

THE HIGH COURT

[2002 14874p]

BETWEEN

THERMO KING IRELAND LIMITED AND THERMO KING CORPORATION

PLAINTIFFS

AND ANTHONY BURKE

DEFENDANT

AND
THE HIGH COURT

[2003 1427S]

BETWEEN

JENNIFER BLUNDEN, DEIRDRE COURTNEY, IVOR FITZPATRICK, CORMAC GORDAN, JOHN KING, MARY CLARE MARKEY, ANNE McHALE, MICHAEL J. O'CONNOR, MARGARET SCULLY, SUSAN R. STAPLETON AND ALFRED THORNTON PRACTISING UNDER THE STYLE AND TITLE OF IVOR FITZPATRICK AND COMPANY SOLICITORS

PLAINTIFFS

AND
TONY BURKE

DEFENDANT

Judgment of Ms. Justice Dunne delivered on the 24th day of November, 2005

1. The above two sets of proceedings came on for hearing together in July, 2005. In the first set of proceedings the plaintiffs therein sought *inter alia* a declaration that the defendant is bound by an agreement made between the plaintiffs and the defendant on or about the 6th day of October, 2000, whereby the parties compromised High Court proceedings bearing the title and record numbers "Anthony Burke v. Thermo King Ireland Limited and Thermo King Corporation, Record No. 2000/4585P" (hereinafter called the "original proceedings") on foot of which the defendant's employment with the first named plaintiff terminated by mutual agreement with effect from 6th October, 2000, and an order that the defendant comply with the said agreement. Further relief was sought within the proceedings but I do not think it is necessary to refer in detail to that at this point. The defendant filed a document by way of defence which was delivered on the 22nd of July, 2004. The document is not in the form required by the Rules of the Superior Courts. It is a lengthy document which to a large extent consists of a statement of the evidence relied on by the defendant in answer to the plaintiffs' claim. The principle point in the defence is that the defendant denies that he entered into the said contract or agreement on the 6th of October, 2000, with the plaintiffs. The defence also claimed damages for "breach and/or wrongful repudiation by the plaintiffs." A reply and defence to counterclaim was delivered by the plaintiffs on 25th day of February, 2005.

2. The plaintiffs in the second set of proceedings are, as can be seen, a firm of solicitors. They acted as solicitors for the defendant in the original proceedings and in that context they claim the sum of €92,182.98 being £60,000 plus 21% VAT which they claim to be due and owing from the defendant to them in respect of legal work and services rendered by the plaintiffs to the defendant at his request in respect of the original proceedings. That sum is claimed on the basis that it was the agreed figure comprised in the terms of settlement dated the 6th of October, 2000, in respect of the original proceedings. A lengthy document dated the 30th May, 2005, entitled "Reply, Defence and Counterclaim of Anthony Burke", sets out his defence to the plaintiffs' claim. Again it is a lengthy document and it is not necessary to set out its terms in detail. He contends that the plaintiffs' Statement of Claim discloses no cause of action against him and he denies that the plaintiffs had permission to enter into the settlement agreement described by the plaintiffs. In his counterclaim he sought a sum equal to his total emoluments plus interest to date from the date of termination of the interlocutory order in the original proceedings. He also claimed damages in respect of loss of remuneration as a result of his "unemployable nature due to the non-settlement of his action against his former employers by the plaintiffs". He also sought costs. A Reply and Defence to Counterclaim was delivered on the 1st of July, 2005.

3. Given the nature of the claim made by the respective plaintiffs in these proceedings and the response by the defendant it was clear that I should first embark on a hearing of the issue as to whether or not there was a concluded agreement between the plaintiffs in the first set of proceedings (hereinafter referred to as Thermo King) and the defendant hereinafter referred to as "Mr. Burke". The hearing before me proceeded on that basis.

4. It would be useful at this point to set out in detail the terms of the agreement contended for in this case. The terms of the agreement were reduced to writing in a document headed "Anthony Burke v. Thermo King". The document was written on note paper carrying the heading "Ivor Fitzpatrick & Co. Solicitors". The terms of settlement were as follows:

1. The defendant will pay to the plaintiff the sum of €310,000 gross in the most tax efficient manner permitted by law.
2. The defendant will forthwith transfer full ownership of motor vehicle reg. No. 98 G 2982 to the plaintiff, with no warranty as to the vehicle's condition and the plaintiff will complete all necessary forms.
3. The plaintiff will be entitled to obtain such benefits under the Ingersoll Rand Stock Option Scheme and the first named defendant's pension scheme as the rules of the Scheme provide.
4. The plaintiffs will be entitled, at the defendant's expense to reasonable tax advice in relation to this settlement.
5. The defendant will issue to the plaintiffs a factual reference and will stand over same.
6. The proceedings will be struck out without order.
7. This settlement is in full and final settlement of all claims of the plaintiffs against the defendants, their associates, subsidiaries, offices, servants or agents, save such legitimate expenses and salary as are due to 6th October, 2000, to the plaintiff.
8. The plaintiff will resign all directorship and offices of and in the defendants or their associates or subsidiaries forthwith and will return all property of the defendants to the defendants.
9. This agreement is confidential to the parties and will not be disclosed to any party save legal and financial advisors and

the plaintiffs will not utter any damaging or disparaging remarks regarding the defendants or their officers or servants and the defendants agree likewise in relation to the plaintiffs.

