THE HIGH COURT

[2005 No. 1749P]

BETWEEN

ORLA McCORMACK

PLAINTIFF

AND

JOHN McCORMACK

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 5th December 2017

Introduction

1. Orla McCormack ('the plaintiff') challenges an agreement that she entered with her estranged husband John McCormack ('the defendant') on 2 December 2004, whereby she agreed to relinquish her share in the fledgling nursing home business that they then operated as a partnership in exchange for both a payment of €350,000 and an indemnity against her liability for the existing borrowings and debts of that business ('the agreement').

2. The parties remain husband and wife, although they have been effectively separated since 2003. There are three children of the marriage: John Junior, born in 1989; James, born in 1995; and Amy, born in 1996.

3. The parties acquired the lands on which the nursing home is now situated at Newpark, the Ward, County Dublin at auction on 4 April 2001 for €926,908.80 (IR£730,000). At the time they were acquired, the lands comprised a bungalow residence and farmyard on 18.5 acres of agricultural land that had been used for growing vegetables.

4. The parties took on substantial borrowings and incurred significant debts in developing the property and financing the nursing home business. The partnership borrowed large sums from Allied Irish Banks plc ('the bank') and significant sums from the defendant's parents, Jim and Mary McCormack (together,'the McCormacks'). The parties had little or no capital of their own to invest in the business.

5. In 2003, the partnership retained the firm of Doody Crowley & Company, as its accountants, and Mr Mark Hutch of that firm began advising the partners.

6. The defendant left the family home in June 2003 and, since then, the parties have been estranged as husband and wife.

7. Mr Stephen Noonan, solicitor, of O'Gradys, Solicitors, attended upon the plaintiff for the first time on 15 March 2004 and from then on provided her with legal representation and advice in relation to her partnership share or interest in the business and, in particular, the negotiation and execution of the agreement. Mr Noonan also provided the plaintiff with legal representation and advice at the material time concerning the family law issues between the parties.

8. The nursing home opened in May 2004 with a small number of residents and, hence, a limited cash flow. It was by then apparent that, due to a number of financial over-runs, the partnership business required additional funding in order to survive. The circumstances of that lack of funding and the manner in which it was addressed are central issues between the parties.

9. On 2 November 2004, a firm of solicitors wrote to the parties on behalf of the McCormacks, asserting that the balance due to their clients from the partnership then stood at €630,000. The letter expressed the understanding that things were then 'quite progressed with regards to a change in the ownership' of the partnership business, before asserting that no such change could take place before the McCormacks were repaid the debt due to them from the existing partnership.

10. On 15 November 2004, the bank wrote to the parties noting that it had received no proposals for the repayment of the partnership's borrowing in response of its letter of five days previously, and demanding repayment of all sums due by close of business on 17 November 2004. The partnership overdraft then stood at €28,254.42, against a €30,000 limit; it principal loan account was €2,940,151.37 in debit, against a limit of €2,900,000; a separate bridging loan account was in debit right up to its limit of €80,000; and a further balance of €366,921 was outstanding in respect of lease finance that had been provided. In short, quite apart from its obligations to its other creditors, the partnership (and, thus, each of the partners) was then in debt to the bank in an amount well in excess of €3 million.

11. The agreement was executed on 2 December 2004. The plaintiff received the sum of €350,000 in cash, less her legal costs, immediately afterwards and has received the relevant indemnities in relation to the partnership's debts, borrowings and Revenue liabilities.

12. Immediately after the execution of the agreement, the defendant formed a new partnership with his brothers Tom and Matthew, which assumed ownership of the property and took control of the nursing home business. That partnership was a success and the business quickly became, and remains, a profitable one.

The plaintiff's claim

13. A plenary summons issued on behalf of the plaintiff on 19 May 2005. In it, and in the statement of claim subsequently delivered on 28 June 2005, the plaintiff's principal claim is for rescission of the agreement on grounds of undue influence or misrepresentation, or on the ground that it was an unconscionable bargain. The plaintiff also seeks: an order setting aside the agreement on the ground of duress; a declaration that the agreement is void; a declaration that the plaintiff still holds a legal and beneficial interest in the nursing home property; an order for the taking of accounts and enquiries; and an order for damages.

(i) fraudulent misrepresentation

14. The plaintiff pleads that she was induced to enter the agreement by the fraudulent misrepresentation of the defendant, his servants or agents, that: (a) the value of the partnership business was less that it was; (b) that there was an urgency to the repayment of the McCormacks that there was not; (c) that the plaintiff's home was at risk in light of the partnership's debts, when it

was not; (d) that the plaintiff's credit rating was similarly at risk, when it was not; (e) that the bank was likely to move on its security over the nursing home property, thereby terminating the partnership business, when it was not; and (f) that the defendant would transfer his legal and beneficial interest in the family home to the plaintiff as part of the consideration for the agreement, although he did not.

15. Under this heading, the plaintiff further claims that the defendant is liable for false representations or fraudulent misrepresentation, or both, while under a duty to act with the utmost good faith towards her, in not disclosing: (a) the value of the nursing home property and of the partnership business, against its liabilities; (b) that the McCormacks were prepared to invest further money in the business (and later did so), rather than being anxious to be repaid; and (c) that the defendant wished to retain the business but to deprive the plaintiff of any interest, or involvement, in it.

(ii) undue influence

16. The plaintiff claims that the agreement resulted from the exercise over her by the defendant, his servants or agents, of unfair and unreasonable mental control or domination, which actions amount to unfair and improper conduct, coercion, over-reaching and cheating, which negated the plaintiff's independent judgment and caused her to enter into a transaction disadvantageous to her. The plaintiff continues that these were fraudulent and wrongful acts from which the defendant obtained a substantial benefit.

17. More particularly, the plaintiff pleads that she made the agreement without the benefit of proper and effective legal advice as a result of pressure she could not resist.

18. The plaintiff further pleads that the facts of the case and the nature of the relationship between the parties (that of husband and wife) give rise to a presumption of undue influence, in circumstances where the plaintiff relied entirely on the advice of the defendant's accountant; the defendant's bankers; and the defendant's 'business partners'.

19. The plaintiff next claims that those persons – the defendant, the bank, Mr Hutch and 'the [d]efendant's business partners, who are related to the defendant' – 'conspired as the servants or agents of the [d]efendant to exercise undue influence on the [p]laintiff resulting in a transaction which [was] manifestly disadvantageous to her.' This is a significant plea because, while conspiracy is a tort (and, indeed, a crime) in its own right, the plaintiff does not plead it as a separate head of claim and has not brought suit against any of the persons that she alleges conspired with the defendant. An allegation that a person's servants or agents have conspired with him is a claim of a different order to the mere attribution to a person of liability for the acts or omissions of his servants or agents, as a matter of law.

20. Finally, under this head of claim, the plaintiff pleads that the defendant, through his servant or agent Mr Hutch, procured Mr Noonan, as solicitor, to advise the plaintiff but that Mr Noonan did not provide effective or independent legal advice in relation to the transaction, which was put in place by the defendant.

(iii) unconscionable bargain

21. The plaintiff pleads that the parties to the agreement did not meet on equal terms because: (a) the plaintiff was ignorant of the value of the premises and business, taking due account of its liabilities; (b) the plaintiff had 'incomplete knowledge' of the position of the defendant's parents as unsecured creditors of the partnership business and of their requirement that the debt due to them be repaid; (c) the plaintiff's home was at risk to her creditors (or so the plaintiff had been led to believe by the defendant, his servants or agents); (d) the plaintiff's credit rating was at risk; (e) the plaintiff needed to provide for her children in light of the defendant's refusal to support them; (f) the plaintiff was unable to think clearly and rationally, or to cope, in light of the mounting pressure placed on her by the defendant, his servants or agents, making her vulnerable to manipulation; and (f) the partnership business was at risk.

22. The plaintiff claims that the defendant, his servant or agents – in the arcane language of the jurisprudence – 'unconscientiously' took advantage of the plaintiff's weaker position as just described, imposing the agreement upon her in a morally reprehensible manner. Specifically, the plaintiff asserts that the open market value of the property was €4,500,000 and that its liabilities were in the region of €375,000, whereas, under the agreement, she received only €350,000 for her 50% partnership share or interest in it.

(iv) duress

23. The plaintiff pleads that the defendant put her under duress, in the form of intimidation, by making the misrepresentations already pleaded.

24. The plaintiff further claims that the defendant put her under economic duress by exerting economic and commercial pressure upon her. Specifically, the plaintiff alleges that the defendant thwarted an investment in the nursing home business by John 'Jackie' Howard as a means of exerting as much pressure as possible on the plaintiff to relinquish her interest in it, and that the defendant 'assigned' Mr Noonan to act as her solicitor, after Mr Hutch proposed Mr Noonan to her, thereby contriving the appearance that the plaintiff had the benefit of independent and effective legal advice, while in reality none was forthcoming.

(v) damages

25. The plaintiff pleads that she has suffered loss, damage, inconvenience, expense, upset and distress as a result of the inequitable conduct and breach of contract of which she complains, for which she claims damages calculated as past and future loss of income in the amount of €500 per week, net of tax, and loss of profit in an amount as yet unascertained.

The defence and counterclaim

26. In the defence delivered on his behalf on 2 August 2005, the defendant admits the acquisition of the property, the operation of the partnership business, the execution of the agreement, the payment of €350,000 to the plaintiff, and the provision to the plaintiff of an indemnity and release concerning the partnership's debts and borrowings. The defendant joins issue with the plaintiff on very nearly every other aspect of her claim, denying each and every allegation made, denying the loss claimed, and denying that the plaintiff is entitled to any relief against him.

27. The defendant counterclaims for a declaration that the agreement is valid.

28. The plaintiff delivered a reply and defence to counterclaim on 24 July 2014, repeating the claim that the plaintiff's legal representation was provided 'for the purpose of giving a veneer of legality to the agreement' and was immaterial to the circumstances in which the plaintiff was 'compelled' to enter into it, and joining issue on the counterclaim.

The family law proceedings
29. The defendant in these proceedings initiated separate family law proceedings against the plaintiff by Circuit Family Court Civil Bill issued on the 24th November 2004, in which he seeks a decree of judicial separation and various ancillary reliefs. The plaintiff delivered a defence and counterclaim in those proceedings on the 14th December 2005 in which she also seeks a decree of judicial separation, together with various ancillary reliefs, notable amongst which is the necessary property adjustment order to resolve the issues with regard to the respective interest of the parties in the nursing home business. Those proceedings have not yet been brought on for trial.

Background
30. The plaintiff was born to Irish parents in England in the 1960s. She has two sisters and a brother. In 1974, her parents moved back to Ireland and set up home in Clondalkin, Dublin 22. Her father had a refrigeration business. The plaintiff attended Coláiste Bride in Clondalkin, where she sat her Leaving Certificate examination. While still in school, she held a number of part-time jobs, baby-sitting and working in both a menswear shop and a kebab shop. After leaving school, the plaintiff began working in a ladieswear shop in Clondalkin.

31. The defendant, too, was born to Irish parents in England in the 1960s. He was the second eldest of six children; five boys and one girl. When he was seven years old, his parents, the McCormacks, returned to Ireland, where they bought a sweet shop in Finglas, Dublin 11. They later moved to Clondalkin, which is where the defendant, too, attended secondary school, before leaving when he was 14 or 15. After school, the defendant did an apprenticeship as a panel beater, qualifying in 1987 or 1988.

32. The defendant's father, Jim McCormack, had a job with Toyota Ireland at its compound in Clondalkin. In 1985, the defendant's brother, Tom McCormack, returned with some savings from the United States of America, where he had been working. Jim McCormack was retiring from his job with Toyota. Together, they bought at auction a public house, Hanlon's Corner ('Hanlon's'), at the junction of the Old Cabra Road and the North Circular Road in Cabra East, Dublin 7. They did the pub up and started serving food. Trade picked up and the business became successful.

33. While the family were living in Cappaghmore in Clondalkin in the early 1980s, Mary McCormack had – in the defendant's words - a brainwave when the house next door came up for sale. The McCormacks bought the house, did it up, and converted it into a four-bedroom nursing home. Evidently, that business went very well because, in late 1984, Mary McCormack and her sister acquired a more substantial property, 'Glenaulin', the former home of the first Governor General of the Irish Free State, T.M. Healy K.C., in Chapelizod, County Dublin, which they operated as a nursing home from 1986 onwards. It appears that the Glenaulin nursing home was also very successful. Mary McCormack retired from the nursing home business in or about 1999.

34. The parties commenced a relationship in or about 1986. They went to London together in 1987 where the plaintiff worked as a receptionist in the YMCA and the defendant found work in a garage. Their son John was born in London in January 1989. The plaintiff returned to Ireland around Easter of that year and the defendant returned in July or August, taking up work as a barman in Hanlon's. The plaintiff found work as a receptionist and typist with an office equipment company in Clondalkin and, according to the defendant, also worked part time in Hanlon's.

35. The parties married on 2 October 1993. They purchased a family home in Lucan, County Dublin for approximately IR£69,000 in the same year. Mary McCormack provided the deposit of between IR£8,000 and IR£10,000 - as a wedding present according to the plaintiff - and the parties used a further Ir£8,000 or Ir£9,000 in equity from the sale of property they had earlier bought in Clondalkin, together with a mortgage loan from the bank, to pay the balance. The parties lived together in the Lucan property until June 2003 and the plaintiff has remained resident there with the parties' children ever since.

36. In 1996, Mary McCormack offered to set the defendant up with an interest in a public house in his own right. The defendant, his father Jim McCormack, and a family friend named Liam Ryan, acquired a pub named 'The Lower Deck' at Portobello Harbour, Dublin 8. The property came with eight apartments over the pub, a basement lounge underneath, and an adjoining house. Mr Ryan acquired a 40% share and the defendant and Jim McCormack each took a 30% share in the property. Those partners installed a company that they controlled to run the pub and the partnership received rent from it in return, as well as the rent roll from the accommodation. The property was acquired with the assistance of mortgage finance from the Educational Building Society ('EBS'). It is not clear whether the defendant received financial assistance from his parents to acquire his 30% interest in the property and, hence, the partnership. It is reasonably clear that the parties had no capital of their own to invest in it.

37. The defendant worked in the Lower Deck as a barman and bar manager. There was one other barman and the plaintiff's sister Eimer also worked there, together with a number of other part-time staff members. The plaintiff stopped working full time in Clondalkin around the time of the birth of the parties' second child – their son James - in 1995. She then worked part time in an office upstairs in the Lower Deck as a book keeper for the partnership, making lodgements, doing the wages, recording invoices, and liaising with Paul O'Neill of Carroll & Associates, the firm of accountants retained by the business. The plaintiff also did some work as a book keeper for a woman who owned a nursing home in Maynooth, County Kildare, to whom she had been introduced by Mary McCormack. This work had to be arranged around the plaintiff's role as principal carer for the parties' three young children.

38. The three partners in the Lower Deck also acquired three investment properties at Hanbury Hall, Hanbury Lane, Dublin 8, in order to avail of the tax relief on rented residential properties in tax incentive areas, commonly known as 'section 23 tax relief', that was then available against the rent received on such properties and all other Irish rental income, thereby allowing them to claim tax relief on all rental income obtained from the Lower Deck property as well. Having no capital of his own to invest, the defendant had borrowed his share of the monies used to acquire those properties from his parents, the McCormacks.

39. According to the defendant, the Lower Deck business went well for a few years. Turnover and the value of the property had increased, and the defendant was drawing a regular wage.

40. In 1999, the defendant acquired another pub as part of another partnership. The pub was 'The Hill', in Ranelagh, Dublin 6. His partners were his father Jim McCormack; his brother Tom McCormack; and their family friend Liam Ryan. Each held a 25% share. Once again, EBS provided the finance. Once again, there is no suggestion that either of the parties contributed any capital towards that partnership, or towards the acquisition by it of that public house.

41. In her evidence to the court, the plaintiff acknowledged that she was not a member of either of the relevant partnerships, nor was she registered as part owner or joint owner of any of the relevant properties. Nonetheless, she expressed the belief that she was the joint owner of the defendant's share or interest in each. In her view, the monies that the McCormacks had advanced to their son, the defendant, in respect of his involvement in those partnerships immediately became, in effect, the joint investment of the parties in each. The basis for the plaintiff's belief in that regard was not made clear. Under cross-examination, the plaintiff acknowledged that

she had no knowledge of the indebtedness assumed by the partnerships in connection with the acquisition of the various properties they purchased.

42. Sadly, the plaintiff's mother died in 1999.

43. In the same year, the defendant suffered a manic episode and was admitted to hospital where he was diagnosed with bipolar affective disorder. The defendant stated in evidence that he spent two months as an inpatient before being released. In all, he was out of work for three months. He had been finding the long hours and late nights associated with bar work increasingly stressful and took a step back when he returned to the business, only working days.

44. In 2000, the participants in both partnerships decided to go their separate ways. A rough agreement was reached, whereby the Hill was to be sold and Liam Ryan was to raise finance to acquire the interest of the other partners in the Lower Deck. The defendant was hoping to get at least Ir£200,000 or Ir£300,000 as the proceeds of his share in the various partnerships, after the deduction of liabilities.

45. In or about the Summer of that year, at the suggestion of his mother, the defendant began thinking about getting out of pubs and into the nursing home business.

The purchase of the Newpark property

46. In his evidence, the defendant recalled that his mother alerted him to the impending auction of the house and lands at Newpark, the Ward, County Dublin, which had been advertised in the newspaper. His mother did so on the basis that the property would make a good site for a nursing home project.

47. The defendant drove out to look at the lands, which comprised a bungalow residence and farmyard on 18.5 acres of agricultural land that had been used for growing vegetables. He was concerned that the property was a bit far out in the country, being approximately eight miles from Ashbourne, County Meath and seven miles from Finglas in Dublin, on a road serviced by a single bus route. However, he felt the location itself was nice and concluded that, if it came at the right price – *i.e.* no more than the auctioneers' estimated value of between Ir£600,000 and Ir£650,000 – he would take it.

48. In reaching that decision, the defendant was anticipating the imminent sale of the pubs and the realisation of the value of his equity in each of the partnerships, which he hoped would raise at least Ir£200,000 or Ir£300,000, in addition to which he was proposing to rely on commercial mortgage finance to cover the balance.

49. The defendant spoke to a friend in Fingal County Council, the local authority in whose area the lands were situated, who advised him that there was a fifty-fifty chance of obtaining planning permission for the nursing home the defendant envisaged there.

50. The auction took place on 4 April 2001. The defendant was working that day and unable to be present. The plaintiff, the defendant's mother Mary McCormack and Thomas 'Tommy' Ryan, the McCormack family solicitor, attended.

