Neutral Citation [2012] IEHC 373

THE HIGH COURT

[1997 No. 4705 P]

BETWEEN

LISA CRONIN

PLAINTIFF

AND

NUALA KEHOE AND BARRY KEHOE

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 22nd day of August, 2012.

Factual background

1. The plaintiff initiated these proceedings by a plenary summons which issued on 3rd April, 1997 in her capacity as personal representative of Timothy Finbar Cronin (Dr. Cronin), her deceased husband. The original defendant was Charles Richard Kehoe (Dr. Kehoe), who died on 20th June, 2008. By order of the Master made on 21st March, 2011 on foot of an ex parte application made by counsel for the plaintiff it was ordered that the proceedings be carried on and prosecuted between the plaintiff and the defendants, who are the widow and son respectively of Dr. Kehoe and to whom probate of his will issued on 15th September, 2009.

2. Both Dr. Cronin and Dr. Kehoe were medical doctors. Dr. Kehoe practised as a general practitioner from his home in New Ross, County Wexford. Dr. Cronin, who was approximately thirty four years of age at the time, took up a position as an assistant doctor employed by Dr. Kehoe in or around the year 1991. At that time, Dr. Kehoe was approximately sixty three years of age. He carried on a private practice and he also participated in the G.M.S. scheme under the aegis of the South Eastern Health Board from which he was going to have to retire when he attained the age of seventy. The claims and counterclaims in these proceedings arise out of a partnership agreement entered into by Dr. Cronin and Dr. Kehoe in 1994.

3. The prospect of Dr. Cronin and Dr. Kehoe forming a partnership was in the air from some time in 1993. Each party instructed a solicitor to advise him. Dr. Kehoe was advised by Paul Ebrill of Kirwan & Kirwan, Solicitors. Dr. Cronin was advised by John Reidy of Reidy Stafford, Solicitors. Both Mr. Reidy and Mr. Ebrill testified at the hearing of the action and quite a lot of contemporaneous correspondence and documentation, including draft partnership agreements, are available to illustrate how the negotiations between the parties progressed. The correspondence between the solicitors commenced on 1st September, 1993 when Kirwan & Kirwan sent the first draft partnership agreement to Reidy Stafford. There were at least two meetings between the parties, the first held in the offices of Kirwan & Kirwan on 18th November, 1993 and the second sometime before 30th June, 1994.

4. The partnership agreement in its final form was sent by Kirwan & Kirwan to Reidy Stafford by letter dated 4th July, 1994. By letter dated 14th July, 1994 Reidy Stafford raised some queries in relation to the terms. However, by that stage Mr. Ebrill had gone on holidays. When he returned at the beginning of August 1994 he learned that Dr. Kehoe and Dr. Cronin had themselves decided to execute that final agreement. Therefore, both Mr. Ebrill and Mr. Reidy were faced with a fait accompli. Subject to two variations subsequently agreed to, the partnership agreement was the agreement in the form of the final draft, which was dated 16th July, 1994 and was executed by Dr. Kehoe and Dr. Cronin (the Partnership Agreement).

5. In the Partnership Agreement Dr. Kehoe was referred to as the Senior Practitioner and the Dr. Cronin was referred to as the Incoming Practitioner. It was recited that Dr. Cronin had never been on the list of medical practitioners providing general medical service under the Health Acts and that the parties were desirous of enabling him to be entered on the list from the commencement of the term of the Partnership Agreement with a view to him being in a position to commence caring for the G.M.S. patients of the partnership during the partnership term and thereafter to continue to care for such of those G.M.S. patients as would transfer to him. The provisions of the Partnership Agreement which are relevant for present purposes are as follows:

> (a) Clause 1.3, in which the consideration was expressed to be the mutual performance by the partners of the terms therein and "the payment by the Incoming Practitioner to the Senior Practitioner of the sum of £40,000 . . . for any and all goodwill the Senior Practitioner is bringing into the Partnership . . ..
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> (b) Clause 2, which provided that the duration of the partnership would be five years from 16th July, 1993, it being obvious that the expiry of that term would coincide with Dr. Kehoe's seventieth birthday.
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> (c) Clause 13, which provided that the accounts of the partnership should be prepared by the firm of accountants, B.J. Doyle & Co. (the Partnership Accountants), and the accounts so prepared and certified would be binding on the parties.
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> (d) Clause 14.1, which provided:
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> > "The profits of the Partnership as shown by the accounts shall be divided between the parties in the following proportions, up until the Senior Practitioner attains his seventieth year, which does not imply this ratio as applicable to any other interest in the business and goodwill of the Partnership both of which remain in the ownership of the Senior Practitioner until the expiry of the Term and compliance by the Incoming Practitioner with the terms hereof:
> >
> > 51% to the Senior Practitioner.
> >
> > 49% to the Incoming Practitioner."

Under Clause 14.2 losses were to be borne in like proportions.

(e) Clause 19, which is only of peripheral relevance, which, having stated that the Senior Practitioner had, by virtue of his long standing list, the entitlement to have the South Eastern Health Board provide a locum tenens for him from week one for a period of not more than twelve months in the event of his absence due to ill health, but that the Incoming Practitioner had no such entitlement, went on to provide as follows:

> "The Partnership shall effect a permanent health insurance policy in respect of the Incoming Practitioner . . . acceptable to the Partnership to provide funds for the provision of a Locum Tenens to cover for the Incoming Practitioner from week one of any absence due to ill health . . . . The cost of the provision of the Policy and any shortfall which the Partnership may need to pay for the provision of the Locum Tenens shall constitute an expense of the Incoming Practitioner solely and the Accounts and the distribution of the Profits of the Partnership shall be treated accordingly."

