[2019] IEHC 928

THE HIGH COURT

[Record No. 2016/7077 P.]

BETWEEN

BLACKROCK MEDICAL PARTNERS LIMITED

PLAINTIFF

AND

MARPOLE LIMITED, BMD INVESTMENTS LIMITED AND PARMA INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 12th day of December, 2019

1. The Plaintiff seeks three reliefs in the following terms:-

> "(A) An order declaring void and of no effect the purported transfer by the second named defendant to the third named defendant of 10 ordinary shares in the first named defendant.
>
> (B) An order declaring void and of no effect the purported registration by the first named defendant of the aforesaid purported transfer in the register of transfers and register of members maintained in respect of the first named defendant.
>
> (C) A declaration that the second named defendant is not entitled to effect any transfer of any shareholding in the first named defendant otherwise then in accordance with the provisions of the SSA executed by the plaintiff and all of the defendants (amongst others) on the 11th June, 2004".

2. In essence, this case concerns the validity of a transfer of shares between the second and third named defendant ('BMD' and 'Parma' respectively), in the first named defendant.

3. The first named defendant, Marpole Limited ("Marpole") is the operating company which owns 100% of Galway Clinic Doughiska Limited which in turn is the operating company for the Galway Clinic, a private hospital in Galway. From the outset it has submitted that it should not have been joined as a party to this litigation.

4. All other parties to this litigation are investors and shareholders in Marpole. In the normal course these parties entered into certain shareholder agreements, a subscription and shareholder's agreement dated 11th June, 2004 and the amendment agreement to that agreement, dated 29th June, 2015 (the "2004 SSA") and the ("2015 amendment agreement") respectively.

5. The 2004 SSA governs the relationship between the parties. Executed on 11th June, 2004 it is between Blackrock Medical Partners Limited (defined within it as "the developer"), Parma Investments Limited (the third named defendant herein and a vehicle of Mr. Goodman) ('Parma'), BMD Investments Limited (the second named defendant and a company whose shareholding was held by Mr. Brendan McDonald and his spouse, in a shareholding ratio of 80/20% respectively), Marpole, Galway Clinic Doughiska Limited and James Sheehan and Dr Joseph Sheehan respectively.

6. As I understand it, in the course of seeking to develop and establish the Galway Clinic Mr James and Dr. Joseph Sheehan, for reasons that they perhaps now differ upon, but which related to the necessity for fresh investment agreed that the plaintiff to these proceedings, which up to that point was the 100% owner of the project, reduced its interest to 50% with the new investors comprising the third named defendant, Parma taking 40% and BMD, the second named defendant, taking 10%. In essence the 2004 SSA is therefore to deal with that new arrangement.

7. Given that this litigation concerns the validity (or purported validity) of two share transfers it is necessary to set out the background documentation and mechanisms of those transfers in some detail.

2004 SSA

8. The recitals to the 2004 SSA state that both the plaintiff BMP and Galway Clinic Doughiska Limited are private limited companies and as a consequence of Marpole wishing to raise additional capital for business, that the parties have agreed to enter this agreement to:-

   (i) provides for the subscription by the investors (BMP, Parma and BMD) for shares

   (ii) provides for investor loans, and

   (iii) regulate the conduct of the business of the companies, the boards and their relationship between the company and its shareholders.

9. Clause 2.1.1 states that Parma would hold 40% of shares, the plaintiff's 48% (I was told that the other two shares were also held by the Sheehan brothers bringing their then total to 50%) and 10% of the shareholding in BMD. Clause 2.1.2 stated that each of the investors would make advances by way of loan to Marpole, Parma would advance €7.2m, BMD €1.8m and the developer BMP would contribute €9 million.

10. In respect of those loans it was asserted that they were "subject always to any portion of the Investors Loan being repayable in accordance with Clause 7.1.4".

11. Within clause 4 under the sub-heading "Restricted Transactions", it is stated that:-

> "the Companies or either of them shall not do any of the matters listed in schedule 3 without the appropriate consent referred to in schedule 3".

12. The opening paragraph to schedule 3 headed "Restricted Transactions" is as follows:-

> "The investors shall exercise all voting rights and other powers of control available to them in relation to the Companies so as to ensure (so far as lies within their power of procurement, individually or collectively with others) that neither the companies nor any of them will, without the prior written consent of Parma (for so

long as it or its permitted transferees hold 25% of the shares) and the developer (for so long as it or its permitted transferees hold 25% of the shares…".

13. There then follows a number of restricted transactions. Number 11 of the restricted transactions is:-

> "Enter into any contract, transaction, agreement, arrangement or understanding which would amend the current corporate structure or shareholdings or control of the Companies or the Group in any way".

14. Clause 7 (and in particular clause 7.4.1 and 7.4.4) of this agreement are the primary clause in contention. It is necessary to recite it in some detail. It is headed "Transfers and Restricted Transfers" and under the heading "Form of Transfer" states:-

"7.1.1. Any transfer of Shares or an interest in Shares contemplated under this clause 7 shall be deemed to be an obligation to transfer the entire legal and beneficial interest in such Shares or the entire beneficial interest in such interest and Shares (as the case may be) free from any lien, charge or other encumbrance of any nature whatsoever.

7.1.2. With the consent in writing of all of the investors (or their duly authorised representatives), any of the provisions of Clause 7 may be waived in whole or in part in any particular case.

7.1.3. Each investor shall at their written request of the company board keep the company informed as to the beneficial ownership and control of such investor such investor's shares and interests in shares.

7.1.4. Subject always to compliance with the provisions of clause 7.2, any investor who proposes or is required or deemed to transfer Shares or an interest in Shares (Sale Shares) pursuant to this Clause 7 (a Proposing Transfer or) shall upon completion of the sale of the Sale Shares to the transferee (the Transferee):

(1) be repaid by the Company such portion of the Investors Loan (Loan Amount) as equals the proportion which the number of Sale Shares represents of the entire Shares in issue immediately following Completion;
(2) procure that it is a term of the sale of the Sale Shares that the Transferee shall lend the Loan Amount to the Company as a new investor loan on the same terms and conditions as set out in Clause 2.1.2;
(3) procure that it is a term of the sale of the Sale Shares that the Transferee shall, subject to consent of Anglo Irish Bank Corporation PLC, … assume all of the obligations of the Proposed Transferor pursuant to the Anglo Irish Rent Guarantee or pursuant to any related agreement entered into by such Proposing Transferor in respect of the matters guaranteed in connection with

the Transaction and the Proposing Transferor shall be released from those obligations;

and for the avoidance of doubt unless otherwise agreed in writing by all Shareholders, no transfer of Shares shall be registered by the company unless the Transferee complies with 7.1.4(2) and (3) above".

