THE HIGH COURT

[2010 No. 345 S.]

BETWEEN

MASON HAYES AND CURRAN

PLAINTIFF

AND
MARIE LOUISE QUEALLY

DEFENDANT

Judgment of Mr. Justice McDermott delivered on the 26th day of October 2018

1. The plaintiff is a firm of solicitors (which merged with Arthur O'Hagan & Company solicitors in 2010). The defendant retained Ms. Jennifer O'Brien an experienced family law solicitor and a partner in Arthur O'Hagan & Company to act on her behalf in the course of matrimonial proceedings which were eventually compromised in 2008. The plaintiff's claim is for the balance of fees said to be due and owing to the firm by the defendant for legal services, advice and representation rendered while retained in the course of those proceedings. The defendant denies liability for the amount claimed and counterclaims for damages for loss allegedly caused by the negligence and breach of duty of her former solicitors and breach of contract.

The Retainer
2. On 15th July, 2005 the defendant attended Ms. Jennifer O'Brien in Arthur O'Hagan & Co. solicitors and retained her to act on her behalf in matrimonial proceedings concerning her judicial separation and subsequent divorce from her husband, Mr. Michael Casey. Arthur O'Hagan & Co. subsequently merged with the plaintiff firm of solicitors and at all material times continued to represent Ms. Queally until 23rd March 2011, when a Notice of Change of Solicitor was served by Nolan Farrell and Goff, solicitors.

3. By letter dated 22nd July, 2005 to Ms Queally, Ms. O'Brien, following an initial consultation, set out a summary of the issues then believed to exist between the defendant and her husband arising from their marital breakdown. There were four children of the marriage aged at that time between two and nine years. The family home was a large residence in Malahide, County Dublin and Ms. Queally (and her former husband) also owned property in Spain.

4. Ms. Queally instructed her solicitors that the family had moved to the house in Malahide in August, 2003 where they remained for approximately one year before moving to Spain in May, 2004. She rented accommodation there. She then returned to Ireland in August, 2004 subsequently returning to Spain in September, 2004 where the children attended school.

5. Ms. Queally was also a minority shareholder in a family group of companies the other shareholders being her parents, siblings and cousins. She was therefore the owner of substantial assets and in receipt of a significant income. Her husband operated an interior plant and maintenance business which was very successful at the time. This enabled him to invest in other business interests and in particular, property development. He also had substantial assets. Ms. O'Brien informed the defendant that it would be necessary when addressing various issues in the matrimonial proceedings to determine Ms. Queally's annual income and the value of her assets. It would, of course also be necessary to examine her husband's income, assets and liabilities. This would provide the evidence upon which the court would be required to assess their respective financial positions and enable her solicitors to advise her as to what a fair and reasonable financial outcome of her case might be in the circumstances.

6. The letter also set out for Ms. Queally the basis upon which legal fees would be charged by the firm. This part of the letter which was clearly composed in order to comply with the requirements of s. 68 of the Solicitors (Amendment) Act 1994 stated:-

> "Costs and Fees:
>
> On the question of costs, this was discussed at our meeting and your responsibilities are now set out more fully in writing as we are obliged to either give you an estimate of fees or to inform you of the basis on which charges are incurred. If you wish to retain Arthur O'Hagan to act on your behalf, you must be responsible for the legal fees due for all work done on your behalf on a solicitor/client basis. The fees chargeable will be calculated mainly by reference to all time spent by me and other personnel dealing with this matter. To this end all time spent on the file is recorded. Time includes advising, attending on you and others by telephone and in person, dealing with papers, correspondence, telephone calls, travelling and waiting times. Unfortunately, with the volume of business being processed in the family Courts there can be delays and a lot of time spent at Court waiting for cases to be called on for hearing. As explained, I am the partner in charge of the family law group and my current charge out rate is €275 per hour. The cost will also reflect the complexity and urgency of the case, the value of the transaction and the priority with which you wish the matter to be treated.
>
> If an application is made to the Courts counsel's fees are also payable by you. Likewise, if an accountant is instructed to carry out a review of financial documentation their fees are also payable by you. There may also be fees for property valuations and pension advice. I will discuss these aspects with you again when other persons need to be consulted."

7. The plaintiff gave detailed instructions to Ms. O'Brien concerning her case. It is clear from the instructions and from the affidavits later exchanged between the parties that this was a difficult and highly contentious matrimonial dispute. It involved allegations and counter allegations between the plaintiff and her former husband. It involved serious issues concerning the welfare of the children. It also concerned issues relating to maintenance and property. Both husband and wife had extensive property interests which had to be fully analysed by accountants retained by each side. To that end the solicitors instructed Mr. Des Peelo of Peelo and Partners to advise in relation to all financial aspects of the case including the assessment of her husband's income, the value of his assets and the calculation of the value of the plaintiff's shareholding in the family business, her other assets, if any, and any income that was potentially to be derived therefrom or otherwise, all of which were understood to be substantial. Following a consultation on 2nd September, 2005 instructions were given to issue a special summons. It was issued on the same date. A grounding affidavit was sworn on 7th December, 2005.

The Family Law Proceedings
8. Ms. O'Brien advanced the High Court proceedings. Disclosure and discovery were sought in relation to the husband's financial situation and reciprocal information was sought from her. Mr. Alan Shatter of Gallagher & Shatter, solicitors represented the defendant's former husband. This work largely concerned the determination of the value of the assets and liabilities of each party and the clarification of same in advance of the High Court hearing. The exchange of information and the raising of queries continued throughout 2006.

9. On 2nd February, 2007 Ms. Queally attempted to reach an agreement with her husband without the involvement of her solicitors. This proved unsuccessful. She complained to her solicitor that her husband became extremely aggressive towards her at this time. Her solicitors expressed concern at possible attempts to manipulate her into an agreement against her interests. The defendant claimed that her husband failed to discharge maintenance payments of €10,000.00 per month which he had agreed to pay and pressed for some action on this aspect of the case: she requested that a maintenance application be brought because she considered that she was owed €250,000.00 in maintenance arrears by June, 2007.

10. A hearing seeking directions from the court took place on 27th July, 2007. It was adjourned to 5th October, 2007 and subsequently for mention to 23rd November. On 13th December, 2007 the court gave directions concerning the exchange of outstanding documents by both parties. The basis upon which a valuation produced by the accountancy firm Ernst and Young of Ms. Queally's shareholding in the family group of companies was questioned by the husband's solicitors. This was considered by the court (Abbott J.) which directed that Ernst and Young should answer any reasonable queries made on the respondent's behalf but also ruled that the court would not go behind the valuation of certain properties upon which the share valuation was partially based or direct any further discovery concerning the basis for the valuation of that property. In April, 2008 the accountants dealt with queries directly with each other in respect of the parties' financial affairs. However, Ms. O'Brien was dissatisfied with the extent of her husband's discovery. Counsel was instructed to draft a motion for discovery in respect of outstanding matters in May, 2008. Ten days later Ms. Queally contacted Ms. O'Brien and informed her that her husband had made her an offer which she wished to consider. An agreement was reached at a meeting between Ms. Queally, her father Peter Queally and her former husband at Malahide on 1st May, 2008 which was made without the involvement of their respective solicitors. The motion for discovery had been issued but was adjourned by consent to 27th June, 2008 to enable Ms. Queally to consider the proposed terms.

11. The agreement was presented to their respective solicitors. The terms of that agreement formed the basis of the terms of settlement signed by both parties on 7th November, 2008 and two Orders made by consent by the High Court on the same date. The terms of the orders and settlement and subsequent attempts to secure their implementation are the subject of the defendant's counterclaim in these proceedings to which I will return.

The Plaintiffs' Claim

12. By summary summons dated the 26th January, 2010 the plaintiffs claimed a sum of €216,149.62 as the balance of monies due in respect of professional services provided by them to the defendant in relation to her matrimonial proceedings. The claim was based on a number of invoices which were issued during the course of their retainer. On 13th December, 2005 a fee note in the amount of €29,057.20 issued. A reminder was sent on 21st February 2006. On 30th May, 2006 a cheque for €30,000.00 was received in discharge of that invoice in excess of the amount sought. A second invoice from Arthur O'Hagan & Company dated 31st January, 2007 sought a sum of €53,915.50. A sum of €932.80 was held in the solicitors' client account arising from the previous overpayment by Ms. Queally. A small sum of €58.00 was used to offset minor outlays and the balance of €874.80 was offset against the invoice dated 31st January, 2007. A further payment was received from the defendant on 12th November, 2007 in the amount of €40,000.00. There remained a balance owing of €13,040.70 in respect of this fee note.

13. On 28th November, 2008 following the settlement of the proceedings an invoice in the amount of €228,518.92 issued to the defendant. This included professional fees in the sum of €90,000.00, taxable outlay of €250.00, non-taxable outlay including counsel's fees and accountant's fees in the sum of €119,316.42 together with VAT in the amount of €18,952.50. This figure was eventually reduced to €109,381.17 when counsel agreed to take 80% of the fees charged for their work. The figure was later further reduced when Ms. Queally reached a separate agreement with Peelo & Partners for payment of a reduced amount in full satisfaction of their claim for fees.

14. In December 2009 two separate bank drafts were forwarded by the defendant to the plaintiff one in favour of senior counsel in the amount of €14,520.00 and another in respect of €5,808.00 in respect of junior counsel (both inclusive of VAT) which represented 80% of their respective fees.

15. The defendant did not express any dissatisfaction with the standard of service and professionalism provided by counsel or Mr. Peelo and his staff.

16. A further invoice was submitted to the defendant on 29th October, 2009 in the amount of €2,396.33 in respect of conveyancing work for the transfer of the property in Malahide into Ms. Queally's sole name.

17. The total sum claimed by the plaintiff as set out in an affidavit of 26th September, 2012 is summarised as follows:-

(a) €13,040.70 Balance due on foot of invoice dated 31st January, 2007

(b) €203,108.92 Balance due on foot of invoice dated 28th November, 2008 (counsel's fees have been deducted).

(c) €2,396.75 Fees due in respect of conveyancing work on foot of the notice of fees dated 4th September,2009

TOTAL: €218,546.37

This figure included €93,729.25 (inclusive of VAT) due to Peelo and Partners.

18. On 22nd July, 2013 an order was made (Hanna J.) that the plaintiff was entitled to judgment in the sum of €100,000.00 of the amount claimed. The balance of the claim was remitted to plenary hearing. The plaintiff registered a number of judgment mortgages against the defendant in respect of the sum awarded which was ultimately discharged when the defendant wished to dispose of the affected property.

19. By the time the matter came on for hearing before this Court on 30th January, 2018 the plaintiffs' claim was further reduced because the defendant entered into the separate agreement with Peelo and Associates in respect of the discharge of its fees. This left a balance of €64,818.70 in respect of solicitor's fees which are said to be outstanding since November 2008.

20. The defendant claims that the fees invoiced by the plaintiff were not charged in accordance with the express provisions of s. 68 of the Solicitors (Amendment) Act 1994 which provides *inter alia* that on the taking of instructions to provide legal services to a client a solicitor must then or as soon as practicable thereafter provide the client with particulars in writing of the actual charges or the likely charges that will be made and the basis upon which they will be calculated. The basis upon which fees would be charged was set out in the letter of 22nd July, 2005.

21. The defendant alleged that the plaintiffs failed to comply with s. 68(8) of the 1994 Act which provides that where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amount or any part thereof the solicitor must take all appropriate steps to resolve the matter by agreement and inform the client in writing of his/her right to require the solicitor to submit the matter to a Taxing Master of the High Court for taxation on a solicitor and own client basis and the right to make a complaint to the Law Society that the bill of costs claimed is excessive. It is submitted on behalf of Ms. Queally that the plaintiffs failed to produce to her any evidence of the amount of time taken by Ms. O'Brien or any of her associates in carrying out work on her behalf or that it was properly recorded. However, the court notes that a cost accountant was never requested to review the file and the defendant accepted that it was unnecessary for the plaintiff to call the appropriate staff from the plaintiffs' account department to establish the basis for the computation of the fees claimed in the course of the trial.

22. For her part, Ms. O'Brien notes that there were significant delays in the discharge by Ms. Queally of the first two invoices submitted each of which required a number of reminders before payment was made. Though an overpayment was made on the first invoice, the second invoice 31st January, 2007 was also the subject of a number of reminders before a partial payment of €40,000.00 was made in November 2007. Ms. O'Brien gave evidence that the invoices issued were based on client case reports submitted on the basis of hourly rates within the firm and what was recorded against the file. In or about July, 2007 she had assured Ms. Queally that no further fee note would issue before the completion of the case which it was anticipated would be six months hence.

23. In April, 2008 Ms. Queally indicated that she would not be making further payments until the case was finalised. In a letter dated 8th August, 2008 Ms. O'Brien informed Ms. Queally that should the case be finalised i.e. ruled or settled before December 2008 she would raise a final fee note. If the case were to continue into 2009 she would forward a fee note in respect of all solicitors' and accountant's fees up to the end of 2008 and then bill for the remainder of the work at the conclusion of the case.

24. Ms. O'Brien averred in an affidavit of 26th September, 2012 and confirmed in evidence that in a telephone conversation on 1st September, 2008 and subsequently in a discussion with Ms. Queally on 7th November, she informed her of the level of fees incurred and payable by her to the plaintiff, counsel and the forensic accountants Peelo and Partners. She was told that the solicitors' fees would be approximately €90,000. She claims that Ms. Queally confirmed her agreement to the level of fees quoted during the course of the telephone conversation. This was denied in evidence by Ms. Queally who said that she was told on 7th November that there would be a bill coming which she was asked to pay before Christmas. Ms. Queally gave evidence that she did not agree a figure for fees with Ms. O'Brien on either of the dates. However, Ms O'Brien's averment was not denied in Ms Queally's replying affidavit and the amount claimed by the plaintiff was never challenged in correspondence at that time. Ms. O'Brien claims that the telephone conversation of 1st September, 2008 is supported by her note on file of that date in which she has noted "fees rough amount 90k and Peelo for 1 day. Less amount – for fees to Christmas" though it is not recorded that this was agreed.

25. Ms. Queally accepted that she never requested that the files be submitted to a legal cost accountant to review the reasonableness of the amounts charged by the solicitors. She also accepted that were it not for the claim for professional negligence she would otherwise be liable to pay the outstanding fees claimed and that if she failed in her counterclaim she had a liability to discharge the sum of €64,818.70.

26. Ms. Queally also accepted in evidence that following advice from a family friend, an experienced businessman, in 2008, who told her that in the then economic climate professionals who had supplied services and billed for them would likely accept a discount in order to get paid, she offered to pay significantly reduced fees to counsel and the accountants. These offers were ultimately accepted. This position is also reflected in correspondence with Mr. Peter Queally on 11th June, 2009.

27. On 2nd September, 2009 Ms. Queally wrote to Mr. Donagh McGowan solicitor in the plaintiff firm, offering €100,000.00 in full and final settlement of all outstanding bills which together with previous payments would amount to two thirds of the total bill issued by the plaintiff. By this stage issues had arisen in respect of the implementation of the terms of settlement. Mr. McGowan replied in a letter dated 4th September, 2009. He referred to a recent meeting with Ms Queally at which he informed her that the payment of €100,000.00 would be accepted as a payment on account in respect of total fees outstanding but made it clear that the amount offered was in no way acceptable in full and final settlement of her outstanding liability to the firm. He also stated that if an immediate payment of €100,000.00 were made the firm could consider how to deal with the remaining balance.

28. Two further letters dated 25th September and 7th October, 2009 were sent stating that the firm was about to send the matter to the debt collection department. The offer of €100,000.00 in full and final settlement was renewed by Ms. Queally on 19th October to Ms. Simone Walsh.

29. In a letter dated 21st October, 2009 to Ms Queally from Ms. O'Brien it is noted that the fees raised in the third and final invoice of 28th November, 2008 in respect of work carried out by the solicitors from January 2007 to November 2008 had been discussed with Ms. Queally prior to the settlement of her case. Ms. O'Brien noted that professional fees for solicitor's services were significantly discounted prior to the issue of the fee note and that as discussed with her at that time the value of the hours recorded against the matter greatly exceeded the fees ultimately charged. Ms. O'Brien expressed the view that Ms. Queally was seeking to take advantage of the then economic climate in the knowledge that Ms. O'Brien had already provided a substantial discount of fees in the case.

30. In a reply dated 2nd December 2009 Ms Queally offered to pay €53,000 in full settlement of the solicitor's fees as part of a "final attempt to resolve the matter on an amicable basis".

31. Ms. Queally accepted in evidence that had Mason Hayes & Curran accepted the offers made in October and December 2009 for a reduction in their fees she would not have initiated or maintained an action seeking damages for professional negligence against them. In effect, Ms. Queally acknowledged that the sum claimed and its outstanding fees by the plaintiff was due and owing.

32. The court is satisfied on the evidence adduced that the defendant agreed that the outstanding amount due to the plaintiff firm of €90,000.00 approximately plus VAT in 2008 and fully understood at the time of settlement that she would be receiving an invoice for approximately that amount for works done to date which reflected that agreement. Subsequently, the defendant sought to negotiate a reduced fee. Her later proposals were rejected by the plaintiff. She accepted in evidence that the sum is due and payable but for her counterclaim for negligence and breach of contract. The court is therefore satisfied that the plaintiff has established that an amount of €64,818.70 remains outstanding in respect of the fees due by the defendant to her solicitors.

