Neutral Citation Number: [2008] IEHC 258

**THE HIGH COURT**

**2000 No. 4269P**

**BETWEEN**

**CHARLES CLEMENTS, MARCUS SEIGNE AND CHARLES BRYANT**

**PLAINTIFFS**

**AND**

**BARRY MEAGHER AND CARL MOYNIHAN, PRACTISING AS MEAGHER MOYNIHAN, CHARTERED ACCOUNTANTS AND REGISTERED AUDITORS, JOHN O'GRADY, TIM O'FLANAGAN AND PHILIP SHAFFREY**

**DEFENDANTS**

**Judgment of Mr. Justice Kevin Feeney delivered on the 25th day of July, 2008.**

1.1 The plaintiffs claim an entitlement to a share in settlement monies which the first, third, fourth and fifth named defendants (hereinafter called "the defendants", Carl Moynihan being referred to by name) recovered arising from proceedings that the defendants brought against CBT Group Plc., ("C.B.T."). Those proceedings were brought in the High Court under record number 1995; No. 7105P and such proceedings are herein after referred to as (the "CBT proceedings"). In the CBT proceedings the defendants sought specific performance of an agreement in writing contained in letters from CBT to Barry Meagher dated the 30th April, 1991 and from Barry Meagher to CBT dated the 21st June, 1991. It was claimed that CBT had agreed that it would pay to the defendants, the plaintiffs within the CBT proceedings, the sum of £29,.000.00 in cash and issue and allot or cause to transfer to them 10,000 ordinary shares in CBT Group Plc.

1.2 CBT was formerly known as Thornton Group Plc. During the period from 1987 to 1990, the defendants, the plaintiffs within the 1995 proceedings, together with others invested by way of a Business Expansion Scheme (BES) a total sum of IR£136,608.00 in a company called Data Code Communications Limited. That company was involved in the manufacture and supply of modems for interactive communication between computers. In 1990, that company was endeavouring to expand and sought new shareholder investment. That resulted in Thornton Group Plc. making an investment in Data Code Communications Limited and the Company also took management control of Data Code. That investment caused the defendants and the other BES investors to lose their tax benefit. Following that investment Data Code expanded its business but the business proved unsuccessful and Data Code went into liquidation.

1.3 The background to the CBT proceedings is that discussions took place between the defendants and the plaintiffs with Thornton Group Plc., concerning the loss of the BES tax benefit. It is claimed that those discussions resulted in an agreement whereby CBT's predecessor agreed to pay to all the BES shareholders the sum of £29,000.00 in cash and to issue and allot or cause the transfer to such BES shareholders of 10,000 ordinary shares in CBT. The BES shareholders consisted of the defendants, the three plaintiffs in this action and Michael Sweeney. The potential beneficiaries of the alleged agreement, therefore, were Barry Meagher, Philip Shaffrey, John O'Grady, Tim O'Flanagan, Charles Clements, Marcus Seigne, Charles Bryant and Michael Sweeney. Each of those persons had invested under the BES scheme in Data Code Communications Limited during the period from 1987 to 1990. The plaintiffs in this action and Mr. Sweeney were all employees of Data Code and Mr. Sweeney was its Chief Executive. The defendants were all outsider or external investors. The BES investors, in total, invested a sum of £136,608.00 in Data Code. The percentage breakdown of each person's investment to the total of £136,608.00 is set out in a letter of the 15th May, 1995, from Barry Meagher to Marcus Seigne.

1.4 The investment by Thornton Group Plc., in Data Code breached the Business Expansion Scheme Regulations, as to the maximum percentage ownership by an individual party of a qualifying company, and the BES investors thereby lost their entitlement to BES relief. It was that fact which gave rise to the discussions which resulted in the alleged concluded agreement of 1991 which sought to compensate the BES shareholders for their lost relief. The alleged agreement of 1991 was subsequently varied in mid 1992, with effect that in lieu of the cash payment of £29,000, CBT would issue 14,500 shares to the eight BES investors herein before set out. Such shares to be issued proportionate to each individual's BES investment in Data Code. That alleged variation was claimed to be evidenced by a letter of the 29th July, 1992, from Mr. Barry Meagher to Mr. Pat McDonagh of CBT.

1.5 Following the alleged agreement to issue 14,500 shares to the BES investors, CBT, or Thornton Group Plc., as it was then called, refused to allot or issue or cause the transfer of any of the said shares to the BES investors. Thornton Group Plc., changed its name to CBT and on or about the 13th April, 1995, issued a prospectus with a view to a public floatation of its share capital in New York in the Nasdaq. The prospectus did not identify or record any legal or beneficially held interests of the BES investors in CBT. Despite repeated requests and demands, CBT continued to refuse to issue shares and the defendants, that is the first, third, fourth and fifth named defendants herein, issued proceedings, as plaintiffs, against CBT Group Plc. Even though those proceedings only related to four named persons and not to all eight BES investors, the proceedings and the statement of claim made a general claim to the effect that the defendant therein, CBT Group Plc., was obliged to issue 14,500 shares to the persons who were plaintiffs in that action. However, the particulars within the proceedings identified that the named plaintiffs therein were seeking their individual percentage of the 14,500 shares based upon the percentage of each person's investment in the total BES investment of £136,608.00. This resulted in the four named plaintiffs in the 1995 proceedings claiming an entitlement to be issued with approximately 65% of the 14,500 shares. Prior to the institution of the 1995 proceedings, there had been correspondence between the solicitors acting for the defendants and CBT Group Plc. There were negotiations which ultimately proved unsuccessful and the 1995 proceedings were issued. In endeavouring to settle the claim and during the negotiations, Barry Meagher had acted not only for the defendants but had acted for all eight BES investors. Mr. Meagher had indicated to CBT that they should include all eight investors in any settlement and Mr. Meagher sought and obtained the agreement of the three plaintiffs herein and Mr. Sweeney that he might act for them in settlement negotiations and to try and obtain a settlement on behalf of all eight BES investors. No settlement was concluded and a proposed settlement meeting in mid 1995 did not occur. Thereafter the defendants determined to bring proceedings against CBT claiming on their own behalf and not on behalf of the other four BES shareholders. The defendants commenced proceedings by plenary summons on the 13th September, 1995. The defendants not only brought the 1995 proceedings but also funded the proceedings.

