

**THE HIGH COURT
(PROBATE)**

[2003 No. 500SP]

**IN THE MATTER OF THE ESTATE OF PHILIP MARKEY, BUSINESS MAN, LATE OF CURRAGH LAWN NURSING HOME, KINNEAGH,
CURRAGH, CO. KILDARE AND FORMERLY OF "THE STRAY INN", MILE MILL, KILCULLEN, CO. KILDARE, DECEASED
JOHN O'CONNOR**

APPLICANT

**AND
GERARD MARKEY AND MARY MARKEY**

DEFENDANTS

Judgment of Mr. Justice Herbert delivered on the 24th day of January, 2006

The Issues

1. Mr. Philip Markey, Publican, late of the "Stray Inn", Mile Mill, Kilcullen, Co. Kildare, died at Curragh Lawn Nursing Home on 28th February, 2002, aged 87 years. A Certificate of his Death, No. T1884/24 was admitted in evidence. He was predeceased by his spouse in 1987 and was survived by two only children, Gerard Markey and Mary Markey the defendants in these proceedings. By his last Will and Testament, made the 24th day of January, 2000, he appointed Gerard Markey and Mary Markey to be executors and trustees thereof. He devised and bequeathed his residential licensed premises with the outhouses and ground attaching thereto and known as the "Stray Inn", to Gerard Markey absolutely, but subject to his paying the sum of £150,000 (former currency), to the estate within one month of death, the same to be a charge on this property until paid. He devised and bequeathed a parcel of land, (agreed in evidence to comprise three acres, statute measure or thereabouts), near the "Stray Inn" to Mary Markey absolutely, together with a pecuniary legacy of £20,000 (former currency). After providing for a number of other pecuniary legacies, he gave, devised and bequeathed all the rest, residue and remainder of his property of every nature and kind, both real and personal, of which he might die possessed, to Mary Markey absolutely.

2. In the events which occurred, Letters of Administration with the Will Annexed, were granted, by Order of the High Court, made the 10th day of March, 2003, pursuant to the provisions of s. 27(4) of the Succession Act, 1965, to John O'Connor, Solicitor, of no. 168 Pembroke Road, Ballsbridge, Dublin, the Applicant in these proceedings. At Part 3 of the Inland Revenue Affidavit sworn by John O'Connor on the 25th day of June, 2003, the following sums, inter alia, were stated to be debts owing by the deceased to persons resident in the State, namely, -

Curragh Lawn Nursing Home	€41,044.28.
Beechfield Healthcare Limited	€2,446.98
Bernard Berney, Pharmacist	€1,132.99
A.C.C. Bank, (joint account with Gerard Markey)	€14,336.93

3. By Order of the High Court, made on the 2nd day of February, 2004, Issues were directed to be tried on oral evidence between the defendants. These Issues were agreed and defined by a Notice of Issues filed by the defendants on the 9th day of March, 2004, as follows:-

"(i) Whether the outstanding account of Curragh Lawn Nursing Home in the sum of forty one thousand, one hundred and seven euro and seventy one cents (€41,107.71) at the date of death of the deceased is payable by the Estate of the deceased or by the first named Defendant personally.

(ii) Whether the outstanding account of Beechfield Healthcare Limited in the sum of two thousand, four hundred and forty six euro and ninety eight cents (€2,446.98) at the date of death of the deceased is payable by the Estate of the deceased or by the first named Defendant personally.

(iii) Whether the outstanding account of Bernard Berney, Pharmacy, in the sum of one thousand, one hundred and thirty two euro and ninety nine cents (€1,132.99) at the date of death of the deceased is payable by the Estate of the deceased or by the first named Defendant personally.

(iv) Whether the outstanding account of A.C.C. Bank Plc., in the sum of fourteen thousand, nine hundred and sixteen euro and sixteen cents (€14,916.16) at the date of death of the deceased is payable by the Estate of the deceased or by the first named Defendant personally.

(v) Whether interest is payable on the sum of one hundred and ninety thousand, four hundred and sixty euro and seventy one cents (€190,460.71) payable by the first named defendant from 28th March, 2002, and if so at what rate?

(vi) Whether the costs and expenses to include reserved costs and expenses of all the proceedings to date in the deceased's Estate i.e. those under Record Nos. 2003/ and 2003/500SP, in full or in part should be borne by:-

(a) The first named Defendant personally; or

(b) The second named Defendant personally, or

(c) The Estate of the deceased.

The Facts

4. I find that the following facts were admitted, or were proved in evidence.

5. In November, 1993, Gerard Markey returned to work with his father in the "Stray Inn" on a part time basis. His father was then aged about 78 years and was suffering from hernia problems which ultimately resulted in his being admitted to hospital. His wife had died in 1987, since which time he had ceased to live over the business and resided instead with his daughter, Mary, the second named defendant, and her husband, at their home about 100 metres distant from the premises. Though he had also worked for considerable periods in the Motor Industry, Gerard Markey had extensive knowledge and experience of the licensed trade. No fixed wage was agreed and what he was paid by his father varied according to the number of hours he worked. On average his weekly

wage worked out at approximately £180.00 (former currency). Gerard Markey was at this time separated from his wife who lived with their son in a property which had been transferred by his father to Gerard Markey in about 1982. Gerard Markey resided in rented accommodation in the neighbourhood of the "Stray Inn" paying a rent of about £40 (former currency) per week. He was in receipt of a Social Welfare Rent Allowance of in or about this amount. The late Philip Markey was the sole legal and beneficial owner of the licensed premises which he operated as a sole trader with part time assistance from the husband of his daughter, Mary, a saddler by occupation, from about 1986 onwards.

6. In October, 1995, the late Philip Markey became seriously ill and underwent major surgery for cancer of the colon. Post surgery Gerard Markey and Mary Markey were advised by Dr. M. Kelly and by Miriam McDonnell, a co-owner of Curragh Lawn Nursing Home with Liam McDonnell, that their father's life expectancy was not more than about three months. Philip Markey required intensive and constant medical care so his urgent admission to Curragh Lawn Nursing Home was arranged on 30th November, 1995. Gerard Markey admitted that he had been informed by Miriam McDonnell, that the nursing home charge was £1,060 (former currency), payable each calendar month in advance, until further notice. Gerard Markey gave evidence, which I accept, and which was not challenged, that before his father left for hospital, he had asked him to, "take care of the place". I find that the sole income of Philip Markey was the profit derived from the operation of the "Stray Inn". Gerard Markey gave evidence, that he told Miriam McDonnell that his father had asked him to take over the running of the business and that he would arrange to pay the nursing home fees out of that. This was not confirmed by Miriam McDonnell, who did not give evidence, or by her brother and co-owner, Liam McDonnell, who did give evidence.

7. In 1997, as a result of a Health Board recommendation, the McDonnell's arranged for contracts in writing to be executed by all residents in the nursing home or by their legal representatives. On 24th November, 1997, Gerard Markey executed such a written agreement. This agreement was proved by Liam McDonnell and was admitted into evidence without challenge. I find the terms of this agreement, relevant to the instant case to be as follows:-

"Residents are accepted on the following terms and conditions, and subsequent to admission this Agreement is required to be signed by the resident or the resident's Legal Representative or such person being empowered to sign on behalf of the resident."

"The resident shall from his/her own resources or personal allowance be responsible for the payment of medical requisites not covered by the Medical Card."

"I confirm that I have read and understood the terms set out in the agreement and agree to them."

"Name of Resident. Mr. Philip Markey.

Room No. 10

From September, 1997.

Signed: Gerard Markey (Son) 24/11/97."

8. The fee specified in this agreement was £1,060 (former currency), until further notice, payable, "calendar monthly in advance". Liam McDonnell told the Court, and this was not questioned, that this fee changed to £1,675 (former currency) in January, 2001 and remained at that rate up to the death of Philip Markey on 28th February, 2002.

9. Mr. Liam McDonnell told the Court, that he and Miriam McDonnell knew that Philip Markey was the owner of the "Stray Inn". He said that they had to have someone who was responsible for a resident's account and that Gerard Markey accepted responsibility for his father's account. Neither he nor Miriam McDonnell had made any enquiry as to the source of the funds from which the account might be paid by Gerard Markey and were not concerned about it. This evidence was not questioned by either Gerard Markey or Mary Markey.

