

**The High Court**

[2022] IEHC 390  
**2019/7048P**

**Between**

**Spiritus Limited**

**Plaintiff**

**And**

**Frank Conway  
and  
Peig Sayers Hotel Partnership  
and by Order  
Sheelagh Conway**

**Defendants**

***JUDGMENT of Mr. Justice Holland delivered electronically on 28, June 2022***

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## ***Introduction***

1. This action relates to intractable and unfortunate commercial disputes between Frank Conway, his long-estranged wife Sheelagh Conway, and their son, Nicholas Conway. Nicholas Conway is the majority shareholder and sole director of the Plaintiff, Spiritus Limited (“Spiritus”). Despite their personal estrangement and separation over 20 years ago, the assets and financial and commercial affairs of Sheelagh Conway and Frank Conway remain intertwined and the affairs of both remain intertwined with those of Nicholas Conway and Spiritus. While some issues are in dispute between Sheelagh Conway and Nicholas Conway, more broadly Sheelagh Conway and Nicholas Conway are united in dispute with Frank Conway. Mediation has failed. The Conways’ disputes centre around control of the Riverhouse Hotel at Eustace St. Dublin, from which all, in greater or lesser degree, have for many years derived, or expected to derive, a great portion or all of their respective incomes and wealth. The Hotel complex includes the hotel proper, bar/nightclub facilities and apartments. I will refer to all collectively as “the Hotel”.

2. The history of this matter is lengthy and complex. The affairs of the Conways and their Hotel have been difficult for many years. Overarching their disputes is the long-standing and considerable indebtedness of the enterprise. The Hotel has at times traded while lacking a liquor licence. While I must deprecate such an alarming and unacceptable situation, the causes of it and responsibilities for it are disputed and it does not now fall to me to address it or attribute responsibility for it or consequences flowing from it. I am informed that the Hotel has held a liquor licence since October 2019.

3. Simplifying matters very considerably, Sheelagh Conway and John Harty, as trustees for the Peig Sayers Hotel Partnership (“the Partnership”), of which they were also the promoting partners, acquired the Hotel in or about 1993. The acquisition was part-funded by a loan from Anglo Irish Bank. Until about 2016/2017 Frank Conway had managed the Hotel. Nicholas Conway had been working in the Hotel for many years. In or about 2016/2017 and in view of Frank Conway’s approaching retirement age, the Conways agreed that Nicholas Conway should run the Hotel (initially in part, latterly the entire). For that purpose Spiritus was incorporated or acquired in February 2016. In or about March 2016 Spiritus, on foot of a Management Agreement between the Partnership and Spiritus executed<sup>1</sup> by all three Conways (the “1<sup>st</sup> Management Agreement”), began to run part of the Hotel – essentially the bar/nightclub element, termed the “Operator Areas”. Frank Conway and Sheelagh Conway executed the 1<sup>st</sup> Management Agreement for the Partnership. Nicholas Conway did so for Spiritus. It provided that it was to last for 3 years from 1 March 2016 and Spiritus was entitled to “*the exclusive operation of the Operator Areas*”<sup>2</sup>. Spiritus was to lodge the income from alcohol sales (presumably the largest revenue stream from the Operator Areas) in an account in the name of the Partnership but Spiritus was to have access to and control of that account. Spiritus was to pay a monthly management fee of €28,000 plus VAT to the Partnership and

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<sup>1</sup> It is unclear to me when the 1<sup>st</sup> Management Agreement was executed. Nicholas Conway exhibited an undated version. Frank Conway has produced a version dated, by hand, 2 February 2017. The Agreement of 21 February 2017<sup>1</sup> between Frank and Sheelagh Conway records it as made in December 2016. But nothing turns on that issue.

<sup>2</sup> The phrase continues “and the Hotel generally.” which sits ill with the remainder of the Agreement but I need not resolve that question.

was to levy a monthly management charge “*to effectively extract the gross profit*” of the business it was to operate. While Spiritus was not to jeopardise the liquor licence, the Partnership was to maintain it - save that Spiritus was to deal with late exemptions. This is a brief account of a quite lengthy agreement.

4. The 1<sup>st</sup> Management Agreement was superseded by an undated Management Agreement between the Partnership and Spiritus – again executed by all three Conways, last by Sheelagh Conway on 31 March 2017 (“the Management Agreement of 31 March 2017”). This gave Spiritus exclusive management of the entire Hotel from 1 April 2017 to 1 April 2020. Spiritus was to pay for its rights by a series of payments to third party creditors of the Partnership, including Pepper<sup>3</sup>, and €1,000 per week to Sheelagh Conway. Again, this is a brief account of a lengthy agreement.

5. Over time thereafter, and for reasons stated but which I need not now interrogate, Frank Conway came to regret the arrangement with Nicholas Conway/Spiritus and to consider that he should resume control of the Hotel. Sheelagh Conway and Nicholas Conway have always remained of the view that the latter should run the Hotel. That is the crux of their present dispute.

6. On 10 September 2019 Frank Conway, in what Counsel for Spiritus described as a “dawn raid”, purported to terminate the Management Agreement of 31 March 2017, took possession and control of the hotel by physical re-entry and excluded Spiritus and Nicholas Conway from its occupation and control (“the Termination”). It is not in dispute that Frank Conway did so and did so without prior notice to, or authority of, Sheelagh Conway. Amongst the cases Sheelagh Conway and Nicholas Conway make is that Frank Conway was not entitled to effect the Termination without the prior authority of Sheelagh Conway. They rely to that effect, inter alia, on their interpretation of an agreement of 21 February 2017<sup>4</sup> between Sheelagh Conway and Frank Conway – an agreement also pleaded by Frank Conway as authorising his actions. This judgment is concerned with the interpretation of that agreement.

7. On 10 September 2019 Spiritus obtained an ex parte injunction in these proceedings restoring its occupation and control of the Hotel. The proceedings have taken an eventful course thereafter. Inter alia, in the context of a motion to attach and commit him for alleged breach of certain undertakings to the Court, Nicholas Conway in March 2020 restored Frank Conway and, as the order records, Sheelagh Conway, to occupation and control of the Hotel. Of this event two things can be said: first, it did not derive from any contested determination of the motion to attach and commit Nicholas Conway and there is no finding by the Court that he breached any undertaking;

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<sup>3</sup> See below

<sup>4</sup> A copy of that agreement is exhibit SC1 to the affidavit of Sheelagh Conway sworn 27 September 2019. A further copy (omitting the cover page) is at exhibit FC1 to the affidavit of Frank Conway sworn 12 September 2019 and at p24 of Frank Conway’s Core Book. Frank Conway pleads it at §4 of his Defence to the effect that thereby Sheelagh Conway agreed that he managed the Hotel. He pleads it as dated 21 February 2017 but it is in fact “Dated ..... 2017”. However there is no dispute as to its having been made on or about 21 February 2017 preparatory to the “Pepper Agreement” signed on 21 February 2017.

second, Sheelagh Conway's occupation and control thereafter appears to have been nominal in that, de facto, Frank Conway has been since and remains in control of the Hotel.

8. Spiritus in these proceedings seeks to recover possession, or at least occupation, of the Hotel from Frank Conway and arguably from the other Defendants and claims declarations and injunctions accordingly. It asserts a tenancy and claims relief against forfeiture. Spiritus also seeks damages for, inter alia breach of contract, and essentially restitutionary reliefs in respect of other monetary transactions. The precise amounts claimed and the precise bases on which they are claimed are not here relevant but they total over €1.2 million. The legal and factual bases for the prosecution and defence of those claims are not simple – in respects perhaps typical of feuding family members and their shifting and difficult relations over decades. Frank Conway's Defence is full and counterclaims various declarations and damages. This is the briefest and an incomplete description of what are lengthy pleadings.

9. The matter came on before me for trial having been called on for four days. On part-reading the papers in advance of trial I had become concerned that the trial would take appreciably longer. I expressed that concern when the case started and my concern was amplified when Spiritus objected to the representation of the Partnership by the same legal team as represents Frank Conway. Sheelagh Conway joined in that objection. The legal team for Frank Conway and the Partnership maintained their entitlement to represent the Partnership.

10. It was thereupon apparent that the trial could not finish in the time available. This was even more than usually regrettable in that I understand this was not its first listing for trial. And so, while no procedural solution was entirely attractive, in an attempt to make at least some progress I decided to hear and determine two issues only. These took 3 days to hear and even that proved possible only given resolution of one issue by consent on the second day. These facts confirmed my view that the many other issues in dispute could not have been disposed of in the time available.

11. The two issues I decided to determine were:

- Whether the legal team for Frank Conway and the Partnership could represent both of them – the "Representation Issue".
- An issue as to the interpretation of §3.1.6 of the Agreement between Sheelagh Conway and Frank Conway of 21 February 2017 – the "Interpretation Issue".

