Neutral Citation: [2014] IEHC 546

THE HIGH COURT

COMMERCIAL

[2014 No. 6559 P.]

BETWEEN

SPORTS DIRECT INTERNATIONAL PLC

PLAINTIFF

AND

SANDRA MINOR, JOHN O'NEILL, MARK HEATON, HUGH HEATON AND WARRNAMBOOL

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered the 14th day of November 2014

1. The plaintiff and the first to the fourth named defendants are shareholders in the fifth named company Warrnambool ("the Company"). The plaintiff alleges that the first to fourth named defendants are in breach of certain provisions set out in an agreement dated the 3rd December, 2002, ("the 2002 Agreement"), which the plaintiff says binds the shareholders in the Company. The plaintiff seeks orders to compel compliance with the 2002 Agreement in the following terms:-

> *"1. An interlocutory injunction restraining the defendants or any of them from procuring the fifth named defendant ("the Company") to enter into a Lease in respect of a property at Unit 5A, Distribution Centre, Co. Antrim without the prior consent in writing of the Plaintiff pending the trial of this action.*
>
> *2. Further and if necessary, an Order restraining the defendants and/or each of them from breaching the provisions of Clause 9 of the Agreement dated the 3rd December 2002 pending the trial of this action."*

Background

2. The predecessor to the Company was a limited liability company called Heatons Limited. By a Share Subscription and Shareholders Agreement dated the 15th December, 1995, ("the Shareholders Agreement") between Hubert Ormsby Heaton, John O'Neill, Sean Flanagan, Mark Heaton, Hugh Heaton, Irene Heaton and Heatons Limited the parties thereto entered into an agreement for the purposes of regulating the subscription of shares in Heatons Limited and the future conduct of the business of Heatons Limited and of regulating the business between the shareholders in Heatons Limited. Mr. O'Neill, Mr. Flanagan and Mr. Mark Heaton were therein described as the "Subscribers" and they acquired certain shares in Heatons Limited. By clause 10.1 of the Shareholders Agreement it was provided that:-

> *"Subject to the provisions of this Agreement, the Business of the Company shall be managed and controlled by the Board who shall have full management authority and who may exercise all the powers of the Company as are not by the Companies Acts 1963 to 1990 or by the Articles of Association required to be exercised by the Company in general meetings."*

3. Clause 11 specified restricted transactions as follows:-

> "*11.1 For as long as Mr. Heaton personally holds shares in the Company, the Shareholders shall procure that the Company shall not,and the Company shall not, without the prior written consent of Shareholders holding 60% of the Shares in the Company*" of any of 20 different matters therein set out.

4. In May 2002, Mr. Mike Ashley agreed to purchase Mr. Sean Flanagan's shares in Heatons Limited. At the same time that Mike Ashley entered into the agreement to purchase Mr. Flanagan's shares, an agreement dated the 10th May, 2002, was entered into between John O'Neill, Mark Heaton and Mike Ashley. I set this agreement out in full:

> *"THIS AGREEMENT dated the 10th day of May 2002 BETWEEN JOHN O'NEILL (hereinafter called "JON") of the First Part MARK HEATON (hereinafter called "MH") of the Second Part and MIKE ASHLEY (hereinafter called "MA") of the Third Part.*
>
> *WHEREAS:-*
>
> *1. By virtue of the Shareholders Agreement dated the 15th day of December, 1995 between Hubert Ormsby Heaton of the First Part John O'Neill, Sean Flanagan and Mark Heaton of the Second Part, Hugh Heaton and Irene Heaton of the Third Part and Heatons Limited of the Fourth Part John O'Neill, Mark Heaton and Sean Flanagan (therein defined as the "Subscribers") applied for and were allotted 26,694 shares in the Company for a consideration of IR£390,000.*
>
> *2. Subsequent to the execution of the hereinbefore Shareholders Agreement the Subscribers agreed that any Shareholders resolution, motion or proposal in relation to the business of the Company would be voted on by each shareholder using all of their shares as a single block, either in favour of or against the resolution, motion or proposal in accordance with the wishes of the majority of the subscribers.*
>
> *3. MA has now agreed to purchase Mr. Flanagan's shares and in this regard agrees to adhere to and operate the Agreement which hereinbefore operated between the Subscribers."*

5. The agreement was signed by Mark Heaton, John O'Neill and Mike Ashley respectively. This agreement was referred to by the parties as "the Voting Pact Agreement".