51. Thomas Ryan was called as a witness for the defence at the trial of the action. He is a first cousin of Mary McCormack and, therefore, a first cousin once removed of the defendant. At all material times, he practiced under the style and title 'Thomas Ryan & Company'. He confirmed in evidence that he had consistently acted for the McCormack family in commercial matters prior to 2003. He had also acted for the parties in respect of the purchase of their family home in Lucan in 1993. Mr Ryan's wife and the plaintiff were good friends when they were young. The two couples had socialised together on occasion, and once met by chance while on holiday abroad. The plaintiff considered Mr Ryan to be a personal friend.

52. Mr Ryan gave evidence that he had confirmed that the parties had finance in place in respect of their maximum proposed bid for the property of Ir£650,000. When the bidding exceeded that price, Mr Ryan could no longer continue to bid on behalf of the parties and Mary McCormack stepped in, successfully acquiring the property in trust for them with a bid of Ir£730,000. The conveyance was to close on 2 May 2001.

53. The plaintiff rang the defendant after the auction to inform him that his mother had acquired the property on their behalf. The defendant gave evidence that he was not impressed when he learned of the purchase price and that he subsequently had words with both his mother and Mr Ryan about it. The defendant's concern was that the parties' maximum bid of Ir£650,000 was calculated by reference to the funds he hoped to obtain from the sale of the pubs and the amount of borrowing that he felt the parties could carry. The plaintiff gave evidence that, after the auction, the defendant's mother told her: 'Not to worry; if there is any difficulty, I will help.'

54. The defendant paid the necessary ten percent deposit (of Ir£73,000) with funds drawn from the Hanbury Hall investment properties' rent account and from the Hill public house current account, with the consent of his partners to what was, in effect, the defendant's borrowing of the relevant amounts from each of the relevant partnerships, less whatever part of that sum comprised the portion of the Hanbury Hall properties' rent to which the defendant was entitled.

55. On 9 May 2001, the parties obtained mortgage finance from the bank in the amount of Ir£400,000, secured against the lands they had acquired. The defendant gave evidence that he had spoken to the bank about getting bridging finance to cover the balance until the pubs could be sold, but that his mother stepped in to pay it. It is common case that those monies were a loan from the McCormacks to the parties.

56. It is also common case that, at some point shortly afterwards, Mary McCormack repaid the parties' £400,000 mortgage loan from her own funds. The plaintiff gave evidence that she only became aware of that fact when a bank statement arrived at the family home one morning recording a zero-balance due on that loan. The plaintiff raised it with the defendant who informed her that his mother had paid the loan off after his brother Tom bought out the McCormacks' interest in Hanlon's. According to the defendant, Mary McCormack had done so on the basis that she had the funds available and that there was no point in the parties paying unnecessary bank interest. While emphasising that she had not requested it, the plaintiff acknowledged in evidence that this made sense.

57. It follows that, of the Ir£730,000 price of the Newpark property, Mary McCormack ultimately financed Ir£657,000 of that sum, being all but the largely borrowed Ir£73,000 deposit. When the punt was replaced by the euro on 1 January 2002, this loan of Ir£657,000 became one of €834,192 (which appears to have been rounded down in all subsequent discussion to one of €830,000).

58. The parties were registered as joint owners of the freehold title to the property with effect from the 24 July 2001.

The nursing home development at Newpark
59. In order to obtain the substantial additional finance necessary to develop a nursing home on the Newpark lands, the parties had to obtain planning permission. In order to prepare their application for permission, they had to retain a planning consultant and an architect. Their planning consultant advised them to seek to retain the existing bungalow property and to convert it into the hub of the development, by linking it to a number of new blocks. The parties hoped to construct a 60-bed facility but were advised that they had a better chance of getting planning permission if they scaled back the number of bedrooms in their initial application, while building substantial ancillary amenities that would facilitate a retention application in respect of a larger number of bedrooms in due course.

60. On 26 April 2002, Fingal County Council granted planning permission for a 45-bedroom nursing home development, along the lines proposed. The permission granted required the construction of an electricity substation, oil and gas storage tanks and an effluent treatment plant with an appropriate percolation area. The parties were required to level, soil and seed a significant portion of the lands as an amenity for the residents of the nursing home. The creation of the percolation and amenity areas required a significant infill. In addition, it became necessary to dig a well to supply fresh water to the development, which in turn required the construction of a temporary road surface to bring the necessary heavy drilling-rig to the appropriate point on the lands.

Funding the development
61. Once planning permission had been obtained, the parties met with representatives of the bank at the offices of their accountants, Carroll & Associates in Templeogue, Dublin 6W. The McCormacks were also present. In her evidence, the plaintiff stated that she had words with the defendant about the presence of the McCormacks at the meeting on the basis that the parties had been, and remained, clear in their own minds that the nursing home development was going to be exclusively their concern. The defendant confirmed in his evidence that this was, indeed, his desire also.

62. That aspiration was even then very difficult to reconcile with the position in reality. It is likely that the parties would not have identified the Newpark property had Mary McCormack not brought it to their attention, having learned of it through a friend or contact. It is clear that the parties would have failed to secure the property at auction had Mary McCormack not stepped in to purchase it in trust for them. And it is plain that they would have been unable to fund that purchase without the benefit of a large interest-free loan from Mary McCormack, since the €400,000 in mortgage finance they had been able to obtain from the bank would not have been sufficient for that purpose.

63. The defendant's belief that it might have been possible to obtain bridging finance for the balance of the purchase price, had the McCormacks not stepped in, is difficult to reconcile with the limited means of the parties at the material time. The little capital that they did have comprised the equity in their family home and the defendant's equity in the public house and investment partnerships already described. Not only was that equity tied up at the time of the auction in April 2001, but it was still tied up a year later when the parties met with representatives of the bank in April 2002 as just described. And as was shortly afterwards to become apparent, there was significantly less equity in the public house partnerships than the defendant had hoped.

64. Neither of the parties had any significant track record in business, whereas Mary McCormack had an impressive one. Moreover, neither of the parties had any experience in either developing or operating a nursing home, whereas Mary McCormack had done both with m

65. On 26 March 2003, the bank provided the parties with a letter of sanction for a loan facility of €2,500,000 to finance the development of a 47-bed nursing home on the site, subject to a first legal charge over the property, as well as an overdraft facility of €30,000, to provide working capital for the business. The loan was a full recourse - rather than a non-recourse – one, in the accepted sense that, while it was secured by a pledge of the nursing home property as collateral, there was nothing to limit the bank's recourse to the parties should the sale of that collateral prove insufficient to discharge the balance of the loan in the event of a default.

66. According to the evidence of the defendant and, later, of Mr Hutch, the accountant, the practice at the time was to value (and, hence, to finance) a nursing home development by identifying the value of each bed and multiplying that figure by the number of beds it had (or was to have). The loan sanction letter was signed by an assistant lending manager with the bank's 'Healthcare and Services Sector' and by Joan Hoban, the assistant manager of the bank's Crumlin Road branch, where the parties held their accounts.

67. Shortly afterwards, the construction contract for the nursing home was put out to tender. The parties received three bids and decided to go with the cheapest, which involved timber-frame construction. It came in at approximately €2.2 million but the builder concerned did not tender for the associated groundworks, as he did not have the necessary expertise. The contract for those works was awarded to a separate contractor.

68. The plaintiff placed great emphasis in her evidence on the significance of a letter that the bank wrote to Mary McCormack on 7 May 2003. The plaintiff was present at the bank's Crumlin Road branch when a member of staff mentioned that a letter was about to go out. When the plaintiff said that she did not know of any such letter, she was given a copy of it. The letter is signed by Joan Hoban, as assistant manager of that branch. It is addressed to Mary McCormack, though it recites that it is to be copied to the parties. In light of the parties' angry reaction to it, it is best to set out the text in full:

> 'We refer to our discussion of recent date.
>
> We have now issued our Offer Letter to John and Orla along the lines requested.
>
> We would expect that given your experience in this sector and that you are an equity participator in the venture that you would play an active role in the management of the Nursing Home for an initial 2 year period, until the profitability/cash flow projections are achieved.'

69. The plaintiff telephoned the defendant about the letter straight away. He told her to bring it home with her. When he had read it, he contacted Tommy Ryan, the parties' solicitor, apparently to emphasise that the parties were fixed in their resolve to manage and control the business themselves, to the exclusion of the defendant's mother. It is common case that the bank was mistaken in its view that Mary McCormack was an equity investor in the nursing home project, in that she had no equity in it. Rather, as we have seen, she had provided a substantial unsecured interest-free loan to the parties to facilitate their acquisition of the Newpark property on which it was to be built.

70. Although one can easily see why the bank would draw comfort from the involvement in the nursing home project of an experienced developer and operator of nursing homes like Mary McCormack, the plaintiff expressed the belief in evidence that the

letter had not been written on the bank's own initiative, but rather that Mary McCormack had asked the bank to issue it in those terms and Ms Hoban had obliged.

71. Unfortunately for the parties, neither the Lower Deck nor the Hill had sold quickly. Liam Ryan experienced difficulty in raising the finance necessary to buy out the interests of the defendant and Jim McCormack in the Lower Deck. The pub was then put up for auction but no bids were made. The Hill also took longer to sell than had been hoped. The defendant's evidence was that both pubs eventually sold on the same day, 19 May 2003, one for approximately €2.2 million and the other for approximately €2.7 million, realising approximately €4.9 million in total, against outstanding borrowings from the EBS secured against them of approximately €4.7 million. The defendant believes that his share of the equity in the two partnerships came to approximately €140,000 before tax.

72. The defendant stated that those funds were quickly expended in part discharge of liabilities incurred by the nursing home project, which included: stamp duty of approximately €60,000 on the purchase of the property; the local authority planning application fee of approximately €30,000 (such fees being calculated by reference to the area of the proposed development); the contributions required by the local authority as a condition of the planning permission granted; the architect's and planning consultant's fees; the cost of the creation of the water treatment percolation area; the cost of the installation of the temporary road for the drilling-rig; and the cost of the well-drilling operation, including test-drilling. The defendant said that he referred to all of this as 'red-tape money'. The cash representing the equity from the public house partnerships was completely gone by the time construction of the nursing home commenced in July 2003.

73. The disappointing sale prices achieved by the pubs and the immediate need to apply the modest equity released by those sales to defray development costs, rather than repay borrowed capital as had been planned, call into serious question the feasibility of the parties' original aspiration to develop and operate a nursing home business in reliance solely upon their own limited capital resources, together with whatever commercial finance might have been available to them on the strength of the defendant's – at best, indifferent - track record in the pub trade, and their determination, despite their inexperience, to do so without the assistance or involvement of Mary McCormack, a person with a wealth of experience in that regard.

74. Having exited the pub business in May, the defendant took a job with a person who was renovating a house in Foxrock, County Dublin.

Parties estranged
75. The defendant left the family home in June 2003 as a result of unhappy differences between the parties that have resulted in their permanent estrangement since then. Initially, he went to stay with his sister Veronica at her home in Dublin 7.

Construction commences
76. Nonetheless, the parties signed their acceptance of the bank's loan facility offer on 2 July 2003. The building commencement notice came from the local authority shortly afterwards. Building work on the nursing home project began with the dismantling of a barn on the Newpark lands on the 14 July. The defendant left his job in Foxrock and began to work full time on the Newpark development in September or October, liaising with the contractors and other persons on site and providing his services as a labourer. There were meetings on-site every fortnight or so with the architect, surveyor and structural engineer. Later, the focus shifted to the fit-out and interior decoration of the nursing home, for which the plaintiff took primary responsibility. 77. By December 2003, the building was roofed, although the windows were not yet in. Construction was already a bit behind.

Liquidity problems
78. Each of the parties drew a wage (and, on occasion, made other drawings) from the business. The defendant's recollection was that there was a loan account and a current account. On the submission of invoices to him, he would draw down money from the loan account into the current account. The defendant thought that the overdraft facility extended to the parties may have been associated with a further separate account. The parties were both mandated signatories on those accounts and only one signature was required to write cheques and make withdrawals.

79. The plaintiff's evidence was that, after the defendant left the family home, she began to attend site meetings in order to apprise herself of the progress of the development, although the discussions concerning construction issues often went a little over her head. The plaintiff played a more significant – indeed, principal - role in the fit-out and interior design of the development as it progressed, and assumed primary management responsibility for the commencement and operation of the nursing home business. To that end, the plaintiff was chiefly responsible for recruiting the parties' next-door neighbour Cathrina Boyle, an assistant director of nursing at a large Dublin hospital, to be the director of nursing at Newpark, and together they set about recruiting other nursing and care staff. The plaintiff dealt with all aspects of the development's interiors: furniture, painting, lighting, flooring, fabrics.

80. The plaintiff gave evidence that she had never had access to the financial side of the business and that the defendant 'had the chequebook from the beginning.' A different picture emerged under cross-examination, when the plaintiff acknowledged that she did have untrammelled access to a particular account, referred to for convenience in evidence as the nursing home's 'operational account', upon which she wrote cheques for monies due to suppliers, staff wages and, indeed, her own drawings. That account was funded from the loan or overdraft finance provided by the bank. The plaintiff gave evidence that the parties each drew a wage from the business, which she thought was in the order of €300 or €350 per week. However, on production of copies of certain of the relevant bank statements, the plaintiff accepted that the figures most often appearing there were weekly drawings of between €600 and €800 each, even before the nursing home began to trade.

81. The plaintiff acknowledged in cross-examination that, on two separate occasions – the first in August 2003 and the second in December of that year - she had a sum of approximately €20,000 transferred from the nursing home's operational account into the parties' joint account. The defendant's uncontroverted evidence was that the parties' joint account had become, in effect, the plaintiff's sole account after he had left the family home in June 2003, because he never attempted to access it for any purpose after that. The plaintiff said that she would have used the first sum, a transfer of €20,500 from the operational account to the joint account in August 2003, to pay off the overdraft on that account and, thus, to discharge various domestic outgoings, including utility bills, the mortgage on the family home and the defendant's car finance payments. The plaintiff expressed the belief that she drew out the second sum of €20,000 in December as the repayment of an advance of approximately €12,000 that she had earlier made to the business from her personal savings. The defendant acknowledged in his evidence that the plaintiff had made her personal savings available to the business at one point, in order, he thought, to discharge certain fees that were then due to the architect.

82. Save to the extent that the defendant could claim an entitlement to a share of the monies from the Hanbury Hall rent account that were used to discharge part of the deposit of IR£73,000 on the Newpark property (and the extent to which the plaintiff could claim an entitlement to an interest in that share), neither of the parties contributed any capital to its purchase. And, aside from the modest equity released from the sale of the pubs and the temporary loan by the plaintiff to the business of approximately €12,000 in

personal savings, which the plaintiff on behalf of the business caused to be redeemed within a matter of months, neither of the parties contributed any capital whatsoever to the construction and fitting out of the nursing home or any working capital to cover the inevitable funding requirement until operational costs could be met from income.

83. The defendant stated in evidence that, in the course of the sale of the pubs, a disagreement over fees arose between the public house partnerships and their accountant Paul O'Neill of Carroll & Associates. In consequence, in or about September 2003, the defendant spoke to his brother Seamus McCormack, who, with his sister Veronica, had acquired the Glenaulin nursing home from Mary McCormack. They were using another firm of accountants that they were happy with. At the defendant's request, Mark Hutch of that firm met with him at the Newpark site on 11 September 2003, where the defendant explained that the project was proceeding as a business partnership between the parties, despite their personal estrangement.

84. The defendant called Mark Hutch as a witness at the trial of the action. Mr Hutch is a chartered accountant who qualified with KPMG in 1982. He then worked in financial services for nine years with Woodchester Finance, for the last two of which he was finance director of Woodchester Bank. Mr Hutch went into sole practice as an accountant in 1991. In 1992, that practice became a partnership. Until October 2014, the partners ran that practice under the title Doody Crowley & Company, Chartered Accountants ('Doody Crowley'). In 2003, the firm was very much a general practice with a number of clients - and, hence, some significant expertise - in the nursing home sector.

85. Mr Hutch had been acting for, and advising, the defendant's brother and sister Seamus McCormack and Veronica McCormack from late 1998 or early 1999 on the acquisition and operation of their mother's nursing home, Glenaulin, in Chapelizod and confirmed that he had been approached by the defendant in September 2003 to advise the Newpark partnership.

86. Mr Hutch stated that, when he became involved, it was hard to assess the business. He noted it was a green field development and that speedy construction was required because, as was common in projects of this sort, the bank had agreed a two-year moratorium on capital – though not interest - repayments on the loan finance it had provided.

87. Mr Hutch said that, from the beginning of his involvement, there was a significant difficulty in that, while at least some cheques and invoices were being retained, no partnership books were being kept.

The funding imperative

88. The defendant stated in evidence that one of his main objectives in retaining the services of Mr Hutch was to secure additional necessary funding for the business. At the end of 2003 it was evident that, at best, funding was going to be tight. From the outset, the strategy of the business had been to get the nursing home operational in stages, in order to begin generating an income as quickly as possible. Thus, it had been hoped to get 'Block A', one of the three accommodation blocks connected to the administration block, up and running in March 2004 with 20 beds or so available for occupation, while the builder remained on-site to complete the remaining two residential blocks. The development had to be completed in a modular way, as, obviously, residents could only be accommodated in self-contained completely finished areas.

89. From the outset, the partnership had done what it could to maximise income from the Newpark property. For a period prior to the commencement of construction, the bungalow on the lands had been rented out for €1,400 per month. The surrounding farm lands were leased for €1,400 per annum to a farmer who grew corn on them. The parties were approached by a third party who said that, in the context of the levelling works necessary to create the percolation area, that part of the lands would make a good landfill site. Accordingly, the parties applied for, and obtained, a waste permit. It had been hoped to get permission to bring in 11,000 loads of clay, which would have generated an income of approximately €200,000, against the outlay involved in providing the appropriate bond to the local authority. Unfortunately, the Council cut back the permitted number to 3,000 loads, resulting in a significant shortfall in that anticipated income.

90. Happily, having made an application in line with their planning consultant's advice, the parties had received retention permission for a further number of bedrooms at the nursing home, bringing the permitted number up to 52. This, in turn, meant that they would be able to seek additional loan finance on the security of a larger development.

91. That was the position when Mr Hutch began to advise the parties. Mr Hutch stated in evidence that all he could do at that point, having requested the partnership to prepare proper books and accounts, was to prepare a set of projections for a 52-bed nursing home, in order to enable an approach to the banks for additional finance.

92. From October 2003 onwards, Doody Crowley prepared those financial projections, based on the information provided by the parties and that firm's predictions regarding start-up and progress of turnover.