1.6 The 1995 proceedings took their course and following the delivery of a statement of claim, detailed particulars were sought and replied to and thereafter the defendant, CBT delayed in the delivery of its defence resulting in a motion for judgment being brought in June of 1996. The defence was ultimately delivered and CBT therein denied all claims made by the defendants herein as plaintiffs and a counter claim was raised, seeking a declaration that CBT was entitled to rescind the alleged agreement or alternatively that such agreement had already been rescinded. On receipt of the defence and counter-claim detailed particulars were raised and no replies were received and a motion was brought compelling the defendant to reply to such particulars. After further procedural delays, the proceedings were ultimately ready for hearing with a date for trial in June of 1998. In the days immediately prior to the hearing date, settlement negotiations took place and a settlement was agreed between the defendants as plaintiffs within the 1995 proceedings and CBT. The settlement of those proceedings was for a total sum of US$850,000.00. The plaintiffs in these proceedings claim an

entitlement to a share in those settlement monies.

2.1 In these proceedings, the plaintiffs seek declaratory and ancillary orders and reliefs against each of the named defendants for a sum or sums of money representing 24.68% of the settlement entered into on the 15th June, 1998 for US$850,000.00. The total sum claimed in these proceedings is US$209,780.00, being 24.68% of the sum of US$850,000.00. The percentage of 24.68% represents the three plaintiffs combined total percentage of the total investment in the aforementioned BES scheme. The sum claimed allows for no deductions for expenses or legal costs. That was the claim pleaded by the plaintiffs and was the claim advanced on their behalf by counsel during the opening of this case.

2.2 The defendants' claim against CBT was settled following pre-trial negotiation on the 15th June, 1998. The terms of settlement were written out by counsel and were signed on behalf of the parties. The terms of settlement provided that CBT agreed to pay the plaintiffs in that action, namely the defendants herein, the sum of US$850,000.00 together with costs to be taxed in default of agreement. The settlement, however, was not for a straightforward payment of US$850,000.00 to the defendants. The sum was in fact divided in two and the entire US$€850,000.00 would only be due under the settlement if the defendants had procured on or before the 24th June, 1998, written discharges from the three plaintiffs herein and Michael Sweeney in respect of all or any claims that they or any of them might have against CBT Group Plc., or any of its present or former officers or employees, including Pat McDonagh or against any associated subsidiary companies. If written discharges were not procured from each and every one of the three plaintiffs herein and Mr. Michael Sweeney on or before the 24th June, 1998, then in those circumstances, the settlement sum payable to the defendants was to be US$600,000.00. The format of the settlement, therefore, was that the defendants, who were the plaintiffs in the High Court action against CBT were to get US$600,000.00 in settlement and were prepared to accept same but that an additional sum of US$250,000.00 would be available if the three plaintiffs herein and Mr. Sweeney all signed written discharges on or before the 24th June, 1998. The approach adopted by CBT demonstrated that a real value was placed upon obtaining waivers from all three of the plaintiffs and Mr. Sweeney, thereby ensuring that all potential claims were disposed. If any of the three plaintiffs or Mr. Sweeney did not agree to sign a waiver, then the settlement which the defendants had accepted would be in the sum of US$600,000.00. That sum represented 70.6% of US$850,000.00.

2.3 The plaintiffs in the pleadings, and during the course of the hearing, pursued a claim for 7.01%, 7.26% and 10.41%, (totalling 24.68%) of the sum of US$850,000.00. Those percentages represented each of the plaintiffs' percentage investment in the original BES scheme. Mr. Sweeney had a 10.65% percentage investment in the original BES scheme and was one of the four persons, together with the plaintiffs, who were required to sign written discharges if the additional sum of US$250,000.00 was to be paid on settlement. The plaintiffs pleaded and opened the case on the basis that they were entitled to be paid their relevant percentage out of the total sum of US$850,000.00. However, during the course of the hearing and again in closing, it was accepted on behalf of the plaintiffs that they were only entitled to share with Mr. Sweeney in the sum of US$250,000.00, based on those four persons percentage BES investment. It was also conceded that there should be a deduction out of the US$250,000.00 of an appropriate sum to provide for agreed expenses and legal costs. I will return to this issue later in the judgment. The alteration in the approach adopted by the plaintiffs reduced the quantum of the plaintiffs' claim. Following such concession the three plaintiffs herein together with Mr. Sweeney were seeking to divide approximately 29.4% of the total sum of US$850,000.00. The initial claim was based on 35.33%.

2.4 That concession also had an impact on the extent of the issues involved in the proceedings. This arises from the nature of the defence as pleaded by the defendants. A defence was delivered on behalf of the first, third, fourth and fifth named defendants on the 22nd October, 2001. At that stage the second named defendant was separately represented and the third named defendant had not yet obtained separate representation. In paragraph 12 of the defence, delivered on behalf of the first, third, fourth and fifth named defendants, it was expressly pleaded, as follows:-

> "…In consideration of the plaintiffs executing the waiver abandonment and acknowledgement, the plaintiffs were entitled to receive their rateable proportion of the difference between the sums of US$600,000.00 and US$850,000.00 less an appropriate deduction for the costs and expenses incurred by the defendants and, in particular, by the first named defendant in recognition of the fact that such monies were obtained solely due to the efforts of the defendants."

The second named defendant originally delivered a separate defence in January, 2004, but by the hearing of the action was represented by the same solicitors and counsel as the first, fourth and fifth named defendants and it was expressly indicated that the proceedings were being defended on the second named defendant's behalf, consistent with the plea contained in paragraph of the 12 of the defence herein before set out. There were separate pleas that the second named defendant had no involvement in the events the subject matter of the proceedings and that the plaintiffs were "not entitled to the relief claimed or any relief" as against the second defendant. It followed that once the plaintiffs' counsel had made the concession herein before set out, that there was no issue as to the percentage entitlements of the plaintiffs and that the only remaining matters in issue related to the quantum of the deductions for costs and legal expenses, if any, and the delay in payment. This Court, therefore, does not have to decide or determine whether or not the US$250,000.00, received by the defendants, was subject to a constructive trust for the plaintiffs, or if such monies was received as agents for the plaintiffs. The defendants accepted that the three plaintiffs are entitled to their respective shares out of the sum of US$250,000.00 together with Mr. Sweeney, less the appropriate or agreed reductions for expenses and legal costs.

