

THE HIGH COURT

2006 No. 593 P

BETWEEN

VINCENT KEANEY

PLAINTIFF

AND

JAMES SULLIVAN, MICHAEL NOLAN AND JULIA NOLAN

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 19th day of December, 2008.

1. The plaintiff commenced proceedings by plenary summons issued on the 8th February, 2006. The proceedings made multiple claims and many allegations against eighteen named defendants arising out of transactions between the plaintiff and the various parties in the year 2000 and in relation to the running of a public house between the year 2000 and 2003 and in respect of various transactions and agreements in 2003 and 2004. In those proceedings the plaintiff sought to set aside all transactions, deeds and property transfers entered into and effected by him both in 2000 and 2003.
2. After the commencement of the proceedings on application of the fourth, seventeenth and eighteenth named defendants the proceedings were admitted to the Commercial List and an order to that effect was made on the 3rd April, 2006. On that date an order was made requiring the plaintiff to deliver a statement of claim on or before the 13th April, 2006.
3. On the 24th April, 2006 at a hearing for directions in the Commercial Court and following an application by a number of the defendants, in relation to the form of the statement of claim, Kelly J. ordered that "the plaintiff be at liberty to deliver an amended statement herein by close of business on the 8th May, 2006, the said statement of claim to be properly drafted, in the proper form and properly particularised". An amended statement of claim was delivered on the 8th May, 2006. That was the first amended statement of claim.
4. A number of the defendants brought motions before the Court seeking orders striking all or part of the plaintiff's pleadings and/or proceedings against certain defendants pursuant to Order 19, rule 27 and rule 28. Directions were given by Kelly J. on the 3rd July, 2006 in relation to the motions pursuant to Order 19, rule 27 and rule 28 and they were set down for hearing on the 25th July, 2006.
5. On the 24th July, 2006 the plaintiff, without leave of the Court, purported to deliver a further amended statement of claim and at the hearing of the motions on the following day it was accepted that the Court should take into account the further proposed amendments contained in the statement of claim dated the 24th July, 2006 which thereby became the second amended statement of claim.
6. Those motions were duly heard before the Court on the 25th, 26th, 27th and 28th July, 2006 and a detailed written judgment was delivered by the Court on the 16th January, 2007. The Court made a number of orders on the 26th January, 2007 striking out all claims against the third, eight, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth named defendants and limiting the claims as against the first, fourth and eighteenth named defendants. On the 26th March, 2007 the Court made a further order striking out all claims against the fifth, sixth and seventh named defendants. The Court also ordered delivery of an amended statement of claim to plead the surviving causes of action allowed and permitted by the judgment of the Court. On the 15th February, 2007 the plaintiff delivered a further amended statement of claim in purported compliance with the order of the Court. On the 26th February, 2007 a motion was heard in relation to a claim that the purported amended statement of claim, delivered pursuant to the order of the Court on the 26th January, 2007, was not in compliance therewith and the Court duly determined, by order on the 26th February, 2007, that the amended statement of claim delivered did not make sense and did not comply with the order of the 26th January, 2007 and indicated that the Court was prepared to afford the plaintiff one final opportunity to deliver an amended statement of claim and that the plaintiff deliver a statement of claim in a proper, appropriate and acceptable form.
7. On the 11th June, 2007 a further application was made on behalf of the first named defendant to strike out the remaining claims for failure to comply with the order of the Court made the 26th January, 2007. The Court made an order that the plaintiff "do have leave to amend for the eighth time the statement of claim herein". Two further amended statements of claim had been delivered on the 12th March, 2007. On the 18th June, 2007 a further motion came before the Court claiming that the plaintiff had failed and refused to comply with the order of the Court made on the 26th January, 2007 and having read the re-amended statement of claim, amended for the eighth time, the Court deemed that re-amended statement of claim be the final statement of claim. On the 18th April, 2008 a motion brought on behalf of the fourth and eighteenth named defendants seeking to strike out the plaintiff's statement of claim for failure to comply with the order of the Court of the 26th January, 2007. The Court duly ordered that the plaintiff do deliver an amended statement of claim precisely in accordance with the order of the Court pleading the surviving causes of action particularised in relation to those particular matters and no further additional matters. On the 2nd May, 2008 the plaintiff delivered a further statement of claim in purported compliance with the order of the 18th April, 2008. A motion was brought returnable for the 20th June, 2008 claiming that the statement of claim delivered on the 2nd May, 2008 was not in compliance with the order of the Court of the 18th April, 2008. On the 26th June, 2008 the Court made an order directing that portions of the statement of claim be excised so as to ensure compliance with the order of the High Court made the 26th February, 2007 and a statement of claim in compliance with that order was duly delivered on the 1st July, 2008. That is the statement of claim which is for consideration by the Court and which identified the remaining issues. The plaintiff did not proceed against the second named defendant and the claim proceeded against the first, fourth and eighteenth named defendants in relation to the claims set out in the statement of claim delivered on the 1st July, 2008, (the final statement of claim).
8. The remaining claims against the first named defendant are that he was negligent, in breach of duty and in breach of contract. The claim is set out at paras. 28 and 30 of the statement of claim delivered the 1st July, 2008. The plaintiff claims that the first named defendant was engaged by the plaintiff to obtain and negotiate with an investment partner and render independent financial advice to the plaintiff. There is also a general allegation of conflict of interest made against the first named defendant. That is pleaded at para. 30(a) of the statement of claim, wherein it is alleged that the first named defendant "negligently and in breach of contract failed to disclose to the plaintiff his (the first defendant's) conflict of interest". Paragraph 30 of the statement of claim seeks to set out the particulars of negligence, breach of duty and breach of contract alleged against the first named defendant. In paragraph 23 of the statement of claim it is pleaded that unknown to the plaintiff the first named defendant already had a close existing conflicting professional and business relationship with the fourth named defendant and it is claimed by way of example that the conflict is demonstrated by the opening of a joint bank account with the fourth named defendant. No claim was pursued against the second named defendant, the wife of the first defendant.

9. There are a number of claims against the fourth named defendant, Michael Nolan. The plaintiff continues to make a limited claim against the eighteenth named defendant, Julia Nolan. The nature of that claim was identified by counsel for the plaintiff on the opening of the case wherein it was stated "Julia Nolan is simply sued because she is a purchaser or a purchaser in the deed which is dated September 2004".

10. As regards the fourth named defendant, the extent of the continuing claims permitted against him was identified at pages 35 and 36 of the judgment of Ms. Justice Finlay Geoghegan J. of the 16th January, 2007, namely:-

"2. All claims against the fourth defendant are struck out other than

(a) The claim for damages for breach of contract in respect of the alleged agreements of 2000 in relation to the matters pleaded in paragraphs 27, 32(i) and 57 concerning the discharge of debts of Pollexfen Design Limited.

(b) The claim in relation to the deed of assignment dated the 30th September, 2004, between the plaintiff and the fourth and eighteenth defendants as pleaded at paragraph 73(i)/(vi) and the first sentence of paragraph 74 subject to such sentence being amended to be confined to the deed of assignment now dated the 30th September, 2004 between the plaintiff and the fourth and eighteenth defendants in respect of the premises Scott's Building, Cobh, Co. Cork.

(c) A claim for damages for breach of contract in respect of the agreement and breach thereof alleged at paragraphs 91 and 92 of the statement of claim in relation to the Tregan Building subject to amendment to claim and particularise loss and damage alleged. ...

5. All claims against the eighteenth defendant are struck out except the claims in paragraphs 73(1) (vi) and 74 subject to the amendment as directed above."

11. The plaintiff's claims against the fourth defendant include: (a) alleged breach of contract concerning a claim that the fourth named defendant was obliged to discharge the debts of Pollexfen Design Limited, and (b) that the fourth named defendant breached the 2000 agreement by failing to discharge the debts due by Pollexfen Design Limited. The defence denies that there was the 2000 agreement as alleged and contends that the only agreement is to be found in a letter dated the 19th July, 2000 from the fourth named defendant to the plaintiff and signed by the plaintiff on the 20th July, 2000 and further that such agreement makes no provision for the discharge by the plaintiff of any Pollexfen Design Limited debts. `

12. Another remaining claim against the fourth named defendant concerns the Tregan building and claims a breach of agreement by the fourth named defendant and seeks declaratory relief. The plaintiff claims that the obligation in relation to Tregan shares arises from a manuscript agreement dated the 31st March, 2000. The defendant denies that any such agreement was concluded and claims that such agreement as was concluded made no reference to Tregan shares and further that such offer as was made in relation to the Tregan shares was not accepted or acted upon by the plaintiff. The final claim relates to the deed of assignment dated the 30th September, 2004. It is to be found at paragraphs 42 and 56 of the final statement of claim. It alleges that the deed has been interfered with by the fourth named defendant in a number of ways and that the figure identified for consideration was blank on the day upon which the plaintiff signed the deed and that no cash consideration passed and that the deed does not have a true or correct consideration inscribed thereon and that the true value and nature of the transaction was not disclosed to the Revenue and it is claimed that by reason of the foregoing the deed is void or voidable and it is claimed that the deed is properly to be dated the 24th July, 2003. It is also claimed that the plaintiff has suffered and continues to suffer loss, damage, inconvenience and stress as a result thereof. The final statement of claim does not repeat an earlier plea that there was no valid consideration for the 2003 assignment. The particulars in relation to this claim are set out in paragraph 42 of the final statement of claim. In paragraph 42, sub-paragraphs (v), (vi), (vii) and (viii) matters are pleaded which were not pleaded in the amended statement of claim considered by Ms. Justice Finlay Geoghegan and are not matters in respect of which the plaintiff has been given liberty to plead and are outside the matters permitted by the judgment of the Court of 16th January, 2007. The Court will however address those matters later in this judgment. There is a full denial of all claims by the remaining defendants.

13. The plaintiff is a businessman from Cobh in the County of Cork. In the early 1990s he won the lotto and received a seven figure sum. Out of his winnings he bought a number of properties, one of those was the Old Cunard White Star building or Scott's Building in the centre of Cobh. It was the old terminal building used in the period when Cobh was a port on the trans-Atlantic liner route.

14. The plaintiff decided to develop the old terminal building and set about obtaining urban renewal status for the building. The plaintiff proposed to use the building as a theme pub and restaurant to be called "The Titanic Bar and Restaurant". As part of that plan the plaintiff obtained a license at a cost of approximately IR£78,000 in 1999. He also succeeded in his attempts to have the building designated from urban renewal status. The plaintiff's evidence was that he had purchased the building for IR£110,000 and thereafter expended considerable sums in an attempt to bring the project to a stage where it could open. The plaintiff gave evidence that he expended in the region of IR£430, 000 to IR£470, 000 on the project. However, by early 2000 the plaintiff was in financial difficulties and had no more capital. He had also borrowed extensively in an attempt to complete the project. The plaintiff had a loan agreement with Allied Irish Banks in Cobh. By early 2000 the plaintiff had exceeded the limit of his sanction and owed a figure of some IR£475,000. The plaintiff faced real problems in endeavouring to complete the project. He sought investment from third parties. The plaintiff in evidence stated that in or about February, 2000, "there were a number of people interested in coming on board, coming on board with me to rescue the project". By this stage the building works had come to a near standstill and urgent investment was needed to enable the project to be brought to completion. The plaintiff summarised the position as of February, 2000, in the following terms:-

"... Mr. Declan Malone was a quantity surveyor and he recommended a costing of the building and the costing of the building was put at X and we engaged an engineer and a very good builder and between the jigs and the reels we discovered that the building ran into trouble due to there was some heavy engineering required that we could not have planned for. So that caused an overrun and AIB in Cobh was a small operation and the overrun ran to the extent they pulled the plug and felt that project could use superior business acumen and business knowledge. ...we had gone as far as we possibly could."

15. Mr. Keaney approached a number of potential investors, one of them was Richard Fitzgerald. By early March, 2000, Mr. Keaney was in direct contact with Mr. Fitzgerald concerning a potential agreement for a joint venture to enable the completion and operation of the project at Scott's Building in Cobh in County of Cork known as Titanic Queenstown Bar and Bistro. The financial position of Mr. Keaney had become critical. He had received a letter of the 21st February, 2000, from the Revenue indicating that tax return and

payments due from his Company, Pollexfen Limited, were due and that a representative from the Revenue proposed to call to see Mr. Keaney on the 28th April, to deal with outstanding matters and with a view to bringing the Company's tax affairs up to date.

16. The negotiations between Mr. Fitzgerald and Mr. Keaney reached a stage where a document entitled Heads of Agreement was drawn up which provided a template for the potential future ownership and operation of the Bar and Bistro business. That template provided that the new investor was to have a 51% interest in the operation and Mr. Keaney a 49% interest. Mr. Keaney was to be employed on an annual salary to work for the new management company. The Heads of Agreement outlined the agreement reached between Mr. Keaney and Mr. Fitzgerald. Ultimately however, no concluded agreement was achieved. In those negotiations and contained within the Heads of Agreement document was a working model as to how a future joint enterprise might be arranged.

