APPROVED **[2023] IEHC 531**

THE HIGH COURT

Record No.: 2022/2516 P

BETWEEN:

IVAN CAWLEY

Plaintiff

-and-

MUNSTER INSURANCES AND FINANCIAL LIMITED, MUNSTER MONEY MATTERS LIMITED, MUNSTER INSURANCE GROUP LIMITED, GREEN REEE PROPERTY CO (DUBLIN) LIMITED and PADRAIC McNICHOLAS

Defendants

EX TEMPORE JUDGMENT of Mr Justice Rory Mulcahy delivered on 21 September 2023

INTRODUCTION

1. These proceedings concern a dispute between the Plaintiff and the Defendants and in particular the fifth Defendant regarding the extent of the shareholding to which the Plaintiff is entitled in the Defendant companies, known collectively as the Munstergroup, a group of insurance companies. By a contract of employment dated 15 November 2012 the Plaintiff was engaged by Munstergroup in the capacity of Commercial Insurance Section Head, with a proposal that he become a board director

subject to Central Bank approval. The contract provided that shares in the Munstergroup companies would be transferred to the Plaintiff: 2.5% on commencement of his employment and further tranches of 2.5% after two years and five years respectively, subject to meeting agreed targets and expectations. The contract was executed by the Plaintiff and the fifth Defendant on 15 November 2012, and he commenced work in 2013.

2. The affidavits filed between the parties detail the Plaintiff's history in the companies and the disputes which have arisen between the parties, including, on the Plaintiff's case, his purported exclusion from the management of the companies. This application and these proceedings, however, are confined to the Plaintiff's claim in relation to shares in the Munstergroup.

3. Notwithstanding the Plaintiff's contention that he met the agreed targets and expectations per his contract of employment, no shares have ever been transferred to the Plaintiff. In June 2022, the Plaintiff issued these proceedings seeking *inter alia* declarations that he was beneficially entitled to 7.5% of the shares in the first four Defendants, specific performance of the Defendants' agreement to transfer 7.5% of the shares in the Defendants to him, including damages in addition to or in lieu of equitable relief. In addition to the 7.5% shareholding claimed by the Plaintiff, he further claims that he is entitled to additional shares by reason of the first four Defendants' acquisition of shares formerly held by Michael Farrell and Paul Cody.

4. The Plaintiff delivered a statement of claim on 11 October 2022 and the Defendants delivered their defence and counterclaim on 25 July 2023. In their defence, the Defendants plead that the claim is statute barred other than the claim in relation to the initial 2.5% allocation of shares. At paragraph 5 of the defence, the Defendants plead that the Plaintiff's 2.5% shareholding is held in trust by the fifth Defendant as agreed between those parties.

5. As set out below the Defendants are in the process of selling the companies through a share transfer of the companies' entire shareholding. At paragraph 3 of the counterclaim, it is pleaded the Defendants proceeded to negotiate with the proposed

purchaser on the basis that the Plaintiff had an entitlement to 2.5% of the shares in the group.

6. In 2022, prior to the institution of these proceedings the Defendants agreed a proposed sale to another prospective purchaser. However, following the institution of the proceedings by the Plaintiff in June 2022 the agreement to sell fell apart. The Defendants counterclaim is a claim for the losses occasioned thereby.

7. On 9 June 2023 the Plaintiff's solicitor wrote to the Defendants' solicitor stating that it was understood that the Defendants were in the process of selling the business and undertaking of the Defendants. The letter queried how it was proposed to preserve and vindicate the Plaintiff's rights and entitlements in the context of the proposed sale and it was stated "plainly, your clients cannot sell what they do not own". The letter sought clear and concrete assurances that the Plaintiff's rights would not be imperilled.

8. The Defendants did not reply to this letter until a letter of 30 August 2023 ("**the 30 August letter**"), having delivered their defence in July 2023. The 30 August letter repeated the position stated in the defence that the fifth Defendant held the Plaintiff's 2.5% shareholding in trust for the Plaintiff stating, for the first time, that this was to accommodate the Plaintiff's tax arrangements. The 30 August letter denied the Plaintiff's entitlement to the additional 5% shareholding.