2.5 In May of 1995, Barry Meagher had obtained the agreement of the three plaintiffs that he could act for them in endeavouring to obtain compensation and/or a settlement arising out of their lost BES tax relief. Each of the three plaintiffs signed a letter of the 15th May, 1995 from Barry Meagher to Marcus Seigne confirming that Barry Meagher could act on their behalf in endeavouring to reach a settlement. Mr. Meagher had indicated that he would endeavour to reach a settlement on behalf of all the BES shareholders and that he would use his best endeavours to affect same. That letter was written in the context of a proposed settlement meeting and the evidence before this Court indicated that such settlement meeting never in fact took place. The plaintiffs rely on that letter and the agreement therein evidenced, and claim that thereafter Mr. Meagher was acting on behalf of all the shareholders. The plaintiffs claim that thereafter Barry Meagher was their agent, for the purposes of securing a settlement for the plaintiffs in respect of CBT's failure to honour the share allotment agreement. The evidence does not bear out such contention as the letter made it clear that if an agreement could not be achieved, that the parties would have to consider their own individual positions and decide whether or not they wanted to act independently. In fact, within four months the defendants had commenced their own proceedings against CBT. The three plaintiffs in this case were not parties to those proceedings. Thereafter those proceedings were conducted solely by the defendants for their own benefit. That is clear from the particulars supplied within those proceedings which demonstrated that the sums claimed related only to the defendants' portion. The letter of 15th May, 1995, had indicated that if a settlement had not been concluded that it would be necessary to evaluate the financial downside of issuing proceedings both in Ireland and New York and that such proceedings would require a considerable financial commitment. None of the plaintiffs sought to institute proceedings or to evaluate their own individual positions so as to determine whether or not proceedings should be issued or financed. The evidence establishes that after May, 1995, the defendants in September, 1995, issued and prosecuted detailed and complicated proceedings

involving a considerable financial commitment. The evidence also establishes that the only step that had been taken by the plaintiffs was to authorise Barry Meagher to try and negotiate a settlement. When such settlement was not concluded, the defendants chose to litigate. The plaintiffs were entirely inactive between May, 1995 and June of 1998, and had no involvement in the 1995 proceedings and took no steps to pursue a claim. Mr. Bryant stated in evidence that neither he or Mr. Clements were involved in the proceedings against CBT and he was not asked to participate. The evidence established that after a three year gap the next involvement of the plaintiffs was when the settlement had been agreed by the defendants. The Court is satisfied that the letter of the 15th May, 1995, and the agreement therein, can not be relied upon by the plaintiffs as placing any obligation on Barry Meagher in and about the events that occurred during 1998.

2.6 The plaintiffs contend that even if they are unable to rely on the agreement evidenced in the letter of the 15th May, 1995, that the circumstances surrounding the execution of the waivers by the three plaintiffs in 1998 give rise to a fiduciary relationship between each of them and the defendants.

It is therefore necessary to consider the circumstances surrounding the execution of the waivers by each of the three plaintiffs. Due to the nature of the settlement agreement which had been concluded on the 15th June, 1998, and the time limit of the 24th June, 1998, therein, it was clear that all waivers had to be obtained on or before the 24th June, 1998, or they would be of no value. This placed a strict time limit on obtaining waivers and explains, to some extent, the informal and hurried manner in which they were obtained. Mr. Meagher made the document entitled "Terms of Settlement" dated the 15th June, 1998, available to the plaintiffs for consideration and it was clear from that document that the defendants would receive US$600,000.00 and costs, irrespective of whether the waivers were obtained. However, it was also clear that an additional US$250,000.00 was being provided to obtain written acknowledgement from the three plaintiffs and Michael Sweeney that they waived and abandoned any claim or cause of action whatsoever against CBT Group Plc., and other parties. The terms of settlement made it clear that CBT had placed an identifiable value on obtaining all four waivers.

The Court is satisfied that the circumstances in which the waivers were signed and the fact that the contents of the terms of settlement were made known to the plaintiffs led to the clear understanding that the three plaintiffs and Mr. Sweeney were to be the beneficiaries of a division of the entire sum of US$250,000.00, less expenses and legal costs.

2.7 It was not just Barry Meagher who exercised control over the settlement funds but all the defendants other than Carl Moynihan. I will return later to this issue but it is clear that the four defendants, other than Carl Moynihan, jointly decided how payments would be made from the total sum of US$850,000.00 and to whom.

The Court is satisfied that the evidence of the circumstances surrounding the execution of the waivers following the transmission of the contents of the terms of settlement to each of the plaintiffs gave rise to a fiduciary relationship between each of the plaintiffs and the defendants. Mr. Bryant confirmed in his evidence that he and the other plaintiffs knew that by signing the waivers they were giving up all claims against CBT and its associates. As Mr. Clements said "he knew that if he did not sign US$250,000.00 would not be forthcoming".

2.8 The existence of a fiduciary relationship is effectively acknowledged in paragraph 12 of the joint defence delivered by the first, third, fourth and fifth named defendants, wherein (in paragraph 12) it was acknowledged that in consideration of the plaintiffs executing the waiver abandonment and acknowledgement, that the plaintiffs were entitled to receive their rateable portion of the difference between the sums of US$600,000.00 and US$850,000.00, less an appropriate deduction for costs and expenses. That plea has within it a clear acknowledgement that there was an obligation on the defendants as the parties who had concluded a settlement with CBT to deal with the US$250,000.00 consistent with the acknowledged entitlement of the plaintiffs. In exercising control over that sum, the defendants had an obligation to deal with that sum in a manner which recognised the plaintiffs' entitlement.