17. The discussions between Mr. Fitzgerald and Mr. Keaney took place before Mr. Keaney met any of the defendants.

18. The first of the defendants which Mr. Keaney came into contact with was James Sullivan. Mr. Sullivan was a qualified chartered accountant, having qualified in 1986. Originally he had trained with Ernst & Whinney and later worked abroad with KPMG. He had returned to Cork in 1990 and had commenced practice as a chartered accountant under the name, Sullivan & Associates. In the mid-1990s he was joined in the practice by his wife and over the following five years he carried out extensive consultancy work. In 1999, Mr. Sullivan ceased to practice as a chartered accountant and he disposed of his practice to a Dublin firm of accountants, Ormsby Rhodes. Thereafter he continued his professional life as a consultant and set up ICP Consultants. It traded as a limited Company and it was whilst carrying on that business that Mr. Sullivan came into contact with the plaintiff. That was in March, 2000.

19. By that date, Mr. Sullivan had well established business connections with Michael Nolan, the fourth named defendant.

20. A good relationship had built up between the two men. Mr. Nolan became a client of Mr. Sullivan. Mr. Sullivan assisted Mr. Nolan in his pub businesses. Mr. Nolan bought one pub in Kinsale in the mid-1990s and a second pub in Cork City in 1997 or 1998. Mr. Sullivan operated the financial systems for those pubs. Mr. Keaney was aware of the connection between the parties as Mr. Nolan invited Mr. Keaney to review the bar operations carried out at the Oyster Bar in Cork. Mr. Keaney visited the Bar and during the visit, Mr. Sullivan outlined to him how the bar was operated and the various systems that were in place.

21. Even though it is claimed by Mr. Keaney that there was a failure to disclose the business relationship between Mr. Sullivan and Mr. Nolan, the evidence shows that Mr. Keaney must have been fully aware of the close business contacts between those two men. Mr. Keaney claimed that he was unaware that Mr. Sullivan was a director of a company operated by Mr. Nolan but that fact is of little relevance given that Mr. Keaney was fully aware that Mr. Sullivan was involved in overseeing and implementing the control systems in Mr. Nolan's public houses. It was because Mr. Sullivan worked for Mr. Nolan that he was in a position to introduce Mr. Nolan to Mr. Keaney.

22. The first meeting between Mr. Keaney and Mr. Nolan took place on the 4th March, 2000. During that meeting Mr. Keaney explained his project in Cobh and outlined his financial difficulties and those of his Company (Pollexfen). Mr. Keaney explained that he was in difficulties with his bank and his cheques were no longer being honoured.

23. At the first meeting, Mr. Sullivan was not only informed of the existence of Mr. Keaney's Company, Pollexfen, but was also told that that Company had its own accountants and solicitor.

24. Mr. Sullivan agreed to provide some assistance to Mr. Keaney. It was agreed that he would meet with the manager of the AIB in Cobh to see if the banking arrangements could be stabilised and the "pressure relieved".

25. Mr. Sullivan met the bank manager, Gerry Deegan, and had a discussion in relation to the "Titanic Project". The bank indicated that they were satisfied with the level of security but were worried that the bank accounts had run out of money and that it appeared that Mr. Keaney was not going to have sufficient finances to finish the project. Mr. Sullivan stated in evidence that he arranged for the bank to provide Mr. Keaney a few weeks grace under a number of conditions, namely that Mr. Keaney would stop writing cheques and that work would be halted on the project on a temporary basis so that the debts would not further increase and also that if the bank contacted Mr. Keaney either by letter or phone that Mr. Keaney would respond. Mr. Sullivan indicated that he left the meeting with the bank and went straight to Mr. Keaney and informed him of its outcome.

26. At that time Mr. Keaney informed Mr. Sullivan that he had identified three potential investors. They were unnamed.

27. The evidence is that it was on the 13th March, 2000, that Mr. Sullivan introduced Mr. Nolan to Mr. Keaney. Mr. Sullivan had given Mr. Nolan an outline of Mr. Keaney's project. All three met in Cobh on the 13th March and viewed the premises. Another meeting between the three took place on the following day. Mr. Keaney indicated that he had a good idea of the terms which he was seeking in any joint venture. In particular, he indicated that he was desirous of running the joint venture through a company and of receiving a salary from the company.

28. On the following day, the 15th March, 2000, Mr. Sullivan went with Mr. Keaney to see his solicitor, Mr. Donegan. The meeting was to enable Mr. Sullivan to outline his experience to Mr. Donegan and to explain his knowledge of and involvement with the public house businesses. Mr. Nolan was identified as a potential investor. The outline of the basis for a potential investment was identified including the fact that the property would be owned 49.51, 50.50 or 51.49 between Mr. Nolan and Mr. Keaney and that Mr. Keaney, who had expended IR£475,000 by that date, would document and vouch such expenditure. A number of other matters were dealt with, which are set out in the attendance docket of the solicitor of the 15th March, 2000. It was also noted that there was an important licensing application due for hearing on the 5th April, 2000. Mr. Donegan explained that even though he was Mr. Keaney's solicitor, he was not dealing with that matter as it was being dealt with by another solicitor. The prospect of Mr. Keaney working for the company at a salary of IR£35,000 p.a. was also outlined. The template for a joint venture for the project was identified on the 15th March, 2000. That template was similar, in many respects, to the Heads of Agreement which Mr. Keaney had previously drawn up with Mr. Fitzgerald. Both approaches were similar in that they sought to operate the business through a company, that there was to be a division of the company or property on a 51 to 49 or similar basis and there was to be provision for the employment of Mr. Keaney by the Company at a salary of IR£35,000 p.a. Both identified the need for the incoming investor to provide equity to facilitate the completion of the project.

29. Mr. Sullivan categorised his involvement between the potential business partners, as of March, 2000, as being a dealmaker with a view to bringing two people together to complete a deal. He had not been engaged by either party and in particular, neither Mr. Keaney nor Mr. Nolan were employing him. At the meeting between Mr. Keaney and Mr. Sullivan which took place on the 9th or 10th March, 2000, Mr. Sullivan had sought to be professionally engaged on a fee per day basis but Mr. Keaney expressly refused such proposal.

30. Mr. Keane, in his evidence, acknowledges that Mr. Sullivan raised the issue of him working for Mr. Keane and being paid. He also confirms that such proposal was rejected on the basis that Mr. Keane did not have the funds to pay Mr. Sullivan. Mr. Keane stated in evidence that he told Mr. Nolan that "he would have to negotiate with any new partnership and it would be for the new partnership to pay him". The evidence is clear that Mr. Sullivan offered to work for Mr. Keane for a fee and that such offer was refused and that no fee was ever paid by Mr. Keane.

31. Following a meeting between Mr. Keane and Mr. Sullivan at Mr. Keane's solicitor's office on the 15th March, 2000, Mr. Sullivan proceeded to draw up a draft Heads of Agreement for consideration by Mr. Keane and Mr. Nolan. The draft addressed the issues covered at the meeting.

32. The evidence establishes that in the days following that meeting that there was no further contact between Mr. Keane and Mr. Sullivan. On the 24th March, 2000, Mr. Sullivan endeavoured to make contact with Mr. Keane through his solicitor, Mr. Donegan. Mr. Sullivan gave evidence that following that attempt he did, in fact, meet Mr. Keane and it was agreed between Mr. Keane and Mr. Sullivan that Mr. Sullivan would issue draft Heads of Agreement for consideration by both Mr. Keane and Mr. Nolan. Mr. Sullivan had prepared those draft Heads of Agreement and they were duly issued on the 27th March, 2000.

33. The draft Heads of Agreement document was prepared for Mr. Keane and Mr. Nolan. It was a discussion document. Its form was narrative and opposite each entry was a section for the reviewer's comments or notes.

34. The evidence establishes that by the 24th March, 2000, when Mr. Keane agreed that Mr. Sullivan should go ahead and issue a draft Heads of Agreement to Mr. Nolan, a significant event had occurred. Mr. Sullivan was unaware of that event and proceeded to issue the draft Heads of Agreement in ignorance of what had occurred. On the previous day, the 23rd March, 2000, Mr. Keane had attended at Mr. Donegan's office accompanied by Edwin Fitzgibbon. A draft agreement relating to the Titanic Queenstown Bar and Bistro between Mr. Keane and Mr. Fitzgibbon was considered.

35. The Court has the benefit of an attendance note from Mr. Donegan in relation to that meeting and is satisfied that it accurately reflects what occurred. Mr. Donegan gave certain advices including that the property should be kept separate from the agreement and also in relation to certain details concerning the operation of the proposed company. On the following day Mr. Keane attended once more at Mr. Donegan's office and signed the agreement between himself and Mr. Fitzgibbon and had his signature witnessed by a solicitor in Mr. Donegan's office. The agreement was also signed by Mr. Fitzgibbon and witnessed by another solicitor. The signed agreement provided for a number of matters including an agreement that Mr. Keane and Mr. Fitzgibbon were to become partners in the ownership and the operation of the Titanic Queenstown Bar and Bistro at Scott's Building, Cobh. The agreement provided for the business to be operated by a company and there was an agreement to transfer 26% of the ownership of the property to Mr. Fitzgibbon. It was also agreed that both Mr. Fitzgibbon and Mr. Keane would be entitled to a fair salary to be paid out of the operating company. The final paragraph stated:-

"Both parties hereto acknowledge and agree by their signing hereof that they understand fully the legal consequences of signing this agreement and both parties by their signing hereto acknowledge and confirm that they have each received independent legal advice in relation to the contents of this agreement."

36. It is clear that as of the 24th March, 2000, Mr. Keane had entered into a legally binding agreement with Mr. Fitzgibbon in relation to the ownership and operation of the Titanic project, consisting of the Titanic Queenstown Bar and Bistro.

37. The evidence establishes that on the 24th March, 2000, which was the day when Mr. Keane entered into the agreement with Mr. Fitzgibbon, that Mr. Keane made arrangements to have Mr. Nolan discharge an outstanding invoice from a builder who was carrying out work on the project. Even though there was no agreement between Mr. Keane and Mr. Nolan, and though the draft Heads of Agreement were yet to be issued, Mr. Nolan paid the sum of IR£24,000 to Mr. Brown, who was the builder.

38. The evidence establishes that the position which existed on the 27th March, 2000, the day upon which the draft Heads of Agreement was issued, was that Mr. Keane had already entered into a binding agreement. Mr. Keane had also allowed another party, Mr. Nolan, discharge a debt due in respect of the project on the basis that there were ongoing discussions between Mr. Keane and Mr. Nolan. The Court is satisfied that Mr. Nolan would not have paid the sum of IR£24,000 to the builder if he had known of the existence of a binding agreement between Mr. Keane and Mr. Fitzgibbon. The Court is further satisfied that as of the 27th March, 2000, Mr. Keane could not have entered into any agreement with Mr. Nolan in respect of the Titanic project.

39. Notwithstanding the above situation, this case was opened, by counsel on behalf of Mr. Keane, on the basis that the document entitled Heads of Agreement dated the 27th March, 2000, was a binding agreement.

40. The plaintiff relied on that agreement of 27th March, 2000 in the pleadings.

41. In the final statement of claim the plaintiff relied on there being a concluded agreement as of the 27th March, 2000, and claimed that there was breach of that agreement by the fourth named defendant, Mr. Nolan. There were also claims made against Mr. Sullivan in relation to that agreement including that Mr. Sullivan allegedly had been negligent and in breach of contract in negotiating that agreement and "did so aggressively, as undisclosed agent for the fourth named defendant, to make the plaintiff enter into the said 2000 Heads of Agreement when he should have been protecting the plaintiff".

42. During the opening of the case, counsel for the plaintiff was expressly asked if it was being alleged that the 27th March, 2000, Heads of Agreement was being relied on as a contractually binding agreement and the Court was informed that that was the case and that that was the plaintiff's understanding. The plaintiff's counsel claimed that there was a concluded binding agreement between Mr. Keane and Mr. Nolan as of March, 2000. This position was persisted with by counsel for the plaintiff even after the Court raised the existence of the agreement with Mr. Fitzgibbon in respect of the same project.

43. Notwithstanding the pleadings and opening and the express statement that it was the plaintiff's case that the Heads of Agreement of the 27th March, 2000, was a contractually binding agreement between Mr. Keane and Mr. Nolan when Mr. Keane came to give evidence and when the issue of that agreement was first raised, Mr. Keane stated:-

"It says 'Heads of Agreement', I would take absolute umbrage to that, because it should have been draft Heads of Agreement to be honest."

44. Mr. Keane later made it clear, in cross-examination, that the 27th March, 2000, Heads of Agreement was one of many proposed Heads of Agreement. In fact, it was the first of such documents. Mr. Keane expressly stated that the Heads of Agreement (of the

27th March, 2000) was not a final document and in his view there were two serious omissions out of that document. Mr. Keaney also accepted, in cross-examination, that what Mr. Sullivan had done was draw up a draft Heads of Agreement and he, Mr. Keaney, was ultimately going to be guided by his solicitor, Mr. Donegan, and any sound, solid legal or financial advisor.