The Counterclaim

33. On the 7th November, 2008 two orders were made by the High Court in the defendant's matrimonial proceedings; the first was in respect of judicial separation proceedings Record No. 2005 No. 70M and the second concerns the divorce proceedings Record No. 2008 No. 93M. The court (Abbott J.) having heard oral evidence from the applicant and the respondent made an order in the judicial separation proceedings following a finding that the marriage had broken down and that in all the circumstances a normal marital

relationship did not exist between the parties for a period of at least one year immediately preceding the date of the application. The order states *inter alia*:-

> "… having regard to the findings as aforesaid the court DOTH GRANT a Decree of Judicial Separation in respect of the spouses concerned.
>
> And by consent
>
> IT IS ORDERED
>
> 1. In the terms of paras. 2, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 21a, 22 and 23 of the said consent; and
>
> 2. That the said Consent be received and be filed with and deemed to be part of this order.
>
> 3. That the Solicitor for the Applicant do advice (sic) the Property Registration Authority in respect of the details of the Property Adjustment Order made herein (as provided for in Paragraph 2 of the said Consent)
>
> 4. That there shall be liberty to apply herein
>
> 5. That this matter be listed for mention on the 19th day of December, 2008."

34. The terms of settlement appended to the order contained a number of clauses in respect of which the court made specific orders as set out in paragraph 1. These included orders under s. 9(1) and (2) of the Family Law Act, 1995 directing the respondent to transfer to the applicant his entire estate and interest in the family home and its contents at Malahide, County Dublin. Similarly, an order was made pursuant to the provisions of s. 10 (1)(a)(i) granting the applicant sole right of residence in the family home to the exclusion of the respondent. Both parties benefited from orders under s. 10(1)(b) and 36 declaring them each respectively to be solely entitled as against the other to all of their individually owned properties and in particular, the order applied to the defendant's ownership of 3 Woodlands, Naas, County Kildare. Paragraph 10 provided for an order under s. 9(5) authorising the County Registrar of Dublin to sign all documents on behalf of either party "as may be required to give effect to the property adjustment orders herein where same are not executed within 21 days of a request in writing to do so". The settlement recorded that both parties agreed that their personal resources were such that neither of them required personal maintenance or the making of a periodical payment order in favour of the other.

35. Two clauses of the terms of the settlement are central to the defendant's counterclaim namely, clauses 4 and 11.

36. Clause 4 provides:-

> "The respondent agrees to execute all documentation necessary, as presented by the Applicant's Spanish lawyers, for the purpose of transferring the property situate at 18 C-Bergantin, Urb, Albayalde, Estepona, 2968A, Malaga, Spain into the sole name of the Applicant free from encumbrance such that the Applicant is released from all charges/mortgages pertaining to the said property."

37. Clause 11 provides:

> "The respondent agrees to be solely responsible for the three Ulster Bank loan accounts (to the extent of approximately €650,000 together with interest and penalties), currently secured against 3 Woodlands, Naas, County Kildare such that the said property shall no longer operate as security for those borrowings and the Respondent has obtained consent from Ulster Bank such that the Applicant shall be released from the said mortgages. The Applicant shall continue to be liable for the sum of €200,000 in respect of these borrowings such that the applicant shall give a personal guarantee to Ulster Bank in this amount. The Applicant and the Respondent hereby agree to an Order for sale of the property situate at Dunquinn, County Kerry such that the proceeds of sale shall be used to discharge the debt due to Ulster Bank by the Respondent in the sum of approximately €650,000 together with interest and penalties and this Honourable Court now directs that the said proceeds of sale shall be applied accordingly and any further monies remaining from the sale of the property at Dunquinn, County Kerry after the discharge of the aforesaid debt due to Ulster Bank, it is acknowledged by the Applicant are the sole property of the Respondent and shall be retained by the Respondent. The Respondent hereby undertakes to discharge repayments due to Ulster Bank in the sum of €10,000 per month to that Bank for a period of six months from the date of this agreement or until the sale of the aforesaid property and the discharge by him of the debt due to Ulster Bank as provided for herein, whichever is the earlier and should the property not be sold within the aforesaid period of 6 months the Respondent shall enter into discussions with Ulster Bank with regard to making any new required arrangements in respect of the aforesaid debt of approximately €650,000 for which in any case the Applicant shall have no responsibility. The Respondent hereby indemnifies the Applicant from any further liabilities arising on foot of any failure on the part of the Respondent to meet these repayments, as they fall due and/or any further liability in respect of the said loans other than the sum of €200,000 dealt with separately herein. Further, the respondent hereby agrees to execute all documentation pertaining to release of the Applicant from the said mortgage deed(s) within 28 days of being requested to do so. In the event of any failure on the part of the Respondent to execute such documents within the said 28 days, the parties hereby agree, and this Honourable Court hereby directs, that the County Registrar shall execute the said documents in his stead. The Respondent shall furnish documentation including deeds of release/discharge to the Applicant's solicitors within four months of ruling the within settlement terms."

38. The original counterclaim as pleaded alleged negligence, breach of duty and breach of contract on the part of the plaintiff in the negotiation and drafting of the terms of settlement and in advising the defendant to settle the matrimonial proceedings upon terms which no reasonably competent solicitor would have agreed or advised. Further particulars in that regard were set out in relation to Clauses 4 and 11. A hearing date was originally fixed for the hearing of the action of 21st March, 2017 prior to which directions were given on 25th January, 2017 for the delivery by the defendant of any expert reports on which she wished to rely by 15th February and outline written legal submissions based on the defendant's then claim by 10th March. A report by Mr. David Kennedy S.C. was furnished which addressed the negligence alleged in the drafting of Clause 11. It did not address any alleged negligence in the drafting of Clause 4. In any event Mr. Kennedy did not give evidence because in the opening of the case the wide ambit of the claim was reduced considerably. It was now acknowledged that the defendant made no case in respect of alleged negligence in the overall advice given in respect of the negotiation and drafting of the terms of settlement. The claim of alleged negligence and breach of duty in the drafting of Clause 11 was withdrawn. An allegation of negligence in relation to the drafting of Clause 4 was however

maintained.

39. The defendant's case as it proceeded at trial was made in relation to the drafting and enforcement of Clause 4 and the enforcement of Clause 11. The claim in respect of Clause 4 is set out in the particulars of negligence at paras. 15 (a), (d) and (e) of the counterclaim. The claim in respect of Clause 11 is to be found in the particulars set out in para. 15 (d) and (e). Thus in respect of Clause 4 it is alleged that the plaintiff, its servants or agents were guilty of negligence and breach of duty and breach of contract in:

> (a) Failing to exercise any care or skill in or about the negotiation and drafting of the terms of settlement….
>
> (d) Failing to protect the defendant's interests in the event that the terms of settlement were not complied with by her former spouse.
>
> (e) Failing to take any or any appropriate steps to enforce the terms of settlement …"

The particulars at (d) and (e) are alleged in respect of Clause 11 also.

Legal Principles

40. The duty of care owed by a solicitor to a client was stated by the Supreme Court in *Roche v Peilow* [1985] I.R. 232 p.258 as follows: -

> "The standard of care required of a solicitor in carrying out the business entrusted to him by his client is the ordinary level of degree of skill and competence generally exercised by reasonably careful colleagues in his profession.

41. There are a number of issues relevant to the interpretation and application of the solicitor's duty of care which arise from the facts of this case.

42. The first relates to a situation which arises if counsel is retained to advise in a matrimonial case. Family law, as a legal discipline, has evolved in Ireland over the last forty years. It has given rise to complex issues of law which are often related to other areas of law such as property, company or taxation law and important aspects of private international law. A legitimate and reasonable difference of opinion may arise in respect of an issue of law or practice between solicitor and counsel retained in any particular case. For example, in this case, it is claimed that the drafting of Clause 4 of the Terms of Settlement was the subject of advice from senior counsel that it should include a property adjustment order which was not followed by Ms. O'Brien. On the one hand there may be different professional views as to how a particular issue such as this ought to be handled. In *Dunne v National Maternity Hospital and Jackson* [1989] I.R. 91, a medical negligence case, Finlay C.J affirming the test set down in *Roche v Peilow* summarised the applicable principles as follows;-

> "1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.
>
> 2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications.
>
> 3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general and which was approved by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice had inherent defects which ought to be obvious to any person giving the matter due consideration.
>
> 4. An honest difference of opinion between the doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.
>
> 5. It is not for a jury (or for a judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable, but their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant."

43. On the other hand there may be cases in which a solicitor retains specialist counsel to advise, for example, on matters in which the solicitor has little or no expertise or is otherwise heavily reliant for advice and guidance on the advices of counsel. As stated by O'Hanlon J in *Park Hall School Ltd v Overend* [1987] ILRM 345 pp. 355- 356: -

> "What course should a prudent solicitor have taken in that situation, if acting for the plaintiff? … there was only one possible course open to the defendants, and that was to consult counsel as to the steps which should be taken as a matter of urgency to protect their clients' interests. This course was taken, and from that time forward senior and junior counsel were briefed to act on behalf of the plaintiff, and the advice of counsel was taken at every successive stage of the proceedings. I am of opinion that this was the correct course for the defendants to take, and that it would have been extremely rash and unwise for them to seek to challenge the expert opinion on the legal situation which was made available to them by distinguished members of the Bar."

44. A solicitor is entitled to rely upon the advice of counsel who has been fully and properly instructed in the case. However, there are occasions when a solicitor's duty may be to reject counsel's advice if it is thought to be " seriously wrong." The solicitor's duty was to be guided by counsel's advice unless it is "obviously or glaringly wrong" when it is his/her duty to reject it (*Locke v Camberwell HA* [2002] Lloyd's Rep. PN 23; *Matrix Securities Ltd. v Goddard* [1998] PNLR 290). There was no such disagreement between solicitor and counsel in these proceedings: Counsel oversaw the final agreement of the terms of settlement and gave advice as requested on the drafting of the terms of settlement. Ms. Queally was directly advised by counsel about the terms of settlement in consultation with them leading up to the making of the order on 7th November, 2008 as is clear from the transcript of the hearing on that date.

45. A further issue which arises in this case relates to whether the course of action adopted by Ms. O'Brien in securing the

defendant's financial interests under Clauses 4 and 11 of the Terms of Settlement fell short of her duty of care to her client. For example, the defendant claims that Ms. O'Brien failed to follow what is said to be the general practice in registering an order for sale as a burden on lands at Dunquinn under the Registration of Title Act, 1964 whereas the plaintiff contends that general practice amongst family law practitioners was not to register orders for sale. In this regard the existence of a general practice and a solicitor's compliance or lack of compliance with such practice would ordinarily amount to compelling evidence as to whether or not that solicitor acted negligently. In *Kelly v. Crowley* [1985] I.R. 212 Murphy J. stated at pg. 220:

> "Clearly the existence of a general practice – where such is established – can be of significance in a case of this nature. If a client can establish the existence of such a practice and show that his solicitor has failed to follow it with a consequent loss to the client this would ordinarily constitute compelling evidence of professional negligence. On the other hand, if a solicitor establishes for his part that there is a generally accepted practice in a particular aspect of his profession and that he has adhered to that practice and despite so doing that his client has suffered loss this would ordinarily provide a defence to a claim of negligence against him. Clearly stress must be placed on the word 'ordinarily' in both cases as it is obvious that many cases will turn upon their own particular facts and indeed there are cases in which professional practices and procedures themselves may be so deficient that reliance upon them would not provide a defence to a claim for negligence…"

46. A solicitor may be found negligent if in following the general professional practice they subjected their client to a "foreseeable, and readily avoidable" risk inherent in the general professional practice (*Edward Wong Finance Co Ltd v. Johnson Stokes & Master* [1984] AC 296). Furthermore if the general practice is found to have inherent defects which are or ought to be obvious to any person giving due consideration to the matter, the existence and adherence to this general practice will not relieve a solicitor of negligence (*Roche v. Peilow*, cited above). A situation may more regularly arise where there are different practices within the profession, each of which are followed by a substantial number of respected and conscientious practitioners and a difference of opinion arises as to which practice would be the best means of achieving the desired result. Applying the test established in *Dunne* quoted above to the present case, a solicitor who adheres to any one of the accepted practices ought to escape a finding of negligence (see *Jackson & Powell, Professional Liability*, 8th ed, (London, 2017) paras.11-092 – 11-098).

Clause 4

47. Clause 4 of the terms of settlement provided that the respondent agreed to execute all documents "necessary, as presented by the applicant's Spanish lawyers" for the purpose of transferring a Spanish property into the sole name of the defendant free from encumbrance so that the she was released from any charges or mortgages on the property. The defendant claims that when her former husband failed to execute the necessary transfer documents, an application had to be made to the High Court for an order transferring ownership of the property to the defendant. It is claimed that this became necessary because a property adjustment order similar to that made under Clause 2 in respect of the family home and an order under Clause 10 authorising the country registrar to execute documents required to give effect to a property adjustment order in respect of the Spanish property were not included in the settlement terms. The defendant claims negligence and breach of duty in the drafting of Clause 4 compounded by a failure to return to court when Mr. Casey failed to execute the documents to procure the necessary relief to ensure that he did so.

48. The Spanish property was the subject of legal advice obtained from senior counsel in the course of the drafting of the terms of settlement. The main point had been agreed at the earlier meeting between the defendant, Mr. Peter Queally her father, and Mr. Casey on 1st May, 2008 at which Mr. Casey agreed to release any interest he had in the Spanish property as set out in Clause 3 quoted below. Gerard Durcan S.C. gave advice on the drafting of the appropriate clause in respect of the transfer of the Spanish property which is summarised at para. 5 of an email dated 7th July, 2008 to his junior counsel which was forwarded to Ms. O'Brien and states:-

> "Para. 5 there should have been a property adjustment order in regard to the Spanish property. Again what happen if the banks refuse to release security?"

Mr. Durcan in evidence stated that he was stating his view that there probably should be a property adjustment order.

49. In a subsequent letter dated 17th July, 2008 from Ms. O'Brien to Ms. Queally Mr. Durcan's advice in respect of the matter is repeated. Ms. Queally was informed that it was necessary to consider "whether it is necessary to obtain a property adjustment order in respect of the Spanish property and the position if the Bank were not to consent to release her from the relevant mortgages". The letter also states in respect of the transfer of the Spanish property that Ms. Queally should send Ms. O'Brien contact details for her Spanish lawyer in order to assess the tax implications of the transfer of the property. Ms. O'Brien in conveying Mr. Durcan's advice to Ms. Queally put it more equivocally indicating that it may be necessary "or otherwise" to obtain a property adjustment order.

50. In evidence Mr. Durcan stated that when dealing with property abroad in a marriage settlement one is never entirely sure as to what may be required to ensure the completion of the transfer in the foreign jurisdiction. While one may draft a condition that a party is obliged to sign whatever document is necessary to effect a transfer, what is in fact necessary is not clear in every case at the time of the making of the agreement. In those circumstances it is appropriate to obtain the advice of a foreign lawyer, in this case a Spanish lawyer.

51. Mr. Durcan confirmed his view in cross-examination that a property adjustment order was appropriate in respect of the Spanish property. The fact that Clause 4 did not include an agreement for a property transfer order did not reflect a change of view on his part that one was necessary. However, he acknowledged that under Irish law two views were open in respect of the necessity and/or appropriateness of a property adjustment order in relation to foreign property which depended on an interpretation of s.9(4) of the Family Law At 1995. Other lawyers were involved and following negotiations the terms of Clause 4 emerged. Negotiations were concluded by Ms. O'Brien and Mr. Shatter. He had expressed a view but there were also very experienced lawyers in the area.

52. Section 9(4) of the 1995 Act provides:-

> "Where a property adjustment order is made in relation to land, a copy of the order certified to be a true copy by the registrar or clerk of the court concerned shall, as appropriate, be lodged by him or her in the Land Registry for registration pursuant to section 69(1)(h) of the Registration of Title Act, 1964, in a register maintained under that Act or be registered in the Registry of Deeds."

Mr. Durcan indicated that one legal view was that since foreign property could not be registered under s.9(4), the provisions of s. 9 applied only to domestic property. His advice reflected a different view namely that a property adjustment order could be made. In this case he advised that it should be done.

53. Ms. Mary Hayes is a solicitor and partner in the firm Gore and Grimes solicitors and gave evidence on behalf of the plaintiffs. She has over 30 years' experience of and expertise in family law litigation and settlements including issues relating to foreign and domestic property. She was retained as an independent expert with no prior relationship with the plaintiff or the solicitor who retained her. She provided two reports: the first was in respect of the report of David Kennedy S.C. which was rendered irrelevant when the defendant withdrew her claim in respect of the alleged negligence in the drafting of Clause 11; the second was an addendum to that report in response to the later report of Mr. Noonan, solicitor. She also gave evidence in relation to the drafting and enforcement of Clause 4.