3.1 It is not possible to provide a complete definition of the categories of persons who occupy fiduciary positions. The categories of fiduciary relationships are not closed and it is well recognised that fiduciary duties may be owed notwithstanding the fact that the relationship in question does not fall within one of the settled categories of fiduciary relationships. That is so, provided the circumstances justify the imposition of fiduciary duties. A fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

It follows that a fiduciary is a person who owes fiduciary duties. A fiduciary relationship, therefore, is a relationship between two or more persons in which at least one of them is a fiduciary who owes fiduciary duties to the other or others. (see paragraph 7 - 04 of the 31st Edition of Snell's Equity). Whilst there is no universal or uniform description of a fiduciary relationship, the approach adopted by Millett L. J. *in Bristol and West Building Society v. Mothew* [1998] Ch 1, at p. 18, is apposite:-

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

3.2 On the facts of this case, the defendants undertook to act for and on behalf of the three plaintiffs by including within their settlement with CBT a term to provide for the disposal of the plaintiffs' claims against CBT. The settlement identified the gross sum which would be available to the three plaintiffs and Mr. Sweeney (less deductions for expenses and legal costs). The first named defendant further undertook to act for and on behalf of the plaintiffs by securing the necessary waivers. The defendants received and dealt with the money. As part of such dealings the defendants invested and paid out monies. By so doing, the defendants undertook to act for and on behalf of the plaintiffs and each of them in circumstances giving rise to a relationship of trust and confidence. There thereby arose a legitimate expectation on the part of the plaintiffs, which equity recognises, that the fiduciaries would not utilise their position in such a way as was adverse to the interests of the plaintiffs. The facts of this case do not disclose a situation which would support the contention that a fiduciary relationship does not exist due to its commercial setting. The reason that fiduciary duties do not commonly arise in commercial settings is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. This is not such a case as the settlement terms were identified and agreed by the defendants and there was no question of having to subordinate their own interests to those of the plaintiffs. This position was equally applicable in relation to the deduction of legal costs and expenses in that what was required was the identification of those sums so that they could be discharged by all the parties. The fundamental position is that no person in a fiduciary capacity is allowed to retain any advantage gained by him in his character as trustee.

3.3 Any case relating to fiduciary relations requires a detailed consideration of the facts of the case. In this case, the circumstances in which the first named defendant came to seek and obtain the plaintiffs' execution of waivers, and the terms upon which the defendants concluded a settlement with CBT which resulted in the defendants coming into possession of the entire settlement monies, placed clear obligations on the defendants. They received a portion of the monies for and on behalf of the plaintiffs. One of the central features of this case is that the defendants agreed to act for and on behalf of and in the interests of the plaintiffs in dealing with the settlement monies. The relationship identified, therefore, is one which gave the fiduciaries the particular opportunity to exercise a power or discretion to the detriment of the plaintiffs. This arose from the fact that the defendants took possession and control of the entire settlement monies in circumstances where the quantum of the expenses and legal costs were to be identified and deducted from the settlement monies and the date and mode of payment out to be determined. As fiduciaries, the defendants were not entitled to act for their own benefit without the informed consent of the plaintiffs. The facts of the case indicate that the fiduciary duties of the defendants continue in existence until the plaintiffs' portion of the settlement monies has been discharged. That has yet to occur.

3.4 Later in this judgment I deal with the issue of expenses and legal costs. What is clear is that the plaintiffs acknowledged that there was to be a deduction for expenses and legal costs out of the settlement monies, but that at no time did they agree that such deductions would be taken exclusively out of the US$250,000.00 portion, from which they were to benefit. Nor was it at any time suggested or intimated that the entire expenses and legal costs would be deducted from the US$250,000.00 portion. Mr. Meagher stated in evidence that he told the plaintiffs that the payments they were to receive "were subject to deductions" but he did not tell them "who was going to pay". The decision to deduct only from the US$250,000.00 was taken exclusively by the defendants and in circumstances where they personally benefited from such decision and without the consent, informed or otherwise, of any of the plaintiffs. In deducting the entire expenses and legal costs from the US$250,000.00 portion, the defendants acted in breach of their fiduciary duties to the plaintiffs. To have deducted such expenses and costs from the entire US$850,000.00 figure on a pro-rata basis would not have been a breach of fiduciary duty and would not have been a case of the defendants acting for their own benefit without the consent of the plaintiffs. The defendants, through their solicitors, took possession of the entire settlement monies and determined how and in what manner expenses and legal costs would be discharged, and when the persons benefiting from the settlement would be paid. The defendants were acting in circumstances where they owed fiduciary duty to each of the plaintiffs. This is confirmed not only by the plea contained in paragraph 12 of the defence delivered on their behalf, herein before referred to, but also by paragraph 18 of the defence which stated:-

> "At all material times a sum of US$250,000.00(less appropriate deductions) has been maintained in an interest bearing account pending the plaintiffs articulating a proper claim for the appropriate amount. These defendants have since tendered the amounts to which the plaintiffs have a lawful claim and the payments of such monies has discharged any legal right or entitlement the plaintiffs may have had."

The defendants acknowledged that they were in control of the settlement funds and that appropriate deductions were to be made and that thereafter there was an obligation to pay out to each plaintiff the relevant sum due to him. Even though the third named defendant was separately represented at the trial, such representation was based upon the joint defence earlier delivered on behalf of the first, third, fourth and fifth named defendants and it was expressly acknowledged during the course of the trial and in written submissions on behalf of the third named defendant, that the pleas contained in paragraphs 12 and 17 of the defence constrained the third named defendant in his defence and that he accepted such pleas.

3.5 One of the reliefs sought by the plaintiffs is that in the event that the proceeds of the CBT settlement have not been distributed, that they are entitled to a declaration that the first and second defendants hold certain percentage sums on trust for each of the three plaintiffs. There is also an alternative claim for a declaration that the defendants and each of them hold the proceeds of the CBT settlement subject to an equitable charge in favour of each of the three plaintiffs to a stated percentage of the total settlement funds. I have already indicated that the plaintiffs have, in effect, abandoned a claim to an entitlement to a percentage out of the total CBT settlement. They have reduced their claim to a lesser sum being a percentage of the US$250,000.00 portion. If the claim for the greater sum had not been abandoned during the course of the hearing, the Court would have rejected such claim and limited the plaintiffs' entitlement to a percentage of the US$250,000.00.