10. Liam McDonnell told the Court that any payments made of nursing home fees in respect of Philip Markey were made on "Stray Inn cheques" signed by Gerard Markey. This was accepted by Gerard Markey. Mr. McDonnell gave the following history of payments to Curragh Lawn Nursing Home which was accepted by Gerard Markey.

30/11/1995 to 31/11/1997	All fees paid.
January, 1998 to December, 1998	Two payments missed (£2,120).
January, 1999 to December, 1999	Four payments missed (£4,240).
January, 2000 to December, 2000	Four payments missed (£4,240).
January, 2001 to December, 2001	Only one payment made at the old rate (£19,040).
January, 2002 to February, 2002	No payment made (£3,350).

11. Philip Markey was fortunate to obtain a significant remission of his serious illness but continued to require a level of nursing care which necessitated his remaining on as a resident at Curragh Lawn Nursing Home.

12. In or about March or April of 1996 his father agreed with Gerard's proposal that he, Gerard, should take up residence in some of the former family rooms over the business, and Gerard moved into occupation of the these rooms in May, 1996. In that year the Revenue Commissioners refused to furnish the Tax Clearance Certificate necessary to obtain the annual renewal of the Intoxicating Liquor Licence. The Revenue Authorities advised Gerard Markey that no Tax Returns had been filed for the period 1989 to 1995 inclusive. Gerard Markey informed his father of this problem, which was an extremely serious one. His father instructed a firm of Solicitors, (whom I shall refer to hereafter as the, "Meath Solicitors"), to recover all Financial Papers from his existing Accountants. These Accountants asserted a lien over these papers for work claimed to have been done on behalf of Philip Markey in the previous two years for which they alleged they had not been paid.

13. For reasons which it is not relevant to consider in this case, Gerard Markey persuaded his father to go back to a Firm of Solicitors who had acted for him on previous occasions. His father agreed and in September, 1996, Gerard Markey made contact with Mr. Michael O'Neill, Solicitor who agreed to accept instructions. Gerard Markey decided himself to consult Mr. Billy Mulhern, principal of J.W. Mulhern and Company, Chartered Accountants and Registered Auditors of Naas, Co. Kildare, about these tax problems and the financial position generally.

14. Mr. Mulhern told the Court that as a result of an urgent approach from Gerard Markey, in October, 1996, he prepared accounts for the "Stray Inn" from the year ending 31st March, 1992, to the ten months ending 28th February, 2002, inclusive. These accounts were accepted by the Revenue Authorities without query.

15. Mr. Michael O'Neill gave evidence that he discovered that Philip Markey was a resident in Curragh Lawn Nursing Home and that his son Gerard Markey was dealing with affairs for him. Mr. O'Neill said that he was authorised on 23rd September, 1996, to deal with the Revenue Authorities and with the issue of fees alleged to be due to the former Accountants and fees due to the "Meath Solicitors". A sum of £11,000 (former currency) was found due by Philip Markey to the Revenue Authorities in respect of Income Tax.

16. The evidence of Gerard Markey and Mr. Michael O'Neill showed that a borrowing of £20,000 to £25,000 (former currency) was necessary to deal with these three claims. The branch of the Bank of Ireland, with which Philip Markey had dealt, declined to advance this money. With the assistance of Mr. Billy Mulhern, Gerard Markey obtained a loan of £20,000 (former currency), from the Naas Branch of A.C.C. Bank, to discharge the amounts ultimately agreed to be owing and which Mr. O'Neill confirmed to the bank by a letter dated 5th March, 1997. I am satisfied from the evidence that Gerard Markey had no capital of his own and while Philip Markey had fixed assets in the form of the licensed premises and the three acres of land, he had no free capital either. A.C.C. Bank required a mortgage over the licensed premises and the lands to secure this loan and insisted that Gerard Markey, though he had no legal or beneficial interest in either property, should join in the Deed of Mortgage as he was the person actually then running the business. Mr. Michael O'Neill corresponded with the Bank and handled all legal aspects of the transaction. Mr. O'Neill arranged for Gerard Markey to execute the mortgage and it was taken to Curragh Lawn Nursing Home where it was executed by Philip Markey. This mortgage is dated 27th March, 1997. In September, 1998, Philip Markey and Gerard Markey, at the behest of the Bank further executed a declaration that the properties were not a Family Home. The amount of the loan was credited to a business account opened in the Bank. Gerard Markey told the Court that repayments were never permitted to fall into arrears and that the entire loan was fully repaid by April, 2005.

17. I find that in respect of this transaction as well as all other matters relevant to these proceedings, Mr. Michael O'Neill, Solicitor, was acting solely as Solicitor for Philip Markey and not for Gerard Markey or, for Philip Markey and Gerard Markey jointly. I am unable to accept the contention of Gerard Markey that Mr. O'Neill was retained by him as his solicitor and I accept the evidence of Mr. O'Neill that his client was at all times Philip Markey and that Gerard Markey had contacted and instructed him in the course of looking after his father's affairs. I accept the evidence of Mr. O'Neill that the only time he had acted as solicitor for Gerard Markey was in relation to a Road Traffic Claim in the period 1997 to 1999. I find on the evidence, that Anthony Barry and Company Solicitors, of Athlone, Co. Westmeath and, Quinn and Company, Solicitors of Tallaght, Dublin 24, were at all material times the Solicitors acting on behalf of Gerard Markey.

18. Gerard Markey commenced running the business on his own in November, 1995, at an agreed salary of £500 (former currency) per month. In 1997 or 1998 his father agreed to Gerard Markey and his new partner taking up residence in the entire living area over the business. At Christmas 1998, after a son had been born to Gerard Markey and his new partner, Philip Markey agreed to increase the salary of Gerard Markey to £700 (former currency) per month. There was no dispute with regard to these figures during the course of the hearing.

19. Commencing at Christmas 1995 and continuing thereafter for a number of years, Gerard Markey employed Mary O'Sullivan as a part-time assistant in the business, mostly at weekends. He employed Brendan O'Neill, a college student in one particular year during the summer vacation. He employed Sharon O'Brien, on another occasion as a part-time assistant for five or six months. Gerard Markey stated that in May or June, 1999, he was experiencing problems because of pain in his back and attended Dr. M. Kelly, who prescribed "Brufen" for the problem. This is a non steroidal anti-inflammatory drug used commonly in the treatment and management of Musculo-Skeletal pain and inflammation.

20. Gerard Markey gave evidence that he told his father that he needed a full-time helper in the business and his father had agreed. There was no express evidence of this agreement. Gerard Markey stated that he had advertised for a suitable person in a local newspaper and in May or June, 1999, had employed Noel Gunning who continued to work as a full-time barman in the business until March or April, 2005. Mary Markey corroborated the evidence of her brother that their father was brought by him to visit the "Stray Inn" on a number of occasions up to early 2001. I consider that it is a reasonable inference to draw that Philip Markey was aware of the employment of Noel Gunning as a full-time barman at the "Stray Inn", and there is no evidence that he complained about his being so employed to Mary Markey or to Mr. Michael O'Neill. At the end of 1999, Gerard Markey decided to also employ his new partner, at an initial wage of £150 (former currency) per week, to assist in cleaning and cooking and to provide general assistance in the business, particularly on Saturdays and Sundays.

