THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 149

Appeal Number: 2015/585

Appeal Number: 2014/1087

Ryan P.
Peart J.
Hedigan J.

BETWEEN:

MICHAEL BUTLER AND WILLIAM BUTLER

PLAINTIFFS/APPELLANTS

- AND -

NELSON & CO SOLICITORS

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 10th DAY OF MAY 2017

1. There are two notices of appeal filed by the appellants. One is stated to be in respect of an order of High Court (Hogan J.) dated 20th December, 2013. However, this may be a clerical error since that particular order, *inter alia*, merely corrected part of an earlier order dated 21st October, 2013. It is clear that the appellants' intention was to appeal against part of the latter order in its amended form. In its amended form the order dated 21st October, 2013, as relevant to the appeal, ordered that:

> "1. The particulars numbered 23.2 and 23.3 of the plaintiffs' claim as disclosed in the plaintiffs' reply to particulars dated the 18th September, 2013 be struck out in their entirety.
>
> 2. The plaintiff [sic] do file replies to particulars 23.1 and 23.4 of the plaintiffs' reply to particulars dated 18th September, 2013 and the claim is now confined to the two claims as disclosed in these particulars".

2. The second appeal, which is in truth the only appeal which the appellants moved before this Court when the appeals were listed for hearing, is against the order made by the High Court (Baker J.) dated 17th October 2015 in which at the conclusion of the plaintiffs' evidence she dismissed the plaintiffs' claims on the basis that they were bound to fail, having heard an application in that regard by the defendants.

3. I should add, in relation to the first notice of appeal, that in any event the grounds of appeal rely upon evidence that was not before Hogan J. when the motion in question was heard by him, namely a report from Mr Charles Russell, accountant. That report, and the complaint by the plaintiffs that the trial judge wrongly refused to allow him to give certain evidence which relied upon his having inspected certain Anglo bank statements which the plaintiffs had failed to discovery as part of what is referred to as Category 4 pursuant to an order of Hogan J. dated 13th January, 2014, was addressed by Mr Michael Butler as part of his arguments made on the second appeal, and he agreed, when asked by Ryan P. towards the end of the appeal hearing, that if the issue around Mr Russell's evidence was dealt with in the second appeal, it effectively dealt also with the first appeal.

4. Only Mr Michael Butler appeared before the Court to prosecute his appeal. He was unrepresented, but was accompanied by Ms. Farrell, his former solicitor, and she sat beside him as his so-called 'McKenzie friend' in order to 'assist' him. Mr William Butler did not appear for the purpose of prosecuting the appeal at all, and was not represented. This Court was informed by Michael Butler that his brother William Butler was in England in an effort to earn a livelihood, but that he had been kept informed by him of all the dates on which the appeal was before the Court of Appeal for directions from time to time, and of the date fixed for the hearing of the appeal, and that he was fully aware that the appeal was listed for hearing.

The 'McKenzie Friend'

5. Before addressing the appeal itself, I would like to say something about 'McKenzie friends' generally, and about Ms. Farrell's involvement in that capacity in the present appeal. To put my remarks in context I will give a very brief procedural history of this case.

6. When these plaintiffs issued a plenary summons against the defendant on the 9th February 2009 they did so in a personal capacity, as they were entitled to do. Some months later they delivered a statement of claim, again prepared by them personally. Following the delivery of a notice for particulars on the 26th May, 2009 by the defendant's solicitors, the plaintiffs furnished replies thereto dated 29th October, 2009 - again, it would appear, having prepared those replies themselves without the assistance of a solicitor. They consulted a solicitor (Mr Byrne) in 2011, and he furnished additional replies to the notice for particulars. Not being satisfied with the replies given in relation to particulars 18 and 23 of their notice for particulars, the defendants issued a notice of motion on the 13th March, 2012 seeking to strike out the plaintiffs' claim for failure to adequately provide these particulars, or alternatively an order requiring the plaintiffs to furnish full and detailed particulars to 18 and 23 aforesaid. That motion was served upon Mr Byrne as the solicitor on record for the plaintiffs at that time. However, by the time the motion came before Hogan J. for determination on the 21st October, 2013 the plaintiffs had consulted Ms. Angela Farrell, who was then a practising solicitor. She had come on record for the plaintiffs in these proceedings and appeared for them before Hogan J, according to the order as drawn up. I have already set out the relevant parts of the order made by Hogan J. in paragraph 1 above, and note in particular that he directed that the case was thereafter confined to the two issues related to particulars 23.1 and 23.4 of the plaintiffs' reply to particulars dated 18th September, 2013. I take that to refer to the only two heads of loss that the plaintiffs were permitted to rely upon, assuming that they succeeded in establishing liability against the defendant.

7. By the time the case came on for hearing before Baker J. on the 3rd March 2015 and following days, Ms. Farrell was no longer the

solicitor on record, she having been struck off the roll of solicitors in 2014. At the hearing in the High Court the first named plaintiff, Michael Butler, represented himself even though his brother, William, was represented by solicitor and counsel.

8. It is a sad fact of life that many litigants nowadays cannot afford to pay for the services of a solicitor, let alone counsel in addition, to represent them as either plaintiff or defendant in their legal proceedings. Legal services are expensive by any standards. Such litigants find themselves having to present their own cases because they cannot afford a lawyer. In many such cases their opponent will be legally represented which serves to increase their own sense of disadvantage notwithstanding the assistance which the trial judge will feel it reasonable and fair to provide in order to ensure a fair and proper hearing.

9. More and more such litigants are finding it helpful to be accompanied in court by what has become known as a 'McKenzie friend', so-called because of the decision of the Court of Appeal (*McKenzie v. McKenzie* [1970] 3 All ER 1034) which concluded that the trial judge was in error to have refused to permit a friend to give advice and *assistance* to Mr McKenzie. As it happened that friend was a qualified Australian barrister who was then working in the firm of solicitors who had at one time represented Mr McKenzie, until he could no longer afford to retain them. Davies L.J noted in his judgment in the appeal that the case was complicated and had lasted some ten days in the High Court. He described it as *"a difficult case for a man with an untutored mind to conduct"*. The barrister friend duly absented himself from the court when he was refused permission to assist Mr McKenzie, who then successfully appealed on that ground, and achieved a rehearing of his case.

10. In his judgment, Sachs L.J. stated that the husband was fully entitled to have the *assistance* that the Australian barrister was willing to provide on a voluntary basis. He noted that there had been no subsequent criticism of what was said by Lord Tenterton C.J in *Collier v. Hicks* [1831] 2 B & Ad 663 at 669 that *"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice …"*. Sachs L.J. concluded with the following at p. 1039:

> *" … I am fully aware that this particular litigant was one who was described by the learned trial judge as adroit, and nimble, and one able to try to turn matters to his advantage; that he was rated to be a remarkably intelligent and astute person; and that he was able to' think on his feet' and (as the trial judge put it) to make any trick which he thought he could capture. I'm also aware and give full credit to both the trial judge and counsel for having rendered every practicable assistance to the husband, endowing him, perhaps, with certain advantages that he would not have had if he had been represented by counsel. Nonetheless, at the end of the day one comes to this: as counsel for the husband aptly pointed out, all the* ***assistance*** *a litigant in person gets from a judge and from opposing counsel is not really the same thing as having skilled* ***assistance*** *at his elbow during the whole of a lengthy trial. In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of the assistance which he ought to have had. It is moreover always, to my mind, in the public interest that litigants should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange. I too agree that in those circumstances there should be a new trial on the one issue to which Davies L.J has adverted."* [emphasis added]

11. It is not surprising therefore that judges in this jurisdiction also and for much the same reasons regularly permit an unrepresented litigant to be assisted in court by somebody who is in a position to render that assistance, when so requested. Indeed, such *assistance* can be of benefit to the court itself, and not just the litigant, especially where the person assisting has some legal knowledge or experience with which to explain matters to the litigant in language which he understands, or can simply provide moral support to the litigant in this difficult and often challenging court environment, whether through personal friendship, family relationship or otherwise.

