[2020] IEHC 256

THE HIGH COURT

Record No. 2014/10816 P

BETWEEN

JOSEPH SHEEHAN

PLAINTIFF

AND

BRECCIA, IRISH AGRICULTURAL DEVELOPMENT COMPANY, BLACKROCK HOSPITAL LIMITED, GEORGE DUFFY, ROSALEEN DUFFY AND TULLYCORBETT LIMITED

DEFENDANTS

Judgment of Mr. Justice Quinn delivered on the 27th day of May, 2020

PART ONE: INTRODUCTION

1. In November 2013, the Special Liquidators of Irish Bank Resolution Corporation Limited ("IBRC") put up for sale as part of a process described as "Project Stone" the loans of the plaintiff, Dr. Joseph Sheehan, and of the fourth named defendant, Dr. George Duffy. These loans had been granted to the plaintiff and Dr. Duffy in connection with the acquisition by them of increased shareholdings in Blackrock Hospital Limited, the third named defendant, on 28 March, 2006, and were secured by mortgages on those shareholdings.

2. The successful bidder for the loans was JCS Investment Holdings XIV ("JCS"), a company controlled by the plaintiff.

3. On 4 April, 2014, JCS executed a Loan Sale Deed with the Special Liquidators. The plaintiff executed this deed in his capacity as "*Purchaser Guarantor"* to guarantee the obligations of JCS thereunder. The Loan Sale Deed provided that a deposit of €2.4m be paid on signing. The deposit was paid on Monday, 7 April, 2014.

4. JCS sourced its funding for the bid by a facility from Talos Capital Limited ("Talos"). It was a condition of the Talos facility that JCS would acquire and provide as collateral for the loan, *inter alia*, the loans of the plaintiff and Dr. Duffy and 56% of the shareholding in BHL which comprised the shareholding of the plaintiff, of Dr. Duffy and of another shareholder, Benray Limited (a company owned and controlled by Mr. John Flynn).

5. It was also a condition of the Talos facility that the plaintiff and Dr. Duffy and others would enter a certain framework agreement which would regulate the rights of the parties in relation to BHL, including the control of the flow of dividends which would fund interest payments on the Talos loan. (See judgment of Ryan J. in *Talos Capital Limited v. Joseph Sheehan and John Flynn* [2015] IEHC 27).

6. On the same day that JCS executed the Loan Sale Deed, namely 4 April 2014, Dr. Duffy repaid his loan to IBRC with the benefit of funding advanced by the first named defendant, Breccia. Breccia is also a shareholder in BHL. It was a company in a group (the "Parma Group") owned and controlled by Mr. Laurence Goodman and his family. (In a separate module of these proceedings, still pending, the plaintiff claims that there have since been certain material changes in the ownership of Breccia.)

7. On 7 April, 2014, JCS drew down from Talos the sum of €2.4 million which was the deposit payable on signing the Loan Sale Deed and this amount was paid to the Special Liquidators, the Loan Sale Deed thereby becoming effective.

8. When Talos later learned that Dr. Duffy's loan had been redeemed in full before the Loan Sale Deed became effective and the deposit of €2.4m paid, it declared JCS to be in default and notified JCS and the plaintiff that JCS was in breach of the conditions precedent for any further drawdown of funds under the facility. Talos also demanded repayment of the deposit, together with interest and costs.

9. These events had the following effects:-

   (1) JCS was unable to complete the loan purchase in accordance with the Loan Sale Deed,

   (2) Talos pursued the plaintiff and Mr. John Flynn, as guarantors of the obligations of JCS to Talos, for the amount of the deposit already advanced together with interest and costs and secured judgment against them for these amounts, (see *Talos Capital Limited v. Sheehan & Ors.* op cit).

10. Later in 2014, the Special Liquidators again put up for sale, in a process referred to as 'Project Amber', the loans of the plaintiff and the attendant security comprising his shares in BHL. This time Breccia was the successful bidder and acquired the loans and security pursuant to a Loan Sale Deed dated 17 October, 2014, and a Deed of Transfer dated 10 December, 2014.

11. On 18 December, 2014, Breccia notified the plaintiff of its acquisition of his loans and demanded repayment of the balance then claimed on his loan facility of €16,144,572, together with a sum of €6,734,852, being an amount then claimed pursuant to a guarantee of a loan of Benray Limited, making a total of €22,879,424.

These proceedings

12. On 22 December, 2014, these proceedings were commenced. The plaintiff claims*, inter alia*, that the repayment of Dr. Duffy's loan on 4 April, 2014, with funding provided by Breccia, followed later by the purchase of the plaintiff's loans by Breccia amounted to a conspiracy between Dr. Duffy and Breccia and others. He also alleges, *inter alia,* breach of a duty of confidence, breach of contract and inducement of breach of contract, misrepresentation and breach of statutory duty. He claims these actions caused him to lose the opportunity to complete the acquisition of his loans and to gain a controlling shareholding in BHL and exposed him to liability for repayment of the deposit borrowed and other amounts.

13. These allegations are denied by all the defendants and the first defendant counterclaims for judgment against the plaintiff in the amounts demanded by it together with interest which as at 27 November, 2019, stood at a total sum of €19,026,588.

14. I have concluded that the plaintiff's claim should be dismissed and that the first defendant, Breccia, is entitled to judgment in the amount of its counterclaim.

Injunction

15. On 22 December, 2014, the plaintiff applied for and obtained an interim injunction restraining Breccia from acting pursuant to the demand in the letter dated 18 December 2014, and/or seeking to enforce the security which it had acquired.

16. When the matter came before the court on 12 January, 2015, and again on 26 January, 2015, the injunction was continued on an interlocutory basis until the trial of the substantive proceedings.

17. Subsequently, Breccia made an application for an order discharging the interlocutory injunction having regard to findings in related cases, notably the judgment of the Court of Appeal in *Flynn and Benray Limited v Breccia* [2017] IECA 74. That application was refused by Haughton J. by order dated 30 November, 2017. This refusal was overturned by a judgment of the Court of Appeal delivered on the 31 July, 2019. At the time of the hearing of these proceedings the plaintiff had sought leave to further appeal that judgment of the Court of Appeal.

18. The basis for the injunction was the plaintiff's claim that the conduct of the defendants impugned in this module of the proceedings rendered the acquisition of the plaintiff's loan by Breccia unlawful and void and that Breccia's demand for repayment was invalid. Having regard to my findings, the claim for a permanent injunction will be refused.

Modules

19. In other modules of these proceedings different claims are made which may be summarised as follows: -

    (1) That the amount claimed by Breccia on foot of the loan acquired by it included certain penalty interest which is unlawful and unenforceable. That claim was upheld by the High Court and Court of Appeal and is under appeal to the Supreme Court. I refer to that issue as the "Redemption Module". The counterclaim maintained in this module is for the loan and interest excluding penalty interest.

    (2) That dividends payable by BHL on the plaintiff's shares which are the subject of a share mortgage originally granted in favour of Anglo Irish Bank and now held by Breccia should be paid to the plaintiff. This claim was dismissed by me and is under appeal (*Sheehan v. Breccia & Ors.* [2019] IEHC 410) (Module 1).

    (3) That certain changes affecting the shareholding of Breccia and of the group of companies ("*Parma*") of which it was a member constituted a change of control of Breccia triggering the application of certain transfer provisions contained in Clause 8 of the Shareholders' Agreement relating to BHL. (Module 2). This module opened before this Court on 19 June, 2019, but stands adjourned pending an appeal to the Court of Appeal on a ruling of the court concerning the scope of evidence to be led by the plaintiff.

20. This judgment relates to Module 3, the so-called "*Conspiracy Module*". In this module, the plaintiff alleges, inter alia, conspiracy, breach of duty, including statutory duty, breach of confidence, misrepresentation, breach of contract and inducement to breach of contract. Breccia counterclaims the amounts outstanding under the plaintiff's loans.

21. The plaintiff was represented by solicitors and counsel from the commencement of these proceedings until September 2019. At that time he discharged his legal team and he conducted the hearing of this module in person.

22. Part Two of this judgment comprises the main chronology of events, being the general background and the engagement between the plaintiff and Dr. Duffy. In Part Three, I examine the role of Breccia and in Part Five, other relevant events, including the actions and conduct of the plaintiff and his associates towards Dr. Duffy. Thereafter I consider submissions and claims made by the plaintiff and the counterclaim.

PART TWO: MAIN CHRONOLOGY

The March 2006 transaction

23. The plaintiff was a founding shareholder in the third named defendant, Blackrock Hospital Limited, together with the fourth named defendant, Dr. George Duffy, Dr. James Sheehan and the late Dr. Maurice Neligan. The hospital was established in 1986 with the support of BUPA, which took a 56% shareholding.

24. On 28 March, 2006, BUPA exited the structure and its 56% holding was taken up by the plaintiff, by Dr. Duffy, and by two new shareholders, Benray Limited (owned and controlled by Mr. John Flynn) and Breccia. Dr. James Sheehan did not increase his shareholding.

25. The percentage shareholding in BHL before and after the 2006 transaction was as follows:-

Dr. Joseph Sheehan	16	28	(+12)
Breccia	0	28	(+28)
Dr. George Duffy	12	20	(+8)
Dr. James Sheehan	16	16	(+0)
Benray Limited	0	8	(+8)
BUPA	56	0	(-56)

26. The acquisition of the additional shareholdings was funded by loans from Anglo Irish Bank, as it then was. Each of the borrowing shareholders, namely the plaintiff, Breccia, Dr. Duffy and Benray signed Facility Letters with the Bank and security was granted which may be summarised as follows.

Anglo Irish Bank Facilities and Security

27. Each borrower entered into a facility letter with the Bank, which provided for repayment of the principal amount on 30 December, 2010, and the payment of interest on a quarterly basis at the end of each year.

28. Pursuant to the facility dated 28 March, 2006, the plaintiff borrowed the sum of €11,188,356. He borrowed a further sum of €6,342,000 pursuant to a second facility agreement dated 12 November, 2008, bringing his total borrowings from the bank to €17,530,256.

29. Each borrower granted to the Bank a mortgage of its shares (which included a charge over dividends and other rights attaching to the shares), and of a deposit account and an assignment of relevant agreements.

30. Each of the borrowers and James Sheehan entered into cross-security arrangements with Anglo the purpose and effect of which was that if any shareholder defaulted, Anglo could force the sale of the entire shareholding. The cross-security was effected by the following:

    (1) Each of the plaintiff, James Sheehan, Rosemary Sheehan and George Duffy guaranteed all monies due to Anglo by Benray (the "Benray Guarantee and Indemnity").

    (2) Each of Benray, James Sheehan, Rosemary Sheehan and George Duffy guaranteed all monies due to Anglo by the plaintiff (the "Sheehan Guarantee and Indemnity").

    (3) Breccia entered into a Deed of Covenant to the effect that on the occurrence of a default by any of the other shareholders it would do such things as the Bank may require to give effect to a sale of its shares (the "Breccia Deed of Covenant").

Breccia Deed of Covenant

31. Breccia's cross-security in the form of a Deed of Covenant differed from the full form of Guarantee of Indemnity given by the other shareholders because Breccia's solicitors, Messrs. A&L Goodbody, advised that the grant of a full Guarantee and Indemnity in respect of the borrowings of the other shareholders could place it in a position where the occurrence of an event of default under such a cross-guarantee could trigger cross default provisions in unrelated borrowings elsewhere in the group of companies (the "Parma Group") of which it was a member. The form of Deed of Covenant it proposed had the effect required by Anglo that Breccia's shares could be included in any sale of shares on the occurrence of a default by any shareholder. This was accepted by Anglo.

32. The plaintiff has asserted in this Module and in previous modules that he was not aware that the form of security granted by Breccia differed from the cross guarantees and indemnities given by him and the other shareholder borrowers. He claims that the final form of the Shareholders' Agreement which he saw before the completion of the transaction provided in Clause 3.4.1 that each "Promoter" would grant to Anglo a Guarantee and Indemnity, and made no exception for Breccia.

33. The Shareholders' Agreement executed by all parties on 28 March, 2006, including the plaintiff by the signature of his solicitor and attorney, Jerry Sheehan, included after the words "*Guarantee and Indemnity",* the words "*or otherwise*". These words permitted Breccia to grant its preferred form of Deed of Covenant instead of a Guarantee and Indemnity. In evidence in Module One the plaintiff did not deny that Mr. Jerry Sheehan was his duly appointed attorney authorised to execute transaction documents on 28 March, 2006. Nor did he deny that on 23 March, 2006, Messrs. A&L Goodbody had written to Anglo Irish Bank and its solicitors, BCM Hanby Wallace, and copied Jerry Sheehan, explaining why they proposed a Deed of Covenant instead of a Guarantee and Indemnity. The plaintiff claims that he himself did not see that letter, and sought – not for the first time – to fix Mr. Jerry Sheehan with responsibility for what he characterised as his own ignorance of its contents. He sought to claim that the introduction of the critical words "*or otherwise*" in Cl. 3.4.1 was concealed from him.

34. Under cross-examination the plaintiff acknowledged the following:

    (1) that Mr. Jerry Sheehan was his lawful attorney,

    (2) that Mr. Jerry Sheehan had seen the A&L Goodbody letter,

    (3) that the existence of the letter and of an explanation for the Deed of Covenant was made known to him at the time of the transaction.

    The plaintiff suggested that an incomplete explanation had been given and therefore that his consent to the transaction on the basis that Breccia only granted a Deed of Covenant was uninformed.

35. Mr. Jerry Sheehan was the plaintiff's duly authorised attorney. He saw the advice of A&L Goodbody which was then accepted by the Bank, informed the plaintiff that he had seen this letter, and then executed the Shareholders' Agreement and other transaction documents as attorney for the plaintiff. The claim that the substitution of a Deed of Covenant for a Guarantee and Indemnity in the case of Breccia and that the insertion of the words "or otherwise" in Cl. 3.4.1 of the Shareholders' Agreement, were all concealed from the plaintiff, is unsupported by evidence.

36. Finally, on this subject, the plaintiff has not pleaded any causal connection between the Breccia Deed of Covenant and the events which he claims resulted in the losses he is alleged to have suffered.

Shareholders' Agreement

37. On 28 March, 2006, the parties also entered into a Shareholders' Agreement. The parties to this agreement were James Sheehan and Rosemary Sheehan, the plaintiff, Dr. Duffy, Breccia and Benray Limited, all described as the Promoters, the second named defendant Irish Agricultural Development Company ("IADC") and Mr. John Flynn, as guarantors respectively of the obligations of Breccia and Benray, the third defendant, BHL and Blackrock Clinic Limited, a wholly owned subsidiary of BHL.

38. The stated purpose of the Agreement was to facilitate the subscription for and redemption of the BUPA 56% shareholding and the future management and development of Blackrock Clinic, being the hospital complex and lands at Blackrock, Co. Dublin.

39. The principal provisions of the Agreement relevant to the proceedings are as follows.

40. Clause 3 provides generally for the parties to co-operate in the operation and development of Blackrock Clinic *"as a first class medical facility aspiring to best medical practice in accordance with its mission statement as revised from time to time and approved by the Board."*

41. Clause 3.4 governed financial obligations of the Promoters. Clause 3.4.1 is relied on heavily by the plaintiff:

"Financial Obligations of the Promoters

3.4.1 Each of the Promoters will mortgage their shares in BHL as security in respect of various loans advanced to them or to third parties on their behalf by Anglo Irish Bank Corporation Plc (herein called "Anglo"). In addition by way of further security each of the Promoters have granted or will grant Anglo a right by way of Guarantee and Indemnity or otherwise whereby Anglo will have recourse to each Promoters shares only in BHL for the purpose of a sale of the Shares in the event that a Promoter is in default of his loan but to the intent that the proceeds of sale of each Promoters shares only to be applied against him/its indebtedness to Anglo.

3.4.2 Each Promoters covenants with the other Promoters to perform its obligations as set out pursuant to any facility made available by Anglo (or any other lending institution in substitution therefore) as set out in clause 3.4.1 above." [emphasis added]

42. Clause 3.4 further provides that each Promoter covenants with the others to perform its obligations to the Bank and indemnifies the others against any breaches.

43. Clause 3.4 also contains provisions governing the indemnity rights as between the Promoters where any are called on to pay pursuant to their guarantees.

44. Clauses 5 and 6 concern the business of the Company (BHL), governance, restricted transactions by Promoters, compliance and competition by Promoters.

45. Clause 7 governs publicity and confidentiality. Clause 7.2 headed "*Confidential Information*" is relevant to this module:

"7.2 Confidential Information

The terms and conditions of this Agreement and/or any document or matter referred to in this Agreement and any heads of terms relating to this Agreement including their existence and any information of a confidential nature relating to the

business or affairs of the Company or of the Promoters (collectively, the "Confidential Information") shall be considered confidential information and shall not be disclosed by any party hereto or to any third party without the prior written consent of the Promoters or except in accordance with the provisions of clause 7.3 save where such information has come into the public domain otherwise as a result of a breach of this clause." [emphasis added]

46. Clause 8 restricts transfer of shares otherwise in accordance with an "*offer round"* procedure, subject to certain exemptions. Relevant to this module are the following.

47. Clause 8.3.1 is headed "*No Concealment of True Ownership", and provides:*

"8.3 No Concealment of True Ownership

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

48. Clause 8.8.1 provides that "*any Promoters may transfer his Shares to and among any one or more, of his Family Members or to a Body Corporate wholly owned by him."*

49. Clause 8.9 requires the disclosure of information between Promoters and Shareholders where a change of control occurs.

50. Clause 9 concerned dividend policies. It stipulated that for the year ended 31 December, 2006, the directors would procure the declaration of a total annual dividend of €4 million. Clause 9.4(b) contained a provision for increasing dividends at a rate of 5% thereafter.

51. In Module 1 of these proceedings, the plaintiff claimed that the dividends declared on his shares should be paid to him notwithstanding the existence of the mortgage on those shares which governed also the payments of dividends. I determined in that module that in accordance with the terms of the Share Mortgage, the dividends payable on those shares were payable to Breccia as the holder of the mortgage (Module 1 judgment). Relevant to this Module 3 is that the allegation of conspiracy in para. 30 of the Statement of Claim is based on "*the said acts*" which includes the non-payment of dividends to the plaintiff. This court has already held that the plaintiff was not entitled to receive payment of the dividends and this aspect of the conspiracy claim was not pursued at the trial of this Module.

52. Clause 10 contained "*General Provisions*", including an acknowledgment on the part of the parties that they had each been afforded the opportunity to take independent legal advice on the terms of the agreement prior to entering into it. The shareholders and promoters were all advised and represented in relation to the Shareholders' Agreement by Jerry Sheehan of Sheehan & Co. Solicitors who at that time acted for both BHL and the shareholders. The only shareholder who was noted to have taken any separate legal advice in connection with the entry into the agreement was Breccia, and that advice

related to the discreet issue concerning the effect of the cross guarantees on which it was advised by Messrs. A&L Goodbody (see para. 31 above).

Events after 2006

53. Each of the Anglo Irish Bank loans provided for repayment of principal on 30 December, 2010, with provision for the payment of interest on a quarterly basis pending repayment. That date passed without repayments of the loans.

54. On 21 January, 2009, ownership of the Bank transferred to the Minister for Finance pursuant to the Anglo Irish Bank Corporation Act, 2009.

55. In August, 2011, Breccia repaid its loan. The Deed of Covenant entered into by Breccia remained in force in accordance with its original terms.

56. At the time of the events referred to below the loans of the plaintiff Dr. Duffy and Benray were still outstanding.

57. Following the passing of the date for repayment of the loans, Dr. Duffy anticipated it could become necessary for him to sell all or part of his shareholding in BHL to repay his loan. On 22 September, 2011, Dr. Duffy transferred his shareholding as to 7% to his wife, Rosaleen Duffy, and as to 13% to Tullycorbett Limited. Tullycorbett was a company controlled by Dr. Duffy in which his children also held shares. His evidence was that the transfer was effected in anticipation of a potential sale of the shares and on the advice of PWC for the purpose of family estate planning. These transfers are referred to in this judgment as the "Tullycorbett Transfer".

58. In some parts of the evidence reference is made to the Tullycorbett Transfer having been effected on 22 October, 2011, but the evidence of Dr. Duffy was that this was made on 22 September, 2011.

59. The consent of Anglo Irish Bank was not obtained for the Tullycorbett Transfer. Although never pleaded in the case, in his submissions for the hearing, the plaintiff claimed, for the first time, that this absence of Bank consent rendered the Tullycorbett Transfer unlawful and said that this "*illegality*", and "*theft*" was the "*root cause"* of this entire proceedings. I shall return to this subject in detail later. (See Part Four).

60. On 3 October, 2011, the name of Anglo Irish Bank was changed to Irish Bank Resolution Corporation.

61. On 7 February, 2013, IBRC was placed in special liquidation and Kieran Wallace and Eamonn Richardson of KPMG were appointed joint Special Liquidators.

62. During the years between 2009 and 2014 a number of efforts were made from time to time by shareholders to sell their shares in BHL. Some of these efforts involved the plaintiff in a leading role, and in certain instances the plaintiff in conjunction with Mr. John Flynn and others. This included references to a potential sale in 2009 to HG Capital, and in 2011, a potential sale to Global Healthcare.

63. In 2012 proposals were brought for the sale of the entire shareholding to Global Surgical Partners and United Surgical Partners. Some discussions about these proposals were held at meetings of the board of BHL.

Project Stone

64. On 31 October, 2013, the Special Liquidators notified the plaintiff and Dr. Duffy of their intention to sell their loans.

65. In November 2013, the Special Liquidators put the loans up for sale together with the attendant security, comprising principally their shares in BHL and the relevant cross-guarantees. The plaintiff, through JCS, and Breccia each submitted a bid and each was invited to make a final bid in Phase 2 of Project Stone.

66. On 21 January, 2014, the Special Liquidators issued their process letter for Phase 2 of Project Stone. Bidders were required to make their final offers by 14 March, 2014, at 1 p.m. The Process Letter stipulated that a Loan Sale Deed would be executed and a deposit paid no later than 4 April, 2014.

67. On 14 March, 2014, the plaintiff, through JCS, submitted his final offer to the Special Liquidators who subsequently informed him that JCS was the successful bidder.