21. Gerard Markey assured the Court that the non-payment of two months fees due to the Nursing Home in 1998, was accidental. No reminder was sent by the Nursing Home which only provided an Invoice on an annual basis. Liam McDonnell did not take issue with this and told the Court that he and his sister did not really become concerned until early 2001, when the arrears had mounted to more than £10,600, (former currency). Mary Markey stated in evidence that Miriam McDonnell had mentioned arrears to her in 1999. However, this does not accord with the evidence of Liam McDonnell or of Mr. Michael O'Neill who recalled that in May, 2001, Mary Markey told him that ten monthly payments to the Nursing Home had not been paid and that the owners were asking for payment. Mr. O'Neill presided over a meeting at his office on 24th May, 2001, at which Mary Markey and Gerard Markey were present, to discuss these arrears. This meeting was followed by two other meetings with them at his office on 10th July, 2001 and 11th September, 2001, at which latter meeting Mr. Billy Mulhern was also present in the interest of Gerard Markey. In the circumstances I find that there was either no mention of arrears by Miriam McDonnell to Mary Markey in 1999 or, if there was, it was of such a casual nature that Mary Markey did not feel it necessary to take any action. I find that the late Philip Markey was never at any time aware that any of the monthly payments remained unpaid and, that not even a suggestion of any difficulty regarding the payment of the Nursing Home fees was made to him by the McDonnells, Gerard Markey, Mary Markey or Mr. Michael O'Neill.

22. In September, 1999, Gerard Markey offered to purchase the "Stray Inn", without the three acres of land, from his father for a sum of £150,000, (former currency). He gave evidence that he told his father that he was experiencing financial pressure in the business and that from a conversation with another resident in Curragh Lawn Nursing Home he felt that if his father were to sell the business to him, his father might be treated for Social Welfare purposes, as a person of no means and, become entitled to a Government subvention in respect of the Nursing Home fees and to the old age pension as well. Mr. Michael O'Neill proved in evidence a letter dated 9th November, 1999, which he had received from Quinn and Company Solicitors, Tallaght, acting on behalf of Gerard Markey.

23. In this letter they state that they understood that certain matters had been discussed between Gerard Markey and Philip Markey with regard to the transfer of the "Stray Inn" to Gerard Markey at a consideration of £150, 000, (former currency). They advised Mr. O'Neill that Gerard Markey had obtained full loan approval for that sum and asked that Mr. O'Neill take instructions from Philip Markey.

24. Mr. Michael O'Neill went to see Philip Markey at Curragh Lawn Nursing Home on 6th December, 1999. He proved in evidence a note which he had made during this meeting. This note records, *inter alia*, the following:-

"2. 85 years of age.

3. Under value – could be 300/400/500 – Milltown Inn, Lawlors Naas, Mannor Inn – £170,000 previously offered – man with plenty of money.

4. £1,000 per month to Nursing Home.

6. Auctioneer's Valuation (McEvoy)."

25. Mr. Michael O'Neill again visited Philip Markey at Curragh Lawn Nursing Home on 16th December, 1999. Mary Markey was there when he arrived and handed him a note of things which she said her father wished to discuss with him and then she left. This note was proved in evidence by Mr. O'Neill and reads as follows:-

"Ph. 897805.

£150,000 – Joint A/C???

VAT. Bill paid.

Nursing Home paid.

Solicitor's Fees or any fee in relation to same.

New Will (1) put Ross in (2) pay Alice Field".

26. The "Ross" referred to in this note is the son of Gerard Markey by his new partner.

27. Mr. Michael O'Neill gave evidence that immediately on his return to his office he had made a three page memorandum of what had taken place at this meeting. This memorandum was proved in evidence by Mr. O'Neill and no objection was taken to its introduction into evidence. It notes, *inter alia* the following:-

"The writer enquired from Mr. Markey as to whether or not he wished to deal with the licensed premises and his other property in alternative ways, such as by creating a life interest in the licensed premises in his own favour with the remainder to Ger and to which Mr. Markey replied that he did not. The writer then enquired as to whether or not he wished to transfer the licensed premises to both Ger and Mary in equal terms, and to which Mr. Markey replied that Mary had no interest in the business. The writer also enquired as to the sale of the property and a division of the sale proceeds, and to which Mr. Markey replied that he did not wish to take this course but interestingly remarked that when there were proposed sales of the property in the past, Ger "ran everyone" and which the writer took to mean that Ger put prospective purchasers off purchasing. In conclusion it was agreed that we would continue with the valuation of the premises through McEvoy's and also obtain the relevant accounts through Ger's new Solicitors and then the writer would then come back to Mr. Markey to finalise matters. Mr. Markey instructed the writer that his son Gerard was to continue to be responsible for payment of the expenses due to Curragh Lawn Nursing Home while Mr. Markey remained a patient and was also to be responsible for the discharge of all Tax payments in relation to the licensed premises and other liabilities in respect of the pub. He is also to be responsible for all legal costs in relation to the proposed transfer of the licensed premises to him.

Mr. Markey also indicated his desire to make a new will. He pointed out that there was also land, and which the writer incorrectly assumed adjoined the licensed premises, but, in fact, is nearer to Mary's home property. He indicated that this land was to be given to Mary. He further directed that the following legacies were to be made namely:-"

28. On the 24th January, 2000, Mr. O'Neill again visited Philip Markey at Curragh Lawn Nursing Home. He advised him that Mr. Colm McEvoy, M.I.A.V.I., had valued the "Stray Inn", exclusive of the land, at £400,000 (former currency). Mr. O'Neill showed Philip Markey the accounts prepared by Mr. Billy Mulhern for the year ending 30th April, 1999, which showed a turnover of £136,353 (former currency) and told Mr. Philip Markey that Mr. Mulhern had advised him that the turnover for the year ended 30th April, 2000, was £192,000 (former currency) inclusive of VAT., or approximately £150,000 (former currency) exclusive of VAT. Gerard Markey gave evidence that just prior to Christmas 1999, his father told him that he was not going ahead with the sale of the "Stray Inn" to him. When he asked his father why was this, his father told him that he had given different instructions to Mr. Michael O'Neill who is taking care of things.

29. Having considered the above valuation and accounts which were produced in evidence, the late Philip Markey advised Mr. O'Neill that he did not wish to increase the sum of £150,000 (former currency) which the new will provided should be paid by Gerard Markey and Philip Markey executed this will in accordance with law. He told Mr. O'Neill that Gerard Markey was running the pub well and had improved it and was most entitled to it and he repeated that in any event Mary had no interest in it. Mr. Michael O'Neill told the Court, and I accept his evidence as true and accurate, that at this time he did not know that the Nursing Home payments were in arrears and that he did not learn of this until May, 2001. At a later date in or about January or February, 2000, Mr. O'Neill said that he had mentioned to Mary Markey and Gerard Markey that Philip Markey had made a will and, without revealing any of its contents, told them that, "they could be comfortable with it". The court accepts Mr. O'Neill's explanation of why he said this to Mary Markey and Gerard Markey.

30. Gerard Markey accepted that in May, 2001, Mary Markey had contacted him to discuss the arrears of fees due to the Nursing Home and he agreed that he had attended three meetings with her at the offices of Mr. Michael O'Neill in May, July and September, 2001. Mr. Michael O'Neill proved in evidence a note which he had made during the meeting of 24th May, 2001. It reads as follows:-

"£160,075 (X) 2 = 20,100 per annum.

£45,000 to break even before payment to Nursing Home.

£35,000 figures dropped to such.

Foot and Mouth: competition - "Weighroom", "Hideout", O'Connells.

Rory Fahy – A.C.C. Naas.

Full discussions.

Engaged one and a quarter hours.

24/5/01."

31. Gerard Markey denied his sister's evidence that he had refused her offer to care for their father if Gerard Markey paid her £500, (former currency) per month, on the basis that he would not be entitled to claim Tax relief on these payments. He told the court that he had refused because their father was then bed bound and needed a colostomy bag and he felt that his sister would not be able to cope. On the balance of probabilities I find this recollection implausible and I prefer the recollection of Mary Markey. Gerard Markey accepted that she had stated that if he got rid of the full-time barman there would be sufficient income from the business to pay the Nursing Home monthly charges as they arose. He had rejected adopting this course, she said, because he contended that he felt unable any longer to do all the hours. This meeting appears to have ended, as recollected by Gerard Markey, with his agreeing to take steps to make the business pay. Unfortunately, the arrears were not paid and further arrears continued to mount. A second meeting was held, - again at the behest of Mary Markey, - on the 10th July, 2001, at the office of Mr. Michael O'Neill. Mr. Michael O'Neill gave evidence that he was now very seriously concerned at the level of the indebtedness to the Nursing Home. Gerard Markey was insisting that he could get no more out of the business and stated that the Bank was not interested in giving him a further loan. Mr. Michael O'Neill proved in evidence notes he had taken during the course of this meeting. Mr. O'Neill told the court that he put it to Gerard Markey that others were being paid out of the income of the business at the expense of his father's care bill. He told Gerard Markey that the debt could not be left to the estate to be dealt with after his father had died and, that he genuinely felt that this was what was going on. Gerard Markey, he said, assured him that this was not so and, he accepted that the business was liable for the Nursing Home fees but stated that the income was simply not there.