93. In January 2004, Doody Crowley prepared figures for an entrepreneur in the snack food business, who the plaintiff had identified as potential investor in the business. That approach came to nothing as, in Mr Hutch's words, 'it wasn't for him, it was an entirely different sector.'

94. Financial projections for the nursing home business were submitted to Paul Swaine of the bank in December 2003, as well as to a representative of EBS (which immediately declined to provide loan finance). In February 2004, Doody Crowley presented a funding proposal to ICC bank, which responded that it was not prepared to provide funding. Doody Crowley approached ACC Rabo Bank in March 2004, which made a funding offer contingent on the deposit of funds by the parties 'back to back' with the issue of the proposed loan – a condition that the parties did not have any resources to meet. Doody Crowley approached those two financial institutions because, according to the evidence of Mr Hutch, each was experienced in the financing of nursing home projects. Unfortunately, neither had an appetite for the Newpark nursing home project.

Tensions in the partnership

95. By March 2004, tensions were becoming evident in the business partnership between the parties.

96. The parties agree that there was a meeting at the office of Doody Crowley in early March 2004. The defendant stated in evidence that he invited his parents to meet Mr Hutch in circumstances where the parties wanted to assure the McCormacks that they would get their money back. He wanted Mr Hutch to explain to his parents the efforts that were in train to obtain further loan funding. The defendant recalled the persons present as his parents, the parties and Mr Hutch.

97. According to the defendant, the meeting did not go well. At the outset, Mary McCormack wanted to know about the status of the McCormacks' loan. In response, the defendant said: 'We will work it out', by which he meant he was hopeful that the necessary additional funds could be obtained to allow the nursing home to commence trading and the McCormacks to be repaid their loan.

Unfortunately, as the defendant recalled the conversation, his father misconstrued that statement as an assurance that the parties could work out their relationship problems and asked if they were getting back together, to which the plaintiff replied: 'Jim, this is an accountant's office, not a marriage counsellor's.'

98. The plaintiff gave a different account of the relevant exchange. According to her recollection, Mary McCormack was not present, although the defendant's brother Seamus McCormack and his wife Bizet were. The defendant's father Jim McCormack said to the plaintiff: 'There is no issue with the loan if you stay with John but if you don't stay with John we want our money.' The plaintiff's evidence was that it was in response to that comment that she retorted that they were not in marriage counsellor's office.

99. At some point shortly after that meeting, Tommy Ryan, the family solicitor visited the Newpark site with the plaintiff. According to the plaintiff, Mr Ryan said words to her there to the effect: 'I see why you want to fight - you should have independent legal advice.' In his evidence, Mr Ryan acknowledged that he had visited the Newpark site with the plaintiff and that he had advised her to obtain independent legal advice, although he did not accept the words attributed to him. He added that the nursing home site visit gave rise to a reservation on his part about its isolated location, but – as it was a commercial rather than legal one – he did not feel it was his place to raise it with the parties. Mr Ryan stated that he made the suggestion that the plaintiff obtain independent legal advice as he understood that the meeting at Mr Hutch's office had ended badly between the plaintiff and Jim McCormack. It is common case that Mr Hutch recommended a solicitor named Stephen Noonan, who practiced in a firm named O'Gradys, Solicitors, to the plaintiff.

100. Stephen Noonan was called by the defendant to give evidence at the trial of the action. He is a solicitor who, in 2004, was a partner in a firm named O'Gradys, Solicitors. He recalled that he was contacted by Mr Hutch who informed him that the plaintiff was seeking independent legal advice. Mr Noonan was in a business network with one of Mr Hutch's partners in Doody Crowley and had previously assisted Mr Hutch with a landlord and tenant matter.

101. After some initial confusion concerning the proper interpretation of his handwritten attendance notes, Mr Noonan confirmed that he first attended on the plaintiff by telephone on the morning of the 15 March 2004. A meeting had been arranged to take place at 1.00 p.m. that day in the offices of Tommy Ryan's firm, Ryan & Company, Solicitors. Mr Noonan stated that, accompanied by Mr Hutch, he met with the plaintiff in person for a coffee in a public house near the offices of Ryan & Company, shortly prior to the commencement of that meeting.

102. Mr Noonan's typed note of his attendance on that date records the main points of his instructions in the following way. The parties were the owners of the nursing home. Its value was approximately €4.6 million. Where that figure came from is unclear. No reference is made to any associated bank indebtedness. The note continues:

> 'The situation is that John McCormack's parents have advanced a sum of €830,000 to their son John and Orla for the purpose of the nursing home. The situation is extremely fraught between all parties. John and Orla are in the course of splitting up and the parents have demanded that the loan be repaid immediately.'

103. Mr Noonan recorded the plaintiff's instructions as being that she wished to continue in the business with John, and that the parties needed time to repay the McCormacks' loan.

104. Mr Noonan's note goes on to record a conversation that he had with Mr Ryan who, it would seem, was then acting on behalf of the McCormacks. Presumably, that conversation occurred prior to, or in parallel with, the meeting. The two solicitors sought to explore the various possibilities, which Mr Noonan noted as being: (1) a charge; and (2) a re-finance. Presumably that meant that the McCormacks were seeking a second charge over the nursing home property behind the bank, or were suggesting that the parties obtain further financing (or re-financing) to enable them to repay the McCormacks' loan. Interestingly, Mr Noonan's note records Mr Ryan as indicating that the McCormacks had no confidence in a re-financing and wanted a 20% share in the business, with the timing for the repayment of the loan to be agreed.

105. The meeting was attended by the parties; the McCormacks; Mr Ryan; Mr Noonan; and Mr Hutch. All sides acknowledge that it also went very badly. The plaintiff stated that the purpose of the meeting was to reassure the McCormacks concerning the repayment of their loan, although it is not clear precisely what meaningful reassurance the parties could give them. The plaintiff stated that she had told Mary McCormack that she (the plaintiff) was 'guaranteeing' the loan, but acknowledged in response to a query from the court, that she had no means to do so and really only meant that the parties could sign a deed or agreement formally recognising their indebtedness. The plaintiff said that this offer was made in response to Mary McCormack's observation that, if anything happened to the parties, there would be no evidence of the debt.

106. The plaintiff said that Mary McCormack was shouting and banging her fists on the table, demanding the repayment of the money. The plaintiff said nothing about her own conduct at the meeting. Mr Noonan's attendance note is, perhaps, a little more even-handed. It records simply that, when the meeting began, 'matters became very heated, both sides making swipes and jibes at each other.' The defendant stated in evidence that the meeting turned into a row between the plaintiff and his mother. Jim McCormack left the meeting before it ended.

107. For his part, Mr Hutch stated in evidence quite candidly that, as the meeting quickly degenerated into a family argument, he found it very uncomfortable and quickly switched off. In his evidence, Mr Ryan acknowledged that the meeting ended badly and little seemed to have been resolved other than that the defendant was to approach the bank for additional finance. Mr Noonan's note records that it was agreed that Mr Hutch was to have until the following Friday week to see if re-financing (presumably, to facilitate the repayment of the McCormacks' loan) could be arranged, but that afterwards a telephone call came through from Jim McCormack (who had earlier left the meeting), saying that he had changed his mind and that he wanted the loan repaid by that Friday.

The valuation of the nursing home

108. As part of the efforts of the defendant and of Mr Hutch to raise additional finance, a firm of auctioneers named Morrisseys was retained to value the nursing home.

109. Morrisseys produced a report and valuation, dated 26 March 2004 on the instructions of the defendant. They valued the property, no doubt by reference to those instructions and the information they had been given, as a completed 55-bedroom nursing home (although it was at that stage, according to the evidence, an incomplete 52-bedroom one). They also included, as an assumption underpinning their valuation, the existence of an oral contract with the Eastern Health Board to take 20 bedrooms within the nursing home on a long-term contract at a rate per room of €730 per week. They noted that nursing homes were normally valued on an 'earnings before interest, taxes, depreciation and amortization' ('EBITDA') basis, but that Newpark had not yet begun to trade. Accordingly, they fell back on the common approach of assigning a value per room and multiplying that value by the number of bedrooms in the development. Assessing the range of room values at between €60,000 and €85,000, they assumed a value of

€75,000 and attributed a 'hope value' of €40,000 per acre to the remaining 10 acres of undeveloped land attached to the property. While noting that they had been advised by Mr Hutch of Doody Crowley that capital allowances in the order of €2.6 or €2.7 million were potentially available in respect of the nursing home, they emphasised that no cognisance of those had been taken in the preparation of their valuation.

110. On that basis, the firm of Morrisseys assessed the open market capital value of the completed nursing home, with the occupancy levels suggested, at €4.4, or €4.5, million.

Raising additional finance
111. On 13 April 2004, the bank issued a second letter of loan sanction in lieu of the first one already described, re-sanctioning the parties' overdraft facility of €30,000 and increasing their loan facility to €2,900,000, stating that the additional €400,000 was being sanctioned to part-finance the repayment of an existing loan to the parties by Mary McCormack ('Mrs McCormack'), the mother of the defendant, and noting that the nursing home development was now to include five more beds, or 52 beds in total.

112. In his evidence, Mr Hutch confirmed that this additional finance from the bank was based on the availability of a further five beds, which the bank had valued (for loan finance purposes) at €80,000 each, hence the increase in the parties' loan facility by €400,000.

113. It appears to be common case that the additional funds provided were used, as intended, to pay down the parties' indebtedness to the McCormacks from €830,000 to €430,000.

114. It seems that Mr Hutch also succeeded in persuading the bank to make a leasing facility separately available to the partnership, presumably in respect of the beds and other specialist equipment required as part of the fit-out of the nursing home.

115. The plaintiff gave evidence that, at about that time, she suggested selling some of the 10 acres of undeveloped land around the site of the nursing home. The defendant told her that there were third party access issues with those lands because of the construction of the nursing home; percolation area; and infill, as well as issues associated with any development around the well area, that rendered those lands effectively unsaleable.

Continuing liquidity problems
116. Nonetheless, the liquidity problems of the business, continued to get worse.

117. Mr Hutch gave evidence that he visited the Newpark site frequently, more than he attended any other nursing home project with which he was involved. The parties were dealing with builders and suppliers and they generally contacted him when money was required. It was hoped to partially open the nursing home in May.

118. A particular problem from Mr Hutch's perspective was that no one was able to tell him how much more money would be required to complete the development. In consequence, it was very hard to prepare projections for the banks and Mr Hutch was becoming concerned because, in approaching banks on behalf of his firm's clients, he traded on his reputation for providing the former with reliable information on behalf of the latter.

119. In addition, it became clear to Mr Hutch that the parties were taking substantial personal drawings from the funds provided under the bank's loan facility. While Mr Hutch was aware that the defendant's logic was that he was doing considerable work on-site (and, presumably, that the plaintiff's logic would have been the same in respect of the considerable work that she was doing on the fit-out, interior decoration and management of the nascent business), he knew that banks do not lend to businesses to facilitate personal expenditure. While Mr Hutch had no personal recollection of the two significant lump sum drawings by the plaintiff reflected in the joint account bank statements, he did recall another cheque for €20,000 drawn down by the defendant to pay for the purchase of a jeep.

120. The position in April 2004, according to Mr Hutch, was that the partnership had no money to complete the construction and fit-out of the nursing home and, even if the necessary funds could be found, no money to pay wages and other operating overheads when it opened.

Registering for VAT
121. As a partial solution to that predicament, Mr Hutch suggested a tax scheme that would generate cash for the business in the short-term, albeit at the cost of incurring an equal or greater tax liability in the medium to long-term. Mr Hutch proposed the division of the parties' existing informal business partnership into two separate ones. The first would have ownership of the Newpark nursing home property and the second would operate the nursing home business there. The parties' son, John Junior, was to be given a token partner's share in the operating partnership, but not the property-holding partnership, to emphasise that the distinction between the two was real and not a mere colourable device.

122. As Mr Hutch explained it, the scheme worked as follows. The property-owning partnership registered for Value Added Tax ('VAT') with the Revenue Commissioners, enabling it to claim a rebate on the VAT element of the significant building and fit-out costs that the parties had incurred in developing the nursing home. However, the logic of this new arrangement meant that the property-owning partnership would have to charge the operating partnership a market rent on the nursing home, upon which VAT would have to be charged, meaning that, in the medium to long term, the VAT rebate obtained by the property-holding partnership was likely to be matched, and then exceeded, by its ongoing VAT liabilities.

123. In practical terms, the property-holding partnership's VAT rebate would amount to a short-term loan from the State (albeit a potentially costly one), providing the parties with at least some of the liquidity they urgently required and could not obtain elsewhere. Mr Hutch stated that, at the time, the use of the strategy by comparable businesses facing pressing cash-flow difficulties was not uncommon, although the law was later amended to prevent it. With the Newpark nursing home, it was, as Mr Hutch put it, a case of 'Live, horse, and you will get grass', from the old Irish saying 'Mair a chapaill is gheobhaidh tú féar', meaning that you must ensure that you survive in the near term, if you are to get what you desire in the end. The plan was to mitigate the longer-term tax liability of the business by de-registering for VAT after two or three years (which, Mr Hutch testified, is what subsequently occurred).

124. On the basis that the parties were proposing to adopt that strategy, the bank was asked to further extend their loan facility. On 8 June 2004, the bank issued a third letter of sanction in lieu of the second one, re-sanctioning the overdraft and loan facilities already described and providing a further bridging loan of €300,000 to facilitate the final completion and fit out of the development, together with €10,500 as the cost of a bank guarantee provided on behalf of the parties to Fingal County Council in respect of the operation of the landfill.

125. It was a condition of the new facility that the 'VAT refund of €304,000, due in August 2004' was to be used immediately upon receipt to repay the €300,000 bridging loan.

126. Mr Hutch encountered a further difficulty in that regard. Doody Crowley took on the task of assembling and writing up the financial records of the business in or about June 2004. They found that the relevant record-keeping was poor. It was only at the end of July or beginning of August that the VAT return (effectively, a VAT rebate application) went in to the Revenue Commissioners on behalf of the property-holding partnership. The aim was to generate the largest possible VAT rebate for the business. Unfortunately, invoices could not be located for approximately €300,000 in goods and service supplied to the parties. This meant that no rebate could be claimed for the VAT element of that sum (approximately €20,000 to €30,000, according to Mr Hutch) because the Revenue Commissioners would be properly assiduous in scrutinising a VAT return that amounted to a claim for a very substantial rebate. Doody Crowley had to make a big effort to get the relevant VAT return in, so that the VAT rebate could be obtained in August, as the parties had represented to the bank it would be.

The nursing home opens

127. The defendant gave evidence that the nursing home opened on 19 May 2004, which is to say it admitted its first two residents on that date. The parties had hoped it would open in April but there were various snagging issues, most notably a problem with the delivery and installation of a large set of doors. The defendant said that he confirmed the arrival of the first two residents by consulting the formal register the nursing home is obliged to keep, although neither that register, nor any extract from it, was produced in court. He stated that the date also stuck in his mind because it was precisely one year after the date on which the two pubs had been sold. There were approximately eight to 10 residents at the nursing home by July. Mr Hutch's evidence broadly tallies with that of the defendant on the point.

128. The plaintiff, on the other hand, gave evidence that, to the best of her recollection, the nursing home opened in March 2004 with approximately ten patients.

More liquidity problems

129. The defendant stated in evidence that, although the main contractor for the construction of the nursing home was on a fixed-price contract of €2.2 million, building and fit-out costs continued to accrue. For example, a waste pipe had to be installed in a ditch or culvert that then had to be filled in at a cost of approximately €90,000. The construction of the percolation area, which was not part of the works contracted for by the main builder, came in at an additional €200,000. The architect was on a percentage of the construction costs and was paid approximately €100,000. There were engineer's fees of approximately €40,000 and fire consultant's fees of €20,000. The commercial kitchen that was installed cost €50,000. A commercial laundry was installed at significant cost. Special baths were installed to facilitate disabled access that each cost €10,000. The fit-out included the acquisition and installation of fixtures and fittings, furniture, beds, catering equipment, curtains, floor tiles and so on. From no later than May 2004, when the nursing home opened, the ongoing outlay for staff wages, operating supplies, and utilities had to be discharged from the loan facility, the modest stream of income paid on behalf of the initial residents, and the limited income derived from the landfill.

130. In June 2004, the main contractor approached the defendant with a claim for 'variations' or 'extras' in the amount of €1.1 million. While that claim, which the defendant considered to have been wildly exaggerated as a negotiating tactic, was quickly negotiated down to €360,000, the builder threatened to walk off site if payment of that sum was not immediately forthcoming. The parties had no funds make that payment.

A further loan from the McCormacks

131. In response to the builder's demand and with no other source of funds available to the parties, the defendant went back to the well. He arranged a meeting with his mother Mary McCormack in Hanlon's. To demonstrate his good faith to the builder, he allowed him to accompany him. According to the defendant, the builder told Mary McCormack that, without additional funds, he would not be able to keep his men on-site. The defendant asked Mary McCormack for a further €100,000 to pay the builder and she gave it to him. On receipt of that payment of €100,000, the builder agreed to take the balance of the €360,000 he claimed to be owed in instalments of €20,000 per month.

132. This meant that the parties' aggregate borrowings from the McCormacks, which had been reduced from €830,000 to €430,000, increased once more to €530,000.

133. When these events were put to the plaintiff in cross-examination, she expressed her belief that the defendant's evidence was untrue in that regard and that the defendant's mother must have gone to the builder to make the payment of €100,000 because of her great faith in the Newpark nursing home business.

Possible investment by other members of the McCormack family

134. As early as January 2004, a third party, an entrepreneur in the snack-food industry, had been approached unsuccessfully about investing in the nursing home business.

135. Mr Hutch's summary of the Doody Crowley time records for the relevant period notes that in July 2004 the business still required €250,000.

136. On 20 July 2004, Mr Hutch wrote formally to the parties. In the opening paragraph of that letter, he states: 'Following the events of today, I feel it necessary to write to you confirming the advice given to you in the last week and to clarify any misunderstandings.'

137. In his evidence, Mr Hutch said that the misunderstanding that had arisen stemmed from a conversation he had with the plaintiff, in which he mentioned the possibility of the partners in Doody Crowley arranging a tax-based investment in the nursing home business for clients of their practice seeking a tax shelter on previously earned income. At the material time, capital expenditure incurred on the construction and fit-out of nursing homes was allowable against tax. The availability of these 'capital allowances' made investment in nursing home projects attractive for investors who had other income they wished to shelter from tax.