68. The plaintiff secured the funding for this bid by a facility with Talos Capital Limited.

Talos Term Sheet

69. On 3 March, 2014, Talos issued its Term Sheet for the facilities.

70. Under the Term Sheet the lender was Talos, and the borrowers were Joseph Sheehan and John Flynn or "*companies 100% controlled by them".* The borrower became JCS. The loan amount was "*up to €45 million",* on the basis that the initial drawdown would be a sum of €35 million "*to purchase the existing facilities".*

71. The loan was for a term of four and a half years with provision for interest only payments to be made quarterly.

72. The required security was defined in the Term Sheet as *"first priority mortgage over the Collateral Shares and other customary security to be provided in definitive amended loan documents."*

73. The "*Collateral Shares"* were defined as "*56% shareholding in Blackrock Hospital Ltd", which* was intended by the plaintiff to be the shareholding of the plaintiff as to 28%, of Benray Limited as to 8%, and of Dr. Duffy as to 20%.

The JCS bid

74. The plaintiff claims that the bid of JCS was made pursuant to a "*unified approach"* involving himself, Dr. Duffy and Mr. Flynn. He gave evidence that his objective in bidding for the loans was to secure control of the hospital and protect what he described as his principle goal, namely to ensure that the future operation and ethos of the hospital would be consistent with that of the original founders. He said that this could be achieved under

the mutual guidance of himself and Dr. Duffy. He believed that the founders' principles and ethos were likely to be diluted or even extinguished in the event that *"the commercial interests proposed or promoted by Mr. Goodman achieved primacy."* The plaintiff said that this objective informed his engagement with Dr. Duffy and Mr. Flynn and he believed that Dr. Duffy was sympathetic to his views in respect of the future operation and ethos of the hospital.

75. In the statement of claim the plaintiff claims that he and the "*Duffy defendants"* (being Dr. Duffy, Rosaleen Duffy and Tullycorbett Limited), were negotiating a joint venture to purchase those loans. No evidence of the terms of a proposed joint venture was adduced.

76. Dr. Duffy was not a director or a shareholder of JCS.

77. Neither the Talos Term Sheet or the later Talos Facility Letter were shown to Dr. Duffy.

78. The plaintiff claimed that although he believed Dr. Duffy was "*onboard*" and part of his "*team*", confidentiality obligations precluded him from showing the Talos Facility Letter to Dr. Duffy, and I shall return to that evidence later. However, he never proffered any explanation as to why in the first instance he had not included Dr. Duffy in the "JCS" venture. Evidence was given that the plaintiff did not trust Dr. Duffy, which was inconsistent with the proposition that they were together engaged in a "*unified approach*".

79. After the plaintiff was informed that he was the successful bidder he engaged further with Talos and with the Special Liquidators. The Special Liquidators required clarifications as to the capacity of JCS to complete the transaction, with particular reference to verifying that JCS was capable of complying with the conditions of its facility with Talos. In this context the plaintiff sought confirmation from Dr. Duffy that he had no objection to the sale of his loan and that Tullycorbett, being the holder of shares which secured the loan, was aware of the conditions precedent to the Talos facility

80. This led to a series of exchanges over the following weeks between the plaintiff and his associates, being Mr. Flynn and a Mr. Dan O'Neill, on the one hand and Dr. Duffy and his son-in-law, Mr. Simon Lynch on the other hand.

81. Mr. O'Neill was a lawyer of "O'Neill & Company, International Legal Advisers" having addresses in Washington DC and Delgany, Co. Wicklow, who had been acting as a legal advisor to the plaintiff in connection with these matters. He did not give evidence, although a witness statement had been delivered in respect of him.

82. Mr. Lynch is a solicitor practising in Dublin and is the son-in-law of Dr. Duffy. Mr. Lynch's role was not to act as solicitor for Dr. Duffy, who had previously retained Alfred Thornton solicitor and at the time of these events Messrs. Eversheds. Mr. Lynch's role was described by him and by Dr. Duffy as a "*sounding board*" or "*second pair of eyes and ears*". He was assisting Dr. Duffy in relation to the various discussions concerning his loans and how they might be redeemed.

83. Mr. Lynch had also been a trainee solicitor at Sheehan & Co. Solicitors in 2006 and was present in that office on 28 March, 2006 when the Shareholders' Agreement was being concluded and executed. In that capacity he was a witness to the execution of the Shareholders' Agreement by all the parties thereto except the first and second defendant. Mr. Lynch gave evidence of his role in relation to a number of the meetings discussions and emails referred to below.

84. In the communications which followed there are regular references to Mr. O'Neill and he is a party to many of the relevant emails. During the course of the plaintiff's own evidence he said that he could not be certain that Mr. O'Neill would give evidence. No explanation was offered as to why Mr. O'Neill did not attend to give evidence, other than that the plaintiff was aware that at the time of the hearing Mr. O'Neill was sailing. He was unable to say where.

85. Before turning to the content of the emails exchanged over the following days and weeks it is appropriate to note their context and the reliance placed on them by the plaintiff.

86. In the statement of claim (para. 19(e)) it is alleged that when the plaintiff, through JCS, made his offer for the loans as part of Project Stone he did so "*with the consent, cooperation, interaction and knowledge of the Duffy defendants"*. It is pleaded that *"the offer was premised on funding from Talos which was conditional on the acquisition of the plaintiff's loans (including security) and the loans of the fourth named defendant (including security)."* In para. 19(f) it is claimed that *"in the circumstances the plaintiff and [the Duffys] were negotiating a joint venture, namely the purchase of the plaintiff's loans and the loans of the fourth defendant relating to the respective shareholding in BHL. As such [the Duffys] had a duty of good faith and/or confidentiality to the plaintiff."*

87. Apart from his emphasis on particular emails, very limited evidence was given by the plaintiff as to the contents of his discussions with Dr. Duffy in the period leading up to the making of the plaintiff's bid for the loans on 14 March, 2014, and in the period between that date and 4 April, 2014, when the Loan Sale Deed was executed. The evidence given by the plaintiff contains nowhere any description of a particular conversation or meeting in which the plaintiff claims that he and Dr. Duffy made an agreement as to either of the two central pillars of this case, namely that Dr. Duffy would not repay his loan when he did, or that Dr. Duffy would rectify or reverse the effects of the Tullycorbett Transfer.

88. Reference was made by Mr. Lynch in very general terms to contact on the evening of 19 March, 2014, but the plaintiff gave no evidence of that contact.

89. The plaintiff referred to a meeting which took place at the Royal Irish Yacht Club in Dún Laoghaire on 3 April, 2014, attended by the plaintiff, Mr. O'Neill, Dr. Duffy and Mr. Lynch. Again, the plaintiff does not describe the terms of any agreement made at that meeting. He says that Mr. O'Neill gave *"details of the Talos transaction to Dr. Duffy and Mr. Lynch and answering questions from each of them"* and that neither of them demurred from Dr. Duffy's further involvement in the transaction. He does not say what details were given of the transaction. He says that he was *"under the impression that Dr. Duffy had no*

problems as he had been kept fully abreast of the details of the Talos transaction." He says that Dr. Duffy did not indicate that he was going to do anything other than to *"allow Mr. O'Neill and Ciaran Scally [KPMG] to complete the Talos agreement".* He continued in his evidence *"Leaving the lunch, it was at that time that the deal was ready to be set*". No particulars of a "*deal ready to be set"* were articulated.

90. In the absence of any evidence of what details the plaintiff says were given to Dr. Duffy in these discussions, still less of the terms of any agreement concluded between him and Dr. Duffy, the plaintiff relies on a series of emails described below.

19 March 2014: "*The Duffy – Scally Email"*

91. At 8 a.m. on 19 March, 2014, Dr. Duffy sent an email to Ciaran Scally, of KPMG, a member of the staff of the Special Liquidators in the following terms:

> *"Dear Ciaran,*
>
> *This is to confirm that the Security that Anglo Irish Bank sought from George Duffy (GJD) and that GJD agreed and gave to Anglo Irish Bank in March 2006, and which GJD, on behalf Tullycorbett Limited and Rosaleen Duffy, offered to Anglo Irish Bank on the Transfer of the GJD shares to Tullycorbett Limited and Rosaleen Duffy in 2010, will continue to be available to the new owner of the residual of GJD's Anglo loan, that is now being sold by the Special Liquidator*. [emphasis added]
>
> *GJD transferred his shares, on tax advice, to Rosaleen Duffy and Tullycorbett Limited, on notice to Anglo Irish Bank.*
>
> Also, this is to confirm that: -
>
> *(1) Rosaleen Duffy is the sole owner of the approximately 7% of Blackrock Hospital Limited (BHL) that were transferred from GJD and that;*
>
> *(2) Tullycorbett Limited is the sole owner of the approx. 13% of BHL shares that were transferred from GJD and that;*
>
> *(3) GJD is the Majority (88%) Shareholder in Tullycorbett Limited.*
>
> *(4) GJD on behalf of Tullycorbett Limited and Rosaleen Duffy do not object to Joe Sheehan acquiring the residual of GJD's Anglo loan that is secured by shares owned by Rosaleen Duffy and Tullycorbett Limited.*
>
> *George Duffy Rosaleen Duffy*
>
> *On behalf of Tullycorbett Limited".*

92. This email was based on but differed in two important respects from a draft of the letter to the Special Liquidators which Mr. O'Neill requested Dr. Duffy to send. In Mr. O'Neill's draft of this letter, the first paragraph was different and read as follows: -

"We confirm that the only Transaction Documents referenced in Schedule 2 relevant to Tullycorbett Limited, a corporate shareholder in Blackrock Hospital Limited (BHL) and to Rosaleen Duffy, relate to the acquisition by Medfund and/or its subsidiary company JCS Investments Holdings Limited, acquiring security over shares held by Tullycorbett and Rosaleen Duffy in BHL".

93. The second and more important difference is that Mr. O'Neill's draft contained an additional concluding paragraph, which Dr. Duffy did not include in the sent email, in the following terms: -

"We confirm that Tullycorbett and Rosaleen Duffy shall promptly complete any transaction documents related to the security over BHL shares required pursuant to the Schedule Two of the Facility Agreement relating to the security acquired by Medfund and/or its subsidiary company JCS Investment Holdings Limited".

94. The evidence of Dr. Duffy is that the final paragraph was excluded because he had not seen the facility agreement referred to in it, despite having requested it.

95. At 10:26 a.m. on 19 March, 2014, Mr. Scally replied to Dr. Duffy in the following terms, copying Mr. O'Neill and the plaintiff: -

"George,

Thank you for your correspondence.

Per our request to Joseph Sheehan, please provide confirmation on behalf of Tullycorbett Limited that Tullycorbett Limited is aware of the conditions precedent relevant to it under the Facility Agreement and that Tullycorbett Limited will provide all of the relevant documentation required by it under Schedule 2 of the Facility Agreement when requested/required to do so in accordance with the Facility Agreement.

I would be grateful if you would provide the above confirmation as soon as possible.

Regards,

Ciaran".

19 March, 2014: "The Duffy – O'Neill Email"

96. At 12 noon on the same day, Dr. Duffy forwarded Mr. Scally's reply to Mr. O'Neill and to the plaintiff and others with the following message: -

"Dear Dan,

I have received this email from Ciaran Scally.

I, on behalf of Tullycorbett Limited, need to see the "Facility Letter" referred to here before confirming that Tullycorbett is aware of the conditions precedent relevant to it under this Facility Agreement.

Also, Tullycorbett Limited needs to know what Documents may be required to be provided under Schedule 2 of the Facility Agreement and knowing the requirement will agree to provide same when requested to do so in accordance with the Facility Agreement. [emphasis added]

Please help me to reply to these requests on behalf of Tullycorbett Limited".

97. Mr. O'Neill replied to this email in the following terms: -

"George,

I am sorry for being offline.

I have not slept in three nights, working through the night on this closing. Last night I crashed. I will prepare it now and send for your approval.

Dan".

98. The Facility Agreement was never furnished to Dr. Duffy.

20 March, 2014

99. The next day the plaintiff was informed that his bid had been successful.

100. On 20 March, 2014, Mr. O'Neill sent a further email to Dr. Duffy in the following terms: -

"George,

I have attached a list of required documentation and the letter needed to IBRC and a revised letter to KPMG.

However, I don't want to feel like we are pressurising you. If you do not wish to send it, I have found a way forward without you if you do not wish to participate. We will acquire your loan and we will impose the original 2006 security as contained in the mortgage agreement signed by you, including the mortgage over the BHL dividends.

We would love to have you on board, but the choice is yours. I must tell you that I was particularly offended by the sense of "blackmail" I was getting from your son – in – law's statements.

I have decided not to send the facility Agreement until you have confirmed that you are on board as part of the team, as it is very, very confidential.

Let me know what you decide.

Dan".

101. Attached to that email was a document headed *"Documents required from Tullycorbett"* which it is said was an extract from the Talos Facility Agreement which was not itself being forwarded and another draft of the letter to Mr. Scally in the terms requested by Mr. O'Neill, and including the final paragraph which Dr. Duffy had excluded from the letter he had sent on the previous day (see para. 93 supra).

102. Dr. Duffy replied to Mr. O'Neill in the following terms: -

"Hi Dan,

Got your email and two attachments. Will get back after I have discussed with my advisors including family. It will be later today before I will be available.

Regards,

George".

103. A further email from Mr. O'Neill was written as follows, again on the same day: -

"George,

No rush. We have lots of housekeeping stuff to do. Until I get your confirmation that you're in, I am proceeding as if you are out. In either case, we will acquire your loan from IBRC and perfect the security.

Look forward to hearing from you,

Dan".

104. Later on 20 March, 2014, at 10:34 p.m., Mr. Lynch emailed Mr. O'Neill, copying Dr. Duffy and the plaintiff and Darragh Blake, solicitor at Eversheds who was at this point advising Dr. Duffy. This email was in the following terms: -

"Dan,

I am somewhat surprised by your comments. I was clear from the call last night that George was on board to furnish the letter to KPMG but wanted his lawyer to review the documents to ensure he wasn't signing up to something that put him in a worse position to now, for obvious reasons. I also thought that George was concerned at the financial structure, but by the time we had finished our call, George was happier and this was further enforced by the subsequent call with John. From the discussion with John it seemed very clear that given the cost of funds that John would need the enterprise value and the sale of BHL to be €145 million to clear his debt in two years' time (ignoring dividend earned/interest paid) being the expected time of sale. A sale at that level would be great for all concerned

especially given all the work that has been done over the years to try to resolve the Shareholders' Agreement without success.

The confirming of security was not an issue, you said you were not concerned by it, but it was something that was a concern to Joe's lender and a CP for their release of funds. Their desire was to have the security party match the registered shareholder. I explained that there are s. 31 (of the Companies Act) issues but that a workaround could be put in place but this was not straightforward. I also advised that Tullycorbett was essentially a family trust with other assets in it and obligations/security, again this is something that Tullycorbett we need to reorganise to find a solution to deliver the transaction and not allow it to be lost to the under bidders especially having heard who they are. [emphasis added]

The protection of the dividend is a key issue for all. George has not received a dividend since the facilities expired and he has had to fund the income tax in respect of such dividends from what are now depleted savings. I presume that George would be happy to remit gross the 8% dividend (500k) that he would have lost had shareholders approved the sale by him of his shares to redeem his loans and to accord with the agreement with Anglo at the time. His purchaser was fully apprised and agreed to the banking covenants (cross guarantees) to enable the 100% sale, the only current method able to realise the real value of the shares. I have been unable to contact George today, my wife said that he was playing golf (in the rain) and I am unsure if he sent in the documents that KPMG have unreasonably sought, however, as he dropped me home last night he was keen to press on with not letting others frustrate the process. As we all know, George is a man of his word and has aligned with John and Joe from an early stage, clearly evidenced by the recent board vote to pay the dividend to Joe directly where there was no security with Anglo over the dividend but a practice had been in place to make such payment since 2006.

Regards,

Simon".

105. Later on 20 March, 2014, at 10:53 p.m., Mr. Lynch sent a further email to Mr. O'Neill as follows: -

"I just had a call on the s. 31 issue that I mentioned last night and in my earlier email. This will take about two weeks to conclude (with the best will in the world) and therefore we need to get cracking on this ASAP to comply with the Schedule 2 requirements.

Tullycorbett needs to get an accountant's report done in order that the board can approve the granting of the security and to "whitewash" the legislative requirements, accountants are generally very slow to do these but we should be able to get a friendly accountant to assist. Also, we need to go to PWC to figure out

how all the other assets within Tullycorbett can be stripped out if it is still a requirement to have Tullycorbett free of any other assets.

Presumably it's Dillon Eustace [acting for JCS] dealing with this element and we can get Darragh [Blake of Eversheds, acting for Dr. Duffy] to liaise with them directly, can you send on the name of the person dealing with this?

Not wanting to put the cart before the horse, but this is all dependent on Joe being successful and presumably this might be known next week? So the sooner we know the requirements, the better prepared we can be in delivering the security requirements. [emphasis added]

Thanks,

Simon".

106. The exchanges of emails between Mr. O'Neill and Mr. Lynch on the evening of 20 March, 2014, reveal that Mr. Lynch was aware of a requirement that some restructuring would need to be done in relation to the affairs of Tullycorbett Limited. In particular, he says in his first email of 20 March, 2014, as follows: -

> *"The confirming of security was not an issue, you said you were nor concerned by it, but it was something that was a concern to Joe's lender and a CP for their release of funds. Their desire was to have the security party match the registered shareholder".* [emphasis added]

107. The discussion regarding the requirements of the plaintiff's lender reached such a level of detail that even Mr. Lynch had an understanding that the funder had certain requirements in relation to the position of Tullycorbett as the registered holder of the shares. This makes it all the more remarkable that the plaintiff and Mr. O'Neill persisted in withholding from Dr. Duffy and Mr. Lynch the Talos facility letter itself. This becomes less surprising when it later emerged that the preconditions to the Talos facility required not only that Tullycorbett would execute such documents as would be necessary to ensure that Talos obtained good security over the mortgaged shares, but also contained other features such as a requirement for Dr. Duffy to enter into a certain framework agreement, a requirement never made known to Dr. Duffy.

108. On 21 March, 2014, at 10:25 p.m., Dr. Duffy emailed Mr. O'Neill and the plaintiff, copying others, in the following terms: -

> *"Dear Dan,*
>
> *Winning this bid is a great achievement by you and the US Sheehans.*
>
> *In answer to your question, I am on the Team.*

It looks as if the Game will be played out over two to four years but there is now an Exit mechanism. During that two to four years' additional debts must not be permitted and current debts reduced. Profits must be pursued and dividends must be continued.

I can see light at the end of this Tunnel.

I was surprised that you did not forward to me as promised during our last phonecall the Facility Agreement. I can be trusted if it can be securely delivered to me.

Regards,

George".

109. On 26 March, 2014, at 5:45 p.m., Mr. O'Neill emailed Dr. Duffy and copied the plaintiff and then Mr. Flynn, Mr. Blake and Mr. Lynch in the following terms: -

"George and Simon,

I understand from our conversation that Tullycorbett owns other assets other than the BHL shares. If this is the case, a subsidiary SPV will need to be created, owned by Tullycorbett, the sole holding of which are the BHL shares. This needs to be done ASAP. I (sic) you need assistance please let me know.

Dan".

110. On 29 March, 2014, Dr. Duffy replied as follows: -

"Dear Dan,

I have received your email re progressing the Loan Sale process, with your request re altering the setup of Tullycorbett. I need to talk and hear from you, or better meet with you to discuss and understand what are the plans, proposals and structures of same now that Medloan/JCS Investments Holdings Limited is in the process of buying Joe and my loans from the SL, and providing funds to John to redeem his loan from NAMA.

My objective remains unchanged. Clear my loan. Restart receipt of dividends, and unlock the obstruction to share sales.

Happy to meet with you ASAP in Dublin, London or US to progress the process.

Regards,

George".

111. There then followed a number of short emails which led to arrangements being made for a meeting to be held on Thursday, 3 April, 2014, at the Royal Irish Yacht Club, Dun

Laoghaire, which meeting was attended by the plaintiff and Mr. O'Neill and Dr. Duffy and Mr. Lynch.

3 April, 2014: Meeting at Royal Irish Yacht Club

112. The plaintiff says that at this meeting Mr. O'Neill explained the details of the Talos transaction to Dr. Duffy and Mr. Lynch and answered any questions arising and he says that at no stage did either of them demur from Dr. Duffy's further involvement in the transaction. He said that he was under the impression from that meeting that Dr. Duffy had no problems *"as he had been kept fully abreast of the details of the Talos transaction"*.

113. Mr. O'Neill did not give evidence.

114. Dr. Duffy's account of the meeting is that there was provided an outline of the funding arrangements and these were discussed and that Dr. Duffy and Mr. Lynch were assured that there was no difficulty in providing them with a copy of the facility agreement from the plaintiff's lender and that this would be forwarded immediately following the meeting.

115. Mr. Lynch gave evidence that Mr. O'Neill had done most of the talking at the meeting and that Mr. O'Neill provided an outline of the proposed transaction and its funding. Mr. Lynch said that it appeared to him that the plaintiff himself did not understand what the transaction entailed, having employed Mr. O'Neill to deliver the project.

116. Mr. Lynch said that Mr. O'Neill disclosed the likelihood that the ultimate purchaser for the shares in the hospital might be a BVI entity who could acquire the hospital for an amount in the region of €50 million *"through an insolvency process following an enforcement by the purchaser of the loans".* Mr. Lynch responded that he did not see how such a transaction could be possible and he did not believe that any reputable insolvency practitioner in Ireland would engage in such a transaction. What is remarkable about this reference is that it is the only piece of detail of the possible structure of the JCS/Talos transaction given in the evidence of any of the parties regarding that meeting.

117. Mr. Lynch said that he raised at this meeting the matter of the refusal of the plaintiff to consent to a proposed sale of Dr. Duffy's shares to a long-time associate and friend, Mr. Charlie Kenny. He pointed out that Mr. Kenny was still willing to assist Dr. Duffy with funding to enable him to discharge his IBRC obligations.