45. In the light of the above evidence it is remarkable that the case was pleaded and opened on the basis that there was a binding agreement between the plaintiff and Mr. Nolan as of the 27th March, 2000. On the plaintiff's own evidence and from a cursory examination of the documents, including the document of the 27th March, 2000 itself, there was no basis for such contention. It is also noteworthy that such a plea was made in circumstances where the plaintiff had already entered into an agreement with a third party in respect of the same project.

46. The Court is satisfied that there was not and could not have been a binding agreement between the plaintiff and the fourth named defendant as of the 27th March, 2000. That document consisted of nothing more than a document for discussion.

47. When Mr. Keaney agreed to the document of the 27th March, 2000, being issued to Mr. Nolan and at the same time allowed and permitted Mr. Nolan to make a payment to the builder, he acted in bad faith. Mr. Keaney had concluded, with legal advice and assistance, an agreement which would have precluded him from entering into an agreement with Mr. Nolan. To have failed to disclose such fact when he knew that Mr. Nolan was to make the payment to the builder was disreputable.

48. The draft nature of the Heads of Agreement is not only confirmed by the evidence of Mr. Keaney, Mr. Sullivan and Mr. Nolan, but also by a letter of the 27th March, 2000 from Mr. Sullivan to Mr. Keaney. That letter expressly indicated that the Heads of Agreement were draft and went on to indicate that Mr. Sullivan was outlining his initial ideas and the letter concluded by stating that Mr. Sullivan looked forward to discussing the matter in further detail with Mr. Keaney on his return from holiday.

49. On the 30th March, 2000, Mr. Nolan sent a four page handwritten fax document to Mr. Keaney. Mr. Sullivan was not aware of such document or its contents. It included an offer from Mr. Nolan to have Mr. Sullivan desist from any involvement in the negotiations and also indicated that Mr. Nolan's offer would be on the table by the Friday of that week and that such offer would enable Mr. Keaney to understand all the details within it. The fax of the 30th March, 2000 confirmed a meeting for the following day in Cobh between Mr. Keaney and Mr. Nolan. Following that meeting Mr. Nolan sent a four page handwritten document by fax dated the 31st March, 2000. The document set out terms which Mr. Nolan was prepared to agree with Mr. Keaney. On the final page of the handwritten document, Mr. Nolan stated:-

"O.K Vince that's it, there (sic) the amendments we discussed and now my offer is clear & we both understand same. However if there is anything on your mind just call. I depart for Scotland on Tuesday next hence as I stated previously, if you accept my offer please let me know by 6pm Monday 3rd April & in the event that you have not acknowledged this in writing by that time, my offer is withdrawn."

50. It is common case that Mr. Nolan prepared that final offer without reference to Mr. Sullivan and following discussions with Mr. Keaney. It is also common case that that offer was not accepted either by 6pm on Monday the 3rd April, 2000 or at any time. It is also the case that as of the 3rd April, 2000, Mr. Keaney could not have accepted the offer.

51. Mr. Sullivan gave evidence that he was unaware of the fact or content of the meetings between Mr. Nolan and Mr. Keaney after the circulation of the Heads of Agreement of the 27th March, 2000. That evidence is unchallenged and demonstrates to the Court that Mr. Sullivan was not an integral part of the negotiations. The discussions leading to the offer from Mr. Nolan contained in his letter of 31st March, 2000 were directly between Mr. Nolan and Mr. Keaney.

52. On the 4th April, 2000, Mr. Sullivan was invited to meet Mr. Keaney the following day in the office of Mr. Donegan. At that meeting Mr. Sullivan was informed of the agreement between Mr. Keaney and Mr. Fitzgibbon. Mr. Sullivan gave evidence that it became apparent during the course of the meeting that Mr. Fitzgibbon had not been fully apprised of the amount of finance that was necessary to enable the project to be completed. Mr. Fitzgibbon had not carried out a financial investigation or a due diligence and had relied solely on information which he had received from Mr. Keaney. Mr. Sullivan advised Mr. Keaney, and Mr. Donegan was aware of such advice, that the sum of £750,000 which was provided for in the agreement between Mr. Keaney and Mr. Fitzgibbon was insufficient to enable the project to be completed. On the 7th April, 2000, Mr. Sullivan met with Mr. Fitzgibbon, at the request of Mr. Keaney, for the purpose of discussing the financial structure of the project and to explain that the proposed capital investment of £750,000 would be insufficient to fund the project to completion. Mr. Fitzgibbon was disinclined to increase his investment and wanted any shortfall to come from Mr. Keaney. It was only at this stage that Mr. Nolan was informed of Mr. Fitzgibbon's involvement. Mr. Nolan made it clear that he was only prepared to become involved in the project if he was the sole investor in the project apart from Mr. Keaney.

53. The lack of sufficient finance within the Fitzgibbon agreement and his refusal to provide extra money resulted in consideration being given by Mr. Keaney's solicitor to the possibility of seeking to avoid the agreement on the basis that it was subject to finance. A draft letter was prepared by Mr. Donegan and that letter was sent by Mr. Keaney to Mr. Fitzgibbon on the 8th April, 2000. The letter sought to impose a deadline on Mr. Fitzgibbon and went on to indicate that Mr. Keaney would have no alternative if the deadline was not met but to deal with other parties who had expressed an interest. Subsequently S. Donegan & Co., wrote directly to Mr. Fitzgibbon by letter of the 13th April, 2000, which stated, inter alia, "our client is willing to comply with the agreement, despite legal advice that the agreement in crucial respects is uncertain and unenforceable". The letter also stated that if there was not an immediate and reasonable response from Mr. Fitzgibbon that Mr. Keaney would consider himself discharged from the agreement by reason of the repeated failure of Mr. Fitzgibbon to comply with his obligations.

54. During the correspondent between Mr. Keaney and Mr. Fitzgibbon and their representatives, the fact that Mr. Fitzgibbon had advanced £19,100 to Mr. Keaney became an issue. Mr. Sullivan and Mr. Nolan only became aware of that fact at a late stage. The advance was dealt with in the correspondence which was taking place between Mr. Donegan and Connolly O'Neill Solicitors, acting for Mr. Fitzgibbon. Donegan & Co., Solicitors, by letter of the 19th April, 2000, returned the sum of £19,100 by enclosing a bank draft. Connolly and O'Neill Solicitors responded indicating that whilst Mr. Keaney might consider himself discharged from the agreement, it was Mr. Fitzgibbon's solicitors' contention that their client had fully complied with the agreement and had raised the finance and was insisting on the completion of the agreement between Mr. Keaney and Mr. Fitzgibbon.

55. The correspondence and negotiations concerning the agreement between Mr. Keaney and Mr. Fitzgibbon and its possible termination, took place between the solicitors. Ultimately they reached an agreement that the parties would terminate the proposed agreement and the sum of £19,100 was repaid to Mr. Fitzgibbon together with a further sum of £2,500 to cover costs and expenses.

56. In May of 2000, as it became apparent that an agreement could be achieved to terminate Mr. Fitzgibbon's involvement with the

project, a second version of the draft Heads of Agreement was prepared by Mr. Sullivan. That document was dated the 8th May, 2000. It states on the face of the draft that it was prepared for James Donegan, solicitor. As with the earlier draft Heads of Agreement, the layout of the document provided for reviewers' comments and notes. It is clear that Mr. Keaney did not consider the 8th May, 2000 draft Heads of Agreement document to be anything other than a discussion document. Mr. Keaney stated in evidence in relation to the various drafts that the March document was the very early days of the negotiation and that:-

"I always maintain that our final Heads of Agreement happened much later in the year. Much later. The summer. So when I saw the Heads of Agreement and it was being presented to me as Heads of Agreement I felt in no position to argue".

57. Mr. Keaney went on to state later in his evidence that:-

"The initial discussion document if you like which is very skeletal, there was no planning out of it, there was a lot of toing and froing to do. There was in my opinion a lot more to happen".

58. After the draft Heads of Agreement was issued on the 8th May, 2000, Mr. Keaney and Mr. Nolan entered into direct discussions assisted by their own solicitors. Mr. Donegan continued to act for Mr. Keaney and Mr. Cahalan of O'Flynn Exham and Partners acted for Mr. Nolan. On the 10th May, 2000, Mr. Sullivan wrote to Mr. Donegan referring to oral discussions with Mr. Nolan. Thereafter the solicitors were in direct contact with one another. On the 18th May, 2000 Mr. Cahalan wrote to Mr. Donegan, a letter which was headed as being subject to contract/contract denied. That letter was written in the context that certain matters required to be agreed between the clients prior to the preparation of draft agreements. The letter stated:-

"There are various issues which need to be clarified and information furnished. I am outlining what I understand to be the issues but they may change as matters unfold."

59. The letter concluded by stating:-

"If agreement is concluded between our respective clients the costs incurred by my client in pursuing the above matter will be costs of the project. If our clients fail to agree my client will discharge costs which he incurs in concluding his investigations into the various issues as detailed in this letter."

60. It was at this time that the issue of the availability of the portion of the building occupied by the Post Office became a live issue. The building in which the Titanic project was located was a building known as Scotts building. In that building the Titanic Bar and Restaurant effectively occupied the ground floor with terrace on to the waterfront. Upstairs the area was split with about 40% of it taken up by the proposed restaurant and the other 60% being occupied by a Post Office. In May of 2000, Mr. Keaney indicated that he wanted to keep the Post Office portion out of the deal and that proposal became a matter of contention.

61. The evidence is that from mid-May until mid-July such discussions as took place were between Mr. Keaney and Mr. Nolan and their solicitors. Mr. Sullivan was not involved.

62. By mid-2000 the evidence establishes that Mr. Keaney was fully aware of Mr. Sullivan's involvement in Mr. Nolan's businesses. In March or April of 2000, Mr. Keaney had received an invitation to inspect Mr. Nolan's business premises at the Oyster Bar in Cork where Mr. Sullivan was involved in operating the financial systems. Mr. Sullivan gave evidence that Mr. Keaney took up the offer of a visit and attended in the Oyster Bar. Mr. Sullivan met him and showed him around the premises demonstrating the systems including the stores and explaining how the bar and financial systems operated. Mr. Sullivan gave evidence that Mr. Keaney could have been under no illusion as to his involvement with Mr. Nolan's bar operations. That evidence is entirely credible and the Court accepts that Mr. Keaney was fully cognisant of the business relationship. It was the expertise which Mr. Nolan had in operating public houses which was one of the reasons why Mr. Keaney was attracted to a business relationship with Mr. Nolan.

63. The evidence also establishes that the involvement of the accountants, Ormsby Rhodes, and the proposal that they would become the auditors to the proposed venture was raised in March 2000. Thereafter Ormsby Rhodes did some due diligence work on Mr. Nolan's behalf. That work was carried out at Mr. Keaney's premises and offices and the nature and extent of such work was known.

64. In July of 2000 the discussions between Mr. Keaney and Mr. Nolan came to a head. By that stage Mr. Nolan had advanced considerable sums of money in support of the project but no deal had been concluded. The letter of the 18th May, 2000, from Mr. Cahalan was responded to by Mr. Donegan by letter dated the 13th July, 2000. That letter was also headed subject to contract/contract denied. The reply dealt with each of the matters raised in the earlier letter and noted the position in relation to what was to happen concerning costs if an agreement was concluded.

65. Part of the delay between May and July of 2000 had been caused by litigation between Mr. Keaney and the owner of an adjoining building. Mr. Nolan's evidence was that he was aware that there was a dispute but was unaware of the nature or extent of the dispute. The adjoining building was known as the Tregan building and that building had been referred to in Mr. Nolan's offer of the 31st March, 2000. That offer had identified how Mr. Nolan and Mr. Keaney might deal with the Tregan building in the event of it being purchased. However when Mr. Nolan came to make a new offer on the 19th July, 2000, he determined not to include any reference to the Tregan building. This matter was dealt with by Mr. Nolan in his evidence where he stated that he was not prepared to leave open the offer in relation to the Tregan building which he had made in his document of the 31st March. The evidence establishes that the Tregan building was not part of the offer made on the 19th July, 2000 and the Court accepts Mr. Nolan's evidence that he chose not to make any offer in relation to the Tregan building.

66. By mid-July of 2000 the project was reaching a critical stage. The project was proceeding to completion but the negotiations between Mr. Keaney and Mr. Nolan were continuing. Mr. Nolan described the negotiations in the following terms:-

"proving extremely frustrating in the light of where we were and what we were heading into with regard to fire officers, trying to complete a public house in the time frame that was becoming more and more shorter because of things not being agreed and to open the premises to catch the high season, I was becoming extremely frustrated is the word I keep saying because Mr. Keaney would sit with me, we'd talk and change things and come back and I'd say I can't talk about that now. We kept referring to documents. In the end I had to put money into the project as well and I was looking at a substantial amount of money coming forward and I felt that it was time to put my foot on the ball and say clarify exactly what I am here for and I'm going to offer and I went to Denis for advice".