15. In respect of the portions of Clauses 7.1.4, in short the plaintiff contends that the second and third named defendants did not comply with its terms in the transfer of BMD's 10% shareholding in Marpole.

16. Clause 7.4 headed "Permitted Transfers" states:-

"Notwithstanding the provisions of Clause 7.2:" (a reference to the pre-emption clauses)

7.4.1 Shares or interests in shares may be transferred by a Shareholder:

(i) Not relevant for present purposes

(1) which is a Corporate Shareholder to an associated company of the Corporate Shareholder (the Transferee Company) (that is to say, a holding company or wholly owned subsidiary of the Corporate Shareholder and any of the other wholly owned subsidiary of such holding company) PROVIDED ALWAYS that such transfer is made on such terms as if the original Corporate Shareholder and the Transferee Company cease to be associated, the Transferee Company shall be deemed to have given a Transfer Notice immediately prior to that event in respect of all Shares or Interests in Shares transferred to it unless it retransfers the shares to the original Corporate Shareholder or to another entity in the same group of the original Corporate Shareholder".

17. Clause 7.4.4 headed "Shares or any interest in Shares may be Transferred" is again a contentious clause and states:-

"(1) Between any of the following: Parma, any permitted transferee of Parma, Mr. Goodman, any member of Mr. Goodman's immediate family, the trustees of a trust where the beneficiaries comprise members of Mr. Goodman's immediate family, Mr. Brendan McDonald, any member of Brendan McDonald's immediate family, any permitted transferee of BMD, and the trustees of a trust where the beneficiaries comprise members of Brendan McDonald's immediate family; and/or

(2) between any of the following: the Developer, any Permitted Transferee of the Developer, Mr. James Sheehan, Mr. Joseph Sheehan, any member of Mr. James Sheehan's immediate family, any member of Mr. Joseph Sheehan's immediate family, and the trustees of a trust where the beneficiaries comprise members of

either Mr. James Sheehan's immediate family or Mr. Joseph Sheehan's immediate family;".

7.4.5 Shares or any interests in Shares may be transferred to a representative of any shareholder who is an individual.

7.5 No Shares or interest in Shares shall be transferred save as provided in this Clause 7.

18. It will be noted in the phraseology within Clause 7.4.4(1) that whilst there is a reference to any permitted transferee of BMD, the entity BMD itself is not referenced at all within Clause 7.4.4(1). All defendants contend this is clearly an obvious drafting error, the plaintiff, and Mr Shannon in his evidence, whilst noting the omission, does not accept it is an error and contends that, if it is an error, it could equally be by the inclusion of the phrase 'any permitted transferee of BMD' rather than the exclusion of 'BMD'

19. With regard to 7.4.4 and the shares or any interest of shares that may be transferred, 7.4.4 (1) and (2), makes it clear that there is a clear differentiation between what might be described as the Sheehan block and the Goodman/McDonald block (subject to the omission of 'BMD' which I have referred to above).

20. Finally, Clause 7.6 states:-

"Each Investor agrees to inform the other Investor without delay of any offer for Shares".

21. Thereafter, there is the 2015 amendment agreement stated to be between Blackrock Medical Partners Limited, Parma Investments Limited, BMD Investments limited, Marpole Limited, Galway Clinic Doughiska Limited, James Sheehan and Dornway Limited.

22. The reasons for this amendment agreement was largely consequent upon an agreement, arising from litigation, but in any event a new company called Dornway Limited ("Dornway") was established, in which Mr. James Sheehan is the 100% beneficial owner. Dr. Joseph Sheehan acquired 100% ownership (formerly 50%) in the plaintiff Blackrock Medical Partners.

23. The 2015 amendment agreement effectively provides for such consequential amendments as are required to the 2004 shareholders agreement to reflect the "inclusion" of Dornway and the reduction in the plaintiff's shareholding in Marpole so that each now holds a 25% shareholding in Marpole.

2015 Amendment to 2004 SSA

24. Clause 3.1.2 amends clause 2.1.2 of the 2004 SSA, with the loans provided by BMP and Dornway now €4,225,000 respectively (which would appear to total €8.5m and not €9m figure as previously provided within the 2004 SSA).

25. Clause 3.1.3 states that it replaces Clause 7.4.4(ii) of the 2004 SSA in the following terms:-

"Between any of the following: The developer, any permitted transferee of the developer, Mr. Joseph Sheehan, any member of Mr. Joseph Sheehan's immediate family, the trustees of a trust where the beneficiaries comprise members of Mr. Sheehan's immediate family;

3.1.4. A new Clause 7.4.4(3) is added as follows: "Between any of the following; Dornway, any permitted transferee of Dornway, Mr. James Sheehan, any member of Mr. James Sheehan's immediate family, the trustees of a trust where the beneficiaries comprise members of Mr. James Sheehan's immediate family".

26. Counsel for the plaintiff points correctly that Clause 4.4.4(1) of the 2004 SSA was not amended by the inclusion of BMD.

27. Clause 4.1 headed "Waiver" states as follows:-

"Parma and BMD hereby waive any rights or restrictions (where the rights of pre-emption or otherwise) which may be contained in or confirmed by the Articles of Association of the Agreement or otherwise (if any) in connection with the distribution/transfer of shares by BMP to Dornway and hereby consent to such distribution/transfer. Parma, BMD and Dornway hereby waive any rights or restrictions which may be contained in or inferred by the Articles of Association of the agreement or otherwise in connection with a pledge, mortgage (whether by way of fixed or floating charge), charge, grant of a lien, or otherwise encumber the legal or beneficial ownership of the Shares in the Developer or any interest therein".

28. The plaintiff contends that the transfer of shareholding from BMD to Parma both in the transfers of March and September 2016 respectively was not in accordance or in compliance with 2004 SSA as amended.

The March 2016 Transfer

29. The genesis of, what I will describe as the initial transaction to effect the transfer of the 10% shareholding of BMD to Parma appears to begin with a letter of resignation from Brendan McDonald as a director of Marpole. It was known by all parties at the time that Mr. McDonald was in poor health, who wished for this reason to extricate himself from Marpole. He wished to do so by effecting a transfer of those shares to Parma. This was effected by the execution of the following documents executed on 14th March 2016:-

(a) the share transfer form from BMD to Parma for the consideration of €5.92 million.

(b) the share purchase agreement between BMD and Parma reflecting the consideration of €5.92m.