9. The letter then stated that the third- and fifth Defendants were considering entering into an agreement for the sale of the entire share capital in the first and second Defendants, which it was said, based on expert professional advice, was in the best interests of the Defendant entities and their shareholders. It was stated that "*should such a transaction complete, our client will ensure that your client will receive the appropriate share of the overall consideration arising on completion of the transaction, in respect of the 2.5% shareholding held in trust for him, subject to any terms and conditions to be imposed by purchaser*." The letter referred to the Defendants counterclaim regarding the collapse of the 2022 transaction but stated that notwithstanding the matters outlined in the counterclaim "*our clients will honour the commitment made above in relation to the shareholding of 2.5% should any sale proceed*".

10. By letter dated 1 September 2023 the Plaintiff sought undertakings that the Defendants would not sell the entire share capital of the corporate Defendants and would retain at least 7.5% of the issued share capital following any transaction with any prospective purchaser. By letter dated 4 September 2023 the Defendants' solicitor refused to give the undertakings, accusing the Plaintiff of attempting to oppress the majority shareholders and stated "*your client would do well to realise that he holds the beneficial interest in 2.5% of the shares in the group, no more*". The letter reiterated the position that the Plaintiff would receive a proportionate share of the sale proceeds referable to his 2.5% shareholding. The letter also referred to an amendment to the constitution of the companies to provide for a so-called "drag along" provision.

11. It might be helpful to briefly explain the reference to the "drag along" provision.

12. Section 457 of the Companies Act 2014 ("**the 2014 Act**") contains a mechanism for the compulsory acquisition of the minority shareholding in a company in certain circumstances. In brief, where an offer is made to purchase the entire shareholding in a company and that offer is accepted by a qualified majority of the existing shareholders i.e. not less than 80%, then subject to certain conditions being satisfied, the offeror shall become entitled to acquire any minority shareholding on the same terms as accepted by the majority. The 2014 Act therefore recognises that, in certain circumstances, the majority shareholding in a company can vote in such a way as to require a minority shareholder to sell his or her shares.

13. Similar provisions may be contained in a company's constitution, which are known as drag along provisions. Prior to the proposed sale at issue in these proceedings, the Defendant companies' constitutions were silent on this issue. However, as revealed in the Defendants' solicitor's correspondence, by special written resolution dated 1 September 2023, a special majority of members passed a resolution, pursuant to s. 193 of the 2014 Act, to introduce a so-called drag along clause pursuant to which any minority shareholding could be acquired if a majority of shareholders voted in favour of an offer to acquire the entire shareholding in the company. The precise terms of that provision are not in evidence. The Defendants accept that a drag along provision can only be relied on where it is exercised *bona fide* and in the best interests of the company.

14. The Defendants explain in their affidavits filed in these proceedings that the Plaintiff was not invited to participate in any of the companies' meetings or to vote on the special resolution since he had not been entered on the register of members of the company. Indeed, they have repeatedly relied on his non-registration to assert that he has no rights as a shareholder. They say, however, that it was always intended to notify the Plaintiff of the proposed sale and "to issue all necessary documentation for the drag along."

15. The Plaintiff argues that but for the breach of the Defendants' obligation to transfer shares to him, he would have had an entitlement to participate and vote on the special resolution. He argues, therefore, that the Defendants should not be entitled to rely on the existence of the drag along clause as an answer to his application for an injunction. He indicates that he proposes amending the proceedings in order to challenge the lawfulness of the drag along clause.

16. On 5 September 2023, the Plaintiff sought, on an *ex parte* basis, an injunction restraining the Defendants from selling any of the shares in the company or in the alternative save to the extent that the Defendants retain at least 7.5% of the shares pending the determination of these proceedings. The High Court (Egan J) granted an interim injunction restraining the Defendants from selling the shares save to the extent that they retained 7.5% of the issued share capital. I briefly note that, for the purpose of this judgment and in light of the Orders sought, I make no distinction between the Defendants, albeit that I understand that the shareholdings in the Defendant companies are ultimately legally owned by the fifth Defendant and it is the fifth Defendant who, on the Plaintiff's case, is obliged to transfer shares to him.