(f) Clause 22, which is the provision which has given rise to the principal claim by the plaintiff and which provided as follows:

> "The Senior Practitioner shall effect a policy of life insurance on the life of the Incoming Practitioner in the sum of £100,000 with the Senior Practitioner as the beneficiary thereof for the duration of the Partnership the premia therefor shall be paid by the Senior Practitioner. In the event of the Incoming Practitioner dying during the currency of the Partnership and the payment out to the Senior Practitioner of the £100,000 proceeds of the above mentioned policy the Incoming Practitioner for himself and his executors and assigns agrees that he shall accept a sum of £60,000 to be paid by the Senior Practitioner to the Personal Representative of the Incoming Practitioner in full and final discharge of all claims against the Partnership by him for Goodwill but excluding any sums otherwise due to him out of the Partnership at the date of his death. On the expiry of this agreement the Senior Practitioner shall effect the assignment of the benefit of the said policy to the Incoming Practitioner, if so requested by the Incoming Practitioner in exchange for a sum to be paid by the Incoming Practitioner to the Senior Practitioner equivalent to the amount expended by Senior Practitioner in respect of the Premia therefor together with a sum for interest thereon at a rate to be fixed by the Accountant in default of agreement."

6. Throughout the correspondence between Reidy Stafford and Kirwan & Kirwan there was an issue as to the sum which Dr. Cronin agreed to pay to Dr. Kehoe in accordance with Clause 1.3, Mr. Reidy contending that the sum agreed was £27,000. In any event, Mr. Reidy prepared a draft supplemental agreement which he sent to Dr. Cronin with his letter dated 30th June, 1994 on the basis of his understanding that Dr. Cronin and Dr. Kehoe intended to modify the Partnership Agreement and that Dr. Kehoe "for his own private reasons" did not want to involve his solicitors. As a result, unbeknownst to Mr. Ebrill or anyone in the firm of Kirwan & Kirwan, Dr. Kehoe and Dr. Cronin signed a supplemental agreement which bears the date 6th April, 1994 and, accordingly, was obviously backdated (the Supplemental Agreement). The Supplemental Agreement was expressed to be supplemental to the Partnership Agreement, the date of which was incorrectly stated to be 6th April, 1994. Having stated that Dr. Kehoe "had agreed to sell" and Dr. Cronin "had agreed to purchase" what was referred to as "the interest therein described in the medical practice of [Dr. Kehoe] for a consideration of £40,000", it was provided in Clause 2 that Dr. Kehoe and Dr. Cronin had –

> ". . . subsequently and by mutual agreement agreed to abate that purchase consideration to a figure of <u>£27,000 being £12,000 immediate payment and the balance of £15,000 spaced over the remainder of the Partnership paid in 6 monthly intervals</u>."

The words which I have underlined in the above quotation were written in manuscript. It was Mr. Reidy's evidence that the handwriting was similar to the handwriting of Dr. Cronin. On the basis of the evidence, I find that it was Dr. Cronin who inserted those words in Clause 2. The Supplemental Agreement contained a number of other provisions which are not material to the issues before the Court. It was signed by Dr. Cronin but it was not signed by Dr. Kehoe.

7. After the death of Dr. Cronin, by letter dated 29th August, 1995, Kirwan & Kirwan sent a copy of the Supplemental Agreement, which had been furnished to that firm by Dr. Kehoe after Dr. Cronin's death, to the solicitors who are on record for the plaintiff in these proceedings, Dermot M. MacDermot & Co. It was stated in that letter that Mr. Ebrill had no knowledge whatsoever that the consideration had been re-arranged but it was fully accepted that that was what happened. There was no suggestion in the letter of 29th August, 1995 that Dr. Kehoe had not agreed to the words which are underlined in the above quotation. If he had not, it is very surprising that the copy of the Supplemental Agreement was furnished by him without comment. Therefore, the contention in the written submissions of the defendants that Dr. Kehoe was not bound by the "spaced" payment of £15,000 must be rejected by the Court.

8. The second modification of the Partnership Agreement involved the inclusion of an additional provision (Clause 24(a)), the inclusion of which was a requirement of the South Eastern Health Board, as set out in a letter of 30th August, 1994. The additional clause, which has no bearing on the issues before the Court, was signed by both Dr. Kehoe and Dr. Cronin and included in the Partnership Agreement. It obviously met the requirements of the South Eastern Health Board, because, by letter dated 27th January, 1995, the South Eastern Health Board advised Dr. Cronin that he was admitted into the G.M.S. scheme with effect from 20th January, 1995 and that he had been allocated a G.M.S. number and could accept patients onto his own panel. However, if the partnership dissolved within a period of five years, the patients on his panel would revert to Dr. Kehoe.

9. Dr. Cronin's family, his wife, the plaintiff and his two young children aged eight years and two years, had moved to New Ross when the partnership was put in place. Unfortunately, the family was about to be hit by two tragedies.