12. The *assistance* of a 'McKenzie friend' can often be helpful to an unrepresented litigant. In my view, a judge should be slow to refuse to permit a litigant to be assisted in this way, and then only for good and specified reason. While it is subject to the exercise of judicial discretion in each case, absent some clear reason to justify refusal, it ought to be permitted.

13. In these few remarks I have been at pains to emphasise the word "*assistance*" that can be provided by a McKenzie friend. It may happen that in a particular case the presence of a McKenzie friend is of little or no assistance, and may indeed become a hindrance to the proper conduct and fairness of the hearing. This will sometimes be because the friend misunderstands his role, or has an agenda of his own. It is a limited role. The intended assistance, apart from moral support, is to take notes, assist with the documents being referred to, and perhaps quietly prompt or remind the litigant of points to be made. It is a passive and limited role so as not to unreasonably interrupt the hearing by constant whispering of hints and suggestions to the litigant. Ultimately it is for the presiding judge to conduct the hearing in a way that is fair to both parties. The judge may give directions to the personal litigant, or even directly to the friend, in order to ensure that the friend's involvement does not overstep the intended role by causing a disruption to the even flow of the hearing. Any such directions must be complied with, and any person who is acting as a McKenzie friend must understand the judge's role and the importance of complying with any such directions. Otherwise, the litigant runs a risk that the judge, in the exercise of his discretion and so that the hearing proceeds in an orderly and fair fashion, may refuse to permit the friend to continue in that role.

14. I have seen fit to make these few remarks in relation to the role of the 'McKenzie friend' because this case has provided an opportunity and indeed, a need to do so. In my view Ms. Farrell overstepped the mark in the way in which she sought to "assist" Mr Butler. Far from the kind of passive involvement which I have described, she was active to the point of greatly exceeding her role. She was both seen and heard to constantly interrupt what Mr Butler was saying to the court, sometimes even to his apparent irritation. On many occasions when members of the court asked a question of Mr Butler he had only commenced to answer the question when he was interrupted by whisperings from Ms. Farrell who was attempting to tell him how to answer the question. Her involvement was certainly not of assistance to the court. Members of the court were attempting to fairly assist Mr Butler in identifying the real issues that he needed to address in his appeal, and to ensure that he himself was aware of what those real issues were. This interaction between the members of the court and Mr Butler was seriously hindered by the way in which Ms. Farrell interposed herself between the questions from the bench and responses by Mr Butler.

15. In my view the Court would have been justified in directing Ms. Farrell to remove herself from Mr Butler's side, and to continue her presence in court from a seat sufficiently removed from him to prevent her from interrupting him, or offering further 'assistance', and failing that, by requiring her to leave the court. In my 15 years experience as a judge both in the High Court and this Court, I have never been given cause to contemplate requiring a 'McKenzie friend' to cease that role. My own experience of the 'McKenzie friend' has on the whole been a positive one, and on the few occasions when I have had to direct the 'friend' in any way, such directions have been fully complied with. I cannot say the same of Ms. Farrell. She was on many occasions during the course of this appeal asked by members of the Court to allow Mr Butler deal with a question or matter raised from the bench without interruption and to desist from interrupting the hearing by her desire to say something to him. She seemed unable or unwilling to comply with these requests. This was not of any assistance either to Mr Butler or to the court.

16. I am not the first judge to express both approval and yet some caution around the question of the 'McKenzie friend'. Lord Donaldson had cause to express himself in the following way in *R v. Leicester City Council, ex. parte Barrow* [1991] 2 Q.B. 260, an appeal against the refusal to allow such assistance to Mr Barrow who in judicial review proceedings sought to challenge his liability to pay a poll tax. In this regard, Lord Donaldson stated:

> *"If a party arms himself with assistance in order that better himself to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance if it is clearly unreasonable in nature or degree, or if it becomes apparent that the 'assistance' is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising the introduction of the relevant issues or the asking of irrelevant or repetitious questions."*

17. It may well be time for some guidelines to be published so that persons who undertake the role of McKenzie friend are fully aware of the nature of the role they are undertaking, its limitations, and the obligations to the litigant and to the court that they undertake. It is a role which has the capacity to assist the litigant and the administration of justice when properly exercised. However, it is important that its proper limits are understood and respected.

The High Court proceedings

18. The plaintiffs' claim as originally set forth in their plenary summons was straight forward and was set out with brevity. It was a claim that the defendant firm, as their solicitors, failed in its duty to them, and conspired with others to perpetuate a fraud upon them, causing them loss and damage for which they sought to be compensated in a sum of €5,000,000 together with costs.

19. Some flesh was put on these bare bones when the plaintiffs delivered their statement of claim – again a commendably succinct document extending to just 13 short paragraphs. These referred to the defendant firm having undertaken to act for them in relation to a business partnership involved in a property development via a company called BOSOD Limited in which the two plaintiffs held between them a 50% interest. It alleges that the parties holding the other 50% interest (namely a Mr Crohan O'Shea and Mr Tom O'Driscoll) offered virtually no assistance or security to the development company, and that despite this, the defendant firm "oppressed the plaintiffs into accepting that the other parties should have a 50% shareholding in the company". They alleged also that the defendant firm structured the company so that Mr O'Shea had a casting vote at meetings of BOSOD. They alleged that the defendant firm "preyed on [their] commercial naivety and ignorance of commercial law" enabling the other shareholders to act in a way detrimental to the plaintiffs. They alleged also that the defendant firm acted "in cahoots" with the other shareholders, and in particular Mr O'Shea, being a person with whom the firm enjoyed an existing and longstanding professional relationship.

20. The statement of claim then proceeded to outline certain provisions of a building agreement prepared by the defendant firm, and allege that this agreement was worded in such a way that all finances which were to the benefit of the development company were channelled into a bank account which was under the control of the defendant firm and Mr O'Shea, and to their benefit and to the detriment of the plaintiffs. They allege that the defendant firm refused to carry out an instruction given to it by the plaintiffs to transfer funds from its client account into the Waterford branch of Anglo Irish Bank, stating that it would accept instructions in this regard only from Mr O'Shea. This sum (€98,000) was alleged to be owed to Anglo in respect of the property development, and its discharge would have yielded a significant financial benefit to the plaintiffs.

21. The statement of claim concluded with a plea that the defendant firm had betrayed and abused the trust which the plaintiffs placed in it, and as a result they sought damages, including punitive damages.

22. A detailed notice for particulars was delivered by solicitors acting for the defendant firm. Included in this request for particulars were those made at paragraphs 18 and 23 relating to the losses alleged to have been suffered by the plaintiffs, the replies to which were considered incomplete, resulting in a motion to strike out the proceedings for failure to properly provide particulars, or alternatively an order directing the plaintiffs to provide full particulars of the losses in question. I have referred to that motion in paragraph 3 above, and to the nature of the order made by Hogan J. in paragraph 1 above where the losses claim was confined to those related to particulars 23.1 and 23.4 in the plaintiffs' reply to particulars dated 18th February 2013, namely

> (a) the loss of half the value of their Clonmel lands, being the fraction which the plaintiffs committed to their partnership with Crohan O'Shea and Tom O'Driscoll,
>
> and
>
> (b) the loss of the monies advanced to the plaintiffs on behalf of the partnership by the plaintiffs' brothers and sister in circumstances where the defendant, at the instance of Mr O'Shea, was frustrating the use of the partnership's own funds.

