Neutral Citation [2015] IEHC 656

THE HIGH COURT

[2009 No. 1167 P]

BETWEEN

MICHAEL BUTLER AND

WILLIAM BUTLER

PLAINTIFFS

AND

NELSON & CO SOLICITORS

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 20th day of October, 2015

1. The plaintiffs are brothers who together with two partners developed an estate of 111 residential units at a 15 acre site at Ard na Sidhe, Clonmel, Co. Tipperary in the year 2003 or thereabouts. The plaintiffs claim against the defendant as the solicitor who acted in certain transactions relating to the development. The precise role of the defendant firm is in issue in the proceedings, but it is common case that the defendant firm did act for the plaintiffs in the sale of the residential units and in drawing down loan finance from Anglo Irish Bank, and as legal advisor to the building or development company.

2. Michael Butler, the first plaintiff, represented himself but was called as a witness on behalf of the second plaintiff. The second plaintiff was represented by solicitor and counsel. From time to time Mr Michael Butler was assisted by a McKenzie friend.

3. This judgment is given in the application by the defendant on the conclusion of evidence by the plaintiffs to dismiss the claim as being bound to fail

Background

4. The second plaintiff is the registered owner of certain lands comprising 52 acres or thereabouts at Lewagh Mor comprised in Folios 3855 and 3856 Co. Tipperary. In 2002, he and his brother, the first plaintiff, purchased the lands containing 15 acres or thereabouts comprised in Folio 34763F Co Tipperary, being lands at Airmount, Cashel Road, Clonmel Co. Tipperary at a cost of approximately IR£800,000, financed with the assistance of loan finance from First Active PLC and secured by a first charge on those lands and on the lands at Lewagh Mor owned by the second plaintiff. Planning permission was obtained for the construction of 111 houses at the Clonmel site and was due to expire in 2006. The Butler brothers did not have access to sufficient development finance to construct the development.

5. The defendant firm had no involvement in the planning or in the purchase of the lands by the Butler brothers.

6. The two Butler brothers were introduced to Crohan O'Shea and Tom O'Driscoll some time in early 2003 and they discussed between themselves entering into a joint venture for the purposes of developing the lands at Clonmel. It was clear that the joint venture would require funding to develop the site and build out the houses, and the non-Butler partners, who had contacts in Anglo Irish Bank, agreed to negotiate finance from that bank, in consideration of which the Butler brothers were to provide the lands, and the four partners were to share equally in the partnership profits.

7. Almost all of the development has now been completed, and only seven sites remain unbuilt. All of the built houses were sold and the Anglo loan has been repaid.

8. The setting up of the partnership and the legal assistance given by the defendant firm to the joint venture, and the associated development company which was established for that purpose, BOSOD Limited, has given rise to this litigation.

The claim as formulated

9. The statement of claim was drafted at a time when neither of the plaintiffs had legal representation and it was difficult to discern precisely what claims the plaintiffs made. Counsel on behalf of the second plaintiff assisted and formulated the claim as one against the defendant firm of solicitors for breach of contract and/or negligence in and about the legal advice alleged to have been given to the plaintiffs concerning the setting up and operation of the partnership. Somewhat unusual language was used in the statement of claim, and in particular it is twice pleaded that John Nelson, the principal of the defendant firm, was "in cahoots" with the other partners in the joint venture. Counsel accepted that the expression "in cahoots" is not intended to import any claim of fraud or conspiracy, but was an index, or illustration, of the extent to which it is alleged John Nelson favoured one "part" of the partnership over the other, and it is argued by the plaintiffs that Mr Nelson did not act with the interests of the partnership as a whole in mind, but preferred the interest of the two non-Butler partners in any situation where a dispute arose between the partners.

10. The case was extensively case managed and Hogan J. had made 13 case management orders and directions. As a result of his order made on the 21st October, 2013 the claim of the plaintiffs for total damages in the sum of €15.850m was disallowed, by the removal of the claim in respect of the alleged loss of profits in the sum of €11m and the loss of the Lewagh Mor lands measured at €1m were disallowed. The remaining claim is measured as

a) half of the value of the Clonmel lands, claimed in the sum of €2,750,000

b) loss of moneys alleged to have been advanced to the plaintiffs by their siblings in the sum of €1.1m

The claim as now formulated
11. Following an order made by me on 5th March, 2015 the solicitors for the plaintiffs furnished updated particulars of breach of contract negligence and/or breach of fiduciary duty alleged against the defendant and the claim is now, in summary, formulated as follows.

The claim for breach of contract
12. The plaintiff claims that the defendant was in breach of his contract with the second plaintiff in:-

(a) Failing to take proper steps to ensure that the second plaintiff took independent advice. This is not pleaded with any particularity and in particular, it is not stated, the matter in respect of which it is alleged that this step ought to have been taken by the defendant.

(b) Acting for the partnership after it became apparent there was a breach of trust and/or preferred some of the partners over the others.

(c) Incorporated a company called BOSOD Limited but failed to ensure that it "performed its proper function" in relation to the partnership.

(d) Disbursed partnership funds and thereby left the plaintiffs short of funds to carry out the building works.

(e) Failed to make any payment out of partnership funds to the plaintiff.

(f) Acted for the partnership and/or BOSOD Limited when he knew or ought to have known that his previous professional relationship with one of the partners made it impossible for him to be independent, and/or failed to disclose the extent and/or duration of that professional relationship.

(g) "Engineered" the breakdown of trust between the partners.

(h) Made disbursements in a "chaotic" way thus causing "confusion and suspicion".