10. The defendant will pay a sum of £60,000 and VAT if applicable as a contribution to the plaintiffs' costs.

5. By a way of background it may be useful to set out the circumstances which led to the disputed agreement. Mr. Burke had been employed by Thermo King since 1978. He was originally employed as a financial planning manager and was promoted to the position of controller – Europe, Africa and Middle East and he was also a director of Thermo King Ireland Limited and a number of related companies. In the year 2000 difficulties arose in relation to the employment of Mr. Burke with Thermo King and in March, 2000, Mr. Burke attended a meeting with representatives of Thermo King and was furnished with a letter purportedly dismissing him from his employment. As a result, he commenced the proceedings against Thermo King which resulted in the disputed settlement. A plenary summons was issued in those proceedings on 14th day of April, 2000, followed by the delivery of a statement of claim in August, 2000. A defence was delivered on the 18th day of September, 2000, and ultimately the matter was due to be heard on the 10th of October, 2000. On that date the Court order recites that:

"This matter being listed for hearing on this day in the presence of counsel for the respective parties and on hearing said counsel and it appearing that a settlement has been reached herein, by consent it is ordered that this action be struck out with no order as to costs".

6. It should be noted that at an interlocutory hearing in those proceedings before Mr. Justice Kearns an order was made on 5th July, 2000, which provided, inter alia, that the defendants undertook to pay to the plaintiff pending the conclusion of those proceedings the equivalent of his salary and other benefits. Various other orders were made on that date including an order listing the action for hearing on the 10th of October, 2000.

7. Finally it should be noted that Mr. Burke brought a motion before the High Court in the original proceedings on the 8th of October, 2001, in which he sought to reinstate the action and other reliefs. That motion came on for hearing on that date before Mr. Justice Smyth and having considered the application the court refused the application.

8. Accordingly it will be seen that the fundamental issue to be determined in these proceedings is whether or not the agreement dated the 6th of October, 2000, represents the concluded agreement of the parties thereto. Mr. Burke has also set out in his pleadings a number of matters which he alleges should have been contained in the agreement had it been concluded in accordance with his instructions.

9. A number of witnesses gave evidence in relation to the circumstances in which the agreement came to be made on 6th of October, 2000. Mr. Ercus Stewart S.C. gave evidence that he had been retained as senior counsel on behalf of Thermo King in the original proceedings. He said that the case first came before the High Court in an application before Mr. Justice Kearns. Following undertakings given at the hearing before Kearns J. a trial date of the 10th of October, 2000 was fixed. A meeting was arranged for the 6th of October, 2000, the Friday before the trial date for the purpose of attempting to reach a settlement. Present at the meeting were John Rogers S.C., Tom Mallon, Barrister at Law and two solicitors on behalf of Mr. Burke. The negotiations on behalf of Thermo King were conducted by Mr. Stewart. He received instructions by telephone from Paul Glenfield, his solicitor, who was not present. Mr. Stewart described negotiations taking place over a number of hours. Eventually, a document was produced which was written by counsel for Mr. Burke. Mr. Stewart indicated that some amendments had been made to that document in his own handwriting. Ultimately it was signed by Mr. Burke.

10. The document dealt with a number of issues namely, the money to be paid to Mr. Burke, the question of costs of the proceedings, matters in relation to the transfer of property, tax advice and so on. The document signed was the end result of the negotiations. Mr. Stewart confirmed that the document as agreed between the parties was expressly agreed with his solicitor. He described going through the detailed terms over the phone with him and said that he had full authority to settle the case. Mr. Stewart said that was his understanding of the situation and that was the understanding of counsel for Mr. Burke. As a result of the settlement having been entered into he said that it was agreed that the case was to be struck out, that witnesses were to be called off and that on the following Tuesday the 10th, the case would be struck out.