32. Mr. O'Neill insisted that Philip Markey's Nursing Home bills had precedence over all other matters. He said that while he accepted that Gerard Markey had improved the "Stray Inn" he was concerned that this had been at the expense of the Nursing Home Fee's. Neither Gerard Markey nor Mary Markey challenged any part of this recollection of Mr. O'Neill as to what had transpired at the meeting. Mr. O'Neill said that he had put to Gerard Markey that the "Stray Inn" was a good pub, - that it always had a good name and was well liked, - and that if he was having difficulties they should consider leasing it to somebody else. Mr. O'Neill told the court that Gerard Markey would not hear of such a suggestion. Mary Markey recalled that her brother said that he was running the place for their father and could not let it go to anyone else and that, he was sure that the business would pick up and he would be able to pay the Nursing Home fees. Gerard Markey told the court that he could not agree to Mr. O'Neill's proposal of leasing the "Stray Inn" to a third party because of all the work and effort he had put into the business and, because of the amount of Nursing Home fees he had already paid. In those circumstances he felt that he was entitled to a chance to continue to run the business.

33. Mary Markey offered to pay £10,650 (former currency) if Gerard Markey agreed to repay her this sum. She told the court the he had agreed to this and accordingly she paid the sum of £10,650 (former currency) to Curragh Lawn Nursing Home in December, 2001. She said that despite his agreement her brother did not repay her for more than two years. Gerard Markey told the court in evidence that he accepted that he had agreed to repay his sister this sum of £10,650 (former currency). He said that he stood by this but that he was not personally liable for the Nursing Home fees and that she and the McDonnells well knew that the money had to come out of the profits of the business. I am satisfied that Gerard Markey right up to the commencement of the oral evidence before this Court in these proceedings maintained that he had no obligation to repay this sum of £10,650, (former currency) to his sister.

34. A further meeting about the continuing non payment of fees to the Nursing Home took place at the offices of Mr. Michael O'Neill on 11th September, 2001. Mr. Billy Mulhern F.C.A. attended this meeting in the interests of Gerard Markey, who also attended, as did Mary Markey. Mr. Michael O'Neill described this meeting as a terribly unpleasant experience. As the £10,650, (former currency) had not yet been paid to the Nursing Home the arrears then due to Curragh Lawn Nursing Home amounted to £25,675, (former currency). Mr. O'Neill recalled that the discussion at the meeting had ranged over turnover figures, actual and projected, for the business, the cost of the improvements and repairs carried out by Gerard Markey and, the cost of the security upgrading required by Thomtons, Loss Adjusters on behalf of the Insurers and by Sergeant Corcoran on behalf of Naas Garda Síochána as a result of the robbery at the "Stray Inn" on 16th October, 1999. The issue of the employment by Gerard Markey of a full-time barman and other bar staff at the "Stray Inn" was also discussed as were the repayments on foot of the A.C.C. Bank loan. Mr. O'Neill told the Court that he had insisted, very forcibly, that something would have to be done immediately and urgently. He said that he had again asserted that the business should be let to a third party which in his opinion would produce a return of up to £2,000, (former currency) per month which would be sufficient to pay the Nursing Home. He said that Gerard Markey would not agree to this.

35. Gerard Markey told the Court that by a letter dated 28th August, 2001, Mr. Billy Mulhern had sought an additional loan of £20,000, (former currency) from A.C.C. Bank. A copy of this letter was proved in evidence by Mr. Mulhern. I accept the evidence of Mr. Michael O'Neill that this letter was not, as Gerard Markey contended, sent to him and, that the first he knew about it was when he was furnished with a copy of the letter at this meeting on 11th September, 2001. It had been suggested to the bank that the proposed new loan and the other borrowing could be consolidated and repaid over an extended period, (a term of over 15 years was discussed at the meeting), in order to keep down the interest levels and therefore the amount of the monthly repayments. Gerard Markey proposed to the meeting that he be given a lease of the "Stray Inn" for the period of these repayments. Mr. Michael O'Neill told the Court that neither he nor Mary Markey would agree to this suggestion from Gerard Markey. He said that at this meeting Mary Markey was again very critical of her brother employing a full-time barman at the "Stray Inn" and she also suggested that he had carried out unessential repairs and improvements at the expense of not paying for their father's keep at the Curragh Lawn Nursing Home.

36. Arising out of this meeting, Mr. Michael O'Neill wrote to Miriam McDonnell by letter dated 19th September, 2001, in the following terms:-

"Dear Mrs. McDonnell,

I refer to my telephone conversation with you in this matter on 13th instant. You have advised that Mr. Markey's outstanding account is in the sum of £25,000 odd. You have furthermore advised me that you have indicated to Ger Markey that the discharge of the account will have to be addressed as a matter of urgency, as otherwise you will be obliged to request the removal of Mr. Markey from the Nursing Home. As indicated to you, I have been aware of the position and very conscious of the outstanding debt. As a result, I have had meetings with both Ger Markey and

his sister Mary Markey and as late as 11th instant met with both these parties and also Mr. Billy Mulhern, Accountant of J.W. Mulhern & Company, Accountants, 13/14 South Main Street, Naas. As a result of the most recent meeting, steps are now being taken to address the issues of the outstanding account and with a view to the total discharge of same. It is also intended to put in place a structure of payment of the account on a monthly basis e.g. the setting up of a direct debit in favour on the Nursing Home. I would hope to be in a position to revert to you shortly and in the meanwhile you might perhaps bear with me pending my finalising the necessary arrangements.

Yours sincerely."

37. I find that none of these meetings were disclosed to the late Philip Markey. As a result of correspondence between Mr. Michael O'Neill and the Legal Services Department of A.C.C. Bank, during November, 2001, the bank agreed to advance this additional sum of £20,000, (former currency) on the security of the Original Mortgage which was sufficient to secure sums of up to £200,000, (former currency). Gerard Markey told the Court that he did not proceed with this additional borrowing, "due to problems with paperwork I think" and events were overtaken by the death of his father on 28th February, 2002. Mary Markey told the Court, and I accept her evidence, that she was totally unaware of the original A.C.C. Bank loan or of the Deed of Mortgage executed to secure its repayment.

38. Mary Markey told the Court that she firmly believed that if her brother had not spent so much on unessential repairs and improvements and had not employed a full-time barman at the "Stray Inn", there would be sufficient income from the business to pay the Nursing Home. She accepted that some of the improvements and renovations to the business premises needed to be done but insisted that the question of whether there was money available to do them was a matter which could only have been determined after provision had been made for the payment of the Nursing Home fees. She believed that from November, 1995 to 28th February, 2000, her brother had pursued a programme of works and had engaged staff without giving any consideration to the necessity to pay the Nursing Home fees. She said that in this same spirit he had even replaced his original car with a brand new Jeep. She said she accepted that it was her father's own money from his business which was to pay the Nursing Home and that it was not her brother's responsibility to pay the Nursing Home fees out of his own pocket. She agreed with her brother that no one had anticipated that her father would survive for so long. She accepted in cross examination that she had not been told by her father and did not know on what basis her brother was managing the pub but said that she knew that he was doing it for their father and was being paid a weekly wage for doing it. She told the Court that she believed that Gerard Markey should have paid the bills due to Beechfield Healthcare Limited and Bernard Berney, Pharmacy out of the profits of the business. Her father, she said, had a Medical Card but with a threshold of €42 per month. When Miriam McDonnell had told her that their father needed a special mattress to prevent bedsores she told her brother about this and his response was that the Nursing Home should pay for it. However, she said, about two or three months later he had told her that he would pay for it. She accepted that he did not mean that he would pay for it personally but he would ensure that it was paid for out of the income of the business.

