

THE HIGH COURT

[2011/3346P]

BETWEEN

MICHAEL HEFFERNAN AND LINDA HEFFERNAN

PLAINTIFFS

AND

PATRICK MURRAY, SHANE TREACY, BARRY HARTE, TONY GARVIN, BRIAN SMITH, TOM KINGSTON, JOHN GAFFNEY, PAUL O'ROURKE, LOUISE RYAN, PHILIP RYAN, THOMAS RYAN AND GEORGE MURPHY T/A BALLYKISTEEN DEVELOPMENTS PARTNERSHIP

AND

JOHN SIMPSON

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 13th day of March, 2015

1. In these proceedings the plaintiffs claim specific performance of an agreement in writing entered into between the plaintiffs and the first to twelfth named defendants trading as Ballykisteenn Developments Partnership and the thirteenth named defendant John Simpson whereby, *inter alia*, the Defendant agreed to provide the Plaintiffs with a dwelling house and garage at a location to be specified by the Plaintiffs and to the specifications set out therein. In the proceedings the plaintiffs also claim, *inter alia*, damages in lieu of or in addition to specific performance. The proceedings were heard over six days between the 3rd of December 2014 and the 11th of December 2014.

2. In opening the case, counsel for the plaintiffs, Mr. Delaney SC informed the Court that by reason of the fact that the defendants were not in a position to transfer to the plaintiff the site (on which the house and garage were to be built), the plaintiffs were now electing to claim damages in lieu of specific performance, which the plaintiffs would claim in the amount of obtaining a similar house in a similar location. Counsel informed the court that the main concern of the plaintiffs was to get enough money to obtain what they should have received had the contract been performed and therefore the plaintiffs would not be seeking additional damages in the sum of €250 per week as claimed in paragraph (e) of the indorsement of claim and as referred to in paragraph 29 of the statement of claim.

Facts

3. By agreement for sale made in writing dated the 25th May, 2005 (hereinafter referred to as the "contract for sale") the plaintiffs entered into a contract for sale of their dwelling house known as the "Groom's House", Ballykisteenn, Co. Tipperary being all the property the subject matter of folio 21702F of the register of Co. Tipperary with Mr. Barry Harte, the third named defendant, and George Murphy the twelfth named defendant, trading as Ballykisteenn Development Partnership (which Partnership is hereinafter referred to as "the Partnership"). The name of Mr. Simpson, the thirteenth named defendant had originally been endorsed on the contract for sale but at the time of execution of same his name was removed and its removal was noted by the initials of the solicitors acting on behalf of the parties to the contract for sale. The contract for sale was signed in person by each of the plaintiffs and on behalf of the purchaser by Mr. Eugene Tormey, solicitor for the Partnership. The agreement was subject to sixteen special conditions most of which are relevant to the within proceedings and which I set out below in accordance with the numbering of the conditions as appearing in the contract for sale:

"7. The purchasers have already obtained planning permission for proposed development on adjoining lands and premises known as Ballykisteenn Golf and Country Club, Ballykisteenn, Tipperary, which proposed development will be a mix of residential and commercial units. The said development allows for *inter alia* the demolition of the premises in sale. Compliance with the said planning permission and all works relating to same shall be a matter solely for the Purchasers at the Purchaser's expense.

8. Closing (as here and after defined) shall take place on the expiry of twelve months from the date hereof or earlier if agreed.

9. On closing, the Vendors shall hand over vacant possession of the premises in sale to the Purchasers at which point in time an unencumbered freehold title to the said premises shall pass to the Purchasers. If and when called upon by the purchasers, prior to closing, the Vendors will grant a revocable licence to the Purchasers to enter upon and carry out development works (to be agreed in writing prior to the granting of said licence) on the premises in sale.

10(a). The Purchasers shall, no later than four weeks from the date hereof, effect and complete an assurance to the Vendors of the Site (referred to in special condition 11 hereinafter contained) and shall furthermore, within the same period, enter into a binding agreement whereby the Purchasers will contract with the Vendors for the erection of a dwelling house and garage as per the copy map affixed hereto on the said site more particularly referred to in special condition 11 hereinafter contained and to complete the said dwelling house and garage on or before the closing date – "Completion" in this regard meaning completion to the satisfaction of the Vendors appointed consulting Engineer/Architect.

10(b). The Purchasers are presently applying for planning permission for the erection of the proposed dwelling house and garage on the site more particularly referred to in sub paragraph (a) hereof – the Site. In the event that the Purchasers have not secured planning permission for the proposed development on the Site within six months of the date hereof or such further time as may be agreed in writing between the parties hereto, the obligations of the Purchasers under the within agreement for sale and more particularly but not to the exclusion of any other condition special condition 11 hereof

in relation to completion of dwelling house and garage aforesaid shall apply to the site more particularly coloured in yellow on the said map attached hereto and the same time limits shall apply or alternatively, at the Vendors' sole discretion shall apply to an alternative site as hereinafter in this special condition set out.

In default in the foregoing respect the obligations of the purchasers under the within agreement for sale and more particularly, but not to the exclusion of any other condition, special condition 11 hereof in relation to completion of dwelling house and garage aforesaid shall apply to a site at another location, not within the Development known as Ballykisteen Golf and Country Club aforesaid, of the Vendors choice which said Site shall be acquired at the direction of the Vendors but at the expense of the Purchasers.

(c) Furthermore, on closing, the Purchasers shall grant to the Vendors, pending closing as hereinafter defined, exclusive possession and control of one three bed roomed lodge and one two bed roomed lodge presently being developed by or on behalf of the Purchasers in the complex known as "Ballykisteen Golf and Country Club" free of rent and without interruption. Possession and control of the said units shall be retained by the Vendors pending absolute compliance by the Purchasers with their obligations herein contained.

11. Subject to what has hereinbefore appeared, the consideration for the sale herein shall consist of payment, on the exchange of the within agreements, of €72,000 and also the erection and satisfactory completion of a dwelling house and garage as per the plans and specifications attached hereto on the site more particularly coloured orange on the copy map affixed hereto or as hereinbefore provided for on the site coloured yellow on the said plan attached thereto. The said dwelling house and garage shall be to the specification attached hereto save that the Purchasers shall not be responsible for installation of windows, doors and interior finishes apart from painting for which the Purchasers will be responsible. On satisfactory completion of the said dwelling house and garage and passing over of vacant unencumbered possession thereof and title thereto to the Vendors the obligations of the Purchasers set out in special condition 10(b) hereof shall cease. The said payment of €72,000 shall not under any circumstances be refunded.

12. In the event that the aforementioned proposed dwelling house and garage have not been completed and handed over to the Vendors as hereinbefore set out the Purchasers shall pay to the Vendors a fine of €250 per week from the closing date to the date of handing over of the said completed dwelling house and garage to the Vendors by the Purchasers.

13. The Vendors shall licence entry upon the premises in sale by the Purchasers for the purpose of commencement of site works for the Purchasers' proposed development scheme in respect of a neighbouring premises (heretofore known as Ballykisteen Golf and Country Club). The Purchasers shall maintain and indeed furnish evidence of adequate employers and occupiers' liability insurance in respect of all such works for the duration of same."

4. It is a feature of the case that one of the plaintiffs, namely Linda Heffernan was a member of the Partnership. However, for obvious reasons she was not named as a defendant. The Partnership required the plaintiffs' property because the hotel being constructed by the Partnership encroached upon both the site upon which the dwelling house was built and upon the dwelling house itself.

5. While contract negotiations between the plaintiffs and the defendants were ongoing, the plaintiffs came under pressure from the Purchaser to vacate their dwelling house because the builders of the hotel required to take possession of the same in order to demolish the house and commence construction works upon the site thereof. The plaintiffs left their dwelling house in or about January 2005 and it was demolished in or about February/March 2005 (evidence was given as to demolition of the house in both February and March but nothing of significance turns upon the precise date of demolition). The plaintiffs received payment of the sum required by special condition number 11 of the contract for sale - €72,000, from the defendants prior to leaving the dwelling house.

6. The plaintiffs were thereafter accommodated in two lodges constructed by the Partnership within the development, one of which they used for storage and the other of which they used for accommodation. This was in accordance with special condition 10(c) of the contract for sale and, also in accordance with that special condition, these units were provided rent free to the plaintiffs. Evidence was given by Mrs Heffernan however that that arrangement, which was subsequently facilitated by Ulster Bank, which bank was financing the development, was assured only until 31st December, 2014. Notwithstanding the obligations of the Purchasers under special condition 10 (c) of the contract for sale to keep possession and control of those units until the provision of a dwelling house to the Plaintiffs, it appears the Defendants caused the same to be secured to Ulster Bank.

7. Title was transferred by the plaintiffs to the Partnership (including the second named plaintiff) in December 2005. The thirteenth named defendant, Mr. Simpson, was not a transferee. The first to twelfth named Defendants and the second named Plaintiff were registered as owners of the site which comprised all of Folio 21702F County Tipperary on 21st December 2005.