12. While this judgment is confined to those issues, there are, as I have said, others between the parties: for example, impugning the Termination on bases other than §3.1.6 of the Agreement of 21 February 2017 and disputing whether the Management Agreement of 31 March 2017 is a lease or a licence. There are disputes as to who was responsible for the unlicensed trading of the Hotel. There are disputes between Sheelagh Conway and Frank Conway – not least whether Frank Conway is a member of the Partnership or a validly appointed trustee of the legal freehold in the Hotel. His being

a partner is denied in her Defence to the Spiritus claim but not pleaded as between herself and Frank Conway. On the basis of that dispute it seems that Sheelagh Conway claims the entire beneficial interest in the freehold of the Hotel but that claim is not for resolution in these proceedings. There are disputes as to what payments were made by Spiritus to third parties for the Partnership and on what terms and as to Spiritus's entitlement to recoup them and or otherwise benefit from them.

13. The only evidence I heard was that of Sheelagh Conway. Unusually, and no doubt reflective of her essentially common cause with Spiritus and her son, Nicholas Conway, though herself a Defendant, she was called by Spiritus. Frank Conway did not call evidence. Save where referred to them, I have not considered the content of the interlocutory affidavits but, as the parties are aware, I have considered the exhibits to those affidavits, to which I was referred. I have also considered a "Core Book" of documents proffered by Frank Conway – though in many cases its content duplicates exhibits and certain additional documents handed in by the parties. I have also been assisted in formulating this judgment by an agreed note of the evidence and submissions, which have supplemented my own understanding.

### ***Background & Evidence***

14. To understand even the two issues to be determined in this judgment it is helpful to give some further account of the general history of the matter.

### **Peig Sayers Hotel Partnership & Respective Roles of Sheelagh Conway and Frank Conway**

15. In 1993 the Peig Sayers Hotel Partnership was created by deed as between 53 general partners, 2 promoting partners, Sheelagh Conway and John Harty, and 2 corporate partners, as a means of acquiring premises to refurbish and operate what became and remains the Hotel. The acquisition was funded in part by partners' investments and in part by a loan from Anglo Irish Bank. Title to the premises was held by the promoting partners in trust for the Partnership.

16. As was always intended, the general and corporate partners resigned over time, leaving the Partnership consisting of the promoting partners only. It is not disputed that Sheelagh Conway is a member of the Partnership. For the purpose of these proceedings only, Spiritus and the Plaintiff now accept that Frank Conway is a member of the Partnership. John Harty appeared in person at interlocutory proceedings and on 6 March 2020 was given liberty to apply to join in the proceedings

as a member of the Partnership. He has not done so. For present purposes, therefore, the member of the Partnership are Frank Conway and Sheelagh Conway<sup>5</sup>.

17. It seems clear that, though he was not from 1993 a partner in the Peig Sayers Hotel Partnership, Frank Conway from an early point played a considerable role in the affairs of the Hotel and the business of the Partnership. As recorded above, there is a dispute between Sheelagh Conway and Frank Conway as to whether the latter is a member of the Partnership – indeed he claims to be managing partner. But while Spiritus and Sheelagh Conway accept, for the purposes of these proceedings only, that Frank Conway is a partner, they say his freedom of action as partner was and is constrained by the agreement between Sheelagh Conway and Frank Conway of 21 February 2017. He denies that constraint. Hence the Interpretation Issue.

18. Sheelagh Conway says and I accept for present purposes that Frank Conway was the businessperson of the family and that, though she had qualifications in interior design and in that role partook in the affairs of the Hotel to some degree, he role was essentially that of housewife and mother. She says that she signed many documents at Frank Conway's request without interrogating them or even knowing what they were. Though she was not challenged on this evidence, presumably as it was not considered relevant to the issues for present decision, I need not and do not determine whether that was so and the issue can be revisited in due course if needs be. Indeed, given not least the narrowness of the issues for present decision, that is my general view as to any respects in which Sheelagh Conway's evidence was not challenged.

19. Sheelagh Conway says, and I accept for present purposes, that amongst the documents she signed in reliance on Frank Conway were what she later appreciated were loan agreements and personal guarantees of loans and that she later came to regret having signed them. It appears from the "Pepper Agreement" of February 2017<sup>6</sup> that in 1999 Sheelagh Conway signed a guarantee in favour of the Irish Nationwide Building Society ("INBS"). I have not seen it and I do not know what debts she guaranteed. The "Pepper Agreement" also records, without giving detail, seven INBS loans made to the Partnership between 1999 and 2004 and five INBS loans to Frank Conway between 2004 and 2006 and another in 2004 to another son, Stephen Conway. The "Pepper Agreement" also records, without giving detail, a mortgage and charge between Anglo Irish Bank and the Partnership of January 1995. The "Pepper Agreement" of February 2017 also requires the sale of eleven properties at Castledermot, County Kildare.

## **Sheelagh Conway's concerns in early 2017**

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<sup>5</sup> This observation per se is not intended to affect any right of John Harty, who is not party to these proceedings.

<sup>6</sup> See further below.

20. Essentially Sheelagh Conway says and I accept in broad terms that by, at latest, late 2016/early 2017 she and/or the Partnership had, by reason of debts arising from both the Hotel and what she called collateral or satellite business activities of Frank Conway, such as the purchase of the Castledermot properties, debts in the region of €8 million<sup>7</sup> in what were originally Anglo Irish Bank and INBS loans. Those debts were by then owned by **Kenmare Property Finance DAC (“Kenmare”)** and were administered for Kenmare by **Pepper Asset Servicing Limited (“Pepper”)**. **It is clear that those debts represented a serious burden and problem for the Partnership.** I need not for my present narrow purposes, and do not, make any finding as to responsibility for this state of affairs<sup>8</sup>. Sheelagh Conway **was unsurprisingly alarmed by the debts. Rightly or wrongly, she perceived these problems as having arisen, at least in considerable part, due to the business activities of Frank Conway** and to a greater or lesser degree without her knowledge and that she was to be the “fall guy” for those debts. She was very anxious to ensure that further such problems would not occur. I say **“rightly or wrongly” because for present purposes whether her perception was justified is not what matters and I make no finding in that regard. What matters is the broad size of and problem posed by the indebtedness and her perception that it was Frank Conway’s doing and fault and had occurred without Frank Conway’s keeping her properly informed over the years of matters affecting her financial affairs.** It is that perception, which I accept she had and which must have been known to all concerned, as opposed to whether it was justified, which forms part of the factual matrix in which the agreement which I am to interpret was made.

21. I also accept that, against the backdrop of that indebtedness, Sheelagh Conway’s anxieties at around this time included a considerable anxiety to secure her son Nicholas – which is to say, in practice, Spiritus – in the management of the Hotel which she considered to be the family business and in which he had worked for many years. Further, it is clear that Sheelagh Conway depended for her income, in at least appreciable degree, on the Hotel business.

22. Though I accept in any event Sheelagh Conway’s evidence of her anxiety in late 2016/early 2017 to secure Nicholas /Spiritus in the management of the Hotel, that anxiety is corroborated by a later record of that anxiety. A letter, signed by Sheelagh Conway, dated 24 November 2018 and addressed *“To whom it may concern”*, was put to Sheelagh Conway in cross-examination. It was also signed by Nicholas Conway, though whether as co-signatory or as witness is not entirely clear. I am somewhat unclear what Frank Conway sought to make of this letter - perhaps a degree of culpable co-operation between Sheelagh & Nicholas Conway. Its significance for purposes of this judgment is as confirming that Sheelagh Conway had a *“major anxiety about the Bar Management Agreement with Nicholas Conway”* with whom she wanted a further agreement as to “extra expenses” he had taken on. She wanted to extend the Management Agreement for an extra four years. The letter corroborates, albeit after the making of the agreement of 21 February 2017, the view that Sheelagh Conway at all material times considered Nicholas Conway’s continued management of the Hotel, or part of it, as very important to her.

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<sup>7</sup> The precise amount does not matter for present purposes.

<sup>8</sup> That observation does not of course prevent such findings when other and broader issues in the proceedings come to be considered.

23. In all those circumstances it is entirely unsurprising that Sheelagh Conway would have been anxious in late 2016/early 2017, and I accept that she was in fact anxious, to ensure that unilateral actions by her estranged husband would not affect, adversely from her point of view, her financial situation, the Hotel and its business and Nicholas's role within it.

24. Frank Conway pleads<sup>9</sup> that by solicitor's letter dated 7 October 2016 from Sherwin O'Riordan for Sheelagh Conway to his solicitor Mangan O'Beirne, Sheelagh Conway agreed that Frank Conway would run the Hotel (presumably those parts other than the Operator Areas).

25. That plea is correct as far as it goes but is a notably selective view of the letter. The letter is considerably more nuanced than the plea and is expressive of the fears, complaints and anxieties of Sheelagh Conway to which I have referred and the fact of dispute between Sheelagh Conway and Frank Conway. The letter dated 7 October 2016 explicitly follows "abandoned settlement negotiations" between Sheelagh Conway and Frank Conway and records Sheelagh Conway's rejection as derisory of a proposal by Frank Conway. It records her claimed entitlements to half of the profits of the hotel<sup>10</sup> and complains of Frank Conway's alleged refusal to disclose the financial affairs of the business, including monthly management accounts. It further complains that Frank Conway's actions have exposed Sheelagh Conway to great personal and financial risk in the form of personal guarantees of which Frank Conway reaps all of the rewards. The letter notes that it is in no-one's interest to jeopardise the business or current negotiations with Pepper and makes certain proposals – including that a management agreement be put in place to allow Nicholas Conway to run the bar and basement<sup>11</sup>. Sheelagh Conway says that otherwise she will end the Pepper negotiations and in that event, most likely, Pepper would sell the Hotel. Sheelagh Conway's letter states that she has been left with no choice given Frank Conway's "unilateral actions and behaviour" and "unreasonable actions".