The 2002 Agreement
6. It was against this background that the Agreement, the subject of this application, was entered into on the 3rd December, 2002, between John O'Neill, Mark Heaton, Hugh Heaton and Hubert Ormsby Heaton, Mike Ashley, Heatons Limited and Sports Soccer Limited. The 2002 Agreement provided, *inter alia*, that Mike Ashley was to acquire a further 30% of the issued share capital in Heatons Limited, various covenants as more particularly specified below were entered into by the parties to the 2002 Agreement and Sports Soccer Limited entered into an exclusive supplier agreement with Heatons Limited in relation to various sporting goods.

7. Clause of 6 of the 2002 Agreement provided:-

> *"Each of the parties to the Agreement herein hereby covenant with the other that it shall take all necessary actions so as to procure (insofar as it lies within its power or procurement, individually or collectively with the others) full compliance with each of the matters set out in the succeeding paragraphs of this agreement. Each of the parties hereby further covenants in like manner with the other that it shall not act or continue to act in any way which would or might be in breach of this agreement."*

8. By clause 10 of the 2002 Agreement, Mike Ashley also agreed notwithstanding para.11(v) of the Shareholders Agreement that he would vote and take all necessary steps to ensure that a minimum of 30% of the profits are distributed each year by way of dividends. By virtue of that clause all of the parties to the 2002 Agreement also confirmed adherence to the Shareholders Agreement.

9. The crucial clause for the purposes of this application is clause 9. I set it out in full:

> *"The Shareholders of the Company, including the Purchaser, [Mike Ashley] shall procure and that the Company shall not,and the Company shall not, without the prior written consent of Shareholders holding 60% in respect of Paragraphs (a), (b) and (c) hereof, and 75% in respect of Paragraphs (d) and (e) of the shares in the Company:*
>
> *(a) Acquire by purchase, lease or otherwise any freehold or leasehold property, or dispose of or carry out any development upon any part of its property or assets.*
>
> *(b) Make any material changes in the relevant business as now carried on.*
>
> *(c) Create or issue or agree to create or issue any share of loan capital, capitalise any of its reserves, or agree to give any option in respect of any share or loan capital without first giving any of the shareholders a pro-rata right to participate therein.*
>
> *(d) Alter any of the rights attaching to any of its issued shares or reduce its share capital or repay any amount standing to the credit of any share premium account or capital share fund or otherwise re-organise its share capital in any way or create any new class of share.*
>
> *(e) Carry out any of the restricted transactions contained in para. 11 of the Shareholders Agreement dated the 15th day of December 1995, which protections were afforded to Hubert Ormsby Heaton for his lifetime on condition he remain a shareholder in the company."*

10. An agreement was entered into between John O'Neill, Mark Heaton, Hugh Heaton and Hubert Ormsby Heaton, Mike Ashley, Heatons (formerly Heatons Limited) and Sports World International Limited ("SWIL") (formerly Sports Soccer Limited) on the 1st July, 2007, whereby:-

> *"The parties (together with their/its successors, assigns and transferees if any) are desirous of reconfirming the terms of the said Agreement [the 2002 Agreement] save and except as set out below."*

11. The balance of the Agreement is not relevant to the issues in these proceedings. It is important to note that all of the parties thereto confirmed the terms of the 2002 Agreement and in particular clause 9 thereof.

12. Mike Ashley purchased the shares in Heatons Limited (subsequently Heatons and subsequently the fifth named defendant) together with an option to purchase up to 50% of the shares in trust for SWIL. He executed a deed of trust to that effect dated the 7th February, 2007. By an agreement dated the 30th April, 2007, between Mike Ashley, SWIL and the plaintiff, shares in the Company together with the benefit of the option to purchase up to 50% of the shares in the Company were transferred to the plaintiff. These shares represented the shareholding originally held by Mike Ashley in Heatons Limited. SWIL is a subsidiary of the plaintiff, a plc incorporated in England and Wales. It is not in dispute that the plaintiff is the owner of 50% shares in the Company and that the plaintiff has a nominee director on the board of the Company.

13. In 2013, SWIL brought proceedings against the Company arising out of the 2002 Agreement and the Confirmation Agreement which proceedings were referred to as the Competition Proceedings. In the Competition Proceedings, it was argued inter alia by SWIL that the exclusive distributions agreement comprised in the 2002 Agreement, as amended, infringed various aspects of competition law. Those proceedings were ultimately compromised, but they are of considerable relevance to these proceedings as the testimony and submissions of both the Company through its managing director Mr. John O'Neill and the plaintiff's subsidiary (SWIL) were canvassed in this application as is more fully set out below.