(c) the loan assignment agreement which, after reciting the 2004 SSA agreement, BMD assigned to Parma the loan (and all its rights and remedies in respect of same) for the consideration of €1.58 million. Clause 4 recited that if Marpole were to repay

any of the monies pursuant to the loan within the 2004 SSA to BMD that it would hold them upon trust for Parma. The plaintiff contends this is not in accordance with clause 7.1.4 as it was a mere assignment of the loan and not a repayment by Marpole of that investor's loan, followed by a new loan by the new transferee to the company in the same terms as the previous loan. The plaintiff also asserts that these matters took place in March and they only learnt of them immediately prior to the meeting of the Board of the Galway Clinic in July 2016. Thereafter, the Revenue Commissioners confirmed receipt of the duty paid on 31st May, 2016.

30. In an email dated 22nd July, 2016 from Declan Sheeran (Parma's company secretary) to Mr. Bolger, the chairman of Galway Clinic Doughiska Limited (there does appear to have been certain correspondence prior to this), he asks that an agenda item be included for the following board meeting on 27th July, 2016 of the following item:-

> "Transfer of shares in Marpole Limited from BMD Investments Limited to Parma Investments Limited".

31. On 23 July 2016, Mr. Joseph AM Sheehan (son of Dr Sheehan) writes to Mr McDonald in what can only be described as vituperative terms. It was in turn forwarded to Mr Bolger in his capacity as chairman of Galway Clinic Doughiska Limited, who described it as 'despicable'. His categorisation is in my view entirely correct. Whilst the Plaintiff's counsel was very clear that such a letter could never be stood over, in his evidence Dr Sheehan was more equivocal. The author of the letter was, despite having furnished a witness statement, not called as a witness.

32. In any event, the meeting of the Board of Galway Clinic Doughiska Limited is set for 27th July, 2016 and on 26th July, 2016, Brendan McDonald (chairman of BMD Investments Limited) wrote formally to Mr. Bolger stating that due to his current health problems he had decided to realise the value of his ten ordinary shares in Marpole Limited held by BMD. The letter continues:-

> "I have, therefore, agreed to transfer these shares to Parma Investments Limited in accordance with Clause 7.4.4.(1) of the original subscription shareholder's agreement dated 11th June, 2004. BMD have further agreed that this transfer be executed by a share purchase agreement.
>
> BMD has also agreed to assign the loan which is owed to it by Marpole Limited to Parma Investments Limited in accordance with Clause 7.1.4.(2) of the original subscription and shareholder's agreement.
>
> A share transfer form will be filed with the appropriate Irish authorities in due course. I assume you will also ensure that the company records of Marpole and Galway Clinic will reflect the above transfer".

33. The meeting was duly held on the 27th July, 2016. On that occasion, Mr. Eamon Shannon (acting as an alternative director for Prof Frank O'Sullivan), ES in the note below and

acting as the solicitor for the plaintiff within this litigation and Dr Joseph Sheehan jnr, subsequently sought that certain amendments to the minutes of that meeting be attached. They were subsequently appended to the minutes and in my view, it is more logical to set them out now:-

> "2. ES noted that Clause 7.4.1 of the shareholder's agreement does not explicitly allow the proposed transfer.
>
> 3. ES noted that what was being proposed in relation to the assignment of the shareholder's loan was not in conformance with Clause 7.1.4 of the shareholder's agreement.
>
> 4. ES reminded the meeting that a similar situation arose last year regarding a transfer of shares between Blackrock Medical Partners Limited and Dornway and that the precedent was set whereby an amendment to the shareholder's agreement was entered into by the parties…".

34. In respect of the meeting itself, the majority were in favour of approving the transfer of the shares while Mr. Shannon and Dr. Joseph Sheehan jnr are recorded as voting against approving its registration.

35. Thereafter, by letter dated 28th July, 2016, Mr. Shannon, of the firm Shannon and O'Connor Solicitors, wrote on behalf of the plaintiff herein, to Marpole, BMD and Parma. Amongst its contents it contained the following:-

> "It would appear that the parties to the proposed transfer are seeking to rely on Clause 7.4.4(1) of the Subscription and Shareholders' Agreement dated the 11th June, 2004 and made between… as amended by… It is perfectly clear that the share transfer as proposed by BMD in its letter of 26th July, 2016 does not constitute a permitted share transfer within the terms of 7.4.4(1) of the Shareholders' Agreement…
>
> Accordingly, any purported transfer (and any purported registration of any such transfer) would constitute a manifest breach of the shareholder's agreement and an unlawful act on the part of the company and on behalf of BMD and Parma Investments Limited…
>
> Our client, accordingly, requires that the Company confirm in writing that it shall not proceed with the registration of any such purported share transfer. Our client further requires that each of the proposed parties to the unlawful proposed share transfer confirm that it shall not proceed therewith and further that it shall not engage in any transaction in relation to any shareholding otherwise and accordance with the Shareholders' Agreement. Failing receipt of such confirmation by close of business tomorrow, the 29th July, 2016, we are instructed to institute such proceedings as may be advised to prevent the flagrant breach of the shareholder's agreement".

36. Marpole issued a letter to Shannon & Co. Solicitors dated 20th July, 2016, addressed 'To whom it may concern' stating:-

> "Please be informed that the above mentioned transfer of shares was recorded in the Company's Register of Transfers and Register of Members on Wednesday, 27th last".

37. As I understand it, no other replies were received and the above entitled proceedings, thereafter issued shortly afterwards on the 3rd August, 2016.

38. This point will be expanded later but, for reasons of chronology, I also note it here. In or about 27th July, 2016, Dornway, Mr. James Sheehan's vehicle, sent a letter to the Directors of Marpole Limited, referencing the 2004 SSA agreement and pursuant to clause 7.2.1. notifying an intention to sell to Parma 25 ordinary shares at €1.25 each and that the share price would be €31 million ('the Dornway shares').

39. Events then move forward to the September 2016 transfer.

The September 2016 transfer

40. After these proceedings issued, a letter dated 1 September 2016 from Mr Sheeran to Mr McDonald, sets out the proposed structure for how it was now proposed to deal with the March, 2016 Parma/BMD transfer. The letter envisages that:-

> "- The transfer from BMD to Parma will be reversed. A draft share purchase agreement giving effect to the transfer back to Marpole.
>
> - Thereafter it is proposed that once the shares are back in the ownership of BMD, it will transfer the shares to a newly incorporated subsidiary and thereafter that company will then sell the Marpole shares to Parma."

41. The plaintiff contends that this new proposal (which in broad outline is the terms of the transfer that ultimately occurred) remains in breach of the 2004 SSA, as amended.