8. Following execution of the contract for sale, the plaintiffs chose their preferred site for the construction of their new dwelling house. An initial planning permission for the construction of the plaintiff's new development was obtained in 2006. However, because of unsuitable conditions in the planning permission, it was necessary to apply for a further planning permission which was granted in January 2008. Construction of the new dwelling house started shortly thereafter but stopped at roof level because the defendants ran into financial difficulties as a result of which construction of the dwelling house was never concluded. Nor was title to the site transferred because, following its acquisition, it was secured by the Partnership to Ulster Bank which refused, until 2013, to agree to the transfer of the site to the plaintiffs. The evidence given by the Plaintiffs in this regard, which was not contested, established beyond any doubt that the Defendants failed to comply with their contractual obligations to the Plaintiffs to provide the plaintiffs with a site and completed dwelling house as described above.

9. An important feature of the case is the context in which Ulster Bank reached agreement with the plaintiffs to release the site to them and the fact that this agreement was not disclosed by the plaintiffs to the defendants or indeed to their own legal representatives prior to the trial of the action. This agreement arose out of the settlement by the second named plaintiff and her siblings, the ninth, tenth and eleventh named defendants of proceedings issued by Ulster Bank against the Partnership in connection with lands known as the "Ballyphillip Lands." Those were lands acquired by the Partnership subsequent to the transaction the subject of those proceedings, with the assistance of finance from Ulster Bank. The existence of the settlement agreement only came to light following a question put by Mr. O'Flaherty, B.L., Counsel for the first to fifth and seventh, eighth and twelfth named defendants. This failure (to disclose the agreement between the Plaintiffs and Ulster Bank) resulted in an application by the first to eighth, and the twelfth and thirteenth named defendants to dismiss the proceedings on the grounds that the plaintiffs did not come to equity with clean hands.

The Partnership

10. The precise composition of the Partnership is a matter of some controversy in these proceedings. The Partnership was established by partnership deed dated 17th April, 2004. The parties to the deed were the first to twelfth named defendants (inclusive) and the second named plaintiff. The background to the establishment of the Partnership was the sale by Mrs. Josephine Ryan, mother of the second named plaintiff and the ninth to eleventh named defendants, of the lands comprising Ballykisteen Golf Club which had been developed by Mrs. Ryan and her late husband on their lands at Ballykisteen during the 1990's.

11. Mrs. Ryan gave evidence that she engaged Mr. John Shelley, auctioneer, to sell her property and he subsequently introduced her to the thirteenth named defendant, Mr. Simpson. She subsequently met with Mr. Simpson who outlined to her his plans for the development of the property and they agreed upon terms. Close to completion of the transaction, Mr. Simpson introduced Mrs. Ryan to Mr. Harte, the third named defendant who in turn introduced her to the fourth to eighth named defendants and the twelfth named defendant who, together Mr. Harte, were already members of another partnership known as the Bailey Partnership. According to Mrs. Ryan, Mr. Simpson explained to her that at this time he "had decided against putting his name on the property and that George Murphy would act in trust for him." However Mrs. Ryan continued dealing directly with Mr. Simpson and on most occasions, according to Mrs. Ryan, she met with Mr. Simpson and Mr. Shelley to discuss the transaction.

12. The transaction that was agreed involved the sale by Mrs. Ryan of her lands and family home for the sum of €5 million. It was agreed that Mrs. Ryan would be allowed to continue to live in her family home until 2008. She moved out to live with the second named plaintiff some time during that year. Prior to conclusion of the sale, Mrs. Ryan met with Mr. Harte, the third named defendant and Mr. Murphy, the twelfth named defendant, but she did not meet with any other members of the Bailey Partnership until after the conclusion of the sale. The contract for sale of these lands was dated 18th June, 2003 and the sale of the lands was completed on 23rd January, 2004. A completion account in relation to the sale was handed into Court and Mrs. Ryan confirmed that that account correctly identified the parties to the contract and those parties were: Mrs. Josephine Ryan, Vendor and Barry Harte, John Simpson and George Murphy, Purchaser. However, it appears from the folio opened following completion of the transfer of the lands by Mrs. Ryan that the registered owners are: Barry Harte; Brian Smith; George Murphy; John Gaffney; Tom Kingston; Patrick Murray; Shane Tracey; Tony Garvin; Paul O'Rourke; Louise Daly; Phillip Ryan; Thomas Ryan and Linda Heffernan. Mr. Simpson is not registered as one of the owners.

13. Mrs. Ryan stated that at this stage she was fully paid the purchase price for her lands and she had no intention of involving her children in the development contemplated by the purchasers. Subsequently however, following discussions with Mr. Harte and Mr. Murphy it was agreed that Mrs. Ryan's children would become members of the Partnership, although Mrs. Ryan herself was not to be a member. This was agreed on the basis that Mrs. Ryan was to place €2 million at the disposal of the Partnership for a period of two years with an option for that to be extended by a further period of one year. She stated that on the basis of making these funds available, it was agreed that her children were to be admitted to the Partnership and were not to be subjected to any cash calls by the Partnership. Moreover Mrs. Ryan stated in evidence that she believed that she had an agreement whereby her children could never be called upon to pay for the provision of a house on behalf of the plaintiffs. She stated that she raised this at partnership meetings - to which she was invited although she was not a partner - and in or about 2010 she asked the other partners to confirm this formally. Mrs. Ryan prepared a document (typed by the second named plaintiff) which she took to a meeting in 2010 inviting the other partners to sign an acknowledgment that the obligation to provide the plaintiffs with a family home "rests with all partners excluding Louise Ryan, Thomas Ryan and Philip Ryan". Mrs. Ryan handed a copy of this document into Court. This document was brought to a Partnership meeting at which the thirteenth named defendant was in attendance and was signed by the thirteenth named defendant, Mr. Simpson, and also by the third named defendant, Mr. Harte, the seventh named defendant Mr. Gaffney and by the first and second named defendants, Mr. Murray and Mr. Treacy respectively. It was not signed by Mr. Smith, Mr. O'Rourke, Mr. Kingston or Mr. Garvin. Mr. Smith refused to sign it and the others who did not sign it were not present at the meeting. On cross examination, Mrs. Ryan was asked as to the whereabouts of the original of this document and she stated that she believed that it was given to solicitors who acted for a time on behalf of Louise Ryan, Phillip Ryan and Thomas Ryan (who together shall hereinafter be referred to as "the Ryan siblings") in connection with these proceedings, namely Messrs Lavelle Colman.

14. Mrs. Ryan accepted that she was not a member of the Partnership, although she was invited to attend Partnership meetings and she attended approximately twelve such meetings. Her focus at these meetings was to protect the interests of her children. She was not satisfied that the Partnership agreement reflected precisely what had been agreed in particular in relation to two issues. The first of these was that, as explained above, it was never her intention that her children or indeed the plaintiffs should have to pay for their own house or that her children should be subject to cash calls of any kind. The second of these related to her own loan to the Partnership which she understood was to be repaid from borrowings in due course and not from profits. The Partnership agreement itself does not contain any provisions which would exempt the Ryan siblings, or the second named plaintiff, from any of the responsibility to provide the plaintiffs with their dwelling house under the contract for sale. Nor does it contain any provision which would exempt the Ryan siblings, or the second named plaintiff, from any cash calls.

15. Nor does the Partnership agreement explain the precise mechanism for repayment of the loan advanced by Mrs. Ryan. Instead it simply states that there will be no payment of any profits out of the Partnership to Mrs. Ryan until she has been repaid her loan. Thereafter, the next €2million of profits was to be divided amongst the partners other than the Ryan siblings and the second named plaintiff and thereafter profits were to be distributed in accordance with Partnership shares. In this regard the agreement provided that there was to be an initial capital contribution of €6,282,000 and set out the percentage of that amount that each of the partners were to contribute. No evidence was given as to who contributed how much (save for evidence relating to the loan advanced by Mrs. Ryan, which is only mentioned in passing in the agreement) and consequently it is not possible to say what the percentage shares were in the Partnership at any time. Since the Partnership did not make profits, however, this is perhaps of academic interest, but it does indicate that the Partnership did not function in the manner provided for in the Partnership agreement.

16. Management of the Partnership was delegated under clause 10 (a) to a managing partner, namely the third named defendant, Mr. Harte. Clause 10(c) of the Partnership agreement provides that "the overall management and administration of the Partnership and all dealings and decisions in connection with the development or re-development of the "Property" shall be determined by the managing partner acting within the parameters of the brief given to him by the Partnership". "Property" was defined in the schedule to the Partnership Agreement and, in general terms, comprised the property of the Partnership on which the Golf course had already been constructed and on which the hotel and lodges were to be developed. On cross examination, Mrs. Ryan confirmed that the lands which she agreed to sell were vested in the Partnership following completion of the sale.

The Defences

17. There were four defences filed to the proceedings. The first defence filed was delivered on 2nd November, 2012 on behalf of Mr. Kingston, the sixth named defendant. No reply was delivered by the plaintiffs to that defence. The second defence was filed on 24th January, 2013 by the Ryan siblings. No reply was delivered to that defence either. The third defence was filed on behalf of the thirteenth named defendant, Mr. Simpson, on 17th June, 2013 and a reply was delivered thereto on behalf of the plaintiffs on 6th November, 2013. The final defence was delivered on 23rd July, 2013 on behalf of the Bailey Partnership (excluding Mr. Kingston) i.e.

the first, second, third, fourth, fifth, seventh, eighth and twelfth named defendants and a reply thereto was delivered on behalf of the plaintiffs on 6th November, 2013.