118. Dr. Duffy said that he was unsettled by the discussions of insolvency processes and BVI structures acquiring the hospital at a discount. This left him at the conclusion of the meeting more anxious than ever to pursue alternative options to redeem his loan as quickly as possible.

119. Whilst the accounts of the meeting differ, the most that the plaintiff says in relation to this meeting is that an outline of the transaction was presented by Mr. O'Neill. He does not claim to have provided at this meeting any particulars as to the terms of the proposed loan purchase or how it was intended that Dr. Duffy would be included going forward. The plaintiff's failure to give any such evidence is consistent with Mr. Lynch's evidence that

the plaintiff himself did not understand the proposed structure. Critically, the terms of the facility from Talos were not handed over to Dr. Duffy at that meeting or on any subsequent occasion.

120. After this meeting, Mr. O'Neill received a phone call from Elizabeth Bradley, of Maples & Calder, the solicitors acting in the loan sale for the Special Liquidators, to say that the Loan Sale Deed was ready to be signed, and was being transmitted to Dillon Eustace who were acting for JCS. The plaintiff and Mr. O'Neill went directly to Dillon Eustace. On arrival they were informed that the document had not arrived. They waited until late that night but ultimately the document did not arrive at Dillon Eustace until the next morning.

4 April, 2014

121. On the morning of 4 April, 2014, the plaintiff and Mr. O'Neill returned to Dillon Eustace and ultimately the required documents arrived. At approximately 11:30 a.m. the Loan Sale Deed was executed.

122. The Loan Sale Deed provides for the assignment and transfer to JCS of the plaintiff's and Dr. Duffy's loans and attendant security *"subject to the subsisting rights of redemption of the obligors … with effect from the Completion Date."*

123. The Loan Sale Deed provided for payment of a deposit which was calculated at €2.4 million, on the date of the Deed. The balance of the consideration was payable on certain completion dates in accordance with a stipulated formula.

124. Clause 11.1 provided that except *"where an obligor has repayed or redeemed a facility … in full in the normal course, [the Vendor] shall not sell, transfer, sub-participate, release or otherwise dispose of any of its material rights, title or interests in or to any assets"* pending completion. [emphasis added]

125. Shortly after the signing of the Loan Sale Deed, the plaintiff phoned Dr. Duffy to inform him of the signing. He says that Dr. Duffy's *"response was platitudinous and he said nothing in respect of his own activities at about that time."*

126. In the afternoon of 4 April, 2014, Dr. Duffy's loan was repaid in the full amount then due of €7,4379,710. I shall return later to the manner in which that payment was effected (see Part Three).

127. At approximately 4:30 p.m. on 4 April, 2014, the plaintiff was preparing to leave for Dublin airport to return to Chicago when he received a telephone call from Michelle Connolly, of KPMG, a member of the Special Liquidators' team. He says that Ms. Connolly informed him that Dr. Duffy had made a payment and congratulated him. His evidence was that he said he could not understand how this would have occurred when Talos had not yet released the loan monies. He claimed that he did not from this phone call know how much had been paid or that this meant that Dr. Duffy's loan had been redeemed. Inconsistently with this, he said that the responded to Ms. Connolly that *"that's an awful lot of money to get."*

128. An unsatisfactory feature of this part of the evidence is that Ms. Connolly was not called as a witness to give her account of this conversation. Whilst the plaintiff suggested that he had not been informed of the exact amount paid or that this meant that Dr. Duffy's loan had been redeemed, he acknowledged under cross-examination that the amount must have been substantial. Nonetheless he took the phone call sufficiently seriously that he instructed Mr. O'Neill to find out what had happened.

7 April, 2014

129. On Monday, 7 April, 2014, at 8:59 a.m., Mr. Scally emailed the plaintiff and Mr. O'Neill in the following terms: -

> *"Joseph/Dan,*
>
> *Further to Michelle's conversation with Joe on Friday last and my conversation with Dan this morning in relation to the George Duffy redemption of his loans last week, can you please provide further details of the documents and the specific clauses therein that you suggest might be relevant in relation to George Duffy's redemption.*
>
> *Regards,*
>
> *Ciaran".*

130. At 9:30 a.m. on the same day, Dr. Duffy emailed the plaintiff and Mr. O'Neill in the following terms:-

> *"Dear Joe and Dan,*
>
> *Delighted to get your call on Friday saying that the loan sale from the SL was complete. As I've said, I have been seeking cheaper funding to pay off my loan as I was not able to obtain funding to participate in the SL loan sale process.*
>
> *I have been successful in obtaining "cheaper" funding and have cleared my IBRC loan. I know that the cross guarantees remain but my locked up Dividends can no longer be retained or claimed.*
>
> Again, congratulations on obtaining funding to clear your IBRC/SL loans.
>
> *Regards,*
>
> *George".*

131. At 10:07 a.m. on the same day, Mr. O'Neill replied to Dr. Duffy in the following terms:-

> *"I am very disappointed in your dishonesty and lack of basic respect towards John Flynn and Joe Sheehan, not to mention myself. This obviously did not happen on Friday, but was some days or even weeks in process and the timing was obviously designed to hinder our loan acquisition process. That is why you made no mention*

of it at lunch on Thursday, you wanted to ambush us with your move. In that, thankfully, you have failed. Medfund now owns your loan, having acquired it on Friday a.m. prior to the arrival of your funds. When the transaction completes, we will discuss redemption, and the terms thereof. In the meantime, the funds you paid in will be held in escrow. We will deal with you fairly but firmly and before anything can be done we need to carefully examine all the security documents which we have acquired with your loan to determine if you have been in compliance. Amongst other things, it would appear at first glance that you have illegally transferred the shares without the bank (now our) permission. Also, note that we are bound to give full expression to the terms of the Blackrock Shareholders' Agreement in any redemption. We will be in touch with you in due course on these matters. You of course have every right to redeem your loan but only subject to the proper legal procedures.

Regards,

Dan O'Neill".

132. On the same morning, 7 April, 2014, there was an exchange of emails between Clifford Chance London, representing Talos, and Maples and Calder Dublin, representing the Special Liquidators, concerning arrangements for the release of the deposit of €2.4 million which up to then had been held in the client account of Talos at Clifford Chance. This culminated in a confirmation by Maples and Calder that afternoon that the Loan Sale Deed had been duly signed by all parties and the deposit was then paid over to the Special Liquidators.

8 April, 2014

133. On 8 April, 2014, Maples and Calder emailed Mr. O'Neill calling on him to deliver certain withdrawal notices relating to litigation in Delaware which were required under the terms of the Loan Sale Deed.

134. In reply Mr. O'Neill said: "*I need to understand the status of George Duffy's loan and security."*

135. Ms. Bradley replied:

"The issue of the GD redemption, which your client was made aware of by KPMG on Friday last is a completely separate matter to the withdrawing of the litigation proceedings. So now that the LSD has been executed by all parties and delivered as of yesterday 7 April, the obligations on your client to immediately withdraw the litigation proceedings has arisen, and is in fact now outstanding as the obligation to withdraw was effective on the signing of the Loan Sale Deed."

136. Mr. O'Neill replied:-

"Elizabeth,

I disagree. We expected all of the loans and all of the security listed in the Loan Sale Deed will be delivered to JCS, including the Duffy loans and security. When I have confirmation that your client will perform as per the loan sale deed we signed, I will be pleased to provide the motion of withdrawal which has already been drafted. We expect, indeed demand, full compliance with the terms of the loan sale deed. If Duffy wants to redeem, he can redeem from JCS. Upon your confirmation that JCS has acquired both the Sheehan and Duffy loans and all related security thereto, I will furnish to you the motion of withdrawal filed with the respective courts in New York and Delaware.

Regards,

Dan".

137. On 10 April, 2014, Maples & Calder, wrote to the plaintiff and to JCS *"C/O'Neill and Company Dublin Office*" warning JCS that the Special Liquidators would declare it to be in breach of the terms of the Loan Sale Deed unless it performed all of its obligations thereunder:

> *"1. Neither the Special Liquidator nor the Vendor has any entitlement to prevent a borrower from discharging his, her or its obligations under any Facility or otherwise. The suggestion otherwise is frankly ludicrous.*
>
> *2. Mr. Duffy as he was entitled to, has already discharged his indebtedness under certain Facilities. It is simply impossible for our clients to deliver the "Duffy" loans as they have already been redeemed.*
>
> *3. The Loan Sale Deed does not oblige the vendor or the Special Liquidators to deliver a specific Facility or Security. Indeed quite the opposite, in that the Loan Sale Deed makes express provision for what occurs on the redemption of any facility after the Cut Off date in recognition of the very fact that this may occur. No warranty or representation was given regarding the delivery of any Specific Facility or security, a fact which is expressly acknowledged and warranted by the Purchaser and Purchaser Guarantor in the Loan Sale Deed. Both the Purchaser and Purchaser Guarantor are estopped from making any claim otherwise; and*
>
> *4. Without prejudice to the foregoing it is noteworthy that despite the fact that our clients had no obligation to do so, the representatives of our client took specific steps to make the Purchaser and the Purchaser Guarantor specifically aware of the fact that Mr. Duffy had discharged his indebtedness under his facilities before the transaction closed. The Purchaser and Purchaser Guarantor proceeded with the transaction.*
>
> *The Loan Sale Deed became effective on 7 April 2014. Pursuant to its terms, the Purchaser and Purchaser Guarantor were obliged to procure the withdrawal of all*

proceedings in accordance with Clause 12.6 on the signing of the Deed. The time for performance has passed, and absent clarification otherwise, the communications of Mr. O'Neill must be construed as constituting a clear communication on behalf of the Purchaser and Purchaser Guarantor that they will not perform their respective obligations under the Loan Sale Deed.

On behalf of the Vendor and the Special Liquidators we hereby give formal notice pursuant to the Loan Sale Deed that they will consider the Purchaser and Purchaser Guarantor as being in breach of the Loan Sale Deed absent written confirmation by 6 pm Irish time 11 April, 2014 that they will each comply with Clause 12.6 and further by close of business (5pm Irish time) on Wednesday 16 April 2014 procure delivery to us of the necessary papers to demonstrate compliance with the terms of Clause 12.6 of the Loan Sale Deed."

138. On 11 April, 2014, Mr. O'Neill replied on behalf of JCS and the plaintiff. He said the following: -

"We reserve all of JCS's rights under the Loan Sale Deed. We note your comments and we accept none of them. JCS is entitled to specific performance by the Special Liquidators of the Vendor of the contract that was signed. I expect better of KPMG than this kind of sleight of hand. In passing, I must correct your misstatement regarding the sequence of events around the signing and the alleged redemption of Dr. Duffy's loan. The Loan Sale Deed was signed at 11am on the 4th of April, the payment of funds from Dr. Duffy was notified to Dr. Sheehan much later that afternoon. (emphasis added) JCS has never, prior to your letter, received any legal or official notice of such a redemption having taken place or of any alteration to the terms or deliverables under the Loan Sale Deed." [emphasis added]

139. He continued as follows: -

"We also note, just in passing, that the clause that you refer to in the Loan Sale Deed 11.1.1 provides an exception to 'standstill' clause in cases where 'Obligor has repaid or redeemed a Facility or Facilities in full in the normal course.' It strikes me that a hasty cash deposit on the afternoon after the signing of the Loan Sale Deed is hardly 'in the normal course'. We will also need confirmation that Dr. Duffy's loan was paid in full, including any past due interest and penalties, on the afternoon of 4th of April and the exact amount of that payment. We expect that we will hear from you or your client shortly."

140. Ultimately, the Loan Sale Deed was terminated and the deposit of €2.4m was forfeit. Talos then pursued the plaintiff and Mr. Flynn as personal guarantors of JCS under the Talos Facility for repayment of the borrowed deposit and secured judgment against them for the amount of the deposit and other costs and expenses.

141. I pause here to consider three questions which inform the remainder of this judgment:

(1) When did the plaintiff become aware of the redemption of Dr. Duffy's loan?

142. The plaintiff was not aware of the redemption before the execution of the Loan Sale Deed on the morning of 4 April, 2014. The more important question is whether he and JCS, either directly or otherwise, were so aware before the time when the Loan Sale Deed became effective on payment of the deposit of €2.4m in the afternoon of 7 April, 2014. On this question, it is regrettable that Ms. Connolly was not called to give her account of the telephone call on the afternoon of 4 April. However, I have concluded that even the plaintiff's own account of that conversation, when tested under cross-examination, does not support his assertion that he was not aware of the fact of the payment which effected the redemption. This conclusion is underpinned by the following.

143. Firstly, the plaintiff took the call from Ms. Connolly sufficiently seriously that he instructed Mr. O'Neill to find out more about what had happened.

144. Secondly, under cross-examination the plaintiff said that Ms. Connolly had gone so far as to congratulate him on the receipt of the funds, rendering it implausible that he did not either ask her about the amount of the funds, or that he was not on notice of the fact that a very substantial payment had been made.

145. Thirdly, Mr. O'Neill's email to Dr. Duffy of 7 April, 2014, at 10.07 a.m. refers to Medfund having acquired the loans *"on Friday am prior to the arrival of your funds."*

146. Fourthly, Mr. O'Neill's letter of 11 April, 2014, quoted above (para. 136) expressly refers to the fact that the payment of funds from Dr. Duffy had been notified to the plaintiff on the afternoon of 4 April, 2006.

147. Had there been any residual doubt about the state of the plaintiff's mind during or immediately after the telephone call from Ms. Connolly there can be no doubt that Mr. Scally's email of Monday, 7 March at 8.59 a.m. (see para. 129) was the clearest of notice of the fact of the redemption payment having been made. Therefore, the payment of the deposit to the Special Liquidators was made after the plaintiff and Mr. O'Neill were on notice of the redemption of Dr. Duffy's loan.

(2) Was the redemption payment unlawful in itself?

148. Dr. Duffy gave evidence that at all times in his dealings with the plaintiff and with Mr. O'Neill and any others who were a party to the matter he made it clear that his overriding ambition was to repay his debt lawfully due to Anglo.

149. Dr. Duffy had made a number of attempts to sell his shares with a view to repayment of the loan.

150. Dr. Duffy made no secret of the fact that he had held discussions about his loans and shares with Breccia, among others, or of the fact that both Dr. Duffy and Mr. Goodman were aware that 4 April, 2014, was a critical date in terms of the signing of a Loan Sale Deed. This latter date was known to all concerned from the Special Liquidators' Process Letter for Phase Two of Project Stone. No attempt was made in any of the defendants' evidence to suggest that the telephone call on the night of the 3 April, 2014, from Mr.

Goodman suggesting that he could arrange for a loan to Dr. Duffy was a coincidence. I shall be returning later to the role of Mr. Goodman and Breccia in this matter.

151. The emails quoted above establish that even in the context of the discussions with the plaintiff about the potential JCS transaction Dr. Duffy repeated his determination to repay his loans. He stated in his email of 29 March, 2014, at 4.05 p.m. as follows: -

> *"My object remains unchanged clear my loan, restart receipt of dividends and unlock the obstruction to share sales."*

152. The plaintiff in his evidence acknowledged that it was open to Dr. Duffy to repay his loan. He sought to limit the consequence of this evidence in the following sequence. It was put to him by Mr. Lewis S.C. on behalf of Dr. Duffy in the following terms: –

Q. – "There was nothing at all illegal or inappropriate abut George Duffy purchasing or redeeming his own loan, isn't that right?

A. – He could always pay down his loan.

Q. – He could always redeem his loan, Dr. Sheehan and you know that?

A. – No I don't know that because he also had obligations left and on the 16th of that same month, Kieran, sorry Sean Barnes reminded him that even though he had paid down his loan, he still had responsibilities through the cross-guarantee structure, through the bank."

153. Later in the same section of his evidence the plaintiff said "*The greater crime is stealing securities".*

154. This was an attempt on the part of the plaintiff to reintroduce his complaint regarding the TullyCorbett transfer, but he did not contradict the proposition that Dr. Duffy was entitled, like any other borrower, to repay his loan at any time, or that he was aware that this was Dr. Duffy's overriding intention.

(3) Was there a binding agreement in place prohibiting the repayment of the loan?

155. The evidence of the discussions between the plaintiff and Mr. Flynn on the one hand and Dr. Duffy on the other hand is that the parties were exploring the prospect of cooperation in a sale of the plaintiff's and Dr. Duffy's loans. The entity bidding for the loans ultimately became JCS in which Dr. Duffy had no shareholding, office or other role. Nowhere in any of the written communications or in the other evidence advanced at the trial was evidence given of any commitment that Dr. Duffy would not repay his loan when he was in a position to do so. The possibility that he would do so was expressly contemplated by Clause 2.2 of the Loan Sale Deed.

PART THREE: ROLE OF BRECCIA IN RELATION TO THE REPAYMENT

156. It is not in dispute that the source of the funds with which Dr. Duffy's loan was repaid was a remittance made on 4 April 2014 sourced from Breccia. The evidence of Dr. Duffy is that Mr. Goodman was aware of his anxiety about the loans and his efforts to repay them,

including the possibility of having to sell his shares or part thereof. Dr. Duffy made no secret of the fact that he had been in at least intermittent contact with Mr. Goodman. Also willing to assist Dr. Duffy was Mr. Charlie Kenny, but ultimately Dr. Duffy considered that introducing Mr. Kenny, not being an existing shareholder, would be less than ideal having regard to contentions already among the shareholders. In any event this possibility was no longer an option when other shareholders declined to consent to a sale to Mr. Kenny. Equally they had declined to consent to a sale to Breccia.

157. Dr. Duffy received a phone call on the evening of 3 April, 2014, from Mr. Goodman offering to arrange for a loan on similar terms to those which had been offered by Mr. Kenny. Dr. Duffy agreed to this, and both he and Mr. Goodman were of the view that this was preferable to bringing in a new party who was not already a shareholder.

158. On the following morning, 4 April, 2014, Declan Sheeran, a director of Breccia, attended at Dr. Duffy's office and made arrangements for the transfer of funds from Breccia to Dr. Duffy's personal account at Bank of Ireland, from which the payment was later made to IBRC.

159. A sequence of emails on 4 April, 2014, to which the parties were Mr. Sean Barnes of IBRC, Dr. Duffy, and Mr. Sheeran shows that Mr. Barnes on behalf IBRC provided to Dr. Duffy and to Mr. Sheeran the redemption figures, and Mr. Sheeran arranged the transfer of funds firstly to Dr. Duffy's account at Bank of Ireland which funds were thereafter remitted to IBRC. A Mr. Bradley of IBRC confirmed receipt of the payment at 4.35pm that day.

160. On Saturday 5 April 2014 a meeting took place at the Four Seasons Hotel Dublin attended by Dr. Duffy, Mr. Lynch and Mr. Goodman. The purpose of the meeting was to discuss the basis of the funding so that it could be duly documented. The evidence given by Dr. Duffy and Mr. Lynch in relation to that meeting was that the contents of the discussion were summarised accurately in an email of 6 April, 2014, from Mr. Lynch to Mr. Sheeran in the following terms: -

> *"Dear Declan*
>
> *Thank you for taking the time and assisting George on Friday last in the repayment of his IBRC (SL) loan.*
>
> *I confirm on behalf of George that he is indebted to The Goodman Trust in the sum of €7,439,710.59, the interest rate is agreed at 6.5% per annum. The said sum will be discharged in full together with any accrued interest on the sale of shares in Blackrock Hospital Limited by Tullycorbett Limited.*
>
> *In the meantime, security to the satisfaction of both Tullycorbett Limited and the Goodman Trust will be put in place in the coming days to secure the above loan.*
>
> *I will speak with you next week to perfect the security, have a good weekend.*

Simon"

161. Later on Sunday, 6 April, 2014, Mr. Goodman emailed Mr. Sheeran and copied Mr. Sean Mooney, an advisor to the first defendant, as follows -

"Declan/Sean

My comments on the email are as follows:

1. *I would prefer if it had been sent by George as had been suggested by Simon and agreed by me. Not a big deal perhaps but if matters went litigious it could be alleged Simon was not authorised by George but, I don't think we should kick up a fuss about it.*

2. *It states the interest will be paid when the shares are sold. That was not agreed or discussed. George made the point when we were discussing when interest would be paid that the dividends were paid quarterly and I said that would be fine. It was not discussed further as we moved on to the subject of buying the shares. Also at what stage are the shares deemed to be sold to us. Is it when we get a suitable agreement in writing that the shares are now ours and documentation to complete will be executed ASAP when Shareholders' Agreement is changed at a future date.*

Regards

L."

The Breccia – Tullycorbett Loan Agreement

162. Six months passed before the terms associated with this funding were recorded in an executed agreement on 5 October, 2014. I shall return later to the events which transpired in between these dates but it is appropriate at this point to note the terms of the agreement which were entered into on 5 October, 2014. It is described as a Memorandum of Agreement between Breccia, Tullycorbett and Xroon Limited (referred to as the Guarantor). Xroon Limited was a company holding Duffy family assets. The terms of the Agreement are as follows: -

163. *"The parties hereto are desirous of recording the financial arrangements agreed between them on the 4th April 2014.*

(1) On the 4th April 2014 Breccia advanced a loan of €7,439,735.94 to Tullycorbett (Loan 1).

(2) On the signing of this Memorandum of Agreement Breccia shall advance a further loan of €560,265.06 to Tullycorbett (Loan 2).

(3) Both loans are repayable on demand but if not demanded both loans are repayable on 31 December 2016.

(4) *These loans shall carry an interest rate of 7% per annum payable on the anniversary of each drawdown date … If the loans are repaid prior to 31 December 2016 interest shall be due and payable at 7% per annum from the last interest payment date to the date of repayment of the loans. Tullycorbett is the sole party obliged to repay Loan 1 and 2.*

(5) *The Guarantor is the beneficial owner of the entire issued share capital of Tullycorbett. The Guarantor confirms that as of the date hereof its shareholding in Tullycorbett is unencumbered and has not been given as security for any borrowings, guarantees or analogous obligations. Tullycorbett confirms that it holds 8% of the issued shares in BHL, and these are unencumbered.*

(6) *The Guarantor has agreed that until loan one and loan two are repaid to Breccia there will be no change in the issued share capital or the shareholding in Tullycorbett and that the shareholding shall remain unencumbered save for the security given in this agreement.*

(7) *The Guarantor confirms and agrees that until such time as Loan 1 and Loan 2 are repaid it will ensure:*

i. That Tullycorbett shall retain unencumbered ownership of 8% of issued share capital of Blackrock Hospital Limited.

ii. That Tullycorbett shall not incur any liabilities other than the borrowing from Breccia and the interest thereon.

iii. That any dividends or monies received on the 8% shareholding in Blackrock Hospital Limited shall be used to discharge interest to Breccia, as and from the 4th April 2014.