11. Mr. Stewart then went through the terms of the agreement in detail. It provided that the plaintiffs in the proceedings were to pay to the defendant the sum of £310,000 in the most tax efficient manner permitted by law. He referred to the word "gross" which was written in his handwriting and he emphasised that the sum of £310,000 gross, to be paid in the most tax efficient manner, did not mean that the sum was to be paid as "personal injuries". He said that that was not contemplated under any circumstances. He described the wording used as being standard for settlements in employment type cases. He emphasised that the whole of the figure could not have been attributed to damages for personal injuries. Again he contended that the figure of £60,000 referred to as costs, was precisely as set out in the agreement, namely a contribution towards the plaintiffs' costs. It was put to him that there was a suggestion that that figure was the full sum in respect of costs and he said that that did not accord with his recollection. He emphasised that what was written was what was agreed. He was asked by counsel for Thermo King if there were other agreements in relation to share options and in relation to a provision for a full immediate pension as is now contended for by Mr. Burke and he said that that was never agreed. He emphasised that the settlement was as written by Mr. Burke's counsel. When he left the meeting, the case was settled; it was clear between all the parties that it was not going to proceed and witnesses were stood down. Insofar as the actual writing out of the agreement was concerned he confirmed that he wrote out paragraph seven, eight and nine of the agreement. Finally he emphasised again that he had authority to settle the case.

12. Mr. Stewart was then cross-examined by Mr. Burke who represented himself. Mr. Burke questioned him as to his authority to enter into negotiations and he reiterated what he had said in direct examination. It was put to Mr. Stewart that the agreement was signed by Mr. Burke at 7.45pm but Mr. Stewart indicated that he wasn't aware of the time. He was cross-examined about the sum of £310,000 and whether it was intended at that meeting to be described as a personal injuries claim. Mr. Stewart said that this was totally wrong. He explained that the settlement involved the settlement of an employment matter and that to describe the figure to be paid under the settlement as damages for personal injuries would not be legal. He was examined a number of times as to the timing of the agreement and asked if the agreement was signed at 7.45pm as contended by Mr. Burke why was everyone still there in the Four Courts at the meeting until 10.00pm. Mr. Stewart indicated that he was not aware of the times. He also explained that he was not aware of what went on between Mr. Burke and his counsel. He reiterated that the sum of £310,000 gross was a settlement he was authorised to enter into on behalf of Thermo King. Insofar as it was stated that it should be in the most tax efficient manner permitted by law he said that that paragraph was in ease of Mr. Burke. There was then a discussion in relation to the car provided to Mr. Burke under the terms of his employment. Mr. Stewart explained that there would have been some difficulty in relation to the transfer of ownership of the car given that the car was held under a lease.

13. Share options were then discussed and Mr. Stewart indicated that paragraph three in relation to share options was inserted in the agreement by senior counsel for Mr. Burke. The various passages in that paragraph were agreed. Mr. Stewart then explained that vouched expenses were agreed to be paid as provided for in paragraph seven. At that time they were estimated to be around £5,000. Insofar as the question of the payment of salary was concerned Mr. Stewart was authorised to agree the payment of salary up to the date of the settlement i.e. the 6th of October, 2000. Thereafter the terms of the settlement would be applicable. Mr. Burke put to Mr. Stewart his understanding as to the meaning of the undertaking as to damages and the undertaking to pay salary provided for in the terms of the order made before Kearns J., namely, that until such time as a settlement was implemented that he was entitled to the payment of his salary. Mr. Stewart did not agree with that contention and further stated that there was no suggestion that Thermo King did not comply with the order.

14. Then Mr. Burke referred Mr. Stewart to paragraph five of the agreement which referred to a "factual reference" and Mr. Burke complained that he never received such a reference. Mr. Stewart indicated that the only reason for that was because of difficulties created by Mr. Burke. There was some discussion as to a document which Mr. Burke contended was to be placed on a company bulletin board but Mr. Stewart said he had no recollection of that. It was then put to Mr. Stewart that at the time when Mr. Burke left the Four Courts that Mr. Stewart did not have the necessary authority to settle the case. Mr. Stewart did not agree with this contention and said that when everyone had left the Four Courts he was clear that there was a concluded agreement between the parties.

15. Mr. Stewart was then cross-examined by Mr. Burns S.C. on behalf of the plaintiffs in the second set of proceedings before me, hereinafter referred to as "Ivor Fitzpatrick & Co.". Mr. Stewart agreed with Mr. Burns that the negotiations started in the afternoon of the 6th of October and went on into the evening. At a certain stage in the evening he confirmed that the agreement in writing had been drawn up and presented to him signed by Mr. Burke. He said that at that stage there were two issues outstanding in relation to relatively minor matters. One related to the payment in respect of tax advice on behalf of Mr. Burke and the other related to difficulties in respect of the motor vehicle. Mr. Stewart indicated that he cleared everything with Mr. Glenfield. It was not necessary for them to obtain instruction from the United States. Ultimately Mr. Stewart got agreement in relation to the outstanding matters and this was communicated to the other side.

