during this time different solutions and redrafts of the Shareholders' Agreement were considered. This process failed because Breccia/Mr. Goodman were not prepared to amend the Shareholders' Agreement to remove the 'veto'. They were open to alteration, but Mr. Flynn/Benray were resistant to any change short of removal.

357. When using the veto in 2013 the reason given by Mr. Flynn at the time was his belief that the sale of shares desired by Dr. Duffy was below the true value of the shares and would depress the value of Benray's shareholding. He also clearly believed that what he perceived to be the full value of Benray's shareholding could only be achieved on a sale of 100% of the shares in BHL.

358. In light of the foregoing, the evidence on this issue goes both ways and when balanced does not give either party any special equity.

(ii) The Purchase of the Benray Loan and Security

359. I have found this purchase and acquisition by Breccia was valid and lawful. However, as I have also found, it was undertaken by Breccia/Mr. Goodman in a secretive manner and without any admission by Mr. Goodman that he was the buyer despite the clear opportunity to admit this in the course of the telephone conversation in May, 2014 with Mr. Flynn.

360. Further, while it was suggested that Breccia's motive was to protect its own shareholding, on the basis that otherwise someone else could acquire the loan and then seek to enforce a sale of 100% of the BHL shares under the facility, this suggestion has no merit. If some third party bank or equity fund had purchased the Benray loan and security, Breccia could have simply 'stepped in' under clause 3.4.3 (using the money which it in fact used to buy the Benray loan), or lent money to Benray in the same way that it lent to Tullycorbett. In this regard I find that the conduct of Breccia/Mr. Goodman neither transparent nor fair.

(iii) 'Calling in' the Loan and Appointing the Receiver

361. The facts relating to the calling in of the loans, the appointment of the Receiver, the advertisement for expressions of interest, and receipt of same by the Receiver from Yalart are detailed above. One point to note is that while Breccia paid €9,104,616.41 to NALM on 23rd May, 2014, being the par value of the loans, Breccia only demanded payment of €8,744,583 (which is the amount counterclaimed by Breccia in these proceedings) when it called in the loan on 8th August, 2014. No explanation for this difference was proffered to the Court by Breccia. Also of note is that the expression of interest from Yalart on 3rd September, 2014 was not disclosed to the plaintiffs, nor were the terms of the offer Yalart conveyed to the Receiver on 12th September, 2014.

362. None of these facts are consistent with the actions of a shareholder just seeking to protect their own shareholding from an enforced sale of 100% of the shareholding in BHL, as was suggested to the Court on behalf of Breccia. Breccia could simply have achieved this by 'stepping in' and redeeming Benray's loan with NALM, as provided for in clause 3 of the Shareholders' Agreement, and then demanded repayment of the redemption figure from Benray. But this had two disadvantages: firstly a delay of at least six months, and secondly the pre-emption provisions of clause 8 would have come into play. Moreover, the dealings between Yalart and the Receiver did not become known to the plaintiffs until after proceedings were initiated. From Breccia's perspective, the sale through a Receiver was always going to be confidential up to the point of registration of the transfer of shares, whereas a Deemed Transfer Notice sale under clause 3.4.5/clause 8 of the Shareholders' Agreement would have been transparent.

363. The appropriate inference from the known facts is that the course chosen by Breccia, and in particular the involvement of Yalart, was aimed to achieve a quick takeover of the Benray shareholding in BHL without going through the pre-emption process. The fact that Breccia was prepared to pay €9,104,616.41 to buy Benray's loan, that Mr. Goodman failed to admit to Mr. Flynn that Breccia had acquired it, and that Breccia only demanded €8,744,583, support this inference. Why else would Breccia/Mr. Goodman fail to disclose the purchase, or be willing to spend the greater sum and demand the lesser?

364. It seems clear that had it not been for the injunction, a sale to Yalart would have proceeded. The further disquieting feature of such a sale is that it would have resulted in a deficit of some €2 million (excluding the Receiver's costs of sale) between the sale price to Yalart and the amount demanded from Benray and Mr. Flynn (or some €2.35 million on the cost to Breccia of purchasing the loan), and the logic of Breccia's position is that it would have been entitled to pursue Benray and Mr. Flynn as guarantor for this deficit.

365. I find that this approach by Breccia was aggressive, lacking in transparency, lacking in any regard for the consequences for Mr. Flynn as Benray's full recourse guarantor, and deliberately designed to avoid the pre-emption provisions of the Shareholders' Agreement. It points to the true motivation for the purchase of Benray's loan being the desire to obtain ownership or control of Benray's shareholding in BHL.

(iv) Tullycorbett Funding, the Effect on the Talos Transaction and the Ambition to Acquire a Controlling Interest in BHL

366. It is admitted that Breccia lent money to Tullycorbett. It is clear that this was used to discharge the indebtedness of Dr. Duffy to IBRC on 4th April, 2014. I am fully satisfied on the evidence of Mr. Flynn and Dr. Joseph Sheehan that this was planned and executed by Breccia in a secretive move, and without their knowledge or that of their solicitor Mr. O'Neill. It is also obvious that Breccia/its lawyers must in advance have been in communication with Dr. Duffy or his lawyers or agents, as Dr. Duffy controlled Tullycorbett. I am also satified that Breccia must have known that Dr. Joseph Sheehan was in the process of buying/refinancing his and Dr. Duffy's loan with IBRC. I am also satisfied that Breccia must have been aware that Mr. Flynn/Benray had some involvement

with Dr. Joseph Sheehan in his bid to IBRC under the Talos transaction.

367. It is simply not credible to suggest Breccia was unaware that the purpose of its loan to Tullycorbett was the immediate redemption of Dr. Duffy's loan with IBRC, and the attempt to disavow this knowledge in the letter of 2nd December, 2014, from Matheson solicitors for Breccia to Downes, solicitors for the plaintiffs, is disingenuous. Breccia's knowledge is plain, or can be inferred from, that letter and the two letters of 3rd April, 2014 to which it refers – one from Matheson and one from Breccia both addressed to the Special Liquidators of IBRC (albeit that these two letters were not received by the Special Liquidators, they disclose a degree of knowledge that could not be denied), and from the content of the Tullycorbett Agreement itself. It can also be inferred from the large amount of the loan.