(8) Not relevant.

(9) *The Guarantor agrees to guarantee Loan 1 and Loan 2 advanced by Breccia to Tullycorbett as described in paragraphs (a) and (b) and to secure this guarantee on its shareholding in Tullycorbett. However the recourse of Breccia under the guarantee is limited to the shareholdings of the Guarantor in Tullycorbett and Breccia has no further recourse against the Guarantor.*

(10) *The Guarantor agrees to lodge as security for its guarantee its share certificates in respect of its shares in Tullycorbett with Breccia and to complete such other documents as Breccia may reasonably require to enable it to register its security on the shares in Tullycorbett."*

164. In essence this is a Loan Agreement from Breccia to Tullycorbett with Xroon Limited, as the parent company of Tullycorbett acting as Guarantor, and securing the guarantee on its shareholding in Tullycorbett.

165. No evidence was given as to the evolution of this agreement between the meeting of 5 April, 2014, and its execution on 5 October, 2014, other than the email of 6 April, 2014, in which the borrower is referred to as Dr. Duffy and not Tullycorbett. This Agreement was the first reference one sees to Xroon Limited.

166. Mr. Lynch, Dr. Duffy and Mr. Sheeran, were cross-examined by the plaintiff about the identity of the parties of this loan and its terms. Insofar as the questioning was addressed to the identity of the borrower, the evidence given was that the money had been advanced by Breccia to Dr. Duffy's personal bank account at Bank of Ireland and remitted to IBRC in repayment of Dr. Duffy's Loan. Tullycorbett itself was not referenced in the emails concerning payments instructions on 4 April, 2014.

167. It is unclear if Tullycorbett itself was referenced by name either in the telephone conversation between Mr. Goodman and Dr. Duffy on 3 April, 2014, or in the meeting of 5 April, 2014. The email of 6 April, 2014, from Mr. Lynch to Mr. Sheeran refers to Dr. Duffy being the indebted party and then to *"security to the satisfaction of Tullycorbett Limited and the Goodman Trust will be put in place."*

168. In their evidence, Mr. Sheeran and Mr. Lynch each said that the borrower in this transaction was Tullycorbett Limited. The stated basis for this evidence was that Tullycorbett was the borrower named in the Loan Agreement executed on 5 October, 2014. This contrasts with the content of Mr. Lynch's email of 6 April, 2014, said to be a record of the meeting of 5 April, 2014, which describes Dr. Duffy as the borrower and Tullycorbett Limited as the party giving the security. Furthermore, the first and second named defendants plead at para. 29(i) of the Defence and Counterclaim that monies were advanced to Dr. Duffy to discharge his liabilities to IBRC and that subsequently Tullycorbett entered into a loan agreement with Breccia in respect of those monies.

169. The plaintiff was not a party to these discussions. He cannot gainsay the terms agreed between the principals. Much of his cross-examination of the defendants' witnesses on this issue, amounted to submissions by the plaintiff. His proposition put in the cross-examination was that there was impropriety or illegality – not particularised by him – about the grant of a loan to Dr. Duffy in the first place which later became the subject of a Loan Agreement in which the borrower was Tullycorbett Limited. Mr. Sheeran in his evidence stated that this reflected the fact that the original loan in 2006 from Anglo had been made to Dr. Duffy in respect of the funding of his shareholding in BHL and it was therefore appropriate that when, in 2014, it came to lending against the same shareholding, the obliging borrower should be the then shareholder, Tullycorbett.

170. To the extent that this is what occurred between Breccia on the one hand and Dr. Duffy on the other hand and the loan was documented to reflect their agreement this was a matter as between those parties, and was not in breach of any obligation which either of those parties had to the plaintiff.

171. There was some discussion during the evidence as to whether the provisions of s.31 of the Companies Act 1990 (prohibitions on certain loans to or security for the benefit of a

director of a company), were breached by the fact that assets of Tullycorbett (the shares) were being pledged to facilitate the repayment of a debt owed by Dr. Duffy personally. Mr. Lynch said that certain s. 31 issues may have needed to be addressed in relation to the affairs of Tullycorbett. The plaintiff did not articulate any basis on which such a proposition would avail him, or could have the effect of rendering unlawful the repayment by Dr. Duffy of his debt to IBRC.

172. The plaintiff was pressed on a number of occasions to refer to any provision of the Shareholders' Agreement which would preclude the making of a loan between shareholders or parties connected to them. He was unable to refer the court to any such provision.

The plaintiff's request for information regarding the Breccia loan

173. Before leaving this subject it is appropriate to consider the correspondence which passed between the parties after 7 April, 2014.

174. On 22 April, 2014 the plaintiff wrote to Dr. Duffy in the following terms:

> *"George,*
>
> *As per the Shareholders' Agreement, please disclose the source of funds that allowed you to deposit €8 million into IBRC.*
>
> *As indicated to us exhaustingly by Andrew Ennis of NCB in 2011 when we all jointly hired them, that the source of funds to redeem the IBRC loans would be required at redemption so as not to breach the offer around provisions of the Shareholders' Agreement. I trust IBRC have gone over this with also being party to the Shareholders' Agreement.*
>
> *As you have recently withdrawn from selling your shares at the last hour, to everyone's shock and surprise, the question above is extremely relevant as we (John and myself) are not aware of any other source of funds or assets (besides Blackrock Clinic shares) that you possess that would yield you €8 million.*
>
> *Blackrock Clinic have advised me that this is a shareholder issue and thus the purpose of this letter.*
>
> *Regards,*
>
> *Joseph Sheehan."*

175. On 24 April, 2014, Dr. Duffy replied to the plaintiff as follows:

> *"Dear Joe,*
>
> *I have received your letter and I have reviewed the Shareholders' Agreement to see the provision in that agreement requiring that a promoter disclose to BRC or to the shareholders in BRC the source of funds to redeem a promoter's IBRC loan.*

I have failed to locate such a requirement.

As you know, you, I and John have spent many hours trying to find a unanimous acceptable method to clear our IBRC loans.

Following the appointment of the SL you, unlike me, were successful in locating a source of funds to assist you in your efforts. I on the other hand obtained a buyer, willing to buy a minority shareholding, a buyer who also accepted the Veto containing Shareholders' Agreement, but when I wrote to each shareholder asking if each of you would allow this sale to be completed, none wrote to confirm that they would not use their Veto. Consequently, I was forced to abandon this approach of selling some of my shares to clear my IBRC loan and in place of this got another Loan to clear my IBRC loan.

Hopefully the Hospital will continue to perform well so both our loans can in time be successfully repaid.

Regards,

George".

176. On 9 October, 2014, at 4.10 pm James Sheehan Jnr. (the plaintiff's son) wrote to the plaintiff repeating the information request:

"Dear George,

I have been asked to follow up with you on our request for information on the funds that you used to redeem your IBRC loan in March 2014.

Can you please confirm that you did not borrow the funds from Larry Goodman, Breccia or any related company?

It is important that I receive this declaration as soon as possible, before Joe is forced to take legal action to get the answers to this question, having crystallised a substantial loss from the inability to complete the purchase of his, yours and Benray's loan in March 2014 with the funds we had in place.

Kind Regards,

James".

177. On Saturday 11 October, 2014, Dr. Duffy replied to James Sheehan on the following terms:

"Dear James,

In reply to your question, I can confirm that I have not borrowed funds from Larry Goodman, Breccia or any related company.

However, I am most disappointed with the tone and the threat contained in your email of the 9th October, 2014.

Regards,

George".

178. The first observation to be made about this correspondence is that there is no provision in the Shareholders' Agreement obliging one shareholder to disclose to another the source of any borrowings. At one level, that should be the end of this particular issue. The next observation is that the reply in which Dr. Duffy stated "*I have not borrowed funds from Larry Goodman, Breccia or any related company"* was disingenuous or even misleading. It was not explained whether the denial is based on the proposition that although the money was transferred to Dr. Duffy, the loan was documented six months later as having been made to Tullycorbett. If so, that is a distinction which does no credit to such an explanation. It is unhelpful in that it justifies a measure of suspicion about the events which transpired between 3 and 7 April, 2014. If Dr. Duffy had been under an obligation to reveal the source of the funding, which he was not, it is questionable whether this response would have met that obligation. However, neither the plaintiff or his son were able to refer to any such obligation and there was no such obligation. Furthermore, when tested on this issue in the albeit limited cross-examination by the plaintiff, none of the defendants' witnesses exhibited any reticence in describing the contents of the discussions which took place among them on 3 April, 2014, or in the days thereafter.

Project Amber

179. Later in 2014 the Special Liquidators initiated a further process for the sales of the plaintiff's loans, ("Project Amber"). The plaintiff says that he attempted to purchase his loans in this process but the successful bidder was Breccia. The plaintiff says that the reason he was unsuccessful in his Project Amber bid was that his brother Dr. James Sheehan refused to allow him use his shares in the Galway Clinic as leverage to raise funds. That is to assume he would have succeeded in a funded bid.

180. Pursuant to a Loan Sale Deed dated 17 October, 2014, and a Deed of Transfer dated 10 December, 2014, Breccia acquired the loans of the plaintiff and all security originally granted by him for the loans, including his mortgage of the shares.

181. On 10 December, 2014, IBRC issued notice of the assignment of the loans to the plaintiff and others.

182. Breccia also acquired from IBRC the benefit of the plaintiff's guarantee of the borrowings of Benray Limited.

183. On 18 December, 2014, Breccia demanded the sum of €16,144,573 due under the plaintiff's facilities and the sum of €6,734.852 pursuant to the Benray guarantee. This demand was followed on 22 December, 2014, by the commencement of these proceedings.

PART FOUR: THE TULLYCORBETT TRANSFER

184. The evidence given by Dr. Duffy was that after his loans had gone into default on 30 December, 2010, he anticipated that he would in due course need to sell some or all of his 20% shareholding in BHL. He received advice from PWC on a restructuring of his holding as part of normal family estate planning and on 22 September, 2011, he transferred his shareholding as to 13% to Tullycorbett Ltd and as to 7% to his wife Dr. Rosaleen Duffy. At that time Tullycorbett Limited was owned by Duffy family members namely Dr. Duffy himself and his children and Dr. Duffy was said to be in control of it. According to his evidence the Tullycorbett transfer was approved by the directors of BHL and subsequent statutory annual returns reflected the change of shareholding. The consent of Anglo Irish Bank was not obtained. I accept this evidence.

185. I return later to the Submissions delivered by the plaintiff on 8 November, 2019, in preparation for the hearing of this Module. In that submission the plaintiff claims that the Tullycorbett Transfer was void or illegal by reason of the absence of bank consent. The submission is the first intimation that the plaintiff challenges the validity or lawfulness of the Tullycorbett transfer. Not only does he introduce this as an issue for the first time, but he places it at the centre of the Submission as the "*root cause*" of the entire action. Nowhere in the case, either in pleadings or witness statements delivered has it been contended that the Tullycorbett transfer was unlawful, much less that it was the "*root cause*" of the losses suffered by the plaintiff.

186. In the statement of claim it is pleaded that Rosaleen Duffy *"owns 7% of the issued share capital of BHL"* and that Tullycorbett Limited "*owns 13% of the issued share capital*". It is also pleaded that although neither Rosaleen Duffy or Tullycorbett were a party to the Shareholders' Agreement of 28 March, 2006, *"it is believed that [they are] now a party having executed a deed of adherence*". This description is repeated in the plaintiff's own witness statement adopted in full at the hearing.

187. The statement of claim before the court was delivered on 4 January, 2018, and is the Third Amended Statement of Claim and therefore the fourth version of the statement of claim.

188. No application was ever made to amend the statement of claim, either before or after delivery of the plaintiff's legal Submissions.

189. The plaintiff sought to justify the failure to plead illegality of the Tullycorbett transfer by suggesting that the fact of it was not known to him at the time when the original pleadings were being delivered. If he had applied, however late, to amend the statement of claim, this assertion could have been properly tested. In any event, the information regarding the Tullycorbett Transfer, as identified in the Byrne Wallace Report, was available in the Project Stone data room.

190. At the outset of the trial I ruled that the plaintiff must direct his submissions and his evidence to the case as pleaded and I determined that the allegation made in his submissions that the Tullycorbett transfer was unlawful and fraudulent is outside the case

as pleaded. Despite this it became necessary on virtually each day of the trial to remind the plaintiff of this.

191. This is not simply a mere pleading point of a technical nature. A question concerning the lawfulness of the Tullycorbett transfer was never in the case as an issue. To determine such a question would have required that it be addressed in the pleadings and submissions and that evidence be taken on the point from all parties.

192. Notwithstanding my ruling that this matter was outside the pleaded case, since the plaintiff chose in his Submission and throughout the hearing to place it at the centre of his case, as the "*root cause*", I have considered the points he has made about the Tullycorbett Transfer.

193. The plaintiff asserted that he was not party to any meeting of the board which had approved the Tullycorbett Transfer. He claimed that the existence of the transfer had been concealed from him and only discovered by him as part of the due diligence undertaken on his behalf in the data room for Project Stone in March 2014. Two documents are of importance in relation to this.

194. Firstly, one of the documents contained within the data room for Project Stone was a security report by Messrs Byrne Wallace dated 31 October, 2013, signed by Eileen Prendergast a partner in Byrne Wallace. This Report as part of a security review undertaken for IBRC by Messrs Byrne Wallace in preparation for Project Stone. The report contained a section relating to George Duffy as borrower.

195. The report refers to the facility granted to Dr. Duffy for the sum of €6,816,995 and to the Mortgage of Shares, Deposit Account and Assignment of Agreements dated 28 March, 2006, referred to as the "*George Duffy Mortgage".*

196. In the section of the report dealing with security reference is made to the Tullycorbett Transfer and to the fact that it was made without the consent of the Bank. The report referred to the register of shareholders and copy share certificates in the name of Rosaleen Duffy and Tullycorbett and continued;

> *"…We understand from IBRC that George Duffy stated that the transfer was for tax reasons. We understand Tullycorbett Ltd is a company established by George Duffy and owned by him and other members of his family. According to the most recent B1 filed in the CRO 88% owned by George Duffy and 2% owned by each of Gavan Duffy, Jane Duffy, Mark Duffy, Natasha Duffy, Robert Duffy and Stephen Duffy which we understand to be his children. We understand that George Duffy sought consent to the transfer of the shares to Tullycorbett Ltd from the bank but consent was not granted.*
>
> *In addition, the secretary of BHL, the transfers by George Duffy to RD and Tullycorbett (without the consent of the bank), was registered in the Register of Members of BHL and share certificates were issued."*

197. The second document presented by the plaintiff as relevant to this is the minutes of a meeting of the directors of BHL held on 10 March 2014. The first heading in the minutes is "*Tullycorbett Limited – Share Transfer*". The meeting noted that "*Dr. Duffy was anxious to commence the offer around process*" and that the shares were held not by Dr. Duffy but by Tullycorbett Limited. The plaintiff referred in particular to the following extracts from the minute: -

> *"Ron Bolger thought the issue was whether or not Tullycorbett owned the shares. Stephen Hegarty (partner at Arthur Cox) replied that the shares are registered in the name of Tullycorbett Limited. Whether the shares are in the name of Tullycorbett Limited or Dr. Duffy, it did not change the quantum of shares being offered. Stephen Hegarty also added that the lender (in this case IBRC) does not have the right to restrict the sale of shares where the purpose of the sale is to repay a loan.*
>
> *The chairman had also noted that Dr. Duffy had clarified that the potential purchaser would sign up to the Shareholders' Agreement.*
>
> *Jimmy Sheehan expressed concern about the letter from Byrne Wallace when they stated that the transfer of shares to Tullycorbett Limited was not legally done. The Chairman replied that, whilst this was a valid point, Stephen Hegarty had confirmed that the shares exist and the legal title to the shares was either in the name of Tullycorbett Limited or Dr. Duffy. Stephen Hegarty added that Byrne Wallace, in their correspondence, were relying on the Shareholders' Agreement, to which they were not party to. If the purpose of the sale was to repay a loan, then, in his opinion, it would be perverse for IBRC to object. He asked if the proceeds would cover the loan. Dr. Duffy confirmed that they would but the discussions with the bank had yet to take place".* [emphasis added]

198. The plaintiff attached importance to use by the chairman of the phrase "…*whilst this was a valid point*" and relied on this statement as a basis for his claim that the transfer to Tullycorbett was not valid or lawful. This construction is to rely on a passing phrase which of itself is not a "*declaration*" by the chairman of invalidity of the Tullycorbett Transfer, even if a chairman had the authority to make such a "declaration". It is also clear from the minutes that the board did not attach importance to the fact that the shares had transferred from Dr. Duffy to an entity controlled by him.

The plaintiff's knowledge

199. When making his bid for the loans, and when signing the Loan Sale Deed, the plaintiff was aware of the Tullycorbett transfer. This is clear from the following facts. Firstly the report of Byrne Wallace was in the data room available to those who were making bids. Secondly, the draft letter which Mr. O'Neill had requested that Dr. Duffy would sign specifically addressed itself to the fact that Tullycorbett Limited and Rosaleen Duffy were the registered shareholders and not Dr. Duffy himself. It included a paragraph to the effect that Tullycorbett Limited and Rosaleen Duffy would promptly complete any

"transaction documents related to the security over BHL shares required pursuant to the [Talos facility]". Dr. Duffy declined to give such a confirmation, expressly because he had not been provided with the terms of the facility letter to which this paragraph referred. Nowhere in those communications did the plaintiff or his advisors suggest that the Tullycorbett transaction was an act of theft.

200. When the plaintiff and Mr. O'Neill were engaging with Dr. Duffy in March, 2014 regarding what they perceived to be the requirements of the Special Liquidators and of Talos, central to this engagement was a request that Tullycorbett Limited and Rosaleen Duffy execute such documents as were necessary to ensure that JCS acquired and could therefore give as collateral to Talos the benefit of the mortgages on the shares originally created by Dr. Duffy. At no point in any of these communications did the plaintiff or Mr. O'Neill suggest that the fact that Tullycorbett Limited or Rosaleen Duffy were the registered shareholders was the result of an illegality, fraud or theft. On the contrary a letter from Mr. O'Neill to Mr. Flynn of 15 April, 2014, quoted in para. 240 below, refers expressly to the fact of the Tullycorbett transfer and makes the point that the failure of the bank to force the relevant shareholders to conform to the mortgage conditions *"is in no way a bar to JCS enforcement of the mortgage".*

201. The defendants say that the plaintiff and at the very least his alternates on the board were aware of references to Tullycorbett at board meetings. The plaintiff in his evidence at the trial sought to suggest that he was not so aware principally on the basis that he had not been at all such meetings. He did not contradict the proposition that at relevant meetings where he may have been absent he was represented by his alternate, usually James Sheehan Jnr.

202. Despite the fact that no application was made to amend the statement of claim the plaintiff in his opening of the case and persistently in the questioning both of his own witnesses and the cross-examination of others sought to introduce this issue referring to such matters as "the stolen securities" and using such phrases as *"why did Dr. Duffy not put back the stolen securities".*

203. Before leaving this subject it is appropriate to note the following substantive matters in relation to the Tullycorbett transfer.

204. It was clearly a family transfer within the meaning of Clause 8.8.1 and therefore a permitted transfer in the context of the Shareholders' Agreement.

205. Reference was made by the plaintiff to the provisions of Clause 8.3 of the Shareholders' Agreement, which relates to concealment of true ownership of shareholding. No evidence was advanced of any effort of the part of any defendant to conceal the fact of the Tullycorbett transfer. Furthermore, the only evidence before the court is that it had been the subject of board approval and registration by the Secretary.

206. No suggestion has ever been made that Dr. Duffy as borrower was attempting to put the charged shares outside the reach of his lender, Anglo Irish Bank, or that the Tullycorbett transfer had any such effect on Anglo/IBRC or, importantly, its successors.

207. No evidence was advanced to the effect that the Tullycorbett transfer of itself caused any loss to the plaintiff. His case is that the failure of Dr. Duffy and/or Tullycorbett Limited and/or Rosaleen Duffy to "put back" the securities caused him to be unable to deliver the collateral required by Talos and therefore unable to complete the Loan Sale Deed and therefore to suffer the loss of the deposit of €2.4 million and to lose the gains he anticipated achieving pursuant to the loan sale. When signing the Loan Sale Deed on the morning of 4 April, 2014, the plaintiff knew that the registered holders of the shares were Tullycorbett and Rosaleen Duffy and that neither of those parties or Dr. Duffy had given the confirmation of agreement "*to rectify"* this matter, as the plaintiff put it. This was no small matter or oversight because Dr. Duffy had expressly and repeatedly stated that he needed to see the terms of the Talos facility before any such confirmation could be given.

208. The inability of JCS to meet the requirements of Talos derived from circumstances already known to him before the deposit was released.

209. No complaint can be made as against the first or second defendants relating to the Tullycorbett Transfer itself as they were not a party to it.

210. For all these reasons, I have concluded that the Tullycorbett Transfer was not unlawful and does not advance the plaintiff's case at any level.

PART FIVE: OTHER BACKGROUND FACTS

211. The plaintiff gave evidence that when IBRC entered liquidation and the Special Liquidators set about the sale of loans relating to BHL he believed at the time that Mr. Goodman was seeking to gain control of the hospital through his corporate vehicle Breccia. He said that he was anxious that the hospital should remain under the control of persons who were "*committed to the founding principles of the hospital*". He said he was concerned that these principles were likely to be diluted or extinguished "*in the event the commercial interests promoted by Mr. Goodman achieved primacy*."