54. She was of the opinion that under Clause 4 the property in Spain could not be conveyed or transferred through an Irish solicitor and required the assistance of a Spanish lawyer and the provision of documents by the Spanish lawyer for execution by Mr. Casey. These documents were not available at the time the settlement was ruled which was not unusual. She stated that it was most important that the client should understand that under Clause 4 the Irish solicitors had no control over the transfer of Spanish property which would have to be addressed by Spanish lawyers. She was satisfied that the clause clearly indicated that the client would be dependent on the Spanish lawyers to effect the transfer and provide the necessary documentation.

55. Ms Hayes stated that the purpose for which a property adjustment order is obtained is to procure the registration of the order under s.9(4) of the 1995 Act. The property adjustment order is an *in camera* order directing the transfer of property. It is the registration of that order that operates as the public notification in respect of the transfer of property. However, in respect of foreign property one cannot register the property because the Land Registry or Registry of Deeds could not accept deeds of foreign property. Obtaining a property adjustment order in respect of foreign property therefore would not be a comfort in respect of the transfer of Spanish property. This was a voluntary agreement between the parties. Ms Hayes said that in her experience it was unusual that one party to such an agreement would not sign the documentation when terms of settlement had been agreed by the parties themselves. If documents were not subsequently signed she considered that a simple *ex parte* application might then be made to the High Court for directions including a direction that the registrar or county registrar of the court as appropriate execute any necessary documents: this was facilitated by the liberty to apply provision in the order and the fact that the terms were made an order of the court.

56. There was no expert evidence adduced on behalf of the defendant on this aspect of the case. Mr. Noonan, solicitor, gave expert evidence on the enforcement of Clause 11 only on behalf of the defendant to which I will return.

57. There are circumstances in which the court may not require the assistance of an expert such as a solicitor in respect of what may be regarded as a question of law or a matter of the conduct of litigation in respect of which the court may have its own knowledge and there may equally be issues concerning the day to day practices adopted by solicitors of which the court may not be as familiar: other cases may involve a hybrid of the two (see *McMullen v Farrell* [1993] 1 I.R.123). The court received the evidence of the two solicitors as experts giving such weight as it considered appropriate to the testimony of each. In this case the court considered the testimony to be relevant and of assistance concerning the issues which arose under Clauses 4 and 11 in respect of conveyancing and in particular the conduct of matrimonial litigation and the adumbration of the complexities and practices adopted by solicitors involved in the drafting and execution of consent orders and terms of settlements in that area.

58. I am satisfied to accept the evidence of Ms Hayes on the issue of the absence of a property adjustment order from Clause 4 to the effect that this reflected a reasonable and widely adopted interpretation of s.9 and the practice adopted by practitioners in respect of the appropriateness of such orders in respect of foreign property. It was clearly one of two reasonably held legal opinions amongst practitioners, the other being that expressed by Mr.Durcan S.C. Thus I am satisfied that the view taken by Ms. O'Brien discussed below, was reasonably open to a solicitor acting professionally and advising on the matter as to whether a s.9 order ought to be included in Clause 4. Of course its inclusion would also depend on the agreement of the opposing side.

59. At the time of the settlement Ms. O'Brien states that she and Gallagher Shatter were agreed and expected that the relevant documents for the transfer of the Spanish property would be signed by Mr. Casey. Ms. O'Brien requested that Ms. Queally supply her with the names of her Spanish lawyers who would effect the transfer and advise concerning the steps necessary for its completion. She was concerned that there might be tax implications for Ms. Queally in effecting the transfer particularly if it occurred after the divorce. She did not agree with Mr. Durcan's advice or view that the property adjustment order was appropriate in respect of property which was situated outside the State. She believed an agreement concerning the transfer of such property was more appropriate. However, her letter of 19th July to Ms. Queally contained Mr. Durcan's advice. She stated that if she had been put in contact by Ms. Queally with her Spanish lawyers in advance of 7th November she could have asked them to prepare the relevant transfer documents and presented them for signature by Mr. Casey through his solicitors in advance of the ruling. If the Spanish lawyers had advised that an order of the court was required under Spanish law in order to effect the transfer she would have attempted to include one in the agreement. On the other hand, she did not know, in the absence of a Spanish lawyer's advice, whether the making of such an order might cause problems in effecting the transfer. She stated that she was never given any instructions by Ms. Queally or information concerning the identity of her Spanish lawyers.

60. Ms. O'Brien acknowledges that she had a different view to that of Mr. Durcan in respect of whether a property adjustment order could or should be made. However, she was satisfied that the agreement was overseen by Mr. Durcan prior to the ruling on 7th November. She was also satisfied that there was a procedure available to her to apply to court if Mr. Casey defaulted in executing the documents. She stated that Mr. Durcan went through the terms of settlement with Ms. Queally prior to the ruling and did not express any reservations about the way in which Clause 4 was formulated. Mr. Durcan for his part had no recollection of any further advices given in respect of Clause 4. She did not accept that she had ignored Mr. Durcan's advice. She had considered it but stated that she also required the input of a Spanish lawyer in order to ensure that the conveyancing aspects of the matter would 'run smoothly'. She had no doubt that if the omission of a property adjustment order was regarded as a serious flaw or omission by Mr. Durcan he would have brought it to their attention at the consultation prior to the execution of the document. She stated that she told Ms. Queally that they needed to consider whether such an order should be made and that she needed Ms. Queally to put her in contact with her Spanish lawyers to that end. In addition she stated that when the failure of Mr. Casey to sign the relevant documents arose it was not brought to her attention at an early stage. If it had been she would have advised that an application be made to the High Court to obtain the necessary orders to ensure that the transfer was effected. She did not accept that omitting a property adjustment order from Clause 4 or failure to comply with Mr. Durcan's advice was a mistake. She was satisfied that both counsel attended and advised prior to the execution of the document. She did not accept that it was clear at that time that an Irish property adjustment order or the execution by the county registrar of a property transfer documents were acceptable or necessary under Spanish law: none of that was obvious without the input of Spanish legal advice. Ms. O'Brien therefore did not consider that her advice was wrong.

61. I am satisfied that when Ms. Queally later obtained the appropriate Spanish legal advice it became clear that she required a form of order in respect of the transfer of the property from an Irish court. That information though specifically sought by Ms. O'Brien was never obtained by Ms. Queally for Ms. O'Brien prior to or after the ruling of the settlement.

62. Ms. O'Brien accepted that had Mr. Durcan's advice been accepted and the advice of a Spanish property lawyer obtained at an early stage, the implementation of the transfer could have been accomplished without the application for an order. It was suggested to her that the fact that a property adjustment order was sought and obtained from the High Court when Mr. Casey defaulted in his obligation under Clause 4 together with an order directing the county registrar to execute the relevant documents suggested that it was a mistake not to follow Mr. Durcan's advice. Ms. O'Brien considered that Ms. Queally took a long time to obtain any advice from a Spanish lawyer in relation to the transfer issue. It was obtained at a stage when she was no longer involved in the case. She considered that within the terms of Clause 4 she could have made an application to the court to ensure its implementation when the difficulty arose if it had been brought to her attention and the relevant advice of the Spanish lawyers obtained.

63. Ms. Queally gave evidence that she was not advised specifically about the difference of legal opinion about the inclusion in Clause 4 of a property adjustment order at the time of the signing of the settlement and therefore she was not afforded the opportunity to make an informed choice as to whether to agree to the terms of Clause 4 without the benefit of a property adjustment order. She claimed that the failure to advise her of the consequences of the omission of such an order constituted negligence by Ms. O'Brien.

64. In that regard neither Mr. Durcan nor Ms. O'Brien could recall any specific discussion about this matter with Ms. Queally between 19th July and 7th November 2008. Mr. Durcan accepted in evidence that he would have seen the agreed terms of settlement which addressed the issue in a different way to that which he advised. It was also his practice to go through each of the terms of settlement in every case in which he was involved to ensure that the client understood that to which he/she was agreeing beforehand. He agreed that it was important to have the advices of a Spanish lawyer as sought by Ms. O'Brien. However, having expressed his view about the inclusion of a property adjustment order he did not resile from it and its non-inclusion should not be interpreted as such. He accepted that the issue was as a matter of practice addressed in either way by practitioners in the area and it was not something in the circumstances of this agreement which he would have advised to be deal breaking having regard to the overall advantages of the settlement. The clause emerged from a process of negotiation which involved Ms. O'Brien and Mr. Shatter who were also two experienced family lawyers.

65. It was suggested in cross-examination to Ms. Queally that her counsel were of the view that the making of a property adjustment order in respect of property in a foreign jurisdiction was not within the jurisdiction of the High Court conferred by s. 9 of the Act. This was clearly not Mr. Durcan's view. It was Ms. O'Brien's view with which the expert retained by the defendant, Mr. David Kennedy S.C. agreed in his report exchanged in the course of the proceedings. He was not called to give evidence and therefore while noting the fact I do not rely upon his opinion in reaching my conclusion. Ms. Hayes was also clearly of the view that there were two views reasonably open in respect of this issue.

66. Ms. Queally gave somewhat confused evidence in respect of the retention of Spanish lawyers to advise her in relation to the documentation necessary to effect the transfer of the Spanish property. She did not give a coherent account of the timeline or indeed the sequence of events concerning the retention of Spanish lawyers and the furnishing of advice to her by them: nor was any evidence given that any documents were in fact produced by the Spanish lawyers for signature by her husband or that he was specifically asked by them or her to sign the documents and refused. At one point she suggested that she had consulted her Spanish lawyers "straight away" as soon as she got the order. However, she also stated that she had no idea when she retained the Spanish lawyers and would have to check. It is clear that the order was perfected on 15th December, 2008. She was requested by letter dated 9th December, 2008 by Ms. O'Brien to contact her Spanish lawyers and request the preparation of the transfer documents. On 28th April, 2009 Ms. O'Brien furnished an attested copy of the High Court order with a recommendation that Ms. Queally immediately instruct her Spanish lawyers to draw up the transfer papers. Ms. Queally maintained that this was the wrong form of order. She states that she was advised that a different form of High Court order was required by the Spanish lawyers before the transfer could be effected. However, there is no evidence to suggest Ms. O'Brien received any communication from her Spanish lawyers about the matter. It is clear that Ms. O'Brien did not hold herself out as an expert in Spanish property law and considered that the transfer of the Spanish property was a matter for Spanish lawyers. Ms. Queally stated that she could not remember the sequence of events in respect of the attempts made to secure the transfer of the property by her Spanish lawyers. From her evidence the matter of concern to the Spanish authorities was that the High Court order was not appropriately sealed. No evidence was adduced from her Spanish lawyer as to the nature of the problem, when they were first instructed, what advice they gave, when that advice was given, or whether it was given during the period of retainer of the plaintiff by Ms. Queally. Indeed, the letter used in the application for the s. 9 order subsequently made to the High Court suggests a different reason for the making of the application. There is no evidence that Ms. O'Brien received any response in respect of her advice and recommendation to retain Spanish lawyers for the purpose of effecting a transfer of the property or that any difficulty arose in respect of same. It is clear on the evidence that had she been so informed or advised, she was willing to make any relevant application to the High Court under the liberty to re-enter the clause in the terms of settlement to ensure that the terms of Clause 4 were enforced.

67. Mr. Goff, Ms. Queally's present solicitor stated in evidence that he had his first consultation with and was retained by Ms. Queally on 31st May, 2010. At that stage she was concerned that she was unable to secure the transfer of the Spanish property because the Spanish authorities were not satisfied with the terms of the High Court order on the basis that it did not contain an order transferring ownership to her from Mr. Casey and Mr. Casey had refused to sign the relevant paperwork. He stated that in November 2012 when the matter had been re-entered in respect of Clause 11 (see below) an application was made for an order asking Mr. Casey to execute the relevant documents. The court determined that the application should be on notice. A motion was issued which was returnable for 12th July, 2013. It was necessary to obtain an order for substituted service and the motion was served in May 2013. On 11th May a solicitor on behalf of Mr. Casey sought an adjournment to review the file. The case was adjourned to 29th June. It was thereafter subsequently adjourned to the 20th July and then to 7th November. The court at that stage expressed a reluctance to transfer the property into Ms. Queally's name but stated that it was amenable to an order directing the Dublin county registrar to execute the transfer papers. The initial notice of motion simply sought an order directing the county registrar to take all steps and to execute all documents necessary as presented by the applicant's Spanish lawyers for the purpose of transferring the Spanish property into Ms. Queally's sole name free from encumbrance. Ms. Queally in her grounding affidavit stated:-

> "6. The respondent has failed and refused to execute all documentation necessary to transfer the Spanish Property into the sole name of the applicant.
>
> 7. By letter dated 12th September, 2012 my Spanish lawyer explained that as a result of the failure on the part of the respondent to execute documentation prepared by a notary in [Spain] the property registry (in Spain) requires confirmation from the court in Ireland that the property be transferred …"

A letter from the Spanish lawyers to Ms. Queally dated 12th September, 2012 was exhibited. It stated:-

> "As your ex-husband failed to execute the documentation necessary prepared by the notary in [Spain] to transfer the house into your sole name the registrar informs us officially that you have no option but to obtain a new sentence from an

Irish court to say the same as in the original order of 2005/17M No. 4 but specifically:

> *'As a result of the High Court order 2005/70M, the house situated in [Malaga] belongs to Marie-Louise Queally in her sole name, free of encumbrances such that Marie-Louise Queally is released from all charges, mortgages, pertaining to the said property.'*

No charges can be registered against her property before the 30th October, but please you must bring the new order with Apostille as soon as possible in order to protect you."

68. Mr. Goff stated that on 21st October, 2013 the court indicated that it was unwilling to make the orders sought as the terms of settlement had not actually transferred the property into Ms. Queally's name. A further motion was required. The matter was then adjourned to 21st January, 2014. A motion issued on 10th February, 2015 returnable to 27th February in which Ms. Queally now sought an order directing the transfer of the property in Spain free from encumbrance into her sole name in accordance with Clause 4 of the terms of settlement or in the alternative, that the property be made the subject of a property adjustment order under s. 9(1) of the 1995 Act or an order directing the country registrar to take all steps and execute all documents necessary as presented by the applicant's Spanish lawyers for the purpose of transferring the property into her sole name. This motion was grounded upon the affidavit of Mr. Goff, solicitor who repeated paras. 6 and 7 of Ms. Queally's affidavit and supplied the further information that as of the date of the swearing of the affidavit there were no encumbrances or charges or mortgages on the property. This information had been obtained following a search carried out on the property registry in Spain at his request by the Spanish lawyers. Once again an order for substituted service was obtained.

69. On 20th March, 2015 the High Court (Abbott J.), made an order pursuant to s. 9 of the 1995 Act that the respondent transfer to the applicant his entire legal and beneficial interest in the Spanish property free from encumbrances so as to give effect to Clause 4 of the consent annexed to the order dated 7th November, 2008. It was further ordered that pursuant to s. 9(5) the county registrar for Dublin had liberty to execute all deeds and instruments and do all things necessary to give effect to the transfer order made pursuant to s. 9 in the event of refusal or failure by Mr. Casey to do so when called upon. This order was made in Mr. Casey's absence. It is not clear to the court what submissions were made on behalf of the applicant in that motion. However, following the making of the order the Spanish property was duly transferred into the sole name of the defendant by the Spanish authorities.

70. The defendant claims that the negligence and breach of duty by Ms. O'Brien in failing to ensure that a s. 9 order was included in Clause 4 necessitated this application which resulted in costs for the defendant in the amount of €14,926.73 inclusive of VAT.

71. The inclusion of a s. 9 order as a matter of law in Clause 4 was the subject of different views on the part of senior counsel and Ms. O'Brien. Ms. Queally complains that she was not informed of the nature of this disagreement. Mr. Durcan indicated that the presence or absence of a s. 9 order was not a deal breaker in respect of the overall settlement and should not have been regarded as such. Ms. Hayes, the expert witness called on behalf of the plaintiffs, supports the alternative legal view that the inclusion of a s. 9 order in respect of foreign property was inappropriate. There was no expert evidence tendered on behalf of the defendant on this point. Although the High Court granted the application to transfer the Spanish property into Ms. Queally's sole name it did so without any appearance by Mr. Casey or submissions in support of the alternative view that it had no jurisdiction to do so. If two legal views were at the time of the making of the agreement reasonably open on this issue, as they were, I am not satisfied to conclude that Ms. O'Brien acted negligently or in breach of duty in maintaining the view which she held in respect of the inappropriateness of a s. 9 order in the drafting of Clause 4.

72. Ms. Queally complains that while these differences may have existed, they were not explained to her and ought to have been. She might then have taken the view that she would not accept the terms of Clause 4 or the entire settlement unless a s. 9 order was made in accordance with senior counsel's advices. I note that senior and junior counsel were present and advised in relation to the final terms of settlement. Mr. Durcan had no specific recollection of the nature of the advice he gave other than to state that it was his practice to go through the terms of any settlement in which he is involved to ensure that they are understood by the client before they are signed. I am satisfied that it is likely the terms of the settlement were explained to Ms. Queally at the time of signing.