10. After the plaintiff had become pregnant with her third child she was diagnosed with bowel cancer in the Spring of 1995. Her baby was induced at twenty seven weeks on 25th April, 1995. Five days later, having visited the plaintiff in the Rotunda Hospital, Dr. Cronin, whom the plaintiff testified had previously been in perfect health, became ill and he attended the Accident and Emergency Department at St. Vincent's Hospital, where he was detained. He was subsequently transferred by air ambulance to Addenbrooke's Hospital, Cambridge. In the meantime, the plaintiff had been transferred from the Rotunda Hospital to Beaumont Hospital for surgery. Her baby daughter remained in an incubator in the Rotunda Hospital. The plaintiff discharged herself from Beaumont Hospital to be with her husband in Addenbrooke's Hospital. He died there on 26th June, 1995. His death certificate, which has been put in evidence, gives the cause of death as multiple organ failure and systemic sepsis due to Wegener's granulomatosis.

11. After the death of Dr. Cronin, the plaintiff, through her solicitors, became aware that a policy of insurance on the life of Dr. Cronin

had not been put in place by Dr. Kehoe in accordance with Clause 22 of the Partnership Agreement. It also transpired that permanent health insurance had not been put in place by the partnership in accordance with Clause 19 of the Partnership Agreement.

12. Having regard to the fact that these proceedings did not come on for hearing for more than sixteen years after the death of Dr. Cronin and more than three years after the death of Dr. Kehoe, in my view, it is of assistance to assess the inter partes correspondence between the plaintiff's solicitor and Dr. Kehoe's solicitor after the death of Dr. Cronin and before the initiation of these proceedings. However, it must be borne in mind that at the time the correspondence was entered into the plaintiff was recently widowed at a young age, she was receiving treatment for her cancer and her baby daughter was seriously ill in hospital.

***Inter partes* correspondence**

13. The plaintiff's solicitors' first letter was dated 6th July, 1995 and in it the solicitors queried the status of the provisions of Clauses 22 and 19 in the Partnership Agreement. The response from Dr. Kehoe's solicitors was dated 7th July, 1995 and it was to the effect that, to the best of their knowledge, no life insurance policy had been effected on Dr. Cronin's life as envisaged by Clause 22 and no permanent health insurance was effected as envisaged by Clause 19. However, a more detailed letter was promised in August 1995. By letter dated 17th August, 1995, Dr. Kehoe's solicitors informed the plaintiff's solicitors that they required to make further inquiries before replying fully to the plaintiff's solicitors. They raised the issue of the existence of the Supplemental Agreement and its existence was clarified in the letter of 29th August, 1995 to which I have already referred. By letter dated 31st August, 1995, the plaintiff's solicitors sought Dr. Kehoe's proposal in the light of Clause 22, given that the policy was not in place.

14. There was a comprehensive reply dated 19th September, 1995 from Dr. Kehoe's solicitors, which outlined the process which led to the execution of the Partnership Agreement. It was stated in the letter that after the Partnership Agreement had been executed Dr. Kehoe had pursued the question of life insurance with Dr. Cronin. The detail which followed was clearly based on instructions given by Dr. Kehoe to his solicitors in a letter dated 31st August, 1995 which, having waived privilege, the defendants have discovered. In that letter, having explained that as a member of the Irish Medical Organisation (IMO) he had received brochures from that organisation in relation to a Group Life Scheme, in which he was not personally interested, Dr. Kehoe stated:

> "In late July 1994 as the final contract between Tim and myself had been agreed and subsequently signed, I showed Tim these brochures and advised him that he should contact the Irish Medical Organisation with a view to obtaining Life Cover as agreed in clause 22 of the contract. I am very definite about this and I also distinctly remember that Tim was not a member of the Irish Medical Organisation and felt that the Life Cover on offer by the Organisation might not be available to him. However, I had ascertained that, in fact, it was not necessary to be a member of the Organisation though it was desirable, but that non-membership did not preclude a doctor obtaining the Life Cover offered.
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> On a couple of occasions after this I asked Tim had he followed up on my suggestions and my recollection is that he had not but was undertaking to do so. Subsequently I admit that I forgot to inquire from Tim whether or not he had taken out any Life Cover. However, I am very definite that I had shown him the brochures which I enclosed in late July or early August 1994 and that I had very definately (sic) inquired from Tim about his following up on my suggestions."

Dr. Kehoe's solicitors conveyed the substance of that to the plaintiff's solicitors. The letter also addressed the fact that the permanent health insurance was not in place. The position adopted on behalf of Dr. Kehoe was that he was discharged from his obligations under Clause 22 of the Partnership Agreement "by virtue of the failure of Dr. Cronin to pursue the matter to a point where Dr. Kehoe could take it up and complete the matter by payment of the relevant premia". The point was also made that Dr. Kehoe had suffered financially as a result of the life insurance policy and the permanent health insurance policy not being in place.

15. The plaintiff's solicitors' response, by letter dated 10th November, 1995, was to deny that Dr. Kehoe was discharged from his obligations due to default on the part of Dr. Cronin. From early 1996 the focus of the plaintiff's solicitors was on obtaining factual information which would be included in the Inland Revenue Affidavit to be sworn by the plaintiff in connection with extracting a grant of administration intestate to the estate of Dr. Cronin. The position of Dr. Kehoe's solicitors was that it was a matter for the plaintiff to determine what should be included in the Inland Revenue affidavit in relation to her claim that the estate was entitled to £60,000 on foot of Clause 22 of the Partnership Agreement. On the other hand, the position of Dr. Kehoe was that, of the amount of £27,000 due to Dr. Kehoe by Dr. Cronin under the Supplemental Agreement, only £14,500 had been paid. Later, in December 1996, Dr. Cronin's solicitors furnished an extract from a letter dated 28th February, 1996 from the Partnership Accountants in which it was stated that the partnership accounts covering the period from 1st August, 1994 to 30th June, 1995 revealed that Dr. Cronin's estate was owed £11,454 by the practice and seeking payment thereof. At the hearing it was admitted on behalf of the defendants that that was correct.