The Current Controversy
14. The current controversy between the parties concerns a proposal that the Company enter into a lease in respect of a property known as Unit 5A, Distribution Centre, Co. Antrim. On the 31st July, 2014, Mr. John O'Neill (hereinafter "Mr. O'Neill") emailed the representative of the plaintiff as follows:-

> *"The Board has carefully considered the two Northern Ireland properties and determined to proceed with both. The Board as always considers this to be in the best interests of the company. The management will investigate further possible store openings and report to the board as soon as possible."*

15. By way of reply dated the 1st August, 2014, the plaintiff's solicitors Messrs. McCann Fitzgerald, wrote to the defendants' solicitors and referred to this email as follows:-

"However, Mr. Barnes had made it clear to Mr. O'Neill by email dated the 22 July 2014(14:45) that SDI [the plaintiff] would not authorise and/or consent either as a Director or as a Shareholder to these two new properties until such time as there was commitment to a store opening programme.

Any acquisition of property by Warrnambool without the prior written consent of shareholders holding 60% of the shares in the company would breach clause 9 of the Agreement dated the 3 December 2002 (to which Mr. O'Neill, Mark Heaton and Hugh Heaton among others are parties and pursuant to which each of them also confirmed their adherence to the 1995 SHA). It would also be in breach of the later Agreement dated the 1 July 2007 which each of your clients entered into reconfirming the terms of the 2002 agreement.

The 2002 agreement was the subject of proceedings brought by Sports Direct.Com Retail Limited in 2012. Mr. O'Neill asserted that agreement and in particular clause 9 thereof in numerous averments which he made on oath in those proceedings."

16. They sought a commitment that the defendants would not proceed to procure that the Company would acquire the property without the prior consent in writing of shareholders holding 60% of the shares in the Company.

17. In reply the solicitors for the defendants wrote on the 5th August, 2014, contending that there was in existence no Shareholders Agreement governing the affairs of Warrnambool and that the plaintiff had no effective veto on any board or shareholder decisions in Warrnambool. They offered a without prejudice undertaking not to execute any new leases on properties or to acquire any new properties either pending the determination of the proceedings or on giving 14 days notice to the plaintiff of their intention to do so conditional upon an application to enter the proceedings into the Commercial list of the High Court being brought at the first available date.

18. By letter dated the 6th August, 2014, McCann Fitzgerald replied indicating that they were very surprised that the allegation that the Shareholders Agreement no longer applied and pointed out that in the Competition Proceedings, the Company sought to rely upon the Shareholders Agreement in support of its case that the plaintiff and the defendant in those proceedings were to be treated under Article 101 of the Treaty on the Functioning of the European Union and s. 4 of the Competition Act 2002, as amended, as one undertaking or as a single economic entity.

19. By email dated the 22nd August, 2014, the Company sent out board agenda for the board meeting of the 2nd September, 2014. The agenda concerned the lease of additional space at the distribution centre in Antrim and proposed the lease of Unit 5A, at an annual rent of STG£40,292. It was stated that the lease term, rent review and break to coincide with existing leases [held by the Company] and that there was an additional break at two years for the Unit. This was a different proposition to the one proposed in July 2014 and had not previously been notified to the plaintiff.

20. The plaintiff said that the parties were required to comply with the provisions of clause 9 of the 2002 Agreement. It also indicated that it had been seeking further information in relation to the lease, but it did not attempt to inspect the premises and it did not offer any explanation for its rejection of the proposal. The defendants argued that the Shareholders Agreement did not apply and that the 2002 Agreement did not apply and argued that there were good business reasons for entering into the proposed lease. They requested that the plaintiff consent to the acquisition of the lease without prejudice to their argument that the consent was not required. By letter dated the 10th September, 2014, the defendants' solicitors argued:-

"Entirely without prejudice to our contention that the consent of [the plaintiff] is not required to the proposed lease, we respectively suggest that if such consent was required it is implicit that consent will not be unreasonably withheld."

21. Ultimately it appeared that the defendants intended proceeding with the proposed lease of Unit 5A and accordingly the plaintiff sought the within injunctive relief.

Competition Proceedings

22. The submissions and averments made in the Competition Proceedings between *Sports Direct.Com Retail Limited v. Heatons and Mike Ashley* 2012/11089 P. addressed the issues now in dispute between the parties. Counsel for Heatons, (now the Company, the fifth named defendant) referred to clause 9 of the 2002 Agreement. She submitted:-

". . . I think what is largely agreed between the parties is that there is negative control; in other words, that it is possible for the holder of the shares to prevent Heatons from taking particular steps and that arises from clause 9."