73. The court is also satisfied that Ms. O'Brien gave appropriate advice to Ms. Queally at the time of the making of and subsequent to the settlement that she should contact her Spanish lawyers and have the documentation relevant to the transfer of the Spanish property drawn up. This was not done and there was no communication or documentation furnished by Ms. Queally over the subsequent period until she retained Mr. Goff. Ms. O'Brien requested the relevant documents so that she could take steps to ensure that Mr. Casey signed them in compliance with Clause 4. She was never given this opportunity as no such documentation was ever produced. It is unclear when Ms. Queally first retained Spanish lawyers or the difficulties about which she now complains first arose. It is equally unclear when and by whom Mr. Casey was asked to execute the relevant documents. No details in relation to this aspect of the case have been supplied either in the affidavits grounding the motions to the High Court brought following the retention of Mr. Goff or in evidence to this Court. There is no credible evidence to suggest that any instructions were given to Ms. O'Brien at any stage up to the termination of the plaintiff's retainer in respect of any failed attempt made to transfer the property in Spain, difficulties concerning same or any failure by Mr. Casey to complete documents submitted to him nor is there any correspondence between the Spanish lawyers and the plaintiffs requesting or outlining any step which it was necessary to take in Ireland to facilitate the transfer of the property in Spain apart from the letter quoted above. I am satisfied that had the difficulty which was ultimately presented to Mr. Goff been presented to Ms. O'Brien during the period of her retainer, she would have taken all necessary steps to seek and procure compliance by Mr. Casey with the terms of Clause 4. It is likely that had she been properly instructed a similar application would have been made with the same result. Indeed, on one view of the correspondence it is likely that such an application would have been made without further charge.

74. I am therefore not satisfied that the defendant has established that the plaintiffs or Ms. O'Brien were negligent or in breach of duty in the drafting of Clause 4. I am also satisfied that had Ms. O'Brien been requested on proper instructions to seek the execution of documents relevant to the transfer of the Spanish property or any further order necessary to facilitate same in accordance with Spanish law she would have taken such steps and made such application as was appropriate under the liberty to re-enter clause set out in the terms of settlement and that such an application would likely have been successful. I am not satisfied that the defendant has established this aspect of her counterclaim.

Clause 11

75. One of the issues that was of importance to Ms. Queally in the course of the matrimonial case was her potential liability to Ulster Bank Limited. Ms. Queally and her husband had an overdrawn account and loan accounts in their joint names with the bank. The bank held a charge over 3 Woodlands, Naas, Co. Kildare in respect of these liabilities. From 3rd November, 2005 Ms. Queally believed that her husband had agreed to make repayments in respect of the outstanding amounts. However, by letter dated 6th April, 2006 Ulster Bank stipulated that the current account overdraft had not been kept to an agreed limit of €100,000 and noted that the loan

accounts should have been discharged by 6th August, 2005. The bank threatened to enforce its legal charge over the Woodlands property. On 3rd May, 2006 the plaintiffs wrote to Gallagher Shatter solicitors, who were representing Mr. Casey concerning the Ulster Bank loans and his failure to discharge and service same. Previously, her husband had also indicated that he would discharge the monies due to Ulster Bank from the sale of a house and give the balance of the proceeds thereof to his wife. He failed to do so. On 4th May, the plaintiff expressed concern to her solicitors about the Ulster Bank loans and her annoyance that she was obliged to address them even though the accounts were in their joint names: she claimed that the operation of the accounts had mainly benefitted her husband.

76. On 26th June, 2006 Ulster Bank wrote to the plaintiff as one of the joint debtors on the accounts. It again insisted that the limit of €100,000.00 be maintained on the overdraft and sought proposals for the repayment of both loans. On 12th July, 2006 Ms. O'Brien informed the bank that the parties were involved in matrimonial litigation which it was hoped would resolve or be determined either late in 2006 or early 2007. In those circumstances the bank was asked to stay its hand in respect of the enforcement of its charge or taking any other steps in respect of the outstanding amounts. The bank in letters to the couple on 20th July, 2006 indicated that it was not prepared to wait until the matrimonial case had been resolved and unless the current account balance was reduced to within its original limit of €100,000.00 and arrangements agreed for the provision of future interest on the loans the bank would have to give serious consideration to calling in the debt.

77. Gallagher Shatter solicitors wrote to Ms. O'Brien on 21st September, 2006 indicating their client's view that the loans formed part of the overall liabilities of the parties and should be addressed in the context of any overall settlement of the matrimonial proceedings. The husband was not prepared to deal with the matter in isolation. They claimed that most of the borrowing concerned expenditure by Ms. Queally. They suggested that she should engage with the bank about any temporary arrangements concerning outstanding liabilities.

The Ulster Bank Liabilities

78. In summary proceedings issued in 2011 entitled "The High Court Between/*Ulster Bank Ireland Limited Plaintiff and Michael Casey and Marie Louise Queally* Defendants Record No. 200S/2011", the Bank sought liberty to enter final judgment against the couple in the sum of €921,669.78. It sought the recovery of monies advanced to them on foot of three facility letters dated 19th August, 2003, 3rd August, 2004 and 27th January, 2005 in respect of which they were said to be jointly and severally liable. In those proceedings Ms Queally in an affidavit of 20th October, 2011 disputes that she had any liability to discharge the amount claimed and avers that the responsibility for those borrowings rested at all times with her husband who negotiated and benefited from the loans. Her former husband did not defend these proceedings and judgment was entered against him. Ms. Queally denies that she signed any of the loan facility agreements or that she entered into any agreement with the bank: she claimed that her signatures on these documents were forgeries. In her defence Ms. Queally also claims that if she is indebted to the bank the extent of her indebtedness is limited to the sum of €200,000.00 by reason of the agreement of 7th November, 2008.

79. Clause 11 of the terms of settlement was intended by Ms. Queally and her husband to settle and determine as between themselves their respective liabilities for the monies which are now the subject of the bank's claim. It required the bank's agreement and forbearance if it were to be effective. The bank for its part agreed to facilitate the implementation of Clause 11 subject to a number of conditions: the bank subsequently resiled from this agreement because these conditions were not fulfilled. The bank's claim as against Ms. Queally has yet to be determined.

The terms of Clause 11

80. The first agreed form of what became Clauses 4 and 11 emerged from a meeting on 1st May, 2008 at Malahide between Ms. Queally, her former husband and Mr. Peter Queally, her father, at which an agreement was reached on a number of matters including the Ulster Bank loans as follows:-

> "3. M.C. is responsible for and currently paying interest only in respect of three loans taken out in the joint names of M.C. and M.L.Q. with the Ulster Bank. Insofar as these relate to the property at 3 Woodlands, Naas M.C. agreed to repay the total amount outstanding to the bank which is approx. €850,000.00 as soon as possible. M.C. intends to and will restructure these loans with the Ulster Bank after this agreement is signed and he has the necessary documentation in order to facilitate M.L.Q.'s intention to sell the property at 3 Woodlands, Naas held in her name and to purchase a Spanish home. One of the Ulster Bank loans is in respect of the purchase of M.L.Q.'s house in Spain at Albayalde held in joint names. M.L. agreed to release any interest he may have in this property.
>
> Copies of all of these loans are available."

81. Clause 11 was intended to embody the agreement of 1st May, 2008 insofar as it related to the couple's liabilities to the bank and was subsequently refined by the parties' solicitors in correspondence. It provides that Mr. Casey would be solely responsible to the extent of €650,000.00 together with interest and penalties in respect of the three outstanding sums: Ms. Queally's liability would be limited to a sum of €200,000. The Bank held a charge over the property at Woodlands in respect of these liabilities. Clause 11 provided that the husband would procure consent for the release by the Bank of its security on Woodlands. He also assumed an obligation to pay €10,000.00 per month to the Bank for a period of six months or until the property was sold.

82. The Bank in a separate agreement agreed to facilitate the agreement made between Ms. Queally and Mr. Casey evidenced in a letter of 4th November, 2008. It agreed to take a first legal charge over the Dunquinn property in respect of the three loan accounts. It would release the Woodlands property from the security held in respect of those borrowings. The arrangement was conditional upon a valuation to be obtained by the Bank demonstrating a minimum valuation of €1 million on Dunquinn and the payment by the couple of €10,000.00 per month (which Mr. Casey agreed to pay under Clause 11). The agreement with the Bank envisaged that the property at Dunquinn would be placed on the market and sold within six months: otherwise the arrangement would be reviewed by the Bank. It is clear that Mr. Casey failed to comply with his obligations to the Bank in not paying the €10,000.00 per month and the valuation obtained by the Bank was €900,000.00. The Bank did not at that stage resile from the agreement. It is clear from the evidence that further options were considered as to how Mr. Casey's default in respect of Clause 11 might be addressed or whether the Bank could be persuaded to continue with some form of the arrangement contained in the letter of 4th November. Ms. O'Brien considered and advised on the issuing of a motion for attachment or committal for breach of the undertaking in respect of the monthly payment of €10,000.00 by Mr. Casey. It emerged that the Bank's main concern was the failure to pay this sum and that notwithstanding the lower valuation obtained by the Bank, it remained willing to continue the arrangement if the payments were regularised. It sought alternative proposals. However, since these were not forthcoming it indicated its intention or 4th March, 2009 to cancel the agreement of 4th November and commence legal proceedings to recover the sums due from the parties. It was particularly concerned that four monthly payments of €10,000.00 had been missed. It indicated that it would take action if no satisfactory proposals were received by 20th March. The successful implementation of this process under Clause 11 was therefore dependent upon a number of contingencies which involved the continuing good will and participation of the bank and the provision of

a legal structure which facilitated this but also recognised and maintained the respective rights and obligations of each of the three parties.

Drafting Clause 11

83. The defendant does not allege negligence or breach of duty in the drafting of Clause 11 but it is useful to the understanding of its implementation to consider how its terms evolved. The drafting of the clause was complicated by the involvement of three parties one of which was not a party to the proceedings and the fact that the successful implementation of the clause was dependent on a number of future contingencies. Gallagher Shatter furnished a copy of the terms agreed between the parties on 1st May by letter dated 4th June, 2008 to Ms. O'Brien. Ms. O'Brien was instructed to draft a legal document which reflected the draft terms of settlement and in turn instructed counsel to do so: draft terms were furnished by junior counsel on 2nd July, 2008. In the meantime there had been further correspondence between the respective solicitors in which various changes and amendments to the original terms were discussed and agreed. The case was listed before Abbott J. on Friday 4th July and was again listed for mention on 29th July on the basis that the parties hoped that a settlement would be reached and ready to be ruled on that date.

84. The terms were reviewed by Gerard Durcan S.C. on behalf of Ms. Queally who advised in an email dated 7th July in respect of an early draft of Clause 11. He raised the question as to what might happen if the bank refused to release the security on the property.

85. In a letter dated 17th July, 2008 Ms. O'Brien wrote to Ms. Queally informing her of senior counsel's reservations including inter alia about the consequences of the bank's refusal to release security on Woodlands. The matter was further adjourned to the 31st October, 2008. It is clear from the advice furnished by senior counsel and conveyed to Ms. Queally that her lawyers were concerned that the reduction of her liability to a sum of €200,000.00 was dependent upon a number of contingencies including the agreement of the bank to the proposal and the fulfilment by her husband of the proposed terms of agreement with the bank. This is reflected in the advice given and accepted by her that the bank's agreement in writing to these proposals ought to be obtained before any further step was taken. It is clear from the subsequent correspondence with the bank and the hearing before Abbott J. on 7th November that Ms. Queally had been fully advised that though the letter from the bank was of some comfort, it did not provide an absolute protection for her in respect of the proposed arrangement.

86. On 28th October 2008 Ms. Queally sent a letter to the bank following a meeting with its official concerning the outstanding joint debts and stated:-

> "In line with the proposal discussed at our meeting today and notwithstanding that the sum of €841,000.00 appears to be due on a joint and several basis, my husband Mr. Michael Casey is offering to take responsibility for the liability as part of our separation agreement. In this regard, it is requested that Ulster Bank takes the property at Dunquinn, Co. Kerry in substitution for the security over Woodlands in respect of the business centre Naas. As such it is further proposed that I will be fully released from the mortgage(s) in respect of these loans and that my exposure in respect of these borrowings shall be reduced to a maximum of €200,000.00 plus interest. I note that the property in Naas will still remain as security for the mortgage on my property at 3 Woodlands with Ulster Bank House Mortgages in Dublin.
>
> It is acknowledged that this proposal requires Mr. Michael Casey to make a monthly payment in the appropriate amount until such time as the debt is fully repaid or on realisation of the proceeds of sale of the property situated at Dunquinn, Co. Kerry which should ideally be within six months…"

Ms O'Brien advised on the drafting and sending of this letter and also wrote a letter to Ms. Queally on 29th October, 2008 expressing some concern that the letter sent to the bank may have been revised following her meeting with her and reiterating that the liability accepted by her should be limited to the sum of €200,000.00 plus interest.

87. On 30th October Ms. O'Brien received a message from Ms. Queally that the bank had agreed to the terms of the letter set out above but required a letter in the same terms from Mr. Casey.

88. The defendant's husband sent a similar letter to the bank by facsimile on 31st October and acknowledged that under the terms of this proposed arrangement he would be obliged to pay a sum of €10,000.00 per month to the bank. Ms O'Brien was furnished with a copy of this letter on the same date by his solicitors.

89. The terms of the clause were also discussed in correspondence with Gallagher Shatter, solicitors, who raised a query as to whether Ulster Bank would require the Naas property to be used as security for the €200,000.00 owed to the bank for which Mr. Queally was assuming responsibility. It was clarified that the Dunquinn property would be applied as security for their client's part of the debt only i.e. €650,000.00 and that the proceeds of sale of that property would be used to discharge their client's portion of the debt due to Ulster Bank. Gallagher Shatter indicated that Mr. Casey agreed to pay the sum of €10,000.00 per month to Ulster Bank until the property was sold.

90. On 31st October, 2008 the court was informed that the parties were in attendance and were close to signing an agreement. It was indicated that divorce proceedings would be issued and returnable for the following Friday with the leave of the court in contemplation of the disposal of all matters between the couple. Any appropriate affidavits would be filed. The court was informed that verbal confirmation of the bank's agreement to the release of certain security had been obtained but as a matter of prudence the parties wished to have the bank's agreement in writing to the proposed terms. The case was adjourned to 7th November 2008.

91. On 4th November, 2008 Ulster Bank wrote to Ms. Queally and Mr. Casey indicating its agreement to the following:-

> "1. The property owned by Marie Louise Queally at 3 Woodlands shall remain as security for Ms. Marie Louise Queally's personal mortgage under Ref. 248373 which balance presently stands at €305,691.33.
>
> 2. The Bank is agreeable to release this property from its security in respect of other borrowings in the joint names of Marie Louise Queally and Michael Casey.
>
> 3. The Bank will accept a first legal charge over Mr. Michael Casey's property at Dunquinn, Co. Kerry in respect of the [3] loan account borrowings in joint names … which balances presently stand at €842,956.75 …
>
> 5. This arrangement is conditional upon the Bank's inspection of the property and upon receipt of a professional valuation to be obtained by the Bank showing a minimum valuation of €1 million in the Dunquinn, Co. Kerry property. This arrangement is also conditional upon the borrowers making monthly payments of €10,000.00 in reduction of the liability and interest, such payments to commence immediately.

> 6. In respect of the loan account borrowings referred to above … the Bank is agreeable to reducing Ms. Marie Louise Queally's liability in respect of those loans to €200,000.00 plus continuing accrued interest at current interest rate of cost of funds plus 2%. The balance of the loan liabilities will be the responsibility of Mr. Michael Casey and will be repaid from the sale of the Dunquinn, Co. Kerry property which property will be placed on the market and sold within six months.
>
> 7. In the event that a sale of the Dunquinn, Co. Kerry property has not commenced within six months from the date hereof, this arrangement will be reviewed by the Bank …"
>
> In event of default of those terms by either party the Bank reserved the right to commence legal action immediately seeking the realisation of its security and the payment of all amounts outstanding.

92. On 7th November, 2008 the parties attended before the court (Abbot J.). The terms upon which the judicial separation had been agreed were set out in detail to the learned judge. The divorce proceedings were also before the court. The court ruled the judicial separation settlement and granted the decree of divorce. At the same time it made the appropriate order under s. 26 of the Family Law (Divorce) Act, 1996 continuing in force the orders made pursuant to the judicial separation proceedings just completed.

93. In the course of the ruling Mr. Durcan S.C., for Ms. Queally outlined the details of the settlement reached and in particular the terms of Clause 11. The court was informed that a letter had now been received from the bank. It was explained to the court that the parties themselves had arrived at the settlement which had been then transposed into its legal form. He stated:

> "She gets some solace in regard to the issue of the loan, which you have seen there, the €850,000. I have obviously explained to her that no protection is absolutely (sic) and while the bank have set out their position there, there isn't any absolute protection to be had…and I think I should also bring to your attention, that obviously I have discussed with my client the situation, and there can't be, I have indicated that while the letter from the bank…. to her, to both of them, must be of some comfort, it is not an absolute in any sense. And clearly though, however, the documentation needs to be put in place in regard to getting the transfer, the first charge on Dunquinn."