17. Following the grant of the interim injunction the Defendants' solicitor wrote a number of letters to the Plaintiff's solicitor in which it was disclosed that the proposed sale provided for an immediate payment to the Plaintiff of the consideration for his 2.5% shareholding, subject to retention of his percentage portion of an escrow amount. In this regard, the letters also explained that an escrow account would be put in place in the amount of €10 million "*to meet any claim relating to the entire transaction*."

18. In this application, the Plaintiff seeks the same interlocutory relief as that granted on an interim basis by the Court on 5 September. The Defendants seeks to have the interim order vacated.

ARGUMENTS

19. The Plaintiff's claim for injunctive relief is based on the simple proposition, as expressed in his solicitor's correspondence, and by counsel in oral argument, that the Defendants are not entitled to sell that which they do not own. The Plaintiff says he is entitled to a little over 11% shareholding in the Defendant companies, he has property rights in those shares and is entitled to an injunction to protect those property rights.

20. The Plaintiff in argument distinguishes between the 2.5% shareholding to which he was entitled upon the commencement of his employment, the 5% shareholding to which he says he became entitled having met the agreed targets in his contract of employment, and the additional shareholding to which he argues he is entitled by reason of the Defendants' acquisition of shares as referred to above. In respect of the last of these, he says that he has an arguable case and in respect of the 5% shareholding claimed, that he has a strong arguable case. However, in respect of the 2.5% he says that he has an *unanswerable* case in light of the Defendants' admissions, and therefore an unanswerable claim for interlocutory relief.

21. In this regard the Plaintiff refers to 2 English authorities. **Hampstead & Suburban Properties Ltd v Diomedous [1969] 1 Ch. 248,** concerned the breach of a covenant in the lease in a licensed premises not to play music. When the tenant allowed the playing of music on the premises, the landlord sought an interlocutory injunction. The tenant argued inter alia that the balance of convenience favoured refusal of the injunction. At p. 257 of the judgment, Megarry J quoted from Lord Cairns LC in **Doherty v Allman (1878) 3 App. Cas. 709**:

> *"If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is*

the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves."

He went on, at p. 259:

"Thirdly, there is Doherty v Allman. I accept, of course, that Lord Cairns' words were uttered in a case where what was an issue a perpetual injunction and not an interlocutory injunction. Indeed, the word seemed to be obiter, for no negative covenant was present in that case. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and then the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligations falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairn's statement come into its own. Indeed, Lord Cairn's express reference to "the balance of convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is."

He went on (at p. 260):

"Finally, there's the balance of convenience. To say that the inconvenience to the Plaintiff is 'nil,' and that to them the case is 'essentially trivial,' seems to me as much exaggeration to say that the loss of the defendant will be 'incalculable.' I have already dealt with the injury to the plaintiffs, and I need

say no more about it. The defendant's claim is, in essence, that he will suffer an 'incalculable loss' if he is not permitted to continue his plain breach of the obligations which he so recently entered into and voluntarily undertook when he became an assignee of the lease. Stripped of the persuasions of Mr Weeks's advocacy, the proposition is: 'I making handsome profits by doing what I covenanted and undertook not to do: therefore it would be wrong for the court to stop me.' I can conceive of few propositions calculated to appeal less equity."