23. A full defence was delivered by the defendant, commencing with a denial that the plaintiffs claim disclosed any cause of action against the defendant firm. The defendant acknowledged that it acted as solicitors for the plaintiffs in the period from 30th July, 2003 to August, 2006 in respect of the conclusion of sales of houses but that it had ceased to act generally for them from March, 2004 when the plaintiffs appointed other solicitors to act for them personally. The defence pleads that the extent of the defendant's retainer was in connection with the partnership agreement being entered into by the plaintiffs with Mr O'Shea and Mr O'Driscoll for the development of the Clonmel lands (Airmount), and acknowledges also that in that capacity it owed a duty of care in relation to advice and representation "to the extent that such advice and representation was sought". All the allegations of wrongdoing were denied, and it was pleaded also that at all times the defendant acted upon the instructions of the partnership, and not any individual member or members of the partnership because of disputes that existed between the plaintiffs and the other two partners, and that it so informed the two plaintiffs. The defendant in its defence also pointed to the lack of particulars provided by the plaintiffs in relation to their claims, and referred to the confinement of the loss and damage claim as ordered by Hogan J. by his order dated 21st October, 2013 to which I have referred at para. 21 above. In respect of those claims the defendant pleaded as follows at para. 28 of the defence:

> "28. The loss and damage to which the plaintiffs are now confined by Order of Mr Justice Hogan made 21 October, 2013, is not recoverable in all the following respects:–
>
> > (a) In the first instance, the plaintiffs have acknowledged by virtue of the Partnership Agreement that they held the ownership of the property then described as "Airmount" in trust for themselves, Crohan O'Shea and Tom O'Driscoll and the stated purpose of the Partnership Agreement was to develop the same site. In the premises, the furnishing by the plaintiffs of the property for the development was precisely what was agreed between the plaintiffs and their

then partners as representing the contribution by the plaintiffs. The stated purpose of the Partnership Agreement included redemption of liabilities of the plaintiffs to First Active Plc as well as the funding of the development. In the premises, the plaintiffs have no claim against the defendant for making available the property for development, where this was precisely what they had agreed and contemplated by the Partnership Agreement. No facts have been set out by the plaintiff's which justify the assertion of loss by reference to the value of the property or any part thereof as a viable measure of loss. The defendant will contend that such loss was excessively remote, irrecoverable as well as having no connection with the matters articulated by the plaintiffs.

(b) In respect of the second head of loss now relied upon by the plaintiffs, such does not in truth constitute a loss at all. The existence or otherwise of funding requirement and the need, for reasons as yet not fully disclosed by the plaintiffs, to seek funding from third parties, does not give rise to a cause of action in its own right. To the extent that the plaintiffs have not sought to advance a claim in respect of any loss of funds and have not sought to advance any entitlement to an account against the defendant in these proceedings as currently constituted, and having failed to furnish any details of any actual loss by reference to the non-accounting for funds, it is denied that the plaintiffs are entitled, as an alternative, to advance the source of alternative funds as a measure of damages. No admission is made by the defendant that the plaintiffs in fact sourced funds from their relations as contended, or for the purposes alleged."

24. This case was subjected to careful and extensive case management on many occasions by Hogan J. prior to its ultimate hearing before Baker J. commencing on the 3rd March, 2015. In fact this Court was told that case management had taken place over 20 months, and that the case had been listed already on 99 separate occasions. Mr Justice Hogan made numerous orders with a view to ensuring that the issues were clearly identified, and that the case was ready as far as possible for hearing. Among the orders made by him were certain orders for non-party discovery made on 30th May, 2014 whereby, on the first plaintiff's application, he made discovery orders against IBRC (formerly Anglo), and against a firm of accountants, LHM Casey McGrath. However, each such order was stayed until such time as the first named plaintiff furnished a suitable indemnity in respect of the cost of such discovery. That was never done. In his evidence in the High Court this was acknowledged to be so by Michael Butler, but he explained that this was because he could not afford that cost. In these circumstances that non-party discovery never materialised, and the orders made were vacated by later of Hogan J..

25. Another order made by Hogan J. is one dated 13th January 2014 whereby the plaintiffs were ordered to make certain discovery including what is referred to later as Category 4 relating to an alleged frustration by the defendant of the use of partnership funds by the plaintiffs. The trial judge was satisfied that the discovery ordered to be made by the plaintiffs in respect of Category 4 documents included certain Anglo bank statements. The plaintiffs did not make discovery of those Anglo bank statements even though they were within their power or procurement. This had the consequence for the plaintiffs that during the hearing Baker J. did not permit the plaintiffs' accountant Mr Charles Russell, to give certain evidence which the plaintiffs wanted him to give concerning a partnership loan from Anglo Irish Bank. The evidence which the plaintiffs wanted him to be permitted to give was in relation to what he gleaned from an inspection by him of the relevant Anglo bank statements at the offices of Ms. Farrell. Since those statements came within Category 4 of the discovery that was ordered, and that discovery of these bank statements had not been made by the plaintiffs even though they were in the possession of the plaintiffs' then solicitor, Ms. Farrell, Baker J. ruled that Mr Russell could not give that evidence. Baker J. made a ruling in respect of Mr Russell on 19th March, 2015 to which I shall refer again later in this judgment. He had been able to give some evidence in accordance with some of his witness statement, mainly in relation to what appeared on a spreadsheet of transactions related to partnership funds, though his ultimate position was that he had not been provided with sufficient documentation to know precisely what the position was. But he was precluded from giving evidence on foot of his inspection of the Anglo bank statements.

26. In addition, on the 19th December, 2014, Hogan J. made the following order, which assumes some relevance during the hearing of the action before Baker J.:-

> "IT IS ORDERED that the plaintiffs do not later than 5 o'clock in the afternoon on the 13th January 2015 furnish witness statements to contain inter alia (i) the heading of the proceedings, (ii) the name of the witness, (iii) the nature of the evidence in succinct terms, (iv) what loans were advanced to whom for how much any losses incurred and how, (v) how any losses incurred are related to an alleged breach of contract herein."

27. While certain witness statements were furnished in respect of witnesses that the plaintiffs wished to call, including one by Mr Charles Russell, accountant, there was no witness statement furnished in respect of Ms. Angela Farrell. Towards the end of the plaintiffs' evidence before Baker J. the plaintiffs sought to call Ms. Farrell to give evidence. At that point counsel for the defendant objected on the basis that no witness statement by her had been provided in accordance with the directions of Hogan J. some months previously. The trial judge asked for clarification of what her intended evidence would be. Michael Butler, representing himself, responded that Ms. Farrell had in fact made a witness statement, and that this was evident from the fact that Mr Nelson in his own witness statement had referred to it. But it turned out that this was a reference to a statement of evidence by Ms. Farrell which had been presented to Hogan J. at a directions hearing, but rejected by him because he was dissatisfied with the contents of the statement, and suggested that it be looked at again and prepared afresh. No new witness statement was ever prepared by Ms. Farrell thereafter. Mr Michael Butler, who wished to call Ms. Farrell to give evidence at the conclusion of the other plaintiff evidence, submitted to Baker J. that Ms. Farrell was an expert witness, and that she had relevant knowledge of what had gone on in relation to their complaints about funding against the defendant. It was said that she had evidence to give in relation to correspondence between herself and Messrs. L.K. Shields, acting for the defendant. However, Baker J. ruled that if she was an expert, it could only be in the relation to conveyancing, and that as neither plaintiff was making any complaint against the defendant in relation to the conveyancing work done by the defendant connected with the loan or the housing development her expertise was not a relevant expertise. Baker J. ruled that she could not give evidence of financial matters because she was not involved in relation to those issues.

28. It should be added that the trial judge refused the application to permit Ms. Farrell to give evidence in relation to the financial complaints also because her evidence was going to relate to information gained from her knowledge of the bank statements of the Anglo loan accounts which she had made available to Mr Russell in her office, and which had not been discovered as ordered by Hogan J. The trial judge ruled that in such circumstances Ms. Farrell could not be permitted to give that evidence.

Non-Suit application

29. The plaintiffs gave their evidence over a period of some six days of hearing. I will not attempt a summary of that evidence from the transcript. But at the conclusion of the plaintiffs' case, counsel for the defendant made an application for a non-suit on the basis that despite all the evidence given there was no case made out based on the claims as pleaded for the defendant to answer, and the evidence that had been given by and on behalf of the plaintiffs, and that their case was bound to fail. In making that application

counsel, as he was required to do, confirmed to the court that if his non-suit application failed, his client would go into evidence.

30. Having heard the submissions by counsel for the plaintiff, and those made by counsel for William Butler and by Michael Butler representing himself, the trial judge reserved her judgment on the application, and in due course delivered a detailed written judgment on the 20th October 2015 in which she granted the application and dismissed the plaintiffs' claims. The present appeal is against that judgment and order.