The claim as formulated in negligence
13. The claim is formulated in negligence is somewhat different although there is a significant overlap. The matters pleaded in respect of alleged breach of contract are also alleged against the defendant under the heads of alleged breach of negligence, but there is a specific plea that the defendant "failed" to give independent advice and/or "failed" to give equal weight to the interests of all the partners. There is also a specific plea that the defendant closed the sale of various house sites without "due regard for" any payments that might be due to the legal owners of the lands.

Alleged breach of fiduciary duty
14. There is an additional plea that the defendant was in breach of fiduciary duty in failing to give an account of the disbursement of partnership assets, and/or failed to treat all partners equally.

The application for a non suit
15. The defendant argues that the plaintiffs have not made out any form of plausible case, and this judgment is given in the application that the proceedings should be dismissed. Counsel for the defendant has indicated that, should this application not succeed, the defendant intends to go into evidence, and in that context it is apparent and following the decision of the Supreme Court in *O'Toole v. Heavey* [1993] 2 IR 544, that in considering an application for the dismissal of a plaintiff's claim that the court should approach the evidence by taking the case of the plaintiff at its height, and that the task for the court was whether the plaintiff had on the evidence adduced, made out a *prima facie* case on the balance of probabilities. The court must also, at this juncture, not have any regard to the witness statements which have been filed on behalf of the defendant, or to certain documentation introduced in the course of the cross-examination of the plaintiffs or their witnesses, save and insofar as the accuracy of the information in those documents was accepted by those witnesses in cross-examination.

16. It is clear also as a matter of law that for a plaintiff to succeed in defending an application to dismiss a claim at this stage, a plaintiff must do more than make mere assertions, and the plaintiff must show that sufficient evidence has been adduced on its side to establish a *prima facie* case, and to put the defendant on its defence. The court must consider all of the evidence adduced, but the court is also free in the context of an application to dismiss to take note of any conflict between oral evidence adduced in the course of the trial and affidavit evidence given at interlocutory stages of the proceedings, and the court is entitled to have regard to any internal contradictions or irreconcilable differences between that evidence and any oral evidence adduced at trial. This particular factor is one which bears noting in this case as certain affidavit evidence of Michael Butler is inconsistent with evidence that he has given in the course of this trial. In *Aer Rianta C.P.T. v. Ryanair Ltd.* [2001] 4 IR 607, at p.623, Hardiman J. made it clear that the court may consider questions of credibility and weigh evidence given on affidavit against that given in oral evidence when considering the strength of evidence.

17. The reason this distinction is important is that while it is settled law that for the purposes of determining an application to dismiss a claim following the completion of the plaintiff's own evidence, and where a defendant indicates that it will go into evidence, the court must take the plaintiff's evidence at its height, but this does not mean that the court must accept that the evidence is true. The court is entitled to, and indeed must, make a determination on the credibility or truth of evidence given before it, and in that regard may require to engage in the assessment of the case made by a plaintiff.

18. This is consistent with the approach of the court in applications for summary judgment and, as stated by Hardiman J. in *Aer Rianta C.P.T. v. Ryanair Ltd*, the court may require to engage questions of credibility and assess whether evidence is contradictory or not credible even in a motion for summary judgment where the test for the court is whether a plaintiff has made out a *prima facie* defence. By analogy the court equally has an entitlement where what is being asked is whether a plaintiff has made out a *prima facie* case to proceed and the court, in sifting the evidence, must have regard to the weight of the evidence, whether it is credible, and to the simple proposition that a plaintiff must do more than assert a claim in a plenary action, but must adduce evidence to establish such a claim.

The events
19. The events complained can broadly speaking be divided into two parts: the events leading up to the execution by the partners of

the joint venture agreement on the 30th July, 2003, and the events thereafter up to the point in time when John Nelson ceased to act for either of the plaintiffs. I set out now the sequence of these events.

The events to mid-2003
20. Messrs Houlihans Solicitors Ennis, Co Clare acted for the Butler brothers in the purchase of the lands at Clonmel, and continued to act for them in the early part of 2003. Certain monies were owed to that firm arising from this, and perhaps other, legal work, and the firm had registered a judgment mortgage against the lands of the plaintiffs. The four persons who executed the partnership agreement or joint venture agreement on the 30th July, 2003 conducted their pre-execution negotiation as business persons and without legal advice or involvement until there came a point when some legal documentation was required to be executed. At that stage the defendant firm had some engagement with the two non-Butler partners and John Nelson prepared a short form document, "the Shelbourne agreement", which came to be executed in June 2003. The plaintiffs do not deny that they signed this document but Mr Michael Butler says that it was not an agreement, and he is correct in this, as this agreement was an "agreement to agree", and contained a sketch of how the parties would establish a partnership and when. In the events, nothing turns on the precise characterisation of that agreement as the parties ultimately did come to execute formal articles of partnership on the 30th July, 2003.

21. The first part of the claim of the plaintiffs is that John Nelson advised the Butler brothers in and about the decision to enter into the partnership agreement and that he negligently permitted them to enter into an agreement, and/or was instrumental in drafting an agreement, which did not properly reflect their instructions to him or the agreement that they had reached with their co-partners. Specifically, and for the present I state this in general terms, Michael Butler asserts that the articles of partnership entered into on the 30th July, 2003 improperly included a clause which provided that the lands at Airmount, Clonmel would be held by the two Butler brothers on trust for themselves and their other two partners equally. He also asserts that the inclusion at clause 1 of the articles of partnership that the Lewagh Mor lands would be offered as security for a loan to finance the development was not done on his instructions, or with his or his brother's agreement.