3.6 It is clear that the entire CBT settlement sum was paid to the solicitors acting for the defendants. Thereafter those defendants exercised control over the entire settlement sum. Mr. Meagher stated that he proceeded on the basis that he should and did get the agreement of the defendants, other than Mr. Moynihan, to the amount of his fee, which was agreed at IR£60,000.00 and "that the fee was quickly agreed". It is common case that the plaintiffs are entitled to receive a portion of the said settlement. A cheque was eventually tendered in purported discharge of the plaintiffs' entitlement. This will be dealt with later in the judgment.

3.7 The Court is satisfied that the facts of this case give rise to a situation where the defendants have received monies, which in equity belong to others and that therefore they are obliged to pay them over to those other persons. This is a case where the law can impute to the defendants a promise that money received by them should be paid over to the plaintiffs, (See *Sinclair v. Brougham* [1914] AC 383). The circumstances of this case confirm that a portion of the monies received by the defendants was received by them as money for the use of the three plaintiffs. In those circumstances the plaintiffs are entitled to an order directing that the relevant portion of the said funds due to each of them is to be paid over to them by the defendants.

3.8 The defendants, on receipt of the US$850,000.00, acted on the basis that they were the beneficiaries or absolute owners of that entire sum and free to deal with that sum as they wished. The evidence before the Court is that they were advised to that effect by a lawyer on the 15th June, 1998. The Court does not accept that the defendants were so entitled. Such a contention is at complete variance with the plea contained in those defendants' defence which acknowledges that these plaintiffs were entitled to a portion of the US$250,000.00. Such acknowledgment is to an entitlement and not to a gift or an ex-gratia payment. The claim of an absolute entitlement is also inconsistent with the legal obligation to pay out such sums as were due to each of the plaintiffs. The defendants were not free to deal with the monies, as they saw fit, but in relation to a portion of it were under a fiduciary duty. It is clear that the advice which the defendants received to the effect that the entire of the UR$850.000.00 could be dealt with as they saw fit, gave rise to the situation which ultimately led to these proceedings. On the 25th June, 1998, the solicitors who acted for the defendants received two bank drafts in settlement of the CBT proceedings. One was for US$600,000.00 and the other US$250,000.00, together covering the two sums due under the settlement agreement. Thereafter, the defendants proceeded, on legal advice, to deal with the entire US$850,000.00 sum as if it was their own. That approach permitted a course of conduct by which those defendants directed immediate substantial payments to themselves. They proceeded on the basis that there was no obligation to make such payments to the plaintiffs.

4.1 Acting on the basis that they had complete control over how the US$850,000.00 would be dispersed, the defendants divided the entire of the UR$600,000.00 together with a small amount of accumulated interest to the 16th July, 1998, between themselves on a pro-rata basis based upon their percentage investment in the BES scheme. The defendants only had regard to the BES investment

made by themselves in deciding the percentage due. That resulted in the first named defendant receiving US$183,629.00, the third named defendant receiving US$115,447.00, the fourth named defendant receiving US$56,487.00 and the fifth named defendant receiving US$247,290.00. All payments were made within weeks of receipt of the settlement monies. No deductions were made out of the US$600,000.00 sum for any expenses or legal costs.

4.2 At the time that the first named defendant obtained the signature of the first named plaintiff on his waiver agreement, it had been stated by the first named defendant in a hand written note signed by him, that the first named defendant on behalf of the plaintiffs in the CBT proceedings, that is on behalf of the first, third, fourth and fifth named defendants herein, agreed to pay IR£14,178.00 out of the proceeds of the settlement. However, since it was understood that the final deductions had not been calculated, it was also expressly stated that the final figure was to be communicated to Charles Clements on the following day, which was the 23rd June, 1998. In fact no final figure was communicated nor was there any agreement in relation to same. What is significant is that it is apparent that Charles Clements knew and agreed to have expenses and legal costs deducted from the settlement figure. Mr. Clements states in evidence that he had "no objection to any legitimate expenses". Mr. Seigne stated that he knew that there would be deductions and that "he recognised something was due to Barry Meagher". The evidence established that whilst Charles Clements and the other two plaintiffs all agreed or acknowledged that they were proceeding on the basis that there would be deductions for expenses and legal costs, that at no time was it intimated or suggested that such deductions would only be made out of the US$250,000.00 portion of the settlement monies. The first named defendant in his evidence confirmed that none of the plaintiffs were informed that the deductions, which all agreed were to be made, were to be made solely from the plaintiffs' and Mr. Sweeney's portion of the settlement monies.

4.3 All the persons who gave evidence before this Court gave evidence in a straightforward and truthful manner and did so without endeavouring to slant the facts towards any particular legal plea. As a result of that, there was almost complete agreement between the witnesses as to factual matters. Each of the three plaintiffs acknowledged that they proceeded on the basis that there would be a deduction for expenses and legal costs made out of the CBT settlement funds. The background to the plaintiffs' understanding included not only the fact that the precise figures could not be given in advance of the concluded settlement due to the absence of definite figures for expenses and legal costs but also that each of the three plaintiffs had known in May, 1995, when they signed the letter of the 15th May, 1995, that it was envisaged that there would be an approximate fifteen per cent deduction to cover expenses and legal costs. Each of the plaintiffs also knew that the CBT settlement stated on its face that CBT were to be responsible for taxed costs in the Court proceedings. It followed that all three plaintiffs proceeded on the basis and acknowledged that there would be deductions which would be for expenses and legal costs to be taken out of the total settlement figure. The three plaintiffs knew that Barry Meagher had expended very considerable time and effort in and about obtaining the CBT settlement over a substantial number of years and that such time and effort pre-dated the High Court proceedings. It was against that background that the three plaintiffs acknowledged that there would be deductions. In relation to legal costs it was apparent that such legal costs would relate to solicitor and own client costs which would be due over and above the taxed costs which would be recovered from CBT on foot of the settlement. The Court is satisfied that given that the plaintiffs were never informed that the expenses and legal costs were to be deducted solely from the US$250,000.00 portion of the settlement, that the plaintiffs could not have understood that the same would occur nor did they agree to same. The Court is satisfied that the waivers were signed by the plaintiffs in circumstances where each of them had agreed to pay their pro-rata percentage of the expenses and legal costs together with the defendants and Mr. Sweeney.