The claims in conspiracy and fraud

31. The trial judge commenced her judgment by setting out a brief background to the claims being made. She then referred to the fact that when these proceedings were commenced the plaintiffs were both un-represented, and stated that "it was difficult to discern precisely what claims the plaintiffs made". She acknowledged the assistance of counsel representing the second named plaintiff who formulated the claim as being "one against the defendant firm of solicitors for breach of contract and/or negligence in and about legal advice alleged to have been given to the plaintiffs concerning the setting up of the partnership". She noted that in so far as the statement of claim (drafted by the plaintiffs themselves) had alleged that the defendant was "in cahoots" with the other partners, counsel for William Butler had accepted that this expression was not intended to import any claim of fraud or conspiracy, but was intended to convey a complaint that the defendant had favoured the other half of the partnership over the plaintiffs, and that he had not acted with the interests of the whole partnership in mind, and where disputes arose had preferred the interests of the other partners over those of the plaintiffs.

32. Before proceeding further I should refer to the fact that on day 3 of the hearing it was again confirmed by counsel for William Butler that the plaintiffs were not alleging conspiracy or fraud against the defendant. I mention that now because in their notice of appeal to this Court the appellants state as follows:

> *"The claim for fraud remained but on the hearing date the legal team for Mr William Butler prevailed upon him to remove the claim of fraud. The claim that Mr Nelson had acted to defraud remained for Mr Michael Butler."*

33. It is necessary to refer to a couple of passages from the transcript for Day 3 in relation to the question of whether any claims based on conspiracy and fraud were withdrawn only by William Butler through his counsel, and not by Michael Butler. I will set out the relevant passages. In my view, having read the transcript closely it is beyond argument firstly, that counsel for William Butler, in answer to very specific questions from the trial judge, informed her that the fraud claim was withdrawn, and further when asked if he was formally withdrawing any part of the claim that was framed or could be deemed to be framed as conspiracy, counsel replied: *"yes – and I'm saying that what I am alleging is that where the defendant purported to act for four co-venturers, if he preferred one of the co-venturers over another then that was a breach of duty"* [see Day 5, pp. 10-12]. This concession has to be seen in the context of the questions from the trial judge at the conclusion of Day 2 when the nature of the plaintiffs' (plural) claims were explained to the trial judge. The trial judge stated that as she understood the claims, as then being characterised, it was not a claim in fraud. Counsel confirmed that was the position. There was no demur by Michael Butler to what was stated in this regard. Counsel for the defendant at that point stated that he was "glad to see the back of the fraud claim", but went on to say that he would prefer it to be specifically withdrawn. Counsel said that he would need to take instructions specifically overnight and that he would clarify the matter the following morning. That is the context in which on the following morning, as I have already set forth, the trial judge asked what was the position about the fraud claim, and when counsel said "That's withdrawn". There was nothing to indicate that this applied only to William Butler but not to Michael Butler. Neither did Michael Butler demur in any way.

34. At the commencement of Day 3 there was also a further exchange between counsel and the trial judge in relation to a claim for breach of fiduciary duty owed by the defendant to the plaintiffs. The trial judge at that stage directed that the plaintiffs clarify precisely what they were alleging in relation to breaches of fiduciary duty so that the claims being made in the case were clear before the evidence commenced. The plaintiffs were directed to provide such particularisation by the following Monday.

35. At this point in Day 3 the trial judge was still at pains to ascertain precisely what claims were still being maintained by the plaintiffs. She was clearly conscious that counsel appeared only for William Butler, and wanted to know Michael Butler's position in relation to any claims made in fraud and conspiracy. The following exchange with Michael Butler ensued in this regard:

> Judge: I do need the other defendant to confirm the position. Mr Michael Butler, you are representing yourself. Counsel who acts for your brother has withdrawn the claim in conspiracy. Are you taking the same position?
>
> Mr Butler: Well, my barrister agreed yesterday evening that I would follow the line taken by him in respect of my brother William.
>
> Judge: But he is not your barrister, Mr Butler. Is this Mr Dixon?
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> Mr Butler: Well, okay he made a submission to the Court yesterday afternoon.
>
> Mr Jackson (counsel for William Butler): I think he is talking about me.
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> Judge: .He's talking about you?
>
> Mr Jackson: Yes.
>
> Judge: You are going to be behind [Mr Jackson] – he can speak for you even though he doesn't represent you.
>
> *Mr Butler: Yes.* [my emphasis]
>
> Judge: We will work with that for the moment.

36. In my view it is clear that when the court was informed by counsel for William Butler that the fraud claims were withdrawn, it was a statement intended by counsel to be in respect of both Mr Butlers. It is also clear also that Michael Butler confirmed when questioned by the trial judge that he was following the line being taken by counsel on behalf of William Butler. The case thereafter proceeded by both plaintiffs on the basis that neither fraud nor conspiracy was in the case.

37. On the appeal before this Court Michael Butler was referred by the Court to this passage of the transcript, when in his submissions he was still alleging fraud against the defendant. In answer, Mr Butler said that while he had withdrawn any claim in conspiracy, he had not done so in respect of fraud. In that regard he was clearly referring to the specific words of the question asked

of him by the trial judge when she asked: *"Counsel who acts for your brother has withdrawn the claim in conspiracy. Are you taking the same position?"* But that question has to be seen in the context of the earlier passages of the transcript of that day, and indeed in the context of the trial judge's urgings on the previous evening that the position in relation to the fraud claims should be made clear on the following morning.

38. Michael Butler cannot now on this appeal attempt to argue that those claims continued to be maintained by him. In so far as he refers to the precise words of the question put to him by the trial judge, in isolation from the context to which I have referred, Michael Butler is indulging in an exercise of dissembling, and this ought not to be permitted, as to do so is to permit an abuse of process.

The judgment of Baker J. on the non-suit application

39. In the light of what the trial judge accepted was the position of both plaintiffs, namely that the claims based on conspiracy and fraud were withdrawn, she proceeded in her judgment to summarise the remaining claims as being in breach of contract, negligence, and breach of fiduciary duty. She did so by reference to updated particulars of claim provided to her by the solicitors acting for the second named defendant, William Butler. There is no appeal by Michael Butler against the way in which the trial judge described these remaining claims by reference to that document. The breach of contract claim is described as follows:

> "The plaintiff claims that the defendant was in breach of his contract with the second plaintiff in:–
>
> (a) Failing to take proper steps to ensure that the second plaintiff took independent advice. This is not pleaded with any particularity and in particular, it is not stated, the matter in respect of which it is alleged that this step ought to have been taken by the defendant.
>
> (b) Acting for the partnership after it became apparent there was a breach of trust and/or preferred some of the partners over the others.
>
> (c) Incorporated a company called BOSOD Ltd but failed to ensure that it "performed its proper function" in relation to the partnership.
>
> (d) Dispersed partnership funds and thereby left the plaintiffs short of funds to carry out the building works.
>
> (e) Failed to make any payment out of partnership funds to the plaintiff.
>
> (f) Acted for the partnership and/or BOSOD Limited when he knew or ought to have known that his previous professional relationship with one of the partners made it impossible for him to be independent, and/or failed to disclose the extent and/or duration of that professional relationship.
>
> (g) "Engineered" the breakdown of trust between the partners.
>
> (h) Made disbursements in a "chaotic" way thus causing "confusion and suspicion."

40. The claim in negligence was described in the following terms:-

> "The claim is formulated in negligence in somewhat different [terms] although there is a significant overlap. The matters pleaded in respect of alleged breach of contract are also alleged against the defendant under the heads of alleged breach of negligence, but there is a specific plea that the defendant "failed" to give independent advice and/or "failed" to give equal weight to the interests of all the partners. There is also a specific plea that the defendant closed the sale of various house sites without "due regard for" any payments that might be due to the legal owners of the lands."

41. The claim in respect of alleged breach of fiduciary duty is described as follows:-

> "There is an additional plea that the defendant was in breach of fiduciary duty in failing to give an account of the disbursement of partnership assets, and/or failed to treat all partners equally."