23. She went on to submit that the stores could not be opened by reason of clause 9 unless there was the consent of shareholders holding 60% of the shares.

"So given that SDI [the plaintiff herein] holds 50% that can only be done where there is agreement. In other words, a store cannot be opened without the consent of SDI and of course the corollary of that is that SDI . . . can block the acquisition by purchase, lease or otherwise of a freehold or leasehold property. . ."

24. In relation of subclause (b) of clause 9, she submitted that this was a vital negative control, because if there was a proposal to change the nature of Heatons business that could not be done without the consent of SDI.

25. In the Competition Proceedings, Mr. O'Neill swore two affidavits. On 14th June, 2013, he averred:-

". . . under clause 9 of the 2002 Agreement, [the plaintiff in these proceedings] is granted significant powers over the Heatons business. This clause provides the consent of shareholders with certain levels of shareholding is required for several categories of important business decisions, including development of any part of Heatons' property or assets . . ."

26. In the affidavit of the 15th July, 2013, he averred that the plaintiff herein:-

"has veto powers over significant strategic decisions by virtue of clause 9 of the 2002 Agreement";

". . . it should be noted that pursuant to clause 9 of the 2002 Agreement, [the plaintiff] does have a veto over the most important strategic decisions of Heatons", and that

"As can be seen from the text of clause 9, it in fact grants [the plaintiff] a veto of significant strategic decisions, including the acquisition of property – which is clearly of immense importance to a retail business such as Heatons . . ."

Present Application

27. The notice of motion herein issued on the 24th September, 2014, grounded upon the affidavit of Mr. David Forsey, which was sworn on the 24th September, 2014. Mr. John O'Neill on behalf of all of the defendants swore a replying affidavit dated the 30th September, 2014. In the first affidavit Mr. O'Neill referred to the Voting Pact Agreement as follows:-

> *"Further, SDI cannot refuse to give its consent in circumstances where Mr. Ashley and SDI are bound to exercise their rights in respect of 14.26% of the shares in the company in accordance with the wishes of the majority of your deponent, Mr. Mark Heaton and Mike Ashley or his successor in title. . . accordingly if you add the 14.26% formerly held by Mr. Flanagan to that block in excess of 60% of the shareholders are in favour of entering into the lease on the send Unit at the distribution centre. Accordingly, SDI cannot veto the transaction of the distribution centre even if it had any valid reason for withholding its consent."*

It is accepted by counsel for the defendants that this is an entirely new argument that had not previously been advanced by the defendants. Obviously it conflicts with the position previously sworn to by Mr O'Neill and which formed the basis of the submissions advanced on behalf of the Company, presumably on his instructions, in the Competition Proceedings.

Serious Issue to be Tried

28. It has long been established since *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88 that an applicant for an interlocutory injunction must satisfy a threefold test, namely: 1. that there is a serious question to be tried; 2. that damages are not an adequate remedy; and 3. the balance of convenience lies in favour of granting the injunction. The defendant has accepted, in my opinion quite correctly, that there is a serious issue to be tried in respect of the application of clause 9 of the 2002 Agreement in relation to the proposed lease of Unit 5A. It is not so conceded in respect of the second relief sought in the notice of motion that there is a serious issue to be tried. I shall deal with the second relief later in this judgment.

29. The plaintiff argued that the issue of the application of clause 9 was so clear cut that it was therefore, without further consideration, entitled to interlocutory relief restraining a breach of clause 9. The defendant submitted that the Voting Pact Agreement was applicable in the circumstances of this case and the effect of applying the Voting Pact Agreement to the 2002 Agreement is to deprive the plaintiff of an ability to vote more than 40% of the shares in opposition to the proposed transaction and thus it cannot veto the proposed transaction. This is an interlocutory application. It is clearly neither possible nor appropriate for the court to attempt to decide these factual matters. The motion cannot be approached on the basis that the Voting Pact Agreement does not apply. This is a question of fact to be determined at trial. Therefore the plaintiff's application must be considered on the basis that it has established that there is a serious issue to be tried in respect of the first relief sought, but that the second and third limbs of Campus Oil must be satisfied before relief can be granted. Thus, it must be ascertained whether or not damages constitute an adequate remedy and where the balance of convenience lies.