4.4 The third named defendant seeks to avoid any legal liability to the plaintiffs on the basis that he had no dealing whatsoever with him. It is claimed on his behalf that the evidence establishes that any privity of contract which was concluded was between the plaintiffs and the first named defendant only. It is clear from the evidence of the first named defendant that at the time that he obtained the waivers from the three plaintiffs that he was acting on behalf of all the plaintiffs in the CBT action, that is on behalf of the first, third, fourth and fifth named defendants herein. Indeed in the hand-written note, signed by the first named defendant on the 22nd June, 1998, which was given to Charles Clements, Mr. Meagher indicated that he was doing so on behalf of the plaintiffs in the CBT action. It is also the case that the third named defendant, together with the first, fourth and fifth defendants, took effective control of the entire settlement funds once they had been paid to their solicitors. Thereafter, the defendants acted together in determining how to deal with such funds. In the light of the findings made by this Court in relation to fiduciary duty and in relation to money had and received, the Court is satisfied that the third named defendant is equally liable to the plaintiffs as are the first, fourth and fifth named defendants.

4.5 It is common case that the plaintiffs signed waivers on an understanding that there would be unspecified deductions in respect of expenses and legal costs. That understanding is succinctly acknowledged in the written submissions of the plaintiffs where it is stated:-

> "The evidence of the plaintiffs is that, when they signed the waivers, they were informed and accepted that there would be unspecified deductions from the settlement monies in respect of costs and expenses."

The Court has already determined that the acceptance by the plaintiffs was that the deductions would be from the total settlement sums and not exclusively from the US$250,000.00 portion. The defendants do not contend nor do they seek to make the case that the plaintiffs knew or agreed to the deductions being made exclusively out of the US$250,000.00 portion. The defendants' case is to the effect that each of the plaintiffs acknowledged in evidence that the first named defendant was entitled to make a reduction for costs, though un-quantified. It was common case that the plaintiffs knew that there would be deductions but that same had not been quantified or identified prior to the payment of the settlement monies. The Court is satisfied that it follows from the undisputed factual evidence that each of the plaintiffs was aware that deductions for expenses and legal costs would be made out of their portion of the settlement monies but that their agreement to make such provision was and could only reasonably have been understood to extend to such deductions being made pro-rata by all the plaintiffs, Mr. Sweeney and the first, third, fourth and fifth named defendants and out of the entire CBT settlement monies. Mr. Meagher never told any of the plaintiffs that the defendants had agreed among themselves that all expenses and legal costs were to be paid exclusively out of the US$250,000.00 portion. There was no agreement to same and the agreement which binds the plaintiffs relates to a pro-rata deduction from the total sum paid by CBT of US$850,000.00.

4.6 The evidence demonstrates that there is no dispute as to the quantum of the two deductions. The two deductions were IR£60,000.00 payable to Mr. Meagher for his work in and about pursuing the claim against CBT both before and after the commencement of proceedings and a figure of IR£20,000.00 as solicitor and own client costs incurred by the solicitors who acted for the defendants in their action against CBT. Those sums were acknowledged as reasonable. There was no cross examination by the plaintiffs' counsel to suggest that the two sums were unreasonable and no submissions were made to that effect.

4.7 The defendants agreed the sum of IR£60,000.00 as being an appropriate fee for Mr. Meagher and arranged for it to be discharged out of the then retained funds on the 7th September, 1998. By that date the only retained funds were to the US$250,000.00 portion of the CBT settlement together with interest thereon. The quantification of Mr. Meagher's expenses at IR£60,000.00 had been

identified as a proposed figure no later than the 11th August, 1998. By that date the first named plaintiff incorporated a figure for costs to B. Meagher in the identified sum of IR£60,000.00 in various worksheets prepared by him. At no time was there any issue as to such sum being excessive.

4.8 All parties understood that there would be a deduction for legal costs. O'Grady Solicitors set about identifying such costs and instructed their cost drawer to calculate same. The cost accountants had prepared a detailed bill of costs by the 22nd September, 1998, which is the date appearing on the Bill of Costs. Ultimately those costs were quantified by agreement between the defendants and O'Grady Solicitors. The sum agreed was IR£20,000.00. That sum was agreed by the 19th April, 1999. It was the same sum as (IR£20,000.00) had been provided in total by the four plaintiffs in the CBT action on account to their solicitor. Since such sum had, in fact, been pre-paid, once the figure was agreed it was necessary to repay the defendants. Repayment was made out of the retained funds to the first, fourth and fifth named defendants and a private arrangement was concluded between O'Grady Solicitors and the third named defendant. The Court is satisfied that such legal costs could and should have been quantified and agreed at an earlier date. After the expenses of Mr. Meagher had been agreed and discharged in September, 1998, the only matter which remained outstanding was the quantification and agreement of the solicitor and own client costs to be deducted out of the settlement funds. A period up to and including the 5th October, 1998, would have been more than sufficient to allow such costs to be quantified. By that date, the 5th October, 1998, all deductions should have been identified and quantified and the defendants acting together should have been in a position to discharge the sums due to each of the plaintiffs out of the retained settlement funds together with accumulated interest up to that date. The documents which are available to the Court indicate that interest at the rate of 5.75% was being obtained on the deposited settlement sum for a period between the 25th June, 1998, the date on which payment should have been made, and the 5th October, 1998. The Court therefore proposes to allow interest on the sums due to the three plaintiffs from the 25th June, 1998 to the 5th October, 1998, at a rate of 5.75%. The actual sums to which each of the plaintiffs are entitled out of the US$250,000.00 payment are hereinafter set out.