Evidence of retainer of the defendant firm
22. The documentation shows that John Nelson was instructed some time in or around the 12th July, 2003 to act for the partnership, and with that in mind he wrote to Messrs Houlihans enclosing an authority, which the two Butler brothers had signed the previous day, for the transmission to him of the various documents of title and files relating to the Butler lands and the development. At that stage the main focus, and the purpose for which the authority was expressly sought, was to deal with the requirements of Anglo Irish Bank set out in its letter of loan offer of the 25th June, 2003, including the putting place of a first legal charge over the lands at Lewagh Mor and Airmount, Clonmel.

23. Michael Butler in the course of his evidence denied that John Nelson properly put in place the Anglo Irish security, and on a number of occasions asserted that the first legal charge registered on his land in favour of First Active PLC by which the sum of €3.25 million was secured, had never been discharged and that First Active never got the money secured thereby. He suggests this *inter alia* on the grounds that the solicitors who acted for First Active at that time, Messrs O'Donnell Breen Walsh O'Donoghue Solicitors, had furnished a receipt dated the 29th July, 2003 for the monies, when in fact it was on the day after, the 30th July, 2003, that the monies were drawn down from Anglo Irish when the parties met to execute the various documents. He did not accept that the reason for the one day difference was that the original draw down was to be on the 29th July, 2003 but that the meeting for the closing of the transactions was postponed to the following day by agreement of all parties but I consider that the evidence overwhelmingly points to this being the case.

24. The Anglo loan sanction was for finance in the sum of €5.4m, the first €3m whereof was stated to be for the redemption of the First Active loan, and the balance to assist in construction, and to be drawn down on the production of architect's or surveyor's certificates.

25. Michael Butler accepted that the instructions given to John Nelson in July 2003 were to act for the four persons intending to develop this land in the draw down of funds from Anglo Irish Bank, which involved him in securing a release of the First Active charge and the putting in place of a charge to satisfy the requirements of Anglo. It was at this stage that the question of the precise terms in which the parties would enter into their joint venture came to the fore. It is not doubted that John Nelson drafted the articles of partnership, and indeed the first draft of the agreement came to be varied following representations made by the Butler brothers.

26. Correspondence adduced in evidence shows that John Nelson refused to act for the Butler brothers in the execution of the articles of partnership, because he did not believe that it was proper for him to act for them until his undertaking to Messrs Houlihans was fully satisfied. In his letter of the 22nd July 2003 to the Butler brothers, Mr Nelson said he would not act for them for the purposes of negotiating the partnership agreement, but that they should take separate legal advice with regard to this. Michael Butler accepts that he received this correspondence, as did his brother.

27. Michael Butler also accepted in the course of his evidence in chief that a potential conflict of interest arose for Mr Nelson because of the undertaking that he had given to Messrs Houlihans but he insisted that John Nelson ought not to have had any part in the transaction, including the redemption of the First Active loan, the draw down of the Anglo loan or in putting the required security in place, without ensuring that the Butler brothers had separate and independent legal advice in respect to each item of business.

28. When pressed with regard to the draft partnership agreement Mr Michael Butler's evidence was that his main complaints were first, that it was never agreed that the Lewagh Mor land would be treated as an asset of the partnership, and second he was not prepared to allow the Airmount lands to be held on trust for his co-partners, and that without his instructions this particular clause was inserted and not removed. He says indeed that when he asked Mr Nelson on the 30th July, 2003 whether there was anything in the partnership agreement about which he ought to be concerned, that Mr Nelson said no.

29. Mr Butler was elusive but he did accept, albeit not until he was pressed, that the First Active loan was redeemed, and the security interest was released. But he continues to complain that he is not sure how and when this happened and his evidence is that he has spent a lot of time seeking information from First Active and other banks with regard to the events. Mr Butler had no answer to the proposition evident from the events as are described both by him and by the defendant firm, namely that it was not possible to make title to the houses that were to be sold in this development without first dealing with First Active, because First Active had the benefit of a first legal charge registered against the lands. No other possible explanation is credible as to why First Active would have released its charge other than on the payment of the monies secured thereby. I have already at para. 23 of this judgment expressed the view that the perceived discrepancy in the dates is of no import.

Discussion
30. Michael Butler is an experienced businessman and it seems that he had been an experienced and busy builder and subcontractor since 1979, that he ran a number of successful developments, and was a director of a number of companies. He accepted that he

had made 150 appearances in court arising out of this transaction, some of which relate to interlocutory applications in this case, and that other litigation around the joint venture has now concluded.

31. Mr Butler accepts that the first time he met Mr Nelson was on the 3rd July 2003 but he was elusive with regard to any phone conversations that he might have had with Mr Nelson before this. The documentary evidence that I have seen suggests that the first contact that Michael Butler had with John Nelson was a phone call of the 27th June 2003, and this came after negotiations had resulted in a letter of loan offer from Anglo Irish of the 25th day of June 2003, and after the Shelbourne "agreement to agree" was entered into between the four intended partners on the 18th June, 2003. Michael Butler accepts that Messrs Houlihans were still acting for the Butler brothers on the 4th July 2003, and that at the time he met John Nelson on 3rd July, 2013 that Messrs Houlihans remained his solicitors. He says he knew that John Nelson at the time of his first meeting was acting for Tom O'Driscoll and Crohan O'Shea.

32. Michael Butler accepts that he signed the authority sent by John Nelson to him on the 11th July 2003 for the taking up of the title deeds to his land and those of his brother for the purposes of clearing the First Active loan. It is very clear from the documentation that John Nelson was retained to deal with the redemption of the First Active loan and the putting in place of the relevant securities to enable the Anglo loan to be drawn down. It is also clear to me that ancillary to this John Nelson had to ensure that the title to the lands was clear of the judgment mortgage registered by Michael Houlihan & Co and another judgment mortgage registered or threatened to be registered by another solicitor.