26. Again I emphasise that I make no finding that any of the complaints in that letter were in substance justified. But I accept that the letter does describe Sheelagh Conway's fears, complaints, anxieties and attitude, whether justified or not, and her complaints include of unilateral action by Frank Conway. And the letter is consistent with her description of those fears, complaints, anxieties and attitude in evidence, which description I accept - at least in general terms.

27. As recorded above, Spiritus had operated the Operator Areas since March 2016. Frank Conway pleads that in December 2016 he served notice on Spiritus of breach of the 1<sup>st</sup> Management Agreement<sup>12</sup> by failure to pay the Partnership €65,000 in respect of VAT and thereby required payment by 28 December 2016 or he would exclude Spiritus from the Operator Areas by changing the locks – which he did. Frank Conway pleads that on the following day Spiritus agreed to pay and

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<sup>9</sup> Defence §4

<sup>10</sup> Presumably other than of the profits of the Operator Areas operated by Spiritus

<sup>11</sup> Where, I understand, the entertainment facilities are.

<sup>12</sup> Thus implying that the 1<sup>st</sup> Management Agreement predated December 2016 but I need not and do not determine that.



was allowed back into the Operator Areas. Whether or not Frank Conway was justified in so doing [I make no finding in that regard], this incident can only have informed Sheelagh Conway's fears for the security of Spiritus's position – and hence that of her son Nicholas – in operating the Operator Areas.

## **The events of early 2017**

28. In all the foregoing circumstances and without taking either or any side of the controversies they represent, it rings true to me that Sheelagh Conway would, in or about early 2017, have instructed her then-solicitor, Mr Sherwin - and I accept her evidence that she did so instruct him - to seek, by the terms of the agreement which she was about to make with Frank Conway, to constrain his freedom of action as to the affairs of the Partnership and the Hotel. As I say, it is not necessary for me for present purposes to find whether her fears and perceptions were justified, or even fair to Frank Conway. I accept as part of the relevant factual matrix that she had those perceptions and fears and they were known to Frank Conway, and merely that she had them is informative as to at least one of the objects of her agreement of 21 February 2017 with Frank Conway which I am to interpret.

29. In early 2017 negotiations with Pepper to resolve the Kenmare debt were coming to a head. In that context and on 21 February 2017 Sheelagh Conway and Frank Conway signed the agreement I am to interpret. It is clear that the imperative of reaching agreement with Pepper was part of the factual matrix in which the Agreement of 21 February 2017 between Sheelagh Conway and Frank Conway was made. Indeed it is clear from its terms that a main purpose of that agreement between Sheelagh Conway and Frank Conway was to facilitate the making of the Pepper Agreement. On that day also, they and Stephen Conway signed the "Pepper Agreement" with Kenmare<sup>13</sup>.

30. On 31 March 2017 Sheelagh Conway and Frank Conway for the Partnership signed the replacement Management Agreement with Spiritus – the management agreement current at the "Termination" of 10 September 2019.

31. I also accept the point made for Frank Conway that, as the Pepper Agreement essentially envisaged the clearing of over €8 million of debt by means of payments totalling €3.45 million, it represented, as counsel for Frank Conway put it, "good business" for the Conways. I note Sheelagh Conway's reply in evidence that the fact that the debts had been allowed by Frank Conway to get to €8 million in the first place represented "bad business" by which her "trust had been shattered". I need make and do not make any finding as to whether the €8 million indebtedness represented

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<sup>13</sup> It might more accurately be called the "Kenmare Agreement" but as it is called the "Pepper Agreement" in the 21 February 2017 agreement between Sheelagh Conway and Frank Conway I will adopt that description.

“bad business” by Frank Conway but I do accept that Sheelagh Conway believed in late 2016/early 2017 that it represented “bad business” by Frank Conway and that her trust in Frank Conway had been shattered by it – whether justifiably or not is beside the point for present purposes.

32. The scheme of the Pepper Agreement included 12 payments of €25,000 per quarter in a total of €300,000 and clearance of the balance of in or around €3.15 million by 31 December 2018. A first mortgage on the Hotel was to secure payment. Default by Sheelagh Conway and Frank Conway would reinstate the full debt of over €8 million – but secured by the new first mortgage on the Hotel. Accordingly and given the Hotel was to be the source of the quarterly payments and against the backdrop of the mistrust and dispute between them, there is yet further reason why it is credible that it was an object of Sheelagh Conway, and that she instructed her solicitor accordingly as to drafting the Agreement of 21 February 2017 between Sheelagh Conway and Frank Conway, that she would wish to constrain unilateral action by Frank Conway as to the Hotel and its business.

33. I will return to the issues canvassed above in due course, but turn now to the “Representation Issue”.

### ***The Representation Issue***

34. The issue whether the legal team acting for Frank Conway could act also for the Partnership was ultimately resolved by the agreement of that legal team that it would not do so and they agreed to come off record in that respect. It seems prudent to briefly record how that came about, albeit at the cost of repetition of some matters addressed above.

35. As stated above, the authority of Frank Conway to act on behalf of the Partnership in purporting to terminate the Management Agreement of 31 March 2017 is disputed, on various grounds, by Spiritus and by Sheelagh Conway. Correspondence by Sheelagh Conway’s solicitors to Frank Conway’s solicitors, Mangan O’Beirne, had disputed the latter’s entitlement to act for the Partnership.

36. Spiritus commenced these proceedings on 10 September 2019 naming separately Frank Conway and the Partnership as defendants and alleging against Frank Conway both wrongs qua partner and wrongs committed not qua partner. Mangan O’Beirne solicitors on 12 September 2019, on the instruction of Frank Conway, appeared for both Frank Conway and the Partnership. On motion by Spiritus, Sheelagh Conway was joined as an additional Defendant by order made on 13 September 2019. An amended summons issued accordingly and Caldwell & Robinson solicitors appeared on 20 September 2019 for “*Sheelagh Conway, Third Defendant and promoting partner of*

*the Peig Sayers Hotel Partnership*". Caldwell & Robinson have since been replaced as her solicitor but Sheelagh Conway has always been represented separately to Frank Conway.

37. The practical issue as to representation of the Partnership arises from the very different views of Frank Conway and Sheelagh Conway as to the defence of the proceedings against the Partnership and whether Frank Conway was entitled to terminate the Spiritus management agreement without her prior agreement and is entitled to make decisions unilaterally for the Partnership in running its defence of these proceedings. Broadly, Frank Conway wishes to defend the action and Sheelagh Conway wishes to concede it - at least in large part. Frank Conway wishes to continue to exclude Spiritus from the operation of the Hotel. Sheelagh Conway wishes to reinstate Spiritus in the operation of the Hotel. In that light, it is unsurprising that Sheelagh Conway should object to the purported representation of the Partnership by a legal team acting for and entirely on the instructions of Frank Conway – instructions with the substance of which she fundamentally disagrees.

38. Argument on the representation issue commenced on a premise that it turned on the question of who was entitled to control of the partnership. However, as argument developed, it became apparent the issue fell to be decided by reference, essentially, to a question of legal personality to which I drew the parties' attention.

39. **Twomey on Partnership**<sup>14</sup> records that Order 14, rule 1 of the Rules of the Superior Courts<sup>15</sup> provides that a partnership may sue or be sued in its firm<sup>16</sup> name. He notes that, although there is no need to set out in the proceedings the names of the individual partners, where a partnership is sued in the firm name the partners are sued individually as definitively as if they had their names set out in the proceedings as Defendants. However, Twomey emphasises<sup>17</sup> that Order 14, rule 1 is simply a rule of procedure and does not impact on the nature of a partnership as an aggregate of its members. He cites **Re A Debtor Summons**<sup>18</sup> to the effect that:

*'[A] firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm-name is a mere expression, not a legal entity, although for convenience under Ord XLVIII A<sup>19</sup> it may be used for the sake of suing and being sued.'*

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<sup>14</sup> Bloomsbury Professional, Second Edition January 2019 §12.11

<sup>15</sup>Ord 14, r 1 states: Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action ...

<sup>16</sup> A "firm" is in law the same thing as a "partnership". The colloquial use of the word "firm" to refer to a company is, strictly, incorrect, though common even amongst lawyers and the context usually prevents confusion on this account.

<sup>17</sup> §12.12

<sup>18</sup> [1929] IR 139; Supreme Court, Fitzgibbon J citing Farwell LJ in *Sadler v Whiteman* [1910] 1 KB 868 at 889

<sup>19</sup> For which now read Order 14, r 1

40. Proceeding against a partnership in its firm name is merely a permitted convenience. It is not compulsory. In actions against partnerships it is common to see a different course taken, in which each partner is an individually-named Defendant and the title to the proceedings then identifies those individually-named Defendants as constituting a named partnership. Thus, proceedings entitled against *“The Peig Sayers Hotel Partnership”* have precisely the same legal constitution, as to the identity of the Defendants sued, as do proceedings entitled against *“Frank Conway and Sheelagh Conway trading as The Peig Sayers Hotel Partnership”*. Words in the title to the proceedings such as *“trading as The Peig Sayers Hotel Partnership”* are helpful and commonly used but are unnecessary if the Indorsement of Claim and/or Statement of Claim identifies them as sued as partners.