Are Damages an Adequate Remedy for either the Plaintiff or the Defendants

30. In *Metro International SA v. Independent News and Media plc* [2006] 1 I.L.R.M. 414, at p. 422 Clarke J. quoted with approval the summary of McCracken J. from *B. & S. Limited v. Irish Auto Trader Limited* [1995] 2 I.R. 142, at p.145, in relation to the test to be applied in circumstances where it has been shown that there is a serious issue to be tried:-

> *"1. An interlocutory injunction should be refused if damages would adequately compensate the plaintiff for any loss suffered between the hearing of the interlocutory injunction and the trial of the action provided the defendant would be in a position to pay such damages.*
>
> *2. Should this test be answered in the negative an interlocutory injunction should be granted if the plaintiff's undertaking as to damages would adequately compensate the defendant, should he be successful at the trial, in respect of any loss by him due to the injunction being in force between the date of the application for the interlocutory injunction and the trial, again assuming that the plaintiff would be in a position to pay such damages.*
>
> *3. If damages would not fully compensate either party, then the court may consider all relevant matters in determining where the balance of convenience lies, but these will vary depending on the facts of each case.*
>
> *4. It is normally a council of prudence, although not a fixed rule, that if all other matters are equally balanced, the court should preserve the status quo.*
>
> *5. Again, where the arguments are finally balanced, the court may consider the relative strength of each party's case as revealed by the affidavit evidence adduced at the interlocutory stage where the strength of one parties case is disproportionate to that of the other."*

31. At para. 4.4 Clarke J. elaborated on the nature of the type of loss which must be assessed in the following terms:-

> *"4.4 It is also, perhaps, important to note the nature of the type of loss which must be assessed as to whether it might be compensatable in damages. As is pointed out by McCracken J. at item 1 of the test set out above it is the loss which would flow between an injunction being granted at the interlocutory stage on the basis of the plaintiff having established a fair issue to be tried up to the time of trial where that issue was ultimately found against the plaintiff. There are, of course, cases where even at trial damages would be an adequate remedy and where, in accordance with the established jurisprudence of the courts, an injunction will not normally be granted even though the plaintiff succeeds in establishing wrongdoing. There are, however, on the other hand, cases where the courts have traditionally not been prepared to award damages even though there is a sense in which any relevant loss could be calculated in monetary terms. Thus in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights. . . . Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy.*
>
> *4.5 While it may well be that a temporary short term interference with a disputed property right (resulting from a failure*

to grant an interlocutory junction) may not give rise to quite such a clear-cut situation, it is nonetheless, in my view important for the court to take into account in addressing the question of whether damages may be an adequate remedy (for the period identified by McCracken J. in Irish Autotrader) whether the nature of the matter which is alleged to be interfered with is the kind of matter which the courts have traditionally held should be protected by injunction rather than simply compensated for in damages. Clearly property rights are one such category . . .

4.6 Similarly in Dublin Port and Docks Board v. Britannia Dredging Co. Limited [1968] I.R. 136 the Supreme Court, following Doherty v. Allman (1878)3 App. Cas. 709 accepted that where it is established that a party has agreed to a negative covenant a court, at least at the trial of an action, will prima facie enforce the covenant even though it may be possible to measure the loss that would be attributable to its non performance in monetary terms. Thus enforcement of a negative covenant may be another type of case where the courts lean in favour of enforcement by injunction rather than compensation.

4.7 In Irish Shell Limited v. J.H. McLoughlin (Balbriggan) Limited (Unreported, High Court, Clarke J. 4th August, 2005) I had regard to the latter above principle in respect of a negative covenant as a factor to be taken into account in the grant of an interlocutory injunction when taken in conjunction with the fact that, in that case, a permanent injunction might well have been of little benefit if obtained at trial having regard to the purpose for which the covenant concerned had allegedly being entered into.

4.8 While fully accepting, therefore, that the primary consideration of the court in assessing the adequacy or otherwise of damages at the interlocutory stage is the loss that might be sustained in the period between the refusal of an interlocutory injunction (or indeed its grant and the reliance by a defendant upon the undertaking as to damages given to secure it) and the trial I am nonetheless of the view that in assessing the adequacy or otherwise of such damages as a remedy the court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."