138. Mr Hutch thought that, if the nursing home was fully operational by the end of July, clients of his practice who were seeking a tax shelter investment prior to the end of the tax year (on 31 October) might be willing to invest. Mr Hutch felt that the plaintiff had misconstrued that suggestion as an attempt by his firm to inveigle its way into an ownership interest in the business, whereas the scheme he was contemplating was one whereby investors would acquire an interest in the property for 10 years only, with a 'put and call' option at the end of that period. It was on that basis that Mr Hutch had brought two of his partners out to view the development earlier that day. In his evidence to the court, Mr Hutch said that his partners were not happy with what they saw. They were concerned about the relative isolation of the site, from the perspective of staff and the families of residents. More

fundamentally, they were conscious that the development was not complete, and that the books and records of the partnership were poorly maintained. In Mr Hutch's opinion, the business was not being properly run.

139. The first part of Mr Hutch's letter summarises the conclusions reached at a meeting he had recently attended with the parties to review the financial position of the nursing home business and to discuss its financial over-runs.

140. Those conclusions were as follows. The builder was to be offered €260,000 in full and final settlement of all claims, comprising €100,000 up front, followed by monthly instalments of €20,000, commencing in November 2004. (Mr Hutch stated in evidence that, at the time he wrote this letter, he did not know that the defendant had obtained €100,000 from his mother to pay the builder). Creditors to the value of €89,000 needed to be paid. Fit-out costs of €76,000 had been incurred on 29 rooms and were unpaid. The parties owed €40,000 to the Hanbury Hall investment properties' rent account because the defendant had been drawing on that account to pay the interest on the loan facility as it fell due. The projected cash-flow from the landfill had fallen by €212,500 (from €275,000 to €62,500) when the local authority reduced the number of loads that could be deposited in the landfill from 11,000 to 2,500, at €25 per load. Various professional fees remained outstanding. The fit-out of the remaining six rooms was estimated to cost €40,000 and would have to be completed by November when those rooms would be required, because it was anticipated that the local Health Board would confirm an agreement to take 30 rooms from 1 September 2004.

141. Mr Hutch's letter continues by noting that it was not viable to address the funding deficit by selling the parties' family home. Mr Hutch stated in evidence that this was because he became aware of the limited equity such a sale would generate after repayment of the existing mortgage.

142. The plaintiff's evidence was that she was at all times opposed to the sale of the family home. It is common case that Mary McCormack had suggested on numerous occasions that the parties should sell the family home in Lucan and rent a home closer to the Newpark property but neither of the parties wished to take that step.

143. It would be wrong to think however that parties' ownership of their family home was impervious to the possible failure of their partnership business merely because, unlike the Newpark property, it had not been pledged as security for the associated borrowing. The partnership's overall indebtedness at that time must have been approaching €4 million and still rising (between loan financing, lease financing and overdraft facilities from the bank; the loan from the McCormacks; the debt to the builder and sundry debts owed to other creditors in connection with the construction and operation of the nursing home). The most optimistic valuation at that time of the parties' only other asset, the Newpark property and lands, was one of €4.5 million, but that valuation, commissioned by the partnership to assist in obtaining the re-financing of its borrowings against the property, is unlikely to have been a conservative one. Moreover, that valuation assumed a properly funded, completed, 55-bedroom nursing home on site (as distinct from an underfunded, incomplete, 52 bedroom one), and assumed a long-term 20-bedroom contract with the local Health Board which, as discussed later in this judgment, did not then exist and, ultimately, never came to pass. What might have happened in the event of a default on that borrowing and a downturn in the market for nursing homes, thankfully, will never be known. It is the position, however, that creditors who obtain judgment against debtors for the unsatisfied portion of any debt can register a judgment mortgage against the debtors' property, including a family home.

144. Returning to Mr Hutch's letter of 20 July 2004, he continued by reiterating his view that the only course of action available to the parties was: (1) to sell the nursing home; (2) to take the defendant's brother Matthew McCormack in as business partner; or (3) to discuss matters with Mary McCormack.

145. As his letter suggests, Mr Hutch was then aware that Matthew McCormack, the defendant's brother, was looking for an investment. Mr Hutch knew this because Matthew McCormack had recently asked him to review the figures in relation to a convenience store on the Navan Road in Dublin that he was then interested in, but later missed out on, acquiring.

146. The defendant gave evidence that he found the idea of an investor assuming an ownership interest hard to take, as the parties had hoped to retain full ownership of the business themselves. He hoped that the business might eventually prosper to the point where it would be possible to buy any investor out.

147. Among the documents discovered by the plaintiff is a typed letter on plain paper dated 26 July 2004 and addressed simply to 'John'. It is a very short letter, signed 'Orla', that states in material part:

> 'It appears that the injection of any fresh equity into the business is unlikely to take place in the current situation. If you feel that my departure from the day-to-day running of the business would facilitate the seeking of new equity I am prepared to enter into discussions in the matter with you. I will, of course, continue to have a shareholding in the property and would require an income. I would appreciate if you would consider this option.'

148. The plaintiff gave evidence that the letter was dictated to her by Mr Hutch. Mr Hutch stated in his evidence that he had no discussion with the plaintiff about that letter, much less did he dictate it to her. Moreover, he knew nothing about any suggestion that the plaintiff might withdraw from the nursing home business until she said so at a meeting a number of weeks later, which came as a surprise to him then. Mr Noonan's evidence was that he had no knowledge of that letter and no recollection of the plaintiff ever discussing its contents with him, though it was evident to him that there was a cash shortage in the business at that time.

149. On 3 August 2004, Mr Hutch wrote to the parties again, attaching financial projections for the business. In his letter, Mr Hutch pointed out that it was difficult to vouch for the accuracy of those projections in circumstances where there were missing invoices and reiterated that this could give rise to problems in seeking to reclaim VAT. There was some good news in that the permitted number of loads at the infill site appears to have increased from 2,500 to 5,000, though still far short of the projected 11,000 loads on the basis of which the parties had originally budgeted. The letter then set out Mr Hutch's most recent calculations regarding the outgoings side of projected cash-flow for the next few months.

150. The letter then continued:

> 'I know that you are in the throes of negotiating the involvement of Matthew as an investor and I would like to make the following points in relation to that:
>
> • On the assumption of a value of €80,000 per bed, completed, the nursing home is worth €4.08m. I have no idea what the value of the remainder of the land is and this will be important. Assume it is worth €0.5m. On that basis the approximate equity after accounting for bank debt and leasing will be in the order of €1.38m. (Out of this amount you owe Mary McCormack approximately €0.4m).

• If Matthew is looking at injecting €0.5m what share should he get? It really depends on how tough a negotiator he is. He may feel that unless he gets a majority holding, he is not interested. To be honest he is in a very strong position as he knows he is the only hope for the survival of the business.

• On a straight investment basis the equity after his injection would be €1.88m (assuming point one is correct) and he would be entitled to 26.6% of the partnership. What he looks for over and above this, I have no idea. As advisor to the two of you I would hope that you can get away with this but I doubt it. The necessity at this stage is cash and it would not be in both of your interests to "scupper" a potential deal.

I think that both of you should talk to Tony Morrissey who produced the last valuation for the bank in order to assess the true value of the business before you are in a position to progress the deal.'

151. Because of the significance that a particular expert witness later attributed to Mr Hutch's valuation of the equity in the business as set out in the passage from his letter just quoted, it is necessary to pause here to consider a number of aspects of it. First, it seems to be a valuation designed to assist the parties in their negotiations with Matthew McCormack. Hence it was not one intended to underestimate the value of the parties' equity in the business at that time. In that context, it is notable that Mr Hutch takes €80,000 as his value per bedroom, which is at the top end of the range of room values - of between €60,000 and €85,000 - identified by Morrisseys in their valuation, and higher than the value per bedroom they selected of €75,000.

152. Second, Mr Hutch had underestimated some liabilities and entirely omitted others, in subtracting only bank debt and the McCormacks' loan from the property valuation he had posited. The evidence so far summarised (or shortly to be described) establishes that, in August 2004, the parties had exhausted the €2.9 million they had received in loan finance from the bank, owed it another €365,000 in lease finance; and were at or near their €30,000 overdraft limit. This amounts to an indebtedness to the bank of €3.295m, although Mr Hutch has attributed a value of only €3.2 million to it (subtracting the equity he assesses of €1.38m from the valuation he posits of €4.58m). The parties' debt to the McCormacks then stood at €530,000; Mr Hutch attributes a value of only €400,000 to it. They still owed the builder €260,000, which they were hoping to pay in instalments. And, according to the cash flow summary set out earlier in the same letter from Mr Hutch; they then owed €89,000 to sundry creditors; would require a further €116,000 to complete the fit-out (budgeted as €76,000 in August 2004 and €40,000 in January 2005); owed €50,000 in outstanding professional fees (due for payment in October 2004); and had a debt of €40,000 to the Hanbury Hall investment properties' rent account, from which they had borrowed to make interest repayments on their loan finance.

153. Taking Mr Hutch's posited valuation of €4.58 million for the Newpark property and lands, if – as the evidence just summarised suggests - the total indebtedness of the parties in connection with the business then stood at approximately €4.38m, a more realistic valuation of the equity in the business, as of August 2004, would have been in the region of €200,000, representing an equity share of €100,000 per partner, rather than the €938,000 (or €469,000 per partner) that Mr Hutch was suggesting. And if the Morrisseys valuation of €75,000 per bedroom were to be substituted for Mr Hutch's assumption of €80,000 per bedroom, even that modest equity would have been entirely wiped out, leaving the partnership in negative equity.

154. The plaintiff's solicitor Mr Noonan met with her on 5 August 2004. He noted that the defendant's brother Matthew (wrongly described as Mark) was expected to come into the business. He was instructed that the situation had become more difficult in that the defendant – not the partnership – had exceeded an overdraft facility and run up more debts in connection with the nursing home construction works. Mr Noonan's note records that the sum of €400,000 was to be lodged with the partnership by the defendant's mother (rather than Matthew) and that there were to be three partners, with the plaintiff to be paid a salary to run the business.

155. On a date that is unclear in the first nine days of August, Mr Hutch received a handwritten fax at the office of Doody Crowley from Matthew McCormack, who was in Spain at the time, which he forwarded to the parties. The text of that fax was as follows:

'Subject to Matthew McCormack investing €450 (sic) in Newpark Care Centre, there are a number of conditions that need to be adhered to first:

(1) That I receive 52% of shares in Newpark Care Centre and the remaining shares be divided amongst John and Orla as they see fit.

(2) List of all outstanding debts.

(3) Letter from builder accepting an agreed amount.

(4) I receive a salary and John and Orla receive a salary which can be discussed and negotiated.

(5) Offer subject to projections of future viability from an accountant.

(6) Orla departs from the day to day running of [the] business.

(7) Any agreement will have a confidentiality clause which prohibits any party discussing any future agreements.

(8) Monies that are owed to Jim and Mary McCormack will be paid back personally by each shareholder."

156. The plaintiff stated in evidence that, while she accepts that the letter is in Matthew McCormack's handwriting, she believes that Mary McCormack was responsible for the text. The plaintiff also suspects that Mr Hutch was aware of its contents before it was sent. It was, in her view, a ploy. She could not accept the offer because; (a) it gave Matthew too large a share in the partnership at 52%; (b) it excluded her from a business that she wished to remain involved in; and (c) she did not believe she could ever repay her 50% share of the outstanding loan to the McCormacks with only a salary and a 24% share in the nursing home's future profits to rely on.

157. The defendant gave evidence that Matthew's proposal was unacceptable to him also, because it meant that the parties would lose control of the nursing home but would remain personally liable for the repayment of the McCormacks' loan.

158. Mr Hutch's summary of the Doody Crowley time records indicates that, at some point in August 2004, there was a proposal for the defendant's brother and sister, Seamus McCormack and Veronica McCormack, to become involved in the business. Both the plaintiff and the defendant stated in evidence that each thought the initial expression of interest by Seamus predated the proposed involvement of Matthew but nothing appears to turn on that. It is clear that there was a meeting at the offices of Doody Crowley on

Saturday, 14 August 2004, with Mr Hutch; the parties; and Seamus McCormack and his wife Bizet all present. The defendant gave evidence that Seamus indicated that, if he was to invest, it would be as a sleeping partner, which is to say he did not want any responsibility for the day-to-day running of the nursing home, and was happy to leave the plaintiff in charge. However, Seamus then added that, in exchange for their proposed investment, he and his wife would expect an ownership interest of about 40% and this made the plaintiff upset. The Doody Crowley time record summary includes the following sentence concerning the meeting: 'Orla insisted she would withdraw from the business at her own instigation.' Mr Hutch gave evidence that he was surprised to hear the plaintiff say that, because this was the first time he became aware of any such intention on her part.

159. In her evidence, the plaintiff had no clear recollection of this meeting. She remembered a discussion that she had with Seamus when he came to Newpark to speak to her prior to Matthew's proposed involvement in the business. Seamus indicated to her that he would invest but only if she remained involved. She was aware that Seamus and his sister Veronica had recently taken over the Glenaulin nursing home. Her recollection was that, for whatever reason, she never heard anything further from him.

160. The defendant gave evidence, supported by the partnership's banks statements, that on the Tuesday following the Saturday meeting, Seamus transferred €20,000 from his own investment account into the partnership account as a gesture of good faith. The transfer of those funds was necessary because the payment of staff wages was due and the partnership's account was at, or close to, it overdraft limit.

161. On 18 August 2004, Mr Hutch prepared a file note of a meeting his firm had organised on its own initiative with a solicitor in a firm that specialised in advising on the legal structure of investment partnerships. That note describes the existing partnership structure, involving the property-holding and operational partnerships. A possible new partnership structure for the Newpark nursing home business was then considered, involving the company Glenaulin Nursing Home Ltd and the defendant's brother Matthew McCormack each investing a sum to be agreed in the nursing home business in exchange for a one-third share each in each of the two existing partnerships. The defendant stated in evidence that there had been a suggestion of Matthew coming back into the picture on some such basis at the meeting of 14 August 2004. According to both Mr Hutch and the defendant, that proposal came to nothing.

162. The defendant gave evidence that the proposed investment by Seamus McCormack collapsed almost immediately afterwards because of a row that took place between his wife Bizet and the plaintiff. Bizet wanted to accompany the plaintiff and Newpark's director of nursing, Cathrina Boyle, to assess a number of residents at the Bloomfield nursing home in Donnybrook that it was hoped the Health Board might agree to transfer to Newpark, should those residents wish to do so. The plaintiff objected to Bizet accompanying them and they had a major disagreement on the telephone. Seamus telephoned the defendant shortly afterwards to say that his proposed investment in Newpark was off.

The bank's concerns

163. Ms Hoban wrote to the parties on behalf of the bank on 26 August 2004. In that letter, she stated:

> 'We are extremely concerned with developments that have taken place in the building and financing of the Nursing Home, and the crisis that is now looming on the cash front.'

164. Those concerns, as enumerated by Ms Hoban, were fourfold. First, the bank understood that no agreement had been reached with the builder on an outstanding claim that he had submitted for €1 million. That concern, at least, was misplaced; agreement had been reached on the builder's claim, which had been negotiated down to €360,000, as already described. Second, funding of a further €150,000 was still required to complete the building and have it operational. Taking the €89,000 then owed to sundry creditors; the €116,000 required to complete the fit-out; and the €50,000 still owed in professional fees, that seems to have been an underestimate. Third, no progress had been made in arranging additional equity or funding of approximately €700,000 which the bank understood was then required. This was undoubtedly true. No progress had been made in obtaining additional funding. While it is not clear where the figure of €700,000 came from, the need to discharge the various debts already described and to provide sufficient working capital to allow wages and other operational costs to be paid until those outgoings could be matched by income strongly suggest such a requirement. Fourth, the overdraft of the business then stood at €47,500 against an overdraft limit of €30,000, with wage payments of €14,000, lease payments of €9,900, and interest payments of €13,527 all then due.

165. The letter concluded that the bank wished to make it clear that no further payments should be made on the nursing home account(s) unless financial provision was first made for them, as the bank was not in a position to provide any additional credit to fund further items presented for payment including wages.

166. While not challenging the validity of any of the concerns raised in this letter, the plaintiff testified to her belief that Mary McCormack's malign influence was behind it and, indeed, all of the correspondence from the bank that followed. The plaintiff gave evidence that the McCormacks' loan was raised at every, or almost every, meeting that the parties had with officials of the bank. The plaintiff's belief is that, in raising as a lender the issue or status of the parties' existing third party indebtedness, the bank's enquiries were inappropriate and, worse, sinister.

167. In commenting on the letter in the course of his evidence, Mr Hutch stated his belief that the parties' relationship with the bank had become very damaged by that time. Their facilities were being regularly breached, although only by small amounts because the bank would not allow larger transactions to be honoured or larger amounts to be withdrawn. The bank was constantly telephoning him to ask what the position was with the funding of the business. All he could do confirm that the parties were actively seeking funds.

Proposed investment of John 'Jackie' Howard

168. In September and October 2004, discussions took place between the parties and a potential investor named John Howard, known as Jackie Howard. Mr Howard was called to give evidence at the trial of action by the plaintiff.

169. Mr Howard owns the Rose Lodge Nursing Home in Killucan, County Westmeath in partnership with a number of other investors. It is a 53-three bedroom nursing home. He was involved in the development of that business. He became involved because, as an investor, he was interested in the substantial tax breaks, in the form of capital allowances, available for such developments.

170. His accountant and advisor was Mr Billy Mulhern, whose practice was, and is, named J.W. Mulhern & Company and located in Naas, County Kildare. Mr Mulhern was also called to give evidence at the trial of the action by the plaintiff. Mr Mulhern is also an investor in the Rose Lodge Nursing Home and is the chairman of the company that currently operates it.

171. Mr Howard was put in contact with the parties by Peter Farrelly, who had a business named Royal Masterpiece Furniture. That business provided furniture to nursing homes across Ireland and, as a result, Mr Farrelly had developed extensive contacts in the

nursing home industry. Mr Farrelly had provided furniture to the Newpark nursing home development and the plaintiff had spoken to him. Mr Howard and Mr Mulhern visited Newpark, where they met with the parties, and had a look around. Mr Howard was impressed. He formed a very favourable impression of the plaintiff.

172. Mr Howard was interested in investing in the Newpark nursing home, primarily because of the significant capital allowances available. Mr Mulhern confirmed in evidence that those allowances alone would be worth as much as €1.2 million to Mr Howard over the period of his anticipated investment. Negotiations began between Mr Howard and the parties through their respective accountants, Mr Mulhern and Mr Hutch. Conversations took place and correspondence was exchanged between them concerning proposals and figures from approximately 9 September 2004 onwards. Heads of terms of agreement were produced on 6 October 2004. Those heads of terms were signed by the plaintiff on 8 October 2004 and by Mr Howard on an unspecified date, though not by the defendant. Correspondence followed between the two firms of accountants concerning issues of due diligence.