Defence of the Sixth Named Defendant

18. In his defence the sixth named defendant claimed to have retired from the Partnership on 1st April, 2008 and to have sold his interest in the same to one Oliver Favier. He claimed that this was acknowledged by the plaintiffs by the terms of a deed of indemnity and release dated 26th August 2011 completed by Mr. Barry Harte and Mr. George Murphy who executed the same on their own behalf and on behalf of all other members of the Partnership purportedly relying upon a power of Attorney dated 20th December 2005 (hereinafter the "POA") whereby all the partners appointed Mr. Harte and Mr. Murphy to be their Attorneys for specified purposes. I return to this below. This deed of indemnity and release, he contends, releases the sixth named defendant from all liabilities of the Partnership with effect from 1st April, 2008 and furthermore, he contends, the continuing partners agreed to indemnify the sixth named defendant against all losses, demands or liabilities of the Partnership, howsoever arising, after that date. Otherwise, the defence filed on behalf of the sixth named defendant constitutes a full traverse and denial of the plaintiffs claim.

19. To a significant extent Mr. Kingston's defence revolves around the deed of indemnity and release referred to above a copy of which, but not the original, was produced in evidence.

20. The terms of the deed of indemnity and release produced to the court are very clear. The principle features of the same are as follows:

1. It is recited at recital (c) that on foot of another deed of indemnity and release dated 1st April, 2008, Mr. Kingston had retired from the Bailey Partnership and that he was to have no liabilities whatsoever in respect of its borrowings to include, but not limited to, the borrowings with Ulster Bank in respect of the Property (which was defined as meaning lands at Ballykisteen).
2. It was recited at recital (d) that the continuing partners in the Ballykisteen Developments Partnership had agreed with Mr. Kingston to confirm in this deed that Mr. Kingston retired from both the Bailey Partnership and the Ballykisteen Developments Partnership.
3. The Continuing Partners in the Partnership indemnified Mr. Kingston from all liabilities arising as a result of "leaving his name on the loan facility and mortgage with Ulster Bank." By clause 4 the continuing partners agreed to assume all debts, liabilities and obligations of the Partnership with effect from 1st April, 2008.

21. By clause 5 the Continuing Partners agreed to fully indemnify Mr. Kingston in respect of the business of the Partnership with effect 1st April, 2008.

22. By clause 7 the continuing partners agreed to indemnify Mr. Kingston in respect of all losses, demands, claims, proceedings, suits, judgments, liabilities, costs, fees, expenses, penalties, payments or fines of whatsoever nature or kind suffered or incurred by the continuing partners from 1st April, 2008.

23. By clause 8 Mr. Kingston acknowledged that as and from 1st April, 2008 he had no right or interest in the Partnership or its property.

24. As stated above, this deed of indemnity and release was completed by Mr. Barry Harte and Mr. George Murphy in their own names, but also in their own names as attorneys of all of the other partners of the Partnership, including the second named plaintiff. The plain meaning of the deed of indemnity and release is clear and, if effective, there can be no doubt but that Mr. Kingston would be entitled to succeed in his defence to these proceedings. Mr. Kingston's defence to these proceedings therefore, hinges upon whether or not the POA empowered Mr. Harte and Mr. Murphy to enter into the deed of indemnity and release on behalf of all of the members of the Partnership.

The Power of Attorney

25. Pursuant to the POA, Mr. Harte and Mr. Murphy were appointed to be the attorneys of each member of the Partnership for the following purposes:

- "1. To approve, execute (whether under hand or under seal) and deliver on behalf of the appointer the documents specified in the second schedule thereto (collectively therein referred to as the "Documents");
2. To make all such amendments, modifications and variations to the Documents on such terms as the Attorney may, in his sole discretion, determine from time to time for and in the name of the Appointer to approve, execute (whether under hand or under seal) and deliver on behalf of the appointer such other documents as the Attorney shall in his absolute and unfettered discretion deem necessary or desirable for the purpose of giving effect to the transactions contemplated by the Documents and/or by this power of Attorney;
3. To do all other acts and things on behalf of the Appointer as the Attorney shall in his absolute and unfettered discretion deem necessary or desirable for the purpose of giving effect to the transactions contemplated by the Documents and/or this power of attorney.

26. The POA went on to state at clause 9 that "the powers set out above shall be given the widest interpretation and is governed by and shall be construed in accordance with Irish Law."

27. The second schedule defined the Documents to which the POA applied as follows:

"All documents of whatever kind, nature or description in any way relating to or connected with any transaction affecting or relating to the development by the Ballykisteen Developments Partnership, Ballykisteen Developments Ltd. (other than the sale of the remaining lodges in the development) and any other parties at Ballykisteen, Co. Tipperary and any matters ancillary thereto, INCLUDING All Guarantees on behalf of Ballykisteen Development Partnership ("The Partnership") and security over assets of the Partnership including mortgages over the Partnership's interest in property at Ballykisteen, Co. Tipperary both to secure liabilities of third parties and the Partnership's own liabilities in respect of loans by Ulster Bank Ireland Ltd. both to the Partnership and to a consortium of investors who are parties to a Development Agreement to be entered into by the Partnership relating to the development of a hotel at Ballykisteen, Co. Tipperary."

28. Both the second named plaintiff and her brother, Philip Ryan the tenth named defendant gave evidence that, while they were aware that they had signed a power of attorney, as far as they were concerned it only related to the sale of lodges and transactions associated with the same, and it did not permit any other use. The POA however, clearly excludes the sale of "remaining" lodges in the development and relates to the completion of any other documentation relating to the development by the Partnership being undertaken at Ballykisteel including the completion of security documentation in favour of third parties. In purported exercise of the powers granted to them under the POA, Mr. Harte and Mr. Murphy completed the aforementioned deed of release and indemnity dated 26th August, 2011

29. Counsel for the plaintiffs submitted that the POA could not be used for the purpose of altering the constitution of the Partnership, and of course this is one of the principle consequences of the deed of indemnity and release; the retirement of a partner amounts to a technical dissolution of a partnership and the immediate formation of a new partnership amongst the continuing partners. Mr. Sreenan, B.L., Counsel for Mr. Kingston submitted that this may be achieved in reliance upon the POA and that neither the plaintiffs nor the other continuing partners, up to the trial of the action, challenged the validity of the POA or the deed of indemnity and release. The plaintiffs did not reply to the defence of Mr. Kingston and Mr. Kingston served a notice of indemnity and contribution upon all other members of the Partnership, to which no reply was received. Mr. Philip Ryan however stated in evidence that when the Ryan family became aware of the deed of indemnity and release their solicitors, Lavelle Colman, wrote to all other parties revoking the POA. Mr. Ryan was unable to produce a copy of this letter to the court but in any case this would have been after the execution of the deed of indemnity and release.

30. Notwithstanding that, it is clear that a power of attorney may not be used for purposes which go beyond the scope of the powers delegated by the donor to the donee of the same. In this case the powers given to the donees may be divided into two parts, both of which are related to the "Documents" as defined in the power of attorney (see paragraph 27 above). The first of these categories is general and is stated to be "all documents of whatever kind, nature or description in any way relating to or connection with any transaction affecting or relating to the development by the Ballykisteel Development Partnership, Ballykisteel Developments Ltd. (other than the sale of the remaining lodges in the development) and any other parties at Ballykisteel, Co. Tipperary and any matters ancillary thereto." While this category of documents is general in scope, its generality is limited to transactions relating to the development. In its ordinary meaning, and in particular in commercial affairs, a transaction usually involves a dealing between parties whereby a party supplies goods or services in exchange for payment. The Oxford English definition of the word defines a transaction as an instance of buying or selling something. It may of course be more broad and another definition includes "an exchange or interaction between people."

31. In this instance the transaction is also qualified in that it must relate to the development by the Ballykisteel Developments Partnership, Ballykisteel Developments Ltd. (other than the sale of the remaining lodges in the development) and any other parties at Ballykisteel, Co. Tipperary and any matters ancillary thereto.

32. It is very difficult to see how the release of a partner from a partnership agreement and the provision of an indemnity to that partner could be considered to be a transaction relating to the development, or even a matter ancillary thereto. It relates to the constitution of the entity that is conducting the development, as distinct from the transaction of business by the Partnership in connection with the development. Accordingly, I do not consider that the first and more general of the two categories of powers conferred by the POA authorises the donees of the power to sanction the retirement of a partner and the provision of a release and indemnity to that partner.

33. The second category of documents authorised to be completed on behalf of the donors by the donees under the POA comprises:

"all guarantees on behalf of the Partnership over assets of the Partnership including mortgages over the Partnership's interest in property in Ballykisteel, Co. Tipperary, both to secure liabilities of third parties and the Partnership's own liabilities in respect of loans by Ulster Bank Ireland Ltd.... relating to the development of a hotel at Ballykisteel, Co. Tipperary."

Quite clearly, this part of the POA does not authorise the execution of the deed of indemnity and release by the donees of the power on behalf of the donor.

34. Since, for the reasons given above, the POA does not give authority to the donees to enter into the deed of indemnity and release I hold that Mr. Kingston is unable to rely upon the same in his defence in these proceedings and must therefore be treated as a member of the Partnership for the purpose of these proceedings.