The judge indicated that there might have to be new charges to which counsel stated "that is definitely going to have to be done, … my client is here, she is an intelligent woman, if I might put I[t] that way. She has thought about the situation and she is content to go with it as it is."

94. Both parties gave evidence. Mr. Casey gave evidence in relation to the state of the parties' relationship as required pursuant to the 1996 Act and the Constitution. Ms. Queally gave evidence accepting that she understood the terms of settlement fully. She confirmed to the court that the terms had been explained to her by senior counsel and that having considered the benefits of the agreement she was content to settle the case on the terms opened to the court.

95. The learned judge in approving the settlement noted that it was about

> "as least dependent on outside banking as most cases. There is a little dependence on outside banking, but I think the court can safely say it is likely and the likelihood is a standard, the likelihood is that things will work themselves out, but it is a very difficult time to be depending too much on banks…if say things don't happen, there might be a need for some ancillary implementing orders, but that is nothing to do with full and final settlement. They will be just following on, on the settlement to make it workable."

The case was then adjourned to 19th December, 2008 in counsel's words "to allow the charge to be put in place…to make sure all of that happen[s] and that progress isn't lost …" Liberty to apply was granted to the parties.

96. It is clear that both parties had the comfort of and acted on a valuation provided by Sherry Fitzgerald of the Dunquinn property of €1.5 million dated 15th August, 2008. They considered that if the Dunquinn property was not worth that amount its sale would still likely yield a sufficient amount to discharge the liability assumed by Mr. Casey under Clause 11.

97. At the time of settlement Ms. Queally states that she was not focusing so much on that risk. She was gaining the Spanish and Malahide properties. She was satisfied that the risk was pointed out to her and she was happy to accept it.

98. I am satisfied that the nature and effect of Clause 11 was fully explained to Ms. Queally prior to the settlement and that she understood the degree of uncertainty which it entailed. She also appreciated that Clause 11 sought to minimise the uncertainties faced by her as far as possible. However, it is clear that everybody understood that the implementation of Clause 11 was dependent upon its acceptance by the bank, full compliance by Mr. Casey and the bank's satisfaction that there had been full compliance by both parties with the terms set out in the letter of 4th December. This depended upon the bank receiving a valuation of the property of not less than €1 million and the monthly payments by Mr. Casey of €10,000.00.

99. In evidence Mr. Durcan stated that it was necessary for his client to take into account the difficulties that might arise if the bank declined to agree to the course proposed by the parties. For that reason he considered that it was important to obtain written confirmation of the bank's agreement. He also explained the importance of the wording of Clause 11: it contained an agreement for an order for sale - not simply an agreement for sale - together with a direction that the proceeds of sale would be used to discharge the debt due to Ulster Bank by the respondent. In addition there was an undertaking by the respondent to pay €10,000.00 per month to the bank. This was different to a simple agreement to make repayments. His advice in that context was informed by the legal principles applicable to matrimonial settlements.

100. Mr. Durcan also emphasised the court's role in ruling the settlement. It had to consider whether it should approve a package based on sufficient information and evidence. It had to determine whether proper provision had been made for the parties and therefore had to look at all the terms of the settlement together. This was unlike a settlement, for example, in a commercial case in which parties were free to settle a case on any basis agreed between them.

101. An issue arises in this case as to whether Clause 11 embodied an order for sale of Dunquinn and a further order directing that the proceeds of sale should be applied to discharge Mr. Casey's liabilities to the bank. Mr. Durcan S.C. was satisfied at the time that it had that effect based on the applicable case-law. The consent was received and filed and deemed to be part of the order under para. 2 of the order. Mr. Durcan considered that this was appropriate to ensure its effectiveness consistent with the principle stated in *Thwaite v. Thwaite* [1981] 2 All ER 789 which had been adopted and applied in Irish law in matrimonial settlements. In Thwaite the English Court of Appeal noted the distinction between consent orders in ordinary civil litigation and consent orders embodying financial

arrangements agreed between parties to a divorce. It was held that the financial arrangements between the parties derived their legal effect from the court order and not from the parties' agreement. This was said to be based on the necessary consequence of the policy underlying ss. 23(1) and 24(1) of the Matrimonial Causes Act, 1973 which applied in England and permitted parties to a divorce to make a clean break in financial matters. Ormrod L.J., delivering the judgment of the court stated at pp. 793-794:

> "… The leading case on the effect of consent orders in the matrimonial jurisdiction is the recent case of *de Lasala v. de Lasala* [1979] 2 All ER 1146, [1980] AC 546 … In giving the advice of the Judicial Committee, Lord Diplock said …
>
> > "Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of a court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order …"
>
> This statement of principle is effectively binding on this Court because the relevant provisions of the Hong Kong Ordinance are identical to the corresponding provisions of the Matrimonial Causes Act, 1973. We respectively adopt it and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract to the parties leading to, or evidenced by, or incorporated, in the consent order … A distinction, therefore, has to be made between consent orders made in this and other types of litigation."

102. I am satisfied that this principle has been adopted and applied in this jurisdiction. It has also been recognised that there may be circumstances in which an agreed ancillary order made in respect of a divorce decree may be varied subsequently if circumstances fundamentally change for example, through a dramatic or unforeseen drop in property values: the court has jurisdiction over orders which it has made in that respect (see *NF v. EF* [2011] I.R. 100 paras. 7-8, applying *Thwaite v. Thwaite* and *A.K. v J.*K [2009] 1 I.R. 814) . A fundamental change in circumstances was later claimed by Mr. Casey due to an alleged collapse in his financial fortunes when threatened with enforcement of Clause 11 by the defendant's solicitors. While no application was made on his behalf to vary the terms of settlement on that basis it is clear from the subsequent court proceedings that he intended to rely upon changed circumstances to resist any attempt at enforcement by way of contempt proceedings.

103. It was submitted on behalf of the defendant that notwithstanding Mr. Durcan's evidence Clause 11 was not and could not be regarded as an order for the sale of the Dunquinn property or a direction that the proceeds of sale be discharged to reduce Mr. Casey's liability under Clause 11 to Ulster Bank. In addition, it was submitted that the "undertaking" to pay the sum of €10,000.00 per month was not to be regarded as anything more than an agreement to pay this sum and should not be regarded in the same terms as a formal "undertaking" to the court which, if breached, gave rise to a remedy by way of a motion for attachment and committal.

104. Expert evidence was given by Mr. Michael Noonan, solicitor in support of the proposition that the terms of Clause 11 did not constitute an order of the court and that further application was required to procure an order for sale. The admissibility of this evidence was challenged on a number of grounds by the plaintiff: the challenge was rejected by the court. Nevertheless it is relevant to consider the background to the procurement of Mr. Noonan's opinion on this and other matters when considering the weight to be attached to his evidence.

105. The application that the court should decline to receive his evidence was based upon the lateness and manner of Mr. Noonan's retainer, the inadequate nature of the report furnished and exchanged with the plaintiffs' solicitors, his lack of relevant experience particularly in the area of matrimonial proceedings and settlements and the omission from his report of conclusions which he had reached after the submission of his report to the plaintiffs' solicitors.

106. Mr. Goff, the defendant's solicitor, retained Mr. Noonan on the afternoon of Monday 5th February while the trial was at hearing and following the abandonment by the defendant of most of the allegations of negligence in respect of which Mr. David Kennedy S.C had been asked for his expert opinion . He had known Mr. Goff since he was a college student and on the previous Friday had a general conversation with him about the case. In the course of that exchange Mr. Noonan was informed that Mr. Kennedy S.C. had been retained to act as an expert on behalf of the defendant in this case. Mr. Goff then contacted Mr. Noonan at 4.30pm the following Monday indicating that he required an expert witness as there was "a different issue now". By this stage it was clear to Mr. Goff that Mr.Kennedy S.C.'s opinion could not be relied upon as the element of the claim which it addressed had been withdrawn. He then sent Mr. Noonan two emails with attachments containing documents relevant to the case. Mr. Goff asked Mr. Noonan to consider the settlement and issues that subsequently arose in respect of the judgment mortgage obtained by Gallagher Shatter and the disbursement of monies from the sale of the Dunquinn property. Mr. Noonan furnished a report on Wednesday morning. The report does not contain an outline of his qualifications as an expert or when he received the instructions or the documents furnished to him. He stated in evidence that if he had more time he would have added more detail to the report. In the course of his evidence in chief he indicated for the first time that he had reached a further conclusion relating to aspects of the Registration of Title Act 1964 which had they occurred to him would have been included in his initial report. An application was made to disallow the evidence of Mr. Noonan on the basis that he was not an appropriately qualified expert. However, on Day 7 of the trial I concluded that I would receive his evidence as a matter of fairness to the defendant. The plaintiffs did not apply for an adjournment in order to receive a further amended report including the additional conclusions said to have been reached by Mr. Noonan prior to his giving evidence and counsel indicated that he was in a position to deal with any issues that arose. I am satisfied that Mr. Noonan's experience for the most part lay in the conveyance of property: I am not satisfied that Mr. Noonan had any extensive experience or familiarity with the principles and practice of matrimonial and divorce law.

107. Mr. Noonan's evidence was confined to matters concerning the enforcement of Clause 11. He was not invited to give an opinion in respect of Clause 4 or its enforcement. Mr. Noonan noted that there were three conditions set out by Ulster Bank for its agreement to the surrender of its security in respect of the three outstanding loans on the Woodlands property. Firstly, it would have a legal charge over the Dunquinn property as security for the three loans, secondly the bank needed to be satisfied that the value of the property was at least €1 million and thirdly, the parties would pay a sum of €10,000.00 per month to the Bank which, as agreed between the couple became Mr. Casey's obligation under Clause 11 of the Terms of Settlement. He considered that a letter to Mason Hayes & Curran from the Bank dated 4th December, 2008 indicated that the Bank was withdrawing its consent to the arrangement as set out in its letter of 4th November. He stated that the correspondence and the transcript at the time of the ruling of the orders before Abbott J. indicated that the terms concerning the debt of €850,000.00 with Ulster Bank were subject to the conditions set by the Bank. If that arrangement was not completed the parties would have to return to court for further orders. He stated that the letter of 4th December from the Bank to Ms. Queally's solicitors should have caused alarm bells to sound in the mind of her solicitor and from 4th December the solicitor ought to have focused on returning to court to ensure that the house in Dunquinn would be sold and the proceeds of sale remitted to the Bank to reduce the indebtedness of the parties. He stated that when the parties returned to

court on 19th December, 2008 the terms of Clause 11 of the consent should have been transposed into a court order at that stage. In December 2008 there was no other encumbrance on the property. Had an order been made on the 19th December it could have been registered pursuant to the Registration of Title Act 1964 and recorded as a burden on the property. He considered that the advice given in the letter of 15th December to Ms. Queally that a motion for attachment and committal should be brought against her husband in respect of his failure to discharge the €10,000.00 monthly payment was not an appropriate response in the circumstances. The more immediate problem lay in securing the money from the sale of the Dunquinn property to discharge the husband's liability for the Ulster Bank loans. At the same time the Bank should have been informed that the defendant intended to seek a court order for the sale of the property and the payment of the €650,000.00 to the Bank in accordance with the terms of Clause 11. Clearly, Mr. Noonan was of the opinion that the Clause was not an order for sale but if it was it should have been enforced.

108. Ms. Hayes was of the opinion that when Ulster Bank resiled from the facility agreed with the parties due to Mr. Casey's default and the lower valuation obtained, Ms Queally was entitled to seek relief in accordance with what she was satisfied was an order for sale under Clause 11 and an order directing the disbursement of the proceeds of sale. Thus, she was satisfied that though the order was not made specifically by reference to a section under the family law code the terms of the Clause were deemed to be part of the order. She stated that this was not an unusual feature in family law cases in which some elements of an agreed term of settlement may be susceptible to the making of an order under a particular statutory provision but others are not. She also noted that Mr. Casey had given an undertaking to pay the sum of €10,000.00 per month. It became clear that Mr. Casey readily acknowledged in his affidavit that he was in default but also stated that he was taking steps to put the property on the market. Ms. Hayes was of the opinion that when it became clear that this was not a realistic prospect Ms. O'Brien ought then to have sought instructions from Ms Queally to seek such relief as was necessary to ensure that the order for sale was implemented.

109. Clause 2 of the order states "that the said Consent be received and be filed with and deemed to be part of this Order". It was submitted on behalf of the defendant in support of Mr. Noonan's opinion that the form in which the consent was received by the court was the same as that which applies when a consent is filed and made a rule of court and deemed to be part of an order in civil proceedings. It was submitted that it was necessary to apply to court for a formal order in the terms agreed in order to give them force and effect. Counsel relied upon *D(A) v. D(M)* [1996] 1 FLR 230 in which the parties entered into a separation deed which was subsequently ruled by the court and a consent order was made as follows:-

> "It is ordered that the said separation agreement to be received and made a Rule of Court and be filed with and deemed to be part of this Order."

The only difference between the wording of the consent order in *D(A)* and Clause 2 lies in the inclusion of the words "and made a Rule of Court" adopted in *D(A).* In *D(A)* Her Honour Judge McGuinness (as she then was) rejected the English judgment of Myerson Q.C. sitting as a Deputy Judge in the Family Division in *Herbert v. Herbert* [1978] 122 SJ 826 which held that an agreement that was made a rule of court had the same effect as an order or judgment of the court. The learned judge instead followed and applied the decision of the English Court of Appeal in *Atkinson v. Castan* [1991] TLR 190 which held:-

> "…there are three possible consequences where parties compromised an action:
>
> 1. Where the Court was not involved in the settlement in the sense that no step was taken to incorporate the settlement in the decision of the Court and therefore a fresh action was necessary to enforce the agreement.
>
> 2. Where positive Orders in consequence of the compromise were made by the Court, then the agreement could be directly enforced by the Court.
>
> 3. Where although the agreement was recorded as part of the decision of the Court and clearly required a party to do or refrain from doing an act, nevertheless there was no Order to that effect. That was the present case.
>
> In the third type of case, a party wishing to enforce the agreement could apply to the Court for an Order making it directly enforceable … accordingly, the judge was correct in deciding that the plaintiffs were entitled to have the agreement enforced without the need to bring a fresh action."

110. It is clear that the effect of the decision in Thwaite v. Thwaite was not considered by the learned judge in concluding that the terms of the agreement could not be enforced through a motion for attachment and committal and that the issue should be addressed by an application to make positive orders by way of re-entry as suggested by the English Court of Appeal. The case is distinguishable because it addresses the effect of a specific clause making the terms a rule of court. I am satisfied that the absence of a provision that the terms of the consent be received and made "a rule of court" together with the language used in Clause 11 indicates that it was intended in this case that an order would be made by consent in those terms without the necessity for any further substantive order.

111. In Clause 11 the "order for sale" is agreed and there is a specific statement as to what the court "now directs" in relation to the application for the proceeds of sale. I am satisfied to accept the evidence of Mr. Durcan S.C. and Ms Hayes on this issue for the reasons which they gave in evidence: I am not satisfied to accept Mr. Noonan's evidence in this regard. Insofar as the matter may be regarded as primarily a matter of law which does not require an expert opinion I am also satisfied that this interpretation of Clause 11 and conclusion is supported by the line of authority based on the decision in Thwaite. I am therefore satisfied that Clause 11 took effect as an order and was directly enforceable under the terms of clause 2 and could have been effectively enforced. Even if that is incorrect, the terms of the order permitted for liberty to apply. The matter could have been re-entered to secure whatever orders were necessary to enforce the terms (see also *D.L. v M.L.* [2013] IEHC 441). It was clearly an effective and enforceable clause on either view by application for appropriate directions as to the time and mode of sale.

112. The defendant also claims that if Clause 11 is regarded as containing an effective order for sale and a direction as to the payment of the proceeds thereof to the bank, the defendant ought not only to have made an immediate application to court to seek directions concerning the sale as early as 19th December 2008 but at the earliest possible opportunity following the making of the order on 7th November 2008 ought to have made an application to register the order for sale as a burden on the Folio thereby protecting the defendant's interest as a burden taking first priority over any subsequently registered burdens. Furthermore, it is alleged that the steps actually taken namely, the registration of a *lis pendens* on the property and the advice given to bring a motion to attach and commit the husband for breach of his undertaking to pay the sum of 10,000 per month to the bank under Clause 11 were wholly ineffectual.

Subsequent Developments

113. By letter dated 4th December, 2008 Ulster Bank Ltd. informed Ms. O'Brien that it had received a valuation in respect of the Dunquinn property of €900,000.00. This was less than the €1 million valuation for the property upon which the agreement with the bank was dependent. Ms. O'Brien was also informed that the initial payment of €10,000.00 from Mr. Casey under the terms of the agreement had not been made. The bank sought alternative proposals.