42. Having set out that summary of the remaining claims, the trial judge then considered the legal basis on which an application for a non-suit must be considered by the court. Having noted that counsel for the plaintiff had confirmed to the court that in the event that the application was unsuccessful, the defendant would go into evidence, she then referred to the decision of the Supreme Court in *O'Toole v. Heavey* [1993] 2 I.R. 544, which held that in considering an application for the dismissal of the plaintiff's claim the court must approach the evidence by taking the plaintiff's case at its highest, and that the court should consider whether the plaintiff had made out a prima facie case on the balance of probabilities. The trial judge stated:

> "The court must also, at this juncture, not have any regard to the witness statements which have been filed on behalf of the defendant, or to certain documentation introduced in the course of cross-examination of the plaintiffs although witnesses save and insofar as the accuracy of the information in those documents was accepted by those witnesses in cross-examination."

43. There is no appeal against the trial judge's statement of the legal test to be applied in relation to applications of this kind, and the evidential basis on which it falls to be considered. Michael Butler made no complaint that the test, though correctly stated, had been misapplied to the evidence adduced by the plaintiffs. Having said that however, and since Michael Butler is unrepresented on this appeal, it is only fair that I should state my respectful agreement with the test stated by the trial judge, and her application of that test to the evidence which was given.

44. The first question addressed by the trial judge in her judgment was the evidence adduced by the plaintiffs of the nature and the extent of the defendant's retainer in relation to the partnership agreement in June/July, 2003. As set forth in para. 39 above, their complaint in relation to this aspect of the case is, as clarified at the trial judge's request, that the defendant solicitor failed to take proper steps to ensure that the second plaintiff took independent advice. Given that Michael Butler had stated to the trial judge that he "would follow the line taken by [William Butler's counsel] …" and confirmed to her that even though that counsel did not act for him he could speak for him (day 3, p.8), I take that clarification of the heads of claim to apply also to Michael Butler.

45. The trial judge considered the evidence adduced in relation to the defendant's retainer. She noted that when the Clonmel lands had been bought by the Butler brothers in 2003 Messrs. Houlihans solicitors of Ennis had acted for them in that purchase. Indeed, she

noted that that firm had registered a judgment mortgage against those lands in respect of legal fees owed.

46. The evidence of the plaintiffs was that these lands had been bought with the assistance of a loan from First Active Plc earlier in 2003 which was secured on these lands by a first charge. They had a planning permission for 111 houses on the site. That loan was not being serviced in accordance with its terms, and First Active was either threatening to appoint a receiver, or had done so. The Butlers needed funding in order to construct the houses, otherwise they risked losing the site. They sought to refinance, and in this regard in June 2003 they were introduced to Tom O'Driscoll. They discussed the matter with him, and he appears to have introduced them to Crohan O'Shea who was apparently well connected to Anglo Irish Bank. A meeting with Anglo then followed.

47. She noted also that when the four partners had first discussed getting together in order to develop the Clonmel lands they had conducted their pre-partnership agreement negotiations among themselves, all of whom were experienced business men, without the benefit of legal advice. However, when it became necessary for some legal documentation to be signed, Mr Nelson became involved, and he had prepared a short document characterised as "an agreement to agree" and which became referred to as "the Shelbourne agreement" which was signed by the four intending partners on the 18th June, 2003. It is not in dispute that Mr Nelson had for some years acted for Crohan O'Shea and that this is how he came to be asked to prepare the 'Shelbourne agreement'.

48. A loan facility letter dated 25th June, 2003 in the sum of €5.4 million issued from Anglo, and was addressed to Crohan O'Shea, Tom O'Driscoll, William Butler and Michael Butler. The Butlers each signed their acceptance of this facility. The security to be provided included a first charge on the Clonmel lands owned by both Butlers, as well as a first charge over lands owned by William Butler at Lewagh More, Thurles.

49. The intention was that there would be an initial drawdown of €3,000,000 on foot of the Anglo facility, to which would be added a sum of €400,000 provided by Crohan O'Shea through his company Vividale Limited. That €3,400,000 was to be used as follows. The parties were agreed that the amount necessary to discharge the First Active loan was in the order of €3,250,000. That is the figure appearing in the partnership agreement executed by the parties on the 30th July, 2003. The balance of €150,000 was to be paid to Michael and William Butler. However, of that €150,000, almost €100,000 would be used to discharge legal fees owed by the Butlers to Messrs. Houlihans, solicitors. These details are un-controversial, and are set forth in the partnership agreement signed by the parties. The balance of the Anglo loan would be used for the purpose of completing the housing development on the Clonmel lands.

50. The discharge of fees owing to Houlihans had to be achieved before Mr Nelson could begin to act for the Butlers in relation to the Clonmel lands and therefore the partnership. But by the end of July, 2003 he had come to satisfactory arrangements with Houlihans in relation to the discharge of their fees, thus enabling the judgment mortgage on the Clonmel lands to be removed. That was necessary in order to put the Anglo security in place.

51. There is no doubt on the evidence that it was Mr Nelson who prepared the partnership agreement that was executed by the four partners on the 30th July 2003, and about which the Butlers make complaint. They have complained that Mr Nelson had a conflict of interest (being the solicitor for Messrs. O'Shea and O'Driscoll), that he favoured those parties over the Butlers, and that he negligently permitted them to enter into the agreement – an agreement which they allege did not reflect their instructions to him, and further that he negligently permitted them to enter into this agreement without ensuring that they had obtained independent legal advice.

52. The trial judge addressed the plaintiffs' evidence in relation to these complaints at great length in her judgment. She went into considerable detail in relation to the evidence given by Michael Butler. She referred specifically to the fact that Mr Nelson had written to Michael Butler on the 22nd July 2003 notifying him of the appointment that had been made for the 29th July 2003 to complete the legalities connected to the drawdown of the Anglo loan. In that letter he raised certain questions about both the Clonmel lands and William Butler's lands at Lewagh More. He went on to state that he was at that time drafting a partnership to be signed by the four partners. But in relation to some of the plaintiffs' complaints about Mr Nelson it is important to recite the following passage from that letter. The trial judge referred to this letter at para. 26 of her judgment but quite briefly. The relevant passage to which I wish to refer in detail states as follows:

> *"My position at the moment is very precarious and I have to be careful not to enter into a 'conflict of interest' situation. I can only officially come on record for yourself and William next Tuesday when I am in a position to honour my undertaking to Michael Houlihan & Partners. Until then, I am, strictly speaking, not entitled to represent yourself and William Butler. To be fair to the two of you, and to protect my own interests, I am insisting that you are advised by another solicitor in relation to the agreement. Who do wish to nominate in this regard? As soon as you do I will send a copy of the draft agreement to him/her.*
>
> *I will not proceed with the re-mortgage from First Active plc to Anglo Irish Bank unless the signed agreement is firstly in place. As soon as the re-mortgage has been completed I can act freely on behalf of all four of you in relation to this transaction. I hope you understand my reasons for wishing to proceed in this manner."*

53. The trial judge noted that Michael Butler accepted that he had received this letter, as did William Butler. The trial judge noted also the evidence of Michael Butler that in fact he had spoken to another solicitor about the matter, though, as noted, this was said by him to be 'tentative advice". It appears that Mr Butler met that solicitor on the street and had a discussion with him. But, as noted also by the trial judge, Mr Butler accepted in cross-examination that he had discussed the contents of the draft partnership agreement with this solicitor. It appears also that in fact Mr Butler had some issues with the draft and had some amendments made to it before it was signed. This is referred to by the trial judge at para. 34 of the judgment.

54. The trial judge was satisfied that there was no credible evidence that the defendant firm had any involvement in the negotiations between the parties that led to the partnership agreement which Mr Nelson drafted. The trial judge pointed to the terms of the retainer of the defendant as evidenced by an authorisation signed by both Michael and William Butler which appears to be dated 11th July, 2003 which stated as follows:-

> "We hereby authorise Nelson & Co solicitors of Templeogue Village, Dublin 6W to act for us exclusively in relation to the following matters:
>
> 1. The redemption of a mortgage in favour of First Active plc affecting a 15 acre residential development site at Airmount, Cashel Road, Clonmel, County Tipperary.
>
> 2. A 52 acre farm at Lewaghmore, Thurles, County Tipperary.

3. Redemption of all loans or liabilities affecting the above two properties.

4. The drawdown of loan facilities from Anglo Irish Bank Corporate plc [sic]

5. the discharge of €40,000 to include €20,000 against judgement Dubai us to Michael Houlihan & Partners, solicitors, Ennis, Co Clare.