The partnership agreement

33. It is not denied that John Nelson drafted the document which came to form the basis for the partnership agreement between the four partners. The main focus of the plaintiffs' claim is that John Nelson advised them with regard to the terms of the partnership and whether the partnership articles sufficiently protected their interests.

34. Michael Butler when pressed in cross examination said that he was unhappy with the early draft of the partnership agreement and that he successfully negotiated the removal of certain clauses, and he took what he described as "tentative" advice from another solicitor, a Mr Scott, although he sought to stress in the course of his evidence that he took this advice "on the street". He accepted in cross examination that he did discuss in detail with Mr Scott the contents of the draft, but says that he did not engage any other solicitor or take any other financial advice before he signed. The steps and advice he took were taken on his own behalf and on behalf of his brother, the second plaintiff.

35. I consider that no credible evidence has been adduced in the long hearing before me that points to any involvement whatsoever by the defendant firm in the agreement negotiated with regard to the terms of the articles of partnership. The evidence overwhelmingly points to the fact that the Butler brothers were advised to seek separate legal advice with regard to this agreement. I consider that no evidence I have heard points to any breach of contract or negligence or breach of duty by Mr Nelson in the redemption of the First Active loan, but that even if I am wrong in this, no stateable loss has been shown as a result of his conduct of that part of the transaction.

36. Messrs Houlihans were joined in these proceedings as co-defendant on a motion brought by Michael Butler in November of 2009 and for the purposes of that application he swore in two affidavits in which he swore that Messrs Houlihans continued to act for the two Butler brothers until the 3rd August 2003. He exhibited various letters from Messrs Houlihans to him and to Messrs Nelson & Co for that purpose.

37. The correspondence that occurred between John Nelson and Messrs Houlihan makes it quite clear that on or before the 11th July 2003 Messrs Houlihans had received instructions from the Butler brothers that they no longer wished to retain them as solicitors, and that Messrs Houlihans were prepared in those circumstances to hand over their files on foot of an undertaking from John Nelson to discharge the fees secured by the judgment mortgage and other outstanding fees which were then identified, although the figure was as yet untaxed and ascertainable only in broad terms. John Nelson did give an undertaking in terms sufficient to satisfy Messrs Houlihans on the 12th July 2003.

38. Michael Butler had a remarkable and almost perfect recall of many letters that were exchanged between the parties in the course of this transaction and he had precise recall of exact and uneven figures, and was an expressive and articulate witness. He was from time to time in the course of his evidence, however, elusive and on several occasions he used the phrase "I will not affirm or deny" with regard to a matter that was put to him, and when he was pressed as to when Messrs Houlihans ceased to act for him and when John Nelson came to act for him he used that phrase on a number of occasions.

39. It is clear further from the documentation I have that Messrs Houlihans prepared initial replies to requisitions for the Anglo solicitors on the 7th July 2013 but this seems to be the last involvement that Messrs Houlihans had in the transaction.

40. Michael Butler accepts that he received the letter of the 22nd July 2003 advising him to instruct a solicitor for the purposes of the partnership agreement. At times in the course of his evidence he insisted that Messrs Houlihans acted for him in regard to the partnership, and his complaint against John Nelson was that he had failed to insist that Messrs Houlihans were present at the signing of that document and/or at the time the various documents necessary to close the transaction with Anglo were put in place.

41. I find that the documentary evidence points me to the conclusion that Messrs Houlihans from 12th July, 2003 no longer acted for the Butler brothers, with regard to any matter relating to the lands in Clonmel, the loan with First Active or any other related matter relevant to these proceedings. No other finding is possible on the evidence.

42. Michael Butler gave evidence that he did take legal advice with regard to the inclusion of the Lewagh Mor lands in the title of William Butler in the partnership agreement, which was initially agreed would be held on trust for the partners. The evidence of the plaintiffs is that after they had taken advice from Mr Scott, and whether as a result of that advice or otherwise, negotiations with their partners led to an agreed concession that the Lewagh Mor lands would not be included as trust lands in the articles of partnership signed on 30th July 2003. Thus even were the plaintiffs to be in a position to argue that the evidence points to some, however minor, involvement of the defendant firm in the partnership agreement, no loss can be shown to have arisen from the inclusion in the initial draft partnership of the Lewagh Mor lands, and the draft was amended to take account of the concerns of the plaintiffs with regard to those lands. Thus no loss can flow from the draft when the plaintiffs' own evidence is that it was amended to reflect their wishes.

43. Further, the plaintiffs complain as to other matters in the draft: first, it is asserted that an arbitration clause was wrongly included in the agreement. Mr Butler accepts that no arbitration ever happened and accordingly I consider that the plaintiffs can show no loss as a result of the inclusion of the arbitration clause, even were it to be established in evidence that the defendant firm

had a duty to advise or failed in this duty by permitting or advising the plaintiffs to execute an agreement containing such clause.

44. Second, it is claimed that Crohan O'Shea was wrongly given a casting vote. Mr Butler accepts that Crohan O'Shea never came to exercise his casting vote, and again even if there was negligence or a breach by Mr Nelson of the terms of his retainer, this clause is not actionable as no loss is shown or claimed to flow therefrom.

45. Third, it is claimed that a clause was wrongly included in the draft providing for the dissolution of the partnership on the bankruptcy of any one of the partners. Again, this happening did not occur in the events that transpired and accordingly no actionable loss has been shown to have been occasioned by the inclusion of this provision, even if the Butler brothers can show that it was wrongly included as a term of the articles of partnership.