32. The defendants have argued that the plaintiff can be adequately compensated for damages in the sense outlined above as the transaction sought to be restrained is the entering into a lease which has a break clause operable at year 2. It is argued therefore that the maximum damage than can be sustained is clearly measureable and ascertainable. This answer does not address the case advanced by the plaintiff. The plaintiff in this application is not concerned about the possible losses that might arise in respect of this particular proposed lease. The case was clearly advanced on the basis that the affairs of the Company and the relationships between the shareholders had been governed by the 2002 Agreement. If the Company were to enter into the lease in the face of the opposition of the plaintiff , this would constitute a breach of the 2002 Agreement (assuming for the purposes of the argument that the plaintiff succeeds in establishing at trial that clause 9 applies and the Voting Pact does not impact on clause 9 as contended by the defendants). The plaintiff is a 50% shareholder in the Company, but has only one nominee director on the board of the Company. This means that in the ordinary way the affairs of the Company were conducted by reference to the wishes of the other 50% shareholders. The plaintiff argues that the 2002 Agreement is essential to the relations between the parties. If the defendants believe that they could determine the affairs of the Company without reference to the 2002 Agreement where applicable, this seriously undermines the position of the plaintiff who had entered into the purchase of the 50% stake in the Company on the basis *inter alia*, of the 2002 Agreement. It is argued that clearly this damage cannot be either adequately assessed or adequately compensated in damages within the meaning set out above.

33. Secondly, it was submitted that the right which is sought to be protected in this case is in the nature of a property right which traditionally the courts have been prepared to protect by way of interlocutory and if necessary permanent injunction. The provisions of clauses 6 and 9 of the 2002 Agreement constitute a negative covenant between each of the parties to that agreement. The Agreement was reaffirmed in 2007. The defendants as parties to those agreements have agreed that they shall procure and the Company shall not acquire by lease any leasehold property without the prior written consent of shareholders holding 60% of the shareholding in the Company. It is common case that if the plaintiff's case is correct (and the Voting Pact Agreement does not apply) then this covenant has not been complied with and the entering into the proposed lease would constitute a breach of that covenant.

34. *Telenor Invest A.S. v. IIU Nominees Limited* (Unreported, High Court, O'Sullivan J. 20th July, 1999) concerned a dispute relating to the right of a shareholder to maintain a director on the board of directors pursuant to the terms of a shareholders agreement. O'Sullivan J. held at p. 6 of his judgment:-

"Because the issue involves the governance of the company pending the final determination of this substantial question I am satisfied, further, that damages cannot be an adequate remedy for either the Plaintiff or the first Defendant. The Plaintiff asserts an entitlement to its correct proportionate share in the management of the company at Board of Director level pending the determination of the issue relating to clause 7.4 of the Agreement and the first Defendant likewise claims its own entitlement in this regard. Because the company is active in a growing and dynamic sector of the economy I consider that damages could not be said to be an adequate remedy for depriving either one of these parties of their share in such management."

35. Similarly, Laffoy J. held in *Ancorde Limited and Harte v. Horgan* [2013] IEHC 265 at para. 73:-

"By way of general observation, I think it is important to emphasise that, as regards both the shareholder issue and the directorship issue, essentially the only remedy which would be adequate for the successful party is the protection of his or her ownership of the shares and the rights and privileges attaching to them. It is for that reason that I find that damages would not be an adequate remedy for the claimants on each application for interlocutory injunctive relief."

36. It was submitted by the plaintiff that *Telenor Invest S.A* and *Ancorde Limited* applied in this case. It was argued that this did not interfere with the ordinary conduct of the affairs of the Company which would continue to be run by the board and executives of the Company in the normal way. I accept this submission. The 2002 Agreement relates only to the matters therein specified. Other than those matters, the Company is obviously free to conduct its business in the normal way in accordance with the articles of association. The defendant has argued that the board of the Company has indicated that the proposed lease is, in its opinion, in the best interests of the Company and its business. Without making any comment on this opinion, it ignores the fact that by virtue of the provisions of the 2002 Agreement (and indeed the Shareholders Agreement preceding it) the shareholders in the Company had agreed that certain matters would be governed by the terms of shareholders agreements and not solely determined by the articles of association of the Company.

37. The defendant relied on the decision of Lord Hoffman in *O'Neill v. Phillips* [1999] 1 W.L.R 1092,to support this argument, at pp.

1098-9 as follows:-

> *"…A member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second [feature of company law] leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."*

However at p. 1101 Lord Hoffman continued:-

> *"…I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed."*

It seems to me that the decision of the plaintiff's nominee director and the plaintiff not to explain why the plaintiff would not consent to the proposed lease does not engage the equitable considerations referred to by Lord Hoffmann. On the contrary, when one considers what the defendants agreed in the 2002 Agreement and reaffirmed in 2007. It follows therefore that the exercise by the plaintiff of its power not to consent in writing to the proposed lease would not be contrary to what the parties have actually agreed. Rather it is entirely consistent both with what they agreed and the clear purpose of the agreement entered into at the time.