35. The following additional issues are noteworthy in relation to the POA:

1. The original was not produced to court and the signatures thereon were not witnessed. This does not meet the standard of proof in relation to such instruments as provided for by s.21 of the Powers of Attorney Act, 1996 which requires the production of the original or a copy of which:

(a) is certified by the donor of the power or by a solicitor or member firm (within the meaning of the Stock Exchange Act, 1995) or in such other manner as the court approves to be a true copy of the original, or;

(b) where the instrument has been deposited in the Central Office of the High Court pursuant to s.22 is attested in accordance with that section.

2. The second named plaintiff and Philip Ryan stated that they had no recollection of executing this power of attorney. In particular the second named plaintiff stated that she recalled signing only a power of attorney authorising the disposal of the lodges within the development. Mr. Philip Ryan stated that he had copies of a number of other powers of attorney signed by him but not a copy of the POA.

All of this made the formal proof of the document a matter of some importance. However, this issue was not argued on behalf of the Plaintiffs and does not therefore fall to be determined by the Court.

Defence of the Bailey Partnership (except for the sixth named defendant)

36. In their defence, the Bailey Partnership admit, as do all defendants, that the plaintiffs entered into the agreement for sale with the Partnership. However, they plead that the contract was frustrated because the site chosen by the plaintiffs upon which their dwelling house was to be constructed, was acquired as part of a larger holding by the Partnership using finance obtained from Ulster

Bank, which was granted a charge over the lands concerned by the Partnership, and that Ulster Bank refused to vacate the charge from the Plaintiffs' site. Further they plead that on 22nd May, 2013 Ulster Bank appointed Mr. Kieran Wallace of KPMG as the receiver of the site and as a result, the Partnership had no authority to transfer the site to the plaintiffs. In their reply to the defence delivered on 6th November, 2013, the plaintiffs contend that the failure of the defendants to procure a release of the Ulster Bank charge over the site, as a consequence of which it came under the control of a receiver, constitutes a breach of contract on the part of the defendants in respect of which the plaintiffs have suffered loss and damage.

37. The defence of the Bailey Partnership revolves entirely around the refusal by Ulster Bank to consent to the transfer of the site and the subsequent appointment of a receiver over the lands of the Partnership, including the site to be transferred to the plaintiffs. I mentioned earlier, at paragraph 9 that the plaintiffs have reached an agreement with Ulster Bank which will bring the site within their control, and I will be addressing this issue later on in this judgment. The plaintiffs in the proceedings at all times claimed in the alternative damages in lieu of specific performance. The net question that arises from the defence of the Bailey Partnership is whether it is open to the Court to make an order for damages in lieu of specific performance in circumstances where specific performance is not possible. Counsel for the Bailey Partnership argued that this is not possible, but I am satisfied that it is open to the Court to make such an order in appropriate circumstances. In *O'Connor v. McCarthy* [1982] IR 161 Costello J. (as he then was) made an order for damages in lieu of specific performance in circumstances where it was no longer possible to order enforcement of a contract, because of the coming into existence of a subsequent (and binding) contract relating to the same property. Moreover, in this matter the plaintiffs have already fully performed their obligations under the contract for sale (to their detriment), and indeed the defendants have part performed their obligations. I do not believe that the principle that a court will not make an award of damages where specific performance is not possible could have any application in such circumstances, because an award of damages is the only remedy available to redress the loss suffered by the plaintiffs in complying with their obligations under the contract for sale. Furthermore, in securing the site to Ulster Bank in the first place, it was the defendants who made performance of their own contractual obligations subject to the consent of the bank. Since, of the defendants only Mr. Kingston gave evidence, and he knew nothing of the transaction, no evidence was put before the court to explain why the site to be provided to the plaintiffs was not excepted from the security given to the bank, or what if any, efforts were made to exclude it from that security, at a time when the bank might well have been amenable to such a proposal.

The Defence of the Ryan Siblings

38. In their defence, the Ryan siblings admit that the Partnership is obliged to provide the dwelling house to the plaintiffs in accordance with the contract for sale, but plead that at the time of entering into the contract for sale, it was agreed that the Ryan siblings would not share this liability with the other members of the Partnership. Furthermore, the Ryan siblings plead that it was agreed at the time of formation of the Partnership that they would not be subject to any cash calls or any liabilities associated with the Partnership. The Ryan siblings were at one point represented by solicitors in connection with the proceedings but drafted and delivered their own defence and represented themselves at the trial of the matter. In their defence it is also pleaded that "the site in question was pledged to Ulster Bank by the third named defendant. However, Ulster Bank is now willing to release its charge over the site." The Ryan siblings also accept in their defence that the sum of €72,000 was paid to the plaintiffs in accordance with the contract for sale, but plead that they did not provide any funds towards that payment.

39. In her evidence, Mrs. Josephine Ryan stated that when the Partnership was initially established it was she took full charge of the negotiations. She said that her children did not participate in the negotiation of the Partnership agreement but that they were aware what was going on. Mrs Ryan considered the participation of her children in the Partnership as part of her estate planning. She stated that there was another agreement or draft of an agreement (which was not put into evidence) which accurately reflected her wishes, but that the final executed contract for sale did not reflect her wishes, because, in her own words "it was never explained that Linda and Michael would have to pay for their own house." Furthermore, she stated that she believed that she had an agreement whereby none of her children could ever be called upon to provide the plaintiffs with the house envisaged by the contract for sale.

40. Mrs. Ryan was asked if she knew of the effect of the contract for sale in so far as it obliged the Partnership to provide the plaintiffs with a dwelling house at the time of execution of the contract for sale, and she confirmed that she did understand the same. She was also asked if she tried to prevent the execution of the contract for sale and she said that she did not. She said that she first raised concerns about the matter with the other partners in or about 2008/2009. In 2010 she requested the agreement in writing (referred to in paragraph 13 supra) from the other members of the Partnership that the obligation to provide the plaintiffs with a dwelling house rested with all partners excluding the Ryan siblings. As stated above, this request was signed by only some of the members of the Partnership, and Mr. Simpson.

41. In relation to the Partnership Agreement, Mrs. Ryan stated that she believed that she had an agreement whereby her children could not be subject to any cash calls. This was also stated in evidence by the second named plaintiff, by Mr. Philip Ryan and by Ms. Louise Ryan. However, there is no provision to this effect in the Partnership Agreement, and while it appears that no independent legal advice was taken by the Ryan siblings in relation to the Partnership Agreement, it is nonetheless clear that they could have taken such advice had they wished to do so. Moreover, the second named plaintiff stated that she did read the Partnership agreement before signing it and had a basic understanding as to its contents.

42. The exoneration of the second named plaintiff and the Ryan siblings from any liabilities of the Partnership must involve an amendment to the Partnership Agreement. Obviously, it would also be possible to amend the contract for sale to exonerate the Ryan siblings from liability under that agreement to the plaintiffs. The document prepared by Mrs. Ryan to confirm that the obligation to provide the plaintiffs with a family home does not extend to Louise, Thomas and Philip Ryan would probably be effective to amend the contract for sale if signed by all of the partners but since it was not signed by all of the partners I do not believe that it has any effect at all. Accordingly I find that the ninth, tenth and eleventh named defendants (Louise, Philip and Thomas Ryan) are bound by the special conditions in the contract for sale relating to the provision of the site and dwelling house to the plaintiffs, in accordance with special condition number 11 of the contract for sale.

The Defence of the Thirteenth Named Defendant

43. By way of preliminary objection, the thirteenth named defendant pleaded that the plaintiffs' claim discloses no cause of action as against the thirteenth named defendant. He pleaded that he is a stranger to the contract for sale. Furthermore, he pleads that the contract for sale was specifically amended to exclude all reference to him, the thirteenth named defendant. He also denied that since the demolition of the dwelling house of the plaintiffs, they have been residing at a premises provided by the thirteenth named defendant and that he had any obligation to the plaintiffs in this regard.

44. In their reply to this defence, the plaintiffs "by way of special reply plead that at all material times the thirteenth named defendant held himself out to the plaintiffs as being a member of the Ballykisteon Development Partnership and, having a significant interest therein and the plaintiffs acted on the faith of and in reliance upon the said holding out by the thirteenth named defendant, in entering into the contract dated 25th May, 2005 such that the thirteenth named defendant is liable to the plaintiffs as a partner

under the aforesaid contract pursuant to the provisions of s.14(1) of the Partnership Act, 1890." Much of the time of the trial of the action was spent in dealing with this issue i.e. whether Mr. Simpson was or was not a member of the Partnership. Mr. Simpson did not give evidence at the trial of the action.

45. It is common case that Mr. Simpson was not a party to the contract for sale. The contract was negotiated over a protracted period and on 25th May, 2005 it was finally agreed and signed. During that period, the name of Mr. Simpson appeared in the title to letters exchanged by solicitors acting on behalf of both the plaintiffs and the defendants in these proceedings; it appears that the last reference to Mr. Simpson specifically in correspondence from Messrs O'Connor Tormey & Co. Solicitors (for Mr. Simpson) is a letter dated 30th July, 2004. Thereafter they simply refer to their client as the Ballykisteen Development Partnership. However, the solicitors for the Vendors continued to refer to Mr. Simpson individually in their letter to Messrs O'Connor Tormey right up to the date the contracts were signed.