Conclusion on this head of claim
46. I consider that the plaintiffs have not adduced any or any credible evidence that John Nelson acted for either Michael or William Butler in or around the partnership agreement, or advised them with regard to its terms, or whether those terms properly protected their interests. Taking their evidence as a whole I consider that there can be no doubt that Michael Butler and William had each been advised by Mr Nelson to seek independent legal advice prior to the execution of the partnership agreement, that Michael Butler did take this advice from Mr Scott, and that the fact that he took the advice while he was "on the street" is irrelevant. The evidence is overwhelming that the two Butler brothers opted not to seek any further advice.

47. Further, I consider that their evidence is that the retainer of Mr Nelson was specific and related to the sale of the residential units, the redemption of the First Active loan, the putting in place of security as required by Anglo Irish Bank and the draw down of funds. I consider that the evidence points to no other finding but that the plaintiffs were aware of the nature of the retainer. Further, the engagement of the defendant firm to act in the sales was done after negotiations by the partners and another firm of solicitors was also in the picture as a possible alternative. Further as events show, and as will appear later in this judgment, the Butler brother employed various different solicitors, including Messrs. Binchy, and Chris O'Shea solicitor, to act on their behalf in the course of related but different matters and disputes at the time.

The partnership post July 2003
48. The plaintiffs evidence points to the fact that the development ran out of money and that this factor gave rise to the supplemental articles of partnership made on the 24th August, 2004 which had the result that the two non-Butler partners gained an advantage by an increase in their equity share. The plaintiffs claim damages against the defendant arising from what they say is a breach of contract or negligence arising from the disbursement of sale proceeds. The argument at its height comes down to an assertion that the defendant firm failed to make provision for the arrangements that would be needed to finance the balance of the build.

49. John Nelson was involved as solicitor for the development and between the 12th July 2003 and March 2004 he acted for the partnership in and about the drawing down of the monies from Anglo and the initial preparation of the booklets of title and other preparatory work for the purpose of selling the houses. He ceased to act for the Butlers with regard to certain disputes they had with their partners on the 8th March 2004, and John Nelson continued to act for the partnership only and insofar as that entity had separate interests from those of the individual partners. By 8th March 2004 cracks had appeared in the partnership, and Fred Binchy solicitor, of Binchy solicitors. Clonmel, Co. Tipperary came to act for the Butler brothers and I note also the clear evidence from Michael Butler that he and his brother had separate financial advice.

50. It is clear however that disputes had arisen, or were close to the surface, between the four partners as to the precise monies to be paid to the Butler brothers, either to both or one of them personally, or to a building company they owned or controlled Michael and Thomas Butler Ltd. and the dispute centred on the value of the works on site. A meeting was held on the 11th March, 2004, 7th April, 2004 and on diverse dates thereafter. Fred Binchy, solicitor, of Binchy Solicitors represented the two Butler brothers in regard to the inter partnership dispute. John Nelson represented the other two partners and that arrangement continued for a number of months, through a number of long and detailed meetings at which the Butler brothers attended and were represented by Mr Binchy. No complaint was made by the plaintiff as to the involvement of Mr Nelson at that time.

51. A particular series of difficulties arose with regard to the title to the development lands and three problems emerged as follows:

> 1) One Elizabeth Tuohy claimed to have title to certain lands on the eastern boundary of the site and she, through her solicitor, John Shee & Co brought proceedings for declaratory relief. The Butler brothers employed Chris O'Shea, solicitor in regard to this dispute which was ultimately resolved by the payment of certain monies to Ms Tuohy.
>
> 2) The second difficulty that arose with the title to the lands was what came to be called in the course of the case "the McMenamin issue", namely that four identified persons had an option to purchase serviced sites in the development at a cost of €100,000 per site, less than the market value, and that dispute too was resolved again with the assistance of Chris O'Shea, solicitor and later Brian Long, solicitor.
>
> 3) The final dispute related to an unregistered wayleave in respect of which Chris O'Shea, solicitor acted for the Butler brothers.

52. It is quite clear to me that neither John Nelson nor the non-Butler partners had been informed of these claims or encumbrances before the Anglo loan was drawn down, or before the partnership agreement was executed. There can be no possible breach of duty of Mr Nelson with regard to how and when the title issues were resolved. No evidence was before me that the defendant firm acted in any of these disputes, or that John Nelson was, or could have been, aware of these potential impediments to sale at the time he certified the title to Anglo and at the time he prepared the booklets of title for the purposes of the sales of the houses in the development. The matters were peculiarly in the knowledge of the plaintiffs, no impediment was apparent on the folios and the Butler brothers, for whatever reason, failed to disclose the disputes or claims.

53. These issues were resolved through the payment of monies which came from partnership funds or more accurately from the proceeds of the development itself and the decision to do this was not made as a result of any advice from Mr Nelson.

54. The argument was made that Mr. Nelson was negligent in the way in which he dealt with certain title matters in regard to the development. It is unequivocally the case that Mr. Nelson was not involved in resolving those title difficulties, and Mr. Michael Butler confirmed in evidence that he had not informed Mr. Nelson of the option agreements nor of the boundary dispute with the neighbour before he was employed to act as solicitor for the vendors of the development. There was nothing on the title by which Mr. Nelson might have become aware of these from his investigation on title and accordingly as a matter of law and fact the responsibility either

for the title difficulties themselves, or for the fact that they required resolution lies with the plaintiffs. There is no causative connection between the delay in closing the sales and any action or inaction of Mr. Butler. I find that the claim with regard to the title difficulties cannot be sustained even taking the case of the plaintiffs at its height.