212. The plaintiff said that in the dispute about the future of the hospital, Mr. Goodman and James Sheehan were aligned on the one side and he the plaintiff was aligned with Mr. John Flynn. Dr. Duffy's shareholding therefore had the capacity to determine which side would control the majority. He believed that Dr. Duffy was sympathetic to his own views in respect of the future operations and ethos of the hospital. He recognised that Dr. Duffy would have his own financial imperatives and interests in the management of his shareholding, but the plaintiff was still anxious to secure his support and commitment to the future operation of the hospital under their mutual guidance.

213. Against this background the plaintiff engaged with Talos to secure funding and he says that at the same time he engaged with Dr. Duffy and Mr. Flynn to secure cooperation regarding the availability of their shareholding. He says that he had received advice that

because Breccia was not a party to the cross guarantee arrangements it would be difficult to obtain refinancing to simply redeem the loans. This led to what the plaintiff describes as a "*unified approach*" whereby finance would be sought to purchase the loans associated with the combined 56% shareholding of the plaintiff, Dr. Duffy and Benray Limited. Despite his reference to a "unified approach", the plaintiff did not include Dr. Duffy in his discussions with Talos or in the formulation of his bid to the Special Liquidators.

214. By the time the final bids were being submitted, the loans of Benray and obligations of Mr. Flynn had been transferred to NAMA. The plaintiff's intention was that the Talos facility would be utilised to repay the Benray Loans to NAMA.

215. The Duffy – Scally email contained confirmation by Dr. Duffy on behalf of Tullycorbett Limited and Rosaleen Duffy that Tullycorbett Limited and Rosaleen Duffy *"do not object to Joe Sheehan acquiring the residual of GJD's Anglo loan that is secured by shares owned by Rosaleen Duffy and Tullycorbett Limited."* None of Dr. Duffy, Tullycorbett Limited or Rosaleen Duffy had any power or capacity to object to the sale of Dr. Duffy's loans to any party. To the extent that the financing of the purchase of the loans and security by JCS required that further steps be taken by the Duffy defendants in relation to the security that was a complication which arose as a feature of the negotiation of the facility between the plaintiff and Talos, to which none of the Duffy defendants were parties and of which they were not informed.

216. When further emails were exchanged on 19 March, 2014, in which the Special Liquidators sought confirmation on behalf of Tullycorbett Limited that Tullycorbett was aware of the conditions precedent relevant to it under the Facility Agreement and that Tullycorbett would provide all the relevant documents required by that facility, Dr. Duffy's response was to contact Mr. O'Neill to say that before he could give such a confirmation he would need to see the Facility Agreement which was never provided.

217. Against this background the requested confirmation was never given.

218. It later emerged that the conditions of the facility agreement included not only particular conditions regarding delivery of the security over the relevant shares, but also a requirement that Dr. Duffy and others enter into a framework agreement regarding the future management of the hospital. That requirement was never communicated to Dr. Duffy.

219. It was put to the plaintiff in his cross-examination that the requirement for entering into such a framework agreement was one of the matters being concealed and was relevant to his reasons for not giving a copy of the facility agreement to Dr. Duffy. The plaintiff in response repeatedly said that the reason he had not shared a copy of the Talos facility with Dr. Duffy was the non-disclosure requirements in that facility arrangement. Of central importance however is that he did not deny that a copy of that facility agreement had not been provided to Dr. Duffy.

220. The plaintiff claimed in his evidence that his objective was to ensure that the founding principles and ethos of the hotel would be maintained. His Submissions to the court reveal an entirely different objective. At paragraph 3 of the Submissions he says: -

> *"The Duffy unlawful act created a situation where Dr. Sheehan was prevented from concluding the opportunity to 'step into the feet of IBRC' with regards to his and Dr. Duffy's loan (under IBRC loan sale Project Stone with all its security and cross guarantees) allowing Joseph Sheehan the right to sell 100% of the Blackrock Clinic at full value, estimated today at €400 million (when recently compared with similar deals on the market)".*

221. Further in his submission he says that: -

> *"The plaintiff is seeking orders from the court to rectify George Duffy's illegal transfer or void all Joseph Sheehan / IBRC loan security, remedy all Joseph Sheehan's losses and create a situation where the plaintiff was given the right to sell 100% shares of the Blackrock Clinic".*

222. At p. 6, the plaintiff says: -

> *"For no other reason, except for the rectification of this unlawful act of Dr. Duffy, would Dr. Duffy have been involved with Joseph Sheehan's purchase of Project Stone, Tranche 14".*

223. If the plaintiff's mission was to retain control of the hospital and protect its ethos, these submissions reveal that Mr. O'Neill was serious when he mentioned at the meeting of 3 April, 2014, that the ultimate solution after JCS acquired the loans was to then force a sale at as little as €50 million through an insolvency process. How this would be implemented was not explained.

224. Not only did the plaintiff not include Dr. Duffy in his negotiations with Talos about funding or share with him any information about the requirements of Talos, he did not include him in discussion of the amount of the bid to the Special Liquidators. It further becomes clear that the plaintiff and his associates took care to ensure that Dr. Duffy was excluded from key information about such matters. It is informative to examine a number of the emails which were exchanged between the plaintiff and his advisors and associates at this time.

225. On 6 March, 2014, there started a chain of emails as between the plaintiff and his associates and advisors which reveals the true nature of their relationship with Dr. Duffy.

226. At 1:44 am on 6 March, 2014, John Flynn emailed Dan O'Neill as follows:

> *"Dear Dan*
>
> *Just a few thoughts on the concerns that Clifford Chance (lawyers to Talos) may*
>
> *have:*

George Duffy

George's loans are being sold with Joe Sheehan's, as one entity by the IRBC liquidators. Joe is the preferred bidder for these loans. If Joe's backers purchase the loans, it will control them. Add to our 8% currently held by NAMA, TCI [Talos] will hold the loans over 56% of the hospital.

In order for George to pay down his loan he needs to sell the approximately 8% of his shareholding. Likely purchasers would be Larry and/or Charlie Kenny. However, he would need the agreement of all the shareholders in order for him to sell any of his shares to anyone. That agreement will not be forthcoming. Therefore, he cannot sell his shares and pay off his loans prior to – or indeed after – the loan sale. The only way it could happen is if an unsecured loan of circa eight million was given to George to pay down his loan without any share transfer – a highly unlikely event. At some point whoever provided the eight million would seek the transfer of George's shares which could not happen without everyone's approval (including Joe's and ours). So whatever happens George's shares will be available under the cross guarantee as they cannot be transferred, even under the most improbable of circumstances. Under these circumstances we will get George's cooperation as the threat to call his loan and foreclose on his shares will ensure his votes in critical issues. I would suggest that this cooperation will be willingly given if George's loan interest is subsidised over the 4.5 year period of the agreement and he is given assurances that his loan will not be called during that period.

I do not believe that these issues should be discussed with George until we have an offer letter from the lenders. Any approach prior to that will be treated negatively".

227. On the same day James Sheehan, the plaintiff's son replied copying Dan O'Neill, James Flynn (Mr. Flynn's son) and the plaintiff as follows:

"Dear John

I agree with your email above but I don't think any of us will be subsidising George's dividend. I believe the fact that he will get his entire 2013 and Q1 2014 dividend including his money on deposit in IBRC/Central Bank which I estimate to be around 1.3 million should hold him over for the next four years.

If he wants to join us in litigation against LG and JS for the veto, AIB covenants, changes in facility and guarantees from the Term Sheet provided by Anglo the day before signing, he might be able to get punitive damages to further hedge against these high interest payments.

However, based on LG groups tone of last meeting, George would be taken if he does not join. However, we want to purchase his loans and then we will deal with him. I think informing him of too much will have him running off to LG to try and

strike a last minute deal. However, the safest option is to redeem all our loans before Wednesday (which would require GDs consent and participation).

Regards

James".

228. On Sunday 9 March, 2014, at 4:20 pm John Flynn emailed James Sheehan in the following terms:

"Hi James

George looking for me. Left message. Very despondent. He thinks he faces a wipe out! I'll call him later.

John

P.S. I already spoke with your Dad".

229. James Sheehan replied to Mr. Flynn as follows:

"Great John

I think Jimmy said it all.

George is not to be trusted.

He should kept with us for the last three years but he is a very selfish man.

If anything, I would provide as much misinformation to him as possible assuming it is all going back to LG.

I hope you are well.

Hopefully we get our dividend tomorrow.

Talk soon

James".

230. On 9 March, 2014, at 5:53 pm John Flynn replied again to this group in the following terms:

"Spoke with George. He is very nervous about his situation. Wanted to know the name of the fund. I told him that I couldn't remember – that it had a peculiar name. Said I thought Joe bid about 50% for the loans, but I rally (sic) had no idea. He wanted to know would we all sell for 100 cents. I said we were sitting tight until we saw who ended up with the loans. He still wanted to know if we would give him a letter saying we would not use the veto. I said it would be useless as everyone

else would. He said that it might be useful in court in future if he could show that he was oppressed and was unable to sell in order to pay his loans off. He is most concerned about the loss of his dividend and the possibility of his loans being called. I told him to stay calm and negotiate with the purchaser when they bought the loans. He says that he is very worried that he will be wiped out.

I think he will be amenable to a deal.

John."

231. On the morning of 18 March, 2014, at 11:08 a.m., Mr. O'Neill emailed the group in the following terms:

> *Please be careful that this Clare woman does not destabilise George. We need his cooperation and agreement to the security. But there should no heavy handed demands."*

232. Mr. Flynn replied at 8:13pm as follows:

> *"Dear Dan*
>
> *I just spoke with George. He is delighted that we are top bidder. He said that we have become "king makers" and I think that he sees himself as part of it. I told him that we needed a letter from him to the SLs supporting the bid position and telling them that he would be transferring his shares in support of the loan from Talos/CIF and that you would tell him exactly what was required. I told him that you would call him before 11pm Irish time tonight. His mobile [given] and his home no. is [given]. His wife's name is Rosaleen.*
>
> *Careful not to spook him. He is very much on board at present, but spoke about how he would be able to pay off his loans if necessary. He also says that his legal team from Larry advice was that there was the ability to sell 100% including Breccia's shareholding on foot of the current cross guarantees and Larry's cross obligations. Put to him the right way, I believe that he will give us the letter that we need for the SLs. I told him that without it, we were all screwed (including him) and that we could expect about 35 cent for our shares rather than 200 cent plus from the market. I think that he realises that fully himself. He said that he was "relieved" to know we were in pole position. He awaits your call.*
>
> *Best Regards.*
>
> *John".*

233. The plaintiff and his son James Sheehan were cross-examined in relation to these emails. The only explanation they offered was that Dr. Duffy was not entitled to detailed information regarding the Talos transaction. It was put to James Sheehan Jnr. that: *"You*

exclude [Dr. Duffy] from the team and then the plan is once you purchased his you "deal with him". Mr Sheehan replied:

> *'I'm sorry, he shouldn't have been included in the team, okay. We bought the loans. No other loan in IRBC had to deal well the borrowers. Only in this case, as Kieran Wallace would say, this was the most complicated loan in the entire IRBC loan sale and why is that? Because Dr. Duffy illegally took his shares out of his name into Tullycorbett, no one was aware of it until it was in the data room and we had to rectify it because we had to close the transaction. So that is the thing, we shouldn't have to deal with Dr. Duffy in this transaction but we were at minimal to dealing with him because we wanted a solution to close the transaction but ultimately it wasn't excluding him, he shouldn't have been included in the first place. And as you can see from my last email, what he did – what I envisioned is exactly what he did, which I think informing him of too much will have him running out to LG, being Larry Goodman, which I believe he did in the Four Seasons to try and strike a last minute deal on better terms. Oh, sorry, I added better terms. And that's exactly what he did. So my premonition was actually correct and that's why we are here today.*
>
> *Q: So limited information that's what Dr. Duffy was to get?*
>
> *A: He shouldn't have got any information.*
>
> *Q: He shouldn't have got any information?*
>
> *A: Correct.'"*

234. It was put to Mr. Sheehan that these emails revealed that the strategy was to "*provide as much misinformation to Dr. Duffy as possible assuming it's all going back to LG*", i.e. "*to misinform Dr. Duffy*". Mr. Sheehan said "*that's what it says*", acknowledging that this was indeed part of the strategy.

235. It was also put to Mr Sheehan that since Dr. Duffy had never been furnished with a copy of the Talos Term Sheet or the Talos Facility Agreement he never knew that if he redeemed his loans this would affect the plaintiff's funding with Talos.

236. Mr. Sheehan confirmed that it was "*wasn't his right to understand, know that*."

237. It was further put to Mr. Sheehan that this information had not been provided to Dr. Duffy because he had not been included in the "joint venture". Mr. Sheehan said that it was because Dr. Duffy "had done an illegal act". Mr. Sheehan continued: "*We weren't excluding him, we just weren't including him fully. And to be very clear giving him misinformation was not after we won the bid it was prior to the bid because, again, this information Larry Goodman and Breccia have a very good way of getting information out of our fellow shareholders and we didn't want to take the chance that we were not part of George's group because George had left us so we were not part of his group. We didn't include him. He had left us at this time when we were dealing with NCB. And at which*

then we were very adamant not to tell him what we were bidding and it was successful not to tell him because ultimately Larry Goodman and Breccia were an under bidder and we were the winning bidder."

238. The emails quoted above precede the events of 19 March, 2014, and set in their proper context the approaches made to Dr. Duffy to give the confirmations which it was said were required by the Special Liquidators as to the availability of the Tullycorbett and Rosaleen Duffy security over the shares and the confirmation required that there would be no objection to the sale. They reveal that the plaintiff's strategy was to provide only very selective information to Dr. Duffy. They also put in context the carefully crafted language of the draft letter to the Special Liquidators submitted by Mr. O'Neill to Dr. Duffy, focussed on meeting particular requirements of Talos as a condition of the funding, which requirements were not explained or disclosed to Dr. Duffy.

239. The only conclusions which can be drawn from these emails and the evidence of the plaintiff and of James Sheehan Jnr, and for which in their evidence neither the plaintiff nor James Sheehan Jnr. offered any plausible alternative explanation is the following:

(1) The plaintiff and Mr. Flynn were engaged in their own discussions about the amount of the bid to be submitted for the loans and about the funding of that bid with Talos.

(2) Neither the amount of the bid or the terms of the facility to be obtained from Talos were discussed with Dr. Duffy.

(3) The plaintiff and Mr. Flynn had resolved not only to withhold such information from Dr. Duffy but had determined to misinform him in relation to such matters.

(4) When selective requests were made to Dr. Duffy regarding the confirmations to be given in relation to the sale of his loans and the availability of corresponding security this was done against the background that the plaintiff had concluded that Dr. Duffy was "not to be trusted" and accordingly these requests for confirmations were made without revealing the details of the loan purchase or of the Talos facility.

15 April, 2014: Letter Dan O'Neill to John Flynn

240. On 15 April, 2014, Mr. O'Neill wrote a comprehensive and informative letter of advice to Mr. Flynn. The premise of this letter is that at that point in time Talos could still step into the shoes of JCS and complete the purchase of the loans, which never happened. This letter is a summary of Mr. O'Neill's view of the rights which JCS (and indirectly Talos) would acquire if the loan sale to it had proceeded. A number of passages in that letter illustrate the plaintiff's understanding and state of knowledge at this time. Mr. O'Neill says the following:

> "*I have reviewed all of the security documents from the data room, and all of the documents listed in Schedule 1 to the Deed of Sale which are the deliverables under that contract. I have concluded that upon closing JCS should have, registered*

in its name, 100% of the shareholding in Blackrock Hospital Limited (BHL), the right to collect all dividends payable on those shares, and the absolute right to sell all or part of those shares as surety over Dr. Sheehan's debt. These obligations, clearly enumerated in the share mortgages signed by each BHL shareholder, are not extinguished or restricted by the repayment of the relevant shareholder's individual debt, and are not modified in any way by the transfer of the Sheehan loan to JCS, but in fact are enhanced as the sale is taking place pursuant to the IBRC Act."[emphasis added]

241. He continues:-

"After the conclusion of the loan sale transaction, JCS will stand in the shoes of, and have all the rights of Anglo Irish Bank/IBRC with regard to the security listed above. Specifically, Clause 3.1 of the mortgage requires all shareholders to;

1. *Surrender all of the shares in BHL to JCS and assure that JCS is registered in the shareholder's register of BHL as the owner of the shares;*

2. *Instruct BHL that all rights, title and interest in the BHL shares present and future including, "any allotments, accretions, dividends…"*

…

Pursuant to the mortgage Clause 4.1 this security shall remain in force until all of the liabilities of all of the cross guarantors are discharged. The payment by any one shareholder of their obligations does not extinguish that shareholder's obligations under the mortgage

…

The failure of Anglo/IBRC to force the BHL shareholders to conform to the mortgage conditions is in no way a bar to JCS's enforcement of the mortgage. In particular, the IBRC Act of 2013, Article 12 makes clear that all of the rights of Anglo/IBRC transferred to the purchaser of the loan.

…

Upon closing JCS most likely will

1. *Notify all of the BHL shareholders, the Board Chairman and the Company Secretary of our interest in the share mortgage;*

2. *Require pursuant to Clause 3.1(e) of the share mortgage, the transfer of all shares in BHL to JCS, and that JCS be entered in the share register of BHL as the owner of such shares, this includes having the Breccia shares reissued and recorded in JCS's name;*

3. *Pay all future dividends payable on such shares into an account held by JCS."*

…

Enforcement of the Security

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

Please feel free to contact me if you need any clarification or further information.

Lawrence Daniel O'Neill"

242. The contents of this letter were put to the plaintiff in cross-examination by counsel for Breccia. The plaintiff sought initially to suggest that this letter did not reflect his plan, and that it simply recited the rights which would be acquired by any purchaser of the loan. He was unable to contradict the following propositions which were put to him arising from this letter:-

(1) That the Deed of Covenant given by Breccia conferred on IBRC, or any purchaser from it, the right on the occurrence of a default by any shareholder to sell all of the shares including those of Breccia.

(2) That Mr. O'Neill at least was of the view that the fact that the shares of Dr. Duffy had been transferred to Tullycorbett Limited and to Mrs. Duffy was no bar to enforcement of the mortgage in respect of those shares.

(3) The view taken by Mr. O'Neill that the repayment of his loan by one shareholder did not defeat the efficacy of the cross-guarantees and of the Breccia Deed of Covenant. (It is ironic that the plaintiff persisted at the hearing in asserting that he was prejudiced by the fact that Breccia had not executed a Guarantee and Indemnity but instead a Deed of Covenant yet he and his associates proceeded with a plan which itself would rely on the Deed of Covenant to ultimately acquire 100% of the shares.)

243. This letter also explains why Mr. O'Neill said to Dr. Duffy on 20 March, 2014, that the plaintiff had found a way forward without him and was *"proceeding as if you were out" and that the plaintiff would "acquire your loan from IBRC and perfect the security".*

PART SIX: BLACKROCK HOSPITAL LIMITED

244. The third named defendant, BHL, has always maintained that it is was not an appropriate or necessary defendant for this Module. The claims of conspiracy in paragraph 30 – 32 of the statement of claim are made against all the defendants. When BHL sought particulars the plaintiff replied to the effect that the conspiracy claim against BHL related only to non-payment of dividends.

245. In his witness statement for this Module, adopted by him at the trial, the plaintiff said:

> *"… this Module relates to the wrongful and unlawful actions of the first and second named Defendants ("the Breccia Defendants") and the fourth, fifth and sixth Defendants ("the Duffy defendants") in relation to the sale of certain loans by the Special Liquidators of IBRC."*

246. On 30 July, 2019, BHL brought an application for an order dismissing the plaintiff's claim as against it in this Module. This court heard and determined that application on 18 October, 2019. BHL claimed that none of the witness statements which had been delivered by the plaintiff contained any statement of intended evidence supporting the claims against it in this Module.

247. BHL referred also to para. 3 of the plaintiff's own witness statement which described this module as relating to the actions of the first, second, fourth, fifth and sixth named defendants in relation to the sale of certain loans.

248. The application was grounded on an affidavit sworn by Mr. James O'Donoghue, Chief Executive Officer of BHL. He swore that the plaintiff's witness statements did not contain indications of any intended evidence to support claims of wrongful and unlawful actions against BHL and that in those circumstances BHL could not reasonably be expected to make a factual response to the very broad allegations made in the statement of claim. He referred to the defence delivered by BHL in which it fully denied the allegations.

249. Mr. O'Donoghue referred to his own witness statement and swore that its contents were true and that there was no basis in fact for the claim of tortious conspiracy made by the plaintiff against BHL.

250. Mr. Donoghue also averred that BHL was concerned that the expenditure of the resources of the hospital in terms of time, personnel, and the associated legal and related costs incurred in defending a groundless allegation of tortious conspiracy should be brought to an end at the earliest possible opportunity. He said that the retention of BHL as a party to this module of the proceedings is damaging to the interests of the hospital and to its ordinary business activities delivering hospital services to the public. Finally, he averred that the continued retention of BHL in this module inappropriately involved the hospital in a continuing shareholder dispute arising out of the private commercial financing arrangements of the plaintiff in relation to his shareholding in the hospital and therefore was not an appropriate matter to continue to involve BHL.

251. The plaintiff did not oppose the application of the defendant and took no part in the hearing on 18 October. The court was satisfied that the plaintiff had been duly served with the motion and grounding affidavit and exhibits.

252. The court was satisfied that the witness statements as delivered did not indicate that the plaintiff intended to adduce any factual evidence to support a claim against the hospital in this module and noted that the plaintiff himself in his witness statement had said that this module related to the actions of the Breccia defendants and the Duffy defendants.

253. The court also noted that the plaintiffs claim to be entitled to receive payment of declared dividends, notwithstanding that Breccia held a charge over the shares and the dividends, had been dismissed in Module 1 of these proceedings, albeit that that judgment is under appeal. The court made an order dismissing the proceedings as against BHL and ordered that the plaintiff pay the third named defendant's costs.

PART SEVEN: SUBPOENAS AND WITNESS STATEMENTS

254. The plaintiff's approach to the matter of witnesses was unusual. In May 2019, four witness statements were delivered on behalf of the plaintiff, being those of the plaintiff himself (14 May, 2019), Dan O'Neill (14 May, 2019), John Flynn (24 May, 2019), and James Sheehan, son of the plaintiff (27 May, 2019). On behalf of the defendants, witness statements were delivered in July 2019 for Mr. Declan Sheeran on behalf of the first and second defendants (26 July, 2019). James O'Donoghue, on behalf of the third defendant (24 July, 2019) and by Dr. George Duffy and Simon Lynch, each on 30 August, 2019, on behalf of the Duffy defendants.