4.9 The plaintiffs acknowledge that part of the expenses should be deducted from any sums due to them. Those expenses should be calculated as having been paid on the 5th October, 1998, which is the date upon which the Court has identified as the date when all the funds could properly have been paid out in full to the plaintiffs with all deductions identified and discharged by that date. It was accepted by counsel on behalf of the plaintiffs that each of the plaintiffs had a liability for portion of the IR£80,000.00 expenses and legal costs. Such portion is to be calculated on 29.4% of the expenses and legal costs and thereafter divided pro-rata between the plaintiffs and Mr. Sweeney. The sum of US$250,000.00 is 29.4% of US$850,000.00.

4.10 The settlement sum was received from CBT on the 25th June, 1998. The defendants proceeded to disregard their obligations to the plaintiffs and neither kept them fully informed nor did they seek to pay over the sums properly due to them. Mr. Meagher could identify, in evidence, no reason "to hold the money". As of April, 1999, Mr. Meagher refused to pay out "known sums" unless the plaintiffs accepted the sums offered in full settlement. The efforts to deal with the dispute were limited and the two meetings held produced no agreement. The refusal to pay anything unless the plaintiffs accepted the defendants' offer resulted in a considerable delay in any sum being proffered to the plaintiffs. In fact no payment, not even a payment on account, was proffered to the plaintiffs until the 5th October, 2001, when a cheque was forwarded to the solicitors acting for the plaintiffs. That was almost a year and a half after these proceedings had commenced. The Court is satisfied that a reasonable period should be allowed for the quantification of the expenses and legal costs but that once same could have been reasonably achieved, the entire sums due to the plaintiffs together with accumulated interest should have been discharged. No argument has been advanced on behalf of the defendants to justify the delay in making any payment to the plaintiffs. The defendants, through their defence, acknowledge that sums were due to the plaintiffs and the facts demonstrate that the defendants were in control of such funds as and from the 25th June, 1998, and that any unquantified deductions could and should have been calculated by the 5th October, 1998, and that in those circumstances the failure to pay out forthwith monies due and owing to the plaintiffs represented a clear breach of fiduciary duty. The defendants are responsible for such breach and are liable to the plaintiffs for interest on the sums which should have been paid to the plaintiffs on the 5th October, 1998, at the Court interest rate up to and including the 5th October, 2001.

4.11 The defendants dealt with the entire CBT settlement funds as if they had complete discretion, when in fact they were under a legal duty to deal with portion of the funds in the interests of the plaintiffs and to their benefit. Such duty included the obligation for prompt payment to the plaintiffs once the sums had been received and appropriate discounts calculated and paid. The duty of the defendants would also extend to an obligation to account for all interest earned on the funds up to the date of payment out.

4.12 The delay cannot be justified on the basis of legal advice. Nor is there any basis for claiming that the delay was caused by the necessity to agree expenses and legal costs. The facts demonstrate that funds properly due to the plaintiffs were retained under the control of the defendants when they should have been paid out. There was no justification for such a delay and therefore the contacts between the parties during the period from June, 1998 to October, 2001, are of no real relevance other than that it establishes a continuing refusal to pay out any sum.

4.13 The plaintiffs commenced proceedings by plenary summons dated the 7th April, 2000, and a statement of claim was delivered on the 15th February, 2001. There was a delay in the defendants filing a defence which resulted in judgment in default of defence being brought before the Court. That finally had the consequence of the solicitors, then acting for the first, third, fourth and fifth named defendants, L.K. Shields, sending a letter of the 5th October, 2001, to the plaintiffs' solicitors enclosing a cheque to cover three stated amounts. The sum identified for Mr. Clements was for IR£21,257.00, for Mr. Seigne, IR£22,003.00 and for Mr. Bryant, IR£31,553.00, totalling IR£74,813.00. That sum was identified as being the total sum due to all three plaintiffs following deduction of legal costs and expenses. However, such deductions were neither quantified nor explained and the letter went on to indicate that the solicitors acting for the plaintiffs should take their clients' instructions as to whether they intended to continue with the proceedings. The letter was responded to by Vincent & Beatty, on behalf of the plaintiffs, on the 15th October, 2001, wherein they indicated that to enable them to take their clients' instructions in relation to the letter from L.K. Shields that a detailed letter might be provided setting out the basis upon which the monies had been calculated and requesting proposals in relation to the balance of the plaintiffs' claims. By that stage the claim being pursued by the plaintiffs, as set out in the statement of claim, included a claim over portion of the US$600,000.00 settlement sum paid by CBT. It did so on the basis of a calculation of percentage interest based upon the original investment in the BES scheme as opposed to the relevant portion of the US$250,000.00 payment. That claim was continued to the hearing of the action and was only abandoned during the course of the case. This had the effect of somewhat prolonging the hearing. It also caused the parties to concentrate on that issue to the detriment of how the funds proffered might be dealt with and the remaining matters in dispute isolated and considered. In fact the cheque which had been proffered with the letter of the 5th October, 2001, in purported settlement was never cashed and merely retained on the file of the plaintiffs' solicitors. In evidence the solicitor dealing with the matter indicated that he had no explanation as to why that course of action was adopted. Neither the plaintiffs' solicitors nor the defendants' solicitors nor the parties endeavoured to identify what issues truly remained outstanding following the attempt to pay a total of IR£74,813.00 by letter of the 5th October, 2001. The evidence before the Court indicated that the defendants, and in particular Mr. Meagher, was unaware that the cheque for IR£74,813.00 had not been cashed until a short period before the trial commenced in 2008. Mr. Meagher believed the cheque had been cashed and nobody told him otherwise. The evidence

before the Court established that no party addressed the issue as to how funds which were acknowledged to be due to the plaintiffs should be dealt with pending the determination of the case. The Court is satisfied that a fair and proportionate way in which to deal with this matter is to provide for continuing interest as and from the 5th October, 2001, only on the balance due to each of the plaintiffs as of that date over and above the individual sums identified in the letter of the 5th October, 2001. The position thereafter was at least in part caused by the plaintiffs' continued assertion of a non-sustainable claim and by a failure of all of the parties to make any real effort to ascertain what were the outstanding issues between the parties.