The supplemental partnership agreement
55. A supplemental partnership agreement came to be executed by the parties in 24th August 2004 and this arose in the context of a short term, or what was perceived to be likely to be a short term, financing issue in that the sale of completed house was held up as a result of the three title problems identified above. The supplemental articles of partnership provided that Crohan O'Shea would lend the partnership the sum of €500,000 and it was considered that this would encourage Anglo to advance another €500,000 which duly did happen. The evidence is that John Nelson had no involvement whatsoever in the negotiation of or in advising the parties with regard to this supplemental partnership agreement. Furthermore, as discussed above he ceased to act for the Butler brothers in March 2004.

56. At its height Michael Butler asserts in evidence is that if John Nelson had "done his job properly" the need for a second or supplemented partnership agreement would never have arisen. This assertion is wholly unfounded on the evidence and it seems to be undoubtedly the case that the reason the funds had dried up for the development was because of the delay in closing the sales arising from the three title problems, and it was not until September 2004 that these were resolved and that money could come in from the individual purchasers.

57. Further, the evidence points unequivocally to the fact that the initial funds advanced by Anglo could never have been sufficient to build the anticipated number of 111 residential units and some arrangement was clearly required by which the partners and/or BOSOD Ltd would obtain additional finance.

58. I consider that the plaintiffs have not adduced any evidence to support a claim that the defendant was negligent or in breach of duty with regard to the drafting of the partnership agreement. This is for the reasons outlined above, and also because, at best, the argument of the plaintiffs, and in respect of which they did adduce evidence, was that Mr. Nelson failed to alert them to problems that might arise in the course of the development and in respect to which the partnership agreement might apply. The two plaintiffs did not adduce evidence that the agreement as drafted did not accord with their instructions, and even were I to accept that instructions were given by the plaintiffs to the defendant to draft the agreement, which I do not, at the very least the plaintiffs in order to succeed in this claim would have to establish either that the agreement did not meet their instructions, or perhaps more narrowly that the agreement did not meet their needs as developers.

59. The plaintiffs have not adduced any evidence that this is so. They did not for example adduce evidence that the partnership agreement ought to have contained a provision to deal with the obvious need that the development would have for further finance beyond the initial tranche that was to be drawn down from Anglo Irish Bank, and which on any reading of the figures was sufficient to deal only with the First Active charge (which reflected the cost of the land itself) and the building out of the first fifteen units. In that context it cannot be ignored by me that the partnership provided that the four partners would be equal partners, but that it would be fair for the purposes of the exercise now engaged to assume that, while the partners were equal, there were two "camps", or sets of interests, which were to be protected by the partnership agreement, the interest of the Butlers as land owners on the one hand, and the interest of the other two partners as the persons who provided the capital or the link or introduction to the bank that itself provided the capital. The height of the borrowings at the time the partnership agreement was entered into was the sum of €5.4 million to be drawn down from Anglo Irish Bank, and the evidence points to this being at best funding for 15 houses. I accept that the plaintiffs have adduced evidence that the intention was to build the 111 residential units in respect of which planning existed, and their own evidence would suggest, and no contrary evidence has been adduced before me, that a multiple of €5.4 million would be required to build out the balance of the units.

BOSOD
60. The other complaint made is that Mr. Nelson and his wife Ms. O'Neill were registered in the Companies Office as the first directors of BOSOD Ltd from the time of its incorporation until the B10 was filed the following year, having been signed by the four shareholders of that BOSOD on the 11th of August 2003. No evidence was adduced as to any involvement of Ms. O'Neill in the management of the company or of any decisions made by Mr. Nelson in his capacity as director in that period. Thus no loss can arise under this head.

The Lewagh Mor lands
61. Another argument that is made is that the putting in place of a security over the farm at Lewagh Mor as a security for the Anglo Irish facility was done without instructions, and/or negligently. In that regard it cannot be forgotten that from the point of view of causation the facility letter from Anglo of the 25th June, 2003 showed that this security was one of the specific requirements of Anglo for the advance of these monies. The Anglo facility was not negotiated by or through or with the assistance of Mr. Nelson and there was no evidence before me that would suggest that Anglo might have removed the requirement for security over those lands had this been requested of it. Thus no fault has be shown on the part of Mr. Nelson, and no loss arising from the putting in place of a security over the Lewagh Mor lands arose from any act or default of Mr. Nelson.

62. Further, the Lewagh Mor farm was removed voluntarily from the security after Anglo agreed to and did in fact release the security on that farm when the facility had been sufficiently paid down. The fact that the farm was used by Mr. William Butler at a later time to secure further advances has not been put in issue in this case and there is no plea or evidence that Mr. Nelson had any involvement in the offering of the lands as security for any further advances.

The disbursement of sale proceeds
63. A further argument made against Mr. Nelson is that he failed to ensure that on the completion of each individual sale the proportionate amount in respect of the site value was not paid to Mr. William Butler. A number of observations can be made about this assertion. In the first place the partnership agreement did not provide for a payment to the site owner in this way, nor indeed was there an agreement between the partnership and the site owners or between the partnership and the builder, or for the distribution of funds. Payments were made and agreed on a somewhat ad hoc basis between the partners and the Butler brothers and the building company Michael and Thomas Butler Ltd. There was no evidence that Mr. Nelson was instructed to put in place a structure to ensure that this was done in an orderly way. Furthermore I am also persuaded by the fact that there was no evidence that pointed to any request by the Butler brothers to their partners for the payment out of monies to represent their respective interests, and the simple truth is that the development struggled to find finance after the first Anglo tranche was fully spent. This is apparent from the fact that the two non-Butler partners, and in particular Crohan O'Shea, put up some of their personal monies to finance the ongoing development and to build out the units in respect which planning had been obtained. Thus the evidence points the other way, namely that the development did not have sufficient surplus funds to make a distribution or a proper distribution to the individual partners, or to the landowner or builder as the case may be.