368. I am further satisfied from all the surrounding circumstances, and in particular the evidence of Dr. Joseph Sheehan, that Breccia made this loan to Tullycorbett with the intention of preventing Dr. Joseph Sheehan proceeding with the refinancing of his and Dr. Duffy's IBRC loans, and thereby preventing any third party lender thereby obtaining security over their shareholdings.

369. But these and other events show that Breccia's secretive move was part of a wider ambition, namely to gain a controlling interest in BHL. Firstly, Breccia was the unsuccessful underbidder for Dr. Joseph Sheehan and Dr. Duffy's loans with IBRC. Secondly, Breccia submitted an offer to NAMA to purchase the Benray loan on 1st April, 2014. Breccia pursued this offer, later acquiring Benray's loan and security on 23rd Mary, 2014. It then attempted to call in the loan and buy Benray's shareholding in BHL through its sister company Yalart.

370. Thirdly, the terms of the Tullycorbett Agreement as reduced to writing on 5th October, 2014 are on their face designed to result in Breccia becoming sole shareholder in Tullycorbett, thus controlling its 8% shareholding in BHL if that loan is not repaid by the end of 2016.

Fourthly, later in 2014 Breccia successfully bid to acquire Dr. Joseph Sheehan's loan and security (including security over his shares in BHL) from IBRC when it was remarketed by the Special Liquidators. That is the subject of further litigation, but the very fact that Breccia made such a bid is consistent with a desire ultimately to obtain a controlling interest in BHL.

Conclusion on the Equitable Discretion Defence

371. While Mr. Flynn's conduct and in particular the manner in which he gave evidence can be criticised, it is not such that the plaintiffs should be deprived of relief. Conversely, when such evidence as to the first named defendant's conduct as is before the Court, or as may be inferred, is considered, the first named defendant's actions disclose ambitions to control BHL, demonstrate a conspicuous lack of transparency, and a total lack of regard for the consequences of those actions for the plaintiffs (and Dr. Joseph Sheehan). Breccia's actions are entirely at odds with Mr.Goodman's statement made before the conclusion of the Shareholders Agreement and recorded in the minutes of the meeting in Mr.Kevin Warren's office on 1st March, 2005 that "…dissension between the shareholders on proprietorial matters could not arise." Breccia' conduct is such that it may be questioned whether it has any right to rely on the suggested inequitable conduct of the plaintiffs. In balancing the evidence and submissions on both sides of this argument over 'the equities' I conclude that the balance of justice clearly favours the granting of relief to the plaintiffs.

(4) The Legal Effect of the Tullycorbett Agreement

372. The fact of the Tullycorbett Agreement and its relevance is raised in these proceedings by the plaintiffs firstly in the context of para. 51 of the amended Statement of Claim alleging an equitable transfer of Tullycorbett's shares in BHL that was concealed from the other shareholders in breach of the Shareholders' Agreement.

The second context is the Breccia/Dr. Duffy/Tullycorbett conspiracy claim in which it is alleged that the Tullycorbett Agreement was unlawful and intended to cause injury to the plaintiffs.

373. But a preliminary issue arises as to whether this Court should make any determination as to the ultimate validity or effect of the Tullycorbett Agreement (in whole or in part) arising from the following matters. First, the Memorandum of Agreement made on 5th October, 2014 between Breccia, Tullycorbett and Xroon recites that "The Parties hereto are desirous of recording the financial arrangements agreed between them on the 4th April, 2014". Only one of those parties is before this Court. Secondly, notwithstanding that the evidence showed that Tullycorbett appeared to be the owner of some 13% of the shareholding in BHL as of March, 2014, it recites that "Tullycorbett confirms that it holds 8% of the issued shares in BHL". No evidence was adduced to explain this discrepancy. Thirdly, notwithstanding that the evidence showed that Dr. Duffy had previously owned 88% of the shares in Tullycorbett, Xroon is recited as being "the beneficial owner of the entire issued share capital of Tullycorbett", and the Memorandum is signed on behalf of Xroon by Dr. Duffy as Director/Company Secretary and another director. There was no evidence before the Court as to when or how these apparent changes took place – in particular whether they occurred before or after 4th April, 2014 – or as to who owned the shares in Xroon, or even when that company was incorporated. Fourthly, on its face the Memorandum does not record a transfer of Tullycorbett's 8% holding in BHL to Breccia – rather on its face it shows that shareholding remained in the legal ownership of Tullycorbett, and if Tullycorbett repays its debt to Breccia within the terms of the Tullycorbett Agreement before 31st December, 2016, then Breccia can have no avenue of recourse to that shareholding. While an argument might be made that the Tullycorbett Agreement is an equitable transfer of shares, and is of itself a breach of the Shareholders' Agreement, cogent arguments to the contrary could be canvassed

374. To adjudicate this question without fuller argument on whether the Agreement could on any interpretation constitute a transfer of an equitable interest in Tullycorbett's shareholding in BHL would be quite wrong in the view of the Court. This is particularly so when Dr. Duffy, Tullycorbett and Xroon are not parties to these proceedings, and Dr. Duffy was not called to give any evidence.

375. Accordingly, aside from my earlier observations which arise primarily from the express terms of the Tullycorbett Agreement and the explanation given in the letter from Matheson solicitors of 2nd December, 2014, I am not satisfied that I can or should make any final or binding determinations in relation to the legal effect and validity of the Tullycorbett Agreement, or the related question as to whether it was a breach of the Shareholders' Agreement.

(5) Damages for Breach of Contract?

376. Damages are claimed by the plaintiffs for breach of contract. The question arises as to whether they can show any loss or damage flowing from any breach of the Shareholders' Agreement. In reality, this is a case in which the timely granting of an interim injunction, extended by consent to the present time, has prevented Breccia completing the apprehended breach of contract, namely the sale of the Benray shareholding in BHL outside of the terms of the Shareholders' Agreement. The plaintiffs can now be protected

from any loss by a continuation of this injunction, and by the granting of appropriate declarations.