114. On 8th December, 2008 Ms. O'Brien furnished a copy of this letter to Ms. Queally requesting that she contact her for the purpose of discussing same. On the same date Ms. O'Brien wrote to Gallagher Shatter solicitors enclosing a copy of the Bank's letter and noting that the case was in for mention on Friday 19th December by which date it was expected that Mr. Casey would have provided the security documentation in respect of the Dunquinn property. On 9th December, Ms. O'Brien wrote a further letter to Ms. Queally stating *inter alia*:-

> "In addition you should now arrange for your Spanish lawyers to draw up transfer documentation in respect of the property situate at 18C – Bergantin, Urb, Albayalde. Provision is made for your sole right of residence to the family home as of the 1st of July, 2009. The agreement is also predicated on the fact that your home in Naas will be released from the liability to Ulster Bank save for the sum of €200,000.00. As you can see the recent correspondence from Ulster Bank appears to negate this position and as such I would ask you to contact me to discuss the matter further."

115. On the morning of 15th December Ms. Queally contacted Ms. O'Brien by email asking whether it was necessary for her to attend court on 19th December. She also sought a copy of the High Court order which was in fact perfected on the same day. Later that day Ms. O'Brien furnished Ms. Queally with a copy of the letter sent to Gallagher Shatter in the following terms and marked "urgent":-

> "We are most concerned by the contents of Ulster Bank's recent letter and your client's apparent failure to comply with the order of the High Court regarding repayments to that Bank in the sum of €10,000.00 per month. You will appreciate that the entirety of the settlement terms was based on restructuring of these debts with Ulster Bank. It should be noted that Ulster Bank had previously indicated to the writer by telephone that a valuation of €900,000.00 would not cause a difficulty. As such, we do not believe it is open to Ulster Bank to withdraw from the arrangement on this basis alone. In the event of your client's continued failure to comply with the order of the Court and his agreement with Ulster Bank, we have instructions to immediately issue a motion seeking orders for Attachment and Committal …"

116. The threat of attachment and committal referred to the failure to discharge the monthly payment of €10,000. When the matter was mentioned before the High Court on 19th December it was clear that Mr. Casey had failed to comply with his obligations to Ulster Bank and had not paid the sum of €10,000.00 per month as agreed. The valuation had come in below €1 million and the bank was seeking to resile from the agreement. However, the bank had informed Ms. O'Brien that the valuation of €900,000.00 was unlikely to cause a problem. Ms. O'Brien instructed counsel in an email on 19th December to adjourn the case until the end of January in order to give her time to bring a motion for attachment and committal against Mr. Casey. She also indicated in an email of 9th January to Ms. Queally that she was in the process of registering a *lis pendens* against the Dunquinn property. The matter was adjourned to 30th January, 2009 for mention.

117. On 9th January, 2009 Ms. O'Brien spoke to Mr. Durcan S.C. He advised that appropriate action would have to be taken in the Family Court as a matter of urgency. He gave evidence that while he had no specific recollection of the advice that he gave he was satisfied that he advised that steps ought to be taken and I am satisfied that this is so. However, he received no such instructions from the solicitor in relation to the matter. His view was that if the bank resiled from the agreement the next stage was to ensure that the Dunquinn property was sold. This would require an application to the High Court for directions, the appointment of joint solicitors to have carriage of sale, the setting of a reserve on the sale price and whether it was to be sold by public auction or private treaty.

118. It was suggested to Mr. Durcan that the order for sale ought to have been registered as a burden under the Registration of Title Act 1964. He stated that at the beginning of 2009 the principles applicable to priority in respect of matrimonial property had been settled by the decision in *A.S. v. G.S.* [1994] 1 I.R. 407. He was satisfied that any orders made in family law proceedings would take priority over a judgment mortgage registered in favour of a party who as a matter of law was a volunteer and stepped into the shoes of the person against whom judgment had been obtained. The judgment mortgagor could not have any more rights than Mr. Casey. If asked to advise about registering the order for sale as a burden on the property pursuant to the Act he would have advised that the Family Court order had priority in any event: registration offered no additional protection. I will return in more detail to this issue later in the judgment.

119. Mr. Durcan considered that registration of a *lis pendens* only offered protection against a *bona fide* purchaser for value who might thereby be put on notice of a difficulty in relation to the property. This was particularly useful if it was thought that the husband might attempt to sell the property and benefit from the proceeds of the sale. He did not consider that it gave protection against a judgment mortgagor. Mr. Durcan was also satisfied from the documentation that other options were being considered at that stage as to how the Dunquinn property might be addressed. Though he had no recollection of precisely what was discussed at the time, he noted from an email sent on 9th January concerning his advices that he had advised about further options in respect of which instructions were sought. This necessitated a discussion with the client about which option she wished to take. In addition he and junior counsel received correspondence in March 2009 which requested the drafting of affidavits seeking wider financial relief which went beyond the issue of enforcement and in effect sought to change fundamental provisions of the consent order originally made. This had important implications in that if one side sought to reopen the terms of the consent order, by seeking wider reliefs, the other side might also seek a reopening of the matter in full. He was aware that further documentation was sought in relation to the drafting of the motion. He was not privy to the nature and extent of the instructions furnished in respect of that matter to the solicitor in March/April 2009.

120. On 9th January, 2009 Ms. O'Brien sent an email to Ms. Queally informing her that Ulster Bank now wished to call in the entirety of the debt due by Ms. Queally and Mr. Casey. She stated:-

> "As such I envisage that we would need to take appropriate action on your behalf in the Family Court as a matter of urgency. Again you might contact me to confirm that I have your instructions to do so. I am discussing with Gerry Durcan S.C. the idea of seeking an outright transfer to you of the Kerry property (unencumbered) in order that we might shelter you from the Ulster Bank proceedings – this is just one idea – and I will be interested to discuss the alternative with you in early course."

121. When the matter was mentioned before the High Court on 30th January 2009 Mr. Shatter on behalf of Mr. Casey, requested and was granted an adjournment for three weeks to 20th February to enable Mr. Casey to file an affidavit outlining his difficulties in complying with the terms of settlement. Ms. Queally was informed of this development and requested to contact Ms. O'Brien to

discuss it with her.

122. In an affidavit sworn on 18th February, 2009 Mr. Casey attempted to address his default in respect of his Clause 11 obligations and pre-empt any application to attach and commit him. He set out a case that while he was endeavouring to fulfil his obligations his financial situation had deteriorated dramatically as a result of the recession: his case was that he could not pay the €10,000 per month at that time not that he was wilfully refusing to pay. He stated that he had instructed Messrs. Sherry Fitzgerald estate agents in respect of the proposed sale and disposal of the Dunquinn property and was dealing directly with Ulster Bank in relation to of the valuation issue. He referred to the valuation furnished by Sherry Fitzgerald on 15th August, 2008 which valued the property at €1.5 million. He repeated his intention to discharge his liabilities to the bank under Clause 11 from the proceeds of sale. He also stated that though his business and financial situation had deteriorated he was negotiating with the commercial credit committee of the bank in an effort to reorganise his finances; however, his liquidity had been severely and negatively affected as a result of the economic downturn. As a result, he was not in a position to discharge the monthly payments of €10,000.00 pursuant to the terms of Clause 11. He expressed his hope that he would be able to reorganise his financial affairs and discharge his obligations under the agreement. He sought further time to do so. By email on 23rd February to Ms. Queally, Ms. O'Brien requested that she contact her urgently in respect of Mr. Casey's affidavit. The case was adjourned to 13th March and it was hoped to have a meeting in the meantime with Ms. Queally.

123. On 4th March, Ms. O'Brien wrote to Ms. Queally referring to recent telephone messages and requested that Ms. Queally contact her for the purpose arranging a meeting. She stated:-

> "I look forward to hearing from you as a matter of priority. In addition, we need to discuss the position on filing a replying affidavit in respect of the affidavit filed by your husband in the High Court proceedings. The case is before the court again on 13th March and I am very anxious to have your full instructions in advance of that date. …"

124. Ulster Bank also wrote to Ms. O'Brien on 4th March expressing its disappointment that it had not received an alternative proposal from Ms. Queally in respect of the outstanding liabilities and advising that unless the sum of €40,000.00 then outstanding together with a satisfactory proposal in relation to the Dunquinn property was received by 20th March the bank would have no option but to formally cancel the agreement of 4th November and recommence its legal proceedings. A copy of this letter was furnished to Ms. Queally by email dated 9th March. It is clear that up to this point the bank was willing to consider proposals from the parties that might address its concerns and enable it to facilitate the implementation of Clause 11.

125. At this point Ms. Queally issued instructions on 10th March, which were conveyed to counsel by Ms. O'Brien on the same date as follows:-

> "I have taken the client's instructions on Mr. Casey's affidavit and she has requested that we file a motion seeking such further and other financial relief as may seem reasonable to the court for the purpose of:-
>
> • shielding her from the Ulster Bank debt, as originally intended by the orders granted on consent last November;
>
> • transferring an income producing asset to the client in order that she can properly maintain the children, as due to a change of circumstance brought about in the main by the collapse of the pork industry last year, the client is no longer in a position to maintain herself and the dependent children.
>
> I have asked the client to forward a copy of her tax returns for 2008 together with specific details regarding the downturn in business for the Queally group. I have also arranged to register a *lis pendens* against the property in Kerry which I understand is unencumbered. The client's preference is to seek a transfer of one or two of the commercial units in Mulhuddart into her sole name in order that she has an income stream to provide for herself and the children. It may well be that Ulster Bank could also attach income from a third or fourth property in Mulhuddart for the purpose of dealing with the indebtedness to them."

126. By letter of the same date to Ms. Queally, Ms. O'Brien confirmed that she had issued instructions to counsel as set out above and noted that Ms. Queally would request Ernst and Young, accountants, to forward a copy of her accounts for 2008 or other related documentation for the purpose of establishing her reduced income in the previous year.

127. On 12th March Ms. Queally sent Ms. O'Brien an email which expressed her frustration at the turn of events and outlined in some detail the reasons for her reduced income. In addition, she said she was very concerned about Mr. Casey's affidavit particularly in the light of the correspondence from Ulster Bank which placed further pressure on her in respect of debts for which she did not believe herself to be responsible.

128. By letter dated 12th March Ms. O'Brien wrote to Gallagher Shatter & Co. concerning Mr. Casey's affidavit and informed them that she had instructions to issue a motion for the purpose of seeking further financial relief and ensuring that their client was shielded from the Ulster Bank debt to the extent intended under the settlement terms and for the purpose of addressing their client's changed circumstances brought about by the collapse of the pork industry in the previous year.

129. On 13th March Ms. O'Brien submitted the relevant documentation to the Property Registration Authority for the purpose of registering a *lis pendens* on the Dunquinn property.

130. The matter was adjourned for mention before the High Court to 27th March. By 13th March two important developments had occurred. Firstly, Ms. Queally had issued instructions that she wished to apply for wider relief than a simple enforcement of the terms of settlement namely substantial maintenance based upon the fall in her income recorded in the previous year. However, these instructions were withdrawn a number of weeks later. Secondly and more importantly Ms Queally's health had deteriorated to the extent that she required residential care and she appointed her father Mr. Peter Queally to act as her agent in her dealings with her solicitors. Her sister, a psychologist approached her on behalf of the family and suggested that she obtain residential treatment. She was stressed and depressed at the time. Initially she went to the Rutland Centre. They were unable to accommodate her immediately. She required approximately four weeks residential care.

131. On 25th March, 2009, counsel were instructed to draft papers seeking relief in respect of the Ulster Bank issue and further financial relief in the same terms as the instructions given on the 11th March. On the same date Ms. Queally informed Ms. O'Brien that she needed to enter hospital for treatment. She felt very stressed and depressed with the situation. At or about this time she also withdrew the instructions to seek further financial relief. However, in evidence Ms. O'Brien also stated that in the same telephone

conversation Ms Queally specifically told her not to take any further steps at all. That is not recorded by Ms O'Brien in an attendance though the instruction not to proceed with an application for wider financial relief is later recorded in an e-mail on 28th April. I am not satisfied to the level of probability that there was a specific instruction given not to do anything on the 25th March but I am satisfied that the instructions to proceed with the sale of Dunquinn which were later specifically sought were not forthcoming.

132. Ms. Queally then appointed her father Mr. Peter Queally as her agent to act on her behalf in furnishing instructions to her solicitors by letter dated 16th April, 2009 to Ms. O'Brien which stated:-

> "I hereby authorise my father to act on my behalf in the short term for my affairs concerning the financial aspects regarding my property in Naas and the repayment of the debt.
>
> I wish to establish what income I can generate and in this regard I am arranging either the immediate rental of both properties so as to address the reality of my financial position following the breach or the sale in the event that this will be necessary to maintain myself and my children and to address personal debts."

133. In evidence Ms. Queally stated that she could not recall discussing the maintenance issue or the Ulster Bank problem with Ms. O'Brien in March 2009. She accepted that instructions were sought. She told Ms. O'Brien "well just do it, without me having to go ahead". She said that she was not advised to seek an order for the sale of the property. In her email of 12th March Ms. Queally also furnished instructions concerning Mr. Casey's alleged expensive life-style and the background to the reduction in her own income for use in the proposed application for financial relief. She believed at that stage that a *lis pendens* had already been registered in January 2009. She believed that the property had by then been protected from the outstanding liability to Ulster Bank.

134. By April, Ms Queally believed that she had given clear instructions to Ms. O'Brien to go to court and if necessary "have her husband arrested". She believed she was going to get full protection in line with the settlement agreement. Ms. O'Brien acting on Ms Queally's instruction then dealt with Mr. Peter Queally who acted on behalf of Ms. Queally from 16th April until June 2009. Ms. O'Brien was thereafter on maternity leave from 29th June, 2009 until October.

135. On 20th April Ms. O'Brien telephoned Mr. Queally's secretary and Ms. Queally and left messages to arrange a meeting. In evidence she stated that she was concerned about Ms. Queally at the time having regard to the instruction which she received appointing her father as her agent. This was a matter upon which she had not advised Ms. Queally and was unexpected.

136. A detailed attendance is recorded by Ms. O'Brien dated 27th April of a conversation with Mr. Peter Queally in which they agreed that he would consider matters further concerning the Ulster Bank issue. It also states:-

> "We also considered the position with regard to the property in Kerry and I pointed out that an Order for Sale had been made in the High Court and if there is a buyer it will be readily enforceable against Mr. Casey. I also informed Mr. Casey [sic] that Gallagher Shatter have come off record in the proceedings. We discussed the issue of outstanding fees and I pointed out that himself and Marie-Louise needed to revert to me with a schedule for payment over the next twelve to eighteen months … We discussed the possibility of letting Malahide and letting Naas with a view to creating income for Marie-Louise and also with a possible view to raising funds for discharge of legal fees."

She also noted:-

> "I mentioned that the property in Malahide comes into Marie-Louise's position[sic] as of the 1st July and arrangements could be made in the intervening period for the purpose of getting the property ready for letting. I said that we would be happy to assist with raising a mortgage over that property if necessary and indeed with forcing the sale of Kerry. I mentioned that there were some slight concerns surrounding Kerry as Mr. Casey was not yet registered as owner on the folio. I also pointed out that the Ulster Bank do not have a loan over that property and I had a small concern that Mr. Casey may have lodged the title deeds with another lending institution in order to raise money. Obviously a full investigation of title would have to take place prior to any purchase by Mr. Casey[sic] or one of his interests of Kerry property. I mentioned that the property had been valued at €900,000.00 by Ulster Bank's valuers and that Mr. Casey may come under pressure if a bid came in even beneath that amount. We said we would discuss all issues again in a week's time."

In evidence Ms. O'Brien stated that her reference in the attendance to an order for sale arose from the words in Clause 11 of the terms of settlement which she understood, based on the terms of paragraph 2 of the Order had the same effect as an order for sale. She was also concerned that Mr. Casey was going to raise funds on the property in Kerry and that he might mortgage the property with another lending institution. However, as Mr. Noonan noted this was not a likely scenario. She was also concerned about the possibility that one of his other creditors might try to register some interest or charge on the property.

137. Ms. O'Brien then wrote to Ms. Queally on 28th April acknowledging the appointment of her father as her agent in handling matters relating to her property in Naas and the repayment of the Ulster Bank debt and legal costs as follows:-

> "I confirm that an order for sale was made in respect of the property in Kerry and as such if a buyer emerges we could force your former husband's hand in relation to the matter. I attach an attested copy of the High Court order for your kind attention and recommend that you immediately instruct your Spanish solicitors to draw up transfer documentation in respect of your Spanish home.
>
> I note that you do not wish to proceed with an application for maintenance of a further financial relief against your former husband at this time.
>
> It is my understanding that your father will shortly revert to me with a plan for payment of the legal fees outstanding to this firm within a reasonable period of time."

The reference to Ms. Queally's wish not to proceed with an application for maintenance against her former husband reflected the instructions given by her to that effect to Ms. O'Brien on 25th March just before she entered hospital. Ms. O'Brien stated in evidence that she did not receive any instructions thereafter in respect of seeking financial relief and I am satisfied that this so.

138. By this stage Mr. Casey was representing himself having discharged Gallagher Shatter solicitors. He wrote on 22nd May to Ms. O'Brien stating that he had approached Ulster Bank requesting that the amount outstanding be converted into a ten year loan agreement. Ms. O'Brien replied by letter dated 21st May indicating that her client would not proceed with any application when the

matter came before the court on Friday 22nd May but would seek a further adjournment of three to four weeks. This correspondence was sent to counsel. At this time Ms O'Brien did not consider that Mr. Casey was dealing genuinely with the Bank. She agreed to an adjournment because she had no instructions to issue a motion. Ms. Queally was informed of these developments by letter dated 21st May.