46. It is also common case that Mr. Simpson's name was excised from the final version of the contract immediately prior to its execution by the parties and that that excision has been initialled by Mr. Tormey, solicitor on behalf of the Purchaser and Mr. Leahy, solicitor on behalf of the Vendors. It was put to the second named plaintiff in cross examination that in agreeing to this deletion, Mr. Leahy, the Plaintiffs solicitor in the transaction, must have been acting with their authority, and she agreed, although she did not specifically recall. The first named plaintiff was asked a similar question on cross examination and he confirmed that Mr. Leahy advised the vendors of the deletion and he further stated that "we believed he (Mr. Simpson) was working under Mr. George Murphy's name."

47. Against that background there is no doubt at all that Mr. Simpson did not wish to commit to being a purchaser of the plaintiffs' property and that the plaintiffs agreed to proceed with the sale to Mr. Harte and Mr. Murphy trading as the Ballykisteen Development Partnership. Accordingly, in so far as the claim proceeded against Mr. Simpson on the grounds that he was a party to the contract for sale, that claim cannot succeed.

48. It was of course for this very reason that the defence of the thirteenth named defendant stated that the plaintiffs claim as set out in the plenary summons and statement of claim disclosed no reasonable cause of action as against the thirteenth named defendant and pleaded that he was a stranger to the contract for sale. This brought about a reply to the defence referred to at paragraph number 44 above. Arising out of that reply the solicitors for the thirteenth named defendant raised a notice for particulars requesting, inter alia, particulars of the circumstances and the manner in which it was alleged that the thirteenth named defendant held himself out to the plaintiffs as being a member of the Partnership. This yielded the following reply, which I set out in full:

1. The original contract for sale of the Groom's house identified the purchasers as the thirteenth named defendant, the third named defendant and twelfth named defendant. The thirteenth named defendant did not sign the contract for sale dated 26th May, 2005 and his name was crossed out and the words Ballykisteen Partnership were amended with the word "Development" inserted in pen so as to read *Ballykisteen Development Partnership*.

2. When the original property namely the club house and golf course was for sale in 2003 the thirteenth named defendant was introduced to the owner by John Shelley of Shee Hawe Auctioneers. The property was owned by the second named plaintiff's mother. The thirteenth named defendant introduced the third and twelfth defendants to the second named plaintiff's mother in early 2003 and the contract for sale of Ballykisteen was signed on 18th June, 2003. This document named the thirteenth named defendant along with the third and twelfth named defendants as the purchasers of the then Golf and Country Club at Ballykisteen for €5 million. The thirteenth named defendant met the committee of Ballykisteen Golf Club prior thereto so as to introduce himself as the owner. The Partnership agreement creating Ballykisteen Development Partnership was entered into on 17th April, 2004 and meetings occurred bi-annually from 2004 to 2012. The second named plaintiff will give evidence that there was never a Partnership meeting of Ballykisteen Development Partnership (as distinct from "Ballykisteen Partnership") held without the thirteenth named defendant being present. Three days after the creation of Ballykisteen Development Partnership namely on 20th April, 2004, the thirteenth named defendant came to the plaintiffs' home and outlined the fact that the new hotel building would be partially on their family home and indicated that he would require to purchase the Groom's house. He indicated that the plaintiffs family home would be replaced by a new property on the development. He also had several further meetings with the plaintiffs for the purposes of securing the acquisition of the Groom's house. All discussions which took place with the plaintiffs in the year 2005 concerning the timescale for building the replacement house, building finishes, finalising right of way etc. were conducted by the thirteenth named defendant. He liaised with Fewer Harrington, Architects, and personally delivered to the plaintiffs the site maps. Along with the third named defendant, the seventh named defendant and the twelfth named defendant, the thirteenth named defendant signed a joint and several guarantee in the sum of €11,050,000 for the provision of banking facilities and loans to Ballykisteen Development Partnership from Ulster Bank. He also agreed to provide updated certified statements of net worth.

3. The thirteenth named defendant attended all Partnership meetings, arranged for the acquisition of the Groom's house, co provided the guarantee as set out above and hired all the managers for the Ramada Hotel from inception to receivership. The defendants applied for a loan of €1.5 million from Ulster Bank on 10th January, 2007 and Ulster Bank required annual certified net worth statements to be provided by the third named defendant, the seventh named defendant and the twelfth named defendant and the thirteenth named defendant.

49. At the trial of the action, the plaintiffs relied upon s. 14 of the Partnership Act, 1890 in order to support their argument that the thirteenth named defendant, although not a party to the partnership agreement, could be held liable as a partner. Section 14(1) of the 1890 Act states:

"Every one who by words spoken or written or by conduct represents himself or who knowingly suffers himself to be represented as a partner in a particular firm, is liable as a partner to anyone who has on the faith of such representations given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."

50. In closing submissions, counsel for the thirteenth named defendant submitted that the pleadings in the reply to the defence of the thirteenth named defendant is inconsistent with the statement of claim. He referred to o.19 r. 16 of the Rules of the Superior Courts, which states:

"No pleading, not being a petition shall, except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

Accordingly it was submitted on behalf of the thirteenth named defendant that the plea made on behalf of the plaintiffs in the reply to the defence that the thirteenth named defendant held himself out as a partner in the Partnership should not be allowed as it is not in compliance with Order 19, r. 16 of the Rules of the Superior Courts. I will return to this argument later in this judgment.

51. The plaintiffs gave evidence as to their dealing with Mr. Simpson and the work that he conducted on behalf of the partnership. The evidence given by the plaintiffs and Mrs. Ryan established the following. As stated at paragraph 11 above, Mrs. Ryan was introduced to Mr. Simpson first in connection with the sale of her lands which was agreed in June 2003 and completed in January 2004. Mr. Simpson made it clear that he did not wish to take title to those lands in his name, and that instead Mr. George Murphy would act in trust for him. However, Mrs. Ryan stated that Mr. Simpson continued to do all the negotiations in connection with the transaction. Ultimately, Mrs. Ryan's lands were transferred to the first to twelfth named defendants. Although Mr. Simpson's name appears as one of the purchasers on the final account prepared by the Purchaser's solicitors in relation to the transaction, he does not feature as a transferee of these lands.

52. When, following the acquisition of Mrs. Ryan's lands, it became apparent that the dwelling house and garden of the plaintiffs would be required for the development, Mr. Simpson approached the plaintiffs and negotiated the acquisition of that property. The second named plaintiff gave evidence that Mr. Simpson came to Ballykisteen to introduce himself as the new owner of the property. She also gave evidence that all of her own negotiations were with Mr. Simpson and that he attended all meetings which she attended in regard to the transaction. She stated that at all times Mr. Simpson presented himself as the leading partner in connection with the development.

53. Mrs. Heffernan also gave evidence that Mr. Simpson paid for the planning application that was required in connection with the development of a new dwelling house for the plaintiffs, and upon commencement of construction of the same in August 2008, he personally oversaw the construction works. At this time the new hotel was open and trading and, according to Mrs. Heffernan, Mr. Simpson was the leading figure in the management of the hotel until it was leased to Ramada.

54. As the purchasers of the plaintiffs' dwelling house experienced difficulties in providing the new dwelling house to the plaintiffs, the second named plaintiff had ongoing dealings with Mr. Simpson only regarding these problems. The plaintiffs never had dealings with Mr. Murphy and as far as they were concerned Mr. Simpson was in the words of the first named plaintiff "acting under the name of Mr. Murphy."

55. In an email sent by Mr. Simpson to Mrs. Heffernan on 27th July, 2010 he stated:

"I confirm that I will fulfil my obligations to yourself and Michael in relation to the partnership and your family home as discussed. I anticipate that the funds will come from projects currently underway in the UK."

56. Mr. Simpson also signed the document, prepared by Mrs. Josephine Ryan (referred to in paragraph 41 above) in or about 2010 which was headed "Ballykisteen Development Partnership" and stated:

"We hereby confirm that the obligation to provide Michael and Linda Heffernan with a family home rests with all partners excluding Louise Ryan, Thomas Ryan and Philip Ryan."

57. In addition to being signed by Mr. Simpson, this document (only a copy of which was produced to the court) was signed by Mr. Barry Harte, Mr. John Gaffney, Mr. Shane Treacy and Mr. Pat Murray.

58. Following the issue of proceedings by Ulster Bank against the Partnership (but not against Mr. Simpson) in 2011 (with a view to bringing about a sale of the Ballyphilip Lands) Mr. Philip Ryan entered into correspondence with Mr. Simpson with a view to resolving issues raised both by those proceedings and also with a view to securing provision of a dwelling house to the plaintiffs in accordance with the contract for sale. All of this correspondence was with Mr. Simpson although on occasion Mr. Harte also participated in the same, and others were copied in the emails exchanged from time to time. It is clear from this that Mr. Simpson was actively involved in trying to secure a resolution of the plaintiff's problems. When Ulster Bank indicated that it would release the site from its charge upon payment of €20,000, Mr. Simpson paid €3,000, Mr. Harte €5,000, and efforts were continuing to raise the balance. Mr. Simpson also arranged for payments to be made to Mrs. Ryan whose circumstances had deteriorated significantly. These payments were, according to Mr. Philip Ryan, made in reduction of the amounts owing to Mrs. Ryan by the Partnership (i.e. part repayment of Mrs. Ryan's loan to the Partnership, albeit only a token measured against the total amount due to Mrs. Ryan).