67. The evidence establishes that Mr. Nolan went to his solicitor, Mr. Cahalan, and following that consultation he decided to write a

letter containing his final offer. Mr. Nolan confirmed in evidence that the purpose of the letter of the 19th July, 2000 was to get a commitment and agreement from Mr. Keaney and to confirm my offer and my final offer.

68. The letter of the 19th July, 2000 was written after discussions between Mr. Keaney and Mr. Nolan and on the face of it sought to confirm the agreement which had been concluded between Mr. Keaney and Mr. Nolan in the preceding days. The letter stated "I confirm our agreement in respect of the following matters" and then set out in five paragraphs the nature of the agreement. Mr. Nolan signed the letter and gave it to Mr. Keaney. Mr. Keaney signed his signature on the document on the following day, the 20th July, 2000, under the words "I confirm my agreement to the above terms and conditions which is evidenced by the signing by me of a duplicate copy of this letter".

69. On the face of it the letter of the 19th July, 2000 represented an offer from Mr. Nolan and Mr. Keaney accepted that offer when he signed his name. Mr. Nolan gave evidence that he prepared the letter with the advice of a solicitor, signed it and that he personally presented the letter to Mr. Keaney. Mr. Keaney's evidence in relation to his signing of that document is equivocal. When directly questioned as to whether the signature which appears on the second page of the document was his, Mr. Keaney stated "I honestly couldn't give an accurate answer to that". When asked if it looked like his signature, he stated "it's got irregularities". In direct evidence when Mr. Keaney was questioned by the Court as to whether he received the letter of the 19th July, 2000, he stated "I say now that I did. It is quite ... it is very familiar because I have been looking at it for four years". When further questioned by the Court Mr. Keaney appeared to confirm that he had accepted the agreement by stating "I will go with it Judge" and went on to state "I certainly cannot confirm the figures mentioned here, but that was the spirit of our agreement". Mr. Keaney under cross-examination from counsel for Mr. Nolan stated in relation to the document and his signature, "I must state at this juncture that in looking at this, I would not have signed anything outside Jim Donegan's office. This is a private letter between Michael Nolan at his private address, presumably a fax or something like that sent to me. It just states it's Michael Nolan, you know. I can't agree that this is a legally binding document because it hasn't been stamped or signed by my solicitor". After further questioning concerning the document and his signature, Mr. Keaney was asked directly by the Court "is that your signature and did you sign the document?" and the answer from Mr. Keaney was "Judge, to be particularly frank to you, I don't know". Later in cross-examination Mr. Keaney went as far as stating that he believed that it was not his signature.

70. The pressure to conclude an agreement as of the 19th July, 2000 arose from a number of factors. Firstly, by that date Mr. Nolan had invested a substantial sum of money in the project on the basis of supporting the project whilst trying to conclude an agreement. By the 19th July, 2000 Mr. Nolan estimated that he had introduced £118,000 and that that sum had been utilised in the project. His letter of the 19th July, 2000 identified that figure. Secondly, on the 20th July, 2000, the licence application for the project was before the Court. It was against that background that the letter of the 19th July, 2000 was prepared.

71. Mr. Nolan gave evidence that Mr. Keaney personally handed over the signed document of the 19th July, 2000 with Mr. Keaney's signature thereon dated the 20th July, 2000. The Court accepts that evidence. The Court is reinforced in this conclusion by the fact that among the papers available to the Court is an unsigned draft of the letter of the 19th July, 2000 which has an additional sixth paragraph added in Mr. Keaney's handwriting. It is clear that Mr. Keaney was in possession of the letter of the 19th July, 2000 and contemplated an alteration or amendment prior to signing and confirming his agreement. The actual signed letter does not contain the proposed additional paragraph six.

72. The unsigned amended letter was retained by Mr. Keaney's solicitor on his file and became available on discovery. The Court is satisfied that in relation to Mr. Keaney's signature and his acceptance of the agreement that he was evasive and untruthful in his evidence. The evidence confirms that Mr. Keaney signed the letter of the 19th July, 2000 on the 20th July. The Court accepts the evidence of Mr. Nolan in relation to this matter. The Court is satisfied that Mr. Nolan's evidence is truthful and accurate. The Court found both Mr. Nolan and Mr. Sullivan to be accurate and truthful witnesses and the Court favours their evidence as against Mr. Keaney's evidence where there is conflict between such evidence. Mr. Keaney in his evidence was vague, evasive and at times untruthful. He attempted in his evidence to avoid the consequences of his own actions. He tried to question his own signature on the letter of the 19th July, 2000 when the true position was that he signed that letter and thereby accepted the terms and conditions contained in the letter.

73. Mr. Keaney purported to deny that the document of the 19th July, 2000 which he signed on the following day was an agreement and claimed that his agreement with Mr. Nolan was not to be found in that document and stated that the agreement was "a much more elaborate and substantive affair". He claimed that the agreement between himself and Mr. Nolan was to be found in the Heads of Agreement and said that they would have been agreed in early summer but was unable to recall when they were agreed other than it was sometime before July. Mr. Keaney was unable to identify the precise nature or terms of the agreement which he claimed to exist nor the date upon which it was agreed. Mr. Keaney offers no explanation as to how the document of the 19th July, 2000 arose in circumstances when he claims that there was already an agreement. There was also no explanation of how the plaintiff's case came to be pleaded on the basis that the agreement between the parties was the Heads of Agreement dated the 27th March, 2000 when his oral evidence denied such agreement.

74. The Court is satisfied that the document of the 19th July 2000 represents the agreement between Mr. Nolan and Mr. Keaney and that both parties signed that document.

75. The fact that other matters were contemplated as being included in an agreement prior to the 19th July, 2000 does not result in those matters becoming a part of the agreement. A previous offer had been made by Mr. Nolan but Mr. Keaney had not accepted that offer. Thereafter there were extensive and prolonged negotiations between Mr. Nolan and Mr. Keaney with the assistance of their solicitors. Indeed, confirmation of the continuing assistance which Mr. Keaney received from his solicitor in relation to the proposed agreement is to be found in the presence of the unsigned version of the letter of the 19th July, 2000 among Mr. Keaney's solicitor's papers. As herein before set out, an additional paragraph six was added to the unsigned document in the handwriting of Mr. Keaney. Mr. Keaney acknowledged that it was his handwriting in cross-examination. Its presence on the solicitor's file indicates to the Court that that document was made available by Mr. Keaney to his solicitor in an unsigned form and that the probability is that Mr. Keaney brought the unsigned document to his solicitor for his assistance and advice in advance of signing the document on the 20th July, 2000. That fact reaffirms the Court in its view that the document of the 19th July, 2000 as signed by both Mr. Nolan and Mr. Keaney represents the agreement between the parties. It is clear that negotiations and discussions were continuing up to that date. The letter from Mr. Keaney's solicitors, S. Donegan & Co., of the 13th July, 2000 recognises that an agreement had not been reached by that date where it responds to paragraph eleven of Mr. Nolan's solicitor's letter of the 18th May, 2000 by confirming that the contents of that paragraph were noted. That paragraph was predicated upon a situation where an agreement was yet to be reached. There is clear and compelling evidence that no agreement was concluded prior to the 19th/20th July, 2000.

76. The agreement between Mr. Keaney and Mr. Nolan is to be found in the document of the 19th July, 2000. When Mr. Keaney signed his name, as the Court is satisfied he did, beneath the words "I confirm my agreement" he was accepting Mr. Nolan's offer and

an agreement was concluded. Matters discussed prior to that date and not included in the agreement do not form part of the agreement. Mr. Keaney seeks to incorporate certain matters into the 'agreement' but fails to give any evidence of terms being agreed outside the 19th July, 2000 document either in writing or orally and gives no evidence of any term coming into existence by both offer and acceptance.

77. The Courts have recognised that in contract law the means of determining when preliminary discussions or inquiries as to terms have ended and the parties have actually entered into a binding contract is based on the concept of offer and acceptance. That is what occurred here, the letter of the 19th July, 2000 was an offer and the signature of the 20th July, 2000 thereon was the acceptance. The terms agreed are those in the document itself. This is not a case of applying offer and acceptance too literally to a commercial arrangement because the facts make it clear that here there was a final inclusive offer and acceptance.

78. In the offer of the 31st March, 2000, which Mr. Nolan made to Mr. Keaney, one of the matters included in that offer was an item identified as future development/neighbouring building. That referred to the building known as the Tregan building. Paragraph two of the offer stated "with regard to future funding & expansion of the property or project, I agree with you that we take out an option and that we raise finance in the same ratios ensuring no dilution of ownership ratios, in short if we cannot do it with our own money, the banks/borrowing. The trading company finance or any combination of these we don't do it at all. However if there is an opportunity to buy the building next door, and I can raise the majority or all of the finance personally then it will be included into the project without any dilution of shares". Mr. Keaney makes a claim regarding the Tregan building based upon that paragraph in the letter of offer of the 31st March, 2000. The claim is set forth at paragraphs 57 and 58 of the final statement of claim. The plaintiff claims that in breach of that agreement, the fourth named defendant together with his wife bought in their sole names the shareholding in Tregan Properties Ltd., without including the plaintiff in the purchase and that the fourth named defendant and his wife excluded the plaintiff from the shares and the plaintiff seeks a declaration that the plaintiff is beneficially entitled to a 50% shareholding in Tregan Properties Ltd., and for an order for the transfer of such shares to the plaintiff together with damages.

79. Firstly it is clear that the offer made in relation to the Tregan building included in the letter of the 31st March, 2000 was not accepted. When questioned as to what agreement he relied on to support his claim relating to the Tregan Property, Mr. Keaney indicated that the agreement was "verbal, a verbal contract that we would both move forward together in the best interest of the project and the understanding was initially and the understanding was that we would move forward with a sense of fellowship and business partnership. We would move forward with that in mind and more or less in the same vein as Michael Nolan's letter to me on the 30th March, 2000". When asked what were the terms of contract agreed between himself and Mr. Nolan in relation to the Tregan building and/or shares, Mr. Keaney stated "The terms of our contract was ongoing heads of agreement. There was an aspiration. The trading building was involved there and then. There and then hopefully we were going to move forward together and it didn't enter into a final heads of agreement anywhere because I now doubt that there ever was a final heads of agreement". Mr. Keaney later claimed that the agreement in relation to the Tregan building/shares was that each party would contribute £100,000 to purchase the building/shares and that there would be borrowings to which both would be jointly and severally liable to fund the balance. Mr. Keaney acknowledged that he never paid £100,000 and claimed that he had brought quite enough to the table. Insofar as Mr. Keaney sought to identify any agreement in relation to the Tregan building/shares, it was that each party was to invest £100,000 and to be jointly and severally liable for the balance. It is accepted that he did not pay the £100,000.

80. The Tregan building/shares were in fact purchased by Mr. Nolan from his own assets and no contribution was made by Mr. Keaney. The building was purchased by Mr. Nolan and his wife by means of a share purchase of Tregan which was the company that owned the building.

81. The documentary evidence available to the Court includes an attendance of the 6th June, 2001 between Mr. Keaney and his solicitor. That attendance states "purchase from Tregan, he (Mr. Keaney) stated that this was dependent upon him selling 11, Harbour View and he did not know how this was proceeding. I told him that I had received a letter about the Court case which can be discussed on Friday". Mr. Keaney in cross-examination confirmed that that attendance reflected the fact that he was to put up £100,000 towards the purchase of the Tregan shares and that his ability to do so was dependent upon him selling 11, Harbour View.

82. There was no agreement in relation to the Tregan building/shares within the 19th July, 2000 agreement and the explanation for that is available to the Court from the evidence of Mr. Nolan. Mr. Nolan stated that he was proceeding on the basis that he had made a final offer in his letter of the 19th July, 2000 and that when Mr. Keaney signed that offer, he accepted the terms therein contained. Mr. Nolan expressly stated to the Court that in relation to the Tregan building/shares, that matter was still an aspiration at the time of the agreement of the 19th July 2000. Therefore it was not included in that agreement. Mr. Nolan confirmed what occurred in relation to the Tregan building/shares thereafter. When the building became available for purchase Mr. Nolan informed Mr. Keaney that he was purchasing the building as there was an opportunity to buy it. The purchase was to be effected through the acquisition of shares in the company that owned the Tregan building. Mr. Nolan informed Mr. Keaney as to how the purchase was to be done and at that point in time offered to Mr. Keaney the opportunity to participate in the acquisition. The terms were "they were the terms that were offered by the bank, which we both went to see, the bank, and we were told that we could do this deal 50/50 if both of us would come up with £100,000 each and the bank would release £100,000 to each of us and that was the deal to go ahead between us". The option available to Mr. Keaney to participate in the purchase of the Tregan building/shares on the terms identified above is confirmed in a document available to the Court, the attendance of the 8th June, 2001 of a meeting between Mr. Keaney and his solicitor, Mr. Donegan. The attendance concerns a meeting on the 8th June, 2001 and relates to the purchase from Tregan and the attendance states "There was a question of monies to be put up by Vincent Keaney on the sale of 11, Harbour View. Presently there are two members of staff there on short term. Herein the property is for sale. It is anticipated this could become of greater value with the marina. Both Mike Nolan and Vincent Keaney were to put £100,000 each and to borrow £200,000". Mr. Keaney accepted in cross-examination that that was an accurate summary of the agreement between himself and Mr. Nolan and that such was explained to both of them by Mr. Donegan on the 8th June, 2001. The attendance went on to state "Mike Nolan has borrowed £200,000 and is awaiting a refund from Vincent Keaney". Mr. Keaney, in fact, made no payment.