22. The second case, **Official Custodian for Charities v Mackey [1985] 1 Ch. 168**, **[1984] 3 All E.R. 689**, concerned an application to, in effect, enforce the terms of a Court of Appeal decision pending an application for leave to appeal to the House of Lords. In granting the injunction sought, the Court (Scott J) stated (at p. 187):

> *"In these circumstances, I was invited by Mr. Nugee to apply the principles of* American Cyanimid Co. v. Ethicon *[1975] AC 396. He submitted that I should consider the balance of convenience and that that balance came down strongly in favour of maintaining the status quo under which the first and second defendants are collecting the rents the property and managing it. I do not, however, think that this is a case to which the Cyanamid principles can be applied. Those principles are not, in my view, applicable to a case where there is no arguable defence of the plaintiff's claim.*
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> *In* Stocker v. Planet Building Society *(1879) 27 W.R. 877 in the Court of Appeal, James L.J. said, at p. 878:*
>
> > *'Balance of convenience has nothing to do with a case of this kind; it can only be considered where there is some question which must be decided at the hearing.'"*

23. The Plaintiff also refers to **Paramount Pictures Corporation and Ors v Cablelink Limited [1991] 1 IR 521**. In that case, Murphy J refused an injunction to restraining the Defendant from infringing the copyright in films vested in the Plaintiffs. However, he observed (at p. 528), in comments which must be regarded as *obiter*, that:

> *"The question whether the plaintiffs have established a stateable case does not and never did cause any problem. The difficulty in this regard was whether or*

not the Defendant showed a stateable defence because clearly an injunction will issue immediately and as a matter of right on an interlocutory application if the plaintiffs' right is not open to challenge. That is so stated and elementary a proposition but it is sometimes overlooked. Because of the fact that other matters are ordinarily considered at the interlocutory stage, including the balance of convenience and the adequacy of damages as a remedy, it does not mean that those considerations would be considered at all unless the defendant had a defence. There is no reason why the plaintiffs' rights or the remedies to vindicate their rights should be postponed if the defendant has no defence."

24. He also refers to **Boyle v An Post [1992] 2 IR 437**, although it seems to me that that case is authority for the proposition that where there was no arguable defence to the Plaintiff's claim, the threshold for the grant of a mandatory injunction was met. Notably, the Court (Lardner J) in that case *did* consider the question of the balance of convenience, notwithstanding the conclusion that the Plaintiff's claim was "undisputed".

25. The Plaintiff says that there is no arguable defence to his claim for the 2.5% shareholding to which he claims an entitlement in light of the admissions made by the Defendants, therefore there is no basis for the court to consider the balance of convenience in deciding whether to grant the injunction sought, at least insofar as the 2.5% shareholding is concerned. The Plaintiff says that in any event the balance of convenience favour the grant of an injunction and that damages are not an adequate remedy for the breach of his property rights.

26. The Defendants do not accept that there is any general principle that the adequacy of damages or the balance of convenience are not relevant considerations in this injunction application. Although it is accepted that the Plaintiff is entitled to a 2.5% shareholding in the companies, it is claimed that any loss suffered by the Plaintiff can be adequately met by damages and that the Defendants have put in place measures to protect the full potential value of the Plaintiff's claim in the event the proposed sale is completed. It is said that an escrow account of €10 million proposed as part of the sale agreement will be more than sufficient to meet any claim the Plaintiff may have. Having regard to the potential loss to the Defendants if the proposed sale is scuppered by reason of an

injunction, when compared to the immaterial loss to the Plaintiff in the event that he is not entitled to assert his rights as a shareholder, but receives the monetary value of his shares, the Defendants say the balance of convenience lies against the grant of an injunction.

27. The mere fact that property rights are at issue does not mean, argue the Defendants, that an injunction follows as a matter of course. The Defendants rely on **Gilead Sciences Inc v Teva BV [2017] IEHC 666** in which the court (McGovern J) refused an injunction to restrain a breach of a supplementary protection certificate (SPC), in effect, a patent, notwithstanding that it was accepted that that involved a breach of property rights. At paragraph 19 the court stated:

> *"The Plaintiffs argued that the SPC is a property right protected by the Constitution and that this creates a presumption that an interlocutory injunction should be granted. I do not accept argument. In* Glaxo Group Limited v. Rowex Limited *(Unreported, 19th May 2015), Barrett J analysed the judgment of Clarke J in* Metro International SA v. Independent News and Media plc *[2005] IEHC 309, and stated:-*
>
> > *"... even if there is no question of delay, an interlocutory injunction is not just there for the asking when the holder of an intellectual property right complains of alleged infringement." (p. 85, para. 120)*