16. That led to a further letter from the plaintiff's solicitors seeking payment of the sum of £11,454 from Dr. Kehoe. The position adopted by Dr. Kehoe's solicitors was that, while the Partnership Accountants had indicated that a sum of £11,454 was owed by the partnership practice to the estate of Dr. Cronin, only £14,500 of the £27,000 due by Dr. Cronin to Dr. Kehoe under the Partnership Agreement, as varied by the Supplemental Agreement, had actually been paid and, accordingly, it was inappropriate that Dr. Kehoe should be requested to pay money to the estate of Dr. Cronin while the estate was still indebted to him. There matters lay when the plenary summons in these proceedings was issued on 23rd April, 1997, just five days after the grant of letters of administration in the estate of Dr. Cronin had issued to the plaintiff.

17. Dr. Kehoe's solicitors made it clear within a month that they required a statement of claim, because Dr. Kehoe wished to file a defence and counterclaim. The statement of claim was delivered by the plaintiff's solicitors by letter dated 16th June, 1997. By the time Dr. Kehoe's solicitors had received it they had already taken the precaution of issuing a plenary summons (Record No. 1997/6993P) on 17th June, 1997 in proceedings (Dr. Kehoe's proceedings) between Dr. Kehoe, as plaintiff, and the plaintiff in these proceedings, in her capacity as legal personal representative of Dr. Cronin, as defendant, claiming –

> (a) the "sum of £13,500 being the balance of monies due and owing by [Dr. Cronin]" to Dr. Kehoe under the Partnership Agreement,
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> (b) "[d]amages for breach of contract",
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> (c) further or other relief, and
>
> (d) costs.

In their letter dated 23rd June, 1997 Dr. Kehoe's solicitors made the following proposal to the plaintiff's solicitors;

". . . if you wish to furnish us a letter confirming that the Statute of Limitations will not be raised against our client in the context of [these] proceedings, then we can proceed to file a Defence and Counterclaim to [these] Proceedings and to take no further steps in connection with [Dr. Kehoe's proceedings] which we have issued to protect our client's position."

The response of the plaintiff's solicitors in their letter of 3rd September, 1997 was as follows:

"On the basis that it is desirable that all issues be heard and determined at one and the same time, we confirm that the plaintiff will consent to the course of action as proposed in your said letter of 23rd June, 1997, subject to the proviso that the defendants' counterclaim is limited to the claim as set forth in the general endorsement of claim to the plenary summons as issued herein under Record No. 1997 Number 699[3]P and dated 17th June, 1997."

The claim and counterclaim pursued in the context of the pleadings

18. As I understand the final position of the plaintiff as put forward by her counsel, there are three elements to the plaintiff's claim, namely:

(a) a claim for the euro equivalent of £60,000 arising out of the alleged breach by Dr. Kehoe of Clause 22 of the Partnership Agreement, which claim is pleaded in the statement of claim;

(b) a claim for the euro equivalent of £11,454 on the basis of the alleged breach of the Partnership Agreement by Dr. Kehoe in refusing to pay the sum found due by the Partnership Accountants to the estate of Dr. Cronin, which is also pleaded in the statement of claim; and

(c) interest at the rate of 5% per annum from 26th June, 1995 on the said sum of £11,454, which is claimed pursuant to s. 42 of the Partnership Act 1890 (the Act of 1890), which element is not pleaded in the statement of claim, but which counsel for the plaintiff contended did not require to be pleaded.

19. The final position adopted by counsel for the defendants, as I understand it, is that there are two elements to the defendants' claim:

(a) a claim for payment of the balance of the premium agreed to be paid by Dr. Cronin to Dr. Kehoe under the Partnership Agreement, as varied by the Supplemental Agreement; and

(b) a claim for the euro equivalent of £40,000 which Dr. Kehoe would have been entitled to retain from the proceeds of the policy effected on Dr. Cronin's life under Clause 22, if it had been effected.

20. The first element is based on the contention that there remains due and owing to the estate of Dr. Kehoe by the estate of Dr. Cronin the euro equivalent of £13,500 being the balance of the sum of £27,000 agreed to be paid by Dr. Cronin to Dr. Kehoe under the Supplemental Agreement. This figure differs from the corresponding figure in the counterclaim, which was £12,500, but my understanding is that both sides accept that Dr. Cronin only paid £13,500 of the sum of £27,000 due to Dr. Kehoe during his lifetime. In the defence, while admitting that the sum of £11,454 was due under the Partnership Agreement to Dr. Cronin at the date of his death, it was pleaded that the claims under the counterclaim should be set off against any sums which might be found due by the defendants to the plaintiff, the essence of the defendants' position being that the admitted amount due to the estate of Dr. Cronin was cancelled by the amount alleged to be due by the estate of Dr. Cronin to the estate of Dr. Kehoe.