59. The following extracts from emails exchanged in this correspondence are also noteworthy:

(a) In an email from Mr. Simpson of 1st May, 2012 Mr. Simpson states;

"Philip, I met with Barry yesterday afternoon. It was not a full partner meeting as we were the only two who showed up."

(b) In an email to all of the Partnership (and some others) on 20th July, Mr. Simpson states:

"Guys, as you all know, there is a partners meeting at noon today. For those who cannot attend, you can join the meeting at 12:15 by conference call."

60. From all of the above it is apparent that Mr. Simpson was deeply involved in the establishment of the Partnership and the subsequent development and operation of its business activities. Nonetheless it is equally apparent that he very deliberately and openly stood back from committing himself in any formal way to becoming either a partner or a party to the contract to purchase the dwelling house of the plaintiffs. Moreover, Ulster Bank clearly did not regard him as a member of the Partnership as he was not named as a defendant in the proceedings issued by Ulster Bank in relation to the Ballyphilip lands. And even though, in the correspondence referred to above, he appears to have assumed some level of personal obligation to the plaintiffs and also referred to Partnership meetings in a manner that would, by itself, suggest that he may even have considered himself a partner, it does not necessarily follow that he is or was a partner. On the contrary, the Partnership deed sets out comprehensively the identity of the partners and the manner in which their liabilities and entitlements are to be determined. It seems inconceivable that, if the Partnership were generating profits, Mr. Simpson would be able to sustain any claim to an entitlement to such profits, other than through whatever arrangements he may have made directly with individual partners such as Mr. Murphy.

61. It is of course for this very reason that the plaintiffs have chosen to frame their claim that Mr. Simpson was a partner on the basis of section 14(1) of the Act i.e. that he held himself out as such to the plaintiffs. However, it is clear from the wording of s.14(1)

and from the authorities that this section is for protection of third parties and not partners themselves. See *Twomey* on partnership law paragraph 7.37 where he cites Richards B in *Greenham v. Gray*(1855) 4 Ir CLR 501 :

"True it is, that persons may act so as to constitute themselves partners, and become liable to third persons, while they are not partners, nor liable inter se."

62. In the context of these proceedings, what that means is that while it may be possible for Mr. Heffernan to rely on s.14(1) it is not possible for Mrs. Heffernan to do so. In order for Mr. Heffernan to sustain a claim against Mr. Simpson under the section, he must meet the three elements set out in the section:

1. He must prove that Mr. Simpson, in his dealings with Mr. Heffernan, held himself out as a partner, and
2. He must prove that he relied upon such holding out by Mr. Simpson and
3. He must prove that he gave credit as a consequence of the holding out by Mr. Simpson.

63. Taking the last element first, I believe it is clear that Mr. Heffernan did indeed give credit to the Partnership as a consequence of the actions of Mr. Simpson in that he made his dwelling house available to the Partnership and subsequently transferred his interest in it to the Partnership before the Partnership complied with its obligation to Mr. and Mrs. Heffernan to provide them with an alternative dwelling house.

64. Did Mr. Simpson hold himself out to Mr. Heffernan as being a partner? It is clear from Mr. Heffernan's evidence he was fully aware that Mr. Simpson was not a partner or at least was not formally a partner of the Ballykiste Development Partnership. However, in saying, as he did, in evidence that he considered that Mr. Simpson was acting "under the name of Mr. George Murphy" he appeared to be of the view that Mr. Simpson was, for all practical purposes, a partner.

65. However, the very nature of holding out is that a person by his conduct towards a person, leads that person to believe that he is a partner, whereas in this instance what has occurred is the opposite; Mr. Simpson made it plain that he was not a partner even though Mr. Heffernan might have considered that he had some interest in the Partnership through Mr. Murphy.

66. Moreover, on cross examination by counsel for Mr. Simpson, Mr. Heffernan acknowledged that he was aware of the Partnership agreement through his wife, but confirmed that he was not in any way relying on the Partnership agreement. For these reasons, I do not believe that Mr. Heffernan can sustain a claim against Mr. Simpson under s.14(1) of the Partnership 1890.

67. In case this is not correct however, I will now address the argument made by counsel for Mr. Simpson that the plea that Mr. Simpson held himself out as a partner should not be allowed because it was made in a manner that is contrary to O.19 r.16 of the rules of the Superior Court. In order to address this it is necessary to consider the specific pleas made by the plaintiffs against the thirteenth named defendant in the plenary summons and the statement of claim. Paragraph (a) of the general endorsement of claim on the plenary summons is a claim for "specific performance of that part of an agreement in writing dated 25th May, 2005 and made between the plaintiffs of the one part and the third and twelfth named defendants, on their own behalf and on behalf of the remaining defendants herein of the other part, whereby the defendants agreed to transfer to the Plaintiffs a certain site forming part of the lands and and premises known as Ballykiste Golf and Country Club..."

68. Paragraph 16 of the statement of claim states:

"By written contract of sale dated 25th May, 2005 and made between the plaintiffs of the one part and the third and twelfth named defendants on behalf of Ballykiste Development and Partnership of the other part, and also the thirteenth named defendant, the plaintiff agreed to sell and the Ballykiste Development Partnership and the thirteenth named defendant agreed to purchase all that and those the dwelling house and premises known as the "Groom's House", Ballykiste Tipperary, being the property comprised in folio 21702 of the register of freeholders, County of Tipperary.

69. Paragraph 17 of the statement of claim states:

"At all material times the members of the Ballykiste Development Partnership were the first to twelfth named defendants, inclusive, and the second named plaintiff."

It is clear from the above that neither the plenary summons nor the statement of claim made any reference to the thirteenth named defendant being a member of the Ballykiste Development Partnership or holding himself out as such. The claim thus far is formulated on the basis that the thirteenth named defendant was one of the parties who agreed to purchase the plaintiffs' dwelling house and premises.

70. Accordingly, the thirteenth named defendant pleaded in paragraph 1 of his defence that the plaintiff's claim disclosed no reasonable cause of action as against the thirteenth named defendant. In paragraph 2 of his defence the thirteenth named defendant states that he is a stranger to the contract referred to in the plaintiffs claim and denies that he was a party to or bound by the contract, and furthermore goes on to state that the contract as originally drafted was specifically amended prior to execution to exclude all reference to the thirteenth named defendant, which is the case.

71. This defence gave rise to the reply delivered on 6th November, 2013 referred to at paragraph number 45 above, in which the plaintiffs claim that the thirteenth named defendant held himself out as a partner to the plaintiffs and that the plaintiffs acted in reliance on that holding out. Arising out of this, the solicitors for the thirteenth named defendant delivered a notice for particulars on 16th January, 2014 in which they requested full particulars of the "circumstances and the manner in which it is alleged that the thirteenth named defendant held himself out to the plaintiffs as being a member of the Ballykiste Development Partnership" and secondly full particulars of the precise terms, nature and extent of the significant interest which it is alleged the thirteenth named defendant held himself out as having in the said partnership.

72. On 2nd April 2014, detailed replies to particulars were furnished by the solicitors acting on behalf of the plaintiffs, providing details of the manner in which the Plaintiff alleged that the thirteenth named defendant held himself out as a Partner.

73. The question that I must address therefore is whether the special reply delivered by the solicitors for the plaintiffs on 6th November, 2013 raises a new ground of claim or contains an allegation of fact inconsistent with the previous pleadings. If I conclude that it does not then it seems to me to follow that the replies to particulars delivered on 2nd April, 2014 must also benefit from that

finding.

74. Counsel for Mr. Simpson submits that the plea in the reply to the defence is inconsistent with the statement of claim. He relies on the authorities of *Herbert & Anor. V. Vaughan and Ors* [1972] 3 All E.R. 122 and *Duckworth v. McClelland no. 2* [1878] 12 ILTR 169. In *Herbert & Anor v. Vaughan*, when considering the equivalent rule of the Superior Courts in England, it was held that the word "inconsistent" did not mean mutually exclusive but merely new or different. In *Duckworth v. McClelland*, which was an action in respect of a tenancy described in the statement of claim as still subsisting, the defendant made a counter claim for money had and received (by the plaintiff) to which the plaintiff replied that by reason of the defendant over holding part of the premises after the expiration of the tenancy, the plaintiff, whose interest as a middle man had also determined, was compelled to pay the head landlord damages in cost which he sought to set off the counter claim. Lawson J held that:

"If this reply were allowed, it would be impossible to try this case. I am clearly of the opinion that paragraph no. 5 must be struck out. It is a departure from and inconsistent with the original statement of claim.. if this claim is to be made it should be made by amending the statement of claim."

He further observed that an amendment to the statement of claim would have allowed the defendant to rejoin specially.

75. Mr. Hickey BL replying to this argument on behalf of the plaintiffs cited the case of *Nationwide Building Society v. Lewis* [1998] EWCA Civ J0224-16 which, as it happens, is a case relied upon by Mr. Simpson for different reasons as it involves the rejection of an argument that a salaried partner in a solicitors firm could be held liable by virtue of an alleged holding out. In the context of this pleadings point however, Mr. Hickey makes the argument that in that case it was the defence filed on behalf of Mr. Williams, a salaried partner in a solicitors firm, asserting that he was not a partner, that gave rise to a reply by the plaintiff that Mr. Williams was held out to the world as a partner in the firm. Notwithstanding the similarity in the equivalent rule of the Superior Courts of England, no argument appears to have been made in that case that there was any inconsistency between the reply to the defence and the statement of claim. Accordingly the case is of limited value in considering the issue.