377. As no loss or damage has been caused, or at any rate none has been proven, the plaintiffs have shown no basis for an entitlement to damages, whether special or general.

(6)(i) Are the Plaintiffs Entitled to Pursue the Claim of Conspiracy between Breccia and Dr. Duffy/Tullycorbett – when Dr. Duffy/Tullycorbett are not Parties to these Proceedings?

The Tort of Conspiracy

378. There was no disagreement as to the ingredients of the tort of conspiracy, and I take these as summarised by O'Neill J. in *Iarnród Éireann v. Holbrooke* [2000] IEHC 47 at para. 18:-

> "1. The agreement or combination of two or more people, the primary or predominant object of which was to injure another is actionable even though the act done to the party injured would be lawful if done by an individual.
>
> 2. An agreement or combination of two or more persons to carry out a purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionable against the individual members of the combination, as individuals".

379. Thus there must be an "agreement" or "combination" between the conspirators, and there must be an intention to injure the plaintiff. If there is a mixed motive, the intention to injure must be the primary or predominant purpose. The conspirators must cause a loss to the plaintiff which must be reasonably foreseeable. Moreover, the intention to injure will not be found where the parties were acting in pursuit of a "legitimate interest", and this has been held to include advancing or defending one's own trade or business interest: *Sorrell v. Smith* [1925] AC 700 at p. 712.

Dr. Duffy/Tullycorbett not Parties to the Proceedings

380. The first named defendant raised a preliminary question as to whether the Court could embark upon an enquiry into the state of mind of, and make serious adverse findings in respect of, the legality of the conduct of Dr. Duffy when he/Tullycorbett were not parties to the proceedings and no party called Dr. Duffy as a witness.

381. The allegation of conspiracy levelled against Breccia in relation to Dr. Duffy's loan necessarily implies that Dr. Duffy was a party to the same conspiracy, and an allegation that Dr. Duffy knowingly agreed with Breccia to do an illegal act, or do a legal act, but with the intention of causing harm to the plaintiffs. This would involve an adjudication that Dr. Duffy or a company controlled by him was acting unlawfully in repaying his loans/entering into the Tullycorbett Agreement; that he was actually aware of this; that his predominant purpose was to cause injury to the plaintiffs; and that he did not have a legitimate interest in the repayment of his loans/entering into the Tullycorbett Agreement.

382. Counsel argued that the Court should not be asked to investigate or make any such findings in circumstances were Dr. Duffy is not a party and has no opportunity to respond. It was pointed out that there was no evidence that the plaintiffs had threatened or taken other legal proceedings against Dr. Duffy. While they could have joined him as a defendant to the action they chose not to do so and they also did not call him to give evidence. It was therefore submitted that the basic rules of natural justice and fair procedures required the Court to decline to embark on the inquiry as to conspiracy.

383. It was argued that support was given to this proposition by analogy with the decision of Gilligan J. in *McCann & Dillon v. Hade* [2013] IEHC 652. In that case borrowers alleged that their accountant had committed a tort of disclosing confidential information (regarding, *inter alia*, allegations of fraudulent accounting) to their bank without their authorisation. The plaintiffs argued that the bank was complicit in the tort, and was therefore debarred from enforcing its security. Although there was documentary evidence before the court evidencing a *prima facie* unauthorised disclosure, the accountant had not been joined as a party or called as a witness by the plaintiff. Because of this, Gilligan J. determined he was unable to reach a conclusion on the allegations against the bank (which necessarily entailed allegations against the non-party accountant). What is more, the judge ordered that the accountant's name be anatomised. Gilligan J. reasoned (at para. 51):-

> "The court is unable to conclude, even if the jurisprudence in relation to the breach of confidence were to apply in such a case as this, that the accountant acted in breach of this duty. The defendant's agent was not a party to this case and was not a witness and as was stated above the court does not have a clear view of what would be normal practice for such a professional attempting to negotiate with a Bank and maintain good relations with a Bank on behalf of his client. The court does not know what was in the mind of the agent in question. The expert evidence of Mr. Frank Laverty, a forensic accountant, did not specifically address this issue and therefore did not give the court a sufficiently clear understanding of the position of such an agent in order to conclude that his actions were in any way improper. Such a conclusion would also be inappropriate as this Court should not in my view make a finding against the accountant as he is not a party to these proceedings and the court has not had the opportunity of hearing his evidence or observing and considering his demeanour."

384. Counsel for the plaintiffs argued that this case should be distinguished because that case concerned an accountant who had not been joined in proceedings where breaches of his professional duty of care were alleged. Mr. O'Donnell S.C. placed some reliance on what he described as a "somewhat exotic decision" of the Chief Justice of Arizona *Rowland v. Union Hills Country Club* 157 Ariz. 301 (1988); 757 P.2d 105 for the statement that "not all members of a conspiracy need be named as defendants for one member to be found liable".

385. At the level of principle there is no reason why a plaintiff must sue all the alleged conspirators in a conspiracy action. There may be a variety of reasons why a plaintiff might choose to sue only one or some of the conspirators. For example there may be no realistic possibility of satisfying a judgment against one or more of the conspirators, or one of the conspirators might be prepared to give vital evidence on behalf of the plaintiff. A further possibility might be that a plaintiff chooses not to sue a particular conspirator on compassionate grounds. No reasons were given by the plaintiff for not naming Dr. Duffy or Tullycorbett as defendants, but it may be speculated that as Dr. Duffy is elderly this was a consideration. There can, I believe, be no hard and fast rule – each case must be decided on its own facts. Nonetheless, I find the decision in *McCann* to be persuasive. There are certain comparisons with the present proceedings. Like the accountant not joined in those proceedings, Dr. Duffy is also a professional. More significantly, Gilligan J. was concerned that without the accountant as a party or witness he would be unable to make sound findings as to what was in his mind at the relevant time. In this instance what was in the mind of Dr. Duffy as of 4th April, 2014 is critical to these issues.