21. As regards the second element to the defendants' counterclaim, it is premised on the proposition by which the defendants defend the plaintiff's claim under Clause 22, albeit that it was not clearly pleaded in the defence. It was pleaded in the counterclaim that it was an implied term of the Partnership Agreement that Dr. Cronin should provide all necessary and proper assistance in effecting and securing the policy of insurance on his life which was to be provided in accordance with Clause 22 of the Partnership Agreement and that, in breach of that implied term, he failed, neglected and refused to provide any assistance towards effecting or obtaining the said policy, which it was alleged constituted a breach of the said contract, meaning the Partnership Agreement, and/negligence on his part, in consequence of which Dr. Kehoe suffered loss and damage, which was particularised at £100,000. It was properly recognised by counsel for the defendants that, even if the policy for insurance had been effected and the insurance company had paid out on it, all Dr. Kehoe would have been entitled to was £40,000. Therefore, this element of the counterclaim is for the euro equivalent of £40,000.

22. As regards the third element of the plaintiff's claim in its final state, it was unequivocally contended on behalf of the defendants in their counsels' written submissions that the plaintiff is not entitled to interest at the rate of 5% under s. 42 of the Act of 1890. While counsel for the defendants did acknowledge during the course of the hearing that the entitlement of the estate of Dr. Cronin to €11,454 was admitted, I did not understand the defendants to make the concession that interest was payable on that sum from the date of the death of Dr. Cronin to date under s. 42 of the Act of 1890.

23. The pleadings closed as long ago as 30th June, 1998, when the plaintiff's reply and defence to the counterclaim was delivered. In reality, there are only two aspects of the defence to the counterclaim which require to be noted.

24. The first was the plea that the counterclaim was statute-barred pursuant to the provisions of s. 9 of the Civil Liability Act 1969 (being obviously a typographical error for 1961), "save and insofar as the statute has been waived in relation to such part of the counterclaim as is limited to the claim set out in the General Endorsement of Claim to the Plenary Summons" in Dr. Kehoe's proceedings. In their closing outline written submissions, counsel for the plaintiff asserted that, as the defendants had withdrawn any claim in breach of contract, the claim for the euro equivalent of £40,000 must be on a different basis and, as such, is not covered by the agreement to waive the defence of the claims in Dr. Kehoe's proceedings being statute-barred. My understanding of what was conceded by counsel for the defendants on the afternoon of the first day of the hearing was that the defendants were not pursuing a counterclaim "for damages for breach of contract", but were pursuing the claim for £40,000.

25. The second aspect of the defence to the counterclaim, which it has to be acknowledged was not pursued with any vigour, if at all, was that by his conduct Dr. Kehoe was estopped from seeking to maintain the counterclaim against the plaintiff in respect of the proceeds of the policy which, it was pleaded, were not available solely by reason of the negligence or default on the part of Dr. Kehoe in or about complying with the terms and obligations imposed on him pursuant to the Partnership Agreement. Counsel for the plaintiff did, however, rely on the doctrine of estoppel in arguing that the defendants' contention that Dr. Kehoe was not bound by the words in manuscript in the Supplemental Agreement, as he had not signed it, should be rejected. However, I have already rejected the defendants' contention.

26. Apart from those pleadings, as one would expect, the plaintiff joined issue in relation to all matters raised on the defence other than admissions. While I have attempted to outline the relevant aspects of the pleadings, the reality is that each side advanced cases which substantially departed from the pleadings. In the circumstances, given the history of these proceedings, I consider that the proper approach is to address the claims and counterclaims which were actually pursued at the hearing.

27. Notice of trial was eventually served by the solicitors for the plaintiff on 22nd July, 2011. That prompted an application by the defendants on foot of a notice of motion dated 29th July, 2011 for an order pursuant to the inherent jurisdiction of the Court striking out or otherwise dismissing the plaintiff's claim on the basis that there had been inordinate and inexcusable delay in prosecuting it. The motion was returnable for the trial date. In advance of the trial date, on 20th October, 2011, the motion was struck out on the application of the defendants and the costs were reserved to the trial Judge. The Court has yet to hear submissions on the costs of the motion, which cannot be addressed in this judgment.

The issues

28. The Court has had the benefit of written legal submissions and oral submissions from both sides, on the basis of which I have concluded that the issues which the Court has to determine are the following:

> (a) whether the plaintiff is entitled to recover the euro equivalent of £60,000 from the defendants, as personal representatives of Dr. Kehoe, deceased, by reason of breach by Dr. Kehoe of Clause 22 of the Partnership Agreement;
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> (b) conversely, whether the defendants, in that capacity, are entitled to recover £40,000 from the plaintiff, as personal representative of Dr. Cronin, on the basis of a breach by Dr. Cronin of an implied term of Clause 22 of the Partnership Agreement;
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> (c) whether the defendants, in the same capacity, are entitled to recover the euro equivalent of £13,500 from the plaintiff, as personal representative of Dr. Cronin, in accordance with the terms of the Supplemental Agreement, so that the entitlement of the plaintiff, as such personal representative, to the euro equivalent of £11,454, which is admitted, is wiped out by the defendants' entitlement to set off; and
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> (d) whether the plaintiff is entitled to 5% per annum on the said sum of £11,454 from the date of the death of Dr. Cronin under s. 42 of the Act of 1890.