76. In both paragraph (a) of the general endorsement of claim on the plenary summons and paragraph 16 of the statement of claim, the plaintiffs' claim is that the third and twelfth named defendants on behalf of Ballykisteel Development Partnership, and also the thirteenth named defendant agreed to purchase the plaintiffs dwelling house and premises. In paragraph 17 of the statement of claim it is stated that at all material times the members of the Ballykisteel Development Partnership were the first to twelfth named defendants inclusive and the second named plaintiff. Accordingly the claim as originally framed in both the plenary summons and the statement of claim alleges an agreement for the sale and purchase of the plaintiff's premises to which the thirteenth named defendant was a party. In so far as the membership of the Partnership is concerned, it is not alleged that the thirteenth named defendant was a partner, whether by reason of actual membership or by holding himself out as such to the plaintiffs.

77. It is difficult therefore to consider that the argument that first appears in paragraph 2 of the reply to the defence of the thirteenth named defendant that the thirteenth named defendant held himself out to the plaintiffs as being a member of the Ballykisteel Development Partnership upon which the plaintiffs acted in reliance is anything other than new ground of claim in respect of which it is necessary to make an application to amend the statement of claim. See Delaney & McGrath, *Civil Procedure in the Superior Courts*, (3rd ed, 2012) at paragraph 5-212 to 5-213. Accordingly, it is my view that for this reason also the plaintiffs claim against Mr. Simpson must fail.

Coming to Equity with Clean Hands

78. It will be apparent from the above that efforts were made by Mr. Simpson and by the Partnership to comply with the obligation of the Partnership to the plaintiffs to provide the plaintiffs with a dwelling house as required by the contract for sale. While funding may have been the initial obstacle to completion of the dwelling house and the provision of the same to the plaintiffs, it is clear from open correspondence produced to the court that significant efforts were being made by or on behalf of the Partnership to resolve the problem, in particular during 2012/2013. Whatever about availability of funding however, it is common case that the site was secured by the Partnership to Ulster Bank, and that Ulster Bank was not prepared, initially at least, to release the site from its charge in order to facilitate a transfer of the same to the plaintiffs. However, it was revealed upon cross examination of the second named plaintiff, that she and the Ryan siblings had arrived at a settlement with Ulster Bank on 13th May, 2013. The settlement arose out of the proceedings issued by Ulster Bank Ireland Ltd. against the Partnership and one Pia Crowe, referred to in paragraph 9 above. Those proceedings were issued by Ulster Bank in connection with a transaction involving the acquisition by the Partnership of additional lands known as the Ballyphilip lands. The second named plaintiff, the ninth named plaintiff, Louise Ryan (who also gave evidence) and the tenth named defendant, Philip Ryan all gave evidence to the effect that the Ryan siblings and the second named plaintiff had indicated at all times their opposition to the acquisition of these lands and for this reason felt that they should have no liability for the same to Ulster Bank. In any case, as a consequence of the failure of the Partnership to repay Ulster Bank the amount advanced in connection with the acquisition of the said Ballyphilip lands, Ulster Bank issued proceedings against the Partnership and Ms. Crowe who retained the legal estate in the lands, in order to bring about a sale of these lands. Mr. Simpson was not a party to those proceedings.

79. Mrs. Ryan, the second named plaintiff, and the ninth to eleventh named defendants (together hereinafter "the Ryan family") entered into a settlement of these proceedings (as to their claim against them only) which was recorded in an agreement dated 13th May, 2013. At the outset of this agreement it is recorded that there had been previous settlements between the parties that were not implemented, the first in May of 2012 which was signed by the Ryan family but not by the bank, and the second dated 22nd November, 2012 which was executed by both the Ryan family and by the bank but which was not implemented. The agreement of 13th May, 2013 provided, inter alia, that:

1. The Ryan family would co-operate in the sale of the Ballyphilip lands;
2. The bank would retain the proceeds of the bonds provided by Mrs Ryan as security for the Partnership debts save for €30,000 which was to be paid towards legal costs incurred by the Ryan family and €50,000 to be retained by the Ryan family for their own use and benefit;
3. The bank would release from its security the site with partially constructed house and garage thereon and facilitate the transfer of the same to the first named plaintiff, either by consenting to such transfer by the Partnership or through the appointment of a Receiver or, should it arise, as mortgagee in possession.
4. The bank would release from its security and as in no(3) above co-operate in the transfer of or procure the transfer of a second site to Mr. Daire Heffernan, son of the plaintiffs;

5. The bank agreed to contribute to the legal costs of the first named plaintiff and the said Daire Heffernan incurred in connection with the transfer of the said sites to them;

6. The bank would assist in the provision of accommodation to Mrs Josephine Ryan for a specified period;

7. The bank agreed that any further recourse against the Ryan family would be limited to any assets secured to the bank in connection with any liabilities of the Partnership. The court heard evidence from Mr. Philip Ryan that at this time the bank was owed approximately €17 million by the Partnership and

8. The terms of the agreement were to be private and confidential. Clause 13.1 of the settlement agreement provided that "save as required by law or as agreed in writing with the bank, all discussions and negotiations between the parties in the context of this agreement, and the terms of this agreement, shall be strictly private and confidential."

80. The significance of this agreement to the within proceedings is that the Ryan family did not disclose the existence of the agreement prior to the trial of the action, either to any of the other parties or indeed to their own legal advisors. The existence of the agreement came to light only following a question put to the second named plaintiff by counsel for the Bailey Partnership, Mr. O'Flaherty. Clearly the agreement enabled the plaintiffs to acquire title to the site on which the house was to be constructed for them by the Partnership, if need be through the appointment of a receiver by the bank. The court heard that Mr. Kieran Wallace of KPMG was appointed as receiver over all Partnership property on the 22nd of May 2013. Having elected to claim damages in lieu of specific performance, the claim of the plaintiffs had for all practical purposes been converted into a claim for the cost of completing the dwelling house in accordance with the specifications attached to the contract for sale, together with the cost of providing a garage and also the cost of provision of a site. Accordingly, counsel for the Bailey Partnership, Mr. Simpson and Mr. Kingston all submitted that the plaintiffs had not come to equity with clean hands in failing to disclose the existence of this agreement at the outset of the trial (or sooner) to the intent of claiming from the defendants the cost of a site title to which they now knew they would be able to take from the bank and that in addition the plaintiffs would receive the benefit of the partially constructed buildings on the site, as well as claiming for the full cost of construction of the same from the defendants. The cost of providing a site was estimated, in a report handed into court on behalf of the plaintiffs, to be in the sum of €50,000. Accordingly, counsel for all of the defendants (save for the Ryan siblings) submitted that the plaintiff's claims should be dismissed.

81. Mrs. Heffernan was asked why she did not disclose the existence of this agreement and she replied that it was on account of the confidentiality clause in the settlement agreement. She said that she asked for the consent of the bank to reveal the existence of the agreement to the defendants but that this consent was not forthcoming and that the bank relied upon the confidentiality clause. Notwithstanding this however, correspondence handed into Court revealed that the agreement had been disclosed by the ninth named defendant on behalf of all members of the Ryan family to another solicitor, a Mr. Muiris Gavin, a solicitor in the firm of Dermot G. O'Donovan & Partners, Limerick, who were acting on behalf of the Ryan family in connection with other proceedings in which the Ryan family were involved with Bank of Scotland (Ireland). However, no evidence was given to the Court this disclosure was made with the knowledge of the plaintiffs.

82. In order to consider this issue it is necessary to consider the behaviour of the plaintiffs as a whole. At the outset of the trial, counsel for the plaintiffs, having explained to the Court that they would be seeking damages in lieu of specific performance, also informed the Court that they would not be advancing any claim for damages under clause 12 of the contract for sale. Clause 12 provided that a fine of €250 per week would be payable by the purchasers to the plaintiffs from the closing date to the date of handing over of the completed dwelling house and garage, in the event that the dwelling house was not delivered on time which it appears was to be no later than twelve months from the date of the contract for sale. If therefore the dwelling house was due to have been delivered by 25th May, 2006 then there would have been a potential claim for damages at the rate of €250 per week between that date and the date of provision of the dwelling house. Taken up to the date of commencement of the trial of the action this would approximately amount to a period of 8 years and 6 months and would give rise to a potential claim of €110,500.

83. Counsel for the plaintiffs submitted that the waiver of a claim under this heading clearly demonstrated the good faith of the plaintiffs. Counsel for Mr. Simpson however, submitted that this waiver was no more than a sop because the plaintiffs had been provided with accommodation by the defendants since delivery of possession of the plaintiffs own house to the Partnership, and accordingly a claim for damages under this heading could not be sustained. In my view however this is not so. There was a clear contractual obligation on the purchaser to provide the plaintiffs with accommodation pending availability of the dwelling house to be constructed. There is a significant difference between being provided with temporary accommodation, no matter how comfortable, and your own home to your own specifications. Special condition 12 of the contract for sale was intended as a penalty clause to encourage compliance by the purchasers with their obligation to provide the plaintiffs with their own home within an agreed timeframe. It was therefore open to the plaintiff to invoke the penalty clause at any time after the obligation to provide them with their own home had been breached. I believe that by waiving any entitlements under this clause, the plaintiffs were demonstrating good faith in these proceedings.