42. It is clear from the documentation that there was significant interaction between the legal and accounting advisors for BMD and Parma as to how the September 2016 might be effected, as it appears that there were also tax issues and implications with regard to any rescission/reversal of the transfer of shares in March, 2016. The uncontroverted evidence was that the ultimate transaction cost was in the order of €150,000.

43. In an email dated 21st September, 2016, from Brendan McDonald, Ormsby & Rhodes, the accountants for BMD, states, in part is as follows:-

> "I met with Goodbody lawyer and the Parma reps yesterday morning. Following a number of reasons detailed by the lawyer (not least of which is the fact that we are facing a very clever, utterly vindictive shareholder who will jump on any excuse to

hold up the deal) Parma and I agreed to the proposed transfer procedure despite the complications and higher expense.

The idea is to reverse the March, 2016 transaction and then implement transactions in line with the exact wording of the original Marpole shareholder agreement. This will be done as follows:-

1. Parma and BMD will file a transfer agreement where the shares and loan notes will be transferred back to BMD for 5.92M and 1.28M respectively.
2. BMD will sell the shares and loan note to MIL for 5.92M and 1.28M. Consideration to be left outstanding on intercompany account.
3. MIL (as a "permitted transferee of BMD") will sell the shares and loan note to Parma for the same price.
4. MIL will then use the proceeds to pay BMD".

44. BMD is a wholly owned subsidiary of McDonald Industries Ltd (MIL). It is accepted by all that it is a 'permitted transferee' within clause 7.4.4 of 2004 SSA, as amended.

45. The documentation which effected this transaction, all dated 23 September 2016, comprises:-

(a) an agreement between Parma (transferor) and BMD (transferee) where Recital B and C state as follows:-

"(B) A share purchase agreement was entered on 14th March, 2016 whereby the Transferor purported to acquire the Shares of the Company from the Transferee for the Consideration (the "Share Purchase Agreement").

(C) The Parties wish to rescind the Share Purchase Agreement. Accordingly, they have agreed to enter into this agreement whereby the Transferor will disclaim in favour of the Transferee, any interest in Shares acquired under the Share Purchase Agreement, such that the Parties are in the same position as they had been prior to the entry into by them of the Share Purchase Agreement".

Within the same document under the heading "Share Purchase Agreement", it states:-

"The Transferor (Parma) hereby agrees that it has no title or interest in the Shares and to the extent that any such title or interest transferred under the Share Purchase Agreement it is hereby conveyed back to the Transferee".

Thereafter, the heading "Loan Assignment Agreement" states:-

"The parties hereby agree that the Loan Assignment Agreement is rescinded and that the Transferee continues to be the lender in respect of the loan as if the Loan Assignment Agreement had never been entered into".

(b) There is a stop transfer form from Parma back to BMD.

(c) A share purchase agreement between BMD (the vendor) and MIL (the purchaser). It recites that BMD as owner of the shares is upon completion, selling to MIL as the holding company of BMD coming within the definition of 'permitted transferee of BMD' in accordance with the shareholders agreement. At completion it is further agreed that the purchaser shall deliver the loan assignment agreement.

(d) a loan assignment agreement between BMD Investments and MIL.

(e) Thereafter, a share transfer form from BMD to MIL; and

(f) A share purchase agreement between MIL and Parma. Within the terms of that share purchase agreement, there is at Clause 4.5.2 the following:-

> "In the event that there is a request from the Company (Marpole) that the Purchaser makes a new loan into the Company equal to the amount of the loan (to be on the same terms as the Loan), the Parties agree that they will take such action as may be necessary to terminate the Loan Assignment Agreement such that, in its place:
>
> (1) The Purchaser advances an amount equal to the Loan to the Company;
> (2) The Company repays the Loan to the Vendor and…
> (3) Any amounts paid by the Purchaser to the Vendor pursuant to the Loan Assignment Agreement shall be repaid to the purchaser
>
> Provided always that if any one of the aforementioned items in (1) to (3) does not occur, there is no obligation on the Parties in respect of the other matters listed therein and the Loan Assignment Agreement shall continue in existence in accordance with its terms".

(g) Counsel for the plaintiff points out that the above entitled clause states that such steps will only be taken if required as opposed to what is contended to be an explicit term or requirement of clause 7.1.4 of the 2004 SSA.

46. There is then a Loan Assignment Agreement between MIL and Parma where MIL assigns the Loan to Parma.

47. Finally, also on 23rd September, 2016, there is a letter from BMD, MIL and Parma essentially summarising the process and the inter-partes agreements between them.

48. The certificate issues from the Revenue on 26th September, 2016.

49. The Deed of Adherence between MIL and Marpole is also dated 23rd September, 2016, essentially confirming its adherence to the 2004 SSA and thereafter notice pursuant to s. 262 of the Companies Act, 2014 to Marpole by Brendan McDonald notifying the disposal of the shares to MIL and thereafter Parma.

50. On 27th September, 2016, in an email from Brendan McDonald to David Marsh (of BMD accountants Ormsby Rhodes), there is confirmation that all of the requisite documentation was executed on Friday, 23rd September, and states:-

> "The steps involved will be announced at the Galway Clinic/Marpole board meeting tomorrow, 28th September, and will be voted through by a majority of the board. The share register will then be brought up to date by KPMG tomorrow afternoon…".

51. In a letter from A & L Goodbody, Parma's solicitor, essentially sets out the the position in anticipation of the forthcoming board meeting.

52. In any event, the minutes of the meeting of Galway Clinic on Wednesday, September, 2016 record, following a brief explanation of the steps taken, followed by a motion to the Directors to pass the transfer, was passed four to one, with Dr. Joseph Sheehan, director, voting against.

53. The plaintiff consistently makes the following complaints with regard to the share transfer process undertaken by BMD:-

    (a) The original March, 2016 transfer was not valid as it was not a permitted transfer within Clause 7.4.4 (there being no reference to BMD within that clause).

    (b) Both the transactions of March and September 2016 were invalid because they purported to assign the loans or novate the loans rather than Marpole repay the loan and the transferee advance a new loan pursuant to the clear terms of Clause 7.1.4.

    (c) Both of the above deficiencies could have been cured with the consent of the plaintiff which was never sought. This was asserted to be in contradistinction to the manner in which the original transfer of shareholdings in the plaintiff and Dornway Limited proceeded.

54. It was made clear by Counsel for the Plaintiff that it was seeking the Court's adjudication upon the validity of both transfers or purported transfers, that of March 2016 and thereafter September 2016. All defendants maintain or submit that any issue as to the validity of March 2016 transfer or purported transfer is moot.