173. The heads of agreement record, amongst other matters the following: that the nursing home was vested in the names of the parties:, that it was subject to a mortgage held by the bank; that it was unfinished, and that amounts then due to suppliers and additional costs to completion were estimated at €650,000; that the defendant was VAT registered and the property was let day-to-day to the operating partnership of the parties and their son, John Junior; and that the nursing home then had 14 bedrooms open and approved by the Health Board.

174. The proposal under the heads of agreement was as follows: Mr Howard was to invest €650,000 interest-free in the property holding partnership in exchange for a 40% partner's share; his name was to be registered on the title of the property, subject to his obligation to pay the associated stamp duty; the parties were to retain ownership of the surrounding lands; Mr Howard was to assume liability for 40% of the bank debt, with the parties to use their best endeavours with the bank to ensure that Mr Howard's assumption of that portion of their indebtedness would be secured on the property and otherwise non-recourse (based on a misunderstanding that the parties' indebtedness to the bank was non-recourse beyond the security of the charge over the nursing home); Mr Howard was to be entitled to a 40% share of the capital allowances on the construction and fit-out of the nursing home; the operating partnership was to continue to operate the nursing home at an agreed level of annual rent, which would step up over a ten year period; the property partners were to receive monthly payments in accordance with theirs shares from the monies received from the operating partnership; Mr Howard was to be repaid his investment of €650,000 by the parties no later than at the expiration of 10 years; and there was to be a 'put and call' option requiring Mr Howard to sell, or the parties to purchase, his interest in the nursing home at that time at an agreed valuation of €2,600,000, less 40% of the bank loan then outstanding, if any.

175. The plaintiff's evidence was that both she and the defendant were delighted at the prospect of Mr Howard's investment. The defendant gave evidence that, having met with Mr Howard, he found him to be a genuine person. However, the proposed investment deal was never concluded.

176. Mr Mulhern acknowledged in his evidence that the transaction was an excellent one from Mr Howard's perspective. In exchange for lending €650,000 to the partnership, repayable in full after 10 years, he would get €1.2 million in tax breaks, a 40% partnership share in the profits of the nursing home for that period (which would be significantly sheltered by those tax breaks), and a €2.6 million payment for his 40% interest in the nursing home property, less 40% of any remaining bank debt on the construction and fit-out of the nursing home, after 10 years. There was a proposal at one point in the negotiations that Mr Howard was to have a second charge on the nursing home property, but he did not hold out for that. He was, after all, to be registered as one of the owners of the property.

177. The McCormacks, on the other hand, had a pre-existing unsecured interest- free loan to the parties of €530,000 in exchange for which they were to receive nothing but the repayment of that sum at an unspecified point in the future, should the business survive.

The defendant's hospitalisation

178. On 27 September 2004, the defendant was admitted to St. Patrick's Hospital. The hospital records show that he had been seen in the outpatient clinic there the previous month and diagnosed with a depressive episode for which he was prescribed medication. After his admission as an in-patient, his medication was increased for a period and he underwent a programme of treatment for bipolar disorder and a course of psychotherapy. He was discharged on 26 October 2004, although as his treatment progressed he had a number of day leaves and weekend leaves prior to that date. The section of the hospital records that deals with the reasons for his admission notes, in respect of 'symptoms and psychosocial stressors', that the defendant had recently built a nursing home and was under severe financial difficulties as the bank had threatened to liquidate the business by taking possession of the property. In his evidence, the plaintiff referred to the fact that the bank had also been contacting him regularly about an outstanding overdraft of €150,000 that had been left unpaid on one of the pub accounts.

179. The defendant gave evidence that his solicitor, Mr Ryan, came to him with the heads of terms of the proposed agreement with Mr Howard while he was in hospital. Those heads of terms had been provided to Mr Ryan under cover of a letter from the plaintiff's solicitor, dated 18 October 2004. The defendant stated that, on reading them, he was struck that there was no mention of the €530,000 owed to his parents. He stated that, on raising this with Mr Ryan, he was told that the parties would have to repay the McCormacks personally. The defendant said that he had thought that provision would be made in the agreement, or an understanding reached, whereby the business would assume that repayment obligation. While conscious of his obligations to the bank, he testified that his biggest concern was the McCormacks' money. Mr Ryan stated in evidence that the defendant instructed him that he was not prepared to sign the heads of terms provided because it made no provision for the repayments of his parents' loan and because he understood that Mr Howard was seeking a second charge, after the bank, over the nursing home property.

180. When this point was raised in cross-examination with Mr Howard's accountant Mr Mulhern, he stated that his job was to securitise Mr Howard's investment, and that the position of the McCormacks, or of any other unsecured creditor, was not Mr Howard's concern. Mr Mulhern acknowledged that, had the proposal in the heads of terms been implemented, it would not have improved the position of the parties' unsecured creditors. Mr Mulhern added that the McCormacks could, or should, have moved at the outset to secure their own interests since, 'if you are putting that kind of money in, you take advice; you don't allow natural love and affection to take over.'

181. It seems that the defendant succumbed to the same error as his parents in that, prioritising his parents' interests over his own financial position, he did not sign the heads of terms in respect of Mr Howard's investment. It was put to the defendant in cross-examination that neither he nor his parents had any real concern about the security of the McCormacks' loan and their priority was simply to 'torpedo' Mr Howard's involvement in the nursing home to the detriment of the plaintiff. The defendant rejected that assertion, insisting that he was as anxious as the plaintiff to secure urgently required investment in the business.

182. It is common case that, around the time of these events, the defendant said to the plaintiff that he would relinquish his interest

in the business for a payment of €300,000. The defendant testified that this occurred while he was still in hospital, although it was suggested to him in cross-examination that it happened before his admission, which he denied. The defendant said he made that offer because he was sick of things; he was fed up fighting with the plaintiff, the bank, the builders and his parents. His thinking at the time was that he would give his parents the €300,000; sign over his interest in the Hanbury Hall investment partnership to them; and repay the balance of the €530,000 owed to them whenever he could get it.

183. Both the plaintiff and Mr Howard confirmed that they discussed the defendant's offer and that Mr Howard was willing to put up the money to buy the defendant out. The plaintiff stated that she put this to someone, perhaps Mr Ryan, but was later informed by someone, perhaps Mr Hutch, that John was not going to proceed with that proposal. The plaintiff expressed the belief in evidence that the defendant's proposal was never sincere but, rather, was intended to place another obstacle in her way, as no one imagined she would be able to raise €300,000. The plaintiff expressed scepticism about the need for, and hence the reason behind, the defendant's admission to hospital.

The McCormacks demand for repayment
184. On 2 November 2004, a firm of solicitors named Doyle & Company wrote on behalf of the McCormacks to Ryan & Company, as the firm of solicitors acting on behalf of their son, the defendant, in the following terms:

> 'We understand that our clients have provided funds towards the purchase and development of Newpark Care Centre, Newpark, The Ward, Co. Dublin. The bulk of the funds were provided in order to redeem bridging finance to the AIB Bank, which your client was unable to pay on a month-to-month basis.
>
> The original funds provided were €830k of which €400k has been repaid. There was a sale of a public house, which was in the joint names of our client James McCormack and his son [the defendant], your client. James McCormack did not receive his full share of the net proceeds as they were applied by your client towards the on-going costs of the development of the care centre. The current amount outstanding to our clients is €630k.
>
> We understand that things are quite progressed with regards to a change in the nature of the ownership of the enterprise and this cannot take place until our clients have been repaid their debts.
>
> We look forward to hearing from you by close of business on Tuesday the 19th November otherwise our client will proceed as appropriate in order to protect their interest without further notice.
>
> Given the urgency of this matter, a copy of this letter is being sent to Stephen Noonan Solicitor of O'Grady's [on behalf of the plaintiff].'

185. The plaintiff acknowledged in her evidence that Jim McCormack had not received his share in the equity from the sale of one of the pubs and that it was to be paid back to him at a later stage, implying that the relevant funds were expended in connection with the nursing home business. This appears to explain why the amount due and owing to the McCormacks was described as €630,000, rather than €530,000.

186. It was put to the defendant in cross-examination that it was obvious that this letter was a ruse to thwart the involvement of Mr Howard. The defendant rejected that assertion, stating that the amount at issue represented half of his parents' life savings; that they had been actively seeking repayment of the loan since at least the previous March; and that they were entitled to move to protect that interest, especially when it was suggested that new investors might obtain priority over them.

The proposal to buy the plaintiff out of the business
187. The defendant gave evidence that, in early November 2004, his brother Tom telephoned him and they had a discussion concerning the funding crisis in the business and the money the parties owed to the McCormacks. The defendant provided the following crude summary of the position: the defendant had an issue with Mr Howard as an investor; the plaintiff had an issue with Matthew McCormack as an investor; Seamus McCormack and his wife Bizet had an issue with the plaintiff and did not wish to invest in the business; and no other banks or investors were interested in becoming involved. The defendant mentioned the possibility of Tom becoming involved in the business, as he was aware that Tom was getting out of the pub trade. According to the defendant, Tom said that he would be interested in becoming involved in the business but not in having the plaintiff as a partner. That was when the idea of offering to buy the defendant out of the business first came up.

188. The plaintiff's solicitor Mr Noonan took an attendance note on 5 November 2004 of two telephone calls. The first was with Mr Hutch. That part of Mr Noonan's note records a number of figures: that the value of the nursing home was €5 million; that the debt was €3.3 million; that €630,000 was owed to the McCormacks; that a further €700,000 was required for work in progress; and that this left a total value, presumably for the equity in the business, of €400,000. Mr Noonan's attendance note then records:

> 'The deal that has been suggested for Orla is to go for a minimum of €500k plus the house.'

189. The attendance note concludes:

> '**Attending** when I spoke to Orla McCormack who indicated that her bottom line was €500,000 plus the house.
>
> We went through the numbers and she is agreeable to be taken out of everything for that amount.'

190. In his evidence, Mr Noonan stated that he believed that Mr Hutch telephoned him. In connection with this development, he stated that his sense of the plaintiff was that she was a very savvy individual, who was operating the nursing home business at that time. She appeared strong and resilient in the face of her marital breakdown and the financial pressure from the bank. He did not get the sense that she was under any duress beyond the obvious pressure experienced by business owners where there is a cash-flow problem.

191. Mr Hutch stated in his evidence that he did not tell Mr Noonan that the value of the nursing home property was €5 million. His view had always been that the 'top line' value per bedroom was €80,000, whereas a valuation of €5 million would imply a value per bedroom of something like €100,000. In addition, Mr Hutch testified that the €500,000 offer figure did not come from him. Rather, he recalled Mr Noonan telling him that the plaintiff was looking for €1 million, to which he replied, flippantly, that the plaintiff would be lucky to get half of that because the business was on the verge of going under.

192. The plaintiff gave evidence that she spoke to Mr Hutch at about this time, explaining that she wanted €1 million for her share in

the partnership to which he replied that that was unrealistic and she should try for €500,000, although that was not put to Mr Hutch.

The plaintiff's health
193. Although no medical records were produced, the plaintiff gave evidence that at or about this time, a mole on her back was diagnosed as a malignant melanoma and she was referred to a consultant oncologist. There was some suggestion of surgery, and of radiotherapy or chemotherapy. Happily, the melanoma was excised over the course of two procedures and more extensive surgery was not required. The plaintiff still undergoes check-ups every 18 months but, thankfully, has received the all-clear to date.

194. In addition, the plaintiff said that she had a fall from a ladder at the nursing home premises at some time prior to March 2004, which was very dramatic and left her badly shaken, though fortunately did not result in any long-term injury.

The bank's demand for repayment
195. On 10 November 2004, the bank wrote to each of the parties. In the heading of that letter, the outstanding balances on the parties' nursing home accounts were set out as follows: an overdraft of €25,813.52, against a limit of €30,000; a negative balance of €2,940,151.37 on the loan account, against a limit of €2.9 million; a negative balance of €80,000 on a bridging loan account, representing its limit; and lease finance of €369,000.

196. The letter stated, in material part:

> 'As discussed on previous occasions, we continue to hold serious concerns with regard to the continued delay in the final completion and fit-out of the Nursing Home, particularly in relation to the funding of same. It is our understanding that a minimum of €650,000 is needed to facilitate the completion of the Nursing Home to full and final specification, to include the payment of outstanding creditors. As advised in August 2004, the Bank is not in a position to provide the financing for these payments.
>
> While we are aware that negotiations have been ongoing for the last 2 months with a third party in terms of an equity input to fully complete the Nursing Home and pay outstanding creditors, we would advise that, against a background where interest has not been met on the above Loan Account, the ongoing cashflow difficulties and the fact that the McCormack family are now demanding repayment of their debt, a final resolution of this position is now required to the satisfaction of the Bank.
>
> Accordingly, we now require a formal proposal agreed in writing by all parties to the said proposal, by the close of business this Friday 12th November 2004 for consideration by the Bank. Unless this is received and is fully satisfactory, the Bank will have no other option but to take such steps as it may see fit to recover payment of all existing facilities, including the realisation of any security and/or the issuance of legal proceedings.'

197. The plaintiff gave evidence that negotiations to buy out the plaintiff were continuing at this point. Mr Noonan attended on the plaintiff on the same date to discuss the position. However, the parties were unable to comply with the bank's deadline for proposals.

198. On 15 November 2004, the bank wrote to the parties again, stating:

> 'I refer to our letter of 10/11/2004 wherein we requested your proposals for the management of the above debt in light of the deteriorating cash situation.
>
> As we have now been advised that there are no proposals, we now demand repayment of all sums due to the Bank. In this regard you have until the close of business on Wednesday, 17th November, 2004 to clear all outstanding liabilities to the Bank.
>
> Interest will continue to accrue on all sums hereby demanded until the date of payment. Payment of the interest is also hereby demanded. Unless we receive full payment by the above date, we may have no option to recover payment by realising security held by us or issuing legal proceedings without informing you further.'

199. On 19 November 2004, Mr Noonan wrote to the bank on behalf of the plaintiff, confirming that negotiations were ongoing between the parties. His letter continued:

> 'We have received a draft Agreement in this matter and understand that a further Agreement will be furnished to us today.
>
> In the circumstances, we understand the Bank is willing to stay its hand pending the finalisation of these negotiations.'

The proposed transfer of Bloomfield Nursing Home residents
200. It is common case that, in the Spring of 2004, contacts began between the plaintiff, on behalf of the Newpark partnership, and the Northern Area Health Board in relation to the potential transfer to Newpark of a number of residents from the Bloomfield Nursing Home in Donnybrook, Dublin 4, which was due to close at that location.

201. In her evidence, the plaintiff stated that, from Newpark's point of view, this was like 'winning the lotto.' Most newly developed nursing homes had to build up resident numbers from scratch over many months, if not a couple of years, towards close to full capacity, with all of the attendant cash flow problems that such a slow start must entail. The plaintiff was discussing the possibility of the Health Board contracting for up to 24 beds in the nursing home, which together with the number of other residents the business was hoping to attract, would mean that the nursing home would be operating at 80% or 90% capacity within the first few months.

202. Presumably, it was the provision of this information to Morrisseys, the auctioneers, that enabled that firm to factor into its valuation, dated 26 March 2004, that the nursing home was then ready to open for business and that there was then 'a verbal contract in place with the Eastern Health Board who will take on a long term contract, twenty rooms at a rate of €730 p.w.'

203. Amongst the discovery documentation, is a letter dated 16 August 2004 from Michael Walsh, deputy chief executive of the Health Board, to the plaintiff, as manager of Newpark, informing the nursing home of the Health Board's intention to proceed with the transfer of Bloomfield residents to Newpark from October 2004 on a phased basis, requiring the ring-fencing of 25 beds, with five

additional beds to be assessed, amounting to payment for thirty beds in total.

204. The court heard evidence that the plaintiff, together with Newpark's director of nursing Cathrina Boyle, attended at Bloomfield Nursing Home by appointment shortly afterwards to conduct a clinical assessment of certain residents who were to transfer. This was at the time when it was proposed that Seamus McCormack might invest in the business, and a disagreement between the plaintiff and Seamus McCormack's wife concerning the latter's attendance at that assessment led to Seamus McCormack withdrawing that proposal.

205. The plaintiff's evidence was that the person she dealt with on behalf of the Health Board was Michael Shasby, an assistant director of nursing with the Health Service Executive ('HSE'), attached to the Department of Old Age Psychiatry at the Mater Hospital in Dublin.

206. Mr Shasby was called on behalf of the plaintiff as a witness at the trial of the action. He confirmed that, at the material time, he was a member of a four-person team tasked with assessing the suitability of alternative nursing homes to take residents from the Bloomfield Nursing Home in view of its impending closure. The other members of that team were Dr Margo Wrigley, a consultant psychiatrist and clinical director in the psychiatry of old age, together with two senior HSE managers. Evidently, Newpark was assessed as suitable for the transfer of Bloomfield Nursing Home residents.

207. On 1 November 2004, Gerry Devine, an area manager of the Health Board wrote to the plaintiff as manager of Newpark, copying a number of other Health Board personnel, including Mr Shasby. In that letter, Mr Devine confirmed that the Health Board was then in a position to consider the transfer of patients to Newpark on a phased basis, prior to Christmas of that year. Mr Devine suggested the following timetable: an open day for residents and their families on 23 November; the transfer of the first six residents on 29 November; the transfer of the next six residents on 6 December 2004; and the transfer of the remaining approximately 12 residents on 13 December.

208. Under cover of a compliments slip, dated 10 November 2004, Michael Shasby forwarded to the plaintiff a copy of a circular letter written by Mr Devine to the relatives of those Bloomfield residents that it was thought might wish to transfer to Newpark, notifying them of the proposed open day on 23 November 2004.

209. The plaintiff gave evidence that, on a date which must have been shortly prior to 15 November 2004, she spoke to Mr Shasby and told him that she might not be at Newpark much longer. She stated that Mr Shasby said that he had 'done the deal with [her] because of her caring nature.'

210. On 15 November 2004, the plaintiff wrote to Mr Shasby, as assistant director of nursing at the Mater Hospital, on 'Newpark Care Centre' headed notepaper. The text of that letter comprised the following two sentences:

> 'Due to circumstances beyond my control Newpark Carecentre is unable to proceed with the transfer of Bloomfield patients to Newpark.
>
> I apologise for any inconvenience caused and wish you well with the transfer.'

211. In his evidence-in-chief, Mr Shasby expressed the view that the letter speaks for itself in that it meant '[the plaintiff] was not able to proceed.' Under cross-examination, Mr Shasby acknowledged that he was entirely unaware that the Newpark nursing home business was a partnership and the plaintiff was then in partnership with the defendant. Mr Shasby stated that he did recall getting a phone call shortly afterwards from Mary McCormack to say that whatever arrangements were in place between the Health Board and the nursing home should continue, to which he responded that there was no arrangement in place.