84. Furthermore, the plaintiffs gave their evidence honestly and with candour. They were not afraid to concede points against their own interests. A very good example of this was that each of them acknowledged that they had been advised by their solicitor, Mr. Leahy, that Mr. Simpson's name had been deliberately excised from the contract for sale prior to the signing of the contract for the plaintiffs. Even though the second named plaintiff did not recall this herself, she was prepared to accept Mr. Leahy's word that she had been so advised.

85. Moreover, the agreement of Ulster Bank to release the site from its charge was disclosed in the defence of the Ryan siblings to these proceedings. Although joined as defendants to the proceedings, the Ryan siblings were supportive of the plaintiffs while denying any liability to the plaintiffs on the grounds that they considered themselves exempt from the obligation and from cash calls generally in the Partnership. So therefore while the disclosure of the matter in the defence of the Ryan siblings was not an act of the plaintiffs, in my opinion it may be considered as such for the purpose of considering this issue because the plaintiffs and the Ryan siblings were in many respects "on the same side" in these proceedings.

86. In sending this defence to the plaintiffs' Solicitors, Mr. Philip Ryan asked the plaintiff's solicitor, Mr. English, if he needed to send this defence to any other party at the time of serving the same upon Mr. English, but it does not appear as though he received a reply. Accordingly while it may not have been sent to the other parties, I am satisfied that there was an intention on the part of the Ryan siblings to serve this defence on whomever it was required to be served. Had that occurred and had the defence been received by the other defendants, then all the defendants would have been put upon formal notice of the fact that Ulster Bank was now prepared to facilitate the transfer of the site.

87. The plaintiffs maintain that they felt bound by the confidentiality clause not to reveal the settlement to any party; including their

legal advisors and that they were told by Ulster Bank not to do so. There is no doubt at all that settlements as between financial institutions and their customers have been considered in recent years by financial institutions to be very sensitive, so much so that some financial institutions have gone so far as to request professional advisors to borrowers to sign confidentiality agreements. While the approach taken by the plaintiffs may have been unnecessarily cautious, nonetheless it is understandable that they would not have wished to do anything that might jeopardize the settlement reached with Ulster Bank.

88. Mrs. Heffernan gave evidence that in spite of the confidentiality clause, the defendants were aware that the plaintiffs had reached a settlement with Ulster Bank. None of the defendants apart from Mr. Kingston gave evidence. He stated that he was unaware of any settlement between the plaintiffs and Ulster Bank. However, it is clear from a letter from his solicitors, Whelan Solicitors dated 17th July, 2012 to Messrs. Lavelle Colman Solicitors (then acting for the Ryan family in the Ulster Bank proceedings) that Mr. Kingston must have been aware that a settlement between the Ryan family and Ulster Bank was in contemplation. In that letter, Messrs Whelan state: "We perceive and understand from our conversation that your client has or intends to enter into a settlement with Ulster Bank which may absolve your clients from any liabilities to Ulster Bank in respect of the Ballykisteel Developments Partnership". Mrs. Heffernan's evidence in relation to the knowledge of the other parties in relation to the settlement is at least to some extent supported by correspondence handed into court. Emails exchanged between Mr. John Simpson and Mr. Philip Ryan in March 2013 in the context of trying to arrive at a settlement referred to a draft deed of transfer of the site being prepared and to payments being made to Ulster Bank to obtain a release from its charge over the site. Mr. Simpson and Mr. Murphy even made payment towards the agreement required by the bank to facilitate a transfer of the site. (See paragraph 58 above).

89. Finally, it needs to be borne in mind that it is unlikely that the plaintiffs would have teased out the full implications of the combination of events that was the agreement of Ulster Bank to release the site and the election of the plaintiffs to pursue damages in lieu of specific performance. This interpretation of events is, in my view, a lawyerly one and attributes a degree of cunning to the plaintiffs that is unfair and would not have been borne out by the evidence or the manner in which the plaintiffs gave their evidence. For all of the reasons that set out above, I do not accept that the plaintiffs did not come to equity with clean hands and reject the application to dismiss the proceedings on these grounds.

Position of the Second Plaintiff:

90. So far as the second named plaintiff is concerned, she is a member of the Partnership which undertook obligations both to the second named plaintiff herself and to the first named plaintiff. The members of the Partnership including the second named plaintiff are registered as owners of the site to be provided to the plaintiffs under the contract for sale, subject to the Ulster Bank Charge. The question of law that arises is whether or not it is open to the second named plaintiff to issue proceedings against the other members of the Partnership of which she is a member to compel the fulfilment of an obligation of the Partnership to the second named plaintiff herself. Although for obvious reasons she is not named as a defendant in the proceedings, nonetheless counsel for Mr. Simpson submitted that it is not possible to escape the general legal principle that a partner may not issue proceedings against a partnership of which he or she is a member by simply omitting that partner's own name as a defendant in the proceedings. Counsel for the plaintiffs, Mr. Delaney has submitted that if the court considered that it is not possible to make a finding in favour of the second named plaintiff, then she would consent to the court making orders in favour of the first named plaintiff only.

91. The proposition that a partner may not issue proceedings against a partnership of which she is a member derives from the principle that "by doing so the partner would be the Plaintiff and also the Defendant in the same cause of action." See *Hawkins v. Rodgers* [1951] IR 48. Although in that case Dixon J. found in favour of the plaintiff he did so because he found that the matter giving rise to the proceedings was "an interference by the defendant, in his present capacity and not as a partner, with the property of the plaintiff." Had the plaintiff in those proceedings not succeeded, (on the grounds that he was a partner of the defendant) he would have been left without a remedy, for the claim would not have fallen within the scope of an action seeking an account of partnership dealings. That is not so in this case. Had the second named plaintiff persisted with her claim for specific performance, it might well have been so because such a remedy would not be available within the context of an action seeking an account of partnership dealings. However, having elected to seek the alternative remedy of damages in lieu (of specific performance) the second plaintiff effectively placed herself in a position whereby her claim is a financial one against her fellow partners which requires to be brought as an action seeking an account of partnership dealings, so that all liabilities and entitlements of the partners inter se may be determined. Furthermore, I believe that Mr. McEntaggart is correct in his submission that this obstacle cannot be overcome by the simple expedient of omitting the second plaintiff's name as a defendant. It was clearly the Partnership of which the second plaintiff is a member that undertook obligations to both plaintiffs, and if it were open to a partner to seek damages against that Partnership by simply omitting her name as a defendant, then it would be possible for a member of a partnership to obtain an award of damages without a full account being taken of all partnership dealings, which could well result in unjust enrichment of a plaintiff.

92. Accordingly, it is in my view not possible to make any award in favour of the second plaintiff in these proceedings, notwithstanding the failure of the Partnership to meet its obligations to her under the contract for sale. That of course does not prevent an award being made in favour of the first named plaintiff.

Conclusions:

93. The obligations to the plaintiffs under special conditions 10 and 11 of the contract for sale have not been performed. While this may, to a significant extent, be due to factors outside of the control of the defendants, that is not something which the court should take into account not least because the plaintiffs kept their part of the bargain and have been left without a family home as a result of the failure of the Partnership to comply with its obligations to the plaintiffs.

94. I have already found that Mr. Simpson was not a party to the contract for sale, that he was not a member of the Partnership and that he is not liable to the plaintiffs under section 14 of the Partnership Act, 1890. Accordingly the proceedings against Mr. Simpson must be dismissed. Since I have further found that:

- (1) Mr. Kingston may not rely on the deed of indemnity and release of the 24th of August 2011 and;
- (2) that the grounds on which the Bailey Partnership defended the proceedings i.e. that the contract was frustrated, does not exonerate the members of that Partnership from an award of damages in lieu of specific performance and;
- (3) that the Ryan siblings are bound by the obligations of the Partnership in the contract for sale;
- (4) that the second named plaintiff cannot succeed by reason of her membership of the Partnership;

it follows from all of the above that the first named plaintiff is entitled to an award of damages, jointly and severally, against the first to twelfth named defendants.

95. As to the amount of the award, Mr. Michael Quirke, Chartered Architectural Technologist and Chartered Building Engineer gave evidence as to the cost of completing the dwelling house to the standard envisaged by the contract for sale. This evidence, which was not contested, was that it would cost of the order of €319,460 to complete the dwelling house to the required standard. Accordingly, I hold that the first named plaintiff only shall be and is hereby awarded the sum of €319,460 as against the first to twelfth named defendants, jointly and severally.

Counsel for the plaintiffs: Michael Delaney SC & Jack Hickey BL instructed by English Leahy Solicitors, Tipperary.

Counsel for the first to fifth, seventh, eighth and twelfth named defendants: Hugh O'Flaherty BL instructed by O'Connor Tormey Solicitors, Thurles .

Counsel for the sixth named defendant: Eoin Sreenan BL, instructed by Whelan Solicitors, Cork.

Counsel for the thirteenth named defendant: Louis McEntaggart SC instructed by Carl O'Mahony & Co. Solicitors.