55. Shortly prior to this hearing, there was an exchange of correspondence between the plaintiff 's solicitors and those acting for BMD and Parma respectively on the issue or question as to the circumstances in which the plaintiff might consent to the September 2016 transaction. This issue was in turn also raised within the cross examination of Dr Sheehan and in submissions by the plaintiff's and the second and third named defendant's counsel.

56. In my view I should initially determine whether this court, in the events that have happened, should consider the validity of the March 2016 transfer or whether any of the reliefs sought as to its validity are now moot.

The March 2016 Transfer – Is that issue now moot?

57. The Plaintiff contends, as against Marpole, that it should not have registered the board resolution on 27 June 2016, at least until it had instituted its own enquiries in light of the queries raised by two of the Board members.

58. In respect of Parma and BMD, as set out above the complaints are essentially as follows;

    (a) The absence of the entity BMD as a permitted transferee with clause 7.4.4 renders the transaction invalid

    (b) The method of assignment of the shareholding (clause 7.1.4) as opposed to the requirement that Marpole repay the existing investor loan with the 'new' investor then making provision of a new investor loan to the company.

    (c) That, particularly from the evidence of Dr Sheehan as the Plaintiff's sole shareholder, but also advanced by his counsel, a failure to acknowledge or make clear that the March 2016 transfer did not proceed or was unwound because it was in fact an invalid transfer, necessities this court adjudicating upon the terms of that transfer.

    (d) No proper or timely notice was given as required by clause 7.6 of 2004 SSA .

59. A suggestion was advanced by the plaintiff's counsel, that, in other proceedings an adjudication upon the March 2016 transfer may be of significance. From the correspondence opened it is clear that there are apparently three sets of proceedings issued by the plaintiff relating to what they contend to be breaches of the 2004 SSA (as amended). As I further understand it, the agreement between the parties was that the two other cases would proceed together but this case would proceed separately primarily, as I understand it, on the basis of the ongoing ill health of Mr. Brendan McDonald and his wish that all issues with regard to BMD's shareholding be resolved at the earliest opportunity. The other proceedings have as an issue, an allegation by Dr Sheehan, pursuant to which he seeks relief pursuant to s. 212 of the Companies Act 2014 ('the oppression proceedings'), in respect of the conduct of the shareholders to the 2004 SSA.

60. The reliefs to these proceedings, in the events that have happened (the withdrawal of any claim for damages and of injunctive reliefs), are now limited and entirely focused in seeking to challenge the validity of the March and September 2016 transfers.

61. Upon execution of the documentation between BMD and Parma dated 14 March 2016, set out in detail above, in my view it is clear that, as a matter of law, thereafter Parma held the 10% shareholding formerly held by BMD, in Marpole. The correspondence issued by the plaintiff pursuant to its challenge to the validity of March 2016 transfer, which culminated in the issue of these proceedings in early August 2016, make this clear.

62. Thereafter in my view it is necessary to consider the effect of the September 2016 transaction.

63. Upon the execution of the documentation dated 23 September 2016 again as a matter of law, the share transfer was reversed to the effect that the 10% shareholding in Marpole was transferred or reverted to BMD. Thereafter the legal effect of those documents, all executed on 23rd September 2016, was to effect a share transfer in BMD to Parma, via MIL. Again the validity of that transfer is challenged, not by any subsequent amendment to the endorsement of claim but, as set out above, in restricting the reliefs sought to those within paragraphs (A) to (C) of the claim. It is accepted that MIL is a proper proposed transferee, within the context of the September 2016 transfer as required by the terms of the 2004 SSA as amended.

64. Are the reliefs sought as to the validity of the March 2016 transfer now moot or is this court's adjudication now required?

65. I appreciate that there has been an agreement that certain proceedings did not ultimately proceed together but I am puzzled by any suggestion or purported suggestion that this Court would be required to adjudicate upon matters, not relevant to its determination upon any issues within these proceedings, but in respect of issues that might be raised elsewhere, particularly within the oppression proceedings. In my view that forms no basis for seeking an adjudication upon the validity of the March 2016 transfer and I decline to do so in respect of that ground.

66. In the Supreme Court decision of *Irwin v. Deasy* [2010] IESC, Murray C.J. considered the doctrine of mootness initially from the decision of Hardiman J. in *G v. Collins* [2005] 1 ILRM which in turn cited *O'Brien v. The Personal Injuries Assessment Board* (Supreme Court unreported 16th November, 2006) to the effect that:-

> "proceedings may be said to be moot where there is no longer any legal dispute between the parties".

Murray C.J. continued:-

> "The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable".

67. The court, again citing Hardiman J.'s judgment above who in turn quoted from a Supreme Court of Canada decision of Borowski v. Canada [1989] 1 SCR, to the following effect:-

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it".

68. Murray C.J. continues:-

> "The general practice of this Court is to decline, in principle, to decide moot cases. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the court may in the interests of the due and proper administration of justice determine such a question.
>
> However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard. Exceptions may only arise where there is a question of exceptional public importance at issue and there are special reasons in the public interest for hearing the appeal".

69. In my view, there is nothing within the circumstances surrounding the execution of the March, 2016 transfer that constitutes a point of law of exceptional public importance necessary to be determined in the interests of the due and proper administration of justice.

70. As well as citing *Irwin v. Deasy* above, the first named defendant also relies on the decision of Denham C.J. in the case of *Lofinmakin v. Minister for Justice* [2013] 4 IR where Denham CJ. delivering the majority judgment stated:-

> "As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this Court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this Court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the court.
>
> Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case".

71. The plaintiff contends and also points out that the registration of the March, 2016 transaction by the first named defendant and their continued refusal to in any sense "admit" that such a transaction was registered in error, or that the other defendants do not accept was a mistake or error, remain issues to which this court can have regard.

72. In my view, all requisite and necessary steps have been taken to unwind the March, 2016 transaction. I can see nothing within the terms of that transaction that remain. That is abundantly clear from the fact that the documentation grounding the September, 2016 transaction began with a transfer of the 10 shares in the first named defendant from Parma to BMD. Thereafter there was the appropriate amendment to the register of companies. I can see no issue that arises on the facts of this case within these proceedings in respect of the May, 2016 transaction that requires my adjudication. I note from the quotation within Irwin v. Deasy above, that courts can restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of law. In my view, this would be, by analogy to seek my opinion on what has now become, in my view, an academic or hypothetical question of law, in the events that have happened.