41. The underlying reason for this position is that, as Twomey points out,

*“..... the grand characteristic of partnerships is the fact that they do not have a separate legal existence, since each partnership is an aggregate of all of its members.”<sup>20</sup>*

Twomey continues:

*“One would expect therefore that in any litigation involving the firm, all the partners in that firm should be made a party to the proceedings. Yet, in order to reduce the administrative burden of joining numerous parties every time a partnership is involved in litigation, the law chooses to treat partnerships involved in litigation as if they were separate legal entities. It does this by providing in the Rules of Court for actions to be taken by or against a firm in the firm name. However, it is crucial to bear in mind that this procedural rule is simply that, i.e. a rule of procedure which allows partnership litigation to be conducted as if the firm were a separate legal entity. It does not alter the fundamental nature of a partnership as an aggregate of its members and this issue will remain of relevance to the conduct of any such litigation.”<sup>21</sup>*

42. Twomey observes that<sup>22</sup> *“a partner has authority to defend proceedings on behalf of his firm”*. That is in the normal course, but when the partners disagree in that regard, ceteris paribus, the entitlement, as between the partners, to defend proceedings and to decide whether to do so cannot depend on the outcome of a race between the disagreeing partners to be the first to appear in the proceedings for the firm.

43. The foregoing position – a firm’s lack of a separate legal personality and that an action suing the firm by its firm name is in substance the same as if each of its partners was named as an individual defendant - is reflected in Order 14, rule 5 of the Rules of the Superior Courts<sup>23</sup>. It requires individual appearances by each partner in his or her own name. Usually, as partners’ interests

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<sup>20</sup> §12.02

<sup>21</sup> §12.02

<sup>22</sup> §12.06

<sup>23</sup> Order 15 Rule 5, RSC: Where persons are sued as partners in the name of their firm, they shall appear individually in their own name, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

typically coincide, one legal team will appear for all partners. But their interests do not coincide here. Indeed Order 14, rule 5, in requiring individual appearances by the partners, demonstrates that a purported appearance for the firm in its firm name is misconceived though I imagine it may be a common misconception upon which, in most cases, nothing will in practice turn. But, again, that is not so here.

44. Significantly, the **White Book**<sup>24</sup> records of the then-equivalent English rule that where more than one partner appears to the proceedings they need not do so by the same solicitor. It<sup>25</sup> cites **Ellis v Wadeson**<sup>26</sup> in which Romer LJ said:

*“.... the plaintiff sues, as under the rules he is entitled to sue, the partnership as a partnership. What happens then with regard to the members of the partnership who defend? Seeing that it is a claim against the partnership, they ought, if they can agree, to put in one statement of defence. Suppose they cannot agree, what then? In our opinion it is clear that each partner who has appeared, and who must appear separately, is entitled to put in a separate statement of defence.”*

45. Though it does not arise at present, given the narrow issues I am to decide, it may be helpful for future reference in this case to record the view, which I record merely as obiter in this case as it was in that case, of Romer J in **Ellis v Wadeson** as to the position of a Plaintiff faced with inconsistent defences by partners who have entered separate defences;

*“ ... what is the plaintiff to do if he finds a series of inconsistent defences put in by the different partners? We think the answer is clear. To entitle him to judgment against the partnership, he must, to use a homely phrase, beat all the defences - that is to say, he must shew and satisfy the judge at the trial that not one of the defences prevents a judgment being entered against the partnership.”*

46. Ultimately in this case the view was taken by all parties, a view in which I share, that at least from the appearance for Sheelagh Conway both partners in the Partnership, Frank Conway and Sheelagh Conway, are defendants in the proceedings, sued as partners for whom appearances have been, separately, entered in accordance with Order 14, rule 5. On that basis alone, a distinct and separate appearance for “*The Peig Sayers Hotel Partnership*” is misconceived and unnecessary

47. On that basis the solicitors who appeared for the partnership undertook to come off record in that respect and will continue on record for Frank Conway.

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<sup>24</sup> The Supreme Court Practice 1997 – shortly before the Introduction of CPR in England and Wales: §81/4/1

<sup>25</sup> White Book §81/4/5

<sup>26</sup> [1899] 1 Q.B. 714

48. I should add that there is considerable force in Frank Conway's complaint that Spiritus and Sheelagh Conway, having been given liberty to do so, should have much earlier than at the opening of what was to be the trial of the action, taken steps to have the Representation Issue decided. However it may also be said that the considerations described above, which resulted in Frank Conway's team agreeing to come off record for the Partnership, should have been apparent to it from once Sheelagh Conway was joined in the proceedings and at least once it became apparent that she disagreed with Frank Conway as to whether and how the case should be defended.

49. Finally, I note that the Plaintiff gave no assurances as to any consequences which might arise from Frank Conway's team agreeing to come off record for the Partnership. I reserved any question of costs which might arise in that regard.

## ***The Interpretation Issue & the Law***

### **Identification of the Issue**

50. In this judgment I determine a narrow and discrete issue whether, as a matter of interpretation of the agreement between Frank Conway and Sheelagh Conway made on 21 February 2017, it prohibited Frank Conway from terminating the Partnership's Management Agreement with Spiritus dated 31 March 2017 and from excluding Spiritus from the Hotel, both without the written consent of Sheelagh Conway.

51. For the avoidance of doubt and as is signified by the underlined words above, I determine this issue only as a matter of interpretation of the agreement of 21 February 2017 and without prejudice to any argument Frank Conway may make in due course, if and insofar as his pleadings permit, that notwithstanding

- a finding, if made, that as a matter of interpretation of the agreement of 21 February 2017, it did prohibit Frank Conway from terminating the Management Agreement of 31 March 2017 and from excluding Spiritus from the Hotel without the prior written consent of Sheelagh Conway,
  - the absence, which is not disputed, of any consent of Sheelagh Conway to the termination of that Management Agreement and exclusion of Spiritus from the Hotel,
- Frank Conway was nonetheless entitled to terminate that Management Agreement and exclude Spiritus from the Hotel as, as is undisputed, he purported to do on 10 September 2019.

52. By way of example only, if and insofar as his pleadings permit, Frank Conway would not be prevented by a finding against his interpretation of the agreement of 21 February 2017, from arguing that events between 21 February 2017 and 10 September 2019 and/or circumstances as

they subsisted at 10 September 2019 absolved him from compliance with the agreement of 21 February 2017 as to getting such prior consent of Sheelagh Conway.

53. For the further avoidance of doubt, I do not in this judgment decide whether and if so when and to what extent and with what, if any, effect in law, Nicholas Conway and by him Spiritus, were at any material time aware of the agreement of 21 February 2017 or more generally of any constraint on the actions of Frank Conway as partner by reason of obligations subsisting between him and Sheelagh Conway or specifically by reason of any requirement of prior agreement by Sheelagh Conway to actions by Frank Conway, including actions such as his of 10 September 2021.

## Principles of Interpretation

54. The applicable principles of contractual interpretation were not in dispute. Counsel referred me to **McDermott on Contract Law**<sup>27</sup> to the effect that<sup>28</sup>

- A contract has a single meaning – which both parties are taken to have agreed.
- That meaning is to be objectively determined. What matters is not what the parties intended to agree or think they agreed but the content of their agreement objectively ascertained from the language they have used considered in the light of the surrounding circumstances and the object of the contract. By “objective” is meant the discernment from that language, used in those circumstances, for that object, of what would have been the intention of reasonable persons in the position of the parties.<sup>29</sup>
- That meaning is to be determined from a consideration of the contract as a whole.
- Interpretation of the contract as a whole requires the court to seek, not an interpretation in which some aspects win out over others, but one which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appear to tend broadly to one interpretation, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features of the contract. To put it another way, the interpretation should, if at all possible, reflect the presumed internal consistency of the contract.
- The document comes first: i.e. the first step in interpreting a contract is to look at the document that records its terms. One starts with the words used by the contracting parties.<sup>30</sup> As Clarke CJ said in **Ryanair**<sup>31</sup>:

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<sup>27</sup> 2<sup>nd</sup> Ed, §§10.12 and 10.5

<sup>28</sup> Citing *The Law Society of Ireland v The Motor Insurers' Bureau of Ireland*, [2017] IESC 31 O'Donnell J. and *Ryanair v An Bord Pleanála* [2008] IEHC 1, Clarke CJ

<sup>29</sup> McDermott 2<sup>nd</sup> Ed, §§10.02 citing *UPM Kymmene Corporation v. BWG Ltd.* (Unreported, 11<sup>th</sup> June, 1999), and *Emo Oil Ltd v Sun Alliance and London Insurance plc* [2009] IESC 2. I should say that counsel did not cite this principle or this excerpt of McDermott but I had earlier expressed the principle to counsel who did not demur and it is convenient to cite it here.

<sup>30</sup> *Flynn v Breccia* [2017] IECA 74 at para 54 per Finlay Geoghegan J.