83. It is clear from the evidence that there is no basis for Mr. Keaney relying on a purported agreement relating to the Tregan building/shares being found in the document of the 31st March, 2000. The offer contained in that document was not accepted. Thereafter the Tregan building/shares was not included in the agreement which was agreed in the document of the 19th July, 2000. At that point in time the future purchase of the Tregan building/shares was an aspiration. It was only at a later date when the building/shares became available that a separate agreement was concluded. That agreement was dependent upon Mr. Keaney paying his portion of the purchase price. He never paid anything. The offer which Mr. Nolan made to Mr. Keaney to provide him with an opportunity of joining in the acquisition of the Tregan shares on terms was an offer which was never accepted by Mr. Keaney. The Court is satisfied that Mr. Nolan's offer to permit Mr. Keaney to share in the purchase of the Tregan building/shares was not acted upon by Mr. Keaney and that there is therefore no legal basis upon which Mr. Keaney can now seek to enforce an alleged contract.

84. The agreement contained in the document of the 19th July, 2000 provided that the Titanic project would operate its business

through a company. That company was Titanic Queenstown Company Limited and it was to be incorporated to facilitate the management of the business. Mr. Sullivan was engaged by the company as a business consultant and to advise on the running of the business. Mr. Sullivan carried out his functions as a consultant and financial or professional adviser for the company and was at all times employed and paid by the company. The evidence establishes that Mr. Sullivan invoiced the business on a monthly basis and that those invoices were paid by the company. Mr. Sullivan was also appointed company secretary upon its incorporation and was a director for a short period to facilitate the formation of the company. Mr. Sullivan gave evidence that he was working for the company from the time that it opened in August 2000 through until April or May of 2002. Mr. Sullivan was paid £16,000 out of the monies borrowed by the company for work that he had already done for the project prior to the incorporation of the company.

85. Mr. Sullivan negotiated the banking facilities for the company with AIB in Midleton. That bank had dealings with Mr. Nolan who was a long standing client. Mr. Nolan's reputation was relied upon in negotiating the facilities for the company. The account was opened towards the end of July 2000 which was before the incorporation of the company. For that reason the trading account was identified as Mike Nolan trading as Titanic Queenstown. That account was a business account and it was operated at all times as a business account. That continued to be the position up to the time Mr. Sullivan left the project in or about April of 2002. There were other accounts including a wages account which was set up in early 2001. There was also another account set up in late October 2000 which was a construction account. Mr. Sullivan requested that the bank open a construction account and informed the bank that the signatories on the account would be himself and Mr. Nolan. The bank inadvertently put Mr. Sullivan's own name on the account. That inadvertence was confirmed by the evidence of Mr. Brian Barnes who became manager of the AIB bank in Midleton on a date shortly after the Titanic project commenced to trade. Mr. Barnes stated that when the Titanic project opened for business that the bank opened an account to facilitate the day to day banking and that it was the bank's understanding that a limited company account would be opened in the future and that the day to day banking would be done through that limited company. The bank did receive the articles and memorandum of the company, the certificate of incorporation and a company mandate to facilitate a company account being opened. When the local branch received those documents they were sent to the bank's central securities department and a problem was identified so they were sent back to the bank who returned them to the clients to enable an amendment to be made. That amendment was to the memorandum and articles of association and it was carried out by the company who returned the necessary document to the bank but the bank failed to progress the matter and the account continued to operate under its original name. Mr. Barnes confirmed the bank should have changed the trading account into a company account once the company had rectified the gap in its powers. That was done in late 2000, but that the bank failed to alter the trading account into the company's name. Mr. Sullivan gave evidence that the reason for the establishment of different bank accounts was to facilitate proper accounting. The different accounts enabled the business to keep its trading expenses and its construction expenses separate. The company operated a trading account for the Titanic Bar and Restaurant which was known as Mike Nolan trading as Titanic Queenstown Project. That was the account which was set up prior to the incorporation of the company which was incorporated on the 11th August, 2000. A £50,000 overdraft was sanctioned on that account as working capital for the day to day operation of the bar and restaurant and a loan in the sum of £475,000 was sanctioned for the purposes of paying off Mr. Keaney's existing debt to AIB Cobh. As part of the overall financing, a further sum of £300,000 was sanctioned to enable the business to complete the first phase of its project. Almost all income was lodged to the trading account.

86. Mr. Sullivan was concerned that the monies from the loans should remain separate as each loan was for a separate purpose and there was a danger that the monies would become intermingled and the records confused if they were maintained in the same account. For that reason a separate loan account referred to as loan account No. 1 was opened. That account was in the name of Mike Nolan and Vincent Keaney and was opened on the 24th October, 2000. The agreed loan of £300,000 which was available for the completion of the works was paid into that account which was known as the Oyster No. 2 account. At that point in time a number of creditors remained unpaid and it was necessary to pay those creditors out of the funds dedicated for that purpose that is from the £300,000 loan. The creditors included numerous suppliers whose invoices remained unpaid and also included the company's own Bar business as its trading account had been used to discharge construction expenses prior to the Oyster No. 2 account being opened.

87. In October 2000 the £300,000 loan was transferred directly to the Oyster No. 2 account. The creditors were repaid within a short period of time and the remainder of the loan account was transferred to a new account called the Titanic construction account which was established on Mr. Sullivan's instructions to cover all further expenses incurred in the construction. It is the evidence of Mr. Sullivan that all the monies that went through that account were wholly and exclusively necessary for the finalisation of the project. They included the repayment from the Titanic construction account of a sum of £61,808.97 to the Mike Nolan trading as Titanic Queenstown Project account. Construction expenses had been paid out of the trading account and the trading account was repaid out of the construction account. Mr. Keaney acknowledged that the purpose of the £300,000 loan account was to ensure that the building works were complete and when asked by the Court as to whether that is what happened, Mr. Keaney confirmed that yes, that indeed did happen.

88. The company did not prove profitable. By late 2001 the business was in financial trouble. There had been extensive investment in the restaurant and a large overdraft had been built up on the trading account.

89. It was suggested in cross-examination to Mr. Sullivan that he was responsible for running up a big overdraft and that he was instrumental in advising Mr. Keaney to run a company that would have limited liability on its trading account and that Mr. Sullivan was the author of the company running outside the limited company account. Mr. Sullivan responded by stating " No, I wouldn't agree with that insofar as the financial transactions are captured in the 087 account (the trading account). The underperformance of the business in terms of its profitability certainly was not my responsibility or my responsibility alone and the bank account and the poor state of the bank account reflected the poor state of the finances of the business at that time". Mr. Sullivan went on to indicated that regardless of whatever account was used, that the ultimate debit balance would have prevailed. Mr. Sullivan gave evidence that the £300,000 available to complete the works were used to discharge the liabilities for the completion of the premises.

90. By early 2002 the financial position of the business was critical and a number of meetings were held with AIB in Midleton in relation to the situation. By that stage the overdraft facilities were in excess of their authorised limits. Mr. Nolan sought the assistance of a Mr. St. John Culligan and later he became involved with the company. Mr. Sullivan ceased any involvement with the company as of May 2002.

91. The claims against Mr. Sullivan fall to be considered in the light of the evidence outlined above. The plaintiff's claim against Mr. Sullivan is that he was negligent, in breach of duty and in breach of contract. In the particulars in support of those claims the plaintiff alleges a failure on Mr. Sullivan's part to disclose an alleged conflict of interest.

92. The first matter to consider in relation to Mr. Sullivan is whether or not there was any contract between Mr. Sullivan and Mr. Keaney. The essence of a contract for professional services is an agreement between a professional man and his client whereby the professional man agrees to render services and the latter agrees to pay for such services. The evidence in this case does not establish any contract between Mr. Keaney and Mr. Sullivan. At an early stage in the contacts between the parties, Mr. Sullivan

offered to provide his services on a professional basis and Mr. Keaney refused that offer. There is no evidence whatsoever of any subsequent offer. Nor was any evidence given of a purported oral agreement between the parties. Absent such evidence the Court is unable to hold that any contract existed between the first defendant and the plaintiff. This finding is supported by the fact that no payment was ever made by Mr. Keaney to Mr. Sullivan. All payments sought and received by Mr. Sullivan were from the company.

93. For parties to be actually bound, the Court would have to have evidence that preliminary discussions or negotiations ended and that the parties actually agreed to bind themselves to a set of terms or contract. There is no such evidence in this case.

94. There is evidence that Mr. Sullivan carried out work for the project and provided certain help and assistance to Mr. Keaney and Mr. Nolan in and about their discussions. He provided that help in his professional capacity and therefore the Court must consider whether or not Mr. Keaney has made out his claim in negligence and/or breach of duty against Mr. Sullivan. The alleged duty of care which Mr. Keaney claims that Mr. Sullivan owed him was the duty "to render independent, arms length professional advice and to negotiate professionally with any potential investor/partner, fearlessly on behalf of the plaintiff".

95. For a plaintiff to establish the tort of negligence against a professional person, certain matters must be established, firstly, that the defendant owed a duty of care to the plaintiff, secondly, that the defendant acted in such a manner as to be in breach of that duty of care and thirdly, that the plaintiff suffered damages as a consequence of such breach. All those factors must be present. In considering the first of those matters one must identify whether a duty of care exists and if so what is the scope of such duty. Even if the Court was to accept that Mr. Sullivan, in carrying out his work in facilitating the negotiations between Mr. Keaney and Mr. Nolan, owed a duty of care and therefore had a duty to prevent economic loss, it would still be necessary to consider whether Mr. Sullivan was in breach of such duty and whether Mr. Keaney suffered any damage as a consequence of a breach if such breach was established.

96. The claim against Mr. Sullivan is that he failed to render independent, arms length, professional advice. There can be no basis for that claim in the light of the evidence. The evidence establishes that Mr. Sullivan was providing the product of his work to both Mr. Keaney and Mr. Nolan and that both of them were aware of such fact. The evidence shows that after the discussion documents were produced by Mr. Sullivan, that they were considered by Mr. Keaney and Mr. Nolan, who had direct negotiations with the assistance of independent legal advice. Such duty of care as may have been present on Mr. Sullivan was limited to the duty to provide services so as to facilitate the negotiations and discussions between Mr. Keaney and Mr. Nolan. There is no evidence whatsoever that any action taken or words spoken by Mr. Sullivan were in breach of that duty or were in any way negligent. It is also manifest that Mr. Keaney and Mr. Nolan were not acting on the basis that they accepted any document produced by Mr. Sullivan as containing terms which either of them should enter into but that such documents would be subject to discussion directly between the parties in circumstances where those parties had the assistance of their own solicitors. In those circumstances it would be impossible, on the facts of this case, for the plaintiff to establish the necessary causative link between any action undertaken by Mr. Sullivan or words spoken by him and any alleged damage suffered by Mr. Keaney.

97. The first particular in relation to the alleged breach of duty and/or breach of care is a complaint alleging that there was a failure on Mr. Sullivan's part to "negotiate in an independent manner with Mr. Edwin Fitzgibbon as a potential investor, and ultimately assisted the fourth named defendant in paying him off so that the plaintiff's only realistic potential partner or investor became the fourth named defendant; who was (as it turned out) a wholly professionally inappropriate choice". This claim is entirely unsupported by the evidence. The dissolution of the agreement between Mr. Fitzgibbon and Mr. Keaney was as a result of negotiations conducted by the plaintiff's solicitor, who put in place and finalised such agreement. The facts do not support any claim based upon an allegation that Mr. Sullivan assisted Mr. Nolan in paying off Mr. Fitzgibbon. A second complaint contained within the same particular is that Mr. Nolan was a wholly professionally inappropriate choice. The evidence available to the Court indicates that Mr. Nolan was an experienced and tested businessman with knowledge of the relevant business, namely a bar and restaurant business. Not only does the evidence fail to establish that Mr. Nolan was a wholly professionally inappropriate choice, the evidence is the opposite. The plaintiff in his own evidence identified Mr. Nolan as not only a wealthy man but a man with a lot of valuable business experience and pub experience. There is no evidence to support a claim that Mr. Nolan was a professionally inappropriate choice. Therefore, insofar as it could be contended that there was a duty of care on Mr. Sullivan to introduce for negotiation purposes a businessman who had the attributes of a suitable investor in the plaintiff's business, the evidence establishes that Mr. Sullivan introduced such a person when he introduced Mr. Nolan.