39. I find that no work or renovation had been carried out to the "Stray Inn" since 1978 when the lounge bar, store room and, new toilets had been constructed. The overhead accommodation had become quite dilapidated since the death of Mrs. Markey in 1987 and, two of the rooms and a spirits store had been damaged by smoke as a result of a fire in the premises.

40. In March, 1996 Gerard Markey personally cleaned, re-wallpapered and renovated an upstairs bedroom and bathroom for his own use. In 1996 he employed a painting contractor to repaint the outside and the inside of the licensed premises. Also, in 1996, he himself re-wallpapered the lounge bar and laid a new timber floor in the area behind the bar. At a date or dates of which the Court cannot be certain, he installed a new counter in the bar with the assistance of two tradesmen; replaced the ceiling in the poolroom and in the snug; replaced the timber wall sheeting and shelving in the bar and in the poolroom and, replaced the back of the counter in the lounge bar. In 1998 and 1999 he replaced part of the floor in the snug and did some other work in the lounge bar. In September, 1998 with the assistance of friends, he completed the repair and renovation of all of the upstairs apartments before his new partner joined him in residing there. In March, 1999, he repaired and remounted toilet facilities which had been damaged by vandals. In April, 1999 he personally re-laid the surface of the bottle yard in concrete. In the same year he devoted a week to carrying out work to the roof valley of the building. In 1999 also, the licensed premises was rewired by Elite Electrical Limited using materials purchased from Wesco and this work was checked and approved on behalf of the Electricity Supply Board.

41. On 16th October, 1999, there was a robbery at the, "Stray Inn" and, the entire weekend cash float was taken. The insurers insisted on a security upgrading at the premises. Changes were made in the alarm system, new security lights were installed and, a security wall, twenty five feet in length and ten feet in height was built at the rear of the yard in January, 2000. This wall took four months to complete and Gerard Markey gave evidence that he did eighty percent of the labour involved. In 2000 or in 2001 he purchased a new television set for the premises. He purchased a number of second hand bar stools and tables and refurbished them himself. He claimed that he had kept a record of and invoices and vouchers for all the work carried out at the "Stray Inn", - the principal part of which I have identified, and furnished these to J. W. Mulhern and Company, his accountants. His handwritten record and these invoices and vouchers were proved and examined in evidence. I accept the evidence of Gerard Markey that he is a keen D.I.Y. enthusiast and has the knowledge, skill and equipment necessary to carry out a wide variety of work which would otherwise require the services of skilled artisans and craftsmen.

42. Gerard Markey gave evidence, which was not disputed, that he had paid for most of the repairs, renovations and improvements to the upstairs accommodation at the "Stray Inn", out of the damages awarded to him in the road traffic accident case. Mr. Michael O'Neill recalled that this compensation was received in 1999. Gerard Markey told the Court that he had spent somewhere between £7,000 and £8,000 (former currency) on this work and this figure was not really challenged in cross-examination. It was put to Gerard Markey in cross-examination that he had spent in the period November, 1995 to the 8th February, 2002, somewhere between £50,000 and £72,000 in carrying out various work at the "Stray Inn", excluding the value of his own work. He did not disagree with this suggestion. In cross-examination it also was established that these figures, the larger of which is computed by reference to his own records and the lesser calculated by Mr. John Eddison, Chartered Accountant, of the firm Upton Ryan and Company, in a Report commissioned by the Applicant, did not include certain payments made in cash, (for example, in respect of casual labour), and, that other items had been accidentally omitted by Gerard Markey from his lists. The total amount of these unincluded items and cash payments could, he accepted, be in the region of £3,500 to £6,500 (former currency).

43. Gerard Markey told the court that in each of the years 2001 and 2002 he had sponsored the local Pitch and Putt Golf Tournament at a cost of €1,000 per year. He stated and, I accept his evidence, that this purchased very valuable advertising and general goodwill for the business. He gave evidence that he had also revived the Sunday night music sessions which had been a very popular feature of the "Stray Inn" in the past but which had been let slip by his father when he became ill. Gerard Markey gave evidence that the average cost of the musicians was approximately £100 (former currency) per night and this was not challenged.

44. Gerard Markey accepted in cross-examination, that in the accounting year ended 30th April, 2000, he had spent more than twice

what he had spent in each of the preceding years ending 30th April, 1999, and 30th April, 1998. He did not deny that a lot of this work was carried out at the time he was endeavouring to purchase the, "Stray Inn" from his father for £150,000 (former currency).

45. Gerard Markey accepted that between 1995 and 2002 the income from the business had almost tripled. He accepted that he had embarked on a total overhaul of the "Stray Inn" but, insisted that this was necessary to keep its existing customers and to attract new customers. He said that he did not appreciate in advance how much it all was going to cost. In hindsight he would accept that all of the work may not have been necessary to maintain and to improve the customer base, but that at the time it seemed to him that it was necessary. Gerard Markey admitted that he did expect to inherit the, "Stray Inn" and, had actively discouraged the three different potential purchasers when they had come to inspect the premises. He accepted, when it was put to him in cross-examination, that it was part of the agreement between him and his father that he would discharge the nursing home accounts as they fell due out of the profits of the business. He also accepted that his father did not know of the non-payment of the nursing home fees when he had approved of the works that had been carried out and of the way in which the business was being run.

46. Gerard Markey told the court that he had hurt his back lifting beer kegs in 1997. He said that in 2000 he had attended a Mr. Brian Moore, a chiropractor practising in Carlow and another spineologist. He had made about six visits in all. No documents were produced to vouch this treatment and the persons who provided it did not give evidence.

47. Mr. John Eddison proved in evidence a Report dated 3rd June, 2004, which he had furnished to the Solicitors for the Applicant. In evidence he told the Court, that having carefully examined the accounts for the "Stray Inn", prepared by J. W. Mulhern and Company, he had reached a number of conclusions. Up to the end of the accounting year ended 30th April, 2001, (and also in the ten months thereafter up to the death of Philip Markey on 28th February, 2002), the income of the business had increased each year even though the amount of that increase fluctuated considerably. He was satisfied that there was no indication in the accounts of any undisclosed sales transactions. He considered that the figures for "repairs and maintenance" in the accounts seemed high for a small licensed premises. The figure entered for the value of the premises in the Balance Sheet did not change much over the years so that actual "improvements" may have been written down as "repairs" which enjoyed a much more advantageous tax regime.

48. The following pattern merges from the accounts:-

Year	Income Increase on Previous Year	Wages and Salaries	Repairs and Maintenance
1997	£36,000 (estimate)	£10,299	£4,631
1998	£60,033	£13,886	£7,817
1999	£31,805	£19,588	£8,936
2000	£26,739	£38,137	£12,135
2001	£5,779	£50,523	£10,798

49. This pattern of income, wages and salaries and repairs and maintenance continues for the subsequent period of ten months up to the death of Philip Markey on 28th February, 2002. There is a huge jump in wages and salaries in the accounting years ending 30th April, 2000, and 30th April, 2001. The accounts year ending 30th April, 1997, was the first full accounting year in which Gerard Markey was sole manager of the "Stray Inn". The accounting year ending 30th April, 2001, was the first full year in which Mr. Gunning was employed as full time barman. The income increase for the accounting year ending 30th April, 1997, is estimated. The income increased from £160,637 for the previous twenty five months, to £113,074 (former currency) for the twelve months ending on 30th April, 1997. Mr. Eddison accepted that Gerard Markey's own wages as shown by the accounts were modest.

50. Mr. Billy Mulhern, confirmed that he had prepared the Accounts for the, "Stray Inn" at the request of Gerard Markey and, proved these in evidence. He stated that he was satisfied that the vast majority of the figures in the accounts were properly vouched. He accepted that some cash payments had been made for which no invoices or receipts were available but he felt that this was almost inevitable where any form of building work was concerned and, was not at such a level as to require adverse comments. The Revenue Authorities had accepted the accounts without query.