<sup>31</sup> *Ryanair v An Bord Pleanála* [2008] IEHC 1

*'It would be to entirely and inappropriately devalue the written form into which parties have chosen to put their agreement, not to pay significant attention to the way in which the agreement is expressed in the document under consideration. It would, in my view, be to put the cart before the horse to start with a consideration of what the parties were trying to do and only then to apply one's mind to what they in fact did by entering into an agreement in the terms of the written document under consideration. Rather one should start with the document but using, as an aid to its construction, the context in which it was entered into by reference to any material background facts which would bear upon the way in which a reasonable and informed person would have interpreted the document in question.'*

The reference above to, and the weight to be given to, the "object of the contract"<sup>32</sup> must be understood in this light.

55. McDermott stated the law as at July 2017. Since then, decisions of the superior courts have not appreciably changed it. Whelan J of the Court of Appeal in **Point Village**<sup>33</sup> recently explicitly approved McDermott's account of the principles of contractual interpretation and reiterated the primacy of the text. She approved McDermott's "*succinct words*" that "*The document comes first*" and cited Lord Neuberger of the UK Supreme Court in **Arnold v Britton**<sup>34</sup> to the effect that commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision to be construed.

56. McDonald J in **McCaughey**<sup>35</sup> recently summarised the effect of the many authorities cited to him:

*"(a) The interpretation of a written contract is an entirely objective exercise. For that reason, the law excludes from consideration the previous negotiations of the parties, their subjective intention in entering into the agreement and also their subjective understanding of the terms agreed;*

*(b) The court is required to interpret the written contract by reference to the meaning which it would convey to a reasonable person having all of the background knowledge which would have been reasonably available to the parties at the time the contract was put in place;*

*(c) The agreement must be read as a whole. It is wrong to consider any of its terms in isolation;*

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<sup>32</sup> A phrase used in *UPM Kymmene Corporation v. BWG Ltd.* (Unreported, 11<sup>th</sup> June, 1999)

<sup>33</sup> *Point Village Development Ltd v. Dunnes Stores* [2019] IECA 233 (Court of Appeal (civil), Whelan J, 30 July 2019) §68 et seq

<sup>34</sup> [2015] U.K.S.C. 36

<sup>35</sup> *McCaughey v McCaughey* [2021] IEHC 412 18th June, 2021



(d) *In construing the agreement, the court looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was concluded. However, the conduct of the parties subsequent to the conclusion of the contract is not admissible as an aid to its interpretation ...*<sup>36</sup>;

(e) *A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. ...., the meaning of individual words is a matter of dictionaries and grammar*<sup>37</sup>. *But the task of the court is to understand what the parties intended those words to mean in the specific context of their contract. That may not necessarily coincide with their dictionary definition. As noted above, in order to determine the meaning of words used in a contract, it is necessary to consider the contract as whole and, as outlined at (d) above, it is also necessary to consider the relevant factual and legal context;*

(f) *While a court will not readily accept that the parties have made linguistic mistakes in the language in which they have chosen to express themselves, there may nonetheless be occasions where it is clear from the context that something has gone wrong with the language and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties; and*

(g) *As O'Donnell J. made clear in the MIBI case*<sup>38</sup>, *in interpreting the meaning of a contract, it is wrong to focus purely on the terms of the contract in dispute. He emphasised the principle that, as noted at (c) above, a contract must be read as a whole and, furthermore, he observed that it is wrong to approach its interpretation solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. cautioned:-*

*"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."*

57. Generally, the foregoing expresses what has come to be described broadly as the "text in context" approach to interpretation of contracts.<sup>39</sup> It is in light of these principles that I will attempt to interpret the agreement between Frank Conway and Sheelagh Conway made on 21 February 2017.

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<sup>36</sup> Citing *Re Wogans of Drogheda Ltd.* [1993] 1 I.R. 157

<sup>37</sup> As explained by Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 at p. 912, in a passage expressly endorsed by the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274

<sup>38</sup> *The Law Society of Ireland v The Motor Insurers' Bureau of Ireland*, [2017] IEHC 31

<sup>39</sup> See e.g. *Premier Dale Ltd v Arachas Corporate Brokers Ltd* [2022] IEHC 178, McDonald J

## ***The Agreement for Interpretation***

58. The agreement between Frank Conway and Sheelagh Conway made on 21 February 2017 is clearly a professionally drafted and formal agreement. It bears the logo of Sherwin O’Riordan, who were then solicitors to Sheelagh Conway. It records that each of Frank Conway and Sheelagh Conway had had independent legal advice as to the terms of the agreement. It is impractical to set out here the entire but I have had regard to the entire. I set out or refer to below certain terms of note.

## **The Recitals<sup>40</sup>**

59. The recitals to the agreement of 21 February 2017 merit setting out all but in full:

*“WHEREAS:*

*A. Pursuant to a partnership and trust transaction SC<sup>41</sup> and FC<sup>42</sup> have advised that they are members of the Peig Sayers Hotel partnership (“the Partnership”) which is the registered owner of the Hotel and are entitled to a share in the ownership of the Hotel.*

*B. FC manages the Hotel.*

*C. SC through the Partnership and inter alia, FC entered into loan facilities and security documents with Anglo Irish Bank Corporation plc and also Irish Nationwide Building Society. The said loans were transferred to Kenmare Property Finance Ltd ('Kenmare') which is being administered by Pepper.*

*D. The Conways reached agreement with Pepper details of which are set out in schedule I attached hereto wherein they agreed to repay the amounts as set out therein in accordance with the terms of the Pepper Agreement.*

*E. The parties have agreed to sign the Pepper Agreement in consideration of certain mutual representations and obligations and have agreed to be bound by the terms of this Agreement.”*

60. In **McCaughey**<sup>43</sup>, McDonald J described the recitals in the contract there at issue as “important”. The operative terms of a contract will prevail if inconsistent with recitals. But short of that, one must assume the recitals are inserted in the contract for a purpose. While I do not suggest it is the only prism, it can be useful to view recitals as a form of identification of at least part of the

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<sup>40</sup> It is particularly the case in this section of the judgment that headings are no more than general indications of the ensuing content.

<sup>41</sup> Sheelagh Conway

<sup>42</sup> Frank Conway

<sup>43</sup> *McCaughey v McCaughey* – a.k.a. In re IJM Timber Engineering [2021] IEHC 412 (High Court (General), McDonald J, 18 June 2021)

factual matrix in which context the contract is to be interpreted. Recitals can commit the parties to their substantive content for that purpose (thus obviating or reducing dispute as to the substantive content of the factual matrix) and also acknowledge that the contract is to be interpreted in light of the specific elements of factual matrix recited, lending particular weight to them in that the parties have considered them worthy of explicit recitation in the contract itself.

61. Understandably, in this case Frank Conway emphasises Recital B – that he manages the Hotel. Indeed he pleads<sup>44</sup> that this Agreement “*sets out what express authority was given to*” him and entitled him to effect the Termination.

62. However, even as the high point of Frank Conway’s argument, that “*FC manages the Hotel*” does not of itself, it seems to me, imply that he is entitled to manage it without regard to any agreed constraints on his freedom of action or regard to the interests of others with a legitimate interest. Indeed that can be said of the recital even without recourse to the rest of the Agreement. Constraints on managers of businesses are a commonplace: in a company for example, a manager will typically answer to the general direction of the board. In a family business it is not unusual to see a manager (sometimes a family member: sometimes not) operate under the general supervision of the owners of the business. The managing partner of a firm is typically answerable to and subject to the direction of the general body of the partners in accordance with terms of the partnership agreement. Managerial power is not necessarily unfettered: indeed it is not even typically so.

63. Notable recitals here also are:

- the invocation of the relevance of the Partnership and the Hotel to this Agreement
- the prominence of the indebtedness, including that of the Partnership
- the prospect of the Pepper Agreement to address the indebtedness.

64. In invoking a partnership, it seems to me that, while it implies the general authority of one partner to unilaterally act for and bind another in relations with third parties, the Agreement of 21 February 2017 implicitly recognises as between partners the ordinary duty of good faith and the default right of joint management essential – or at least ordinarily desirable - to the successful operation of any partnership. Where, as here, the reality is a background of deep distrust, it will be no surprise to find that the Agreement of 21 February 2017 seeks to appreciably constrain the freedom of action of a partner otherwise placed in the position of managing the business of the partnership.

65. To the fair objection that this is a recipe for deadlock, the answer, according to Twomey<sup>45</sup>, is that in deadlock on a particular issue the law preserves the status quo on the principle that those

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<sup>44</sup> Replies to Particulars 15 November 2019 §§1 - 3

<sup>45</sup> §[13.25]

who oppose a change are entitled to outweigh those who seek to alter the existing state of affairs<sup>46</sup>. Twomey cites *Donaldson v Williams*<sup>47</sup> in which it was held that in a partnership of two members, one partner could not dismiss an employee of the firm where the other partner objected. This seems at least to some degree analogous to the present case. Often, the objection of deadlock in a partnership of two partners against a background of general mistrust is an argument for dissolution of the partnership and sale of its business. But despite their mistrust, the partners in this case are, for understandable reasons, decided to persist. That is not in practice very unusual but in such circumstances agreement imposing restraints on partners' freedom of unilateral action are not unusual either.