98. A further particular alleged against Mr. Sullivan is that he failed to disclose and/or avoid any potential or actual conflict of interest and that failure is claimed on the basis that Mr. Sullivan had failed to disclose that he had acted as agent/accountant/business associate of the fourth named defendant and that AIB Midleton was a bank branch repeatedly used by Mr. Nolan. The evidence outlined above establishes that Mr. Keaney was fully aware of Mr. Sullivan's business relationship with Mr. Nolan. As earlier pointed out in this judgment, Mr. Keaney was shown around Mr. Nolan's licensed premise in Cork by Mr. Sullivan and had the business systems and workings of that establishment explained to him by Mr. Sullivan. Mr. Keaney was fully aware of the business relationship between Mr. Sullivan and Mr. Nolan and therefore there can be no basis for a claim that there was a failure to disclose. In relation to the use of the AIB Midleton bank, the evidence establishes that Mr. Keaney had reached a stage where AIB in Cobh were refusing to provide him with any further facilities and that new banking arrangements were urgently required. The move to AIB Midleton was done in circumstances where the proposed venture was more likely to receive support in a bank where Mr. Nolan had an established reputation. This must have been obvious to Mr. Keaney and there is no basis to support a claim of a failure to disclose Mr. Nolan's association with AIB in Midleton. Even if it could be suggested that there was such a failure, there is no evidence that the plaintiff suffered any damage as a consequence of same.

99. A further particular alleged against Mr. Sullivan is that it is claimed that he acted negligently and in breach of contract as a non-disclosed agent for the fourth named defendant in the negotiations which led to the 2000 Heads of Agreement. There is no basis for this claim. Firstly, the Court is satisfied that the 2000 Heads of Agreement, as pleaded by the plaintiff, was no more than a discussion document. Also the evidence makes it clear that at the commencement of Mr. Keaney's contact with Mr. Nolan, he was aware of Mr. Sullivan's involvement in Mr. Nolan's business. There is no evidence to support a claim that Mr. Sullivan was Mr. Nolan's undisclosed agent. In any event, Mr. Keaney cannot have suffered any damage in relation to this alleged wrong in that the 2000 Heads of Agreement was no more than a discussion document and was not the agreement concluded between Mr. Keaney and Mr. Nolan. In evidence Mr. Keaney expressly disavowed that the so called 2000 Heads of Agreement represented a concluded agreement and claimed it was merely an early stage in the negotiation process.

100. A further particular alleged against Mr. Sullivan is that; "he failed to advise the plaintiff of the financial disadvantage of entering into the said 2000 Heads of Agreement with Mr. Nolan, where effectively all the plaintiff was to get was the £165,000 Pollexfen debts to be paid, in return for his first half title (and this new money did not even happen)". Firstly, the Court is satisfied that Mr. Keaney did not enter into what is described as the 2000 Heads of Agreement. Secondly, the actual agreement which was entered into by the plaintiff was entered into with the advice and assistance of his own solicitor. Indeed Mr. Keaney's own evidence was that "any legal

document that I signed in relation to my dealings with Michael Nolan, my dealings with anybody, would have been done through a solicitor with the consent and advice of a solicitor, and invariably signed off by a solicitor". The evidence establishes that Mr. Keaney did not act on any advice or documentation emanating from Mr. Sullivan but sought and obtained his own independent legal advice and entered into a contract with Mr. Nolan following direct negotiations with Mr. Nolan.

101. As pointed out in the first named plaintiff's submissions, one of the claims made by the plaintiff during the course of the hearing was that the first named defendant advised the plaintiff to set up a company to run the bar and it was claimed during the course of the hearing that the first named defendant was negligent for then undoing that advice. This matter is not pleaded. Even if it were, the evidence establishes that the intention and desire to set up a company to run the bar if any joint venture was agreed, pre-dated any involvement of Mr. Sullivan. That advice as to how the bar might be run had emanated from Mr. Keaney's own solicitor and is first identified in Mr. Donegan's attendance docket of the 3rd March, 2000. The concept of operating a proposed joint venture through a company was part of Mr. Keaney's approach in dealing with Mr. Fitzgerald in March of 2000 and was expressly incorporated in the agreement between Mr. Keaney and Mr. Fitzgibbon of the 23rd March, 2000. Mr. Keaney's claim that he acted on the advice of Mr. Sullivan in operating the business through a company is not supported by the evidence.

102. Mr. Keaney purports to pursue a claim that Mr. Sullivan was negligent and in conflict of interest by engaging in negligent banking practice. There is extensive reference to such claim contained within the plaintiff's legal submissions. Such an allegation was in an earlier version of the statement of claim but such claims as related thereto were struck out as a result of the judgment of Ms. Justice Finlay Geoghegan. The plaintiff is expressly prevented from maintaining such allegations. In any event, even if the plaintiff were allowed to pursue such claims, which he is not, there is no evidence to support a claim based upon the premise that Mr. Sullivan advised the plaintiff that the company money should be lodged in named company bank accounts. The evidence which is before the Court is that the bank account in respect of which the plaintiff makes complaint, which is Account No. 16917047, was regarded by the bank as the company trading account and was so operated. The fact that it was not in the name of the company arose from an oversight on the bank's part.

103. Mr. Keaney has failed to establish that Mr. Sullivan was negligent or in breach of duty. He has also failed to establish a breach of contract and indeed has failed to identify or establish any contract. Further it is clear that in relation to all the matters alleged against Mr. Sullivan, which were permitted to be pursued by the order of Ms. Justice Finlay Geoghegan, that such actions as were undertaken by Mr. Sullivan or such statements as were made by him did not result in or cannot be said to have caused the plaintiff to take any step which has caused him any damage. All the plaintiff's claims against the first named defendant must be dismissed.

104. The business continued to be unprofitable in 2002 and by November it was apparent that the trading situation could not continue and that a decision would have to be taken in relation to the viability of the project. Mr. Nolan was continuing to invest in the project but was not prepared to persist with a loss making business. The business ceased to operate on the 2nd December, 2002. Thereafter there were various discussions and negotiations between Mr. Nolan and Mr. Keaney. Alternative proposals were considered. Relations between Mr. Keaney and Mr. Nolan became difficult. By the end of April 2003, Allied Irish Banks were seeking to enforce their security and Mr. Keaney was indicating a unilateral intention to recommence trading in the premises. Discussions took place between Mr. Keaney and Mr. Nolan from May through to July 2003 ultimately leading to a Heads of Agreement signed on the 2nd July, 2003. Both Mr. Keaney and Mr. Nolan had legal advice during those negotiations. Mr. Keaney had used a number of different solicitors but by July of 2003 he was represented by Philip Bass & Co. Following the Heads of Agreement settlement dated the 2nd July, 2003, legal agreements were prepared between the solicitors and they were signed on the 24th July, 2003.

105. The plaintiff makes a claim against Mr. Nolan in respect of an alleged obligation on Mr. Nolan to discharge all of the indebtedness of Pollexfen Design Limited together with the costs of liquidating that company. The plaintiff claimed that he had expended considerable sums of money through a company which he controlled known as Pollexfen Design Limited and was to be reimbursed by that company and that therefore he was to benefit from the obligation which he claims was on the fourth named defendant to discharge the liabilities of Pollexfen. It was claimed that Pollexfen's creditors were owed an estimated sum of IR£165,000 and they were going to re-invoice the fourth named defendant who would discharge the invoices. The portion of the plaintiff's claim which remained extant after the judgment of Ms. Justice Finlay Geoghegan limited the plaintiff's claims against Mr. and Mrs. Nolan. The claim was restricted to the pleas contained in paras. 27, 33(1) and 57 of the July 2006 amended statement of claim. Paragraph 27 claimed a breach of a purported agreement in that the fourth named defendant allegedly failed to discharge all debts of Pollexfen Design Limited or arrange for it to be wound up and paragraph 57 alleged that without prejudice to the plaintiff's contention that the 2000 Heads of Agreement be impugned by this honourable Court; further in breach of the said 2000 agreement the fourth named defendant "failed to discharge the debts of Pollexfen Design Limited incurred in renovating the Titanic Bar to a high standard, and the taxation debt of that company, and failed to arrange for and/or discharge of costs of liquidating the company". It was claimed that all the foregoing caused the plaintiff loss and damage including judgments. There had been reference in the Heads of Agreement of the 27th March, 2007 under the heading "Corporate affairs of Vincent Keaney" to Pollexfen Design. It was stated therein:-

"Mr. Keaney's company, Pollexfen (sic) Design is currently insolvent. A rough statement of affairs indicate that it has creditors amounting to IR£165,000 (which will be transferred to Mr. Michael Nolan, see above) taxation liability of approximately £10,000 and a current VAT refund of approximately £45,000".

106. The draft Heads of Agreement had earlier stated;

"that the development of the building currently owes an amount estimated at £165,000 to its creditors. This development has been executed through a company owned by Mr. Vincent Keaney. Once the amount due to the creditors has been established, Mr. Michael Nolan will invest sufficient sums to completely clear all these debts".

107. The Court has already indicated that the agreement entered into between Mr. Keaney and Mr. Nolan is to be found in the document dated the 19th July, 2000. The position as of March was entirely different from July and as Mr. Keaney stated in his own evidence "March was very early days of negotiation".

108. The clear and uncontested evidence establishes that there was no concluded agreement prior to 19th July, 2000/20th July, 2000. That agreement does not contain any reference to Pollexfen Design Limited. By mid-July 2000, Mr. Nolan had already invested £118,000 in the project.

109. The fourth and eighteenth named defendants' case is that the agreement relating to the joint undertaking with Mr. Keaney regarding the Titanic project is to be found in the terms set out in the letter of the 19th July, 2000. The Court is satisfied that this contention is correct. The letter of the 19th July, 2000 sets forth the terms of the agreement. The Court finds the evidence of Mr. Nolan in relation to that agreement both compelling and truthful and has already indicated that it finds Mr. Keaney's evidence to be evasive, vague and in some instances untruthful. Mr. Keaney has by his evidence sought to avoid the consequences of his own

actions in agreeing the offer of the 19th July, 2000. That agreement makes no reference to the discharge of the Pollexfen debts whether in the sum of £165,000 or otherwise or to the payment of any Revenue liability due by Pollexfen or to the liquidation costs of Pollexfen. The agreement of the 19th July 2000 deals with the circumstances which existed as of that date. Mr. Nolan was to invest a sum of £125,000 in the project of which £118,000 had already been invested and that thereafter Mr. Nolan was to become jointly and severally liable with Mr. Keaney for the raising of a further £300,000 in borrowings.

110. In the submissions of the plaintiff, the claim in relation to the Pollexfen debts was recast. It was claimed that:-

"(1) The 19th July, 2000 letter ... purports to reduce the earlier signed Heads of Agreement ... so that Mr. Nolan allegedly does not have to furnish new money agreed for the £165,000 Pollexfen renovations on the bar.

(2) I submit that the signed Heads were acted upon. Mr. Nolan says in print in the letter that he had spent £118k since the Heads of March. It is incredible that he spent money on renovations ex gratia that he was not bound to spend. This evidence is not credible. The 19th July letter was not the full deal, there was more Pollexfen debts were to be paid by Mr. Nolan legally".

111. That claim fails to identify the basis upon which it is contended that the 19th July, 2000 letter is not the full agreement or "the full deal". There is no identification as to the form, date or terms of any alleged other agreement. There is no identification of any agreement whereby it is alleged that Mr. Nolan agreed to discharge the Pollexfen debtors other than a reference to a discussion document or draft document. That claim ignores that within the actual agreement signed and accepted by Mr. Keaney that the sum of £118,000 was expressly identified. The Court accepts the evidence of Mr. Nolan that substantial sums had been introduced by him up to July 2000 and that the parties agreed that as of the 19th July, 2000 the total of those sums amounted to £118,000. The Court does not accept that the same is incredible and Mr. Keaney himself acknowledged such sum by signing the agreement. There is no claim before the Court of an alleged failure by Mr. Nolan to perform any of the terms of the 19th July, 2000 agreement.

112. In the light of the above facts the Court is satisfied that there is no legal basis for contending that there was any obligation on the fourth or eighteenth named defendant to discharge the Pollexfen debts. That was a matter which had been part of discussions but when it came to actual terms agreed such proposal was not included. There is no evidence to support any claim based upon a separate verbal agreement nor is such agreement identified either by date or terms. The Court is satisfied that the plaintiff has failed to make out any basis in respect of an alleged breach by the fourth or eighteenth named defendant in respect of the Pollexfen debts.