212. The plaintiff testified in her evidence-in-chief that she contacted Mr Shasby as a courtesy to let both him and the Health Board know that she was leaving the Newpark nursing home. But that is a very different thing from unilaterally notifying the Health Board, through Mr Shasby, that the Newpark partnership would not be proceeding with a patient transfer that the plaintiff herself had described as a benefit to the partnership akin to winning the lotto. Under cross-examination, the plaintiff conceded that she did not discuss sending that letter with the defendant, with the bank or with her own solicitor Mr Noonan. Ultimately, the plaintiff further conceded that there was 'a distinct disadvantage to the partnership' in the way that she closed off the Bloomfield transfer but, she insisted, one that only had effect in the short term and not the long term.

213. It was put to the plaintiff that her action in sending that letter in those terms on behalf of the Newpark partnership was improper and unconscionable. The plaintiff did not accept that.

214. What is not open to question, is that the unilateral cancellation of the proposed transfer of a fixed number of residents from the Bloomfield Nursing Home to the Newpark nursing home is bound to have reduced the valuation of the latter, under the approach to its valuation adopted by the firm of Morrisseys the previous March, and that the plaintiff must reckon with the implications of that fact for her complaint that she was bought out of the partnership at an undervalue a little over a fortnight later.

The negotiation of the agreement

215. The draft agreement that was furnished by Ryan & Company, on behalf of the defendant, to O'Gradys, on behalf of the plaintiff, stipulated a payment to the plaintiff of €350,000 to buy out her interest in the business. The plaintiff said that she learned of this figure from Mr Hutch, who telephoned her while she was on holiday in Lanzarote with the parties' children to tell her that he had made a deal in that sum. Mr Noonan thought that the €350,000 figure had come from Mr Hutch. In his evidence, Mr Hutch emphasised that he played no part in the negotiation of the agreement and made no recommendation to either side to pay or accept a figure of €350,000 or any other figure.

216. On 19 November 2004, Mr Noonan wrote to Ryan & Company on behalf of the plaintiff, suggesting a number of amendments to the draft agreement they had just furnished to him on behalf of the defendant. Those amendments were requested by Mr Noonan after urgently seeking, and obtaining, the advice of Counsel. They were designed to protect the plaintiff's position in relation to; the most advantageous characterisation of the nature of the payment she was to receive; the stipulation of the consequences of any failure to make the payment agreed; the requirement for the provision of an indemnity against all liabilities of the partnership, including in particular all liabilities to the McCormacks and to the Revenue Commissioners; the deletion of a provision imposing a general obligation on the plaintiff to co-operate in the finalisation of the agreement that was considered to be too vague; and an indemnity against any tax liability arising from the execution of the agreement.

217. There was a further exchange of correspondence between Mr Ryan and Mr Noonan on 22 and 23 November 2004 concerning the

requested amendments.

The plaintiff's request for the transfer to her of the family home
218. Meanwhile, on 19 November 2004, Ryan & Company had written to Mr Noonan about the family law issues between the parties. The letter stated that judicial separation proceedings were on file and would shortly issue as the parties had by then been living apart for almost 18 months. The letter continued:

> 'We understand that discussions have taken place in regard to the family home of the parties at ….., Lucan, Co. Dublin in relation to the proposed Agreement to buy your client out of the parties' business interest in the Newpark Nursing Home, The Ward, County Dublin. Our client's postion vis-à-vis these discussions has not changed however if the Agreement does not proceed then obviously, as the Family Home will be the only remaining asset of the parties, the position will change. We understand that if the agreement does not proceed then it may not be possible to hold on to the family home in any event.'

219. The letter concluded by noting custody, access and maintenance issues would also have to be addressed in the context of the judicial separation proceedings.

220. The plaintiff gave evidence that her principle concern at that time was in securing the transfer into her name of the family home. That concern is recorded by Mr Noonan in his attendance notes. On 23 November 2004, Mr Noonan replied on the plaintiff's behalf to the Ryan & Company letter in the following terms:

> 'In regard to [the relevant paragraph] of your letter can you please confirm that, if the written Agreement concerning Newpark Care Centre proceeds, [the defendant] agrees to transfer the family home at…Lucan, County Dublin.
>
> In regard to the other issues of custody, access and maintenance these will all have to be addressed within the terms of the Judicial Separation and Family Law Reform Act 1989.'

221. This elicited a further response from Ryan & Company on behalf of the defendant by letter dated 23 November 2004, stating in material part:

> 'We can confirm that our client would be agreeable to the transfer of the Family Home of the parties at…Lucan, Co. Dublin to your client as part of the Family Law settlement. This would be contingent on the proposed agreement to buy your client out of the parties' business interest in the Newpark Nursing Home…. As obviously, if this Agreement does not proceed then [the Lucan property] will be the only remaining asset of the parties and this will change the whole situation.'

222. Both Mr Noonan and Mr Ryan stated in evidence that they thought it would be problematic to, in Mr Noonan's words, 'bolt on' the transfer of a family home to a commercial contract between separating spouses. Both accepted under cross-examination on behalf of the plaintiff that it would have been theoretically possible to do so, but neither was asked to consider what the significance or effect of such a step might be in the context of the impending judicial separation proceedings. It does not seem unreasonable to suggest that, as solicitors advising each side, where both sides were intent on judicial separation, it was prudent to leave the issue of the family home over to the family law proceedings rather than advise either side to make the family home part of the subject matter of a separate commercial agreement before invoking that jurisdiction, particularly in light of the constitutional obligation upon the court exercising it, recognised under s. 16 of the Family Law Act 1995, to make proper provision for each spouse, which may include a property adjustment order under s. 9 of that Act.

223. Moreover, it cannot be overlooked that the plaintiff has remained in continuous uncontested sole occupation of the family home at all times since the parties became estranged and throughout the very lengthy currency of the present proceedings, while the separate family law proceedings have remained in abeyance by tacit agreement between the parties.

224. The plaintiff was unclear about her discussions with Mr Noonan concerning either the proposed agreement to buy her out of the nursing home business or the transfer to her of the parties' family home, beyond recalling that the latter was her main concern. She was also uncertain about whether she ever had sight of any of the relevant correspondence just described.

225. It has to be said that the plaintiff's recollection of her interaction with Mr Noonan was generally very poor. Until the trial of the action opened in April 2015, it had been the plaintiff's position that Mr Noonan did not begin to advise her until shortly before the agreement was signed on 2 December 2004. At trial, the plaintiff acknowledged that she had been accompanied by Mr Noonan at the meeting between the parties and their legal representatives that took place in the office of Ryan & Company on 15 March 2004, approximately eight months previously. The plaintiff sought to criticise the advice provided by Mr Noonan, stating that he had really only provided his office as a place for her to sign documents. The plaintiff gave evidence that, after the meeting on 15 March 2004, Mr Noonan said to her: 'You are like the meat in the sandwich, Orla; the best thing you can do is get out.'

226. In his evidence, Mr Noonan denied that he ever made any such statement. The allegation that he did so after the meeting in March is difficult to reconcile with the evidence in the case generally and, in particular, the uncontroverted evidence that no suggestion arose that the plaintiff might withdraw from her day-to-day role in the business prior to July or August, and that the first suggestion that the plaintiff might be bought out of the business was not made until the beginning of November.

227. In addition, the plaintiff appeared to suggest at several points in her evidence that, to the best of her recollection, Mr Noonan did not advise her at all in relation to matters of family law.

228. For his part, Mr Noonan stated in evidence that he was an experienced solicitor who had been in practice since 1989. He was quite sure that the plaintiff absolutely understood that he was advising her in relation to her family law position as well as in relation to the Newpark nursing home partnership. Mr Noonan's attendance on the plaintiff of 5 August 2004 concludes by noting that the plaintiff's marital situation was discussed. Mr Noonan advised that the plaintiff should seek a mediated agreement, failing which she should proceed to seek a judicial separation. Mr Noonan's file contains a letter to the plaintiff of 6 August 2004, reiterating that advice and enclosing a mediation service booklet. Mr Noonan was adamant that he had brought the plaintiff through the correspondence concerning both the proposed amendments to the partnership buy-out agreement and the proposed transfer to the plaintiff of the family home.

229. The defendant's evidence on the point was reasonably clear. He said that he had agreed with the defendant from the very start of their estrangement that she would get the family home but that his advice has always been that it should be done as part of the overall settlement in the family law proceedings and not otherwise.

Failure to execute the agreement on 24 November 2004
230. The terms of the proposed agreement between the parties were settled on 24 November 2004 and arrangements were made to have the agreement executed that afternoon at the offices of the plaintiff's solicitor Mr Noonan. The plaintiff was to attend those offices to sign the agreement at 3.00 p.m. and the defendant was to attend at 4.00 p.m. for the same purpose and to bring with him a bank draft for €350,000.

231. The bank wrote to the plaintiff's solicitor on the same date, confirming its consent to the transfer of the plaintiff's interest in the Newpark nursing home property to the defendant or his nominee(s). The bank also confirmed that the plaintiff would be released from her obligations to the bank in respect of the nursing home loan and finance facilities upon finalisation of the transfer to the plaintiff.

232. In the event the agreement was not signed that day. The plaintiff stated in evidence that she refused to sign the agreement because she discovered that it did not include any provision effecting the transfer of the family home to her sole ownership. The defendant's evidence was that he attended Mr Noonan's office at 4.00 p.m. with a bank draft for €350,000, as arranged, but refused to sign the agreement when he was informed that he was also expected to sign a document confirming the transfer of the family home to the plaintiff. He left Mr Noonan's office briefly to phone Mr Ryan, who informed him that if he signed any such document he would have to get himself a new solicitor. Accordingly, he did not sign the agreement or the transfer document.

233. In his evidence, Mr Ryan said that he made that comment to the defendant because he had consistently advised him that the transfer of the family home should be effected as part of the overall settlement in the context of the family law proceedings.

The alleged telephone call to the plaintiff from Mr Ryan
234. In her evidence, the plaintiff alleged that, shortly after her refusal to sign the agreement on 24 November 2004, she received a telephone call while at home from Mr Ryan, the defendant's solicitor. Mr Ryan was a long-standing personal friend of the plaintiff and her former solicitor. The plaintiff alleges that, while Mr Ryan seemed genuinely concerned about her and the parties' children in the course of the call, he urged her to sign the agreement, telling her that creditors of the business were screaming for their money and she could lose the family home.

235. Mr Ryan's evidence when this was put to him was as follows. There was no such telephone call. He never telephoned the plaintiff about the proposed agreement. He had advised the plaintiff to seek separate legal representation in March 2004. It would be a case of professional misconduct on his part and a matter for the Disciplinary Committee of the Law Society if he had conducted himself otherwise. Nor did the plaintiff telephone him at the time. He would not have discussed the matter in the manner alleged by her, if she had.

236. Mr Noonan testified that the plaintiff never informed him of any such alleged telephone call from Mr Ryan.

Execution of the agreement on 2 December 2004
237. The circumstances in which the execution of the agreement got back on track are far from clear. The plaintiff stated that she can only think that she would have telephoned Mr Noonan after the telephone call she alleges she received from Mr Ryan, although without informing Mr Noonan of that telephone call.

238. The defendant gave a different account in evidence. He said that he was contacted on the telephone by the plaintiff's sister Mandy Murphy, who, by coincidence was, and is, an official with the bank, and who had asked him to try to sort things out. In her evidence, the plaintiff had rejected the suggestion that Ms Murphy had contacted the defendant, expressing the belief that the defendant had gone to see Ms Murphy at the bank where she worked. The defendant said that, on the basis of that phone call, he had gone back to his brothers who would be financing the payment to the plaintiff and investing in a new partnership with him if the agreement went through. They said they would give the agreement one more go.

239. Ms Murphy was called on behalf of the plaintiff as a witness at the trial of the action. She confirmed that she had indeed contacted the defendant but testified that she had not done so at the behest of the plaintiff to attempt to revive the agreement. Ms Murphy testified that she knew nothing about the agreement and had contacted the defendant because she was concerned about her sister's malignant melanoma diagnosis and her financial affairs, and was worried for the parties' children.

240. The agreement was finally executed in the bank's business centre on the Naas Road in Dublin on 2 December 2004. The agreement executed on that date is precisely the same agreement as the one that had been presented to the parties for signature on 24 November 2004.

The agreement
241. The key features of the agreement for the purposes of the present action are the following:

> (a) Under clause 1, the plaintiff was to receive €350,000 in consideration for the acquisition by the defendant of her capital contribution to the partnership that owned the nursing home property.
>
> (b) Under clause 3, the plaintiff and the defendant agreed and acknowledged that the various borrowings and debts of the nursing home business then exceeded the value of the Newpark property, and the plaintiff agreed to transfer her full legal and beneficial interest in the Newpark property to the defendant for a consideration of €1 and to relinquish her interest in the partnership that owned and operated the nursing home business there in favour of the defendant.
>
> (c) Under clause 11, the defendant was to indemnify the plaintiff against all liabilities, including taxation liabilities arising out of the property partnership and operating partnership at the Newpark site, save for any potential capital gains tax liability arising out of the execution of the agreement.

242. It follows that the plaintiff, who brought little or no capital into the nursing home project and who, as a partner in the project had incurred, in common with the defendant, a personal indebtedness approaching €4 million (comprising her joint liability as a partner for the partnership's indebtedness to the bank; to the McCormacks; to the Revenue Commissioners; and to sundry creditors), left the partnership with €350,001 in cash and almost €4 million in debt relief, in addition to the income that she earned – in the form of the drawings that she took - while managing the development and operation of the nursing home.

The new partnership
243. As a matter of partnership law, the departure of the plaintiff resulted in the technical dissolution of her partnership with the defendant. The defendant immediately formed a new partnership with his brothers Tom and Matthew, which assumed ownership of the property and took control of the nursing home business. Tom McCormack financed the payment of €350,000 to the plaintiff.

Thereafter, Tom and Matthew McCormack each introduced €125,000 into the current account of the partnership business. Each of the partners was allocated a one third share. The partners met with the existing creditors of the business to explain to them that there was a new partnership in place and assure them they would all get paid. Most creditors agreed to accept staged payments, as the builder had already done.

244. The plaintiff testified that, in November 2004, just before the new partnership took over, only the 14 rooms in the first section, 'Block A', were completed. The remaining 35 rooms approximately were not yet finished. They had no floor covering; no beds, no bedside lockers and no curtains – they were shells.

245. Having assumed liability for the loan facility of €2.9 million that the old partnership, comprising the plaintiff and the defendant, had received, the new partnership was able to obtain additional loan finance from the bank so that its aggregate loan facility stood at €3,988,540 on 30 April 2005, and €4,189,290 on 30 April 2006. The new partnership also assumed liability for the loan that the old partnership had obtained from the McCormacks. That loan, in the amount of €530,000, remained outstanding in 2005 and 2006.

Subsequent activities

246. After leaving the nursing home partnership, the plaintiff got a job working part-time as a receptionist in a hairdressing salon in City West, southwest Dublin. In 2005, Mr Howard contacted the plaintiff and asked her to come and work at his Rose Lodge Nursing Home in Killucan, County Westmeath as general manager, effectively running the nursing home on behalf of the owners. The plaintiff is the 'nominated provider' of nursing home care at Rose Lodge for the purposes of the Health Information and Quality Authority ('HIQA'). The plaintiff has a small equity in Rose Lodge of approximately 4%. In their evidence to the court, both Mr Howard and Mr Mulhern, who each have an ownership interest in Rose Lodge, spoke highly of the plaintiff as a manager there.

247. The defendant said that, under the initial agreement he reached with Tom and Matthew, he stepped back from direct involvement in the Newpark nursing home. The defendant had to re-mortgage his interest in the Hanbury Hall residential investment properties to repay the €40,000 that the parties had borrowed from its rent account to pay the interest on the loan finance they had obtained from the bank. Under the agreement, the plaintiff had to pay the PAYE, PRSI and income tax on the drawings that both he and the plaintiff had taken from the business for their own benefit in 2004. That came to approximately €80,000. Although the plaintiff offered to pay her half of the overdraft on the parties joint account, for logistical reasons the bank could only accept the discharge of that debt as a single payment (presumably, because the bank was unwilling to accept the discharge of half of the overdraft by either of the parties as satisfaction of his or her obligation to the bank, since each of the parties was jointly and severally liable to the bank for the whole amount of the overdraft). Accordingly, the defendant took out a ten year loan in the sum of €60,000 to pay it off.

248. For the first year after the new partnership agreement, the defendant did not draw an income from the nursing home business. This was to facilitate the more expeditious payment of its creditors. From January 2005, he took a job with a friend who was doing up apartments. Then he got a contract erecting hoarding around a redevelopment site close to Dublin city centre. He had no steady income but his earnings were averaging €550 per week. It was only when the plaintiff rang him to say that a tax rebate cheque had arrived at the family home that he was able to make a payment to her.

249. Jim McCormack, the defendant's father, who had been ill for some time, died on 19 June 2015 in the midst of the trial of the present action.

The affidavit sworn by Mr Hutch on 3 February 2005

250. Among the documents discovered by the defendant is an affidavit sworn by Mr Hutch on 3 February 2005. It comes from the file of the defendant's solicitor Mr Ryan. It does not bear the title of any proceedings. There are just four paragraphs in it after the oath. The first paragraph identifies Mr Hutch and contains the usual averment as to the source of the deponent's knowledge. In the second, Mr Hutch avers that he was engaged by the parties as accountant and auditor for their nursing home business. The third paragraph describes the agreement. The operative paragraph is the fourth and final one. There, Mr Hutch avers:

> 'I say that in my opinion the net asset value of the business at the date of the Agreement was nil as bank debt and creditors were greater than the value of the underlying asset which was incomplete and in my opinion incapable of trading at a profit without a substantial injection of new capital. Numerous unsuccessful attempts were made to secure investors all of whom were of the opinion that the level of debt exceeded the value of the premises.'

251. Mr Ryan testified that he was the person who took the decision to request that Mr Hutch swear an affidavit addressing the value of the nursing home property at the date of the agreement. He did so because he was conscious of the valuation that the firm of Morrisseys had placed on the property and lands of between €4.4 and €4.5 million at 26 March 2004 (albeit without reference to the associated liabilities of the partnership that owned it). Mr Ryan wanted to have evidence on file in case of any query by the Revenue Commissioners. After it was sworn, the affidavit simply sat on the file. Mr Ryan said that, while he had probably drafted the first three paragraphs of the proposed affidavit, he believes the last was drafted by Mr Hutch. In his evidence, Mr Hutch was not certain he had drafted the last paragraph of the affidavit but nothing turns on the issue because he certainly stood over its contents in his sworn evidence to the court.