139. On 25th May Ms. O'Brien spoke to Mr. Queally and discussed Mr. Casey's position. Mr. Queally queried where the deeds of the Kerry property were. They discussed the option of trying to force a sale of the property and obtain the deeds thereof.

140. As a result of that consultation Ms. O'Brien on the same date drafted a letter to Mr. Casey in the following terms:-

> "I might refer you to the Consent Terms ruled by the High Court on 7th November, 2008 which include an Order for sale of the property in Co. Kerry for the purpose of reducing our client's indebtedness to Ulster Bank. At this juncture, it is proposed that the property at Dunquinn, Co. Kerry is immediately placed on the market for sale through the offices of a reputable local auctioneer. In this regard you might nominate a firm of solicitors who would have joint carriage of sale with this office for the purpose of said sale, and also for the purpose of ensuring that the proceeds of sale would be allocated in accordance with the terms of the consent order, …
>
> We await hearing from you within ten days of the date hereof. Alternatively, we will bring an application before the High Court for the purpose of enforcing the said order …"

It was also proposed to send a copy of the letter to Ulster Bank.

141. Ms. O'Brien furnished a copy of this draft to Mr. Queally on 26th May, 2009. She requested that he contact her "to confirm whether it is in order to send on same". She noted that a meeting had been arranged provisionally for 2nd June at 2:00pm with Ms. Queally in order to discuss the options concerning the enforcement of the consent terms and the issue of outstanding fees. She also attached a copy from a recent land registry search which showed a pending registration of transfer to Mr. Casey together with the *lis pendens* registered by Ms. O'Brien. Mr. Queally did not instruct her to send the letter to Mr. Casey. No instructions were received at any stage to send the draft letter. Mr. Queally did not give evidence in the course of the trial concerning his involvement in these events.

142. Mr. Queally also raised the prospect that he might buy the Dunquinn property or that he might secure a buyer for it. This was discussed briefly but nothing came of it. Ms. O'Brien had some further contact with Mr. Queally concerning fees by telephone on 2nd June, 2009.

143. Ms. O'Brien wrote to Mr. McCarthy B.L. on 2nd June, 2009. By that stage the case had been adjourned for mention to 10th July. Mr. McCarthy was informed that Ms. Queally was considering her options following her husband's failure to comply with the terms of Clause 11. She stated that she had arranged to lodge the *lis pendens* against the relevant folio and furnished a copy of the draft letter of 25th May. She noted that they might need to issue a motion for the purpose of progressing the sale and she would keep him updated with developments in this regard. I am satisfied that at this stage Ms O'Brien was awaiting specific instructions to send the draft letter of 25th May and make the necessary application to court to procure directions in respect of the sale of the Dunquinn property.

144. On 9th June Ms. O'Brien wrote to Ms. Queally enclosing the correspondence received from the Land Registry in Waterford which now indicated that Mr. Casey was registered as the full owner of Folio 54586F Co. Kerry (the Dunquinn property). It also indicated that the lis pendens had been registered on the folio and that "at the time of writing there is no mortgage or charge registered against the property". She stated that she awaited Ms. Queally's instructions "with regard to proceeding with her application for sale of this property in order to discharge debt due to Ulster Bank". A copy of the letter was sent to Mr. Peter Queally. Ms. O'Brien stated in evidence that by this stage she was concerned that she had not received instructions to enforce the sale.

145. At a meeting on 10th June with Mr. Queally, Ms. O'Brien discussed the issue of fees, the order and the situation with Ulster Bank. They discussed the sale of the Dunquinn property. They also discussed the Naas property and the possibility that the Dunquinn property might be substituted for the Naas property as security with the bank. There was some further discussion about a possible maintenance application and Mr. Queally mentioned the prospect of returning to court on other issues. He also requested that she revert to the barristers and Mr. Peelo to seek a reduction of their fees.

146. Mr. Queally summarised the discussion of 10th June in an email to Ms. O'Brien on the 11th June:-

> "… We will seek to the best of our knowledge how we could proceed on realising cash from the Kerry property or whatever security Ulster Bank has other than security we know they have against the mortgage.
>
> *Partial Discussion – Without Conclusion*:
>
> Something I thought of that we did not discuss yesterday was trying to establish exactly the security that Ulster Bank has and the validity of same, where the deeds are presently held and what debentures are registered against it. I would like to see the other letters that Ulster Bank gave Michael in relation to the extra borrowings and how security was taken on same. I believe it will be important for us to have this information when we decide we are moving forward regarding the Kerry property. …
>
> I just thought of putting those few notes together, it won't be going anywhere until we are both happy about the format of what we outline on proposing to do."

147. At this time further consideration was given by Mr. Queally and Ms. Queally to challenging the basis of her liability to Ulster bank notwithstanding the terms of Clause 11. Ms. Queally alleged the fraudulent execution of documents in respect of the original Ulster Bank loans and Ms. O'Brien stated in evidence that at some point she had received advices from another barrister specialising in criminal law on this aspect of the case. This later formed part of Ms. Queally's defence to the bank's proceedings issued in 2011. Mr. Queally expressed a desire to obtain the relevant documents and have this matter examined before he made up his mind what to do next.

148. Ms. O'Brien gave evidence that she was absent from the office between 29th June and October 2009 on maternity leave. She also stated that no instructions were received by her from Ms. Queally or Mr. Queally to take any steps to enforce the order for sale as requested. However, in a subsequent letter dated 19th October, 2009 to Ms. Simone Walsh of Mason Hayes and Curran, Ms.

Queally referred to a conversation which she allegedly had with Ms. O'Brien in July 2009 in which she specifically instructed her to take the necessary steps:-

> "Regarding the property in Kerry I understand that another subsequent order has been obtained against Michael and secured against that house. I believe an order for sale is to be made/made already by that creditor. Following a conversation with Jennifer in July I understood that after the summer recess that we would be making an application for the sale to recover the €675,000.00 debt. Where does this new debt leave my claim and are you aware of the situation currently regarding the enforcement of our order? Are we better off allowing the other party to seek order if we would be paid first or should I be protecting my interests in another way?"

149. On 4th September, 2009 Gallagher Shatter solicitors registered a judgment mortgage against the Dunquinn property based on a judgment obtained against Mr. Casey in respect of legal fees due for their work on his matrimonial case. In the letter of 19th October Ms. Queally expresses an awareness that some creditor had an order for sale in respect of Dunquinn or that one was about to be made. In evidence she stated that she was seeking advice in that letter as to how to handle this new state of affairs, she was worried that there might be another creditor who had obtained an order for sale of the property. She is clearly concerned that another party may have priority over her entitlement to have the proceeds of sale applied to the discharge of the Ulster Bank debt. Her evidence of the alleged conversation with Ms. O'Brien in July 2009 was somewhat unclear. She stated that she probably had a telephone conversation with her:-

> "If it is not here on any of these notes from myself or letters or it is not in a memo from Mason Hayes & Curran, that nobody recalled it or it was not put down. But I would not say to somebody something that referred to something that she should know about unless it was true … In July I had a conversation. This is another person dealing with it from Mason Hayes & Curran called Barbara Casey who I don't even recall – I remember a Simone Walsh, who seemed to take over from Jennifer O'Brien or was her secretary and Donagh something. But I know, you know, at this stage Jennifer O'Brien had moved on, she was dealing with cases and so I think Simone Walsh was left to mop up with me, that I was dealing with her. So this Barbara Casey sent me the order and I think it must have prompted me between 6th July and 4th September to call Jennifer and I think I did speak to her, I must have."

Her counsel then asked whether her understanding following this conversation was that after the summer recess an application would be made for the sale of Dunquinn to recover the monies in respect of the Ulster Bank debt: she replied in the affirmative.

150. Ms. O'Brien's next documented involvement, following her departure on maternity leave on 29th June appears to be a reply to the email of the 19th October dated 21st October following her return to the office.

151. In evidence Ms. O'Brien stated that Ms. Barbara Casey, an assistant solicitor and Mr. Donagh McGowan, the head of the Family Law Unit at Mason Hayes & Curran, dealt with Ms. Queally's case in her absence. She denied any conversation with Ms. Queally in July 2009. She was not instructed to apply to court in relation to the sale of the Dunquinn property. She had been seeking instructions to that effect since January 2009. She regarded the suggestion that she was instructed to bring any application by Ms. Queally in July or September as a fabrication.

152. In the same email of 19th October Ms. Queally suggested that she had received a number of calls and messages from Ms. O'Brien in late-September. However, Ms. O'Brien denied that she had left any telephone message for Ms. Queally in September and she believed that she was still on maternity leave at that point. Ms. O'Brien also noted that though Ms. Queally stated that she had received a telephone message from her in late-September she did not claim that she had spoken to her at that time. An objection was made by counsel for Ms. Queally during the course of Ms. O'Brien's evidence that it had not been put to Ms. Queally that she had not given this instruction to Ms. O'Brien in July 2009. However, I also note that in the course of cross-examination counsel for the plaintiffs suggested in a question that was not date specific that Ms. Queally's suggestion that she had instructed Ms. O'Brien to go back to court in respect of the sale of Dunquinn was fabricated. Ms. Queally denied the suggestion.

153. There is no note or attendance reflecting this alleged conversation with Ms. O'Brien. The correspondence and her father's email summarising the conversation of 10th June is consistent with the submission that no instruction to return to court to seek the implementation of the order for sale was given by Ms. Queally or her father up to the time that Ms. O'Brien went on maternity leave on 29th June. It is clear that the Queallys wished to pursue the alleged fraudulent feature of the transactions with Ulster Bank Ltd. and this is also clearly reflected in the letter of 19th October. I am not satisfied on the evidence that any instruction was given to Ms. O'Brien in July 2009 to enforce the order for sale. I am not satisfied to accept Ms. Queally's memory as reliable or correct on this matter.

154. Furthermore, in the course of maintaining that she had furnished instructions repeatedly to Ms. O'Brien in this regard she referred for the first time, in evidence, to records of telephone calls made to Ms. O'Brien on her mobile telephone. She stated that it was evident that one conversation in the records which she had obtained continued for 36 minutes and another for 25 minutes. She claimed to have relevant dates to support this proposition together with text documents and data. She claimed that these had been handed to her on the morning of the 7th February 2018. It was suggested that appropriate memoranda were not kept of these calls by Ms. O'Brien. The court gave Ms. Queally an opportunity to furnish these records to her solicitor and counsel. They were also furnished to the plaintiffs' solicitor and counsel. The records indicated that between January 9th and February 23rd 2009 there was one telephone call to a telephone number which was that of Arthur O'Hagan & Co. solicitors. As already indicated that firm merged with Mason Hayes & Curran in October 2008. The telephone call was alleged to have taken place on 2nd February, 2009 and lasted for one minute and ten seconds. Ms. Queally believed that the call was made in order to speak to Ms. O'Brien. No other relevant calls were identified by the witness. I am not satisfied that the defendant has established that she made repeated attempts to contact Ms. O'Brien to give her the instructions in controversy or that she in fact made the telephone calls which she described, which on the basis of the records produced have not been established.

155. I am satisfied that the agreement for an order for sale in Clause 11 and the direction that the proceeds of sale be applied to the discharge of Mr. Casey's liabilities to Ulster Bank could have been enforced as an order against Mr. Casey by further application to the court. Clause 11 was deemed to be part of the order of 7th November, 2008. Even if this were not so and it was to be regarded merely as an agreement for an order, an application could have been made to the court to have an order made. If Mr. Casey was in default of his obligations under Clause 11, application could have been made to the court for directions in respect of the procedural steps necessary to sell the Dunquinn property. I am satisfied, as stated in evidence by Mr. Durcan S.C. that there was no difficulty in relying upon the terms of Clause 11 as the basis for a return to court in order to ensure that the necessary steps were taken to secure the sale of the property. However, instructions were required to do so. I accept Ms. O'Brien's evidence that no instruction was given to her between January and July 2009 to return to court to seek to enforce the order for sale in the specific terms now alleged nor am I satisfied having regard to the course of events, correspondence and dealings between Ms. O'Brien and Ms. Queally and Mr.

Queally, that Ms. O'Brien had a general instruction to do so. Clearly Ms. O'Brien sought specific instructions in relation to taking steps in the case and in particular, in respect of seeking further specific relief on behalf of her client to enforce the sale. I am satisfied that she acted correctly in seeking those instructions in a way that any reasonable and prudent solicitor would given the circumstances which she faced. Unfortunately Ms Queally never gave her the necessary instructions. Instead Ms. O'Brien was faced with a degree of vacillation and indecision on the part of Ms. Queally and Mr. Queally during this crucial period. On 4th September 2009 Gallagher Shatter registered a judgment mortgage against Dunquinn and on 9th February 2010 obtained a well charging order on the property together with an order for sale. If the necessary instructions had been forthcoming I have no doubt that the plaintiffs acting in accordance with those instructions would then have moved an application before the High Court to secure the necessary directions to advance the sale of the property and the disbursement of the proceeds of sale in accordance with Clause 11 in advance of those events. I am not satisfied that the defendant has established that the plaintiffs were negligent or in breach of duty or contract in this regard.

The Sale of Dunquinn

156. It is submitted on behalf of Ms. Queally that there were a number of other essential steps which ought to have been taken to protect her from the consequences of her husband's default in discharging €10,000.00 per month or in the event that the bank resiled from the agreement if it obtained a valuation of less than €1 million for Dunquinn. In particular, it was submitted that if Clause 11, contained an order for sale in respect of Dunquinn it should have been registered as a burden on the property folio pursuant to s. 74 of the Registration of Title Act 1964 which provides inter alia:-

> "Burdens which are registered as affecting the same land, and which if unregistered would rank in priority according to the date of their creation, shall … rank according to the order in which they are entered on the register and not according to the order in which they are created or arise."

It is submitted that the failure to register the order for sale allowed a third party judgment obtained by Gallagher Shatter solicitors to be registered in priority to it and that the plaintiffs as her solicitors owed Ms. Queally a duty of care to register the order. In addition, it is submitted that the steps taken by Ms. O'Brien post-settlement in registering a *lis pendens* on Dunquinn and advising Ms. Queally to issue a motion for attachment and committal were completely ineffectual and failed to secure Ms. Queally's interests under Clause 11 adequately or at all.

157. A *lis pendens* was registered on the relevant folio on 7th April, 2009 by Ms. O'Brien. Gallagher Shatter, solicitors, sued Mr. Casey for outstanding fees due to them and obtained judgment against him on 7th April in the amount of €143,140.35 together with interest. As already stated on 4th September, 2009 Gallagher Shatter registered a judgment mortgage against Dunquinn and on 9th February, 2010 obtained a well charging order on the property together with an order for its sale. It should be noted at this stage that though the terms of Clause 11 did not contemplate the provision of a legal charge to the bank over Dunquinn, Clause 3 of the bank's letter of agreement of 4th November 2008 provides that the bank would be provided with a first legal charge over the property. This was never effected: it was dependent upon the implementation of the agreement with the bank from which it resiled pursuant to the letter of 4th March 2009. Thus the first charge on the folio was that of Gallagher Shatter.

158. Mason Hayes & Curran remained the solicitors on record in respect of the matrimonial proceedings which had been adjourned from time to time for mention. They remained on record in the proceedings until 23rd March, 2011 when they were replaced by Nolan Farrell & Goff solicitors. In reality the relationship between the plaintiffs and the defendant had broken down by December 2009.

159. On 1st September, 2010 the County Registrar directed that advertisements be published in respect of encumbrances on the property in Dunquinn. She was informed about the *lis pendens* pending against the property but no charge had been registered in the folio in connection with the family law proceedings. On 17th December, 2010 Gallagher Shatter issued an *ex parte* docket seeking an order vacating the *lis pendens* registered on the property.

160. In early 2010 Ms. Queally retained the firm of Nolan Farrell Goff Solicitors who had previously acted for Mr. Peter Queally in company and commercial law matters to advise on the Ulster Bank indebtedness and the charge over the Woodlands property. By December 2009 Ms. Queally was aware of the judgment mortgage obtained by Gallagher Shatter. She instructed Mr. John Goff solicitor and counsel to attend at a hearing on 14th January, 2011 before the Circuit Court and to object to the vacation of the *lis pendens*. The Circuit Court directed that the *lis pendens* be vacated and that the proceeds of sale be lodged with the County Registrar and also awarded the costs of the application against Ms. Queally. Mr. Goff stated in evidence that it was a somewhat futile application as he did not consider that it was appropriate given that the proceedings had concluded and it was inevitable that it would be vacated. However, he felt any step however unlikely to succeed should be taken in an attempt to redeem the situation for his client. Following the sale of the property the County Registrar received the proceeds of sale of €451,000.00. On 1st April, 2011 Gallagher Shatter issued a motion for payment by the County Registrar of its share of the proceeds of sale.