38. I am satisfied that damages would not be an adequate remedy for the plaintiff in the event that at the trial of the action an injunction were refused and the plaintiff ultimately succeeded at trial. The court therefore must consider the question of where the balance of convenience lies in the circumstances.

39. Balance of Convenience
As was pointed out by McCracken J. in *B&S Limited v. Irish Auto Trader Limited* the court may consider all relevant matters in determining where the balance of convenience lies. In *Allied Irish Banks plc & ors v. Diamond & ors* [2011] IEHC 505 at para. 5.7 Clarke J stated:-

> *"In substance, the court has to assess how serious the consequences for the respective parties would be in the event that an injunction is granted which ultimately, again with the benefit of hindsight after a trial, should not have been granted or is refused where ultimately, with the benefit of hindsight after a trial, it is determined that it should have been granted… the court has to form a view as to which of those consequences, on balance, would be the lesser."*

40. In *Ancorde Limited* quoted above Laffoy J. at para. 75 dealt with the issue of the balance of convenience as follows:-

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

41. In applying these principles to the facts of this case I believe the following matters are particularly relevant to the weighing the balance of convenience. Firstly, there is the nature of the right sought to be protected: it is a right of veto of the shareholder pursuant to a shareholders agreement. Secondly, it is a right in the nature of a negative covenant. This is particularly significant in the light of the decision of the Supreme Court in *Dublin Port and Docks Board v. Britannia Dredging Co. Ltd.* [1968] I.R. 136 and the decision of Clark J. in *Shell Limited v. J.H. McLoughlin (Balbriggan) Limited* (Unreported, High Court, Clarke J. 4th August, 2005) quoted above in para. 31. The enforcement of a negative covenant is one where the courts lean in favour of enforcement by injunction. This applies whether the court forms the view that the case is so strong that the court does not have to assess the question of either the adequacy of damages or the balance of convenience or where the court determines damages would not be an adequate remedy. It is clearly also relevant to the question of where the lesser risk of injustice lies. Further, the enforcement of the rights of a shareholder pursuant to a shareholders agreement is an interest concerning the entitlement to exercise the rights and privileges attaching to the shares as was the case in *Ancorde Limited*.

42. The defendant argued that the failure of the plaintiff to give any explanation for its failure to consent to the taking of the proposed lease amounted to a lack of *bona fides* on its behalf and this was a factor which the court should take into account in assessing the balance of convenience. I do not accept this argument. When asked during the course of argument as to whether it was the defendants' case that the plaintiff was obliged to give any explanation, counsel for the defendants did not seek to advance this proposition. On the other hand, counsel for the plaintiff clearly put the *bona fides* of the defendants in issue in these proceedings. He did so on the basis of the contradictory position adopted by the defendants and in particular Mr. O'Neill in these proceedings when compared with the Competition Proceedings. In the Competition Proceedings the Company through Mr. O'Neill advanced its argument on the basis of the sworn testimony that the 2002 Agreement applied and in particular clause 9 and that the plaintiff herein had a veto in respect of all matters set out in clause 9 and in particular on the acquisition of any property by the Company. In swearing the replying affidavit in these proceedings, Mr. O'Neill failed to address this contradiction between his evidence in the Competition Proceedings and this court at all. Furthermore, in correspondence prior to the institution of these proceedings, the defendants' solicitors denied that the 2002 Agreement applied at all. At the hearing of these proceedings, counsel for the defendants accepted that the 2002 Agreement and in particular clause 9 applied. Again there was no explanation forthcoming as to why the previous position had been adopted. It was argued by counsel for the defendants that the inconsistency of the position adopted by the defendants in these proceedings and in the Competition Proceedings is a matter that merely went to whether or not a serious issue to be tried had been established. I cannot agree. Injunctive relief is equitable relief. While certainly the onus is on the moving party to come with clean hands, it cannot be said that it has no relevance whatsoever to the respondent to such an application. Furthermore, it would appear that in proceedings in England, Mr. O'Neill may well have adopted a different position on behalf of the Company to those adopted in either the Competition Proceedings or before this court. These are matters which cannot be ignored and to which the court ought to give some weight. As is pointed out by McCracken J., all relevant matters are to be considered in assessing the balance of convenience and I consider the conduct of the defendants to be one of those matters. I am of the opinion that at the very least this conduct justifies this court in concluding that the balance of convenience lies in rejecting the defendants' argument and therefore in accepting the plaintiff's case.