255. On Friday 15 November, 2019, being the Friday immediately before the commencement of the trial, the plaintiff attempted to effect service of a subpoena on Mr. Patrick Molloy, the chairman of the third named defendant, by delivering it to the hospital, and purporting to require Mr. Molloy to attend before the court on 22 November, 2019. The trial was listed to commence on Tuesday, 19 November, 2019.

256. On Sunday, 17 November, 2019, at 7:03 p.m., the plaintiff emailed Arthur Cox, the solicitors for the third named defendant attaching a copy of the subpoena and stating that Mr. Molloy's attendance was required before the High Court on 26 November, 2019. In that covering email, the plaintiff stated as follows: -

> *"I will be looking to ask him questions around his interactions with George Duffy on and around 22 October 2011 and the matters leading up to that date".*

257. On Monday, 18 November, 2010, the plaintiff emailed Messrs. Arthur Cox enclosing yet another copy of the subpoena but this time with a return date of 19 November, 2016, although the covering email again referred to 22 November, 2019, as the date on which Mr. Molloy would be required.

258. On Sunday, 17 November, 2019, the plaintiff also emailed Matheson, solicitors for the first and second named defendant, referring to a number of administrative matters in preparation for the hearing. In that email he stated that he had issued and attempted to

serve a subpoena on Mr. Laurence Goodman to attend court on 22 November, 2019. He invited Matheson to confirm that Mr. Goodman would attend on 22 November at 2 p.m. He said that he would be looking to ask questions around Mr. Goodman's involvement in the Blackrock Clinic *"and the contracts and transactions associated with the following time periods: March 26 2006 and months leading up to the date, October 22 2011, and months leading up to that date, and then April 4 2014, and the months leading up to that date and the months after that date."*

259. On Monday, 18 November, 2019, counsel instructed by BHL, who at this stage were no longer a party to the action for this module, and instructed also by Mr. Molloy made an ex parte application for leave to bring a motion to set aside and discharge the subpoena as regards Mr. Molloy. I granted leave to bring that motion returnable for the start of the trial.

260. When the court sat for the commencement of the trial on Tuesday, 19 November 2019, the court was informed that the plaintiff had served or attempted to serve subpoenas on a number of persons in respect of whom no witness statements or precis or evidence had been delivered in accordance with the prior directions of the court. These persons were Rosaleen Duffy, Eileen Prendergast, Patrick Molloy and Laurence Goodman. Service of a subpoena had also been attempted on Dr. George Duffy, the third named defendant, in respect of whom a witness statement had been delivered by his solicitors in accordance with the court directions. (Dr. Duffy attended court to give his own evidence but was called as a witness by the plaintiff).

261. No witness statements or precis of the evidence intended to be adduced from these witnesses had been delivered within the original time directed by the court. No explanation was offered by the plaintiff as to the reason for the lateness of the service and attempted service of the subpoenas save for a reference to a late decision on the plaintiff's part to which I shall return.

262. The court drew the attention of the plaintiff to the provisions of Order 63A, Rule 22(1) which provides as follows: -

> *"Unless a judge shall otherwise order, a party intending to rely on the oral evidence of a witness as to fact or of an expert at trial, shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings, and not later than seven days in the case of a defendant, serve on the other party or parties a written statement outlining the essential elements of that evidence, signed and dated by the witness or expert as the case may be".*

The court also drew the attention of the plaintiff to the practice which has developed in cases before the Commercial Court that where a witness statement is not available to the party seeking to call a certain witness a precis of the evidence intended to be elicited from that witness may be delivered.

263. The plaintiff was represented by solicitors and counsel up to September 2019, and therefore when he was delivering his original witness statements in May 2019. Yet no application for late delivery of additional statements had been made. Notwithstanding this, in recognition of the status of the plaintiff at this stage of the proceedings as a lay litigant, the court gave liberty to the plaintiff to bring an application for leave to deliver witness statements and/or precis and for leave to call these persons as witnesses, which application would be returnable for 2 p.m. on Thursday, 21 November, 2019, being the third day of the trial. The court directed that the application be grounded on an affidavit which would identify the matters in respect of which the plaintiff intended to elicit evidence. The court also adjourned for hearing to the same time the application of BHL to set aside the subpoena as regards Mr. Molloy.

264. Having heard submissions of the plaintiff and of the defendants, the court ruled against the plaintiff's application for leave to call any of these additional witnesses for the following reason.

265. No explanation was given or any attempt at an explanation as to the reasons for the application being made six months after the deadline set by this Court for the delivery of witness statements and an application being made only during the trial.

266. During submissions on the application the plaintiff conceded that, in particular in relation to Mr. Goodman, he had taken the decision to call Mr. Goodman at some date before the end of October but had decided not to action the matter until his return to Ireland for the trial itself.

267. The plaintiff also confirmed to the court that in May, when he was still represented by solicitors and counsel, he had discussed the list of witnesses with his legal team. Whilst the plaintiff was not questioned as to the substance of these discussions, which were privileged, it was clear that the outcome of those discussions was a determination by the plaintiff and his solicitors and counsel to deliver witness statements only in respect of the four which were delivered, namely the plaintiff himself, Mr. O'Neill, Mr. Flynn and James Sheehan Jr. When delivering the witness statements of those parties in May 2019 no indication had been made that more would follow or that the plaintiff was reserving his right to call more witnesses or to apply to the court for leave to do so. The proceedings had since been mentioned in court on several occasions when no reference was made to the possibility of calling additional witnesses.

268. In making my ruling, I emphasised the importance of adhering to the rules of the Commercial Court, which is the court in which the plaintiff elected to advance these proceedings.

269. Despite the fact that the plaintiff had advanced no justification for extending the time for delivering witness statements or precis, or for calling witnesses, I considered that it would be appropriate to assess the merits of the application by reference to each of the proposed additional witnesses. I did so and concluded that none of the matters referred to in the plaintiff's grounding affidavit or in the submission made by him to the court in

support of his application justified a deviation from the application of the provisions of O. 63A, r. 22 (1). I therefore refused the application.

270. I also granted the application of BHL to set aside the subpoena as regards Mr. Molloy, and set aside the subpoena as regards Ms. Prendergast.

Witness John Flynn

271. On the fourth day of the hearing the plaintiff announced that the next scheduled witness, Mr. Flynn, was then in Florida and has recently been in hospital and that the plaintiff would like to have him give his evidence by video. This was the first suggestion that Mr. Flynn would not give evidence in person.

272. The plaintiff was unable to advance any evidence in support of this unusual application being made at such a late stage in the matter. On the following Tuesday, 26 November, 2019, being day five of the hearing, a letter from Mr. Flynn's doctor was made available. The defendants then indicated that they would not then object to the witness giving his evidence via video link. Arrangements were made for the court to facilitate the taking of evidence of Mr. Flynn on the following day by video link.

273. On the following morning, the court was informed that Mr. Flynn had determined not to give evidence, despite the fact that the necessary arrangements had been made both in this Court and with attorneys in Florida to facilitate the giving of evidence by video link. No satisfactory explanation was given for this last minute change. The case concluded without any evidence from Mr. Flynn.

Witness Dan O'Neill

274. When giving his own evidence the plaintiff said for the first time, that there was doubt as to whether Mr. O'Neill would attend to give evidence. Under cross-examination he said that he understood that Mr. O'Neill was sailing, but he was unable to say where. Mr. O'Neill did not attend the hearing and no evidence was given by him.

PART EIGHT: PLAINTIFF'S LEGAL SUBMISSIONS

275. In September 2019, the plaintiff discharged his solicitors and counsel. The Legal Submissions delivered by him on 8 November, 2019, were signed by himself as "*plaintiff in person".*

276. I quote below some extracts from the Submissions. To any reader they lack an exposition of legal principles relevant to the facts of the case and numerous points are made which bear no connection to the pleaded case. They also contain what Noonan J. in *Bank of Ireland Mortgage Bank v Martin* [2017] IEHC 707, described as "*irrelevant, incoherent and nonsensical pseudo-legal points*". Elsewhere in that case Noonan J. had referred to an "*overwhelming miasma of fake law*", which would fairly describe the submission.

277. In recognition of the fact that the plaintiff was unrepresented from September 2019 onwards, and therefore when delivering his Submissions, I considered it appropriate to examine them to determine if any of their contents assist the court in making its judgment.

278. The following are the central propositions which can be extracted from the Submission:

(1) That the Tullycorbett transfer was illegal even if approved by the Board of Directors of BHL and registered by its secretary, because it was made without the consent of Anglo/IBRC which held security over Dr. Duffy's shares.

(2) That this illegality had the effect of perpetrating a fraud on the bank and ultimately on the tax payers of Ireland.

(3) That the Tullycorbett transfer constituted a criminal offence such as would require further investigation either "*as part of this trial*" or otherwise.

(4) That this illegal act was the root cause and central event in a conspiracy to which the parties were at least Dr. Duffy, Dr. Duffy's wife and children, BHL and Breccia.

(5) That in March, 2014 Dr. Duffy agreed to "*put back the stolen securities"* in order to facilitate the plaintiff's proposed acquisition of the loans of Dr. Duffy and others and security granted for those loans.

(6) That by repaying his IBRC loan after making such an agreement Dr. Duffy perpetuated the illegality of having the securities "*stolen*" and breached an agreement he had made with the plaintiff to "*return the stolen security".*

(7) That in lending to Dr. Duffy to enable him to repay his loan Breccia induced a breach of contract and was party to a conspiracy to injure the plaintiff's interests. The Submission does not identify whether the conspiracy is alleged to have been perpetrated by lawful or by unlawful means, although it is replete with reference to "*illegal acts*".

279. It is appropriate to quote a number of the more elaborate submissions which have been made, many of which relate in no way to the pleaded case. In his submissions the plaintiff submits, by reference to the Tullycorbett transfer that:

> *"This unlawful act and conspiracy conducted by Dr. Duffy and his co-conspirators is the root cause to this entire action and that the conspiracy that spun from that, involving Breccia and Larry Goodman, that as a result created tremendous losses for the plaintiff in real cash terms, shareholder value and banks security." (page 2).*
>
> *The Legal Principle of a Poisonous Tree produces Poisonous fruit, clearly applies in the case of Joseph Sheehan v. Breccia et al. Lawful contracts cannot result from an unlawful act which the plaintiff will demonstrate but an unlawful act is the root cause of this entire court case".*
>
> *"The plaintiff is seeking orders from the court to rectify George Duffy's illegal transfer or null in void all Joseph Sheehan IBRC loan security, remedy all Joseph Sheehan's losses, and create a situation where the plaintiff is given the right to sell 100% shares of the Blackrock Clinic as though he had closed the purchase of*

Tranche 14, Project Stone and possesses the security to trigger the sale of 100% of Blackrock Clinic. In addition, issue immediate transfer notices for George Duffy, Breccia UC and other shareholder shares that participated in the unlawful acts and conspiracies". (page 2)

280. This is a form of prayer that the court make orders compelling the reversal of the Tullycorbett transfer, a relief never sought in the proceedings.

281. The submission continues:

> *"This conspiracy by George Duffy and his fellow conspirators created a loss for the plaintiff of not only preventing him his lawful right to realise full value for his Blackrock Clinic through the sale of 100% of the share capital, but also multiple of millions of euros in expenses, legal fees, opportunity costs, time and so much more. The Duffy unlawful act created a situation where Dr. Sheehan was prevented from concluding the opportunity to "step into the feet of IBRC" with regards to his and Dr. Duffy's loan (under IBRC Loan Sale Project Stone with all its security and cross guarantees) allowing Joseph Sheehan the right to sell 100% of the Blackrock Clinic at full value, estimated today at €400 million (when recently compared with similar deals in the market)." (page 3)*

282. *"The evidence will show that the plaintiff appealed to Dr. Duffy, as a director and shareholder, including Dr. Sheehan's lawyer Dan O'Neill and his fellow director (John Flynn), all appealed to Dr. Duffy to remedy the unlawful event he conspired to achieve in on 22nd October, 2011 before losses accrued to the plaintiff or any other shareholder in Blackrock Clinic, which Dr. Duffy would be responsible for under his unlawful act. George Duffy listening to the appeals, taking in Dr. Sheehan's confidential information, agreed to rectify the illegal share transfer in the days leading up to April 3, 2014)*." (page 4). No evidence was given of an "*appeal*" or a "*agreement*" in such terms.

283. Notwithstanding that the Tullycorbett Transfer had never been pleaded as an issue in the case, at Part Four of this judgment I have considered the Tullycorbett Transfer in detail and concluded that it does not support the plaintiff's claim.

284. The Submission is replete with references to an agreement "*to rectify an unlawful act".* None of these references were supported by evidence, and a plain reading of the emails quoted extensively in this judgment shows that no agreement in such terms was made.

285. *"By using his own lawful power, George Duffy used his position to further conspire (with his family and Tullycorbett directors and beneficiaries and defendants, and eventually Breccia) on April 3rd 2014 by leveraging the unlawfully [sic] security taken from IBRC, in addition to using the confidential information of Joseph Sheehan and his lawyers (both in writing and verbally) of specific closing requirements of Joseph Sheehan Project Stone loan sale dead (sic), George Duffy and Larry Goodman as Directors of Blackrock Clinic conspired to stop the completion of Joseph's Sheehan's Project Stone Loan Sale Deed by entering into a new illegal loan using stolen securities."* (page 5)

286. No evidence was adduced on disclosure of *"specific closing requirements of Joseph Sheehan Project Stone loan sale deed"*. I return to the subject of confidential information later.

287. The Submission repeats the themes of "*unlawful share transfer", "illegal loan using stolen securities", "criminal theft" and "dishonesty".* The recurring theme throughout is that the Tullycorbett Transfer is the root cause of the case, and the plaintiff says:

> *"But Breccia should be stopped by the very basic legal principle of a Poisonous Tree Produces Poisonous fruit which clearly applies in this situation. Lawful contracts cannot result from an unlawful act as was the loan provided to Dr. Duffy and his fellow conspirators (in Tullycorbett) by Breccia UC. Irish Law. Section 4 'Theft'. 1 subject to s. 5 a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it. The plaintiff will demonstrate that unlawful acts and conspiracy is a pattern of George Duffy and the members of Tullycorbett ultimately stemming from the illegal transfer of George Duffy shares in October 22, 2011, without bank consent". (p. 8).*

288. "*Knowing that bank consent was a requirement allowing the hospital to register, what did George Duffy say to the hospital to have them approve the share transfer? How did this root cause come about? And as a Director of Blackrock Clinic, George Duffy had more obligations than a standard shareholder, as did Larry Goodman. So why did Dr. Duffy not tell the clinic he did not have bank consent, if they registered the shares? And why didn't he rectify the illegal transfer after being asked by the bank, the Special Liquidator, and his fellow director (Joseph Sheehan) to rectify the illegal transfer before any damage was caused and losses accrued to injured parties. In this case, the Plaintiff will endeavour to answer these questions throughout the course of this trial."* (p. 8)

289. "*Witnesses will be called that will clarify the background to the restriction by Blackrock to prevent the transfer of a shareholders' shares into the new company (*"*New Co*")". (page 9)

290. No such witness evidence was called.

291. Further repetitive references are made throughout the Submission to the Tullycorbett Transfer as *"theft, fraud and concealment*" and as the "*root cause of this case."*

Allegations against other parties

292. The Submission does not confine its allegations to parties to the proceedings. Sweeping allegations are made against non-parties, including the chairman of BHL, Mr. Pat Molloy, the Special Liquidators, Dr. Duffy's children, Mr. Lynch, Eversheds Sutherland and Mr. Breffni Byrne. At no point during his presentation at the hearing, did the plaintiff connect these broad allegations to his evidence.

293. The Submission contains a section at page 18 headed '*Fraud'*. No plea of fraud was made. The plaintiff refers to Mr. Lynch having known *"that it was a major problem for anyone*

buying the loan from the IBRC Special Liquidators portfolio and thus why they agreed to rectify the illegal transfer". He refers to the plaintiff's funders having "*refused to close due to the fact that George Duffy and his wife and fellow conspirators refused to upkeep the promises they gave to both the SL/Ciaran Scally and Dan O'Neill leading up to the Loan Sale Deed closure 4 March, 2014."*

294. No further articulation or particulars of fraud are given.

295. In the "*Conclusion*" the plaintiff says the following:

> *"Using the Data Room IBRC Project Stone – Byrne Wallace – George Duffy Security Report, and other evidence, the plaintiff will demonstrate that George Duffy and his fellow conspirators are the type of people that have committed conspiracy in the past not to mention criminal activity at the same time, aided by the help of his family his fellow Blackrock Clinic directors and other motivated parties like Breccia."*

296. The Submission contains a number of references to statutory provisions and I have considered those in paragraph 301 below.

297. Having regard to the difficulty of extrapolating meaningful or relevant legal principles from the Submission, it is necessary to assess the elements of the plaintiff's claim by reference to his statement of claim.

PART NINE: STATEMENT OF CLAIM

298. Again, no attempt was made by the plaintiff to identify which parts of his evidence were said by him to support the different headings of claim made in the Statement of Claim. Therefore, the court has been presented with the exercise of considering whether any, and if so, which of the claims are supported by evidence.

Conspiracy

299. Although this module of the proceedings is referred to generally as the "Conspiracy" module, the allegation of conspiracy is made in the most broad and formulaic terms, principally in paragraph 30 to 32 of the Statement of Claim, and without any particulars, as follows:-

> "*30. Further and/or in the alternative and without prejudice to the foregoing the said acts by the defendants and each of them in combination with other defendants had at its object and effect the wilful and/or intentional injury and/or damage of the plaintiff in his trade and business and resulted in damage to him. Further and/or in the alternative, and without prejudice to the foregoing the said acts by the defendants were carried out using unlawful means thereby constituting an actionable conspiracy.* [emphasis added]
>
> *31. Further and/or in the alternative, and without prejudice to the foregoing, the said acts by the defendants and each of them constitute the use of unlawful conduct and/or amounted to an intentional interference with the plaintiff's economic interests.*

32. *The plaintiff believes and/or has reason to believe that the defendants, their servants or agents are intent on pursuing their unlawful conduct aimed acquiring the plaintiff's shares unless restrained by this Honourable Court."*

300. The allegation is made "*further and/or in the alternative*" to claims of breach of contract, negligence, breach of duty including breach of statutory duty and/or fiduciary duty and breach of duty of confidence, inducement to breach of contract, misrepresentation. I shall consider each of them before returning to the claim of conspiracy in Part Ten.

Negligence

301. In para. 19 of the Statement of Claim it is alleged that the defendants are guilty of "negligence". The only description of a duty of care alleged to have been breached giving rise to a cause of action in negligence is to be found in paragraph 11. In that paragraph it is pleaded that the defendant owed to the plaintiff *"a duty of care and/or a statutory duty and/or fiduciary duty, which duty was co-extensive with the terms of the Shareholders Agreement and/or the terms pleaded at paragraph 9."* Paragraph 9 is a recital of certain terms of the Shareholders Agreement and an assertion of certain implied terms. I shall examine below the claims by reference to the Shareholders' Agreement. However, as far as concerns the broad allegation of negligence the plaintiff has nowhere articulated a breach of duty independent of the claims considered below and has not claimed damages for negligence.

Breach of statutory duty

302. Nowhere in the Statement of Claim is any statute pleaded. That should be the end of this claim. However in the plaintiff's Legal Submissions he refers variously to the following:-

(1) "*The Anglo Irish Bill signed by President Mary McAleese on 21 January 2009*". I take this to be a reference to the Anglo Bank Corporation Act, 2009. This is the Act pursuant to which the Minister for Finance acquired the shareholding of the then Anglo Irish Bank. The plaintiff has not cited any breach of that Act.

(2) Criminal Justice (Theft and Fraud Offences) Act, 2011. I take this to be a reference to the Act of the same title made in 2001. That Act appears to be referenced in the context of the allegation that the "Tullycorbett Transfer" constituted an act of theft or fraud. The plaintiff quotes sections 2 and 4 which contain the definition of theft. Although not clearly articulated these references are made in context of repeats of his allegations that Dr. Duffy "*unlawfully removed his 20% shareholding in Blackrock Hospital in 2011"*.

I have considered the Tullycorbett Transfer elsewhere in this judgment. The statutory definition of theft refers to *"appropriation of property without the consent of its owner and with the intention of depriving the owner of it*". The owner of the shares was Dr. Duffy and it was he who made the Tullycorbett Transfer. Insofar as the plaintiff is alleging that the bank was deprived of its security, the mortgage on the shares was not released, the bank retained its security over the shares after the Tullycorbett Transfer and was never deprived of its right to sell that security.

(3) The Companies Act 2014. The plaintiff refers in his submission to s. 389 (the offence of making a false or misleading statement to the statutory auditors of a company) and s. 793 (the offence of falsifying, concealing, destroying or otherwise disposing of a document or record relevant to an investigation by the Director of Corporate Enforcement, knowing that such an investigation is being or likely to be carried out and that the document or record is or would be relevant to that investigation).

i. The reference to s. 389 appears to be made in the context of Dr. Duffy having been a signatory to the account and committing a false statement *"by confirming bank consent was achieved to allow the Blackrock Clinic register the shares into the name of his wife and Tullycorbett and beneficiary, at the expense of fellow shareholders, the Bank and the Irish people, all who's [sic] security was shattered by Dr. Duffy and his co-conspirators on 22nd October, 2011."*

No such submission was ever made in the pleaded case and no particulars or evidence were advanced by the plaintiff in the course of the trial to establish the commission of such an offence. Nor does the plaintiff identify who he claims were Dr. Duffy's "co-conspirators on 22 October, 2011".

ii. As regards s. 793, no reference was ever made to an ongoing or likely investigation by the Director of Corporate Enforcement. Nor is any evidence advanced that the Tullycorbett Transfer was made *"with the sole purpose of interfering with Joseph Sheehan's purchase of his and Dr. Duffy's loans and security in IBRC Project Stone loan sale*" (at p. 20 of plaintiff's submissions).