He went on (at paragraph 22):

> *"It follows, therefore, that even if the SPC in this case involves a property right vesting in the plaintiffs it is not determinative of whether or not an injunction should be granted. It is no more than a factor to be taken into account in applying the principles to be found in* Campus Oil *and* Okunade*."*

28. In addition, the Defendants argue that the Plaintiff has delayed in seeking relief and, in particular, in seeking to have the 2.5% shareholding transferred into his name such as to entitle him to exercise his rights as a shareholder. They argue that this delay should disentitle him to relief.

29. The parties are, unsurprisingly, agreed that in general terms the principles applicable to for interlocutory injunctions are as set out in **Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited [2019] IESC 65, [2020] 2 IR 1** where the Supreme Court identified a series of steps which might be of assistance in deciding whether an injunction should be granted.

DISCUSSION

30. The Defendants contend that if the injunction is granted and they are prevented from selling 100% of the shares in the companies, the sale will not proceed and they say that there is no prospect of finding an alternative buyer. Although the Plaintiff disputes the quality of evidence to support this proposition, I have no difficulty accepting that if a second proposed sale in the space of 18 months collapses by reason of the dispute between the Plaintiff and the Defendants regarding the Plaintiff's shareholding, the likelihood of finding a third potential purchaser might be remote.

31. The Plaintiff argues, in effect, that if I grant an injunction in relation to his 2.5% shareholding, I may as well grant the injunction in relation to the entirety of his claimed shareholding since, on the Defendant's case, the proposed sale will be lost anyway. For the reasons discussed below, I am not satisfied that this is so and intend therefore to separately consider the merits of the injunction application by reference to the 2.5% shareholding to which his entitlement is not in dispute, then in relation to his disputed shareholding.

32. Before considering each though, I might briefly observe as follows. The Defendants assert that the Plaintiff's objective in seeking the injunction is to exert maximum commercial pressure on them. Without reaching any conclusion on whether this is so, since it is entirely permissible for the Plaintiff to choose to act in this way, the court is left with the strong suspicion that there is some substance to this objection. The assertion by the Plaintiff of his property rights in the context of this application does not appear likely, on its face, to serve any useful purpose other than to frustrate the Defendants with whom he has been engaged in a protracted and ongoing dispute, presumably in furtherance of his interests in that dispute. Were there no dispute between the parties, and if for instance the Plaintiff's entire claimed shareholding had been

transferred to him, it seems that the proposed purchaser would nonetheless be able to acquire the Plaintiff's shareholding either by operation of the 2014 Act, or by operation of a duly authorised drag along clause. Any rights that he purports to have are, therefore, subject to significant potential restrictions.

33. Be that as it may, the Plaintiff has acknowledged property rights, at least, in the 2.5% shareholding to which he is entitled and he is *prima facie* entitled to exercise those property rights as he sees fit. The court queried at the hearing of the application whether there was an inevitability about the outcome even if the Plaintiff had been properly registered and entitled to vote and attend meetings. Counsel for the Plaintiff argued that the court was not entitled to assume that if things were done "correctly" that the same outcome would inevitably follow. I think that must be correct, but the foregoing observations nonetheless have relevance in determining the scope of any equitable relief to which the Plaintiff may be entitled.

34. In respect of the Plaintiff's 2.5% shareholding, I am satisfied that the Plaintiff is entitled to that shareholding and to exercise the associated property rights. His contract of employment required the Defendants to transfer 2.5% of the shares of the companies to him. Although there was some conditionality about this obligation, including in relation to the transfer being done in a tax efficient manner, the Defendants did not argue that the obligation to transfer had not been triggered. This is unsurprising in circumstances where, on 17 October 2022, after receiving the Statement of Claim, the Defendants' solicitor wrote to the Plaintiff advising that the fifth Defendant was going to issue shares to the Plaintiff two days later and that it was a matter for the Plaintiff to take his own tax advice. For reasons which were not explained, that share issue never took place.