252. In his evidence to the court, Mr Hutch explained that the basis upon which he attributed a nil valuation to the partnership business was as follows. First, he took the rule of thumb valuation of €80,000 per bed that he had adopted in his letter of the previous August, which - multiplied by the 52 beds that the completed nursing home was to contain - gave a figure of €4.16 million, to which he added €330,000 or €340,000 as a valuation of the surrounding lands, giving a top line value for the development and lands of €4.49, or €4.5, million.

253. From that figure he deducted the following: the bank loan of €2.9 million; the leasing facility of €400,000; creditors worth €89,000; further fit-out costs of €76,000; bank interest of €40,000; a scheduled payment of €200,000 to the builder; outstanding professional fees of €50,000; seven further instalment payments to the builder of €20,000 each (€140,000); the McCormacks' loan of €400,000; and what Mr Hutch characterised as the VAT loan of €294,000 (which I take to mean that, having registered for VAT to obtain a rebate on construction and fit-out costs, the property holding partnership was now going to have to collect VAT on the rent it charged to the operating partnership to a broadly equivalent value, making the VAT rebate, in effect, a loan to the property holding partnership that would have to repaid by the operating partnership).

254. This gives a total indebtedness of €4,589,000 against a value of €4,490,000 or €4,500,000 for the property and lands, which were the only asset of the partnership.

255. When Mr Mulhern, the chartered accountant who advised Mr Howard and who - together with Mr Howard and the other owners

of Rose Lodge Nursing Home - now employs the plaintiff, was asked to comment on Mr Hutch's averment that the nursing home business had a negative value and was incapable of trading at a profit without a substantial injection of new capital in December 2004, he responded that he would not argue with that assessment, which he described as 'the smart common sense of an accountant.'

The evidence of the plaintiff's expert accountant

256. At the trial of the action the plaintiff called as a witness Liam Grant, a chartered accountant with the firm Grant Sugrue & Company, forensic accountants and registered auditors.

257. Mr Grant's first involvement in this case was in the preparation of an expert report, dated 'July 2014.' That report describes the work conducted by Mr Grant's firm as 'a preliminary review', so qualified because the report recites that the firm did not then have all of the financial information and documentation that it required to conduct a full review. The relevant material was never obtained and the firm's preliminary review thus became final. Mr Grant met with the plaintiff at a single consultation that lasted approximately half an hour but, essentially, he relied on the pleadings and documents furnished to him by the plaintiff's solicitor.

258. Mr Grant subsequently produced a further report dated 22 April 2015. In that supplemental report, he presented the results of a Companies Registration Office search that he had conducted regarding the members of the new partnership: the defendant; Tom McCormack; and Matthew McCormack. It had disclosed, as is common case, that a company named Newpark Care Centre Limited was incorporated on 21 December 2010 of which those three persons are the shareholders and directors. In his evidence, the defendant said that he and his brothers transferred the business from their partnership to a limited company, incorporated for that purpose, on tax advice. The most recent financial statements then filed on behalf of the company demonstrated an annualised profit in 2013 of €485,000 and an annual profit in 2012 of €506,401. Clearly, the Newpark nursing home is now significantly profitable, as everyone always hoped it would be.

259. In the summary at the end of Mr Grant's report of July 2014, he notes that it 'features minimum information/documentation.' Nevertheless, in that report and in his evidence, Mr Grant expressed two significant opinions.

260. The first such opinion was that it would not have been possible for any sensible accountant advising the plaintiff in October 2004 to say that there was no equity in the business.

261. In expressing that view, Mr Grant took as his starting point the estimation of the value of the equity in the business set out in Mr Hutch's letter to the parties of 3 August 2004. That is to say, Mr Grant took as a fact Mr Hutch's approximation of €980,000 as the equity then in the business. Mr Grant took no account of the context in which that valuation was produced nor, more importantly, of the basis upon which it was arrived at. For the reasons set out at paragraphs 151 to 153 above, that undermines the fundamental premise on which Mr Grant's opinion is based.

262. A further infirmity in that expression of opinion is that, while Mr Grant acknowledged the valuation produced by the firm of Morrisseys was among the papers furnished to him, he conceded that he had not seen it (whether he meant 'recently' or 'at all' was not clear). If he had, he might have been less insistent that the valuation of the Newpark property (and hence of the equity in the partnership that owned it) had to include a premium in respect of the available capital allowances, in light of the fact that the Morrisseys valuation did not consider it appropriate to do so. He might have questioned whether €80,000 per bedroom was a necessary or realistic component of Mr Hutch's valuation in light of the firm of Morrissey's view that €75,000 was a more appropriate one, within a range of values between €60,000 to €80,000. He might have done so particularly in light of the fact that the Morrisseys valuation assumed a completed 55-bedroom nursing home, rather than an incomplete 52-bedroom one, with a lucrative contract in place with the Health Board.

263. Another problem with the expression by Mr Grant of this opinion is that it rested in part on the related proposition that, contrary to all of the available evidence (including the concession of the plaintiff to that effect), the business was not really experiencing a cash flow crisis throughout 2004. This, in turn, forced Mr Grant into some difficult positions. For example, in relation to the statement in Mr Hutch's letter to the parties of 3 August 2004 that 'the necessity at this stage is cash', Mr Grant insisted that it implied no more than the – one might say banal and superfluous – statement that every business needs an income. In relation to the statement in the bank's letter to the parties of 26 August 2004 that a 'crisis' was then 'looming on the cash front', Mr Grant expressed serious reservations about whether that correspondence may have been contrived. In relation to the strategy of creating a separate property-holding partnership and registering it for VAT, Mr Grant took the view that to register for VAT or not was an inconsequential choice, devoid of any practical significance. The adoption of these various positions allowed Mr Grant to express the view that he could see no basis to conclude that the value of the equity in the partnership might have diminished between August and October or, indeed, December 2004.

264. Lastly on this point, the manner in which the relevant question was framed (*i.e.* what advice would a sensible accountant have given concerning the valuation of the equity in the business in October 2004?), meant that Mr Grant never had to address his mind to the issue of how the unilateral cancellation of the proposed Bloomfield residents transfer by the plaintiff on 15 November 2004 might have affected that advice in the context of an agreement to buy out the plaintiff's equity that was not finally executed until two weeks after that.

265. The second significant opinion that Mr Grant expressed is the one set out in the summary of his July 2014 report. There, Mr Grant expresses the view that the consistent suggestion in all of the correspondence in the latter part of 2004 that the partnership business required a significant injection of capital and equity cannot be reconciled with the position after 2 December 2004 whereby no new equity was introduced into the business and the bank provided it with additional finance to the extent that the loan facility associated with it increased from €2.9 million in 2004 to €4.18 million at 30 April 2006.

266. In his evidence, Mr Grant expanded darkly and obliquely on the significance of this asserted paradox by expressing 'serious reservations' that the situation may have been 'contrived'.

267. Mr Grant several times posed the rhetorical question 'what changed between the period before 2 December 2004 and the period after it?', before partly answering his own question in observing that the plaintiff left the business on that date. Of course, the second part of the answer is that Thomas McCormack and Matthew McCormack entered the business at the same time.

268. It is common case that, just prior to accepting €350,000 in cash and almost €4 million in debt relief to exit the business, the plaintiff had no capital of her own to invest in it and no access to any such capital to invest on terms acceptable to the defendant regarding the security of the McCormacks' loan. Tom McCormack, who Mr Hutch described as a successful businessman, did have access to capital, evidently in the form of a willingness on the part of the bank to extend further loan facilities to the new partnership

in which he was now involved (and in which the plaintiff was not). In addition, the evidence of the defendant and of Mr Hutch was that each of the two new partners lodged €125,000 in the new partnership's current account – evidence that I have no reason to doubt despite Mr Grant's suggestion that he can find no evidence in the limited documentation available to him that the new partners introduced any equity into the business. The plaintiff had no track record in business; Tom McCormack had, by all accounts, a very good one. Accepting that the plaintiff was an excellent nursing home manager, the overwhelming preponderance of the evidence establishes that the nursing home business was very badly managed by the parties. And in the same way that the bank drew obvious comfort from the re-composition of the partnership operating the business after 2 December 2004, I can find nothing surprising, much less sinister, in the conclusion that the McCormacks felt less urgency in securing the repayment of their loan from the new partnership than they had felt in doing so from the old one.

269. For the reasons I have just given, I was unable to derive assistance from Mr Grant's evidence.

Conclusions of fact and law

270. It has been necessary to provide so extensive a conspectus of the evidence in this case for two principal reasons. The first is the large number of different allegations made by the plaintiff and the broad range of persons, alleged to be servants or agents of the defendant, against whom she makes them. The second is the contention advanced in the closing submission made on behalf of the plaintiff that, to do justice in this case, the court has to assess a course of events that run from 2001 to 2006. Accordingly, that is what I have endeavoured to do.

271. The parties did not differ in their identification of the applicable principles of law, although there were of course differences of emphasis between them.

272. I propose to set out various findings of fact, applying the law to the facts so found as I go.

(i) the valuation of the partnership business

273. Both in her evidence and in the submissions made on her behalf throughout the trial, the plaintiff sought to emphasise that the prospects for the Newpark nursing home business were always excellent and that this has been borne out by the success it has had since the plaintiff's departure from it. In evidence and in argument, the plaintiff sought to contrast those propositions with the suggestion that the nursing home partnership was on the brink of insolvency or, worse, actually insolvent in the second half of 2004. If the first proposition is correct, the plaintiff's argument appears to run, then the second can only be a misrepresentation and, in the manner in which it was relied upon by the defendant in this case, a fraudulent one at that.

274. Having carefully considered the evidence, I have come to the firm conclusion that both propositions are correct and, moreover, that they are easily reconcilable in light of the fundamental problem that the partnership at the centre of this case encountered. That problem was undercapitalisation. The Oxford Dictionary of English, revised 2nd edn., defines 'undercapitalisation' as 'the provision of insufficient capital to produce desired results.' Since adequate start-up and expansion capital are critical not just for the success of a business but frequently for its survival, even a business with excellent prospects can fall into insolvency when it is undercapitalised. So it was with the business partnership between the parties in this case. Similarly, the combination of a business with good prospects and sufficient capitalisation will, more likely than not, yield success. So it has proved with the new partnership that took over the Newpark nursing home business on 2 December 2004.

275. The valuation of a business, more even than the valuation of a property, is not an exact science. The question is not, therefore, whether a valuation is in any sense mathematically correct but whether it is reasonable.

276. The plaintiff's claim in this case, first pleaded in the statement of claim delivered on her behalf on 28 June 2005 and never afterwards amended, is that the open market value of the partnership business was in the order of €4.5 million and that, at the time, the total liabilities were in the region of €375,000. That plea is untenable on the evidence. If, on the other hand, the figure of €375,000 is accepted as a typographical error for what should have been €3.75 million, the plaintiff's claim loses all force. That is so for two reasons. First, it suggests a net equity of €750,000, a 50% share in which would be worth €375,000, by comparison with which a payment of €350,000, together with the provision of significant debt relief, could hardly be said to be an undervalue.

277. Second, such a claim would wrongly elide the distinction between the sale of a share in a business, which can have an open market value, and a payment offered in respect of the dissolution of a partnership, which cannot. The plaintiff might have attempted to assign the benefit of her partnership share to a third party, but she could never have assigned her partnership in the business in that way for, as Smith MR explained in *Re Tipperary Joint-Stock Bank* (1856) 6 Ir Ch R 72 (at 78):

> '[I]n cases of partnership, one partner could not transfer his interest to a stranger, on this obvious principle – the members of a partnership might have confidence in each other, but they might not have confidence in the person to whom any of them might choose to assign his interest.'

278. In any event, I am satisfied that the nil-value that Mr Hutch subsequently attributed to the partnership business at 2 December 2004 was, by reference to all of the evidence I have set out, a reasonable one. It follows that I am further satisfied that the consideration provided to the plaintiff in exchange for her agreement to the dissolution of the partnership and for relinquishing the value of her partnership share in it was a fair or, more likely, moderately generous one.

279. Having rejected the plea that the defendant, his servants or agents, fraudulently misrepresented to the plaintiff the value of the partnership business, I must also reject the obverse claim that one or more of those persons made a fraudulent misrepresentation to the plaintiff by not disclosing, or concealing, the true value of the equity in the nursing home business.

(ii) the risk to the parties' personal assets and to the credit rating of each

280. I am satisfied by reference to all of the relevant evidence set out earlier in this judgment that, by November 2004 if not earlier, the nursing home partnership had run out of working capital and was in default of its obligations towards the bank in respect of the loan, overdraft and leasing facilities that had been extended to it. In the circumstances, the parties were jointly liable to the bank for all of the monies owed to it and were subject to all of the risks faced by defaulting debtors, including a risk to their family home and to the credit rating of each. How large that risk was in relation to the family home, in particular, is a different matter. For previous generations, it may have been a vanishingly small one in practice, if not in theory. A glance at a newspaper or news website nowadays is enough to suggest that that is no longer the case.

281. In its letter of 15 November 2004, the bank had expressly indicated that it was reserving its right to recover payment by

realising the security it held or by issuing legal proceedings. The security it held was a first charge over the nursing home property. Such security is realised by the appointment of a receiver. I conclude that the representation that there was a risk, a likelihood even, that a receiver would be appointed to the only significant asset of the partnership was not a misrepresentation. If that risk came to pass, all would thereafter depend on the sale price of that asset obtained by the receiver on behalf of the bank.

282. In so far as either the defendant, Mr Hutch, Mr Noonan or Mr Ryan alerted the plaintiff to any of the foregoing risks, I find that there was no misrepresentation.

283. As regards the plaintiff's assertion in evidence that Mr Ryan telephoned her while she was at her home, between 24 November and 2 December 2004, to warn her of a risk to her family home and to her credit rating if she did not enter into the agreement then proposed, I accept Mr Ryan's evidence that no such telephone call took place. This is an allegation that was never properly particularised. At paragraph 7 of the statement of claim it is alleged that various fraudulent misrepresentations – including, *inter alia*, 'the likelihood that the plaintiff could lose her family home' and 'the likelihood that the plaintiff could lose her credit rating' - were made by the defendant, or unspecified servants or agents of the defendant, in unspecified circumstances at unspecified times.

284. In my view, that pleading does not comply with the requirement of Order 19, rule 5(2) of the Rules of the Superior Courts ('RSC') that '[i]n all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence…, particulars (with dates and items if necessary) shall be set out in the pleadings.'

285. In *Superwood Holdings plc v Sun Alliance & London Insurance plc* [1995] 3 I.R. 303 (at 327), the Supreme Court (*per* Denham J; Hamilton CJ and Blayney J concurring) cited with approval the following passage from Kerr on Fraud and Mistake (7th ed.) at p. 644:

> 'When an action is brought for the purpose of impeaching transactions on the ground of fraud it is essential that the nature of the case should be distinctly and accurately stated. The facts must be so stated as to show distinctly that fraud is charged. Any charge of fraud or misrepresentation must be pleaded with the utmost particularity; it will not be inferred from the circumstances pleaded, at all events if those circumstances be consistent with innocence. A general charge of fraud, however strong, without alleging specific facts, is not sufficient to sustain the action. It must be shown in what the fraud consists and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly. A charge of fraud must be proved as laid, and where one kind of fraud has been charged, another kind of fraud cannot be substituted for it.'286. Even if that difficulty could be surmounted, I have in any event concluded that Mr Ryan was a truthful witness.

(iii) the McCormacks demand for the repayment of their loan by the parties and their willingness to lend to the new partnership.

287. The relevant pleas advanced on behalf of the plaintiff are that the defendant, his servants or agents: (a) fraudulently misrepresented to the plaintiff that the McCormacks' loan had to be repaid urgently; and (b) made a fraudulent misrepresentation to the plaintiff by failing to disclose that the McCormacks were prepared to invest further money in the business (and later did so), rather than being anxious to be repaid.

288. Insofar as the McCormacks, through the letter written by their solicitors on 2 November 2004, demanded repayment by close of business on 19 November 2004 of the balance then outstanding of the monies they had loaned to the parties, I am quite satisfied that the said loan fell due to be repaid accordingly. It is common case that the parties owed the relevant monies and I am satisfied, on the balance of probabilities, that the loan was repayable on demand. Accordingly, any such demand brought its own urgency.

289. There was an undercurrent in both the evidence and the submissions of the plaintiff that the McCormacks could not lawfully or, perhaps, equitably demand repayment of the monies they had loaned to the parties, without first establishing that they required those funds urgently as a matter of their own economic necessity. I can see no basis for any such submission. Whether the McCormacks were wealthy or not; whether the monies concerned formed part of their life savings or not; and whether they had any pressing personal economic need for those funds or not, are each an irrelevant question on which there was, in any event, no admissible evidence before the court.

290. And for the reasons I have already given, I am entirely unpersuaded by the suggestion that the McCormacks willingness to lend money to a properly capitalised, properly managed business partnership, comprising three of their sons, is in any way inconsistent with their understandable desire to obtain repayment of the money they had loaned to a dangerously undercapitalised, badly managed business partnership, comprising one of those sons and his estranged wife, that was already in breach of its bank borrowing limits.

(iv) a concealed intention to exclude the plaintiff from the nursing home partnership?

291. I find that the plaintiff has failed to make out her claim that the defendant made a fraudulent misrepresentation or false representation to her by failing to disclose that he wished to exclude her from the business. The defendant several times in evidence stated words to the effect that he wanted the parties' business partnership to succeed; that he respected the hard work that the plaintiff had put in to the business; and that he thought that the circumstances of her eventual departure from it were unfortunate and sad. I found the defendant to be a measured and truthful witness. I conclude that the defendant did not want to exclude the plaintiff from the business and that, accordingly, there cannot have been any failure to disclose the existence of an intention to the contrary.

(v) a misrepresentation about the transfer of the family home under the agreement?

292. The plaintiff's evidence on this point was that, on or about 24 November 2004, the defendant or Mr Noonan, or both, provided her with an assurance that the family home would be transferred as part of the proposed agreement, which representation was false, and was intended to induce, and did induce, her to enter into that agreement on 2 December 2004. That evidence is inconsistent with the evidence of those persons and with the terms of the correspondence that passed between Mr Noonan and the defendant's solicitor, Mr Ryan, at the material time. I am satisfied, on the balance of probabilities, that what was represented to the plaintiff at all material times by, and on behalf of, the defendant was that he would consent to the transfer of the family home to her but, in accordance with the legal advice available to him, only in the context of the overall settlement of the family law proceedings.