386. The plaintiffs invite the Court to consider all the circumstances and documentation surrounding the redemption of Dr. Duffy's loans on that date and to draw inferences as to his state of mind. I am reluctant to do that for a number of reasons. First, issues arise in relation to the true effect and validity of the Tullycorbett Agreement which this Court has declined to resolve in the absence of interested parties and when faced with a deficit in evidence. Secondly, Dr. Duffy/Tullycorbett may have had other legitimate interests which they were seeking to protect, and it is hard to see how this Court can make findings as to Dr. Duffy's state of mind in his absence as a party or a witness. Thirdly, Dr. Duffy is said to be in the order of 80 years of age and the Court has no information before it as to his capacity as of 4th April, 2014 to fully understand complex transactions and take reasoned decisions with a full appreciation of the possible consequences.

387. I therefore determine that the plaintiffs are not entitled to pursue their claim for conspiracy. However, lest I am wrong in this decision I propose to address some of the substantive aspects of the conspiracy claim, because there are compelling reasons why this claim must fail.

(6)(ii) Was there an Actionable Conspiracy by Breccia and Dr. Duffy/Tullycorbett?

388. First, it was open to Dr. Duffy to redeem his loan with IBRC at any time. The mere fact that he discharged his indebtedness, using monies provided by Breccia and channelled through Tullycorbett, was not necessarily an illegal act.

389. Secondly, as already indicated there are issues as to the legal validity and effect of the Tullycorbett Agreement (or part of that Agreement). No evidence given in these proceedings, or inferences that might be drawn from the circumstances of which there is evidence, indicate whether or not Dr. Duffy himself ever considered the validity or otherwise of the Tullycorbett Agreement.

390. Thirdly, the Court is unaware as to whether Dr. Duffy had the benefit of legal advice on 4th April, 2014 (or indeed 5th October, 2014 when the Agreement was reduced to writing). Counsel for the first named defendant drew my attention to the case of *Meretz Investments NV v. ACP Ltd*. [2007] EWCA Civ 1303 as authority for the proposition that an action will not constitute unlawful means even where the party had an honest, but mistaken, belief that it was legally entitled to take that action. I did not understand this authority to be disputed. Accordingly, even if Dr. Duffy/Tullycorbett held an honest but mistaken belief that Tullycorbett was legally entitled to enter into the Tullycorbett Agreement, the mere fact that it may lack validity cannot be relied upon by the plaintiffs.

391. Fourthly, the plaintiffs have been unable by their evidence to persuade the Court that Dr. Duffy was not acting in pursuit of a "legitimate interest". I am satisfied from the evidence that Dr. Duffy knew that Dr. Joseph Sheehan was orchestrating the acquisition of both his own loans and those of Dr. Duffy from IBRC under the Talos transaction, and that Dr. Duffy knew that Mr. Flynn/Benray were also involved in that refinancing exercise. Further, I am satisfied that Dr. Duffy was up to a point in time close to 4th April, 2014 cooperating with Dr. Joseph Sheehan and Mr. Flynn. Clearly, Dr. Duffy had a legitimate interest in his IBRC loan being discharged – whether under the Talos transaction or by a loan from Breccia. However, Dr. Duffy may have considered that, when comparing what he knew of the Talos transaction with what was on offer from Mr. Goodman/Breccia, there was less risk in the Breccia offer and more prospect of preserving his family shareholding or part of that shareholding in BHL.

392. In this regard, the Term Sheet between Talos and Dr. Joseph Sheehan and Mr. Flynn, signed by Mr. Flynn on 2nd March, 2014, discloses that the borrowing from Talos was to be up to €45 million for a term of four and half years with interest only repayable at 15% per annum. While the borrowers were Dr. Joseph Sheehan and Mr. Flynn, the security included the entire shareholding of Dr. Duffy as well as that of Benray and Dr. Joseph Sheehan. The Talos transaction might have appeared unfavourable when set beside Breccia's offer of funding. There was no evidence put before the Court, and no evidence from which it could draw inferences, as to Dr. Duffy's thinking or state of mind when Tullycorbett accepted the loan from Breccia.

393. The plaintiffs are therefore unable to discharge the onus of proof on the issue whether Dr. Duffy was or was not pursuing a legitimate interest, and as to whether he had the requisite intention to injure the plaintiffs. Moreover no evidence was adduced or could be inferred that would indicate why Dr. Duffy would want to injure the plaintiffs, or why this might be his predominant intention if he entertained more than one objective.

394. The plaintiffs sought to circumvent this by arguing that the onus of proof can be reversed where a matter is not within the means or knowledge of one party and is peculiarly within the knowledge of the opposing party. They relied upon this principle as considered by the Supreme Court in *Hanrahan & Ors v. Merck Sharpe & Dohme* [1988] ILRM 629, where Henchy J. stated that:-

> "[t]he ordinary rule is that a person who alleges a particular tort must, in order to succeed, prove (save where there are admissions) all the necessary ingredients of that tort and it is not for the defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of the tort lies or is deemed to lie, pre-eminently within the defendant's knowledge, in which case the onus of proof as to that matter passes to the defendant. Thus, in the tort of negligence, where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant, the rule of *res ipsa loquitur* will allow the act relied on to be evidence of negligence in the absence of proof by the defendant that it occurred without want of due care on his part. The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof."

395. Counsel also referred to the more recent decision of the Supreme Court in *Rothwell v. MIBI* [2003] 1 IR 268 where at pp. 275-276, Hardiman J. made the following remarks:-

> "It appears to me that the judgment in *Hanrahan v. Merck Sharp & Dohme*…requires not merely that a matter in respect of which the onus is to shift is within the exclusive knowledge of the defendant, but also that it is "peculiarly within the range of the defendant's capacity of proof"."