6. The payment of any fees due to Martin E. Marren & Co-Solicitors, in relation to the restoration of Butler Bros (Cashel) Limited."

55. On the 10th July, 2003 both Butlers had signed an authority authorising First Active to release the title deeds held by First Active plc to Nelson & Co. on an accountable receipt. This was to enable Nelson & Co. to put in place the security required by Anglo as a condition of the loan approval referred to above.

56. It appears from the judgment of the trial judge that at one point Michael Butler asserted that Mr Nelson had been negligent by not insisting that Messrs. Houlihan solicitors were present when the Butlers signed the partnership agreement since, according to what Michael Butler stated, that firm was acting for him and his brother in relation to the partnership. However, the trial judge was satisfied that the documentary evidence pointed to the conclusion that Messrs. Houlihans had ceased acting for the Butlers from 12th July, 2003 with regard to any matter relating to the lands in Clonmel, the loan with first active or any other related matters relevant to the proceedings. She stated that "no other finding is possible on the evidence". I entirely agree with that conclusion having examined all of the evidence given by the plaintiffs during the course of the hearing in the High Court, and having carefully considered the submissions made on this appeal.

57. I also agree with certain comments made by the trial judge in relation to the quality of some of the evidence given by Michael Butler. She found him in some respects to be "elusive". That phrase was used for example at para. 29 of the judgment. At para. 38 she said the following:-

> "Michael Butler had a remarkable and almost perfect recall of many letters that were exchanged between the parties in the course of this transaction and he had precise recall of exact and uneven figures, and was an expressive and articulate witness. He was from time to time in the course of his evidence, however, elusive and on several occasions he used the phrase "I will not affirm or deny" with regard to a matter that was put to him, and when he was pressed as to when Messrs. Houlihans ceased to act for whom and when John Nelson came to act for him he used that phrase on a number of occasions."

58. I am satisfied that the trial judge was entitled to reach the conclusions which she reached on this aspect of the plaintiff's evidence and to find, as she did, that there was no credible evidence adduced by the plaintiffs to support a claim in either breach of contract or in negligence on the part of the defendant arising from its involvement it with these parties either prior to or up to the execution of the partnership agreement on 30th July, 2003.

59. Even though Mr Butler asserted in his evidence that Mr Nelson's retainer was of a general and all-embracing nature to advise the Butlers in relation to everything to do with the partnership, and that it was not confined to the re-financing transaction, the putting in place of the Anglo security, and to the sale of houses that would be constructed on the Clonmel lands, the trial judge was entitled to conclude that there was no evidence adduced to substantiate that mere assertion, and that the documentary evidence contradicted it. In this regard she concluded at para. 47 of her judgment:-

> "Further, I consider that they are evidence is that the retainer of Mr Nelson was specific and related to the sale of the residential units, the redemption of the First Active loan, the putting in place of security as required by Anglo Irish Bank and the drawdown of funds. I consider that the evidence points to no other finding but that the plaintiffs were aware of the nature of the retainer. Further, the engagement of the firm to act in the sales was done after negotiations by the partners and another firm of solicitors was also in the picture as a possible alternative. Further as events show, and as will appear later in this judgement, the Butler brothers employed various different solicitors, including, Messrs Binchy, and Chris O'Shea solicitor, to act on their behalf in the course of related but different matters and disputes at the time."

60. One only has to look at the authorisation to which I have already referred and which was signed around 11th July, 2003 by Michael Butler and William Butler to see the very specific nature of Mr Nelson's retainer at that time, to see that the retainer was confined to these issues. There was no evidence adduced, apart from the plaintiffs' mere assertion unsupported by anything else, which could support their claim that Mr Nelson had any wider or more general extensive retainer as alleged.

61. The trial judge was entitled also to conclude that there was no evidence of negligence in relation to the question of independent legal advice for the Butlers. The letter of 22nd July, 2003 to which I have referred, explained Mr Nelson's position with great clarity, and makes it abundantly clear that Mr Nelson was insisting that the Butlers take independent legal advice, and he explained clearly why that was necessary. He was not dealing with persons suffering from any incapacity. He was dealing with persons he knew to be experienced businessmen. Having expressed his insistence upon them taking independent legal advice in relation to the proposed partnership agreement, for the reasons which he gave, he was entitled to assume thereafter that they would do so. As it turns out, the evidence has disclosed that Michael Butler did so. The fact that he chose to do so in the manner in which he did, namely by discussing the proposed agreement in some detail with a solicitor who he met on the street, is not something that diminishes in any way the discharge by Mr Nelson of his duty to insist upon the Butlers taking independent legal advice. The trial judge was completely correct to reject the assertion by Michael Butler that Mr Nelson was obliged to have ensured that the agreement was signed by the Butlers in the presence of a solicitor from Messrs. Houlihans, and she was entitled to conclude in any event that that particular firm had ceased to act by 12th July, 2003.

62. The trial judge was entitled to conclude, having regard to all of the evidence adduced by the plaintiffs, that taken as its height from the plaintiff's point of view, including the documentary evidence, and without regard to anything contained in the witness statements of the defendants or even the cross-examination of the plaintiff's, that the defendant had no case to answer in relation to allegations related to events prior to and up to 30th July, 2003.

BOSOD

63. BOSOD is a limited liability company that was incorporated on the 30th July, 2003 for the purpose of carrying out the building works for the housing development on the Clonmel lands. BOSOD would build the houses, and be paid for doing so from the Anglo borrowings, or any other funding that might be provided for the development.

64. Mr Nelson incorporated this company. He and his wife were named as the subscriber shareholders, and were named as the first directors. The name represents the surnames of the Butlers, Mr O'Shea and Mr O'Driscoll. They each signed a share transfer form so as to divest themselves of those shares in favour of the partners, and resigned as directors in favour of the four partners almost immediately thereafter as is evidenced by a letter dated 7th August, 2007 from Mr Nelson to the partnership's accountant, Frank Hussey of LHM, Chartered Accountants in which he stated that he had sent a form B10 to the Butlers for their signature as incoming directors, and stating also that as soon as he received that form back from them he would have it signed by Mr O'Shea and Mr O'Driscoll and then file it in the Companies Registration Office. He also enclosed the share transfer forms which had been signed by himself and his wife, Susan Nelson stating that the four incoming directors were to be equal shareholders in the company "as you are aware". As it happens, that Form B10, though signed by all the partners as incoming directors on the 11th August, 2003, was not actually received by the Companies Registration Office for filing until one year later on the 14th August, 2004. Much is made of this feature of the case by Mr Butler, particularly in support of his allegation, based only on the fact that the records in the Companies' Registration Office continued until August, 2004 to show Mr & Mrs Nelson to be the directors, that Mr Nelson and his wife effectively ran this company for their own benefit and embezzled the company's money, and otherwise defrauded them. These outrageous allegations persisted in the High Court and through this appeal despite the fact that by then they had copies of the form B10 that they had signed in August, 2003, and the letter from Mr Nelson to Mr Hussey that I have referred to. On this appeal, when I drew Mr Butler's attention to the form B10 which bore his signature, so that I could be sure that he had not inadvertently overlooked its existence when suggesting wrongdoing on the part of Mr Nelson and his wife, he resorted to responding that the form had been deliberately backdated by Mr Nelson. This stance was maintained even when the letter to Mr Hussey was drawn to his attention which puts beyond doubt the fact that Mr and Mrs Hussey had resigned as directors in August 2003 and had transferred their subscriber shares.

65. The trial judge concluded that there was no evidence adduced in relation to any involvement by Mrs Nelson in the management of the company, or in any decisions made by Mr Nelson in relation to the company. That is a correct conclusion. There was no such evidence adduced. On this appeal the appellant included Mrs Nelson in the accusations which he levelled against Mr Nelson in relation to his alleged mismanagement of the affairs of BOSOD. There was no basis for him to do so.

66. As far as Mr Nelson and BOSOD is concerned, the trial judge noted that the allegation is that he:-

> (a) Incorporated a company called BOSOD Ltd but failed to ensure that it "performed its proper function" in relation to the partnership;
>
> and
>
> (b) dispersed partnership funds and thereby left the plaintiffs short of funds to carry out the building works.