66. Significantly, though Recital A of the Agreement of 21 February 2017 refers to the Partnership and the Hotel, neither Recital B nor any other provision of the Agreement describes Frank Conway as "Managing Partner" – a description of status which implies certain powers of unilateral action unless explicitly constrained. This was a formal agreement professionally drafted with legal advice to both sides. It clearly is intended to widely govern relations between Frank Conway and Sheelagh Conway. Given Recital A refers to the Partnership and the Hotel and that Recital B invokes the concept of management, it would have been obvious to the legal advisors – and indeed to Frank Conway and Sheelagh Conway - that if it was agreed that Frank Conway was Managing Partner, that fact should be recited or his appointment in that capacity explicitly recorded. But neither was done and the omission seems notable. Rather than accord him that status, Recital B describes his activity: that he "manages" the hotel. I do not shut out Frank Conway from later in this case arguing, as I understand he does, on wider evidence than that before me, that he was and indeed remains, managing partner of the Partnership. I merely observe that, for present purposes of interpretation of this agreement, the factual matrix before me does not include that he is managing partner and indeed, by omission, suggests that he is not.

67. It also bears repeating at this point that Frank Conway positively pleads<sup>48</sup> the Agreement of 21 February 2017 and does so specifically for the assertion that Sheelagh Conway agreed therein that Frank Conway "*managed the premises*". In pleading that Agreement he necessarily invokes the entire. And he does so in the context, which he explicitly pleads<sup>49</sup>, that Sheelagh Conway had, by her solicitor's letter dated 7 October 2016, confirmed that she was not looking to run the premises and was happy that Frank Conway continue to do so. I have addressed the proper interpretation of that letter above as conveying a considerably more nuanced meaning than the bald and simple one for which Frank Conway pleads it. Even accepting Frank Conway's plea<sup>50</sup> that he was the "sole" person managing the premises for the Partnership, it by no means necessarily follows that he was unconstrained in his powers of doing so.

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<sup>46</sup> Presumably on the basis that, at least generally, the status quo is the creation of prior agreement between the partners.

<sup>47</sup> *Donaldson v Williams* (1833) 1 Crompton & M 345

<sup>48</sup> Defence §4

<sup>49</sup> Defence §4

<sup>50</sup> Defence §5

68. Indeed, in exhibiting the Agreement of 21 February 2017, Frank Conway by affidavit explicitly says that he had “*essentially made all the day-to-day<sup>51</sup> decisions in respect of the hotel, its operation and running and more significantly how various loan facilities owed by [the Partnership] will be repaid or refinanced*”. Making all day-to-day decisions is in no way inconsistent with a constraint on making major or strategic decisions. It seems to me that Frank Conway’s actions of 10 September 2019, in ejecting<sup>52</sup> Spiritus as the exclusive operator of the Hotel, taking control of it from Spiritus and purporting to terminate the Management Agreement of 31 March 2017 which entirely governed the operation of the Hotel were, objectively, far from quotidian.

## **§2, 3 & 4 of the Agreement of 21 February 2017**

69. §2 of the Agreement of 21 February 2017 is entitled “Representations” and essentially consists of mutual representations that each party has made full disclosure of his/her financial affairs to the other and makes the agreement in reliance thereon. Indeed the Recitals record the agreement as made in consideration of those representations. Notably, it is specified that Frank Conway has made full disclosure as to the financial information, income, assets and liabilities of the Hotel. As I observe below, these provisions are at least consistent with the factual matrix of mutual distrust.

70. §4 of the Agreement of 21 February 2017 sets out the primary obligations of Sheelagh Conway under the Agreement. They are notably succinct. She is to sign the Pepper Agreement and also a lease of premises at 27 Eustace St. Dublin<sup>53</sup>.

71. §3 of the Agreement of 21 February 2017 sets out the primary obligations of Frank Conway under the contract. They are explicitly in consideration of Sheelagh Conway’s execution of the Pepper Agreement and are notably less succinct – running to 13 sub-clauses.

72. Sheelagh Conway testified that Frank Conway did not fulfil at least some of his obligations under §3 but that cannot affect the interpretation of the Agreement and is an issue for determination, if at all in these proceedings, at a later point in these proceedings.

### **§3.1.6 of the Agreement**

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<sup>51</sup> Emphasis added

<sup>52</sup> I use the word in the colloquial as opposed to the technical, legal, sense

<sup>53</sup> This is not the Hotel

73. Importantly for present purposes, §3.1.6 of the Agreement of 21 February 2017 contains the following:

*“FC hereby acknowledges that SC is entitled to such information as SC shall require in respect of the business and FC further confirms that he will not do anything or sign any documentation or incur any expense or make payments over €15,000 ... to any party or any aggregate amount the same party<sup>54</sup> or draw any funds (other than to trade and other creditors and suppliers as referred to in attached schedule<sup>55</sup>) without the prior written consent of SC in relation to the Hotel or any ancillary business thereto.”<sup>56</sup>*

74. As a general observation it is inescapable that the purpose of §3.1.6 is to constrain Frank Conway’s freedom of action in respects which will require the prior written consent of Sheelagh Conway. The only question is the identification of those respects.

75. Despite Frank Conway’s submission to the contrary, it seems clear to me,

- in the context that the Recitals refer to the Partnership, the Hotel and Frank Conway’s management of it and
- given the phrase in §3.1.6 *“in relation to the Hotel”* and the fact that the Partnership owns the Hotel, which is its primary – perhaps its only - business activity and
- given that the words *“the business”* clearly refer to the business of the Hotel,

that whatever the substance and extent of the constraints imposed by §3.1.6 of the Agreement of 21 February 2017 on Frank Conway’s freedom of action, they are constraints which relate, at least in part, to his actions as a partner and to his management of the Hotel.

76. Spiritus and Sheelagh Conway argue that Frank Conway’s actions of 10 September 2019 – the Termination - were in breach of §3.1.6 of the Agreement of 21 February 2017 for want of the prior written consent of Sheelagh Conway. Sheelagh Conway relies on §3.1.6 in particular, as meaning for present purposes that:

*“.... FC ... confirms that he will not do anything ..... without the prior written consent of SC in relation to the Hotel or any ancillary business thereto.”<sup>57</sup>*

77. Taken in isolation, strictly and literally this interpretation would mean Frank Conway could do nothing at all without Sheelagh Conway’s prior written consent. That would, I agree, be inconsistent with any practical power to manage the hotel and unless compelled to do so I would not so interpret the contract. But I do not consider that is the meaning which would be attributed to §3.1.6 by a reasonable and informed person and Sheelagh Conway does not so argue. Rather she

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<sup>54</sup> sic

<sup>55</sup> sic

<sup>56</sup> §3.1.6

<sup>57</sup> §3.1.6

argues that this clause must be read as constraining Frank Conway's power to make and act on major or significant decisions – in evidence she used the phrase “of note” - concerning the hotel and its business.

78. It is clear that §3.1.6 does seek to constrain Frank Conway's power of unilateral management of the Hotel and my interpretive task is to give meaning, if at all possible, to that constraint and map that meaning onto the impugned actions of Frank Conway of 10 September 2019 – the Termination - to see if it applies to those actions. Some such meaning is necessary to the operation of the Agreement of 21 February 2017 generally and §3.1.6 in particular if the Agreement is to be practically operable as to both Frank Conway's acknowledged role of managing the hotel and his obligation, clear at least in general terms from §3.1.6, to obtain Sheelagh Conway's prior written consent for at least some decisions made in doing so. Limitation of the constraint on Frank Conway's unilateral action to major or significant decisions is not express in §3.1.6 and the concept of “major or significant” decisions was not really teased out by Spiritus or Sheelagh Conway in submissions. But it can usefully be contrasted with the concept of “day-to-day” decisions – whether or not invoked, as in fact it was, by Frank Conway himself.

79. The following observations can be made:

- It is clear that by §3.1.6 of the Agreement of 21 February 2017 some constraint is intended but that it must not be such as to negate Frank Conway's powers of management.
- In a general sense that constraint must be intended to apply to greater rather than lesser decisions and to decisions likely to be of greater rather than lesser concern to Sheelagh Conway.
- A precise dividing line between the greater, constrained, decisions and the lesser, unconstrained, decisions will, linguistically, be impossible to draw given the inevitable imprecision of language as applied to myriad possible future events and circumstances.
- The Agreement of 21 February 2017 was made against a background of mistrust and dispute between Frank and Sheelagh Conway on matters which Sheelagh Conway clearly regarded as of great importance to her – reflected, for example, in the letter of 7 October 2016. This is at least consistent with a somewhat greater rather than lesser constraint on Frank Conway's powers of unilateral action.
- At the date of the Agreement, a fundamental fact of the operation of the Hotel was that Spiritus was in occupation of the Occupier Areas - the bar/nightclub element – pursuant to the 1<sup>st</sup> Management Agreement and ran them for its own profit subject to payment of a management fee.
- It was further clear that Spiritus's occupation was part of the agreed process of Frank Conway's retirement and Nicholas Conway's succeeding to the family business. Frank Conway himself so described it in his letter to the Garda Síochána sent on 10 September 2019<sup>58</sup>. Nicholas Conway's succession was of great importance to Sheelagh Conway. Indeed and as recorded above, by 31 March 2017, consistently with such a process, a replacement

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<sup>58</sup> Misdated 19/10/19. I refer to this letter not as part of the factual matrix of the agreement of February 2017 but as a later record of what had been the factual matrix of the agreement of February 2017.

management agreement had given Spiritus exclusive operation and management of the entire Hotel. Though that Management Agreement is not itself part of the factual matrix of the Agreement of 21 February 2017 as it post-dates the Agreement of 21 February 2017, it is further corroboration that, prior to the Agreement of 21 February 2017, Spiritus's occupation was part of the agreed process of Frank Conway's retirement and Nicholas Conway's succeeding to the family business. Sheelagh Conway testified and I accept that Nicholas Conway's succeeding to the family business was very important to her. She said it seemed like the natural thing to do.