Conclusions on issues arising from Clause 22

29. It is absolutely clear on the wording of Clause 22 that the contractual obligation to effect a policy of insurance on the life of Dr. Cronin in the sum of £100,000 lay with Dr. Kehoe. The consequence of the failure of Dr. Kehoe to comply with that obligation was that there was no insurance fund available out of which to pay the estate of Dr. Cronin £60,000, as would have happened if the obligation had been complied with. Prima facie, Dr. Kehoe was in breach of his contractual obligation under Clause 22.

30. However, it was submitted on behalf of the defendants that there was an implied obligation on Dr. Cronin to involve himself in, and co-operate with, Dr. Kehoe in effecting the life policy, because it would not have been possible to do so without his involvement and co-operation. In this connection, the defendants relied on the evidence of Paul Kirwan of Kirwan Insurance Services Ltd., whose evidence was that, in order to effect a policy of life insurance on the life of another, the co-operation of that other is necessary. Apart from that, counsel for the defendants have dredged up some very old authorities in support of the proposition that there was an implied term in Clause 22 that Dr. Cronin would afford the degree of co-operation required to carry into effect the objective of Clause 22 (*Mackay v. Dick* (1881) 6 App Cas 251; and *Mona Oil Equipment and Supply Ltd. v. Rhodesia Railways Ltd*. [1949] 2 All ER 1014). Further, the decision in *Kyprianou v. Cyprus Textiles Ltd*. [1958] 2 Lloyd's Rep 60 was relied on for the proposition that, if a party to a contract is in breach of its duty to co-operate, so that performance of the contract cannot be effected, the other party will be entitled to treat himself as discharged. Apart from observing that the authorities relied on are far removed from the factual basis of this aspect of the plaintiff's claim, I consider that it is not necessary to address the authorities any further. That is because it was expressly acknowledged by counsel for the plaintiff that Dr. Cronin was required to give such assistance to Dr. Kehoe as was required to enable him to comply with his obligation, presumably, on the basis that there must be implied in the Partnership Agreement a term to that effect.

31. Where counsel for the plaintiff disagreed with counsel for the defendants was in relation to the latter's contention that co-operation was not forthcoming from Dr. Cronin and that, accordingly, Dr. Kehoe must be deemed as having been discharged from the obligation to effect the insurance, so that there was no breach of contract on his part. The position adopted by counsel for the plaintiff was that there was no evidence that Dr. Cronin was requested to give reasonable assistance or that he failed to do so and that the onus of proof as to acts or omissions on the part of Dr. Cronin, which would have had the effect of discharging Dr. Kehoe from his contractual obligation, rests with the defendants. Counsel for the plaintiff analysed the letter of 19th September, 1995, which was written by his solicitors on behalf of Dr. Kehoe, referring to certain matters in that letter to which I have not referred earlier, because they were not alluded to in the letter of 31st August, 1995 from Dr. Kehoe to his solicitors and, in any event, in my view, they were speculative and argumentative rather than factual. Of course, Dr. Kehoe's letter of 31st August, 1995 is not evidence, but it must be regarded as a more accurate reflection of what his view was shortly after the death of Dr. Cronin in 1995 than what is stated in his solicitors' letter of 19th September, 1995. There is no doubt that what transpired after the Partnership Agreement was executed, and, in particular, the failure to effect the life or permanent health insurance, was most unfortunate from everybody's perspective. However, there is no evidence before the Court to suggest that at the time the Partnership Agreement was executed the death of Dr. Cronin within less than a year was other than unpredictable. Moreover, there is no admissible evidence of any conduct on the part of Dr. Cronin which relieved Dr. Kehoe of his duty after 16th July, 1994 to take the steps necessary to effect the policy of insurance, which he had contracted to effect in accordance with Clause 22.

32. Therefore, I find that the plaintiff has established that there was a breach of Clause 22 of the Partnership Agreement on the part of Dr. Kehoe, which resulted in a loss of £60,000 to the estate of Dr. Cronin. Therefore, the plaintiff, as personal representative of Dr. Cronin, is entitled to judgment for the euro equivalent of £60,000. On the other hand, the defendants have not established any civil wrong on the part of Dr. Cronin in relation to the procurement of a policy of insurance on his life in accordance with Clause 22. Therefore, the counterclaim of the defendants for the euro equivalent of £40,000 must fail.

33. In relation to the plaintiff's contention that, in any event, so much of the defendants' counterclaim as relates to the claim for the euro equivalent of £40,000 claimed on the basis of an alleged breach of the term implied in Clause 22 of the Partnership Agreement is statute-barred by virtue of s. 9 of the Civil Liability Act 1961 and that such defence was not waived by the letter of 3rd September, 1997 quoted at para. 17 above, I am satisfied that the plaintiff is correct. There is nothing in the correspondence from Dr. Kehoe's

solicitors prior to the expiration of two years from the date of the death of Dr. Cronin or, indeed, prior to 3rd September, 1997, which indicated any intention on the part of Dr. Kehoe to counterclaim for £100,000 (since corrected to £40,000), as he did eventually on 2nd December, 1997.