5.1 The plaintiffs also claim against the second named defendant, Carl Moynihan, and do so on the basis that his chartered accountancy practice with Barry Meagher had an involvement in this case and also that he was a beneficiary of a portion of the CBT settlement monies. Carl Moynihan had no involvement with CBT and at no time invested in the BES scheme which gave rise to the proceedings against CBT. He was not a party to those proceedings. Mr. Moynihan's involvement arises out of the fact that when the agreed sum of IR£60,000.00 as payment for expenses was paid, Mr. Meagher arranged for half that sum to be paid to Mr. Moynihan. In putting in place such an arrangement use was made of the partnership notepaper, that is, the notepaper of Meagher Moynihan. One letter of the 11th August, 1998, on such notepaper is a letter to William O'Grady, solicitor of O'Gradys which refers to the fact that the IR£60,000.00 was to be transferred to an account in the name of Meagher Moynihan. The plaintiffs also seek to rely on a handwritten letter from Mr. Moynihan dated the 31st August, 1998, re; a CBT payment to Meagher Moynihan of IR£60,000.00. That correspondence merely indicates how the agreed sum of IR£60,000.00, identified as being due to Mr. Meagher, was to be discharged. It was within Mr. Meagher's power and gift to direct that half that sum be paid to Mr. Moynihan. He did so because of a private understanding.

5.2 It is contended by the plaintiffs that Mr. Moynihan had no right or title to any portion of the settlement proceeds and that is indeed correct. What is clear from this judgment is that Mr. Meagher had an entitlement to receive out of the total proceeds IR£60,000.00 in discharge of the expenses incurred by him. He was free to deal with that sum as he saw fit and by choosing to have half of it paid to Mr. Moynihan, he does not create any legal liability for Mr. Moynihan. The Court is satisfied that Mr. Moynihan does not hold the IR£30,000.00 which he received as a constructive trustee for the plaintiffs. Such constructive trust can not arise in circumstances where it is acknowledged by all parties that Mr. Meagher was entitled to receive IR£60,000.00 out of the CBT settlement funds. Given such entitlement it follows that when he was paid he was free to arrange how such sum was to be used. The Court is satisfied that there is no liability on the part of Mr. Moynihan and all claims against him should be dismissed.

6.1 In the light of the above findings the Court proposes to approach the award of damages to the plaintiffs on the following basis. Firstly it is necessary to ascertain the appropriate proportion of the US$250,000.00 to which each of the three plaintiffs is entitled. That proportion is based upon the extent of the original BES investment of the three plaintiffs and Mr. Sweeney. Mr. Clements had a 7.01% share of the total BES investment, Mr. Seigne a 7.26% share, Mr. Bryant a 10.41% share and Mr. Sweeney a 10.65% share. A division of the US$250,000.00 based upon those respective percentages results is Mr. Clements having a US$49,604.00 share, Mr. Seigne a US$51,373.00 share and Mr. Bryant a US$73, 663.00 share.

Secondly the Court is satisfied that each of the three plaintiffs is entitled to receive interest on said sums for the period from the 25th June, 1998 to 5th October, 1998, at the rate of 5.75%. That arises from the fact that the CBT settlement payment was made on the 25th June, 1998, and the Court is satisfied that thereafter such sum should have been invested and the plaintiffs should have pro-rata benefited from any interest earned on the investment of the US$250,000.00 prior to it being paid out. The documents available to the Court demonstrate that the original deposit of US$850,000.00 made by the solicitors acting for the defendants earned interest at the rate of 5.75% and the Court therefore deems it appropriate that that rate should apply for the period from the 25th June, 1998, to 5th October, 1998. The sums identified in the previous paragraph and the sums earned for interest on the above calculation should be added together.

Thirdly the total sums achieved by the above additions should be converted into Irish Pounds, from US Dollars, as of the 5th October, 1998.

Fourthly in the light of the above findings it is both necessary and appropriate to deduct expenses from each of the sums identified in Irish Pounds as of the 5th October, 1998. Those expenses are to be calculated on the basis that the plaintiffs are responsible for their portion of IR£80,000.00. To obtain that figure it would be first necessary to identify 29.41% of IR£80,000.00 which results in a figure of IR£23,528.00 and liability for such costs and legal expenses should be divided pro-rata between the three plaintiffs and Mr. Sweeney. That would result in Mr. Clements being responsible for IR£4,668.00, Mr. Seigne being responsible for IR£4,835.00 and Mr. Bryant being responsible for IR£6,933.00, totalling IR£16,496.00.

Fifthly to identify the sums due to the plaintiffs it is necessary to deduct the three sums identified for expenses and legal costs attributable to each of the three plaintiffs from each of the Irish Pound sums attributable to each of the plaintiffs after the conversion referred to above.

Sixthly it is necessary to calculate interest on each of the three sums identified in the proceeding paragraph on the basis of Court rate interest for the period from the 5th October, 1998 to 5th October, 2001. That arises from the fact that the Court is satisfied that the sums should have been paid out to the plaintiffs as of the 5th October, 1998, and that no payment was proffered until the 5th October, 2001 and that therefore interest at the Court rate should be allowed on the entire of such sums up to the 5th October, 2001.

Seventhly the Court is satisfied that after the proffered payment made by the letter of the 5th October, 2001, that different circumstances prevailed and that any interest thereafter should be on the sums obtained by deducting the proffered payments in respect of each of the three plaintiffs from the sums attributable to each of the three plaintiffs on the conversion into Irish Pounds as of the 5th October, 1998, and that interest at the Court interest rate should be payable thereon from the 5th October, 2001 to the 25th July, 2008.

6.2 The Court has already received calculations from the parties based upon the approach indicated in the preceding paragraphs. The Court will hear the parties in relation to the precise calculations prior to finalising its order. The Court will also hear the parties in relation to the issue of costs. The Court proposes to grant judgment to the plaintiffs in respect of the sums to be identified from the approach herein before set out. Such judgment to against the first, third, fourth and fifth named defendants.