- The arrangement for the operation, and application of the proceeds of operation, of the Hotel were of great importance to all concerned; including to Sheelagh Conway as to both her indebtedness to Kenmare and her own disposable income.
- Tending against the foregoing it can be argued that, even allowing for imprecision of language as applied to myriad possible future events and circumstances, it was open to the drafters of the contract to specify such an important matter as the termination of the Spiritus management agreement as requiring Sheelagh Conway's prior written consent. That argument seems to me to suffer from the deficiency of seeking to interpret the contract through the lens of this later dispute.

80. In light of the foregoing, it seems to me that it is unnecessary to identify a bright line division between greater and lesser decisions and between those decisions likely to be or not be of greater and lesser concern to Sheelagh Conway for purposes of identifying those decisions the activation of which required, by §3.1.6 of the Agreement of 21 February 2017, Sheelagh Conway's prior written consent. It suffices to observe that, wherever such a line might be drawn and whatever its penumbra, it seems to me clear, as a matter of interpretation of §3.1.6, that the decisions of Frank Conway underlying his actions of 10 September 2019 in ejecting Spiritus clearly lie on the side of that line which required prior written consent of Sheelagh Conway.

## **Other Terms of the Agreement of 21 February 2017**

81. Remembering that it is to be interpreted as a whole, certain other terms of the Agreement of 21 February 2017 shed light on the question whether §3.1.6 is to be interpreted as requiring, as to the decisions of Frank Conway underlying his actions of 10 September 2019 in ejecting Spiritus, the prior written consent of Sheelagh Conway.

82. First, and as a general observation, the Agreement of 21 February 2017 speaks to the mistrust between Frank Conway and Sheelagh Conway – which comes as little surprise given their status as estranged spouses, and the terms of the letter of 7 October 2016. While §2 as to representations and disclosure, described above, might appear in any commercial agreement and perhaps especially between partners, seen in the matrix of their former marital status, ongoing



commercial relations and mutual mistrust, it makes constraint on freedom of action by Frank Conway all the less unsurprising.

83. Second, and again as a general observation, the subclauses of §3.1 of the Agreement of 21 February 2017 range widely as to relations between Frank Conway and Sheelagh Conway - emphasising her interest in this Agreement and its importance to her.

- §3.1.1 requires Frank Conway to pay Sheelagh Conway €1,000 per week – whether or not strictly as a maintenance payment is not stated but the effect is likely to be the same and to represent a considerable, if not the major, part of her income.
- §3.1.2 and §3.1.3 relate to arrangements as to what was the family home in Sandymount, rectification of title to its garden, division of its garden and to fund construction of a new home for Sheelagh Conway in her part of the garden.
- §3.1.3 and §3.17 provide for financial transactions implying their equal ownership of the Hotel.
- §3.1.4 obliges Frank Conway to give Sheelagh Conway access to the financial information as to the Hotel – including monthly management accounts.
- §3.1.5 and §3.1.12 oblige Frank Conway to pay Pepper and comply with the Pepper Agreement, including by sale of the Hotel if needs be.
- §3.1.8 obliges Frank Conway to refurbish the Hotel to planning and fire safety requirements within 6 months.

Also, §5 provides that “the Hotel” will pay the legal fees of Frank Conway and Sheelagh Conway. It is also particularly notable that by §6 Sheelagh Conway’s remedies for any material breach of the Agreement by Frank Conway were to include sale of the Hotel.

84. These clauses appreciably undermine Frank Conway’s argument that the Agreement of 21 February 2017 was not intended to regulate the affairs of Frank Conway and Sheelagh Conway qua partners. First, as I have said, they seek to address their relations comprehensively: it seems highly unlikely that they would, in doing so, omit the Partnership relationship central to their financial relations and respective financial well-being. Second, the clauses other than those relating to the family home and maintenance clearly relate to Partnership debt and to the Partnership business – i.e. the Hotel.

85. That last observation can all the more be made of two further subclauses of §3.1 of the Agreement of 21 February 2017. At §3.1.10 Frank Conway agrees that he will do nothing to prejudice the interest of Sheelagh Conway in the Hotel.

86. Importantly, §3.1.11 is an unusually-phrased confirmation by Frank Conway that he “*should not do anything to undermine the operation of the Kitchen, Breakfast Room, Bar and nightclub currently occupied by Spiritus*”. The word “*should*” here is unusual and, as seen in a contract, vague. However, and whatever it means precisely, §3.1.11 readily suffices to characterise “*the operation of the Kitchen, Breakfast Room, Bar and nightclub currently occupied by Spiritus*” as sufficiently important as to be worthy of particular protection in the specific form of consideration being provided by Frank Conway to Sheelagh Conway for her execution of the Pepper Agreement. Further, it establishes, at least as a general principle, that Spiritus’s operation should not be “undermined” by “anything” done by Frank Conway. On any view, termination of Spiritus’s operation is the most fundamental possible form of undermining it and is commensurately inconsistent with that general principle. In my view, §3.1.11 is appreciably supportive of an interpretation of §3.1.6 to the effect that the decisions of Frank Conway underlying his actions of 10 September 2019 in ejecting Spiritus required the prior written consent of Sheelagh Conway.

87. Accordingly, I hold as a matter of interpretation, subject to the issue of exhaustion which I next consider, that §3.1.6 of the Agreement between Frank Conway and Sheelagh Conway made on 21 February 2017 required her prior written consent to the Termination.

### ***Agreement Exhausted?***

88. Frank Conway also argued that whatever the scope and content of §3.1.6 of the Agreement of 21 February 2017, on a proper interpretation of that Agreement his obligations pursuant thereto were exhausted and ceased to bind him once the Pepper Agreement was superseded - as it was by the “Clinton Loan & Mortgage” signed by Frank Conway and Sheelagh Conway on 20 December 2018. Or, to put it another way, Frank Conway argued that, as a matter of interpretation of the Agreement of 21 February 2017, the obligations of §3.1.6 subsisted only as long as the Pepper Agreement subsisted.

89. To understand this argument it is necessary to say a little more of the facts. As recorded above, the Pepper Agreement was signed on the same day as the Agreement of 21 February 2017. The scheme of the Pepper Agreement included 12 payments to Kenmare of €25,000 per quarter and clearance of the balance owed to Kenmare by 31 December 2018. The Management Agreement of 31 March 2017 with Spiritus in essence subcontracted to Spiritus the making of the quarterly payments to Kenmare and it did so. But, in the events which occurred, that left a lump sum of €3.15 million to be paid to Kenmare by 31 December 2018. So either the hotel would have to be sold to make that payment or the Partnership had to refinance that €3.15 million.

90. Much of the evidence and cross-examination on how that was done and events thereafter is not strictly relevant for present purposes but some account of it may make the issues for present decision more comprehensible. Essentially, the parties each retained financial advisors to seek the

funds necessary to refinance the Kenmare debt and it became clear that, for various (disputed) reasons, the only alternative to sale of the Hotel was a loan by one Paul Clinton of €3.5 million, at an expensive interest rate of 14%, resulting in monthly repayments of €41,000, and on terms that the loan was for repayment 18 months from drawdown and that the Hotel was mortgaged to him. Sheelagh Conway says she had misgivings about this loan – not merely as to its expense but also as Paul Clinton was a friend and business associate of Frank Conway. But she also regarded him as a helpful go-between in communications with Frank Conway. It may be best to describe her view of him as at least wary and she later considered he was trying to buy the Hotel for himself. But I need make no finding on those issues and I make none inimical to the position or reputation of Paul Clinton, who did not give evidence and is not a party to these proceedings. In any event, the Clinton Loan was ultimately seen by the Conways as the only option, was urgently required by late 2018 and so was made and Kenmare was paid off in late December 2018.

91. Frank Conway's argument is that, as a matter of interpretation of the Agreement of 21 February 2017, once Kenmare was paid off his obligations under the agreement between Frank Conway and Sheelagh Conway made on 21 February 2017, and specifically those under §3.1.6, ceased. I address only the interpretation argument without prejudice to any argument as to the effect of events postdating 21 February 2017 on the obligations created thereby. I respectfully reject Frank Conway's interpretation argument for reasons set out below.