Conclusions on the defendants' counterclaim for €13,500 under the Supplemental Agreement

34. I have already rejected the submission made on behalf of the defendants that, as Dr. Kehoe did not sign the Supplemental Agreement, he cannot be bound by its terms in relation to the manner of the payment of £27,000 by Dr. Cronin. The reality is that what Dr. Kehoe counterclaimed for was the sum of £12,500 (since adjusted to £13,500), as the sum remaining due and owing and unpaid to him in respect of the purchase price payable under the Partnership Agreement "as amended by the said Supplemental Agreement". For that reason and for the reasons outlined earlier, it must be assumed that Dr. Kehoe regarded himself as bound by the terms of the Supplemental Agreement as they appear in the document he furnished to his solicitors.

35. It is necessary to plough a furrow through some rather arcane law to determine whether the contention of counsel for the plaintiff that, after the death of Dr. Cronin, Dr. Kehoe had no entitlement to so much of the premium of €27,000 as remained outstanding, is correct. The starting point is s. 33(1) of the Act of 1890, which provides that, subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner. It is common case that the partnership created by the Partnership Agreement terminated on the death of Dr. Cronin on 26th June, 1995.

36. Both sides have regarded the sum of £27,000 as a premium. That was the correct approach. Provision for a premium is addressed in *Lindley & Banks on Partnership* (19th Ed.) at para. 10 – 43 where the author states:

> "Although a reference to premiums has been retained, they are now rarely, if ever, encountered and most certainly could not be considered 'usual'. If a premium is to be paid, the agreement should identify both the time and manner of payment and the circumstances in which it is to be returned, whether on dissolution or otherwise."

It is interesting to note that after "the time and manner of payment" the author has included a footnote to the following effect:

> "*e.g.* if it is payable in instalments, will they continue even if the partnership is dissolved?"

The author refers to para. 25 – 15 in that context, which is contained in the chapter which addresses the return of premiums. Counsel for the plaintiff lay particular emphasis on the following observations of Lord. Lindley, prior to the enactment of the Act of 1890, which are quoted in para. 25 – 07:

> "It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium, *i.e.* a sum of money for his own private benefit . . . The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership . . .."

37. There is a specific provision in relation to the apportionment of a premium in the Act of 1890 where a partnership is prematurely dissolved, namely, s. 40. However, it is expressly provided in s. 40 that it applies where one partner paid a premium to another on entering into a partnership for a fixed term and "the partnership is dissolved before the expiration of that term otherwise than by the death of a partner". In relation to the exclusion of dissolution on the death of a partner from the operation of s. 40, it is stated in *Lindley & Banks* (at para. 25 – 12), under the heading "*Death*":

> "Prior to the Partnership Act 1890 a return of premium could not normally be obtained where the partnership was dissolved by the death of a partner since, in Lord Lindley's own words:
>
> > 'Death is a contingency which all persons entering into a partnership know may unexpectedly put an end to it'."

In the succeeding paragraph there is a suggestion that, notwithstanding that the exception is now embodied in s. 40, a return of premium may still conceivably be obtained if fraud can be proved, citing an example given by Lord Lindley, although the author questions whether a court today would readily override the provisions of the Act of 1890. The point is academic for present purposes, because the example cited envisages the recipient of the premium having acted fraudulently or dishonestly, so that it is of no assistance having regard to the facts here. Equally of no assistance is the commentary in paragraph 25 – 15 of *Lindley & Banks*, which deals with the situation where the dissolution has resulted from disagreements between the parties, although it is stated that a dissolution brought about by the misconduct of a party will not relieve him of the liability to pay a premium which is due but unpaid.

38. In Twomey on *Partnership Law* (at para. 26.56) the rationale of excepting dissolution caused by the death of a partner from s. 40 is explained as follows:

> "The rationale for this exception is that every partner who enters into a partnership, whether paying a premium or not, should envisage the possibility of a partner's death leading to the dissolution of the partnership. For this reason, such a partner cannot subsequently complain when the partnership is so dissolved and he cannot seek the return of his premium on the occurrence of such a death."

In this case, the plaintiff did not seek the return of the portion of the premium (£13,500) actually paid by Dr. Cronin. However, the question which the Court has to determine is whether the defendants, as personal representatives of Dr. Kehoe, are entitled to claim the balance of the premium which remained unpaid on the dissolution of the partnership on the death of Dr. Cronin.

39. Counsel for the plaintiff characterised the claim by the defendants as in the nature of a desire to have ones cake and eat it, in that between the death of Dr. Cronin on 26th June, 1995 and what would have been the expiry of the term of the partnership on 15th July, 1998, if it had not been dissolved, Dr. Kehoe became entitled to the entirety of the profits of the partnership, but his estate is also seeking the premium agreed to be paid by Dr. Cronin, which was intended to be in consideration for Dr. Cronin's right to share in the profits of the partnership over the period. It was submitted that, as that right to share in the profits determined with the dissolution of the partnership on the death of Dr. Cronin, so too did his obligation to pay the balance of the premium falling due after dissolution.

40. Dissolution on death is expressly outside the ambit of s. 40 of the Act of 1890. That being the case, in my view, it is not appropriate to attempt to resolve issues which arise in relation to a premium in the excepted circumstance as a corollary to the application of s. 40, as suggested by counsel for the plaintiff. On the contrary, it seems more logical that, if, having paid the whole premium upfront, the estate of the paying partner cannot seek the return of an apportioned part of it on the premature dissolution of

the partnership on his death, where part of the premium remains outstanding at the death of the paying partner, the estate of the paying partner should be liable to the other partner for the balance of the premium, subject to any express agreement to the contrary.