35. The Plaintiff is thus *prima facie* entitled to those shares, and the Defendants have not advanced in this application any arguable defence to his claim for those shares. There is an assertion by them that the Defendants held the 2.5% shareholding on trust for the Plaintiff, that this was agreed and for the benefit of the Plaintiff's tax arrangements, although this seems to be advanced as an explanation for not having transferred the shares *to date* rather than as an argument that the Plaintiff was not entitled to the shares *at all*. In any event, there are a number of problems with this assertion. Firstly, it is in direct contradiction of the position taken by the Defendants in the correspondence from

2018 up to the institution of these proceedings regarding the Plaintiff's entitlement. Secondly, the suggestion that that the monies are held on trust seems to have first been made in October 2022, following the institution of these proceedings, again in apparent contradiction of the position taken by the Defendants up to and including their solicitor's letter of 12 August 2022, in which any entitlement was denied but it was suggested that "as a gesture of goodwill" 2.5% would be held in trust for him. The reference to tax purposes emerged for the first time immediately prior to this injunction application. Thirdly, there is no written evidence of such an agreement or details of the terms of the purported trust. Fourthly, the Plaintiff denies any such agreement. And fifthly, and most importantly, even if any such agreement had existed, the Plaintiff had long since made clear that he wanted his shareholding transferred to him, not least by the issuing of these proceedings.

36. In circumstances where the Plaintiff is *prima facie* entitled to the transfer of the shares, he argues that he is entitled to an injunction as of right. He relies in this regard on the case law cited above. Those cases clearly support the view that, save in special circumstances, an injunction should be granted where there is no arguable defence. It seems to me that I should approach the matter on the basis of requiring something exceptional to tip the balance against the grant of an injunction. Therefore, the question is are there exceptional reasons for refusing equitable relief? The Defendants rely on delay, the fact that damages are an adequate remedy, and the extent of the potential adverse impact on them. They also question the adequacy of the Plaintiff's undertaking as to damages.

37. Has there been culpable delay by the Plaintiff? No doubt, the entitlement to have the shares transferred to him was in existence for a long time prior to the Plaintiff first asserting it. He commenced his employment in 2013 but does not seem to have demanded the transfer of shares to him until June 2018. And at that stage, his demand was for 7.5% of the shareholding not the 2.5% now accepted by the Defendants. He pursued this claim in correspondence for a lengthy period without issuing any proceedings to protect his rights. But in response to the 2022 proposed sale, he did issue the within proceedings, and, the Defendants say, the mere existence of the dispute with the Plaintiff was enough to cause that sale to collapse. Where he has issued and progressed proceedings seeking to assert his rights, the Plaintiff cannot be criticised, in

my view, for not having sought injunctive relief prior to confirmation that a further sale is proposed and prior to confirmation that it was proposed to include his shareholding in the sale. Although he seems to have been aware since June 2023 of the proposed sale and raised queries in relation thereto, no confirmation was provided by the Defendants until the end of August that a sale was proposed. Had the Defendants responded to correspondence in a timely manner and the Plaintiff still taken no action, the situation might be different. But the Defendants chose not to reply and cannot therefore be heard to complain of the Plaintiff's delay. The Plaintiff has not delayed such as to disentitle him to relief to which he would otherwise be entitled.