396. This principle might have assisted the plaintiffs in showing the *first named defendant's* state of knowledge and intentions on 4th April, 2014, but I have grave doubts that it can assist in showing Dr. Duffy's state of mind for two reasons. He is not a party – if he was, the onus of proof might shift to him to disprove any intention to injure. Also, the state of mind and intentions of Dr. Duffy on that date are not facts that could be said to fall within the range of Breccia's capacity to prove, and are certainly not facts exclusively within Breccia's knowledge.

397. Fifthly, it is relevant to consider in this context the circumstances in which adverse inferences may be drawn from the absence of any evidence being tendered on behalf of the first named defendant at the trial of the action, despite having named witnesses whose witness statements were delivered in advance of trial. It was accepted that the authority on this point is *Wisniewski v. Central*

Manchester Health Authority [1988] Lloyd's Rep. Med. 223 which was considered and approved by Laffoy J. in *Fyffes v. DCC* [2009] 2 IR 417, at p. 508. The *Wisniewski* principles as enunciated by Brooks L.J. were summarised by Stephen Dowling in *The Commercial Court* (2nd edn., 2012) at para. 12-96 in the following terms:-

> "(a) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (b) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (c) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (d) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation giving, even if not wholly satisfactory, the potentially detrimental effect of the absence or silence may be reduced or nullified."

398. In the case of conspiracy such as the present the onus is on the plaintiff to show the intention of both/all of the conspirators to injure the plaintiffs. While inferences adverse to the first named defendant may be drawn from the fact that no witnesses were called, it is hard to see how any adverse inference could be drawn from this to demonstrate any intention on the part of Dr. Duffy to injure the plaintiffs. As O'Donnell J. stated in *Whelan & Ors v. Allied Irish Banks Plc. & Ors* [2014] IESC 3, at para. 91:-

> "The drawing of an inference in this context, as indeed in any other, is an exercise in logic: when one party asserts a given set of affairs, which the identified witnesses available to the other party could be expected to rebut if untrue, then, if the second party does not call those witnesses to give evidence, the court may draw the inference in support of the case made by the first party, that those witnesses were not called to give such evidence because they would not in fact rebut the case made by the first party. Each case therefore, involves a consideration of the *specific* inference which the court is invited to draw."

399. If, as I find to be the case, there is no *prima facie* case shown on the plaintiffs' evidence against Dr. Duffy as to intention to injure the plaintiffs, then no adverse inference can be drawn by the first named defendant's failure to name him as a witness, or call him as a witness in these proceedings.

400. Further, the circumstances in which the onus of proof may be reversed, and then adverse inferences drawn, do not seem to me to arise in a case such as this where the plaintiffs could have but chose not to name Dr. Duffy as a defendant. Had they done so they might have had the benefit of a witness statement, and if he was called to give evidence they would have had an opportunity to cross examine him. If he was not called, they would have been in a position to invite the Court to draw appropriate adverse inferences.

401. Sixthly, while the plaintiffs plead a claim for damages for conspiracy, they have failed to particularise any losses and this lacuna was not made good in legal submissions. Judgment was entered for Talos against Dr. Joseph Sheehan and Mr. Flynn, as guarantors of JCS, for €2.4 million as a result of the judgment of Ryan J. on 23rd January, 2015. Nowhere is this pleaded as a loss arising from the alleged unlawful conspiracy, and when pressed in argument on this issue, Counsel was unable to identify any actual loss.

402. Seventhly, there was no evidence before the Court, and no evidence from which inferences could be drawn, that either the first named defendant or Dr. Duffy were, as of 4th April, 2014, actually aware that the first named plaintiff had personally guaranteed to Talos the deposit paid by JCS to IBRC for redeeming the loans. While it may be argued that Breccia, and particularly Mr. Goodman with the depth of his business experience, and their ready access to advisors including experienced commercial solicitors, ought reasonably to have foreseen that those lending to Dr. Joseph Sheehan and Mr. Flynn/Benray would require personal guarantees, there was no evidence before the Court to suggest that this could reasonably have been foreseen by Dr. Duffy personally, or Tullycorbett.

403. The first named defendant further suggested that there was no evidence that the redemption of Dr. Duffy's loans was a legal cause of the Talos judgment against Mr. Flynn. They rely on part of that judgment at para. 56 in which Ryan J. found that the:-

> "second defendant [Mr. John Flynn] knew that Dr. Duffy had bought out his own loans from IBRC and was not going to be involved. When that happened, the agreed program of loan acquisition and extinguishment could not proceed… Notwithstanding the exit of Dr. Duffy from the scene on the 4th of April, 2014 JCS went ahead with the drawdown of funds on the 7th of April, 2014 even though the sale agreement for which it was the deposit could not be completed."

404. With regard to this passage, I am conscious that that case was heard on affidavit, and that there was no cross-examination of deponents on their affidavits. Moreover, since the affidavits were sworn in that case, and since it was argued before Ryan J., further information/documentation has come into the possession of the plaintiffs and Dr. Joseph Sheehan as a result of the discovery and exchange of documentation in this case. Also, the oral evidence of Dr. Joseph Sheehan before this Court raised questions as to the extent of his knowledge of the redemption as of 4th April, 2014, and over the ensuing days. Dr. Joseph Sheehan also has his own proceedings pending against Breccia in which the factual and legal background and cause for the Talos judgment may fall to be further litigated. I also note that that case is also under appeal. For these reasons, this particular submission on behalf of the first named defendants is not one that influences my decision.

(6)(iii) If so, what Damages (if any) have the Plaintiffs Suffered?

405. This question does not now arise.

(7) Did the Acts or Omissions of Breccia have the Effect of Triggering a Deemed Transfer Notice under the Shareholders' Agreement, and if so, is such Notice Revocable?

406. On the final day of the hearing during the plaintiffs' reply to the first named defendant's closing submissions, this claim was withdrawn. However, in the interests of providing clarity between the shareholders, it is appropriate to address it.

407. As we have seen Deemed Transfer Notices arise under a number of circumstances provided for in the Shareholders' Agreement. Under clause 3.4.5 where a Promoter has stepped in and discharged an Underpaying Promoter's debt, and where the Underpaying

Promoter has failed to repay the rescuing Promoter within six months, a transfer notice is deemed to have been served. The plaintiffs however relied on sub clauses 8.3.1 and 8.3.2.