73. The first two reliefs sought by this Plaintiff (see paragraph 1) within its endorsement of claim seek reliefs to the effect that the purported transfer (unspecified but as issued prior to the September 2016 transfer, arguably only relates to the earlier transfer) and its registration is void and of no legal effect. That would in my view require a ruling in respect of a transaction which no longer has any legal import. To seek declaratory relief that this transfer is void and of no legal effect and in respect of a registration which has been reversed appears nonsensical. In my view there is now no issue requiring this court's adjudication in respect of the specific reliefs sought in respect of the March 2016 transfer. In my view any issue seeking the court's adjudication upon the validity of the March 2016 transfer or its entry onto the register of companies is moot.

The September 2016 Transfer – the Issue of Consent

74. An issue that arose within the hearing of this case was the extent to which the plaintiff had or has in fact consented to this transfer. Of particular relevance is the correspondence between the respective firms of solicitors (the plaintiff's and Parma's) prior to the commencement of this hearing, dated 11th October and 15th October, 2018.

75. The plaintiff's solicitors write on 11th October. They initially note that there are apparently three sets of proceedings issued by the plaintiff relating to what they contend to be breaches of the 2004 SSA (as amended). As set out above, there was an agreement that this matter proceed separately. The letter also references comments by Twomey J. in his judgment in *Sheehan v Talos Capital Ltd* [2018] IEHC 361 ('Talos') where the learned Judge stated that in respect of that litigation and indeed other litigation concerning Galway Clinic and Blackrock Hospital that:-

> "While this Court has regard to the rights of access to the court, it must also be cognisant to the fact that if even a relatively small number of other litigants used court resources to resolve their private disputes to this extent, the legal system would grind to a halt. Such a scenario would have a serious negative impact on all Court users".

76. The plaintiff's solicitors set out the following proposition:-

> "Our clients would expressly consent to the transfer of the BMD (Investments) Limited shares in Marpole Limited to Parma Investments Limited, such consent being given by our client without prejudice to its position in respect of the invalidity of the transfer mechanisms used between vendor and purchaser and such consent being accepted by your clients without prejudice to its position that the transfers were entirely valid.
>
> The parties would expressly retain their respective entitlements to agitate their positions in respect of the validity of the transfer mechanisms used between purchaser and vendor in the course of the oppressions proceedings".

77. The reply from the solicitors for the second and third named defendants is dated 15th October. Insofar as the consent issue was concerned, the proposal is framed as follows:-

(a) That the plaintiff would consent to the transfer of BMD's shares to Parma.

(b) That that implicitly recognises the necessity that there would also be consent to the assignment of the investor loans from BMD to Parma.

(c) That the plaintiff would no longer be pursuing its claims for the reliefs sought in the proceedings, specifically:-

(i) orders declaring the transfer void;
(ii) injunctions restraining Mr. McDonald from selling his shares; or
(iii) damages.

(d) That the separate s. 212 proceedings would be maintained and the further suggestion that the costs of these proceedings be reserved to the judge dealing with the s. 212 oppression proceedings.

78. At the hearing of this matter, the issue became more nuanced and potentially more confusing. As I understood the submission by counsel for the plaintiff, the plaintiff's position, was that if the court found in favour of the plaintiff within these proceedings and if the defendant were then to ask for its consent to the September 2016 to transaction to Parma, that that consent would be immediately proffered.

79. That position was also raised in the cross-examination of Dr. Sheehan who appeared to suggest that consent was forthcoming but that other reliefs within the endorsement of claim remained. Within his witness statement (which he adopted in its entirety) he asserts that in the event of the plaintiff being requested by any of the defendants to consent to the proposed transactions, that are consistent with the requirements of the SSA, then the plaintiff shall provide that consent.

80. Of course, if a court were to find that the plaintiff had in fact consented to the September transaction, that would be to prosecute this litigation upon a very narrow plinth. It would also suggest that the objection raised is a technical one at best and certainly one of form over substance.

81. Whilst I note that the claim for interlocutory reliefs and damages were not proceeded with by the Plaintiff, in my view given that the nature of the consent being furnished on behalf of the Plaintiff is unresolved, I must now consider the validity of the September, 2016 transaction.

82. On the issue of shareholders rights and their potential infringement, the plaintiff places great reliance upon the case of *Sport Direct v. Minor & ors* [2014] IEHC 546 ('Sports Direct'). Accordingly, it is necessary to consider the case in some detail. On the facts of the case, the plaintiff and the first to fourth named defendants were all shareholders in the fifth named defendant's company. It was the plaintiff's case that they (the first to

fourth named defendants) were in breach of certain provisions within a shareholder agreement dated 3rd December, 2002, which the plaintiff contends were binding upon them.

83. It was common case that the plaintiff was the owner of 50% shares in the company and a nominee director on its board. The difficulty concerned a proposal that the company enter into a lease of a property in Co. Antrim. The plaintiff contended that the shareholder agreement required the consent of shareholders holding 60% of the shares and that this percentage had not been reached in effecting or seeking to affect the decision at issue. The defendants argued that the shareholder's agreement did not apply and, to the extent that it did, it was implicit that any such consent would not be unreasonably withheld. There was also the suggestion that within other proceedings, described as the competition proceedings, involving the same parties, that the terms of the 2002 agreement had been sought to be upheld by the party now arguing as to its enforceability.

84. The Plaintiff sought interlocutory reliefs. In adopting the *Campus Oil* criteria the defendant accepted, in the opinion of the court correctly, that there was such a serious issue to be tried in respect of whether the 2002 shareholder agreement applied on the facts of that case. Thereafter, the court went on to consider whether damages were an adequate remedy for either party. The court quoted from the decision of *Dublin Port and Docks Board v. Britannia Dredging Company Limited* [1968] IR where the Supreme Court accepted that where parties have agreed to a negative covenant clause that a court, at least until the trial of the 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".

85. In *Sports Direct* the court then stated:-

> "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".

The court continued:-

> "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".

86. The court then quoted Laffoy J. in *Ancorde Limited and Harte v. Horgan* [2013] IEHC as follows:-

> "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".

87. Thereafter, the court continued:-

> "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 [a reference to a quotation form him in *O'Neill v Phillips* [1999] 1 WLR]. 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".

88. On that basis, the court was satisfied that damages would not be an adequate remedy for the plaintiff and thereafter, the court considered the balance of convenience and where it lay on the facts of the case. In considering that issue, the court looked at the nature of the rights sought to be protected and stated:-

> "…it is a right of veto of the shareholder pursuant to a shareholder's agreement. Secondly, it is a right in the nature of a negative covenant…. The enforcement of a negative covenant is one where the courts lean in favour of enforcement by injunction".

On the facts of the case, the court granted an injunction in limited terms essentially requiring or restraining the defendants from entering into the said lease "without the prior consent in writing of the plaintiff pending the trial of this action".