51. These accounts showed that in the two year period ending on the 30th of April, 1994, the Philip Markey had only drawn £8,795 (former currency) in total from the business. In Mr. Mulhern's opinion, after the year ending 30th April, 1997, the net profits of the business could not sustain the level of drawings being made. He was unable to comment on why the figures for repair and maintenance were at the level they were or why they continued to rise.

52. He was present at the meeting on 11th September, 2001, in the office of the Mr. Michael O'Neill but did not take notes at the meeting or prepare a memorandum immediately afterwards. In his view it was doubtful whether at that time the business could have sustained a long term loan. Competition, he said is very keen in the licensed trade. He is aware of this because he acts for a number of owners of licensed premises. All rural public houses were affected by the foot and mouth crisis to some extent. He agreed with Mr. Michael O'Neill's recollection of what occurred at this meeting. He recalled Mary Markey's sense of outrage at her brother having employed a fulltime barman while nursing home fees were in arrear. He also recalled Mr. Michael O'Neill pressing for the premises to be leased to a third party if Gerard Markey continued to insist that enough income could not be generated to pay the nursing home fees. He said he clearly recalled that the meeting was at all times a most serious one and that it had become very distasteful towards the end.

53. He did not negotiate with A.C.C. Bank or with any other bank for an additional credit line for the business after this meeting. He recalled that he had been told by Gerard Markey sometime that autumn that he was negotiating with a bank for a loan. At all times he had only dealt with Gerard Markey. He had never met, had never written to and had never received any instructions from Philip Markey. As an accountant he said he would tend to regard the creation of a beer garden; the changing of a grocery store to a poolroom; the establishment of a smoking area; the setting up of a refrigerated keg store; the making of a secure spirits storage room upstairs in the premises and, the building of a kitchen downstairs at the rear of the premises to produce food for consumption in the public house, as "repairs and replacements" rather than as "improvements". He accepted that while certain works had to be carried out at the "Stray Inn" for health, safety and security reasons, a considerable amount of the work undertaken was not required for any of these reasons and would probably be regarded outside the field of tax treatment as constituting an improvement. He did not know why motoring expenses were so high, (£5,022) in the year ending 30th April, 1999. He said that he did not recommend the lease-purchase of a new Jeep by Gerard Markey in September, 1998 but felt that this would make good financial sense if the business could otherwise afford it. The trade-in of £3,053.96 which Gerard Markey had received for his old vehicle was shown in the accounts for the year ending 30th April, 1999.

Conclusions

54. Central to the determination of the first four issues in this case are the terms upon which Gerard Markey assumed the sole management of the "Stray Inn" when his father became a resident in Curragh Lawn Nursing Home on the 30th November, 1995. I find that Gerard Markey agreed to manage the business on behalf of his father. I find that this agreement was made orally between the late Philip Markey and Gerard Markey without the advice, assistance or presence of any third party either lay or expert. Gerard Markey, at all times during his evidence, fully accepted that he had entered into occupation and remained in occupation of the "Stray Inn" and ran the business as a manager for his father and in no other capacity or title whatsoever. It was established by the evidence that no lease, tenancy agreement, licence or franchise was entered into between the late Philip Markey and Gerard Markey in respect of the "Stray Inn" I find that Gerard Markey did not execute the Deed of Mortgage made with A.C.C. Bank on 27th March, 1998, as agent for the late Philip Markey so as to bind him. As was disclosed by the evidence, Gerard Markey executed this Indenture at the behest of the Bank as a principal on his own behalf as the person managing the business and not as agent for his father who separately executed it.

55. I find that Gerard Markey was authorised by Philip Markey to carry on the business of the "Stray Inn" as a general agent on his behalf of the type aptly described by Bowstead and Reynolds on Agency, (17th Edition: 2001: London, Sweet and Maxwell), article 29 page 106 et seq., as a, "managerial agent". In my judgment it was an express and a fundamental term of the contract between them that Gerard Markey would, out of the profits of the business, discharge all sums due to Curragh Lawn Nursing Home in respect of his father as they became due. The income derived from the licensed premises was Philip Markey's sole income. I am satisfied that it was clearly understood between them that the sole reason why Gerard Markey was given the management of the "Stray Inn" by Philip Markey was to ensure that sufficient income was generated by the business to maintain Philip Markey in Curragh Lawn Nursing Home.

56. I find that Gerard Markey's overriding obligation was to manage the "Stray Inn" in such a manner as to provide sufficient income to pay the nursing home charges in respect of his father as they became due. I find that if he was bona fide unable to achieve this he should have considered that the agency was terminated and the whole issue of providing for the support of his father in the nursing home subject to reappraisal. I am satisfied that Gerard Markey did not assume any obligation to pay the nursing home from his own resources and I am further satisfied that in any event he had no assets or free capital which would have enabled him to assume such an obligation, nor did his sister Mary Markey. I am satisfied that Gerard Markey signed the Agreement with Curragh Lawn Nursing Home on 24th November, 1997, as an agent for a disclosed principal and did not assume any personal liability to the nursing home on foot of that agreement.

57. In my judgment Gerard Markey did not have either express or implied authority to improve the fabric of the "Stray Inn" or to execute works or to adopt measures designed to maintain or to increase its custom at the expense of failing to pay the fees due to Curragh Lawn Nursing Home. This is obvious when one considers what would almost certainly have occurred had the McDonnells, as they were fully entitled to do, served notice of termination of residency on Philip Markey at any time during 1999. I am satisfied that only such expenditure as was essential to the day to day trading of the "Stray Inn" had, by necessary implication, priority over the obligation to produce and to retain sufficient income to pay the nursing home fees. By "essential expenditure" I mean, such matters as the costs of renewal of the intoxicating liquor licence; the costs of essential services such as light, heat, water, sanitation and power; the cost of trade goods and equipment; insurance in respect of fire, theft, public and employers liability; non deferrable repairs and maintenance, of buildings, fixtures and trade equipment; the wage agreed to be paid to Gerard Markey and, central and local government taxes. This does not purport to be an exhaustive list of what might properly be included in the term, "essential expenditure" but is intended rather to be illustrative of the extremely narrow range of expenditure which of necessity to enable any business to be conducted had to be afforded priority over the nursing home fees in the allocation of available income. If, after meeting this essential expenditure the income from the business was not sufficient to meet the expenses of maintaining Philip Markey in Curragh Lawn Nursing Home then the entire matter would have to be reconsidered and alternative solutions found, such as an outright sale of the "Stray Inn" or, a lease of the business to another party as suggested by Mr. Michael O'Neill at the meetings on 10th July, 2001, and 11th September, 2001.

58. In my judgment expenditure on other matters, whether in the form of nonessential repairs, maintenance improvements or staffing, however otherwise desirable or convenient, or even necessary from a long term perspective, could not be incurred without a breach of contract so long as this expenditure resulted in the diversion of income from what was necessary to pay the nursing home fees as they fell due. I find that the decision of Gerard Markey in 1999 to employ a fulltime barman and also to employ his new partner at a weekly wage, was non-essential expenditure of this nature. If Gerard Markey had suffered from back problems from 1997 onwards, as to which I remain unconvinced, they certainly were not such as to so incapacitate him that he could only manage this small rural licensed premises with the assistance of a fulltime barman and other paid assistance from his new partner and other casual and part-time employees. No medical or other evidence was led in support of this claim. His own evidence of his physical activities throughout 1998 and 1999 together with his account of the medical treatment he received are in my judgment inconsistent with the existence of any significant back pain or limitation of movement. But even if he was seriously incapacitated after 1997 he had no right to continue to insist on managing the "Stray Inn" in a manner which resulted in insufficient income being available to pay his father's nursing home bills. I find on the balance of probabilities that the reason why Mr. Gunning was employed as a full-time barman was that Gerard Markey decided that he no longer wanted to work all the hours necessary to manage the business on his own with part-time or occasional assistance. To this end he employed the increased income of the business without considering or disregarding his fundamental obligation to pay the nursing home fees as they fell due.

59. I am satisfied that a great deal of the expenditure by Gerard Markey on the various works carried out by him, whether properly described as "repairs, maintenance or improvements" and, which attracted the attention of Mr. Eddison as being high for a small rural public house, were non-essential as I have defined that term for the purpose of this case, and should not have been carried out and, by being carried out left insufficient income available from the business to pay the nursing home fees.