408. The plaintiffs pleaded that clause 8.3.1 was breached in that by virtue of the Tullycorbett Agreement, Breccia acquired or purported to acquire an interest in Tullycorbett shares without compliance with clause 8 and without disclosure of the fact. As it has already been determined that the validity and true effect of the Tullycorbett Agreement cannot be determined in these proceedings it follows that this basis for a Deemed Transfer Notice is not made out. In any case this claim must fail under the express terms of clause 8.3.2 because, assuming there was an infringement of 8.3.1, it is only in the event that "the Board so resolves" that a Transfer Notice is deemed to have been served.

409. Next the plaintiffs reled on clause 8.6.3 relating to the failure of a Promoter to remedy a material breach of the Shareholders' Agreement within a certain period of time and the consequences that arise from same. The plaintiffs pleaded that Breccia was in breach of clause 8.5 which provides inter alia that any transfer or purported transfer made otherwise than in accordance with the Shareholders' Agreement should be void and of no effect whatsoever.

410. Insofar as the plaintiffs reled on the attempted sale by the Receiver to Yalart, as this never proceeded there cannot be any breach of clause 8.5 by Breccia. For reasons already given the plaintiffs cannot rely on the Tullycorbett Agreement.

411. Then the plaintiffs alleged breach of clause 8.9 concerning the provision of information, particularly clause 8.9.1 which requires the disclosure of information in circumstances where the control of a Promoter or shareholder or guarantor has changed.

412. As I have stated before, on its face, the Tullycorbett Agreement is not, nor does it record, a transfer of the 8% shareholding of Tullycorbett in BHL to Breccia – that shareholding remains in the legal ownership of Tullycorbett, and no further adjudication as to equitable interests can or should be made in these proceedings. It follows that the plaintiffs cannot succeed under this provision.

413. Moreover it is clear that when clause 8.9 is read as a whole it imposes a duty of disclosure of information and evidence, but only provides for sanctions in the event of refusal or wilful failure to deliver same upon request within a period of three months following demand – see clauses 8.9.3 and 8.9.4. No sufficient evidence was given of a wilful refusal or breach of clause 8.9. It is also evident from the disclosure made by Matheson solicitors on behalf of Breccia in their letter of 2nd December, 2014 that Breccia have in fact (albeit belatedly) disclosed details and a copy of the Tullycorbett Agreement that might constitute a change of control coming within clause 8.9. I am not therefore satisfied that there has been any breach of clause 8.9, or any sufficient breach to warrant a determination that a Transfer Notice is deemed to be served in respect of Breccia's shareholding in BHL.

(8) Is Breccia Entitled to Succeed on its Counterclaim for Judgment for Monies due under the Anglo Facility?

414. Breccia pleaded a counterclaim for judgment in the sum of €8,744,853 in favour of Breccia against Benray on foot of the outstanding loan Facilities and the same amount against Mr. Flynn on foot of the Guarantee and Indemnity dated 28th March, 2006. It also seeks interest pursuant to statute.

415. As already noted Breccia did not seek to recover the larger sum of €9,104,616.41 being the 'par value' consideration which it paid to NALM to purchase the Benray loan on 23rd May, 2014, as is apparent from the email correspondence passing between their respective solicitors B. Vincent Hoey & Co. and Matheson on 22nd May, 2015. This was expressly admitted by Breccia in its Defence (para. 28).

416. In is closing submissions Mr. Gleeson S.C. on behalf of Breccia maintained the claim for judgment on foot of the Counterclaim, notwithstanding that no defence witness gave evidence. The basis for these claims was that the Benray loan was in default since 13th January, 2011. He agreed that demands were validly made of Benray and Mr. Flynn on 8th August, 2014 and 12th August, 2014, respectively, and the plaintiffs made no payments. Evidentially, counsel relied on (1) the documentation in core books and (2) certain admissions made on cross-examination on day 9.

417. The loan documents, and the fact and dates of such demands, were in fact pleaded and relied upon expressly by the plaintiffs (para.s 8, 9, 32 and 33 of the amended Statement of Claim), and must be taken to be admitted. The fact of demands and demand correspondence relied upon were also in the discovery and the core books used at trial. These were documents which the parties agreed should be admissible against them on the so-called *Bula/Fyffes* basis, i.e. that they were taken to be admissible as prima facie evidence of the truth of their contents as against the party producing the document. They were documents that were referred to in the plaintiffs' evidence and clearly relied upon by Breccia. At no point did the plaintiffs challenge the *amount* of €8,744,853.

418. As to admission on cross-examination, the following exchange between Mr. Gleeson S.C and Mr. Flynn took place on day 9 (p. 71 of the transcript):-

> "Q. …But before we do, the proposal that came from HIG last month was a proposal expressly to allow Benry to repay the debt to Breccia, isn't that the way it was put by HIG?
>
> A. Yes.
>
> Q. Not to anybody else?
>
> A. To redeem.
>
> Q. To repay the debt that is owed to Breccia?
>
> A. Yes.
>
> Q. Yes. And the purpose of that facility, as I understand it, is to repay to Breccia the debt that it has had assigned to it by NAMA, isn't that so?
>
> A. Yes.
>
> Q. The only way, in fact, of discharging the debt is by repaying my client, yes?
>
> A. Yes."

419. The plaintiffs pleaded that the demands were invalid on several bases. First, they said that the loans were 'performing'. Secondly, they argued that no event of default was notified. Thirdly, they asserted that no opportunity as required by law was provided by Breccia to allow for the mechanics of repayment.

420. It is the case that prior to 8th August, 2014 there was no 'first stage' notification of default by Breccia. The demand of Benray was made on Friday 8th August, 2014 at 11.45 am, and the Receiver was appointed on foot of non-payment on Monday the 11th August, 2014 at 4.30pm. The demand of Mr. Flynn was made by certified post dated 12th August, 2014. Both demands were for €8,744,853, and were for payment "forthwith".