43. In written submissions the defendants argued that the balance of convenience lay in refusing the reliefs sought on the basis *inter alia* of the decision of Clarke J. in *Re Avoca Capital Holdings* [2005] IEHC 482 and the Supreme Court in *Dowling & ors v Cooke & ors* [2013] IESC 25. Each of those cases concerned proceedings brought under section 205 of the Companies Act, 1963, as amended. In each case they were concerned with whether or not a director could remain or be appointed to the board of a company. Injunctions were refused in those cases on the basis that this could lead to a fraught atmosphere on the board of directors or that it was a grave matter for a company to have on its board a person whom the directors did not desire to be there. This case is not concerned with the appointment of a director to the board of the Company. It is concerned with the enforcement of the rights of shareholders in a shareholders agreement and therefore these cases are not relevant to the assessment of the balance of convenience in this case.

44. For these reasons the plaintiff is entitled to an injunction in terms of para. 1 of the notice of motion.

45. Second Relief
The plaintiff also sought an injunction restraining the defendants or any or each of them from breaching the provisions of clause 9 of the 2002 Agreement. This was strenuously opposed by the defendants on the basis that it was far too widely cast, too vague and it was not the type of order which the courts normally would grant by way of an interlocutory injunction. It was also argued that it was unnecessary as the defendants were prepared to give an undertaking to the court in the following terms:-

> *"1. The defendants undertake that in the event that the board of the fifth defendant resolves to take any action that may require the consent of the plaintiff on foot of the provisions of either clause 11 of the 1995 shareholders agreement or clause 9 of the December 2002 agreement then the fifth defendant will give the plaintiff 14 days notice of a proposed action and the reasons why the fifth defendant believes said action is in the best interests of the business of the fifth defendant and will invite the plaintiff to consent to the action.*
>
> *2. If the plaintiff indicates within the 14 day notice period that it is not prepared to consent to the proposed action then the plaintiff will have a 7 day period (from the date on which they indicate their refusal to consent) in which to make an application to the court for interlocutory injunction restraining the fifth defendant proceeding with the action and the defendants undertake that they will not cause the fifth defendant to proceed with the action during that 7 day period.*
>
> *3. In the event that the plaintiff does not apply for interlocutory injunction in relation to the proposed actions then the defendants undertake that they will not cause the fifth defendant to proceed with the action pending the resolution of that application for an interlocutory injunction.*
>
> *4. The defendants give the foregoing undertakings on the basis that they will have liberty to apply to the court for relief from the foregoing undertakings in the event that the action is, in the opinion of the defendants, particularly urgent for the business of the fifth defendant.*
>
> *5. The defendants give the foregoing undertaking entirely without prejudice to the respective parties' positions in relation to the dispute between the parties."*

46. The plaintiff says that the undertaking is inadequate to protect its position as there is no undertaking offered not to proceed with a proposed course of action if the plaintiff withholds its consent to any such proposed action pending the trial of the proceedings.

47. I am of the opinion that the second relief sought by the plaintiff is too widely drawn. As appears from the terms of clause 9 quoted at para. 9 above, it extends to many matters which are not remotely in dispute between the parties. There has been no indication whatsoever that there is any threat that the defendants may make a material change to the relevant business of the Company. It was submitted that it was not appropriate in those circumstances to grant an injunction in the terms sought and thereby expose the first to fourth named defendants to possible contempt applications arising out of the *bona fide* conduct of the affairs of the Company. It was submitted that the uncertainty concerning the second injunction was precisely the type of order that a court will not grant.

48. On the other hand the plaintiff argued that there can be no certainty of its rights under the 2002 Agreement in circumstances where the defendants have indicated that they will not abide by it. It seems to me that this is to overstate the matter. I do accept however that there is evidence that since July 2014 the defendants have proposed to enter into two different leases in circumstances where they knew that the plaintiff had not given its written consent to either of the transactions. It is important to note that at this stage, the defendants had not considered the implications or application of the Voting Pact Agreement. At that point in time they simply denied that the 2002 Agreement (or indeed the Shareholders Agreement) applied. That being so, there is evidence before this court to support the allegation that the defendants were prepared to breach the provisions of clause 9 (b) of the 2002 Agreement unless restrained by an order of the court. It seems to me that the terms of the undertaking offered could merely result in a further injunction being brought between now and the trial of the action rather than disposing of the matter until the trial of the action. In those circumstances, I propose to grant the injunction sought in the following terms:-

"An order restraining the defendants or any of them from procuring the fifth named defendant to enter into a lease in respect of a property at Unit 5A, Distribution Centre, Co. Antrim or to acquire by purchase, lease or otherwise any freehold or leasehold property without the prior consent in writing of the plaintiff pending the trial of this action."