(vi) the remedy of rescission for fraudulent misrepresentation

293. In Delany, *Equity and the Law of Trusts in Ireland*, 5th edn. (Dublin, 2011) ('Delany') at p. 721, the author states that a contract can be rescinded both at common law and in equity were there has been fraudulent misrepresentation, citing as the leading

authority on the point the decision of the Supreme Court in *Northern Bank Finance Corporation Ltd v Charlton* [1979] IR 149. For the reasons I have already given, I conclude that there has been no material misrepresentation by or on behalf of the defendant to the plaintiff, whether fraudulent or innocent, by assertion or omission, in connection with any of the matters that are the subject of the present proceedings.

294. Even if it were otherwise and these were not idle *obiter dicta*, I do not think that it would be open to the court to order the remedy of rescission in this case because of the practical impossibility of *restitutio ad integrum.* When this point was raised in argument on behalf of the defendant, objection was made on behalf of the plaintiff that it was too late in the day to do so. I think that misunderstands the position. I do not believe the impossibility of *restitutio ad integrum* is a defence that must be raised in a pleading in order to be relied upon. Rather, I think that before a court can order the equitable remedy of rescission it must be satisfied that the restoration of the *status quo ante* is feasible; *per* Henchy J in *Northern Bank Finance v Charlton*, already cited (at 197-8). The difficulty here is that, for each side to divest itself of what it has received under the contract, the defendant would have to return to the plaintiff a 50% partnership share in a business in which he now holds only a one third partnership share and, in an even more conceptually difficult exercise, the plaintiff would have to return €350,000 in cash and reassume approaching €4 million in debt in connection with her partnership share in that business. It is perhaps not surprising that the argument on behalf of the plaintiff did not touch, much less dwell, upon how the Order of rescission that the she is seeking might be enforced.

(vii) undue influence

295. The plaintiff claims that the agreement resulted from the exercise over her by the defendant, his servants or agents, of unfair and unreasonable mental control or domination, which actions amount to unfair and improper conduct, coercion, over-reaching and cheating, which negated the plaintiff's independent judgment and caused her to enter into a transaction disadvantageous to her. The plaintiff continues that these were fraudulent and wrongful acts from which the defendant obtained a substantial benefit.

296. These various pleas draw together the language from a number of leading decisions on the doctrine of undue influence.

297. As O'Malley J observed in *Lynn v O'Hara Lynn* [2015] IEHC 689, the leading case in this area is the decision of the Supreme Court in *Carroll v Carroll* [1999] 4 I.R. 241. Denham J (with whom Lynch and Barron JJ concurred) cited with approval (at 253-4) he *dictum* of the House of Lords (*per* Cotton LJ) in *Allcard v Skinner* (1887) 36 Ch. D. 145 that the decisions on undue influence whereby gifts or transactions may be set aside can be divided into two classes. First, where the transaction was the result of influence expressly used by the other party for that purpose; and second, where the relations between the parties at, or shortly before, the transaction are such as to raise a presumption that the other party had such influence.

298. The first question I must ask, therefore, is whether the defendant, his servants or agents, expressly applied undue influence that caused the plaintiff to enter into the agreement. I am satisfied that they did not. I have already found that the undercapitalisation crisis that the nursing home business experienced with increasing intensity throughout 2004 was genuine and not contrived. I have also found that the partnership was in default in respect of its loan facilities, despite the earnest efforts of the parties, through the agency of Mr Hutch in particular, to avoid that predicament.

299. I do not accept that the defendant, as the plaintiff's husband; or Mr Ryan, as a personal friend of the plaintiff and her former solicitor; or Mr Hutch, as the accountant to the nursing home business in which both parties were partners, exercised any, much less any unfair or unreasonable, mental control or domination over the plaintiff.

300. In the course of her evidence to the court, the plaintiff more than once referred to her unwavering belief in her ability to make a success of the parties' nursing home business, if only the defendant would provide her with the necessary support. The gist of her complaints about the defendant's conduct, whether justified or not, related to his weakness rather than his dominance, whether in standing up to his mother or in supporting the plaintiff in the nursing home business (as the plaintiff saw it).

301. As regards her dealings with the defendant, as her business partner, and Mr Hutch, as the partnership's accountant, the plaintiff' initial position was that she never had access to the financial side of the business, arguably implying that one or other of those persons exercised some form of mental control or domination over her in that regard. However, she never suggested that either the defendant or the partnership's accountant, Mr Hutch, had prevented her from having access to any financial information she might require, and she acknowledged under cross-examination that she had untrammelled access to a partnership bank account to make drawings, including personal drawings, as she saw fit.

302. When questioned during her evidence in chief about the expression of 'extreme concern' in the bank's letter of 26 August 2004 regarding a 'crisis' that was then 'looming on the cash front', the plaintiff's response was that, while she was not trying to 'pass the buck', the defendant had been in charge of the partnership's finances. In relation to the decision to make the parties son, John Junior, a partner in the nursing home operating partnership as part of Mr Hutch's VAT rebate scheme, the plaintiff's evidence was that she knew that John Junior had been given a small partnership share but she was not sure why. Under cross-examination concerning financial over-runs in the construction of the Newpark nursing home, the plaintiff acknowledged that she was not familiar with the 'building end of things.' The tenor of all of this evidence was not that the plaintiff was dominated by, or subject to the control of, the plaintiff or Mr Hutch but that she was simply inattentive to, or uninterested in, the financial and capital management side of the business.

303. I have already indicated that I do not accept that Mr Ryan attempted to exercise, much less that he succeeded in exercising, any domination or control over the plaintiff at any time and certainly not after the plaintiff began to obtain the independent legal representation and advice of Mr Noonan in March 2004.

304. I do not accept as a matter of fact that Mr Noonan was ever a servant or agent of the defendant. Therefore, the question of him exercising dominance or control over the plaintiff on the defendant's behalf does not arise.

305. The plaintiff claims that those persons – the defendant, the bank, Mr Hutch and 'the [d]efendant's business partners, who are related to the defendant' – 'conspired as the servants or agents of the [d]efendant to exercise undue influence on the [p]laintiff resulting in a transaction which [was] manifestly disadvantageous to her.' This is a claim of such gravity in respect of each of the persons concerned, including the defendant, that I am satisfied that it attracts the application of Order 19, rule 5(1) of the RSC, which – in requiring the necessary particulars, with dates and items where necessary, where undue influence is alleged – must apply *a fortiori* to an allegation of conspiracy to exercise undue influence.

306. The plaintiff has provided no meaningful particulars of an alleged conspiracy so broad in scope that it extends beyond the plaintiff to encompass a bank, a chartered accountant and the plaintiff's two brothers who are both, on the evidence before the

court, respectable businessmen. At the trial of the action, although it was nowhere mentioned in the pleadings, it was submitted on behalf of the plaintiff:

> 'The simple fact of the case is that it is not possible to conclude that the bank has a concern that is not driven by, or that is independent of, the plaintiff's mother-in-law's manipulation of the situation. This is all immensely cunningly planned. The court has to be prepared to see through what is a very, very clever scheme devised by a lady of immense commercial acumen and unbridled ruthlessness.'

307. It was not fair to the defendant or to the person concerned to purport to make a case at trial nowhere presaged, much less pleaded with the necessary particularity, in the plaintiff's statement of claim. That procedural impropriety has been compounded by a closing submission in which the court has been invited to draw inferences adverse to the defendant from the defendant's failure to call his widowed mother as a witness at trial to respond to that allegation. As it happens the evidence adduced on behalf of the plaintiff at trial could not have satisfied the court that the person concerned has a case to answer. The court was satisfied, however, as no one present in court during the trial could fail to be, that the plaintiff bears her mother-in-law considerable ill will.

308. Having considered the evidence already summarised as carefully as I am able, I am satisfied that the agreement at issue was, if anything, advantageous to the plaintiff where the alternative was, on the balance of probabilities the liquidation of the parties' partnership. I am further satisfied that the plaintiff has failed to establish in evidence, by a very wide margin, any conspiracy of the kind she alleges against the persons she identifies. Finally, I have concluded, on the balance of probabilities that no undue influence was applied to the plaintiff by the defendant, his servants or agents.

(viii) is undue influence to be presumed?

309. The plaintiff further pleads that the facts of the case and the nature of the relationship between the parties (that of husband and wife) give rise to a presumption of undue influence, in circumstances where the plaintiff relied entirely on the advice of the defendant's accountant; the defendant's bankers; and the defendant's 'business partners'.

310. This is an invocation of the second class of case identified in *Allcard v Skinner*, already cited, and approved by the Supreme Court in *Carroll v Carroll*, already cited also, namely those cases where the relations between the parties at, or shortly before, the transaction are such as to raise a presumption that the other party had an undue influence on the person now making complaint. Costello J approved the same taxonomy of cases in *O'Flanagan v Ray-Ger Ltd*, Unreported, High Court, (Costello J), 28 April 1983.

311. I do not think that this case falls into that category. The basis upon which it is asserted that it does is that the parties were wife and husband at the material time. This is not a transaction between an elderly widower and a son as in *Carroll*; nor one between an elderly woman and her son, as in *Lynn*; nor one between a vulnerable elderly woman and her nephew as in *Prendergast v Joyce* [2009] 3 IR 519. While in the last of the three cases just mentioned, Gilligan J was careful to make clear (at 532) that the categories of relationship to which the presumption applies are neither closed nor rigid, I share the view expressed by Murphy J for the Supreme Court in *Bank of Nova Scotia v Hogan* [1996] 3 IR 239 (at 247-8) that, while references have been made in the courts of other jurisdictions to women being treated 'more tenderly' by the law than others and to the 'the invalidating tendency' applied by courts in relation to transactions between a husband and a wife, the consequence is not that the presumption applies but that it may be possible to identify circumstances in a particular case which would more readily raise the presumption in favour of a wife than any outside party. I can identify no such circumstances in this case, in view of the conclusions of fact I have already reached. The parties dealt as equals. They were broadly the same age; of broadly similar education and experience; in similarly straitened circumstances, and had similar access to advice. Neither was suffering from any intellectual disability or cognitive impairment. Neither was significantly more vulnerable than the other. Both were experiencing similar stresses and strains.

312. If I were wrong about that and the presumption did apply, then the onus would shift to the defendant to disprove undue influence. As Delany explains (at 728):

> 'The manner in which the presumption may be rebutted relates to two main issues; first, the question of whether independent legal advice has been received and secondly, whether it can be shown that the decision to make the gift or transfer was "a spontaneous and independent act" or that the donor "acted of his own free will".

313. It is in this context that, under this head of claim, the plaintiff pleads that the defendant, through his servant or agent Mr Hutch, procured Mr Noonan, as solicitor, to advise the plaintiff but that Mr Noonan did not provide effective or independent legal advice in relation to the transaction, which was put in place by the defendant.

314. Having carefully considered the evidence, I am in no doubt that Mr Noonan did provide effective and independent legal advice. The nature and extent of the interactions between the elderly, infirm, recently bereaved donor and the solicitor who advised him in *Carroll*, already cited, as described by Barron J in that case (at 261-2), are many leagues distant from those between the plaintiff and Mr Noonan in this case. Mr Noonan had a knowledge of all of the relevant circumstances, in so far as the proper diligence he showed in attending on the plaintiff, taking full instructions, and obtaining the advice of counsel on her behalf would permit. The plaintiff was not ill-educated, vulnerable or infirm at the material time. Instructions must be provided as well as taken. Insofar as I have already found that the plaintiff was inattentive in relation to the financial and capital management of the business, no blame can be laid at Mr Noonan's door for failing to supply that deficit. Nor, for that matter, can any such blame be laid at the door of Mr Hutch. There was no question in this case of Mr Noonan 'blithely following instructions without stopping to consider whether to do so was appropriate' as was, regrettably the position in *Carroll*.

315. Thus, even if I am wrong in my earlier conclusion that the presumption does not arise in the particular circumstances of this case, I am in no doubt that, if it did arise, it has been rebutted.

316. Indeed, in my judgment it has been doubly rebutted because I am also satisfied that the plaintiff's decision to sign the agreement was 'a spontaneous and independent act' and that she 'acted of her own free will.' In this context, the plaintiff asserted a number of times in the course of her evidence that she signed the agreement because she had 'no choice.' I do not accept that. There was the security of the agreement with its payment of €350,000 in cash and accompanying debt relief of almost €4 million, though bringing with it the end of her involvement in a business that she loved, on the one hand, and the plaintiff's desire to remain in a partnership that was on the brink of liquidation, about which she could only hope for the best, on the other. To be sure, the plaintiff may have had a difficult or unpleasant choice to make, but that is not the same thing as having 'no choice.'

(ix) an unconscionable transaction?

317. The plaintiff pleads that the parties to the agreement did not meet on equal terms because: (a) the plaintiff was ignorant of the value of the premises and business, taking due account of its liabilities; (b) the plaintiff had 'incomplete knowledge' of the position of the defendant's parents as unsecured creditors of the partnership business and of their requirement that the debt due to them be repaid; (c) the plaintiff's home was at risk to her creditors (or so the plaintiff had been led to believe by the defendant, his servants or agents); (d) the plaintiff's credit rating was at risk; (e) the plaintiff needed to provide for her children in light of the defendant's refusal to support them; (f) the plaintiff was unable to think clearly and rationally, or to cope, in light of the mounting pressure placed on her by the defendant, his servants or agents, making her vulnerable to manipulation; and (f) the partnership business was at risk.

318. This plea is an invocation of that equitable jurisdiction whereby, as Gavan Duffy J described it in *Grealish v Murphy* [1946] IR 35 (at 49), '[e]quity comes to the rescue whenever the parties to a contract have not met upon equal terms.' I have already concluded that the parties here did meet on equal terms.

319. The most succinct modern restatement of the relevant test for setting aside a transaction on grounds of unconscionability is that set out in the judgment of Peter Millett QC in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 (at 94-5):

> 'First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken. Second, this weakness of the one party has to be exploited by the other in some morally culpable manner…And third, the resulting transaction has been not merely hard or improvident, but overreaching and oppressive…In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself.'

320. For all of the reasons I have already set out, the plaintiff fails each limb of ths test. First, I am satisfied the parties met broadly as equals, though equals under significant commercial and personal strain. Second, I have already found that the terms of the agreement did not, and could not, amount to exploitation of the plaintiff. Third, the agreement was neither hard nor improvident. Fourth, *a fortiori*, it was not overreaching or oppressive. Fifth, there was no impropriety in either the conduct of the defendant, his servants or agents, regarding the contract or in the terms of the agreement itself.

321. Insofar as the plaintiff was ignorant of the value of the premises, and I do not believe she was (as she had access to the valuation of Mr Hutch, which I have found to have been reasonable), that would have been the consequence of her own consistent inattention to the financial and capital management of the business. The plaintiff had broadly the same knowledge of the McCormacks' requirement that the debt to them be repaid as the defendant, which is to say the McCormacks had become understandably nervous about the security of their funds in view of the increasingly imperilled position of the partnership due to undercapitalisation and were becoming anxious to get their money back. Once the business was being properly run by a new partnership with access to adequate capital, their concerns appear – perfectly understandably – to have evaporated. The parties were jointly liable for the debts of their partnership and, in consequence, their assets were equally at risk. The risk to the partnership business equally affected both parties. The obligation to provide for their children equally applied to both parties. Mediation is desirable in the event of any difficulty in that regard and the family law courts are available to resolve any otherwise intractable disputes. No transaction that any party wanted to avoid could withstand an application for an order of rescission if all it was necessary to do to obtain one was to baldly assert that the party concerned had not been thinking clearly at the time because of the relevant personal and commercial pressures. No evidence of any psychological impairment on the part of the plaintiff was adduced at trial. The defendant would have been in a better position to impugn the transaction on that basis.

322. Accordingly, I reject the plaintiff's claims that the defendant, his servant or agents – in the arcane language of the jurisprudence – 'unconscientiously' took advantage of the plaintiff's weaker position as just described, imposing the agreement upon her in a morally reprehensible manner.

(x) duress

323. The plaintiff pleads that the defendant put her under duress, in the form of intimidation, by making the misrepresentations already pleaded. In that regard, it is only necessary to reiterate my earlier conclusion that no misrepresentation, fraudulent or otherwise, has been established on the balance of probabilities in this case, hence no question of intimidation arises.

324. The plaintiff further claims that the defendant put her under economic duress by exerting economic and commercial pressure upon her. The plaintiff makes two specific allegations in that regard. The first is that the defendant thwarted or frustrated Mr Howard's proposed investment in the nursing home for the improper purpose of subsequently forcing the plaintiff out of their nursing home business partnership. The second is that the defendant somehow 'assigned' Mr Noonan to act as her solicitor, contriving, as a colourable device', the appearance that the plaintiff had the benefit of independent and effective legal advice, when in reality she had none.

325. I have no hesitation in rejecting each of those submissions. I have already accepted the defendant's evidence in relation to his reasons for refusing to sign the heads of terms of Mr Howard's investment proposal.

326. In relation to the plaintiff's assertion that Mr Noonan's legal representation was somehow foisted upon her, I cannot overlook the fact that she was, at the relevant time, an adult woman of at least normal intelligence, holding herself out as an adept businesswoman. The suggestion that she was uniquely incapable of selecting her own solicitor or moving solicitor if unhappy about the nature of quality of the advice that she was receiving is, at best, unconvincing, at worst, ridiculous. Moreover, this second assertion carries with it, as an ineluctable inference, the proposition that Mr Noonan, in flagrant and disgraceful breach of his obligations both under the Solicitors Code of Conduct and as an officer of the court, allowed himself to be used as the defendant's catspaw to subvert or damage, rather than to advance, the interests of his client. It is an allegation for which not a scintilla of evidence was produced at trial and one which I entirely reject, without a moment's hesitation.

327. Undoubtedly, personal and commercial pressures were in play (on both sides) in the run up to the agreement but, as Charleton J pointed out when considering the concept of economic duress under the law of contract in *ACC Bank plc v Dillon* [2012] IEHC 474, fraught circumstances of negotiation do not of necessity amount to illegitimate pressure for that purpose. Or as Dyson J put it for the England and Wales Technology and Construction Court in *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] B.L.R. 530 (at 545), '[i]]llegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.' For all of the reasons I have already given, I am satisfied that, while the pressures of commercial bargaining in this instance were intense, involving as they did a partnership business on the brink of receivership and a marriage between the partners that had recently failed, they were not contrived either by or on behalf of the defendant and they were not, in that or any other sense, illegitimate.

(xi) damages

328. The plaintiff pleads that she has suffered loss, damage, inconvenience, expense, upset and distress as a result of the inequitable conduct and breach of contract of which she complains, for which she claims damages calculated as past and future loss of income in the amount of €500 per week, net of tax, and loss of profit in an amount as yet unascertained. As all of her allegations have been rejected, this claim cannot succeed.

Conclusion
329. The plaintiff's action is dismissed. I will make an Order in terms of the declaration sought in the defendant's counterclaim.