The trial judge stated at para. 56 of her judgment that "at its height" the case being made against Mr Nelson is that if he had done his job properly there would not have been any need for additional funding which necessitated a supplementary partnership agreement in August, 2004. As explained by the trial judge in her judgment, the initial loan from Anglo was never going to be enough to complete the entire development. Further funding was always going to be required. She explains also that certain title difficulties emerged of which the Butlers were aware but of which Mr Nelson had not been apprised. Those problems needed to be resolved which took time, and that led to sales of houses not being completed as speedily as would otherwise have been the case. The trial judge was completely satisfied that there was no evidence to support any claim of negligence by Mr Nelson arising from any delay in having these matters resolved. That is a conclusion which she was obliged to reach on the evidence given. There was no evidence which she overlooked in that regard. There was simply no evidence to support the allegations made.

67. The need for additional funding culminated in a supplementary partnership agreement dated 24th August, 2004. Crohan O'Shea had agreed that he would make an additional €500,000 available to assist in the completion of the development, and it appears that the bank was willing to loan a further €500,000. The additional funding by Mr O'Shea is reflected in the supplementary partnership agreement. Essentially this provided that this loan would be repaid to Mr O'Shea by the 31st January 2005 with interest, and that he was to receive "the first one million five hundred thousand euros of the nett profit arising from the development. There were other provisions that it is unnecessary to specify.

68. It is important to note from the judgment that by the 8th March, 2004 Mr Nelson had ceased to act for the Butlers. They had by that date instructed Messrs. Binchy solicitors of Clonmel. Disputes between the parties had emerged so that Mr Nelson could no longer act for all four partners. He continued to act for Mr O'Shea and Mr O'Driscoll, and for the partnership but, as stated by the trial judge "only and in so far as that entity had separate interests from those of the individual partners".

69. One of the allegations made by the Butlers is that if Mr Nelson had prepared the partnership properly, or "had done his job properly" there would not have been any need for the second agreement which arose because additional funds were needed. It is very unclear what the basis for that allegation is. The trial judge found it to be completely unfounded on the evidence, and that no evidence had been adduced to support it. I can find none either. There seems to have been a suggestion by the Butlers that the delays in the completion of the sales led to the cash-flow problems. But as I have already stated, the clear evidence was that this delay arose because of specific title problems which Mr Nelson encountered and of which he had not been made aware in advance, even though Michael Butler was aware that they existed. These difficulties were not in fact resolved until September, 2004.

70. The trial judge also concluded, as she had to in my view on the evidence before her, that no evidence had been adduced by the plaintiffs that the partnership agreement as drafted, which they signed and in respect of which Michael Butler received independent advice, did not in its final form accord with their instructions or did not meet their needs, and certainly not in any way that could give rise to any claim for losses arising. In this respect she stated at para. 59 of her judgment:

> "The plaintiffs have not produced any evidence that this is so. They did not for example adduce evidence that the partnership agreement ought to have contained a provision to deal with the obvious need that the development would have for further finance beyond the initial tranche that was to be drawn down from Anglo Irish Bank, and which on any reading of the figures was sufficient to deal only with the First Active charge (which reflected the cost of the land itself) and the building out of the first 15 units. In that context it cannot be ignored by me that the partnership provided that the four partners would be equal partners, but that it would be fair for the purposes of the exercise now engaged to assume that, by the partners are equal, there were two of "camps", or sets of interest, which were to be protected by the partnership agreement, the interest of the Butlers as landowners on the one hand, and the interest of the other two partners as the persons who provided the capital or the link or introduction to the bank that itself provided the capital. The height of the borrowings at the time the partnership agreement was entered into was the sum of €5.4 million to be drawn down from Anglo Irish Bank, and the evidence points to this being at best funding first 15 houses. I accept that

the plaintiffs have adduced evidence that the intention was to build the 111 residential units in respect of which planning existed, and their own evidence would suggest, and no contrary evidence has been adduced before me, that in multiple of €5.4 million would be required to build out the balance of the units."

71. The trial judge was clearly entitled to conclude that there was no evidence that the instructions which Mr Nelson received for the purposes of preparing the partnership agreement were not fully included in that document. Mr Butler made some complaints about a few matters included in the agreement which he said he had not agreed. For example, he was not happy that Mr O'Shea was given a casting vote at meetings of the partnership in the event of a tied vote. But, as the trial judge concluded, no possible loss could arise on foot of that complaint because Mr O'Shea had never exercised a casting vote in respect of any decision. Similarly, Michael Butler was unhappy with clause 17 which provided for the appointment of an arbitrator in respect of any dispute or difference which might arise and which might not be capable of agreement. But again, no such arbitrator was ever appointed, and no possible liability could therefore arise. He was also unhappy about the reference in clause 1 to William Butler's lands at Lewage More. But again that is a mere reference. There was no transfer of those lands into the partnership for any question of that. It is simply a fact that those lands are mentioned and it is also a fact that those lands formed part of the security that were being provided to Anglo Irish Bank. Again, there is no question of any loss arising, even if Michael Butler is correct that such a recital should not have been contained within the document. If the argument is that there was never any agreement that William Butler's lands would be part of the security for the Anglo loan, there is no getting away from the fact, as mentioned by the trial judge also, that Mr Nelson was not part of any negotiations with Anglo, and further, the facility letter which was signed by all the borrowers, including William Butler, made a specific reference to those lands as being part of the security requirement. The trial judge was entitled to conclude that there was no evidence to indicate any fault on the part of Mr Nelson in that regard. That is clearly a correct finding. Further, in any event, as noted by the trial judge at paragraph 62 of her judgment, in due course Anglo in fact agreed to release that particular security after the facility had been sufficiently paid down.

72. In paragraph 63 of her judgement onwards, the trial judge deals with a number of headings under which the plaintiff's seek to attach liability to the defendant. These are the disbursement of sale proceeds, money advanced by siblings, conclusion on the contractual role of Mr Nelson, conflict of interest, whether Mr Nelson had a general retainer. In respect of each such heading of complaint the trial judge concluded, after an exhaustive consideration of the evidence given by the plaintiffs, and taking it at its height, that there was no evidence to support even stated will case of negligence or breach of contract or breach of fiduciary duty against the defendant firm. She concluded her judgement from para. 77 by stating her conclusions by reference to the heads of claim as set out in the lettered paragraphs which I have set out in para. 39 above. By reference to those paragraphs she stated the following conclusions:-

"(a) I have dealt in detail with this part of the claim and consider that the evidence point overwhelmingly to the fact that the defendant advised the plaintiff's to take separate advice and that they did so take advice from Mr Scott.

(b) I have dealt with this head of claim and consider that the evidence does not point to any preference by the defendant of the interest of one partner over that of others. The disbursement of funds was made in accordance with the partnership agreements.

(c) No evidence was heard by me in regards to any alleged failure of the defendant to deal properly with the company BOSOD.

(d) The evidence overwhelmingly points to the fact that the partnership did obtain additional finance, and indeed most of the units from which planning permission was granted were in fact built. The claim by the builders is not before me, but even accepting that the plaintiffs did act as builders they have not adduced evidence of any agreement with the partnership for the disbursement of the proceeds of sale. Furthermore the defendant firm did not act for the plaintiffs in their capacity as builders, and another firm of solicitors acted.

(e) This head of claim is dealt with at paragraph 63 [of the judgment of the trial judge].

(f) The evidence of Mr Michael Butler is that he and his brother knew of the prior professional involvement that the defendant firm had with Crohan O'Shea. No negligence arises as a result. Furthermore, no loss was shown as having arisen as a result of any alleged lack of independence. The claim as made is that Mr O'Shea was preferred in the making of certain payments at a time when another firm of solicitors was acting for the plaintiffs.

(g) The trust between the parties broke down early in the course of the partnership. The Butler brothers as a result had separate legal and ferment shall advice from March 2004 at the latest. No loss is shown to arguably have arisen as a result of the action or inaction of the defendant. I consider that no evidence has been adduced that Mr Nelson caused the loss of trust between the business partners.

(h) No evidence was adduced as to the "chaotic" disbursement of funds, and no loss was shown as arguably arising therefrom."