64. Further, insofar as monies are claimed in respect of building works, such a claim is one that may be maintained by the company Michael and Thomas Butler Ltd., not a plaintiff in these proceedings.

65. Finally, Binchy solicitors acted for the Butler brothers from March 2004 and dealt *inter alia* with the claims of the brothers and/or their building company for payments form time to time. It is not credible that no monies were paid to the building company, and had that happened the building work would quickly have ground to a standstill. Mr Nelson is not shown by the evidence to have had any role to pay in acting for the Butler brothers with regard to the cost of materials or the building works.

Money advanced by siblings
66. Hogan J. permitted the plaintiffs to make their claim for losses arising as a result of family borrowings. Both of the Butler brothers gave evidence in the most general terms of having borrowed money from family members. No evidence was adduced as to the amount of money, when it was borrowed, nor was any documentary evidence adduced to show any money trail. Further, no evidence was adduced as to any involvement of the defendant in regard to these borrowings. Thus any claim for any loss arising from such borrowings is not supported by any evidence and must fail.

Conclusion on contractual role of Mr. Nelson
67. Mr. Nelson was employed to act as solicitor for the development and to prepare booklets of title, deal with enquiries and purchasers, and deal with the requirements of making good title. He was not engaged in the resolution of the title difficulties that arose as a result of matters of which he had no knowledge, and which were not apparent on any investigation of the title. His second involvement was with the drawing down of the Anglo monies. He did this in accordance with instructions no complaint is made that the monies were not drawn down, or indeed that they were not fully repaid to Anglo. Mr. Butler did what he was engaged to do and there is no complaint made against him that he failed in his role as conveyancing solicitor, or as solicitor with responsibility for drawing down the funds.

A conflict of interests
68. It seems to me that the height of the case made by counsel who made submissions on this application on behalf of William Butler is that Mr. Nelson had a conflict of interest and ought not to have acted for the partnership at all. I reject the suggestion that Mr. Nelson admitted he had a conflict of interest, and insofar as he admitted that a conflict of interest might arise, that arose in the context of the undertaken he had given to Messrs. Houlihans in July 2003 which was discharged before Mr. Nelson came to be engaged as solicitor to deal with the conveyancing aspect of the development.

69. Counsel for the second plaintiff however argues that another conflict of interest arose, namely that Mr. Nelson had for a long number of years acted for Crohan O'Shea in various business matters, and that that fact alone put him in a position where a conflict of interest might arise should he act for the partnership and/or for the development company BOSOD. It is argued in particular that Mr. Nelson preferred Mr. Crohan O'Shea in that on the 1st September, 2004 a payment of over €576,000.00 was made to Mr. Crohan O'Shea, as he puts it "without difficulty", from the proceeds of sale. This particular payment arose in contents of the second partnership agreement and from the fact that Mr. O'Shea had put personal monies into the partnership to assist in the obtaining of further finance from Anglo Irish Bank. Mr. Nelson had no involvement with that partnership, whether with the events leading up to the execution of that agreement or the enforcement of it. He cannot be faulted for making that payment when the partners themselves had agreed the context in which that payment was to be made, and no evidence was adduced before me to point to the payment having been made other than as expressly agreed in the supplemental partnership agreement.

Did Mr. Nelson have a general retainer?
70. A certain amount of difficulty became apparent at the conclusion of the plaintiffs' case as to the precise role that Mr. Michael Butler played in the development. He was a partner, and a shareholder and a director in BOSOD Limited. He was described by his counsel as "the builder", but in the course of argument at the end of this application counsel accepted that Mr. William Butler was a foreman or manager of the site, and not the builder employed by the partnership to build out the units. The builder was either Michael Butler, or the company Michael and Thomas Butler Limited, for whom Mr. Nelson did not act.

71. It is submitted however that Mr. Nelson by agreeing to take on the role he took as conveyancing solicitor, and as the solicitor who dealt with the Anglo security, the drawing down of funds and the repayment of the Anglo monies in accordance with the agreed repayment schedule, expressly or by implication took on a general advisory role in respect of the two Butler brothers. I consider it important in that context that Mr. Fred Binchy Solicitor acted for the Butler brothers in their personal capacity from March 2004, and in so far as a separate interest might have arisen, in regard to the interest of the building company Michael and Thomas Butler Limited. No connection has been shown between any decision made by the Butlers and/or the building company and the alleged breaches by Mr. Nelson. Put simply, the chain of causation was broken by the involvement of Mr. Binchy as solicitor for the Butler brothers at a time when it became clear that conflicts had arisen in the partnership and separate interests, or groups of interest, came to be in conflict.

72. I consider that at its height the claim of the plaintiffs that Mr. Nelson failed to put in place a structure to enable the builder to be paid the monies that he or it expected to be paid from the development, either in the amounts or at the times expected. I will take the plaintiffs' case at its height, and assume the builder to be Mr. Michael Butler, Mr. William Butler and/or Michael and Thomas Butler Limited, noting too that the company is not a party to these proceedings. Both of the Butler brothers in the course of their evidence accepted that Mr. Nelson was never engaged to advise them with regard to the role and position of the building company, or to advise either of them personally as builder, or to negotiate in respect of individual claims by the building company for monies from time to time. Indeed the evidence quite clearly points to the fact that from March 2004 until February 2007 Mr. Fred Binchy was acting for Mr. Michel Butler, in his role as builder, and the evidence points also to the fact that if any solicitor had an involvement with the building company Michael and Thomas Butler Limited it was Mr. Fred Binchy and no other solicitor has been identified to me.