Breach of duty of good faith and/or confidentiality

303. In para. 19(f) the plaintiff alleges that in circumstances where he and the Duffy defendants were negotiating a joint venture the "*Duffy defendants*" owed a duty of good faith and/or confidentiality to the plaintiff.

304. The concept of information imparted during the course of negotiations for a joint venture was considered by Fennelly J. in *Mahon v. Post Publications Limited* [2007] 2 ILRM at p. 1 where he said the following: -

> *"The law of confidence has, however, developed more generally in a commercial context. Dismissed or defecting employees have not infrequently purloined their former master's technical or commercial information. While employees can be restrained in contract without resort to the equitable doctrine, the latter becomes relevant when the information is conveyed to third parties who are on notice of the confidential character of the information. A more specific type of application of the equitable principle has arisen where information has been conveyed during negotiations for the establishment of a joint commercial venture. Many of the cases have arisen from cases of failed negotiations. The recipient of the information is deemed to have received the confidential information on trust solely for the purposes of the intended joint venture. If the negotiations fail, that recipient will, if necessary, be restrained from using it or authorizing use of it without permission,*

for his own purposes. Kelly J cited a passage from the judgment of Megarry J. (as he then was) in Coco v A. N. Clark (Engineers) Ltd. [1969] R.P.C. 41 at 47. It neatly encapsulates the requirements for a successful action based on breach of confidence, at least in a commercial setting. He said:

> *'In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the Saltman case on pg.215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'"*

305. Fennelly J. also cited the judgment in *House of Spring Gardens Limited v. Point Blank* [1984] IR 611 in which Costello J. (as he then was) had reviewed the English decisions in some detail. Costello J. had cited a dictum of Lord Denning M.R. in *Seager v. Copydex Limited* where he said: -

> *"The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole information is private. The difficulty arises when the information is in part public and in part private".*

306. Finally, Fennelly J. summarised what he described as the *"contours of the equitable doctrine of confidence"* as follows: -

> *"1. The information must in fact be confidential or secret: it must, to quote Lord Greene, 'have the necessary quality of confidence about it';*
>
> *2. It must have been communicated by the possessor of the information in circumstances which impose an obligation of confidence or trust on the person receiving it;*
>
> *3. It must be wrongfully communicated by the person receiving it or by another person who is aware of the obligation of confidence".*

307. As regards the joint venture claim pleaded in para. 19 (f), the evidence given by the plaintiff was that the parties were not engaged in a joint venture. This is clear from the following. Firstly, the Talos Term Sheet shows that the borrowers were to be the plaintiff and John Flynn, and Dr. Duffy was not a party to that borrowing. Secondly, in circumstances where the plaintiff and Mr. Flynn had declined to show Dr. Duffy a copy of the Talos facility letter, they could clearly not have been described as parties to a joint venture. Thirdly, the evidence of Mr. Sheehan Jr. was most categoric on this in that he

insisted in his evidence (Day 5, p. 35) that Dr. Duffy was not in a joint venture with the plaintiff when he said the following: -

> "*He didn't* [sic] *have been on our team. He shouldn't have been on our team but he didn't – for the loans. He was separate from us and then we find out that he had taken the shares out of his own name into Tullycorbett at the time we were doing this whole transaction."*

308. In Mr. O'Neill's email to Dr. Duffy on 20 March, 2014, he said: -

> *"George,*
>
> *No rush. We have lots of housekeeping stuff to do. Until I get your confirmation that you are in, I am proceeding as if you are out. In either case, we will acquire your loan from IBRC and perfect the security.*
>
> *Look forward to hearing from you.*
>
> *Dan".*

309. Although a duty of confidentiality can arise even from the negotiation of a joint venture (per Fennelly J. in *Mahon v. An Post Publications*), in this case the evidence given by all witnesses including the plaintiff and his son, is that they did not regard Dr. Duffy as an actual or prospective joint venture partner. The plaintiff's characterisation of the parties as having a "*unified approach*" is unstatable when regard is had to the evidence of communications between the plaintiff and his associates regarding their treatment of Dr. Duffy, particularly in the period March and April 2014 when they were seeking to extract certain confirmations they needed in their dealings with the Special Liquidators and Talos and providing only selective information regarding their proposed transaction. See Part Five of this judgment.

310. Since the only particulars of confidential information allegedly disclosed are those in para. 19 (f) of the Statement of Claim, it is necessary to analyse the three categories of information cited as against the evidence given.

A. The plaintiff's loans with Anglo including the value of the said loans and their performance

311. Firstly, the fact of the loans was a matter known to all shareholders including the first, second, fourth, fifth and sixth defendants from the time at which the loan arrangements for the purpose of the shareholding were taken out in March 2006.

312. Secondly, details of the loans and their performance were in the data room provided by the Special Liquidators for Project Stone, which was accessed by both the plaintiff and the first defendant in the context of their bids for the loans.

313. Thirdly, the value of the loans was informed by the information in the data room to the extent that a bidder would take such information into account in assessing the value.

314. No evidence was given that the plaintiff had disclosed to any of the defendants' information relevant to the value and performance of the loans or that the Duffy defendants imparted to Breccia any more information than Breccia had accessed or was entitled to access in the data room.

B. The proposed purchase of the plaintiff's loans (and the loans of the fourth named defendant) from Anglo including the proposed purchase price and conditions relating to any sale

315. Both the plaintiff and his son confirmed in evidence that they had not informed the Duffy defendants of the proposed purchase price. On the contrary, the evidence before the court was that Mr. Flynn had reported to the plaintiff that when a conversation took place relating to the loans and the price at which they might be sold, Mr. Flynn had indicated that a "*bid of about 50%"* had been made (see email from John Flynn of 9 March, 2014, referred to at para. 230 above). James Sheehan Jr. confirmed under cross-examination that this was part of the misinformation which was being provided to Dr. Duffy.

316. Under cross-examination the plaintiff himself confirmed that the reference to a bid *"in the order of 50%"* for the loan was a fiction.

317. As regards the "*conditions relating to any sale*", no evidence was given that the terms and conditions of the proposed sale were disclosed to Dr. Duffy. Dr. Duffy's evidence that he had not been made privy to the terms on which the Special Liquidators had agreed to sell the loans to JCS was not contradicted in any evidence by the plaintiff or by James Sheehan Jr.

C. The financing of the proposed purchase of the loans, including the fact that such finance was conditional upon both the acquisition of the plaintiff's loans and the loans of Dr. Duffy

318. As to the identity of the provider of the finance the email by Mr. Flynn on 9 March, 2004 confirmed that when he was speaking with Dr. Duffy he had informed him that he did not know or could not recall the name of the fund. This followed the email from James Sheehan Jnr. to Mr. Flynn saying *"I would provide as much misinformation to him as possible"*. Because Mr. Flynn did not attend to give evidence he was not tested on this point, but the suggestion by the plaintiff that this was because Mr. Flynn was uncertain as to the exact name of the funding entity was unconvincing to say the least.

319. As regards the terms of the financing the evidence consistently given by Dr. Duffy himself and even by the plaintiff and by James Sheehan Jnr. was that the terms of the Talos facility were not disclosed to Dr. Duffy. When pressed on this matter under cross-examination, both the plaintiff and James Sheehan Jnr. insisted that it would not have been appropriate for them to share the contents of the facility letter because they had a non – disclosure agreement with Talos.

320. The claim that Dr. Duffy received and used confidential information to the effect that the acquisition of the plaintiff's loans and the loans of Dr. Duffy was a condition precedent of the Talos facility, is undermined by the emails exchanged between Mr. O'Neill and Dr. Duffy in which Mr. O'Neill, acting on behalf of the plaintiff, had specifically informed Dr.

Duffy that the plaintiff had *"found a way forward without him"* (see email from Dan O'Neill to George Duffy, 20 March, 2014, at 2:14 a.m.) (paragraph 100).

321. The claim of breach of confidentiality must fall at the first evidential hurdle because the plaintiff has not established that confidential information regarding his bid under any of the headings referred to above was revealed to any of the Duffy defendants, let alone divulged by them to Breccia or used by them. On the contrary, selective information was provided in the context of attempts to obtain from Dr. Duffy letters confirming that he had no objection to the sale of his loans and seeking to obtain specific confirmations from Tullycorbett and Rosaleen Duffy to the effect that they were aware of the terms of the Talos facility.

Breach of Contract

322. It is not pleaded what contractual provision precisely has been breached by any of the defendants and how such a breach is alleged to arise. In the submissions the plaintiff refers variously to a number of the provisions of the Shareholder Agreement and I consider these firstly. He refers separately to an alleged agreement by Dr. Duffy who *"agreed to rectify the illegal share transfer in the days leading up to April 3 2014"* and I shall return to that claim later. The clauses mentioned by the plaintiff are:

    (i) Clause 3.4 – Financial Obligations,

    (ii) Clause 5.5 – Covenants concerning the constitution of the board,

    (iii) Clause 6 – Restrictions on conduct by the promotors,

    (iv) Clause 7.2 – Confidentiality,

    (v) Clause 8 – Restrictions on share transfer.

Clause 3.4 – Financial obligations

323. Frequent references by the plaintiff to this Clause in the context of the Tullycorbett transfer infer that the plaintiff claims that the transfer violated the obligation in 3.4 that each promotor would mortgage their shares in BHL to Anglo Irish Bank. This was never pleaded in the case and no application was made to amend the Statement of Claim to make such a plea. I have also considered this subject separately in Part Four of this judgment and found that his complaint about the Tullycorbett Transfer does not support the claim in any respect.

324. Dr. Duffy redeemed his loan on 4 April, 2014, and the plaintiff remained in breach of his repayment obligation.

325. The indemnities between shareholders in Cl. 3.4 do not arise as the plaintiff did not suffer loss by reason of breach by any of the defendants.

Clause 5: Covenants concerning the Company

326. Although Clause 5 was referenced in the submissions no particulars of any breach of its provisions were articulated. Clause 5 relates to covenants concerning the company and

deals with such matters as the control of the company, constitution of the board, alternate directors, conduct of directors' meetings, information, access to company's books, restricted transactions. Again, nowhere has the plaintiff evidenced any breaches of Clause 5.

Clause 6: Restrictions

327. Clause 6 of the Shareholders' Agreement relates to restrictions on competing activities of promotors and such matters and no submission or evidence was proffered on this subject.

Clause 7: Publicity

328. Clause 7.2 is the clause which concerns confidential information and reads as follows:

> *"The terms and conditions of this Agreement and/or any document or matter referred to in this Agreement and any heads of terms relating to this Agreement including their existence, and any information of a confidential nature relating to the business or affairs of the Company or of the Promotors (collectively, the "Confidential Information") shall be considered confidential information and shall not be disclosed by any party hereto or to any third party without the prior written consent of the Promotors or except in accordance with the provisions of Clause 7.3 (compulsory disclosure by law) save where such information has come in to the public domain otherwise than as a result of a breach of this clause."* [emphasis added]

329. In para. 19(f) of the Statement of Claim the plaintiff refers to the Duffy defendants and the *plaintiff "negotiating a joint venture namely the purchase of the plaintiff loans and the loans of the Duffy defendants relating to their shareholdings in BHL."* It continues:-

> "During these negotiations, the fourth to sixth named defendants received confidential information relating to, inter alia;
>
> *(1) the Plaintiff's Loans with Anglo including the value of the said loans and their performance;*
>
> *(2) the proposed purchase of the Plaintiff's Loans (and the loans of the fourth named defendant) from Anglo including the proposed purchase price and conditions relating to any sale, and*
>
> *(3) the financing of the proposed purchase of the said loans including the fact that such finance was conditional upon both the acquisition of the plaintiff's loans and the loans of the fourth named defendant."*

330. In paragraph 19(h) the plaintiff claims that the Duffy defendants divulged this confidential information to the first and second defendants.

331. In paragraph 19(i) the plaintiff alleges that the: -

> *"Purchase and/or redemption of the loans of the fourth named defendant were the result of a breach of good faith by the first, second, fourth, fifth and sixth named*

defendants and were procured using the confidential information known to the first, second, fourth, fifth and sixth defendants due to their involvement in the Shareholders' Agreement and/or the business of BHL and/or using confidential information disclosed by the plaintiff to the fourth, the sixth named defendants and communicated to the first and/or second named defendants, their servants or agents in circumstances where the first, second, fourth, fifth and/or sixth named defendants knew the information to be confidential and sensitive and/or in circumstances which permitted them to acquire and/or redeem the said loans."

332. On 5 February, 2018, the Duffy defendants sought particulars of "*precisely what confidential information it is alleged was used by these defendants or any of them".* The plaintiff never replied to that Notice for Particulars. Therefore, the only detail of his claim is that contained in para. 19(f) quoted above.

333. The obligation of confidentiality imposed by Clause 7.2 of the Shareholders' Agreement was sufficiently broad to extend to the categories of information referred to in paragraph 19(f) of the statement of claim. However, I have already found that the plaintiff has not established that confidential information of the nature described in paragraph 19(f) was received by the defendants or divulged by Dr. Duffy to Breccia. See paragraphs (310 – 321) above.

Clause 8: Restrictions in Share Transfer

334. Insofar as the Tullycorbett transfer was referenced in the context of Clause 8 of the Shareholders' Agreement relating to restricted transfers it is clear that the Tullycorbett transfer was to a *"family transferee*" which was specifically permitted by the Shareholders' Agreement at Clause 8.8.

335. No other breach of Clause 3 of the Shareholders' Agreement was cited.

Contract of March/April 2014

336. Insofar as the plaintiff claims a breach of contract otherwise than breach of the terms of the Shareholders' Agreement, the high point of the claim is to be found in para. 19 (g) where he states that on 4 April, 2014, following the execution of the Loan Sale Deed with the Special Liquidators: -

" . . and following express confirmation from the fourth named defendant on 3 April 2014 that he was agreeable to the plaintiff's purchase of his loans, the loans of the fourth named defendant were purchased and/or redeemed by the first, second, fourth, fifth and/or sixth named defendant their respective servants or agents".

337. Clearly Dr. Duffy had in advance of 3 April, 2014, given the two confirmations by email that the relevant *security "will continue to be available to the new owner of the residual of the GJD Anglo loan" and "does not object to Joseph Sheehan acquiring the relevant loans".*

338. No evidence was given of an agreement made on 3 April, 2014, and I have already considered in detail the accounts given by the parties of the meeting that day at the Royal Irish Yacht Club.

339. There is no doubt that the outline of an intended transaction was discussed at this meeting. However, the only evidence given by the plaintiff about this meeting contained no information as to the terms any agreement made. Insofar that meeting was relied on to establish any form of contract, there is a total absence of any of the fundamental requirements to evidence the formation of a binding legal contract, namely offer, acceptance, consideration or intention to create legal relations. This explains the plaintiff's reliance on the emails that I have considered earlier.

Inducement to breach of contract

340. The allegations under this heading are to be found at para. 19(j) and para. 29 of the Statement of Claim. At 19(j) the plaintiff claims the following:

> *"Further and/or in the alternative the first and/or second named defendants induced the fourth to sixth named defendants to breach their agreement with the plaintiff to allow the plaintiff to purchase his loan and the loan of the fourth named defendant."*

341. In para. 29, the plaintiff claims that the acts of the first and/or second named defendants in purchasing and/or redeeming the loans of the fourth named defendant constituted an inducement to breach of contract and resulted in the plaintiff being unable to acquire his loans *"as previously agreed with the fourth named defendant."*

342. In *Iarnód Éireann v. Holbrooke* [2000] IEHC 47, O'Neill adopted with approval the description of the tort of inducement of breach of contract by Hamilton J. (as he then was) in *Armstrong Motors Limited v. CIE & Ors*. where he identified the following as *"essential ingredients of the tort of actionable interference with contractual relations or otherwise known as the tort of procuring or inducing breach of contract"* to be the following:

> *"1. That the Defendants did know of the existence of the contracts and intended to procure their breach.*
>
> *2. That the Defendants did definitely and unequivocally persuade the employees concerned to break their contracts of employment with the intention of procuring the breach of the contracts.*
>
> *3. That the employees so persuaded, induced or procured did in fact break their contracts of employment*
>
> *4. That the breach of the contract forming the subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment."*

343. The tort was also described and considered by Lord Hoffman in *OBG Limited and Ano. v. Allan & Ors*. [2008] 1AC 1 as follows:

> *"To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so."*

344. Again, in OBG v. Allan, Lord Hoffman considered this question and stated as follows:

> *"One cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability."*

345. I have already found as a fact that no binding legal agreement came into existence between the plaintiff and the first named defendants arising from the events and communications referred to in March and April, 2014.

346. Whilst not clearly articulated as an alternative plea, insofar as the plaintiff alleges that the first and second defendants procured a breach of the Shareholders' Agreement as a contract between the plaintiff and the Duffy defendants, I also have found that no such breach occurred. For these reasons, the plaintiff has relied on the more elaborate conspiracy claim.

Misrepresentation

347. This allegation is made in paragraph 24 of the statement of claim. Analysing that paragraph and the statement of claim as a whole it is difficult to know whether the plaintiff was intending to characterise the representations pleaded by him as either fraudulent or negligent. Neither is pleaded. It is pleaded that *"the fourth, fifth and sixth named Defendants, their servants or agents represented expressly or alternatively impliedly, that in the event the plaintiff bidding for his loans and/or for the purpose of raising finance, the fourth named defendant would allow the sale relating to the plaintiff's loan to include the sale of the loans of the fourth named defendant and that they would not 'deal in' the fourth named defendant's loans by way of sale assignment or redemption of howsoever pending the purchase by the plaintiff thereof. The said representations were made knowing that the Plaintiff would rely upon same and would be influenced thereby to enter into negotiations and/or agreements with IBRC to purchase the said loans. In the premises, the fourth, fifth and sixth defendants were under a duty to ensure that the said representations were true and accurate and that they would not be released from such representations in the event that they were wrong. Acting on the face of the said representations and induced thereby the plaintiff entered into the negotiations with IBRC (In Special Liquidation) and the Loan Sale Deed."*

348. There are two elements to the representation alleged in this paragraph. Firstly, that Dr. Duffy would allow the sale relating to the plaintiff's loans to include the sale of the loans of Dr. Duffy. Secondly that the Duffy defendants would not "*deal in*" Dr. Duffy's loans "*by*

way of sale assignment or redemption of howsoever pending the purchase by the plaintiff thereof." [emphasis added]

349. As regards the first of these ingredients, there is no doubt that in the Duffy – Scally email of 19 March, 2019, Dr. Duffy confirmed that he had no objection to the plaintiff acquiring "*the residual of"* the loan. The term "*residual of*" meant that this confirmation can only have applied to such balance of this loan as remained outstanding at the time of the sale. If the sale had become effective and binding on the morning of 4 April, 2014, before the repayment of the loan, there may have been some force for a further argument between the plaintiff and the Special Liquidators. However, the Loan Sale Deed did not become effective until the deposit was paid on Monday, 7 April, 2014, by which time there was no "*residual of"* Dr. Duffy's loan outstanding.

350. Clause 2.2 is the operative provision of the Loan Sale Deed and it provides:

> *"… the Vendor hereby agrees to sell, assign, transfer, convey and deliver the Assets to the Purchaser subject to the subsisting rights of redemption of the obligors …"* [emphasis added]

351. From this provision it was always clear to the purchaser that there would only transfer on closing such balances as had not been redeemed, although it has to be noted that this of itself would not avail Dr. Duffy if the plaintiff had established a binding obligation to refrain from redeeming.

352. The second ingredient is the alleged representation that the Duffy defendants would not "*deal in*" the loan, which expression is said to include "*redemption*". The submission is that the phrase that these loans "*will continue to be available to the new owner of the residual of GJDs Anglo loan*" carried with it a representation that the loan would remain extant. However, it is appropriate to examine the text of the first paragraph of the Duffy – Scally email which is a confirmation that the relevant security, now being shares registered in the name of Tullycorbett and Rosaleen Duffy, would continue to be available to such a new owner of the loan. If Dr. Duffy had been silent as regards his intention to repay the loan, there may have been some force in an argument that the contents of this email carried with it an implication that he would not redeem or repay the loan. However, in a series of communications on the subject Dr. Duffy had repeatedly made it clear that his desire and intention was to discharge his lawful obligation to repay his loan and the plaintiff does not deny this. This context is important in understanding the significance in the email of the words "… *the residual of* …" Dr. Duffy's loan, which can only have meant any such balance of the loan as remained outstanding.

353. Although Dr. Duffy did not write the email in the precise terms requested by Mr. O'Neill, the email had been drafted by Mr. O'Neill, or at least submitted by him. Therefore, if it had been Mr. O'Neill's desire to secure from Dr. Duffy definitive confirmation that he would not redeem the loan, it was open to him to have included such express language.

354. It is pleaded that when the plaintiff entered into the negotiations with the Special Liquidators and entered into the Loan Sale Deed he did so *"acting on the face of the said representations and induced thereby"*. The Loan Sale Deed only became effective on 7 April, 2014, when the deposit was released to the Special Liquidators, and the evidence clearly shows that this occurred after the plaintiff and his advisors had become aware that Dr. Duffy's loan had been redeemed. It is clear from the judgment of Ryan J. in *Talos Capital Limited v Sheehan* (op. cit.) that a fatal omission on the part of the plaintiff was the failure to inform Talos that the Duffy loan had been redeemed.

355. A final observation in relation to this allegation is that it is said in para. 24 that the representation was made prior to the plaintiff bidding for his loans *"and up to after the execution by the plaintiff of the Loan Sale Deed on 4th April, 2014*". The plaintiff in his evidence refers to a conversation which he says he had with Dr. Duffy at approximately midday on 4th April, 2014. He telephoned Dr. Duffy to advise him that the transaction documents had been executed as far as he was concerned. He said that Dr. Duffy's *"response was platitudinous and he said nothing in respect of his own activities at and about that time"*. The inference from this piece of evidence is that Dr. Duffy led the plaintiff to believe that nothing else had occurred or was occurring in relation to his own loan. The plaintiff does not expand on this conversation and it is significant that he did not put any of the contents of that conversation to Dr. Duffy when examining him. I cannot regard the plaintiff's very general reference to that conversation as containing any of the particulars which would give rise to a claim of misrepresentation, either negligent or fraudulent.