60. In my judgment, while I am fully satisfied that Philip Markey did approve of the works carried out at the "Stray Inn" by Gerard Markey and, also approved of the manner in which Gerard Markey was running the business, this was not a fully informed approval and consent. The evidence establishes that Philip Markey was not at any time aware that nursing home fees remained unpaid or that there were serious problems in relation to them. Despite his apparent attitude to income tax arrears and the issue of fees due to other professionals, I am satisfied from the evidence that Philip Markey must have been very conscious of the extent to which he was dependent on the care supplied by Curragh Lawn Nursing Home and the only proper inference to be drawn is that he certainly would not have approved of either these works or of the management of the business by Gerard Markey had he known of the huge arrears of fees due to the McDonnells.

61. I find that Gerard Markey was at all material times, fully aware of the cost of his father's residence at the nursing home and that he solemnly undertook on behalf of his father that these costs would be paid as they fell due. Despite this, I am satisfied that he engaged staff and carried out works which he knew would deplete the income of the business to the point where he was unable to pay the nursing home fees. I am satisfied from the evidence that Gerard Markey was determined to become the owner of the, "Stray

Inn" whether by purchase or inheritance. I am satisfied that he openly discouraged potential purchasers of the property and, would not give up the management of the business and agree to the "Stray Inn" being leased to a third party at a rent sufficient to pay the nursing home fees despite his own claimed inability to pay those fees. In my judgment Gerard Markey spent income from the Stray Inn which should have gone to paying his father's nursing home bills, to his own immediate and prospective benefit.

62. I accept that the various works disclosed by the evidence as having been carried out by Gerard Markey were to the benefit of the "Stray Inn". While the cross-examination of Gerard Markey disclosed certain inaccuracies and omissions in the accounts, I am satisfied that there is no evidence on which a court could make a finding of any deliberate or fraudulent distortion of the record of expenditure incurred, whether by a way of suppression or inflation. I find that all the work stated to have been carried out was in fact done and all the money claimed to have been spent on that work was so spent. In my judgment, one is driven to conclude on the evidence that considerably more was spent on carrying out these various works, which I have found were largely non-essential works, than the sum of £72,000 (former currency) indicated by the records maintained by Gerard Markey. In other circumstances this expenditure might well have been regarded as both prudent and justifiable, but on the facts of the instant case, it was a breach of a fundamental term of the contract of agency, because it resulted in there being insufficient income remaining to provide for the upkeep of Philip Markey in the nursing home, which on the evidence was crucial to his welfare and even to his continued survival.

63. I accept that the security works required to be carried out by the insurers must be regarded as essential works. However, I am satisfied that the sum of £10,125 (former currency) claimed to have been spent on these works was inflated by at least £4,000 (former currency). While I accept the explanation offered for this I cannot but firmly disapprove of it. I am satisfied that the apparent difference of €10,395.59, between the sums shown in the accounts for Legal and Professional Fees, (€20,085) and, the sum of the vouchers proved in evidence by Gerard Markey, (€9,689.41), is accounted for by excise and revenue fees incurred in connection with the annual renewal of the intoxicating liquor licence and fees due to a firm called Computerised Stock Control Limited for monthly and year end stock taking at the "Stray Inn".

64. While I accept that this stocktaking was essential to the running of the business, there was no evidence from which I could conclude that it necessarily had to be done by an outside agency at a cost of several thousand euro at the time when it was being asserted that the income from the business was insufficient to pay the nursing home fees.

65. While I accept that Mr. Mulhern probably did indeed advise Gerard Markey that it was more tax efficient to lease-purchase a new Isuzu Trooper Jeep in 1998, I am satisfied that the decision to purchase such a vehicle was that of Gerard Markey alone. His justification for this purchase was that he was experiencing difficulties with members of An Garda Síochána on Traffic Patrol when carrying cases of spirits in his former car for use in the "Stray Inn" and, business at the "Stray Inn" was particularly buoyant because "Kildare was in the Finals in 1998". His explanation that the non payment in 1998 of two monthly instalments of fees due to the nursing home was due to a mere oversight, leads one to ask why this oversight was never noticed and corrected. While the evidence established that an Annual Invoice only was issued by Curragh Lawn Nursing Home, it did not indicate whether or not this invoice was issued at the start or at the end of the year or, whether the invoice issued at the end of 1998 or at the start of 1999, whichever may have been the case, indicated that two out of the twelve payments previously due had not been paid.

66. In my judgment, as agent for his father in the management of the business, Gerard Markey owed a duty to act in good faith, to act within the limits of his actual and implied authority as a managerial agent and, not to act so as to benefit himself without the fully informed consent of his father. However, in my judgment the evidence takes the matter much further and, I am satisfied that a fiduciary relationship is shown to have existed between Gerard Markey and Philip Markey in relation to the management of the "Stray Inn". The court accepts that many, if not all, managerial agencies involve a reliance by one party on the other party properly performing the obligations assumed without those expectations giving rise to a fiduciary relationship between them. I find, however, the position in the instance case to have been very different. Though undoubtedly relating to a commercial matter - the running of a licensed premises - the agreement between Philip Markey and Gerard Markey could not reasonably be described as an ordinary, at arms length, commercial contract of agency based upon freedom of choice, commercial reputation, assessment of risk, contract terms, third party supervision, remedies for breach and, other similar considerations which to a greater or lesser extent inform and lie behind all such agreements.

67. On the contrary, I find that the agreement between Philip Markey and Gerard Markey, in relation to the management of the "Stray Inn", was based upon necessity, kinship and trust. I am satisfied on the clear evidence of Gerard Markey, Mary Markey and Mr. Michael O'Neill that the late Philip Markey was both autocratic and secretive in relation to his business affairs and by reasonable inference would have retained total control over the running of the business for so long as it was at all possible for him to so do. I find that the managerial agency in the instant case only arose because an elderly and possibly even terminally ill parent had no real option but to entrust the immediate running of his business, which produced his income and was his principal asset to his only son, who prior to that had been assisting him in the business.

68. In addition to the intimate and confidential nature of the relationship between Gerard Markey and Philip Markey, because of his very serious illness and his being confined to the nursing home, Philip Markey was obliged to repose total trust in his son to run the business for him and to pay the nursing home fees. In my judgment the facts of this case are far more akin to those pertaining to the Court of Appeal decision of *Re Coomber* [1911] 1 Ch. D. 723, than to the commercial situations contemplated by Lord Mustill in the case of *Re Goldcorp Exchange*, [1995] 1 A.C. 74 at 98.

69. I find that Gerard Markey was not entitled to deal with the income of the business as he considered appropriate within the scope of the usual powers implied in the case of a managerial agent running a public house business. I find that it was an express and fundamental term of the management agreement and, a fiduciary duty which he solemnly undertook to discharge, that so much of the money of the business would be set aside each month, after the cost of essential items as I have already described them, as was necessary to discharge the fees due to the nursing home as they arose in priority to all other considerations.

70. I do not mean to suggest that Gerard Markey was obliged to establish an exclusive fund or account for this purpose in some financial institution where this portion of the income of the business would be maintained as a separate fund until paid over to the nursing home. However, I am satisfied that Gerard Markey was more than a mere debtor of his father in relation to this money and was in fact a constructive trustee of the money for his father. In my judgment, he acted not only in breach of contract but also and, more importantly, in breach of trust in applying that portion of the income of the business which he should have expended in paying the nursing home fees on other matters, despite the fact that such expenditure might in other circumstances possibly fall within the scope of his implied authority as manager of the licensed premises on behalf of his father. In the circumstances of this case he ceased to act in good faith and in the interests of his principal by failing to pay the nursing home fees and acting for his own immediate benefit and also for his prospective benefit as heir presumptive of the business, without fully and properly informing his father of what was occurring and the actual or probable consequences of it so far as the payment of the nursing home account was concerned.