73. The trial judge went on to state that her conclusions in relation to the claim in negligence had already been fully dealt with earlier in her judgement, as was her conclusion in relation to the claim for breach of fiduciary duty. In respect of each of these heads of claim, the trial judge was satisfied that no credible evidence had been adduced by the plaintiffs to support them.

74. In my view these were conclusions that the trial judge was entitled to reach on the evidence before her which was deemed by her to be admissible. By stating my conclusion in that manner, I am referring to the fact to which reference has already been made by me that on the appeal before this Court much of the focus of Michael Butler's submissions was upon the fact that in the High Court the plaintiffs were not permitted to call Ms Angela Farrell as a witness in relation to her knowledge of the Anglo Irish bank statements which she had obtained, and the fact that the trial judge had allowed Mr Charles Russell, accountant, to give only limited evidence by way of comment upon the spreadsheet which had been put to Mr Butler in cross-examination, and he was not permitted to give any evidence derived from his inspection of the Anglo bank statements.

75. I have already explained the reason why Ms Farrell was not permitted to give evidence. She was not permitted to give evidence because she had not provided a witness statement as directed during case management, and also because the trial judge was not satisfied that Ms Farrell had the necessary expertise to comment upon the financial transactions evident from the bank statements, and that any expertise that she had would have been in relation to conveyancing, she having been a solicitor, but that no complaint was made by the plaintiff's in relation to any conveyancing work carried out by the defendant firm.

76. In my view the trial judge was correct to refuse to permit Ms Farrell to be called as a witness in these circumstances. The bank statements in question had not been discovered by the plaintiffs. The plaintiffs had been ordered to make discovery of documents referred to as category 4 in the order dated 13th of January, 2014. Category 4 was in the following terms:-

> "All documents relating to the alleged frustration by the defendant of the use of the partnership funds leading to the necessity to source of funds with the plaintiffs' siblings (as alleged at paragraph 23 (iv) of the plaintiff's replies to particulars dated 18th September, 2013) to include any documents or records held at any time by the plaintiffs or their companies relating to the proceeds of sale of the development at [Clonmel lands] and all documents relied upon by the plaintiffs as evidencing any alleged failure by the defendant to adequately account for the application of partnership funds which led to the necessity for such sourcing of funds."

77. It is clear beyond any doubt in my view that the trial judge was correct in concluding that the Anglo Irish bank statements relating to the loan facilities for this development were within Category 4. The fact that these documents were not discovered as ordered lies fairly and squarely with the plaintiffs themselves. If those documents had been discovered, there is it least the possibility that despite any apparent lack of financial expertise, Ms Farrell may have been permitted to comment upon them. But the fact that they were not discovered as directed had the inevitable result that the bank statements could not be adduced in evidence and relied upon to support the claims of financial mismanagement, negligence, breach of contract being alleged against the defendant firm.

78. These comments are equally applicable to the complaint made by Mr Butler on this appeal that Mr Russell was not permitted to give evidence on foot of his inspection of the same bank statements. Mr Russell's evidence as far as it went did not constitute even prima facie evidence of negligence, breach of contract or breach of fiduciary duty, or even of any losses arising to the plaintiffs. Mr Russell candidly admitted that the information and documents provided to him and which he had an opportunity to consider were insufficient to reach any definite conclusion in that regard.

79. I have carefully read the transcript for 19th March, 2015 which was the day on which it was sought to call Mr Russell. There was an exchange between counsel for William Butler and the trial judge about whether or not he could be called. It transpired that he had with the leave of the court prepared a witness statement on the 6th March. 2015. The trial judge had read it. She did not think that his evidence would assist her greatly but she stated that she would allow him to give evidence in relation to the spreadsheet already referred to, but she would not permit him to make comments upon what was not contained in the spreadsheet.

80. Mr Russell stated that he had carried out an analysis of what returned and paid client account cheques of Mr Nelson he had been provided with in respect of payments to Anglo. But he acknowledged that these cheques did not cover all the amounts that had been paid out of that account, and also that it was not always clear who exactly the payee was in respect of some of the cheques. Some were to Anglo itself and others were to other accounts within Anglo, for example "Anglo – Crohan O'Shea". He was unable to say what every cheque paid into Anglo was in respect of. That was as far as his evidence could go, he said. But then at Q. 948 in answer to the trial judge he went on to state:

> " … looking at the Anglo statements, which was the other thing I did, Anglo statements showed the total repayments on the three loans and those total repayments came to €12,299,000."

81. It was at this point that the issue arose that these bank statements had not been discovered as ordered. Mr Russell stated that he had seen them at the offices of Ms. Farrell where he was presented with full statements on three Anglo loan accounts "from inception to completion". He had not been aware that there was an order for the discovery which included these bank statements. The trial judge concluded that in these circumstances that he could not give evidence by reference to his inspection of these statements. There followed some discussion with counsel. The trial judge stated that she would rise for five minutes so that counsel could take instructions from Mr Butler and advise him as to the consequences of the failure to discover these documents. After a short adjournment, according to the transcript, the hearing resumed, whereupon counsel stated that his clients view was that the order for discovery that had been made did not cover those bank statements. There was a good deal of discussion about that, but the trial judge ruled on the matter to the effect that the statements were within Category 4 in the order for discovery made on the 13th January, 2014, and accordingly that Mr Russell could give no further evidence.

82. In my view this ruling by the trial judge was absolutely correct. The bank statements of the Anglo loan accounts were within Category 4. There can be no doubt about that. They should have been discovered, and were not. That failure has consequences, one of which is that at trial evidence cannot be led which is related to or reliant upon what is in those statements. In my view it is extraordinary, and indeed unexplained in any rational way, why they did not discover the bank statements which, if the plaintiffs are correct in their allegations, would surely show in black and white the deficits in the accounting for the monies of the partnership which are alleged to have been perpetrated by the defendant, or certainly assisted greatly in that endeavour. The plaintiffs have only themselves to blame for the problem that arise with Mr Russell giving evidence by reference to them.

83. I should refer again to the spreadsheet which was produced to Mr Butler during his cross-examination for his comments. Mr Butler has submitted this Court that once that spreadsheet was produced in cross-examination it was not permissible for the defendant thereafter to bring an application for non-suit. But in my view it cannot be the case that a defendant who considers that he or she may wish to bring an application for non-suit at the conclusion of the plaintiff's case may not conduct as thorough and complete cross-examination of the plaintiff's witnesses as he/she would if no such application was being contemplated. The fact that a document is produced to the plaintiff in cross-examination, which the defendant in due course would have to prove and in turn be cross-examined on, does not mean that the defendant is obliged to be called to give evidence, thereby ruling out a non-suit application at the conclusion of the plaintiff's evidence.

84. On this appeal the Court made valiant and frequent efforts to try and intervene with Mr Butler in order to try and help him to focus on matters that were in the Court's view the relevant issues. These efforts were to no avail whatsoever. Whether or not that is because of Ms. Farrell's guidance and constant advice to Mr Butler does not really matter. The fact is that most of the hearing on this appeal was spent by Mr Butler essentially trying to re-run the case he had been trying to make in the High Court, rather than by focussing his arguments on submissions as to why in his view the trial judge erred in her conclusions in relation to the plaintiffs' lack of evidence, and in granting the non-suit application. The Court did its best in this regard. But it was in truth impossible to divert Mr Butler from the course on which he seemed to have set his compass so firmly. His submissions did not address in any meaningful way the evidence in the High Court, or perhaps more appropriately, the lack of evidence which resulted in the trial judge concluding that despite the fact that evidence had ranged over some eight days of hearing there was no prima facie case made about against the defendant.

85. For all the reasons stated I am satisfied that the appeals by Michael Butler should be dismissed. I am also satisfied from what Michael Butler informed the Court that William Butler was kept fully informed by him as to the progress of this appeal through the

directions stages, and that he was made aware of the date fixed for the hearing, and has therefore chosen not to attend to prosecute his appeal. It is safe to assume in any event that the submissions made by Michael Butler apply equally to William Butler's appeal, and that his appeal must also be dismissed. In my view it is appropriate to dismiss his appeal on the merits also, rather than simply on the default basis that he failed to appear to prosecute it.