421. As to the absence of any first stage notification of default, this argument cannot be maintained. Under clause 7 of the 2006 Facility Letter it became immediately enforceable "on the occurrence of an Event of Default", and under clause 9(a) default occurred 14 days after 30th December, 2010 when the Facility fell due for repayment. Under clause 7 of the 2008 Facility, it was provided that it would be "repayable on demand which demand may be served at any time by the Bank at its sole discretion…". Moreover, General Condition 4.1 contains a similarly worded provision applicable to both loans. Accordingly, to require notification of default to precede a demand for payment would be contrary to the express terms of both Facilities.

422. As to whether the loans were performing, I have already found that they were in technical default from 13th January, 2011. The effect of clause 16.1 of the General Conditions was that no relaxation or indulgence by Anglo, NAMA or NALM (or Breccia) could amount to a waiver of any right or remedy to recover the amount due. So the fact that Anglo did not call in the loans, and treated the loans as 'performing' was not a representation that could be relied on by the plaintiffs.

423. As to the length of time allowed by the demand letters, some reliance was placed on the 'cure' provisions of the 2006 Facility. This is provided for in clause 9(d), but the extension of time by the bank to remedy a default (by 30 days or 15 days, depending on the default) is expressly stated to be "in the absolute discretion of the Bank". Accordingly, Breccia was not bound to grant any extension of time.

424. More reliance was placed on the lack of time afforded to make repayment. The plaintiffs argued that they should have been given 'reasonable time', whereas Breccia relied on the rather stricter 'mechanics of payment' test which essentially limits the demand time to that which is necessary to arrange for a transfer of money.

425. The plaintiffs relied on the decision of Irvine J. in *In the matter of O'Flynn Construction: O'Flynn & Anor. v. Carbon Finance Ltd & Ors* [2014] IEHC 458. In that case, the defendant had purchased the plaintiffs' indebtedness from NAMA and then purported to demand repayment by a letter delivered on a Friday "forthwith". The plaintiffs sought and were granted interlocutory injunctions restraining the defendants from pursuing a petition recovery of various loans, and while many other issues arose in the case, Irvine J. considered the case law relating to the time that should be given in a demand letter. At para.s 135-136 she states:-

> "From these authorities it is easy to see why the mechanics of payment test has proved itself so attractive to the Courts and why there is an almost complete dearth of authority to support an alternative test. This is probably because the mechanics of payment test involves the application of relatively objective criteria. Applying this test, a borrower can without too much difficulty determine when it is likely to be safe to proceed to enforce its security. This cannot be said of the reasonable time test which involves a great deal of subjectivity and is one that Courts have considered imprecise and undesirable in the commercial context in which it usually arises.
>
> Taking into account all that was submitted to the Court by way of written and oral submission regardless of the obiter pronouncement of Charleton J. in Barden, I am not satisfied that the plaintiffs may reasonably argue for a test other than the mechanics of payment test. Accordingly, the question I must now answer is, whether, applying that test, the plaintiffs may reasonably argue at the trial of the action that the letters of demand are unlawful and the consequential appointment of the receivers invalid."

426. On the facts before her, Irvine J. decided that it was arguable that "forthwith" gave inadequate time to make a transfer. In coming to this conclusion she took into account that "there was no history of prior default, no prior or subsequent admission that the monies could not be paid and an uncontested averment by Mr. O'Flynn that he would have been able to pay had reasonable time been afforded to him."

380. The *obiter* pronouncement of Charleton J. in *National Asset Loan Management Limited v. Barden* [2013] IEHC 32 appears at para. 13 of his judgment:-

> "The loan is repayable on demand. Were it to be the case that the bank jumped ahead of the business situation contemplated to be a success and demanded repayment notwithstanding that sales were progressing in a reasonable fashion it is possible that another argument might succeed. It might also be that a borrower would be entitled to reasonable notice of the change in the attitude of the bank and reasonable time to arrange another facility. While not deciding that issue, as it is not now before me, it is beyond argument that where the expectation of repayment through a business venture has not been met because that venture has failed, or has stalled in circumstances where there is no reasonable expectation that it may turn in the context of whatever time may be reasonabl[y] contemplated under the contract, there is nothing to stop the bank treating a repayment on demand facility as just that."

427. It was submitted on Breccia's behalf that the *O'Flynn* decision applied a lower bar as it was an application for interlocutory relief, and that in any event Irvine J. approved and applied the 'mechanics of payment test', approved in this jurisdiction by McGovern J. in *AIB v. Moran* [2012] IEHC 323, and given some support by Hogan J. in *Re Belohn Limited* [2013] IEHC 157. The test was formulated by Blackburne J. in *Sheppard & Cooper Limited v. TSB Bank plc (No.2)* [1996] BCC 965, at p. 696 as follows:-

> "What that time is must, in my view, depend on the circumstances of the case. If the sum demanded is of an amount which the debtor, if he has it, will be likely to have in a bank account – which will be the position in 99 cases out of 100 – the time permitted must be reasonable in all the circumstances to enable the debtor to contact his bank and make the necessary arrangements for the sum in question to be transferred from his bank to the creditor. If the demand is made out of banking hours, the period of time is likely to be longer – involving waiting until banks reopen – than if the demand is made during banking hours."

That was a case where there was substantial indebtedness and a history of non-payment. The time between demand and the appointment of a receiver was no more than 60 minutes. Also cited by counsel for Breccia was *Bank of Baroda v. Panessar* [1987] Ch 335 in which Walton J. held that a period of one hour was sufficient time for the bank to allow for repayment before appointing a

receiver as this was sufficient to allow for the mechanics of transfer of money "under modern conditions".

428. If the 'mechanics of payment test' applied then, Breccia argue, and I accept as correct, that as the demand was made at 11.45am on the Friday the banks were open and arrangements could, at least theoretically, and assuming money was available, have been made for transfer of monies to discharge the loans, either on that day or on the following Monday.