38. Is it an answer to say that damages are an adequate remedy? I am not convinced that there is an absolute rule that damages can never be an adequate remedy where an injunction is sought to restrain an admitted breach of property rights. There is authority, albeit in the context of an application for a permanent injunction, that there are circumstances where it is appropriate to award damages in lieu of an injunction. **McKeever v Hay [2008] IEHC 145** is a case which involved the laying of pipe across the Plaintiff's lands for the purpose of a group water scheme. The evidence in that case was that the lands in question were subject to a compulsory purchase process which would, in effect, render lawful that which was at that point unlawful. The Court (Feeney J) described the jurisdiction to withhold an injunction as arising in "*very exceptional circumstances"* (at para. 50) and stated (at para. 52):

> *"If a Court comes to the conclusion that the Plaintiffs' property will remain substantially as useful to the Plaintiff as before the act complained of, and does not take the property away from him and the injury can be compensated by money, then an injunction need not necessarily be granted. The Court may still grant an injunction if the facts are such as to indicate that the Court should exercise its discretion to do so. This is a case in which the injury to the Plaintiff's rights is small and it is one capable of being estimated in money and is one which can be adequately compensated by the payment of a relatively small amount of money. It is also the case that if the injunction sought was granted, that such injunction would be oppressive to the Defendants and would cause them real and substantial damage."*

39. The Court found that although the harm to the Plaintiff was small, in the circumstances where the trespass was deliberate and continuing, it was appropriate to grant the injunction. However, the injunction would only come into effect if the compulsory purchase process was not completed.

40. If damages may be an adequate remedy even where a permanent injunction is available, it seems to follow that the adequacy of damages may, in some circumstances, be a justification for refusing an interlocutory injunction. And there are some echoes of **McKeever** in this case in circumstances where the Defendants argue that it would be perfectly lawful to impose an obligation on the Plaintiff to sell his shareholding even had it been properly transferred to him. However, in my view, the situation here is, in substance, different from that at issue in **McKeever**. Here, the Defendants seek to compulsorily convert the Plaintiff's property right in his shares in to a right to compensation for those shares. Albeit that it may seem inevitable that the rights associated with those shares would not enable the Plaintiff to prevent a forced sale of those shares in due course, it is not for this Court, still less the Defendants, to say that he must accept a compulsory conversion of his property into "money's worth", thus permanently depriving him of his rights to exercise his property rights as he sees fit.

41. The Defendants do not argue that the Plaintiff's interest in the shares will be preserved in the event of the transfer to the proposed purchaser; indeed, it seems that the reverse is intended by them. Nor is it an answer to argue that there are drag along provisions in circumstances where the Plaintiff may have no entitlement to assert the rights of a minority shareholder where such provisions are engaged, e.g. to be informed of the terms of the proposed sale, to vote on it, or to argue that the sale is not in the best interests of the company, or that the drag along clause is not being exercised in good faith.

42. As to the assessment of the balance of convenience or the balance of justice more generally, insofar as that assessment may be material to the question of whether there are exceptional circumstances justifying the withholding of an injunction where a claim is admitted, I do agree that the potential loss of the sale may be a significant blow to the Defendants. However, just as I observed above that there must be some suspicion that the Plaintiff's approach here is designed to put maximum commercial pressure on

the Defendants, the course of action adopted by the Defendants, one suspects, has also been designed to obtain maximum benefit for the Defendants. There has been ample opportunity to address the Plaintiff's claim for a 2.5% shareholding, but the Defendants have failed to do so. As pointed out by the Plaintiff, the Defendants' position in relation to same has changed repeatedly, and it is only belatedly that the Defendants have acknowledged the Plaintiff's entitlement. Still they have failed to honour it. The Plaintiff long ago offered to mediate, but the Defendants refused to share the cost of the mediator and, incredibly, proposed their own solicitor as a mediator. The Plaintiff has repeated the offer to mediate but the Defendants have refused.

43. While I accept that the proposed sale may be lost if the purchaser cannot acquire 100% of the shareholding in the companies, there is no reason to suppose that the transfer of a 2.5% shareholding to the Plaintiff would cause this to happen; indeed, the Defendants' own evidence and argument contradict it. The Defendants assert, correctly I think, that either s. 457 of the 2014 Act or a drag along clause contained in the companies' constitution would, if properly engaged, entitle a purchaser to acquire all the shares in the companies even if a minority shareholder opposed the sale. It is difficult, therefore, to understand what the risk to the Defendants would be if they did that which they already accept they are obliged to do; transfer 2.5% of the shares to the Plaintiff. If they choose not to do so until the proceedings are determined, then they may bear the consequences of that decision. But if they simply do what they said they would do in October 2022, then the Plaintiff's entitlement to the 2.5% would not be a barrier to the sale completing.