41. Reverting to the first passage from *Lindley & Banks* which I have quoted earlier, it is obviously a matter for parties entering into a partnership agreement and their legal advisers to address in the agreement how the premium is to be paid and, insofar as it is payable in instalments, what impact the dissolution of the partnership before the expiry of the agreed term by the death of the paying partner will have on the liability of his estate to continue to pay the instalments. In addition to the submissions which I have already outlined, it was submitted on behalf of the plaintiff that the wording in the Supplemental Agreement was crucial and that the fact that the balance remaining after the "immediate payment" was "spaced over the remainder of the partnership paid in 6 monthly intervals" meant that the instalments were only payable for as long as the partnership endured. The flaw in that argument is that neither the number nor the amount of the instalments was not specified and the words used are equally open to the construction that, if the partnership continued for only one year after the "immediate payment" was made, as happened, the balance due would be payable by two instalments, one payable after six months and the other payable after a year.

42. Having had regard to what I consider to be the relevant factors, namely –

> (a) that the premium of £27,000 was the price Dr. Cronin agreed to pay for being brought into the partnership, and
>
> (b) Dr. Kehoe in the Supplemental Agreement agreed to payment of part thereof by instalments, but did not agree to forgo any part of the premium in the event of premature dissolution on the death of Dr. Cronin,

I have come to the conclusion, albeit with a certain degree of diffidence, that the outstanding balance of the premium was due to Dr. Kehoe from the estate of Dr. Cronin following the death of Dr. Cronin. Therefore, I consider that that element of the defendants' counterclaim succeeds.

Conclusion on plaintiff's claim under s. 42 of the Act of 1890

43. This aspect of the plaintiff's claim is based on s. 42(1) of the Act of 1890 which provides:

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets."

The manner in which counsel for the plaintiff has invoked that provision is that it is asserted that the plaintiff has not exercised her option to claim such amounts of the profits post-dissolution which may have been attributable to the defendants' use of the plaintiff's share in the partnership enterprise, but instead she now claims interest at the rate of five per cent per annum on the sum of £11,454 calculated from the date of Dr. Cronin's death (26th June, 1995) to, presumably, the date of judgment.

44. I think it is important to recall what the figure of £11,545 represents. It represents what the Partnership Accountants have assessed as Dr. Cronin's share of the profits of the partnership between 1st August, 1994 and 30th June, 1995. Where the estate of the deceased partner is entitled to elect under s. 42(1), the interest payable under s. 42(1) is payable on the amount of the share of the deceased partner in the partnership assets, not on his share of pre-dissolution profits.

45. As counsel for the defendants pointed out, the nature of the option under s. 42(1) is explained as follows in *Lindley & Banks* (at para. 25 – 26):

> "Although the partner whose entitlement has not been paid out theoretically has an option to take a share of profits or interest at five per cent in all cases, that option will in fact be exercisable only where the continuing partners can be shown to have derived profits from the use of his share and where that partner does actually have a share in the assets in question."

46. The submission made on behalf of the defendants that it is clear from the Partnership Agreement that Dr. Cronin did not actually bring anything into the partnership apart from his own work as a doctor, in respect of which his entitlement was to share in the profits on the basis provided in the Partnership Agreement, in my view, is correct. The practice was conducted from Dr. Kehoe's premises, albeit that there was provision for a yearly rent. The present stock of surgical instruments, furniture and fittings in the surgery at the commencement was the property of Dr. Kehoe. Clause 14.1, which I have quoted above, provided that the business and goodwill remained in the ownership of Dr. Kehoe until the expiry of the term. Having regard to the foregoing matters, I can see no basis on which the plaintiff can maintain a claim under s. 42(1).

47. Apart from that, the eventuality envisaged in Clause 22, the death of Dr. Cronin during the currency of the partnership, unfortunately occurred. The provision made in Clause 22 was designed to compensate the estate of Dr. Cronin in respect of his interest in the goodwill of the partnership, presumably on expiry of the term. By finding that, notwithstanding that the policy of insurance on his life was not effected and that there was no insurance fund out of which to pay his estate the agreed sum of £60,000, nonetheless, Dr. Kehoe, because of his breach of Clause 22, was liable to the estate of Dr. Cronin for the sum of £60,000 and his estate is now liable for the euro equivalent of that sum, the plaintiff can have no further entitlement to any share in post-dissolution profits or, in the alternative, to the payment of interest in accordance with s. 42(1).

48. Finally, for the avoidance of doubt, I do not accept that this element of the plaintiff's claim, which I consider to be wholly misconceived, did not require to be pleaded. One would expect at the very least that the circumstances which would give rise to a claim under s. 42(1) be pleaded, as well as the exercise by the estate of the deceased partner of the chosen option.

Summary of conclusions and order

49. The net effect of the findings I have made above is that the plaintiff, as personal representative of Dr. Cronin, is entitled to payment of the euro equivalent of £60,000 together with £11,454 by the defendants, as personal representatives of Dr. Kehoe, but, given that the plaintiff, as such personal representative, is liable for payment to the defendants for the estate of Dr. Kehoe the euro equivalent of £13,500, after setting off that sum, the plaintiff is entitled to judgment for the euro equivalent of £57,954.

50. Accordingly, there will be judgment for the plaintiff against the defendants, as personal representatives of Dr. Kehoe, for the sum

of €73,586.