71. The total of the sums due to Curragh Lawn Nursing Home, Beechfield Healthcare Limited and Bernard Berney Chemist, amounting to €31,164.97 were paid by the Applicant by consent of this Court granted by Order (Carroll J.) made the 2nd February, 2004, for the purpose, I infer, of preventing threatened litigation against the estate and to avoid claims for interest. In my judgment the estate and the Applicant are entitled to be fully indemnified by Gerard Markey in respect of the total amount so paid.

72. Beechfield Healthcare Limited furnished Invoice 015996, in the sum of €2,446.98, dated 2nd April, 2002, addressed to, "Accounts Department, Mr. Ger Markey, "The Stray Inn", Mile Mill, Kilcullen, Co. Kildare". It relates to the delivery of an Emerald (Twin Cell) Mattress Replacement System at a cost of €2,022.30 with VAT at the rate of twenty one percent in the sum of €424.68, delivered to Curragh Lawn Nursing Home.

73. I accept the evidence of Mary Markey that Miriam McDonnell told her that Philip Markey required this special mattress if the occurrence of bed sores was to be prevented. I accept the evidence of Mary Markey that she told Gerard Markey about this and that he ultimately, after a delay of some months, agreed to pay for it out of the income of the business. The items covered by the nursing home fee are set out in the agreement signed by Gerard Markey on behalf of his father on 24th November, 1997, as including only:-

- "(a) Full Board and Lodging.
- (b) 24 Hour Care Cover by Qualified Nurses and Auxiliary Staff.
- (c) Meals cooked to required medical dietary prescription.
- (d) Occupational Therapy.
- (e) Colour TV in all bedrooms."

74. I find that the provision of this special mattress was absolutely necessary to the proper care of Philip Markey in Curragh Lawn Nursing Home and, as such, was an item payable by Gerard Markey out of the income of the business with exactly the same priority as the nursing home fee itself.

75. The Invoice raised by Bernard Berney M.P.S.I., Pharmaceutical and Veterinary Chemist, Kilcullen, Co. Kildare is dated the 17th January, 2002, and is addressed to Mr. Phil Markey, and is in the sum of £892.30 (former currency), "Euro Total €1,132.99". The invoice unfortunately does not give an itemised breakdown of this sum. I accept the contention of Mr. Michael O'Neill, as set out in his letter dated 6th June, 2002, to Quinn and Company, Solicitors for Gerard Markey, that this account should have been discharged by Gerard Markey from the income of the licensed premises in similar fashion to the nursing home account. As regards the creditor the account is a debt payable by the estate of Philip Markey pursuant to s. 45 of the Succession Act, 1965, however, as regards the beneficiaries *inter se*, the Invoice is clearly an account of pharmaceutical products furnished to Philip Markey while a resident at Curragh Lawn Nursing Home. These would clearly be "specialist charges", not included in the nursing home fee. Clause 10 of the Agreement signed by Gerard Markey on behalf of his father on 24th November, 1997, expressly provides that:-

"the resident shall from his/her own resources or personal allowance be responsible for the payment of medical requisites not covered by the Medical Card."

76. I am satisfied that whatever items were covered by this invoice they were sought and furnished as an essential part of the proper medical management and care of Philip Markey in the nursing home. Had the cost of each individual component part of the account to be met as the need for it arose there could not be the slightest doubt that these items would have had to be paid by Gerard Markey out of the income of the "Stray Inn" as there was no other source of income from which to pay them.

77. The time and the manner in which the account was rendered does not, in my judgment, alter this obligation.

78. The evidence establishes that as a consequence of the disagreements between Gerard Markey and Mary Markey, the executors nominated in the will of Philip Markey, deceased, an application was made to this court pursuant to the provisions of section 27(4) of the Succession Act, 1965 for a grant of administration to the estate in the special circumstances arising. Mr. John O'Connor, Solicitor, the Applicant herein, was by Order of the Court made on the 10th day of March, 2003, given leave to apply for a Grant of Letters of Administration with the Will Annexed to the estate of Philip Markey deceased. This grant was issued by the Probate Registry on the 14th day of October, 2003. I find on the evidence that on the 10th December, 2003, the sum of €190,460.71, being the equivalent of £150,000 (former currency), was paid to the Applicant by Gerard Markey.

79. By his Last Will and Testament, dated 24th January, 2000, the late Philip Markey made the following devise in favour of his son Gerard Markey:-

"I give devise and bequeath my residential licensed premises with outhouses and ground attaching known as The Stray Inn, Mile Mill, Kilcullen, Co. Kildare to my son, Gerard Markey absolutely subject to him paying the sum of One Hundred and Fifty Thousand Pounds to my estate within one month of the date of my death and which payment shall be a charge on the said property until discharged."

80. In my judgment, the intention of the testator was not to create a trust of this sum binding upon Gerard Markey, or to impose a mere personal liability on Gerard Markey to pay the sum, or to make a devise to Gerard Markey subject to a condition - whether precedent or subsequent - but rather to create a charge on the property devised for the purpose of securing the payment of the sum of £150,000 (former currency) by Gerard Markey. The fact that the gift is made absolutely and that there is an absence of any gift over signifies that time was not intended by the testator to be of the essence as regards the "month of the date of my death", stipulated by him as the time within which the payment was to be made. I am satisfied that the intention of the testator was to ensure that there should be no unreasonable delay on the part of Gerard Markey in paying this sum of £150,000 (former currency) to the estate. I find, on the balance of probabilities that this sum was intended to provide a fund out of which the funeral, testamentary and administration expenses, debts, liabilities and general legacies could be paid with any remaining money, (if any), falling into the residuary bequest in favour of Mary Markey.

81. In the events which occurred, because of this litigation, it was not until the 14th October, 2003, that there was someone who could give a valid and effective receipt for the sum of €190,460.71. In my judgment, Gerard Markey was entitled to a reasonable time after that date within which to make the payment. What was reasonable must be judged by reference to the fact that the Order giving liberty to the Applicant to apply for a Grant of Letters of Administration with the Will Annexed was made on the 10th March, 2003. I find that in the circumstances, seven clear days would have been sufficient and reasonable so that the money ought to have

been paid by Gerard Markey on or before Thursday the 23rd day of October, 2003.

82. By Order 55 rule 43 of the Rules of the Superior Courts, 1986, general legacies are payable and carry interest from the end of one year after the death of the testator at the rate provided by s. 26 of the Debtors (Ireland) Act, 1840, unless otherwise ordered or unless the Will directs a different time and/or rate. By the provisions of Statutory Instrument 12 of 1989, the rate of interest is fixed at eight percent. In order to place all parties in the same position they would have been in had Gerard Markey paid the sum of €190,460.71 not later than the 23rd October, 2003, I find that interest should be paid on so much of that sum as is necessary to pay the general legacies at the rate of eight percent from 1st March, 2003, to 10th December, 2003, inclusive and additionally, interest should be paid on the sum of €31,164.97 from 23rd October, 2003, or the date of borrowing of this sum, - whichever is the later, - to 10th December, 2003, inclusive at the rate charged by the lender to the estate of Philip Markey deceased in respect of that borrowing.

83. Gerard Markey admitted in evidence, that despite what was averred by him at paragraph 13(b) of the Affidavit sworn by him on the 7th January, 2003, that neither Mary Markey nor the estate of his late father, were liable to reimburse him for any part of the sum of €14,916.16 which was outstanding to A.C.C. Bank on the 28th February, 2002. The evidence established that after the death of Philip Markey on the 28th February, 2002, Gerard Markey continued in occupation of the "Stray Inn" and continued to run the business and repaid the entire of this sum to the bank out of the income of the business. The bank issued a Letter of Discharge dated 22nd April, 2005, and this letter was proved in evidence. Gerard Markey admitted that this claim ought not to have been made and accepted that it was a serious error on his part. He also accepted in evidence that the averment at paragraph 14 of that affidavit sworn on 7th January, 2003, to the effect that Mr. Michael O'Neill had intermeddled in the estate and had never been instructed by him to extract a Grant of Probate to the late Philip Markey and was also totally incorrect.

84. The Court will hear the parties on the issue of the costs and expenses, to include all reserved costs and expenses of this action and of the other related proceedings.