89. The plaintiff also relies upon the judgment of Clarke J. in *Metro International SA v. Independent News and Media PLC* [2006] 1 ILRM ("Metro") (also quoted within *Sports Direct*) where Clarke J. stated:-

> "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".

90. This case, and indeed the references quoted from *Britannia Dredging* above, are advanced by the plaintiff in support of its proposition that it is not a case of analysing the ultimate net outcome of what occurred but rather of ensuring that there is strict contractual adherence by all parties to the agreement. If a negative covenant has been contracted for then that is the covenant that must be complied with.

91. In that regard, the defendant advances the proposition that the net effect is that there is no difference and that the intentions of the parties with regard to clause 7.1.4 when they entered into the agreement has been met, in that the capitalisation of the company by reference to the shareholder's loans has been maintained. It was also emphasised that both in respect of *Britannia Dredging* and *Sports Direct* that the enforceability or otherwise of a negative covenant was dealt with expressly and in the context of considering the balance of convenience in the grant of interim relief and not as a stricture or mandate to a court in making final orders in any action. I agree.

92. Not only was the court in *Sports Direct* considering the grant of interlocutory relief only, it was doing so in the context of both parties agreeing that there was a serious question to be tried. On its facts it also involves the potential additional acquisition by the company which in my view is different from the transfer of shares amongst existing shareholders.

93. On the facts of this case no interlocutory relief(s) are now sought; the Plaintiff contended that the specific declaratory reliefs sought within the endorsement of claim are sufficient as the defendants could undoubtedly be relied upon to abide by their terms. I note that Marpole makes an almost identical argument against its joinder to the proceedings ,on the basis that it would of course abide by any order of this court in respect of the nature of the declaratory reliefs sought.

94. Counsel for Marpole cites an extract from Courtney, The Law of Companies (4th ed.) at para. 9.075, as follows:-

> "The primary provision of a pre-emption provision is to control the admission of members to a private company and to obstruct the unregulated admission of outsiders to the circle of members".

The relevance of this passage to the September 2016 is readily apparent

95. The September 2016 transfer is of course linked to the issue or degree to which this plaintiff has already consented to its terms. It is clear that there has been an attempt by the plaintiff to narrow the issues within this case, in part arising from this case proceeding

alone, but also within the confines of the case itself and it is to be commended for doing so.

96. In whatever terms the consent is articulated it now appears that it is, at best, the methodology underpinning the end result of the transfer that is at issue. Dr Sheehan appears to contend that if the method is correct, thereafter consent, if sought (or perhaps not even sought but volunteered) will be forthcoming. The letter from his solicitors of 11 October 2018 appears to adopt a slightly different position. In any event, in carefully considering the comments of O'Donnell J in *Law Society v MIBI* [2017] IESC (cited at paragraph 103 below) in my view they also highlight the unremarkable proposition that some degree of common sense must be brought to bear, even in commercial transactions. I appreciate in that case his conclusions were in respect of the construction of contractual terms, here it is the degree to which the methodology of effecting a share transfer, not impugned by Marpole who argued that it is better protected by a loan assignment as opposed to a repayment of the loans (presumably sequentially to BMD and thereafter MIL) to achieve the share transfer, is an appropriate and valid interpretation of its obligations pursuant to the 2004 SSA as amended..

97. Were I to make the declaratory reliefs in respect of the September 2016 transfer as sought by the plaintiff, that would then presumably require another re-winding of that transaction (presumably at the expense of the second and third named defendants), to thereafter begin again to effect the share transfer to Parma, to achieve an outcome to which the plaintiff has agreed it will consent. That is of course to accept that the plaintiff does not again take issue with any new transfer of the type envisaged.

98. As adverted to above, when dealing with the chronology of events, Mr Sheehan through Dormway offered his shareholding in Marpole in the terms of his letter referred to at paragraph 38 above.

99. The minutiae of that transaction, ultimately to Parma, although Dr Sheehan did seek to acquire some or all of these shares, does not concern this court. However, what is noteworthy is that that transaction was ultimately effected by assignment, that is in the same manner as the September 2016 transaction. It has not been challenged by the plaintiff, a fact confirmed by Dr. Sheehan in his evidence.

Is BMD a permitted transferee?

100. It may well be, consequent upon my ruling that any reliefs sought in respect of the May 2016 transfer are now moot, that this issue no longer requires adjudication. However, as it had been raised in respect of the 2004 SSA, as amended, as a more generalised proposition, for the avoidance of doubt I also deal with it here.

101. In respect of the difficulties or potential difficulties which have arisen in the omission of BMD or the inclusion of the phrase "permitted transferee of BMD", Mr Shannon suggested in his evidence that it was unclear as to the precise nature of the omission and suggested it could have been either of the options above. All defendants contend that BMD ought to

have been included in the list of permitted transferees and the omission is a clear and obvious drafting error

102. All defendants rely upon the judgment of Lord Hoffmann in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 All ER and the decision of the Supreme Court (O'Donnell J) in *Law Society v. MIBI* [2017] IESC ('MIBI').

103. O'Donnell J, delivering the judgment of the court, confirmed the operative principles for construing a contract are those set out by Hoffman J in the case cited above. O'Donnell J. noted that this authority has been cited with approval in cases before the Irish courts. The defendants to this case rely in particular upon his fourth principle in the construction of contracts as follows:-

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning or its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean…"

The Court continued:-

> 'Legal agreements are not poetry intended to have nuances and layers of meaning which reveal themselves only on repeated and perhaps contestable readings. Agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and the agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time the agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard the Court must consider all of the factors, and the weight to be attributed to each….The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial contest in which the agreement was meant to operate, and perhaps even an understanding of the many ways in which even written, formal and legal communication falls short of the standard clarity and precision set by the early editions of Fowler's *Modern English Usage*"

104. In my view applying the matters considered by O'Donnell J, and in considering the 2004 SSA as amended as a whole and the fact that, in my view, no-one has satisfactorily explained why, alone amongst the shareholders, BMD is excluded, I accept that the exclusion of the third named defendant (BMD) from Clause 7.4.4 of the 2004 shareholders agreement as amended, is a drafting error. It is clear from the entire tenor of the agreement, that it reflects the manner in which all parties envisaged that the

transfers would take place between the various shareholders. That was not in any sense departed from when Dornway was included as a shareholder within the amendments incorporated with the 2015 Shareholder's agreement (again without the amendment necessary to include of BMD). All shareholders in essence have the same entitlement to transfer shares within the respective permitted transferee categories and in my view the exclusion of the third named defendant from that categorisation is simply an oversight or omission.