73. I also cannot ignore the fact that, not only did cracks appear in the relationship between the parties as early as 2004 when Mr. Binchy was instructed, but the development ran into financial difficulties and cash flow problems in the summer of 2004. Some of these problems arose as a result of the title difficulties that emerged and made it impossible to close the sales, but the fundamental reason for the cash flow problems was that the initial monies borrowed from Anglo Irish Bank could not possibly have been sufficient to build 111 houses in respect of which planning existed, and that is so particularly in context were over €3 million of the €5.4 million borrowed went immediately to discharge the First Active loan in respect of which a first legal charge was registered on the lands to be developed. The evidence of the Butlers taken at its height was that the development cost in total was €22 million, and even though there was some dispute with regard to the precise figure in the evidence before me, it was certainly a figure which was a multiple of the €5.4 million borrowed, and if one excludes the €3 million in respect of the land purchase, the final cost was many multiples of the €2.4 m available from the initial draw down. Thus the development and the ongoing needs of the business of the partnership and of BOSOD required continued finance and that could not have been provided merely from the profits from the sales of the units. The Butler brothers both accepted this to be the case, and the evidence clearly points to this fact.

74. I consider that what arose was a commercial problem, one in respect of which Mr. Nelson had no instructions, but even were I to hold that he had instructions, there cannot be said to be any causal connection between his role as solicitor and the steps taken by the partnerships or individual members of the partnerships to negotiate development finance from a bank. Mr. Nelson was never employed to negotiate with any of the lending institutions, or to secure additional finance or seek capital. His role was to act as solicitor in the draw down of monies and in the completion of the sale, and while this of course involved him in dealing with the lending institutions, his dealings were in respect of the performance of the obligations reached between the partnership and the lending institutions from time to time, and not in putting in place those agreements or advising any of the parties with regard to the terms and conditions offered or ultimately agreed with the banks.

Conclusion on general retainer
75. I consider that the plaintiffs have not made out even a stateable case on the evidence that Mr. Nelson was, or could even by implication be considered to have been, employed as solicitor for them personally in so far as they had a conflict with their partners, or in regard to their claim for monies to represent their interest in the development lands, and/or as builders..

Conclusion on the claim as pleaded
76. Although the evidence in this case was heard over a number of days, and there was extensive argument with regard to the application of the defendant that the case be dismissed, it remained difficult to understand the precise nature of the claim and the evidence frequently strayed into matters which were irrelevant or not pleaded. I have endeavoured to deal with the claim in the various headings in this judgment. Nonetheless I will conclude by considering in sequence each of the separate heads of claim made in the updated particulars delivered to the court on the 10th March on behalf of the second defendant.

The claim in contract
77. Using the subheadings at para. 12 above I conclude as follows:

78. (a) I have dealt in detail with this part of the claim and consider that the evidence points overwhelmingly to the fact the defendant advised the plaintiffs to take separate advice, and that they did so take advice from Mr Scott

79. (b) I have dealt with this head of claim and consider that the evidence does not point to any preference by the defendant of the interest of one partner over that of others. The disbursement of funds was made in accordance with the partnership agreements

80. (c) No evidence was heard by me in regard to any alleged failure of the defendant to deal properly with the company BOSOD

81. (d) The evidence overwhelmingly points to the fact that the partnership did obtain additional finance, and indeed most of the units for which planning permission was granted were in fact built. The claim by the builders is not before me, but even accepting that the plaintiffs did act a builders they have not adduced evidence of any agreement with the partnership for the disbursement of the proceeds of sale. Furthermore the defendant firm did not act for the plaintiffs in their capacity as builders, and another firm of solicitors acted.

82. (e) This head of claim is dealt with at para. 63 ff.

83. (f) The evidence of Mr Michael Butler is that he and his bother knew of the prior professional involvement that the defendant firm had with Crohan O'Shea. No negligence arises as a result. Furthermore, no loss was shown as having arisen as a result of any alleged lack of independence. The claim as made is that Mr O'Shea was preferred in the making of certain payments at a time when another firm of solicitors was acting for the plaintiffs.

84. (g) The trust between the parties broke down early in the course of the partnership. The Butler brothers as a result had separate legal and financial advice from March 2004 at the latest. No loss is shown to arguably have arisen as a result of the action or inaction of the defendant. I consider that no evidence has been adduced that Mr. Nelson caused the loss of trust between the business partners

85. (h) No evidence was adduced as to a "chaotic" disbursement of funds, and no loss was shown as arguably arising therefrom.

The claim in negligence
86. This aspect of the claim has been fully dealt with in the body of my judgment.

The claim in breach of fiduciary duty
87. This aspect of the claim has been fully dealt with in the body of my judgment.

Decision
88. The jurisdiction to strike out a claim is relatively seldom used. Nonetheless I consider for the reasons stated, and bearing in mind the conclusion that I have come to in regard to the credibility of some of the evidence adduced by the plaintiffs, and further noting that I must for the purpose of the exercise engaged take the case of the plaintiffs at its height, that this is a case were I should accede to the application on the part of the defendant that the plaintiffs' case be dismissed on the grounds that it cannot possibly succeed and that even taking the evidence and argument at its height, for the reasons stated I consider that the plaintiffs have not made out a case that the defendant has to answer.

89. Accordingly, I will make an order that the claim be dismissed.