113. The Court is satisfied that there is no evidence to support any breach by the fourth named defendant of his agreement with the plaintiff. The Court will consider the legal position which would arise if the Court was incorrect in that conclusion by reference to whether or not the plaintiff would in any event be entitled to maintain an action in relation to such alleged failure in circumstances where there is a deed of release dated the 24th July, 2003.

114. The negotiations of May to July 2003 resulted in a signed document headed Heads of Agreement legally binding dated the 2nd July, 2003. That document was signed by Mr. Keaney on his own behalf and was signed by Mr. St. John Culligan on behalf of Mr. Nolan. Mr. St. John Culligan's signature was witnessed by Mr. Keaney's adviser, Mr. Hugh Phelan. The basis of the agreement between the parties was that the Titanic Queenstown Trading Company Limited was to be taken over one hundred per cent by Mr. Nolan with a guarantee in relation to its debts and that Mr. Nolan would lease back the property to a new company to be incorporated by Mr. Keaney at an agreed rent and the agreement also provided for a buy back option. Following on the Agreement of the 2nd July, 2003, the solicitor, Denis Cahalan, on behalf of Mr. Nolan and Philip Bass and Co., on behalf of Mr. Keaney completed and agreed a series of legal documents which were dated the 24th July, 2003.

115. A number of agreements were signed and completed on the 24th July, 2003. Those agreements included firstly, an agreement relating to the sale of Mr. Keaney's shares in the company to Mike Nolan. Secondly, there was an option agreement whereby Mike Nolan and Tregan Properties Limited gave an option to Titanic Cobh Trading Company Limited (Mr. Keaney's new company) to acquire the Scott's building and the Tregan building. Thirdly, there was a contract for sale of Mr. Keaney's share of the Scotts building to Mike Nolan. In the special conditions of that contract the parties agreed the value of Vincent Keaney's share of the property at a figure of €525,000 and further agreed that that sum was paid or satisfied by Mike Nolan taking over responsibility for the mortgage on the property which at that time was in the joint names of Mike Nolan and Vincent Keaney. The uncontested evidence available to the Court was that that sum of €525,000 was the agreed consideration arrived at following discussions between Mr. Keaney's and Mr. Nolan's representatives. The evidence as to how that sum was precisely calculated was unclear at the hearing before the Court. However what was clearly established was that the figure was agreed. The fourth document forming part of the suite of agreements of the 24th July, 2003 was a deed of release made between Mike Nolan, Q.E.F., Magpie International Trading Company Limited, Vincent Keaney and AIB Bank. Q.E.F. and Magpie were two companies owned and controlled by Mr. Nolan who had provided various services to the company. The purpose of the deed of release was to provide a clean break between the parties with each of them releasing the other, including their related companies, from "every form of liability, indebtedness, and obligation". The parties waived and released "any claims against each other, against any and all loss of liability of any nature incurred directly or indirectly by any party as a consequence". The intention of the deed of release was to ensure that if there were any outstanding liabilities between Mr. Nolan and Mr. Keaney, that those liabilities would be covered by the release. The fifth and sixth documents were new leases for the Scott's building and the Tregan building to Titanic Cobh Trading Company Limited. The seventh document was an agreement between Mr. Nolan, the company, Mr. Keaney and Titanic Cobh Trading Company whereby Titanic Cobh Trading Company Limited agreed to take responsibility for a leasing agreement with Woodchester Bank.

116. The option agreement allowed Titanic Cobh Trading Company Limited to purchase Scott building and Tregan building for an agreed consideration of €2.8 million at any time during the period from January 2004 to January 2009 subject to terms and conditions. As Titanic Cobh Trading Company Limited was subsequently in breach of its obligation under the leases of the two properties including the non-payment of three instalments of rent, that option ceased and became null and void. That fact was confirmed by letter from Mr. Nolan's solicitor to Titanic Cobh Trading Company Limited on the 24th September, 2004. Titanic Cobh Trading Company Limited also failed to honour the seventh agreement resulting in Mr. Nolan being exposed to a personal guarantee of approximately €85,000. The documents demonstrate that by the end of 2004 Titanic Cobh Trading Company Limited was in serious arrears in relation to rental payments and ejectment civil bills were issued in December 2004.

117. The final matter, in time, which the Court is required to consider is the deed of assignment of the 30th September 2004. The Court will later return to that deed and the claims relating thereto.

118. One of the documents completed and signed on the 24th July, 2003 was the deed of release. Those documents were drawn up and agreed by the solicitors. One of the professional advisers involved was Mr. Cahalan who acted for Mr. Nolan. He was called as a witness by the plaintiff. Mr. Cahalan gave evidence that the meeting of the 24th July, 2003 which resulted in the signing of a suite of

agreements, was the culmination of acrimonious negotiations between Mr. Nolan and Mr. Keaney and their representatives and in his words the agreements concluded could not be described in any sense as a "sweetheart deal".

119. The Court has already indicated that it is satisfied that there was no breach by the fourth named defendant of his agreement with the plaintiff. Even if the Court had concluded otherwise, the Court is satisfied that the plaintiff would not be entitled to maintain any claim in relation to the alleged breaches where there is the agreed deed of release dated the 24th July, 2003. The terms of that document do not permit the plaintiff to make such a claim.

120. When one has regard to the definition of obligations contained in clause 1 and the fact that in clause 2 the receipt of good and valuable consideration is acknowledged by Mr. Keaney and given the waiver and releases contained in clause 5, the Court is satisfied from the terms of the deed of release that any claim that the plaintiff may have had, in relation to the 2000 agreement and/or against the company Titanic Queenstown Trading Limited and/or as to the ownership of the Titanic bar and restaurant was waived for good and valuable consideration. The plaintiff has failed to identify any basis upon which the deed of release can be impugned. Mr. Keaney entered into the deed of release with the advice of his solicitor. He is bound by the terms of that document.

121. The plaintiff also makes a claim in relation to the deed of assignment dated the 30th September, 2004. That claim is set forth in paras. 42 and 56 of the final statement of claim.

"42 The plaintiff avers that the purported Deed of Assignment purportedly inscribed with the date the 30th September, 2004, (between Vincent Keaney and the fourth named defendant and Julia Nolan) of the premises Scott's Building, Cobh, Co. Cork (registered in the Registry of Deeds on the 25th October, 2005) has been interfered with by the fourth named defendant, in the following respects:-

- (i) The date of first execution thereof by the disponent was properly the 24th July, 2003, and not the date inserted thereon, which is a deliberate and intentional misleading date. The fourth defendant perpetrated this misrepresentation in open court in July, 2006.
- (ii) Further the subsequent memorial of the said Deed executed by the fourth named defendant and sworn by Denis Cahalan, solicitor, perpetrates the lie as to the date of true execution of the Deed.
- (iii) The Deed was not stamped until the 13th May, 2005, and the plaintiff asserts that the post dating of the Deed was to evade substantial stamp duties, penalties and interest.

Recited Consideration on Deed

- (iv) Further the recited in the consideration in the Deed of "€525,000 now paid by the purchasers to the vendor receipt of which the vendor hereby acknowledges" was in fact blank on the day on which the plaintiff signed. The plaintiff was not furnished with a copy of this Deed after his signature despite promise of same.
- (v) No cash consideration passed on the day as recited. The solicitors involved confirm (sic) this in a court filed written statement. In fact there was no cash consideration despite the representation of Senior Counsel for the fourth named defendant before Ms. Finlay Geoghegan J. in July 2006, that the "Receipt clause" stands.
- (vi) In the premise the Deed has not the true/correct consideration described thereon nor has the Deed been stamped on the basis of 50% sale, at correct market value, which is the correct basis for ad valorem due stamping. The connectedness of the transaction with the other events/documents of the same day was not disclosed in the certificates to the Revenue for stamping purposes.
- (vii) The plaintiff asserts that (outside his control) the true value/nature of the transaction was not disclosed to the Revenue Commissioners who, if notified, would have sought stamp duty on the basis of a percentage of proper gross market value (divided by two) at the time of execution, plus penalties, surcharges and interest for late stamping.

56. By reason of the foregoing the said deed of the 24th July, 2003, is void/voidable together with the public licence thereto and should be set aside by this Honourable Court and the plaintiff has suffered and continues to suffer, loss, damage, inconvenience and distress.

Particulars of loss:-

By reason of the foregoing, the plaintiff has suffered loss and damage in that: The plaintiff has lost his remaining half title to his public house, valuations of which will be furnished as of the relevant dates; His 7 day public house licence, then costing IR£76,000 appurtenant to the title; to the title;".

In the submissions to the court counsel for the fourth and eighteenth named defendants identified ten matters which were alleged in those paragraphs, namely:-

- (1) The date of the first execution was properly 24th July, 2003,
- (2) The date inscribed on the deed is a deliberate and misleading date,
- (3) Mr. Nolan perpetrated the misrepresentation in July 2006 in open Court,
- (4) Mr. Cahalan perpetrated the lie as to the date of true execution in the memorial of the deed,
- (5) The alleged post-dating of the deed was to evade stamp duty penalties and interest,
- (6) The recited consideration on the deed was in fact blank on the day on which the plaintiff signed,
- (7) No cash consideration passed on the day as recited,

- (8) The deed had not the true or the correct consideration inscribed thereon,
- (9) The deed had not been stamped on the basis of fifty per cent of correct market value,
- (10) The connectedness of the deed to other events or documents was not disclosed for stamping purposes.

122. In relation to these matters the Court had the benefit of hearing the evidence of both solicitors who dealt with the deed. From their evidence it is clear that there is no basis to support the claim that the date of the first execution was properly the 24th July, 2003. This claim was made in the pleadings and during the opening of the case. That claim was made by the plaintiff notwithstanding clear documentary evidence to the contrary. Those documents were not referred to in the opening of the case nor were they put to Mr. Cahalan in his direct evidence and they first came before the Court during cross-examination.

123. The plaintiff persisted with the claim that the deed was executed on the 24th July, 2003 when correspondence, including correspondence from the plaintiff's own solicitor, demonstrated that that clearly was not so. Failing to bring this to the attention of the Court either in opening or during the direct examination of Mr. Cahalan was a further instance of the irregular manner in which the plaintiff's case was pleaded and presented. As previously identified in this judgment, the plaintiff's counsel opened the case on the basis that there was a concluded agreement in the document entitled Heads of Agreement dated the 27th March, 2000, even though the plaintiff disavowed such contention in his direct evidence. These matters when taken together with the manner in which the plaintiff and his advisers sought to circumvent the order of Ms. Justice Finlay Geoghegan of the 26th February, 2007, demonstrated an approach to this case which bordered on an abuse of process.

124. Mr. Denis Cahalan was called in evidence by the plaintiff. Mr. Cahalan acted as solicitor for Mr. Nolan in relation to various commercial matters over a number of years and acted for him in relation to the matters in issue in this litigation. Mr. Cahalan is a highly experienced solicitor who has been in practice for some 39 years, the majority of that time in the area of conveyancing. He has been a partner in his firm for some 30 years and has done a substantial amount of conveyancing and has developed a significant expertise in that area of law. Mr. Cahalan was involved in the preparations leading to the meeting of the 24th July, 2003 and was present. Mr. O'Kane, Mr. Phelan and Mr. St. John Culligan and Mr. Keaney were also present. Mr. Nolan was not present but Mr. St. John Culligan was acting on his behalf with a power of attorney. Mr. Cahalan confirmed that a series of documents were executed on that date but that there was no assignment of the lease and that it was the contract that was signed. It was expressly put to Mr. Cahalan, in cross-examination, that the case had been made that Mr. Keaney had signed the deed of assignment of his interest in the lease of the Scott's building on that date. He responded by stating that such document did not exist as of that date and that the only documents which existed as of that date are the documents dated the 24th July, 2003. The solicitors for both sides had been in contact prior to the meeting of the 24th July and Mr. Cahalan confirmed that Mr. O'Kane, acting on behalf of Mr. Keaney, had approved the drafts of all documents to be signed some days in advance of the meeting. The contract was produced in evidence and Mr. Cahalan confirmed that the handwritten clause 11 had been written in his hand on the date of the meeting. The terms of clause 11 had been agreed between him and Mr. O'Kane. The handwritten alteration was initialled by Mr. Keaney. Special condition 11 was agreed between the clients, and Mr. Cahalan translated such agreement into special condition 11 and had it approved by Mr. O'Kane prior to signing. The figure of €525,000 was agreed between the parties and was given to the solicitors at the meeting. When the precise terms of clause 11 were put to Mr. Cahalan, by counsel for the plaintiff, and he was questioned as to whether he saw any difficulty with that clause, Mr. Cahalan indicated that he did not.

125. The issue of the dating of the deed was dealt with in cross-examination by Mr. and Mrs. Nolan's counsel. Mr. Cahalan was asked how the deed came to be dated the 30th September, 2004. He responded by saying that his solicitor's firm received the deed on the 4th February, 2004 and it was undated and had not yet been executed by Mr. and Mrs. Nolan. The reason for that was that he would arrange for his clients to sign the document when it had been returned to him signed by Mr. Keaney.