429. The 'reasonable time' test would involve wider consideration of the facts. Although there was technical default on repayment of the loans from 13th January, 2011, it is undoubtedly the case that Anglo did not at any time demand payment. It is also not disputed that in the documentation supplied by NALM to Breccia prior to purchase recorded the "Default Rate" of interest as "N/A" which I take to be "not applicable". Also, while Mr. Flynn admitted that the plaintiffs were not in a position to immediately obtain money for repayment on the date of demand, I accept that they had been trying to refinance the loans for some time and had been frustrated in their attempts by the possibility that a body providing refinance would not be able to realise security over the shares in BHL due to the perceived 'veto', and the threat by Breccia to use that 'veto'. I must also accept Mr. Flynn's evidence that the Flynn family were "asset rich but cash poor" at the time, as no evidence to the contrary was adduced. Arguably, under this test the time given by the demand was unreasonable.

430. But I do not find it necessary to decide between these two competing positions because of the fact that Breccia and Benray were parties to the Shareholders' Agreement, along with Mr. Flynn and, as I have already found, this constrained Breccia in terms of what it could do once it acquired the loans. It was not entitled as a Promoter to enforce collection of the debt otherwise than in accordance with the powers conferred on Promoters in sub clauses 3.4.3 and 3.4.5. Accordingly, as a matter of law it could not simply demand payment and sue for the amount due. It could only sue once it had redeemed the Benray loan. Then and only then could Breccia demand payment of Benray and seek to recover by way of simple contract debt. It follows that Breccia cannot rely on the letters of demand for its counterclaim in these proceedings as the Benray loan was not redeemed at that time.

Declarations and Orders

431. Many declarations are sought in the amended Statement of Claim, but it is appropriate to reframe these in light of my findings, and in a manner that brings some clarity to the relative positions of the plaintiffs *and* the first named defendant. While I will hear Counsel before finalising these, I propose to make the following declarations and orders:-

> I. A Declaration that the acquisition on 23rd May, 2014 by Breccia from NALM of Benray's Anglo Facilities and Security under Loan Sale Deed and Deed of Transfer both dated 23rd May, 2014, including the acquisition by assignment of any right interest or entitlement to receive or be paid dividends declared by Blackrock Hospital Limited, was valid and lawful.
>
> II. A Declaration that upon the true construction of the Shareholders' Agreement dated 28th March, 2006 (as amended) and/or pursuant to an implied term to like effect and/or pursuant to an implied term that Breccia and Benray as Promoters and shareholders owed each other mutual duties of good faith and fair dealing, Breccia as a Promoter is not entitled to demand or recover monies from Benray as another Promoter or John Flynn as Guarantor of Benray in respect of monies that are due and owing under Benray's Anglo Facilities dated 28th March, 2006 and 19th February 2008 and/or to enforce a sale of Benray's shareholding in Blackrock Hospital Limited otherwise than in accordance with sub clauses 3.4.3 and 3.4.5 and sub clauses 8.2 to 8.4 inclusive of the Shareholders' Agreement.
>
> III. A Declaration that the purported calling in by Breccia of Benray's Anglo Facilities dated 28th March, 2006 and 19th February, 2008 by letters of demand dated 8th August, 2014 and 12th August, 2014 to Benray and John Flynn (as Guarantor), respectively, was invalid.
>
> IV. A Declaration that the purported appointment on 11th August, 2014 of the second named defendant as Receiver was invalid.
>
> V. A Declaration that as against Benray and John Flynn, Breccia as a Promoter/shareholder is not entitled to the benefit of the Letter of Waiver of Pre-Emption Rights executed by Benray/John Flynn in favour of Anglo on 28th March, 2006.
>
> VI. A permanent injunction restraining Breccia, its servants or agents from offering for sale and or effecting a sale or other disposal of Benray's shareholding in Blackrock Hosptial Limited otherwise than pursuant to and in accordance with sub clause 3.4.5 and clause 8 of the Shareholders' Agreement dated 28th March, 2006 (as amended) *provided always* that this injunction shall not prevent the sale or assignment by Breccia of the Loan Sale Deed and Deed of Transfer dated 23rd May, 2014 or the benefit thereof.
>
> VII. An Order refusing the plaintiffs' claims for a declaration of material breach by Breccia of the Shareholders' Agreement dated 28th March, 2006 (as amended) such as could lead to a Transfer Notice being deemed to have been served under clause 8.6 or otherwise.
>
> VIII. An Order dismissing the plaintiffs' claim for damages for breach of contract.
>
> IX. An Order dismissing the plaintiffs' claim for conspiracy.
>
> X. An Order dismissing the first named defendant's counterclaim.

The order will note the Receiver's undertaking to abide by the order of this Court.

I will adjourn this matter to hear the parties further in relation to the final form of the declarations and orders, and in relation to all questions of costs. Before doing so I will require the first named defendant's confirmation that pending such adjourned date the existing undertakings will remain in place. I will give all parties liberty to apply pending the adjourned date.

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1. Other proceedings:

> On 13th May, 2015 I made, on consent, a final order, in a Construction Summons Joseph Sheehan v. Breccia and Ors (The High Court Rec. No. 2015/27SP) - having an overlap with one aspect of these proceedings. That case commenced before settling,

and was heard on affidavit.

In the related proceedings of Talos Capital Limited v. Joseph Sheehan and John Flynn [2015] IEHC 27, Ryan J. in a decision delivered on 23rd January, 2015 granted judgment to the plaintiff. That matter was heard on affidavit as an application for summary judgment. It is understood to be under appeal.

Further plenary proceedings of Joseph Sheehan v. Breccia and Ors (Rec. No. 2014/10816P) are pending before the High Court (Commercial).

In addition there have been or are pending proceedings in the USA and the UK.

2. This latter clause was amended by the Supplemental Shareholders' Agreement dated 31st May, 2007 so as to permit Arthur Cox to act as solicitors for the company.

3. As amended by the Supplemental Shareholders' Agreement dated 31st May, 2007. The Shareholders' Agreement of 28th March, 2006 previously provided that "a total annual dividend of €4,000,000 shall be declared".

4. This is a nominated account into which dividends were to be paid under clause 7(a) of the Facility Letter.