Conclusion

105. In respect of the March 2016 transfer, the declaratory reliefs seek an order of the court that the relevant transfer (and its subsequent registration) is "void and has no legal effect". Shortly after the issue of these proceedings that transfer was reversed. In short, in my view the matters upon which declaratory reliefs are sought are no longer applicable to the March 2016 transfer and any reliefs sought against all defendants, are moot.

106. To the extent that it is required I accept that the exclusion of the second named defendant (BMD) from Clause 7.4.4 of the 2004 shareholders agreement as amended, is an inadvertent omission and/or a drafting error.

107. In respect of the September 2016 share transfer:

(a) It is not a precondition or condition precedent of the 2004 SSA as amended that consent must be sought within the categories of permitted transfers. That the agreement between the plaintiff and Dornway was the subject of such consent does not make it a prerequisite in any other share transfers. Clause 7 is clear in its use of the word 'may'.

(b) Clause 2 of the 2004 SSA as amended is clearly stated to be subject at all times to clause 7.1 4, which is the operative clause in respect of any analysis of this transaction. Likewise, invoking Schedule 3 does not in my view assist this plaintiff as it relates to the acts of the company not its shareholders. In short, the operative clause is 7.1.4 of the 2004 SSA, as amended.

(b) Whilst the statement of claim does plead the September 2016 transfer, which occurred after the issue of these proceedings, there was no consequential amendment to any of the reliefs sought. What did happen over time was that the other proceedings relating to the 2004 Shareholders Agreement were agreed to be dealt with elsewhere and this litigation to be dealt with independently of the others. Within the pleadings it appears that the plaintiff seeks to impugn the September 2016 transfer in the same manner as it did the transaction in March 2016.

(c) Consequent upon matters set out within this judgment, the issue or degree to which the plaintiff had consented or was prepared to consent to the terms of the September 2016 transfer became of importance.

(d) Certainly the nature and extent of that consent is not entirely clear cut; in my view there are nuanced differences between the nature of the consent offered within the

correspondence on behalf of the plaintiff, in the opening of this case, the evidence of Dr. Sheehan and within the written submissions. The preponderance of the plaintiff's case would appear to be to the effect if there was some form of agreement or recognition that the September 2016 transfer would be executed in accordance with the terms the plaintiff contends properly reflects the 2004 Shareholders Agreement as amended, then the consent of the plaintiff would be forthcoming.

108. I have noted the submissions advanced on behalf of the first named defendant. It has opened correspondence showing that it very clearly, at an early stage, sought to be removed or not joined as a party to these proceedings. The only response from the solicitors on behalf of the plaintiff was confirmation that default judgment would be sought if it did not enter an appearance. It is difficult to see what cause of action lies against the first named defendant. In respect of the March 2016 transfer I have already set out my views that any adjudication upon that transfer is moot and in my view that includes any issues raised by the plaintiff surrounding the efficacy of the plaintiff's registration of that share transfer. It is difficult to discern to what extent any argument surrounding the efficacy of the share transfer arising from the September 2016 now arises where it is common case that MIL is a permitted transferee within Clause 7.4.4 of the 2004 SSA.

109. It is noteworthy and in my view of particular significance that in submissions to this Court the first named defendant contends that, as a matter of reality a number of the provisions of the 2004 SSA as amended, inure for its benefit and it does not lie with the plaintiff to seek to litigate any alleged breach of its terms. I would not go so far as to suggest that this plaintiff lacks *locus standi*, but the position adopted by Marpole in maintaining that its interest have been properly protected at all times throughout this process is one to which I have had regard. It further contends that the assignment of the loan (which is the manner in which the September 2016 transfer was effected) in fact afforded a "cleaner" and more timely protection of the company's interest rather than the more laboured methodology set out above.

110. I can see nothing within the September 2016 which requires the declaratory reliefs sought by this plaintiff. In my view the documentation and steps taken by the second and third named defendants (which have been set out in some detail above) accord with the tenor of the 2004 SSA as amended. I reiterate that no issue has been taken by the first named defendant in respect of the steps that had been taken. Quite the contrary.

111. Dr. Sheehan, in his evidence, stated that he was concerned about the status of his company as a minority shareholder. Given what is clearly the significant enmity that exists between the respective shareholders of the plaintiff and Parma, Dr. Sheehan apprehended a significant "shift" in the shareholding and consequential voting rights within this company arising from the 10% transfer of shares to the third named defendant, to the plaintiff's detriment

112. The plaintiff seeks to argue the efficacy of the September 2016 transfer upon the narrowest and if I might say most pedantic of grounds namely, that there has been, upon a deeply literal interpretation upon Clause 7.4.1 and 7.4.4 of the 2004 Shareholders Agreement (as amended), a failure to adhere strictly to its terms rendering it null and void. I am not prepared, and nor do I consider it appropriate, to make such an order.

113. Even if there has not been a strict absolutely literal adherence to the Shareholders Agreement (and I am far from satisfied that that is the case), then the assignment of the shareholding (and the comfort that the first named defendant takes from that procedure in the context of the company remaining fully protected in respect of any loan that it might call upon) renders it a transfer that in my view accords with the terms of the 2004 Shareholders Agreement (as amended). The entire structure of the Shareholders Agreement must be considered as a totality and it is clear that between inter-shareholder transfers (if I may describe them as such) that the share price and indeed loans that inured for the benefit of the company (in respect of the latter) and for the protection of remaining shareholders (in respect of the former), that in my view the terms of the September 2016 transfer reflect that interpretation of this Agreement.

114. The suggestion that consent would be readily forthcoming if, to achieve precisely the same result, another perhaps even more convoluted reversal and execution of additional documentation to satisfy the plaintiff were now to be effected, is in my view very difficult to understand.

115. In short, for the reasons set out above, any reliefs sought pursuant to the March 2016 transfer are now moot, the omission of BMD as a permitted transferee is an inadvertent omission or drafting error and the terms of the September 2016 transfer, has been effected in accordance with the terms of the 2004 SSA as amended.

116. Accordingly, insofar as the plaintiff seeks reliefs pursuant to paragraphs A, B, and C within its endorsement of claim, in respect of A and B, I decline to make the declarations sought.

117. With regard to paragraph C, I do not understand the nature of the declaratory reliefs sought. In my view it is too broadly drawn and in any event the matters at issue within this litigation (as opposed as perhaps when these matters were initially drafted) are dealt with in the reliefs of A and B above. The reference to 11 June 2004 within its terms can only relate to the March 2016 transfer which I have already dealt with. For the avoidance of doubt, I decline to grant any declaration in accordance with para. C also.

118. I will therefore now hear the parties as to any additional orders that may be required including the question of costs.