92. Before I recite those reasons and as something of an aside, I should briefly recognise that the reader will have noticed that the Management Agreement of 31 March 2017 was to expire on 1 April 2020. Spiritus says that it agreed with the Partnership to make the monthly €41,000 payments to Paul Clinton and it is agreed that it did so. There is dispute as to the terms on which it did so but Spiritus says that those payments entitled it to an extension of the term of the Management Agreement of 31 March 2017 such that it remains entitled to enforce it. I mention that issue merely to explain why, despite the apparent expiry of the Management Agreement of 31 March 2017 on 1 April 2020, Spiritus still pursues occupation of the Hotel. I was not addressed as to the present position of Mr Clinton as to his loan as that might bear on the prospect of Spiritus' recovering occupation of the Hotel. I do not here attempt to precisely state those issues, much less resolve them.

93. As to my reasons for rejecting Frank Conway's argument that his obligations have ceased, first, whereas Sheelagh Conway's obligation under the Agreement between Frank Conway and Sheelagh Conway made on 21 February 2017 – to sign the Pepper Agreement – was clearly exhausted on her signature of it that same day, many of Frank Conway's various obligations as described above were clearly to continue after its signature.

94. Second, though the Pepper Agreement was, at the time of the Agreement between Frank Conway and Sheelagh Conway made on 21 February 2017, clearly to last only until 31 December 2018, Frank Conway and Sheelagh Conway did not provide in their agreement, as easily they might

have, that Frank Conway's obligations as described above, would cease at that time. Not least as Sheelagh Conway was not cross-examined on her evidence that the Hotel represented the sole significant Partnership Asset, it must have been anticipated in February 2017 that by 31 December 2018 it would either have to be sold or the debt refinanced. In that sense, and as to the "lump" of debt to be repaid in December 2018, the Pepper Agreement was certainly a considerable reduction in the total debt but was also an exercise in buying time rather than a final or long-term solution to the Conways' financial problems or, from Sheelagh Conway's point of view, to securing the family business to her son Nicholas.<sup>59</sup>

95. Third, the nature of Frank Conway's obligations as described above, undoubtedly obligations continuing after 21 February 2017, seems to me to be such that one would expect them to continue indefinitely pending agreement to the contrary. There is no assertion of agreement to the contrary. The obligations are, as I have said, clearly intended to widely govern what were clearly expected to be ongoing commercial and financial and property relations between Frank Conway and Sheelagh Conway; relations moreover which had already proved difficult and had resulted in solicitors' letters inter partes and were characterised by mistrust. Further, they were intended at least in part to avoid sale of the Hotel if possible and to continue its business even after the Pepper Agreement was ended. That implies a continuing relationship between the Partners Frank Conway and Sheelagh Conway. It seems unlikely that Frank Conway and Sheelagh Conway intended, or more importantly that a reasonable person in their position would objectively understand them as having intended that, having set their future, stressed and complex relations down in some detail, they would provide for the automatic undoing of those arrangements merely by reason of a change in 2018 of the identity of their creditor. It is just as unlikely in that context that they would provide for the automatic undoing of those arrangements, as is in effect suggested by Frank Conway, other than on terms of their replacement by new arrangements. Of course such a position is not impossible but it is not objectively likely. Certainly, they may have anticipated revisiting their arrangements once the Pepper Agreement was ended, but that does not imply the automatic undoing of those arrangements once the Pepper Agreement was ended and in advance of their replacement by new arrangements. Much more likely is that they would contemplate those arrangements as continuing until altered by agreement.

96. Fourth, there is nothing inherently surprising or unusual or unlikely in Frank Conway's obligations outliving the Pepper Agreement.

97. Fifth, as Frank Conway's obligations are explicitly and undoubtedly obligations continuing after 21 February 2017 and the execution of the Pepper Agreement and as there is no express provision for their termination, Frank Conway in effect asks that I imply a term terminating his obligations on the expiry of the Pepper Agreement. It does not seem to me appropriate to imply such a term. Frank Conway did not address me on the basis in law for the implication of such a term. In those circumstances a detailed account of the law as to implication of terms in contracts is not

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<sup>59</sup> In this observation I do not forget that the Pepper Agreement also involved a very considerable write-down of debt.

required. But I note that Heslin J in **Moloney**<sup>60</sup> has helpfully outlined the principles<sup>61</sup> as to implying terms as follows:

- Where a contract is apparently complete, the court may be prepared in appropriate circumstances to imply an additional term.
- It is done on the basis of the presumed intention of the parties.
- It is done with the object of giving to the transaction such efficacy as both parties must<sup>62</sup> have intended that it should have.
- It is done only if the term to be implied is all of
  - So obvious as to have tacitly formed part of the contract
  - Reasonable
  - Such that without it, the contract will not operate.
- “the touchstone is always necessity and not merely reasonableness”<sup>63</sup>.

98. Seeking to apply the foregoing principles, it does not appear to me that the implied term for which Frank Conway contends is either obvious or necessary in the sense canvassed above.

99. I am conscious that Collins J in **Betty Martin**<sup>64</sup>, as to the need for an implied term to be necessary (and not merely reasonable), thought it important<sup>65</sup> to avoid any exaggerated understanding of that requirement. As rarely can a party demonstrate that, absent a particular implied term, a contract simply cannot operate, it may be more helpful to express that aspect of the test in terms of a term being implied only if, without that term, “the contract would lack commercial or practical coherence”. Even by that somewhat attenuated standard of necessity and for the reasons set out above, it does not appear to me that the implied term for which Frank Conway contends is necessary in the sense that without it “the contract would lack commercial or practical coherence”.

100. At Frank Conway’s instance I have considered §7.3 of the Agreement of 21 February 2017. It continues the §7 confidentiality obligations “without limit in time and notwithstanding the termination or expiration of this agreement”. This is not an unusual clause specific to confidentiality obligations and I do not see it as implying limits in time as to other obligations of the Agreement. It does contemplate in very general terms the expiry of the agreement but there is no express term

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<sup>60</sup> *Moloney v. Cashel Taverns Ltd (In Voluntary Liquidation)* [2020] IEHC 658 (High Court (General)), Heslin J, 10 December 2020)

<sup>61</sup> Citing the Moorcock [1889] 14 PD 64; Trollope and Colls Ltd v Northwest Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601; Carna Foods Ltd & Anor v Eagle Star Insurance Company (Ireland) [1997] 2 IR 193 and Liverpool City Council v Irwin & Anor [1977] A.C. 239

<sup>62</sup> Emphasis added

<sup>63</sup> Liverpool City Council v Irwin [1976] UKHL 1

<sup>64</sup> *Betty Martin Financial Services Ltd. v EBS DAC* [2019] IECA 327 (Court of Appeal (civil)), Collins J, 18 December 2019)

<sup>65</sup> Citing Lord Neuberger in Marks & Spencer plc v BNP Paribas Securities Services [2015] UKSC 72; [2016] AC 742 as in turn cited by Haughton J in Wingview Limited v Ennis Property Finance DAC [2017] IEHC 674

identifying that point, time or occasion of expiry and I do not consider that thread strong enough on which to hang an implied term of the kind suggested.

101. I have considered §11 of the Agreement of 21 February 2017 – an entire agreement clause – but, without purporting to state the law in this respect, have not found it necessary to consider it as weighing against the implication of a term<sup>66</sup>.

102. Finally, it bears observing Frank Conway’s argument that his obligations and any constraints on his decision-making powers under the Agreement of 21 February 2017 expired in December 2018 when Kenmare were paid off, such that the Pepper Agreement came to an end, is inconsistent with his pleaded reliance on the continuing efficacy of that same Agreement of 21 February 2017 as the very source of his authority to effect the Termination on 10 September 2019<sup>67</sup>.

103. Accordingly, I reject Frank Conway’s argument that the Agreement of 21 February 2017 is to be interpreted to the effect that his obligations under §3.1.6 ceased on the termination of the Pepper Agreement.

104. I should add that at one point in her testimony, Sheelagh Conway referred to the Agreement of 21 February 2017 as “*done and dusted*” by the time she wrote a certain letter to Nicholas Conway on 14 September 2019. I said at the time and remain of the view that, in using that phrase, she did not intend to suggest that the Agreement was exhausted or no longer current. Whether I am right or wrong in that regard, Sheelagh Conway’s personal and subjective interpretation of the Agreement of 21 February 2017 is irrelevant to its interpretation.

### ***Conclusion on the Interpretation Issue***

105. For the reasons set out above I hold, as a matter only of interpretation of the agreement between Frank Conway and Sheelagh Conway made on 21 February 2017, that it prohibited Frank Conway from terminating the Partnership’s Management Agreement with Spiritus dated 31 March 2017 and from excluding Spiritus from the Hotel, both without the written consent of Sheelagh Conway. As I have said, that finding does not preclude Frank Conway from otherwise justifying the Termination notwithstanding that interpretation.

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<sup>66</sup> See e.g. *Exxonmobil Sales and Supply Corp v Texaco Ltd* - [2003] All ER (D) 121 (Aug); and in *Betty Martin* the EBS notably disavowed reliance on an entire agreement in resisting implication of a term.

<sup>67</sup> Replies to Particulars 15 November 2019 §§1 – 3.

106. As this judgment is delivered electronically, I will list this matter for mention at 10:00 on the 8<sup>th</sup> of July 2022.

**David Holland**  
**28/6/22**