44. As regards, the Defendants' claim that the Plaintiff's undertaking as to damages is inadequate, clearly this could never be an answer to a claim in respect of which the Defendants do not have a defence.

45. Finally, I have also had regard to the principles in **Merck, Sharp & Dohme**. Although the Defendants argue that a permanent injunction could not be obtained at a full hearing, and therefore an interlocutory injunction should be refused, it is frankly impossible to understand the basis on which that contention is made. Clearly, at the full hearing of the action, the Plaintiff could obtain an Order requiring the transfer of the 2.5% shareholding to him.

46. In all the circumstances, I do not think that there is anything exceptional warranting the refusal of some limited form of relief to the Plaintiff in relation to his 2.5% shareholding. As set out below, in order to achieve the least risk of injustice, I think a more limited form of relief to the interim relief granted may be appropriate.

47. In my view, different considerations arise in relation to the remaining shareholding claimed by the Plaintiff. His entitlement to any additional shareholding is disputed and, although the Plaintiff has made out a fair issue to be tried in relation to his entitlement to additional shares, it is no more than that at this stage. More importantly, any such entitlement has not crystallised and will not be determined pending the determination of these proceedings. Any property rights he may ultimately have in them is contingent on the proceedings.

48. Where there is no subsisting right to any additional shareholding and therefore no subsisting entitlement to participate in the affairs of the company on the basis of the additional claimed shareholding, I think that the balance of justice lies against granting an injunction to preserve the Plaintiff's purported entitlement to those shares. The Plaintiff will be compensated in damages in the event that it ultimately emerges that he was entitled to additional shares. There is every reason to believe that the Defendants will be in a position to meet any such award. An escrow account will be put in place with €10 million. There is no suggestion that that would not exceed the value of any putative claim by the Plaintiff. But even in the absence of such an escrow, the Defendants are selling the business of the Munstergroup for what, it seems clear, is a very significant sum. The Defendants will clearly therefore be a "mark" in the event of any subsequent successful award in favour of the Plaintiff. This is not to suggest that the Plaintiff is entitled to 'security' for his claim, but it seems clear that his position will be protected.

49. On the Defendants' case, they also have property rights in all the shares, bar 2.5% of the total and an injunction would restrain their entitlement to deal with them pending the determination of these proceedings. A balance must therefore be struck between competing asserted interests.

50. If a sale is lost by reason of the Defendants being restricted in dealing with shares to which they claim an entitlement, then the prejudice suffered by them would outweigh any potential loss occasioned to the Plaintiff. By contrast, an award of damages would, in my view, be an adequate remedy for the Plaintiff for the loss of his potential entitlement to participate in the affairs of the company on the basis of a greater shareholding than the 2.5% to which the Defendants acknowledge that he is entitled.

51. In the circumstances, I propose granting a limited form of injunction in relation to 2.5% of the shares in the Defendants. The goal in granting an interlocutory injunction is to do the least risk of injustice. The least risk is obtained by ensuring that all parties' rights are protected to the greatest extent possible. Although the Plaintiff is entitled to some form of injunctive relief, the Defendants should not be restrained any more than is necessary to protect the Plaintiff's interest. In circumstances where the Defendants may lose a potential sale of the companies if it becomes impossible for the purchaser to acquire 100% of the shares in the companies, I propose amending the interim Order so that the Defendants be at liberty to deal with the entire shareholding in the companies save that, in respect of 2.5% of the shares, they can only deal with them by transferring them to the Plaintiff. This should facilitate the Plaintiff in exercising his property rights and the Defendants, if they so wish, in exercising their rights as majority shareholders either in accordance with s. 457 or, in the alternative, a properly authorised drag along clause.

52. I will hear the parties as to the form of Order. The parties can address whether the Order needs to be made against all five Defendants.