161. In the meantime, on 31st March, 2011 an application was made on behalf of Ms. Queally to the High Court under the liberty to apply provision in the order. Since there were no papers properly before the court it directed that a motion be issued to re-enter the proceedings. A motion was issued on 6th April, 2011 by Nolan Farrell & Goff seeking an order for directions in relation to the implementation of the terms of the settlement. The High Court granted liberty for short service of the notice of motion and made an order restraining the County Registrar from making any payment in respect of the proceeds of sale for a period of four weeks. The matter was again before the High Court on 9th May, 2011. Counsel on behalf of Ms. Queally sought an extension of the order which was refused by the court (Abbott J.). Mr. Goff stated that the learned judge refused to make any order in respect of the proceeds of sale as the High Court order in the separation proceedings did not contain a formal order for sale or a direction for payment to Ulster Bank of the proceeds of sale. The substantive relief sought in this motion on behalf of Ms. Queally was to transpose the agreement for an order for sale and disbursement of the proceeds of sale into an order of the court but this was refused because an order for sale had already been made by the Circuit Court.

162. On 8th June, 2011 the County Registrar considered the applications made in respect of the payments out of the proceeds of sale and directed that a sum of €10,914.20 be paid to Coldwell Banker Property Associates, auctioneers and a sum of €15,476.50 to Eversheds O'Donnell Sweeney solicitors for the conveyance. A sum of €179,937.33 was paid out to Gallagher Shatter in respect of the sum owed and the costs of judgment and interest and costs on the well charging proceedings. This left a balance of €244,672.00.

163. Ulster Bank had been a notice party at the hearing before Mr. Justice Abbott on 6th April, 2011. Thereafter Ulster Bank made a separate application to the High Court for the payment out of the balance of the proceeds to it by the County Registrar which was granted. It is clear at this stage that Ulster Bank did not have any charge over the Dunquinn property which had been sold. However, the court notes that it was directed that the proceeds of sale be paid to Ulster Bank in discharge of the €650,000.00 due and owing by Mr. Casey. It is unclear to the court upon what basis the High Court order in favour of Ulster Bank was made. Abbott J. lifted the *in camera* rule in respect of the terms of settlement on 13th May, 2011 for the purpose of forwarding a redacted copy of the relevant

part of the order and terms of settlement to the solicitors for Ulster Bank in order to assist them in applying to the High Court for an order seeking the payment out of the balance of the proceeds of sale. Thus it appears that Ulster Bank were relying upon Clause 11 for the payment out of a balance of the proceeds of sale to them in accordance with its terms.

164. Mr. Goff gave evidence that the sum of €14,701.19 in costs were incurred by Ms. Queally in seeking to secure payment for the Ulster Bank of the proceeds of sale of the property at Dunquinn.

165. It is submitted on behalf of the plaintiffs that the registration of the judgment mortgage by Gallagher Shatter did not as a matter of law give priority to their judgment mortgage over Ms. Queally's order of 7th November in respect of the Dunquinn property. As the judgment mortgagee was a volunteer and the judgment mortgage was simply a form of security created by the creditor over the land as it existed at the time of registration, the judgment mortgagee stepped into the shoes of the debtor and could not obtain a greater priority than the debtor could have himself. As already seen Mr. Durcan S.C. did not consider that registration of an order for sale was necessary on the established legal authorities to ensure priority once an order for sale was made and the proceedings were in being prior to registration of the judgment mortgage. There is no evidence that any application or submission was made to the learned Circuit Court judge that the order in respect of the Dunquinn property in the matrimonial proceedings entitled Ms. Queally to priority over the registered judgment mortgage either at the time when an application was made to lift the *lis pendens* by Gallagher Shatter solicitors or when the order was made directing payment out of the judgment amount to them. There are a number of decisions on this issue which support Mr. Durcan's opinion and understanding of the law as it applied at the time of the agreement.

166. In *A.S. v. G.S.* [1994] 1 I.R. 407 the respondent was the registered owner of a leasehold interest in registered lands. Allied Irish Banks plc.obtained a judgment against him. The applicant, however, had issued proceedings for a decree of judicial separation which also included a claim for a property adjustment order under s. 15(1)(a) of the Judicial Separation and Family Law Reform Act 1989 in respect of the lands. However, this application, was not registered as a burden on the lands. Following the issuing of the proceedings, a preliminary protection order was made under s. 11 of the Act directed to the bank restraining it from registering the judgment as a mortgage over the respondent's interest under the hearing of the application for the decree and the property adjustment order. At the hearing the bank sought the lifting of the preliminary protection order prior to the making of the property adjustment order to enable it to register judgment prior to the transfer of the respondent's interest. The applicant contended that the application for the property adjustment order was a lis pendens of which the notice party had express notice. The High Court (Geoghegan J.) made a property adjustment order but without first lifting the preliminary protection order. The court held that an application for a property adjustment order was a registrable *lis pendens* even though the claim to an interest was contingent on the making of the order sought rather than an estate or interest alleged to exist at the commencement of the action. The concept of a *lis pendens* was not linked to the equitable doctrine of notice but existed as a matter of public policy to prevent a party to litigation giving to others pending a litigation rights to the property in dispute which would give rise to interminable litigation. In that case because the notice party had been given notice of the applicant's claim by virtue of being a notice party to the application for a preliminary protection order, it could not have registered a judgment mortgage which would have taken priority over the property adjustment order and therefore no point would be served by lifting the preliminary protection order. In any event, Geoghegan J. held that since a judgment mortgagee was a volunteer rather than a person acquiring an interest for value and that since the protection of the Judgments (Ireland) Act 1844 was confined to protecting those acquiring an interest for value, a judgment mortgagee was bound by a *lis pendens* irrespective of whether he had been on notice or whether the *lis pendens* had been registered. Geoghegan J. stated at pp. 414 to 415:-

> "At the time of the Act of 1844 claims to land would have been based on alleged estates or interests in the land at the commencement of the action. But having regard to the general purpose of the pre-1844 common law and chancery rules as to the binding nature of a *lis pendens*, I see no reason why a claim for a property adjustment order should not be included even though the claim is contingent on the court deciding to make such an order. It follows, therefore, that AIB once it had notice of the claim, could not register a judgment mortgage which would take priority over the property adjustment order. If that is not the legal position, the consequences are most unfortunate in that if, for example, the hearing of an application for an adjustment order had to be adjourned for, say, two weeks because of not being reached in the list, it could be totally defeated by registration of a judgment mortgage in the meantime.
>
> I should add that although Mr. Durcan relies on the actual notice given to AIB by the application for protective orders, I do not think he has to go that far. The protection given to "purchasers and mortgagees" in the Act of 1844 is intended only for persons acquiring an interest for value. But a judgment mortgagee has long been held to be a volunteer (see *Re Murphy and McCormac*k [1930] I.R. 322 and *Re Strong* [1940] I.R. 382). It would seem to me that a volunteer is bound by a *lis pendens* irrespective of whether he has notice of it and irrespective of whether the *lis* has been registered. This is an added reason why I should make the property adjustment order without first giving AIB an opportunity of registering a judgment mortgage."

167. The principles set out in *A.S. v. G.S.* were applied and considered by Clarke J. in *ACC Bank plc. v. Markham and Casey* [2007] 3 I.R. 533. In that case the defendants were the joint owners of a property that had functioned as a family home until their separation. In subsequent family law proceedings, the second defendant sought a transfer of the property into her sole name under s. 9 of the Family Law Act 1995 but never registered her legal proceedings as a *lis pendens* under the Registration of Title Act 1964. The plaintiff secured a judgment against the first defendant and registered it as a judgment mortgage over his interest in the former family home unaware of the litigation between the defendants. The plaintiff then applied to court for a declaration that its judgment was well charged and further for an order for partition and sale. The second defendant submitted that the plaintiff's application should be deferred until the resolution of her family law proceedings on the basis that any interest that a court might direct the first defendant to transfer to her in that action, would rank in priority over the registered judgment mortgage. The plaintiff relying on s. 10 of the 1844 Act and s. 17 of the Registration of Title Act 1964 contended that the second defendant having failed to register her dispute as a *lis pendens* had forfeited any priority in favour of the plaintiff. Clarke J. refused the application holding that any interest to which the second defendant might become entitled as a result of proceedings instituted by her ranked in priority to the judgment mortgage of the plaintiff and that where litigation was pending between parties concerning the right to a particular estate the decision of the court was binding not only on the litigants but on those who provided title under them by alienation. The family law proceedings in which a transfer of an interest in property was sought from one spouse to the other was sufficient to constitute a *lis pendens*. Since the judgment mortgagee was a volunteer who had no interest for value he was precluded from relying upon s. 10 of the 1844 Act and must rank behind any *lis* or suit instituted prior to the registration of his judgment mortgage. Furthermore, s. 71(4) of the Registration of Title Act 1964 did no more than recognise the status of a judgment mortgagee as a volunteer and that he registered his interests subject to all unregistered rights that existed over the property at the time of registration, including any suit or *lis* commenced prior to such registration. Section 71(4) then provided:-

> "Registration of an affidavit which complies with the said sections and this section shall operate to charge the interest of the judgment debtor subject to...

(c) all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit."

The learned judge stated:-

> "20. The real question is, therefore, whether the second defendant, as a person who has brought a claim which may, if successful, entitle her to a direction that certain lands be transferred to her, may be said to be a person who has an unregistered right subject to which the first defendant held his interest at the time of the registration of the affidavit. If she is then it is clear from the provisions of s. 71 that the judgment mortgage is subject to that right and thus that her right has priority over the judgment mortgage.
>
> 21. It seems to me that the use of the phrase 'all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit' does no more than recognise the historical position as analysed by Kenny J. in *Giles v. Brady* [1974] I.R. 462 and Geoghegan J. in *A.S. v. G.*S. [1994] 1 I.R. 407. It acknowledges the position of a judgment mortgagee as a volunteer. It therefore specifies that, as such, the judgment mortgagee will take subject to unregistered rights. In equity such rights included the rights of persons who had, prior to the registration of the judgment mortgage, commenced a suit or *lis* in respect of the lands. There is nothing, therefore, in the wording of s. 71 of the 1964 Act which would cause me to depart from the view expressed by Geoghegan J. in *A.S. v. G.S.* [1994] 1 I.R. 407.
>
> 22. It follows, therefore, that any interest to which the second defendant may become entitled as a result of the family law proceedings will rank in priority to the interest of the plaintiff under the judgment mortgage by virtue of the fact that the family law proceedings were commenced and in being as of the time of the registration of the judgment mortgage affidavit. …"

The learned judge therefore considered it appropriate to postpone any further consideration of the case until the family law proceedings had been concluded and the precise interest of the second defendant had been authoritatively determined.

168. In *Dovebid Netherlands B.V. v. Phelan* [2007] IEHC 239 Dunne J. also adopted and applied the principles in *A.S.* and *ACC Bank v. Markham*. In *Dovebid* a property adjustment order was made in matrimonial proceedings by consent and the plaintiff had not been permitted to make representations on whether the order should be made. An application was brought to have the judgment mortgage declared well charged. In considering the issue of priority between the plaintiff and the second defendant Dunne J. stated at p. 12:-

> "The decisions in the case of *S. v. S.* and *ACC Bank plc. v. Markham* whilst dealing with registered land contain principles that are applicable to unregistered land. It is clear from those authorities that a judgment mortgagee is a volunteer. Therefore, a judgment mortgagee will take its interest subject to unregistered rights. A person who has commenced legal proceedings in respect of the lands prior to the registration of the judgment mortgage is therefore entitled to rank in priority to the interest of a judgment mortgagee. The fact that the property in the instant case is unregistered does not seem to me to alter the question of priority. That that is so seems to me to be reinforced by the decision of Clarke J. in *ACC Bank v. Markham* in which he acknowledged that s. 71 of the 1964 Act, did not require a departure from the views expressed by Geoghegan J. in the case of *S. v. S.*"

169. It is clear therefore on the authorities cited above that once Ms. Queally had instituted proceedings in respect of the Dunquinn property as part of her matrimonial proceedings any interest to which she became or might become entitled as a result of those proceedings would rank in priority to the judgment mortgagee's judgment because the family law proceedings had been commenced and were in being at the time of the registration of the judgment mortgage affidavit. However, in this case those proceedings had resulted in an order for the sale of the property thereby crystallising Ms. Queally's interest in Dunquinn and moreover directing that the proceeds of sale thereof be paid to the Bank in reduction of Mr. Casey's liability under Clause 11.

170. Though it is accepted by Mr. Durcan and Ms. Hayes that an order for sale could have been registered as a burden on the property as suggested in evidence by Mr. Noonan, neither of them as experienced family law practitioners had ever experienced the registration of an order for sale and it was not the practice to do so because priority was clearly established in such circumstances. Both were confident that on the basis of the A.S. line of authority, once the family law proceedings had issued, the judgment mortgagee, being a volunteer, could not obtain priority over Ms. Queally's entitlements and more particularly when those entitlements had been crystallised in the form of an order, regardless of whether the order was registered or not. Furthermore, though s. 9 of the Family Law Act 1996 provides that a property adjustment order be lodged in the registry under s. 69(1)(h) of the Registration of Title Act, 1964 as amended, the mandatory registration of such orders did not apply to orders for sale. The registration of the order would not have affected its priority. It is unclear whether any submissions were made during the course of the later proceedings by the defendant's then advisors on the basis of A.S. line of authority which if relied upon offered a strong counterargument and/or answer to the Gallagher Shatter claim in that regard, more especially when Gallagher Shatter were on full notice of the existence of the proceedings, the order and the terms of Clause 11. In any event the plaintiffs and Ms O'Brien did not have carriage of or responsibility for the conduct of these later applications in respect of which no liability attaches or could attach to them. It is not an aspect of the case upon which Mr. Noonan appeared to have any view or knowledge: he had little or no experience of this aspect of matrimonial law and practice.

171. Ms. Hayes considered the registration by Gallagher Shatter of the judgment mortgage in this case to be most unusual. The judgment mortgagee, Gallagher Shatter, clearly knew that priority rested with Ms. Queally and had full notice thereof. She expressed surprise that a well charging order was made in favour of the judgment mortgagee as against the priority of the order for sale and discharge of proceeds that should have been accorded to Ms. Queally's order.

172. I do not consider that the issue of the registration of the *lis pendens* by Ms. O'Brien is relevant to these issues. Mr. Noonan did not consider that the registration of a *lis pendens* on the property in accordance with s. 69 of the Registration of Title Act 1964 was an appropriate response in the circumstances. He stated that under the section litigation which is pending must relate to a claim or interest in the property. It was not appropriate in the circumstances to register a *lis pendens* because there might be claim to a share of the proceeds of sale of that property. The *lis* must be fundamental to the ownership or interest in the property. He considered that other matters which were considered in 2009 such as returning to court for further financial relief or the application for a *lis pendens* were irrelevant. While that may be a reasonable view, the client and her father were anxious to consider these aspects of the case and others such as whether Ms Queally had any liability to the bank at all before taking any further action or giving the instructions repeatedly requested by Ms. O'Brien to return to court to enforce the sale of the property.

173. I do not accept Mr. Noonan's opinion that Ms. O'Brien fell short of her professional duty in failing to apply for the order for sale

and then registering it for the reasons already given. I also reject the proposition that Ms. O'Brien was so lacking in knowledge that she believed that the *lis pendens* would in the circumstances secure priority over a judgment mortgage and so advised Ms. Queally. Indeed Mr. Noonan accepted that the correspondence and in particular the letter of 9th June from Ms. O'Brien to Ms. Queally indicated that Ms. O'Brien fully understood the nature of a *lis pendens* and the fact that it was not a full protection against other mortgages or charges that might be registered against the property. He acknowledged that if Mr. Casey made an attempt to sell the property to a third party the *lis pendens* would have operated as notice of the fact that there was an issue arising in respect of the matrimonial proceedings in respect of the property. I am satisfied that the registration of the *lis pendens* occurred because at a number of stages the client became concerned that her husband might attempt to dispose of the property. It would be up to a potential third party purchaser to decide to proceed or abandon any proposed purchase on learning of it. I do not accept that Ms. Queally was advised that the registration of the *lis pendens* provided full protection for her against any other judgment mortgage or burden registered or that might be registered on the folio. In any event I am satisfied that such priority had already been established by operation of the law referred to above.

Conclusion

174. I am satisfied for the reasons set out above that the plaintiff is entitled to judgment in the amount of €64,818.70. I am not satisfied on the evidence that the defendant has established on the balance of probabilities that the plaintiffs or Ms. O'Brien were negligent or acted in breach of duty or contract by failing to protect the defendant's interests in the drafting of clause 4 or failing to secure the enforcement of Clauses 4 and 11. I am satisfied that the terms of Clause 11 provided an effective legal mechanism for the sale of the Dunquinn property and that the defendant and her father were requested to provide the necessary instructions to take the necessary steps to apply to the High Court to do so at a time which would have secured the proceeds of sale for the discharge of the husband's liability to the bank. I am also satisfied that these instructions were not given by the defendant at all. Had they been given I am satisfied that they would have been acted upon in a timely and effective way by Ms. O'Brien and the plaintiffs and most likely before September 2009. In addition I am not satisfied that the failure to register Clause 11 and the order of 7th November 2008 as a burden on the Dunquinn property in the circumstances of this case amounted to negligence or breach of duty. The defendant's counterclaim is therefore dismissed.