356. As regards reliance on any representation, on 20 March, 2014, Mr. O'Neill had informed Dr. Duffy that the plaintiff was proceeding as if Dr. Duffy was "*out*".

The Constitution, The European Convention on Human Rights and the EU Charter of Fundamental Rights

357. In paragraph 28 of the Statement of Claim, the plaintiff claims "*further and/or in the alternative and without prejudice to the foregoing*" that the defendants have violated his rights under Articles 40.3.1, 40.3.2 and Article 43 of the Constiution, and under the European Convention on Human Rights and the EU Charter of Fundamental Rights.

358. Throughout the plaintiff's submissions, no mention or reference was made to these provisions and the plaintiff has not articulated any basis on which they could be applied to the facts of this case. Nor did the plaintiff pursue any of these matters at the hearing.

PART TEN: CONSPIRACY

359. The essence of the conspiracy claim is made in para. 30 of the statement of claim which reads as follows: -

> *"Further and/or in the alternative, and without prejudice to the foregoing, the said acts by the defendants and each of them in combination with other defendants had at its object and effect the wilful and/or intentional injury and/or damage of the plaintiff in his trade and business and resulted in damage to him. Further, and/or in the alternative, and without prejudice to the foregoing, the said acts by the*

defendants were carried out using unlawful means thereby constituting an actionable conspiracy".

360. By way of supplement to this, para. 31 pleads as follows: -

> *"Further, and/or in the alternative, and without prejudice to the foregoing, the said acts to the defendants and each of them constituted the use of unlawful conduct and/or amounted to an intentional interference with the plaintiff's economic interests".*

361. No further particulars of these claims were provided. O. 19, r. 5 which identifies certain categories of claims which must be particularised in pleadings. O. 19, r. 5 (2) provides as follows: -

> *"In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings".*

362. In *O'Flynn & Ors. v Carbon Finance Limited & Ors.* [2015] IECA 93, the court made it clear that O.19 r.5 (2) *"specifically refers to actions in which misrepresentation or fraud or breach of trust or wilful default is alleged. It does not specifically refer to allegations of conspiracy and/or other economic torts … such torts are clearly similar in nature to the types of allegations specifically mentioned in r. 5 (2)"*. Accordingly a failure to deliver meaningful particulars of a claim of conspiracy constitutes non-compliance with O. 19 r.5(2).

363. Having cited the "*said acts*", which is a reference to the entire narrative recited in the Statement of Claim, paragraphs 30 and 31 contain no meaningful attempt to identify which "*acts*" are evidence of conspiracy. Nor is this done in the written Submissions or in the plaintiff's presentation at the hearing.

364. The plaintiff did not address separately the two classic forms of conspiracy, namely unlawful objects conspiracy, or unlawful means conspiracy, although he makes numerous references to *"theft", "stolen securities", "concealment of unlawful act*", the failure of the Special Liquidators to "*call the police or gardaí", "securities irregularities", "unlawful share transfer*" and more.

365. The plaintiff not having identified the elements of his case which would fall either under lawful means conspiracy or unlawful means conspiracy, it is necessary to examine the elements of those distinct torts against the evidence advanced during the hearing.

366. In Iarnrod Eireann v. Holbrooke [2000] IEHC 47, O'Neill J. described the essential features of the tort of conspiracy as follows: -

> *"1. The agreement or combination of two or more people, the primary or predominant object of which was to injure another is actionable even though the act done to the*

party injured would be lawful if done by an individual. (lawful means/unlawful objects conspiracy)

2. *An agreement or combination of two or more persons to carry out a purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionable against the individual members of the combination, as individuals." (unlawful means conspiracy).*

367. This passage was adopted with approval by Charleton J. in Talbot v. Hermitage Golf Club [2014] IESC 57, where he added: -

> *"All agreements to do something unlawful either as the end object or the means are actionable conspiracies. A further specific observation needs to be made: while an agreement to do something unlawful, whether by object or means, is a tort, liability was also influenced by centuries old notions that people are entitled to combine for their own interests even with the object of undermining the business or interests of another person. Thus, where two or more persons determine to further their own interests to the detriment of another, but do not pursue unlawful action thereby, this combination is not actionable. Such just cause or excuse for all lawful actions of those in the agreement renders the combination lawful. The boundaries of that exception have been eroded as regards economic activity, however, by Articles 101 and 102 of the Treaty on the Functioning of the European Union and by the national legislation in the form of the Competition Acts – 2012".*

368. The classic description of tortious conspiracy is to be found in Halsbury's Laws of England, Volume 97, 2015 and is described in paras. 712 and 713.

"712. Tortious conspiracy in general

- A tortious conspiracy is an unlawful combination of two or more people, intended to cause and in fact causing injury to the claimant. The tort takes two forms: conspiracy to cause loss by the use of independently lawful means, and conspiracy to injure by lawful means. The latter constitutes an exception to the normal requirement in the economic torts of independently unlawful means, and for that reason liability is restricted by a requirement of a predominant purpose to injure which is not a requirement of conspiracy to use unlawful means.
- If a tort is committed by several persons acting in concert, and damage is caused, the prior agreement may add nothing to the tort, and has been said to merge in it, for the parties will be joint tortfeasors. Yet there may be good reasons in some cases for alleging a conspiracy and not (or not only) the underlying torts, for example if the torts are committed in several different jurisdictions. It is also necessary to consider conspiracy as a separate tort where the act would not have been tortious if done by one individual.

713. Essential ingredients of tortious conspiracy

- In order to make out a case of conspiracy the claimant must establish;

  (1) An agreement between two or more persons, which either:

  (a) where the means are lawful, is an agreement the real and predominant purpose of which is to injure the claimant. ('unlawful objects conspiracy') or

  (b) where the means are unlawful, is an agreement an intended consequence of which is to injure the claimant ('unlawful means conspiracy') and

  (2) that acts done in execution of that agreement result in damage to the claimant."

369. The features common to unlawful objects conspiracy and unlawful means conspiracy are at the minimum the following:

(1) Agreement or combination between two or more parties.

(2) Intention to injure the plaintiff.

(3) That the actions of the defendants have caused loss to the plaintiff.

370. The essential additional ingredient which must be proved to establish "unlawful objects conspiracy", where the means may not be unlawful, is that the intention to injure must be the predominant intention of the defendants. See *Crofter v. Veitch* [1942] AC 435, *Flynn v. Breccia* [2015] IEHC 547 and *McGowan v. Murphy*, Supreme Court, 10 April 1967, Walsh J.

371. The essential ingredients of an unlawful means conspiracy are as follows: -

(1) The means adopted must in fact be unlawful.

(2) The defendants must be aware that the means adopted was unlawful.

(3) There must be a common intention on the part of the defendants to injure the interests of the plaintiff, even if that intention was not the primary or predominant intention.

372. As regards intent, the plaintiff makes a very general plea at paragraph 31 of the statement of claim that the acts of the defendants *"constituted the use of unlawful conduct and/or amounted to an intentional interference with the plaintiff's economic interests*." In paragraph 32, he pleads:

> *"the plaintiff believes and/or has reason to believe that the defendants, their servants or agents are intent on pursuing their unlawful conduct aimed at acquiring the plaintiff's shares unless restrained by this Honourable Court."*
>
> I have already examined at length the numerous allegations of illegality and unlawful acts and found that they are not substantiated by evidence.

373. This being the case, I have to consider whether the combined effect of the acts of the defendants, leads inexorably to a conclusion that the defendants intended to injure the plaintiff's economic interests and if so, whether that was their predominant intention.

374. One can recognise how the plaintiff may have developed a perception that the defendants conspired to injure his interests when one summarises the following sequence of events:

(1) Dr. Duffy had from time to time engaged with the plaintiff to find a solution for the repayment of their respective loans, and regarding the potential purchase of their loans in Project Stone. This engagement included at one stage jointly retaining NCB Corporate Finance as advisors, who negotiated with KPMG on behalf of Breccia. This engagement continued up to 3 April, 2014, the eve of the date scheduled for signing the Loan Sale Deed and, as far as the plaintiff was concerned, was never "*broken off*".

(2) Dr. Duffy confirmed on 19 March, 2014, that he did not object to the plaintiff acquiring *"the residual of GJD's Anglo loan that is secured by shares owned by Rosaleen Duffy and Tullycorbett Limited", and said that the relevant security "will continue to be available to the new owner of the residue of GJD's Anglo loan that has now been sold by the Special Liquidator"*.

(3) Dr. Duffy had indicated a willingness to be part of the plaintiff's "*team*" and Mr. Lynch confirmed in an email of 20 March, 2014, that "*George is a man of his word and has aligned [from] John and Joe from an early stage*".

(4) On 21 March, 2014, Dr. Duffy had confirmed *"I am on the team*", as part of an email in which he repeated his request for a copy of the Talos Facility Agreement.

(5) At lunchtime on 3 April, 2014, the plaintiff and Dr. Duffy together with Mr. O'Neill and Mr. Lynch met and discussed the project, albeit that there is no evidence of an agreement concluded at that meeting. The plaintiff's own evidence was that at that meeting Dr. Duffy did not demur from further involvement in the transaction. He says that he "*was under the impression that Dr. Duffy had no problems as he had been kept fully abreast of the details of the Talos transaction."*

(6) Later that evening, Mr. Goodman made an offer to Dr. Duffy to provide the funding required to repay his IBRC loan. On any account of the matter, this offer did not come "*out of the blue"* and followed previous discussions.

(7) On the next morning, the plaintiff arranged for JCS to sign the Loan Sale Deed and himself signed the Loan Sale Deed as a Purchaser Guarantor.

(8) That afternoon, Dr. Duffy repaid his loan, utilising funds advanced by Breccia.

(9) When the plaintiff's funder Talos learned that Dr. Duffy's loan had been redeemed it declared JCS to be in default under the facility. Later the plaintiff was held personally liable to Talos for the deposit of €2.4m it advanced.

(10) In May 2014, Breccia acquired from NAMA the loans of Benray Limited, and the Benray Guarantee.

(11) By a Loan Sale Deed of 17 October, 2014, and a Deed of Transfer dated 10 December, 2014, Breccia purchased from the Special Liquidators the plaintiff's loan facilities together with associated security.

(12) On 18 December, 2014, Breccia made demand of the plaintiff for repayment of the amounts due under the plaintiff's loans.

375. At one level, it may be said that the conduct of the plaintiff is not a factor to be taken into account in judging the actions of the defendants against the tests for proving conspiracy. However, I cannot eliminate from my assessment of the factual matrix, the evidence I have seen and heard as to the evolution of the relationship between the plaintiff and the defendants, and in particular, how the plaintiff treated Dr. Duffy in March 2014. This evidence is summarised in Part Five of this judgment and reveals that the plaintiff himself was pursuing a scheme in which he would secure control of BHL by utilising a structure which excluded Dr. Duffy as a participant, and was not consistent with the "unified approach" espoused by the plaintiff or even the negotiations of a "joint venture" as pleaded in the statement of claim.

376. After the nationalisation of IBRC and later its liquidation, the shareholders in BHL, in common with many of the borrowers of IBRC, had concerns about what would happen to their loans having regard to the change of status of the bank. Dr. Duffy was no different and his objective, known to all concerned, was to repay or refinance his debt to the bank.

377. During this period there was a measure of collaboration and communication among the borrowers which included collaboration between the plaintiff and Dr. Duffy and Mr. Flynn. The joint retainer of NCB Corporate Finance was part of this collaboration. This dialogue among borrowers continued in the context of Project Stone. Critically, however, it did not then extend to including Dr. Duffy in formulating the plaintiff's bid in Project Stone, made through JCS as the purchaser or the terms on which to borrow from Talos.

378. Dr. Duffy was not:

(1) A shareholder in or director of JCS,

(2) Shown the Talos Facility Letter or informed of its terms and conditions,

(3) A party to the bid to the Special Liquidator,

(4) Informed of the price offered for the loans,

(5) Informed of the terms of the Loan Sale Deed.

379. Dr. Duffy was informed by Mr. O'Neill on behalf of the plaintiff that "*we*", being the plaintiff and his associates, had found a way forward without him.

380. Dr. Duffy did not make any binding commitment to refrain from redeeming his loan. On the contrary he repeatedly stated, and never withdrew his statement of intention to repay his loan. That repayment was in discharge of a lawful obligation.

381. When Mr. Goodman offered on the night of 3 April, 2014, to advance to Dr. Duffy the funds to repay his loan, Dr. Duffy knew that the plaintiff, through the structure of JCS, was the successful bidder in Project Stone but was uninformed of the terms on which the plaintiff had become the successful bidder, or of the terms of the Talos/JCS facility, this latter information having been the persistently refused over a period of many weeks. The plaintiff says that he was precluded by a non-disclosure agreement from showing the Talos facility to Dr. Duffy. That evidence was not contradicted and such a non-disclosure agreement would be common. However, this "*obstacle*" to sharing the document with Dr. Duffy only serves to evidence that the plaintiff had, at the latest by early March 2014, embarked on a project from which he had determined to exclude Dr. Duffy.

382. The plaintiff was under no legal obligation to include Dr. Duffy in the negotiations of the purchase of the loans or the negotiations of the Talos facility. However, having chosen to exclude Dr. Duffy from these matters, he cannot later rely on what he characterised as a "*unified approach*" or the negotiation of a "*joint venture"* to advance his claims based on those concepts.

383. Dr. Duffy was under no obligation to decline the Breccia loan and the acceptance of such an offer was consistent with his openly stated objective, in the protection of his own interests, of repaying his debt, an objective from which he had never withdrawn. By this time, Mr. O'Neill had informed Dr. Duffy that if he "*did not wish to send it* [the letter required by KPMG], *I have found a way forward without you."*

384. The deposit of €2.4 million was paid to the Special Liquidators without the plaintiff or JCS disclosing to its lender Talos that Dr. Duffy's loan had been repaid, a fact then known to the plaintiff. That failure constituted breach of the continuing obligation as to representations and an event to default under the Talos facility agreement *(Talos Capital Limited v. Sheehan and Flynn* [2015] IEHC 27).

385. The inability of JCS to comply with the conditions of the Talos facility was triggered by the redemption, lawfully, of Dr. Duffy's loan on 4 April, 2014. However, that inability and the loss which resulted derived from the plaintiff's act of causing JCS to enter into a facility, guaranteed by himself, without informing Dr. Duffy of the terms of the facility and, more importantly, without, as I have found, securing Dr. Duffy's agreement on matters which may have enabled JCS to comply with the Talos conditions. Such matters would have included an agreement not to repay the loan pending completion of the loan sale and such agreement as may have been necessary on the part of Rosaleen Duffy and Tullycorbett Limited regarding the shares Talos required as collateral. The plaintiff's case is that he believed, in reliance on particular emails examined earlier in this judgment, that he had secured such agreement. If he held such a belief, it was misplaced and I have found that those emails and related communications did not form the basis of such agreement.

386. Another remarkable feature of the plaintiff's case is his evidence that the refusal of his brother Dr. Jimmy Sheehan to permit him to charge his shares in the Galway clinic to raise the required funds precluded him from making a successful bid in Project Amber. This is to assume that he would otherwise have succeed in such a bid, a proposition for which no evidence was given. Nor does any of this evidence form a basis for alleging that Breccia acted unlawfully when bidding in Project Amber.

387. The plaintiff in his evidence claimed that Breccia acted with a view to preventing him from exercising his right of redemption so that it could enforce security over his shares and deny him the opportunity to continue to participate as a promoter and/or shareholder. This is stated as his belief and is grounded upon his characterisation of the sequence of events which I have summarised earlier. When the totality of the evidence is assessed, this belief is not supported by that evidence. Furthermore, if Breccia's intention was to increase its shareholding with a view to securing ultimately a controlling interest, that was not an unlawful commercial objective and I accept Mr. Sheeran's evidence that it was not Breccia's intention to injure the plaintiff's interests.

388. I accept the evidence of Dr. Duffy, whom the plaintiff called as his own witness, that his objective and intent was to repay his loan and not to cause injury or loss to the plaintiff. I also accept the evidence of Mr. Sheeran that Breccia was not aware of the contractual arrangements which JCS and the plaintiff had entered into with Talos and with the Special Liquidators, or of the substance of Dr. Duffy's engagement with the plaintiff.

389. The losses claimed by the plaintiff resulted from his actions in causing JCS to enter into agreements, notably the Talos facility, the conditions of which it became unable to fulfil by reason of his own actions and those of his associates. Therefore, the plaintiff has failed to prove that any of the defendants acted unlawfully or that they acted pursuant to an agreement the predominant intention of which was to injure the plaintiff's interests.

PART ELEVEN: COUNTERCLAIM

390. The second defendant, Breccia, counterclaims for the following

(1) an amount of €16,258,469 being the balance claimed to be due by the plaintiff pursuant to the Loan Facilities granted to him by Anglo Irish Bank in 2006 and 2008 and which the first defendant Breccia acquired pursuant to a Deed of Transfer dated 10 December, 2014.

(2) interest on this balance calculated in accordance with the Facility Agreements. For the purpose of this module only, Breccia is not pursuing penalty interest, its entitlement to which is the subject of an appeal to the Supreme Court in a different module. The claim for interest as of 27 November, 2019, was €1,249,273.

(3) the sum of €1,518,846.57, including interest to 26 July, 2019, being the balance due by Benray Limited pursuant to its facilities, which the plaintiff guaranteed under the Benray Guarantee.

391. On behalf of Breccia, Mr. Sheeran, put into evidence by way of proof the following:-

(1) The plaintiff's Loan Facilities dated 28 March, 2006 and 12 November, 2008,

(2) The Mortgage on Shares dated 28 March, 2006,

(3) The Benray Guarantee dated 28 March, 2006,

(4) The Loan Sale Deed dated 17 October, 2014,

(5) The Deed of Transfer dated 10 December, 2014, whereby Breccia acquired from the Special Liquidators, ownership of the plaintiff's loans and security,

(6) The Loan Sale Deed dated 2 March, 2014 between Breccia and National Asset Loan Management Ltd, and

(7) The Deed of Transfer dated 23 May, 2014 also between NALM and Breccia, whereby Breccia acquired the ownership of the Benray loan and security and of the Benray Guarantee, and

(8) The letter of demand of 8 August, 2014, by which Breccia demanded from Benray the immediate repayment of the sum of €8,744,852 being the sum then due and owing to Breccia on foot of the Benray Loan Facilities and that by letter dated 18 December, 2014, Breccia made demand of the plaintiff for the sum of €6,734,852 on foot of the Benray Guarantee.

(9) That by letter dated 18 December, 2014, Breccia notified the plaintiff of the acquisition of the Loan facilities and demanded the payment of the sum then due of €16,144,572 under the 2006 loan agreement and the 2008 loan agreement and the sum of €6,734,852 then due under the Benray Guarantee, making at that time a total of €22,879,424.

392. Mr. Sheeran put into evidence an up to date statement of account in respect of the plaintiff's loan account being a sum of €17,507,742.28 comprising the amount due as at 27 November, 2019 including interest calculated in accordance with the Facility but excluding penalty interest. The matter of the claim of Breccia for penalty interest pursuant to the facilities has been the subject of determination in the redemption module and is still under appeal. He also put into evidence a statement of account showing the balance due by Benray and by the plaintiff under the Benray Guarantee, as of 26 July, 2019 of a sum of €1,518,846.57.

393. In his Defence to the Counterclaim, the plaintiff alleges that he is a stranger to the terms of the Deeds of Transfer pursuant to which Breccia acquired his loan and the Benray Guarantee. Without prejudice to that allegation, the plaintiff denies that Breccia acquired the rights and obligations of Anglo Irish Bank under the loan facilities and the Benray Guarantee.

394. None of Mr. Sheeran's evidence at the hearing in relation to the facilities, the mortgage, the Benray Guarantee, the notices of assignment, the letters of demand, or the statement

of balances due at the hearing was challenged by the plaintiff. Nor was any submission to contradict this evidence made in the course of the hearing. I accept the evidence of Mr. Sheeran and I shall grant judgment on the counterclaim in the amounts claimed by Breccia namely the amount of €17,507,742.28, due pursuant to the plaintiff's loans, and the amount of €1,518,846.57 due by the plaintiff pursuant to the Benray Guarantee together with interest up to the date of judgment calculated in the manner evidenced by Mr. Sheeran.

PART TWELVE: CONCLUSION

395. The reliefs sought in the Plenary Summons issued on 22 December, 2014, were amended in the Third Amended Statement of Claim. By reference to the allegations in that statement of claim relevant to this Module, the plaintiff has failed to establish that in the matter of the repayment of Dr. Duffy's loan on 4 April, 2014, and the acquisition of the plaintiff's loans by Breccia, and their actions related to those events, the defendants or any of them have acted negligently, in breach of contract, or have been party to inducement to breach of contract, breach of duty, including statutory duty or fiduciary duty, conspiracy, intentional interference with the plaintiff's economic interests, misrepresentation, or misuse of confidential information.

396. I shall refuse the claims for the following declarations, namely:

(1) that the first named defendant its servants or agents or any person acting in concert with it is not entitled to acquire the plaintiff's loan facilities dated 28 March, 2006, 12 November, 2008, and/or the Guarantee and Indemnity dated 28 March, 2006, ("the Benray Guarantee") by reason of their unlawful and/or illegal conduct (para. 4 of the prayer for reliefs), by reason of its involvement in the bidding process (para. 5), by reason of breach of the plaintiff's constitutional rights and/or his rights under the European Convention on Human Rights and/or his rights under the Charter of Fundamental Rights of the European Union (para. 6),

(2) a declaration that any sale or transfer of the plaintiff's loan facilities was null, void, invalid and/or illegal (para. 7) and

(3) a declaration that the defendants have conspired to adversely and prejudicially affect the property interests of the plaintiff in divesting, selling and seeking to enforce against the shareholding of the plaintiff's [sic] (para. 22).

397. I shall also refuse the plaintiff's claims for damages and for accounts and inquiries.

398. I shall grant judgment on the counterclaim in the amounts referred to at paragraph 392.

399. These orders determine Module 3. The claims for relief in the remaining paragraphs of the Statement of Claim have been or remain to be determined in other modules.