126. He then explained that the date of 30th September which appeared on the face of the deed could only be explained by the fact that that was the date when it was signed by Mr. and Mrs. Nolan. Mr. Cahalan also dealt with the stamping of the deed. It was not presented for stamping until April/May 2005. Mr. Cahalan indicated that he received a letter from Mr. Keaney's solicitors, Philip Bass & Co., on 22nd April, 2005 which dealt, in part, with motions then listed before the court and also stated:-

"We shall comply with your request to furnish a particular's delivered form as soon as we have the necessary information and confirm that we shall not be making an issue of that particular matter."

127. Mr. Cahalan gave evidence that the particular's delivered form is one of the forms that has to be delivered to the Stamp Office to enable the stamping to take place and as of April 2005, Mr. O'Kane, Mr. Keaney's solicitor, had not provided that form. Mr. Cahalan gave evidence that there was no attempt to defraud the Revenue, in relation to stamping. Mr. Cahalan confirmed his witness statement that he had prepared a draft deed and forwarded it to Mr. Keaney's solicitor on 4th September, 2003, and had received verbal confirmation in early November 2003 that the draft deed was in order and then forwarded an engrossment for execution on 11th November, 2003 to Mr. Keaney's solicitors and that that was returned executed by Mr. Keaney on or about 4th February, 2004, signed but undated.

128. The other solicitor involved in the transaction, Mr. O'Kane, also gave evidence. [Mr. O'Kane is at times, both in the documents and in evidence, referred to by his name in Irish, Mr. O'Cathain]. Mr. O'Kane confirmed that special condition 11 was agreed on the day of the signing, that is 24th July, 2004.

129. Mr. O'Kane explained that the concept, which ultimately was incorporated in clause 11, had been agreed in advance but that the actual amount was agreed on the day. As regards, clause 11 he knew that money did not pass over but:-

"I was of the view personally at the time that that was acceptable if the liability was taken over by the other person that Mr. Keaney was getting the benefit of that, that that would constitute consideration, but apparently that wasn't paid over as far as I am aware."

130. In cross examination, Mr. O'Kane stated that he did not have any quarrel with the deed and he stated he would have considered it to be alright if slightly irregular but he had seen a number of things like that in his practice over the years.

131. As regards the signing of the deed, he confirmed that when Mr. Keaney had executed the deed he sent it to Mr. Cahalan on the 3rd February, 2004. He gave evidence that the date was blank when he returned the signed deed as was the normal practice.

132. Mr. Keaney gave evidence that he believed that he had signed the deed in 2003 and that it was one of a number of documents that he signed. That would have been at the meeting on 24th July, 2003. That was Mr. Keaney's evidence in direct examination. By

the time he came to be cross examined by Mr. and Mrs. Nolan's counsel in relation to this matter, the two solicitors Mr. Cahalan and Mr. O'Kane had already given evidence. Therefore when Mr. Keaney was questioned in relation to the fact that the case had been opened on Mr. Keaney's behalf and that he had given evidence in chief to the effect that he had signed the deed of assignment on 24th July, 2003 and that by the time of the cross examination it was clear that that wasn't the date upon which he signed the deed, Mr. Keaney responded by stating "these are kind of legal technicalities, I am a layman". It was expressly put to Mr. Keaney, by the Court, that a letter dated 12th September, 2003 from his then solicitors, Philip Bass & Co. had been produced in the Court, after Mr. Keaney's direct evidence, which stated "we confirm that we are awaiting a call from Vincent Keaney to sign the deed of assignment." He was therefore asked how, in the light of that letter from his solicitors, he was in a position to give evidence that he had signed the deed of assignment prior to the date of that letter. Mr. Keaney responded by stating "it's a very detailed thing, judge, and I don't genuinely have an immediate recall. I apologise". Mr. Keaney later indicated that in relation to signing the deed he could not accurately remember and that there was lots of signings going on, on 24th July, 2003.

133. It is clear from the foregoing that Mr. Keaney made a case, through counsel, which was unstateable.

134. Mr. Nolan gave evidence in relation to the execution of the deed and stated that he and his wife signed the document on 30th September, 2004 and that they signed the document without making any alterations or changes thereto. He also confirmed that in dating it 30th September, 2004 he was not doing so in an attempt to defraud the Revenue.

135. The evidence makes it clear that the deed of assignment was not executed by any party on 24th July, 2003, indeed it did not exist. The plaintiff seeks to deal with that fact by altering the basis for his claim. In the submissions made to the court, at the conclusion of the evidence, the plaintiff put forward a new claim that the deed was "operative", rather than signed as of 24th July, 2003 and that alternatively the date of 4th February, 2004 should have been inserted rather than 30th September, 2004. The plaintiff seeks to alter his case without seeking any amendment. It is also the uncontested evidence before the court that the normal practice in relation to the dating of deeds of assignment is that the date would be left blank when returned signed by one solicitor to the other. In the plaintiff's legal submission the case was made that Mr. Nolan's solicitor chose to insert a random date being the date on which his clients called in to his office to sign. That claim is not supported by the evidence. The evidence established is that it was on that date that it was signed by Mr. and Mrs. Nolan and that they put the date of signing thereon.

136. The Court is satisfied that the evidence establishes that the date on the deed was the date of signing by Mr. and Mrs. Nolan and was inserted in accordance with normal practice. There was a delay after receipt of the signed document in having it signed by Mr. and Mrs. Nolan but the plaintiff has not identified any legal consequence which flows from such delay.

137. Even if the court were to determine that the date on the deed was incorrect, the court is satisfied that such error would not have a material effect as to the validity or efficacy of the deed.

138. The issue of the date on a conveyance is dealt with in *Wylie's's Irish Conveyancing Law* (2nd Ed.) at para. 18.09 (p. 629) where he states:-

"It is usual to date a conveyance of unregistered land with the date of actual completion, though it has long been established that insertion of a date is not strictly a necessary part of the deed. Furthermore, it is also clear that the date from which a deed operates, i.e., transfers the estate to be conveyed to the purchaser, is the date of the delivery of the deed, which is not necessarily the closing date or date of completion."

139. The text goes on in the following para. (18.10) p. 630/631 to state:-

"...if a date is going to be inserted in a conveyance, care should be taken to see that it is the correct one, if only because under the Forgery Act 1913, it is a criminal offence to forge a document "with intent to defraud or deceive" and making a false document includes falsely stating in it "the time or place of making, where either is material". It is true that in many cases where the wrong date is inserted there may be no requisite intent or the date may not be material."

140. The evidence establishes that there was no deliberate post dating of the deed. It is also clear that there was no attempt to avoid any stamp duty and that it cannot be contended, on the facts of this case, that there was any intent to defraud or deceive. This is a case in which there is no evidence of requisite intent. Nor has it been shown that the date is material.

141. This is not a case of a forged deed which would be null and void. Mr. Cahalan gave evidence, which the Court accepts, as to the manner and circumstances in which the deed was signed and stamped and accepts his evidence that there was no attempt to defraud the Revenue. The evidence establishes that there was in fact a reduced penalty imposed for the late stamping of the deed. The evidence also establishes that the documentation necessary to enable the deed to be stamped and forming part of the required package, had not been received from Mr. Keaney's solicitors by the date of Philip Bass & Company's letter of 22nd April, 2005. That fact of itself is demonstrative that there was no intent to defraud or deceive on the part of the fourth or eighteen named defendants or anybody acting on their behalf.

142. Even if the Court was satisfied that the deed was misdated that would not result in the Court holding that the document was invalid or rendered a nullity. In *Kwei Tek Chao v. British Traders & Shippers Limited* [1954] 2 Q.B. 459, Devlin J. held (at p. 475) as follows:-

"There does not seem to be any authority precisely in point, and Mr. Ashe Lincoln has relied upon broad statements, in *Kreditbank Cassel G.m.b.H. v. Schenkers Ltd.* [1927] 1 K.B. 826, in particular, that a forged document is null and void."

143. In that case Banks L. J. said:-

"To mere irregularities the principle of (*Mahony v. East Holyford Mining Co.*) no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void. But such general dicta must be related to the circumstances in which they are made. If somebody forges a signature to a document, that document is wholly fictitious from beginning to end, and it is of course null and void as soon as forgery is proved; but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and void".

144. The Court is satisfied that taking into account the circumstances of this case where the date is not material to the operation of the document, that it could be held that the manner in which the document was actually dated gives rise to circumstances effecting its validity or efficacy.

145. The plaintiff made two complaints in relation to the consideration identified in the deed. They are items seven and eight listed above. They are that the recited consideration on the deed was in fact blank on the date upon which the plaintiff signed and secondly, that no cash consideration passed on the day as recited. The evidence of the two solicitors establishes that there is no factual basis for the claim that the recited consideration of the deed was blank upon the day upon which the plaintiff signed. The plaintiff's own solicitor's evidence clearly demonstrates otherwise.

146. The fact that no consideration passed on the day was well known to the plaintiff and his advisers. There was no expectation or agreement that the plaintiff would be paid cash in consideration for the transfer of his half interest in the lease of Scotts building. The agreed consideration, well known to the plaintiff and his advisers, was that Mr. Nolan agreed to take responsibility for all the indebtedness relating to the property in question. The consideration agreed and identified was in fact conferred on the plaintiff. If there was any doubt in relation to that it is confirmed by paragraph 11 of the special conditions in the contract which was initialled by Mr. Keaney which stated:-

"The vendor acknowledges that the purchase price for the property in sale is paid by the purchaser taking over the AIB loan attaching to the property. The parties agree that the value attributable to the property in sale is €525,000."

147. There is no evidence that cash was to be paid and the terms of the contract and special conditions, and the conduct of the parties and their legal advisers, confirm that the plaintiff had already received the consideration expressly provided for in the deed. The recital within the deed is that the plaintiff acknowledges receipt of the consideration. It is not open to the plaintiff to go behind that recital nor is there any evidence before the Court to support such an attempt. This is not a case where the deed can be said to be void. In those circumstances the contention put forward on behalf of the plaintiff that no estoppel could arise because the deed was void is not established on the facts of this case.

148. During the course of cross-examination of Mr. Nolan and Mr. Sullivan and in submissions made on behalf of the plaintiff, there was an attempt to call into question or undermine the stated consideration. That attempt is in conflict with the judgment of Finlay Geoghegan J. which resulted in that issue not being before the Court at trial. In any event the evidence in relation to consideration, which was before the Court, clearly establishes that it was an agreed consideration identified by the parties and their representatives.

149. The Court is satisfied that the plaintiff has failed to establish any legal basis as to why the deed is not valid and enforceable. The evidence which was before the Court identified a rational and logical basis for the figure of €525,000. Mr. Nolan in his evidence identified three specified bank accounts which had a total indebtedness of over €1 million and fifty per cent of that total would approximate to the agreed figure for consideration. It is not open to the plaintiff on the facts established in this case to claim that he received no consideration under the deed nor is such pleaded.

150. In the light of the limited issues which are live before the Court it is unnecessary for the Court to consider, in detail, the evidence which related to the banking arrangements. However such evidence, as was before the Court supports a finding that the bar operating account and the construction account were operated in a proper manner.

151. The Court is satisfied that having regard to the express terms of the deed of release of the 24th July, 2003, that it is not open to the plaintiff to seek to go behind the various bank balances as to permit him to do so would allow him to question or deny his liability for such balances or part of them with consequence that increased liability would attach to Mr. Nolan. That is not permissible under the terms of the deed of release.

152. A discrete issue raised by the plaintiff related to the basis for the stamping of the deed. It was contended in the plaintiff's submissions that deeds for non-cash consideration should be stamped on the basis of a professional arms length valuation. The Stamp Duties Consolidation Act of 1999 deals with the stamping of deeds and s. 41 of that Act is relevant. It follows from the terms of s. 41 that where the consideration for a transfer is the assumption of debt, that the stampable value to be identified is the value of the debt so assumed. The undisputed evidence before the Court was that the sum of €525,000 was a sum agreed as being the value attributable to the property. The evidence establishes that such valuation was established as a true and proper commercial valuation and in no way could be said to be contrived or invented.

153. The Court has made a number of findings which result in the Court concluding that the plaintiff has failed to establish any claims against the remaining defendants. It should be noted that the facts of this case establish that Mr. Nolan has assumed all liabilities attaching to the AIB facilities and in circumstances where there were a series of transactions concluded on the 24th July, 2003, which have been executed it follows that *restitutio in integrum* is not possible and that even if the plaintiff had established facts and circumstances which would have entitled him to rescind or invalidate the deed of the 30th September, 2004, it would not be open to the plaintiff to do so as *restitutio in integrum* is simply not possible.

154. Finally, since Mrs. Nolan is sued because she is a purchaser in the deed dated 30th September, 2004 and since the Court is satisfied that there is no basis for the plaintiff's claims in relation to that deed, it follows that the case against her must be dismissed.

155. The plaintiff has failed in all his claims and all claims against the first, fourth and eighteenth defendants are dismissed.