16. Tom Mallon appeared as junior counsel for Mr. Burke in the proceedings. He described the settlement meeting on the 6th of October, 2002. His recollection was that he met with Mr. Burke at approximately two o'clock in the afternoon. Present were Ms. Deirdre Courtney, Ms. Markey, solicitors of Ivor Fitzpatrick & Co., and John Rogers S.C. Also present were Mr. Burke and his wife. The discussions were interrupted during the afternoon by a bomb scare at the Four Courts. He described Mr. Burke as a reluctant settler from whom it was difficult to get instructions. Ultimately whilst they were outside the Four Courts building on the Quay as a result of the bomb scare Mr. Burke gave instructions to negotiate. Negotiations then commenced with Mr. Stewart S.C. At this stage, Mr. Burke and his wife, together with counsel and solicitors, had occupied a cubicle in the square hall in front of the Law Library. Mr. Rogers and Mr. Mallon spoke to Mr. Stewart in that vicinity or indeed in the Law Library. In discussions with Mr. Burke, both Mr. Rodgers and Mr. Mallon made it clear to Mr. Burke that they were strongly of the view that the case should be settled. It was their view that terms could be agreed which would be better than those which could be obtained in court. He said that he was conscious of the possibility of a lodgement in the case, but ultimately that didn't happen, but there was concern on the part of Mr. Burke's advisors in relation to a Calderbank letter which was received in August. That particular letter referred to a sum of £290,000 plus costs up to that date. He explained that at the time of the termination of Mr. Burke's employment his package was worth approximately £130,000 per annum. It was his view that there was a risk that as Mr. Burke's employment could be terminated on reasonable notice and that Mr. Burke had been paid three months salary between July and October a figure in respect of damages for loss of employment could be of the order of twelve months salary assuming that Mr. Burke won the case. Accordingly a figure contained in the Calderbank letter of £290,000 was in his view way above what a court might give.

17. Mr. Mallon went through the terms of the agreement and agreed with the evidence of Mr. Stewart as to what parts were written by him and what parts were written by Mr. Stewart. He said that the various terms were not all agreed simultaneously, that various parts of the draft document were agreed throughout the course of the day. He said that one of the issues on which there was difficulty was in relation to the question of payment for tax advice in relation to the settlement. It was Mr. Mallon's clear evidence that around 9.00pm the situation was that all of the terms in the draft agreement were acceptable to Mr. Burke. Mr. Mallon said that he suggested that the document should be signed by Mr. Burke, presented to the other side as a fait accompli and that Mr. Burke should then leave the Four Courts. In addition he stated that at that time the parties were coming under pressure from security staff at the Four Courts who wished to close the premises. Ultimately he said Mr. Burke left at around 9pm. Thereafter Mr. Stewart made a phone call and at that stage Mr. Mallon and his team were waiting in the Judge's yard. Mr. Stewart came back and said that the terms were acceptable to his side. Ms. Markey then communicated with Mr. Burke.

18. Mr. Mallon was asked about a number of specific matters dealt with in the agreement. He was asked if it was intended or agreed that the capital sum was to be paid in full as damages for personal injuries. He said that that was absolutely incorrect. He accepted that there was a claim in the proceedings by Mr. Burke for damages for personal injuries but that it was not contemplated that the entire amount would be attributed in that way. He emphasised that the term of the agreement was that the sum should be paid in the most tax efficient manner permitted in law. He emphasised that there was no agreement between counsel for the parties or between Mr. Burke and his representatives to the effect that damages could be ascribed to personal injuries. He added it would have been contrary to law. Insofar as the car was concerned, he said that there was an issue in relation to the possibility of a tax liability arising in respect of that issue. Other than that he said that there was no major discussion in relation to other issues in the agreement such as the stock options. It was a matter to be determined in accordance with the rules of the relevant scheme. Mr. Mallon was then asked if there was any agreement in relation to the provision of a full and immediate pension. He said that this was absolutely not discussed. He said it would be an extraordinary clause to include in an agreement and he couldn't even begin to imagine the cost of such a clause. He referred to the factual reference to be provided and he also referred to the order of Kearns J. It was put to him that Mr. Burke contended that that order was to continue until such time as a settlement was implemented. Mr. Mallon disagreed with this contention. He said it was not correct and he referred in support of his evidence to the terms of the actual agreement. He said that as a result of the agreement having been entered into, advice in relation to taxation was to be paid for but he said that there was no agreement in relation to the payment for any advice in respect of pension. Insofar as the issue of costs were concerned, he said that there was an agreed sum to be paid but it did not refer to all costs. It was put to him that Mr. Burke had indicated that the agreement was withdrawn unless certain matters were included in the agreement. Mr. Mallon disagreed with this contention and said it was clear that Mr. Burke had agreed the terms of the agreement. He stated that as soon as Mr. Stewart S.C. confirmed from his client that the terms of the agreement as signed by Mr. Burke were acceptable there was a done deal. Subsequently Mr. Rogers mentioned the matter in court on Tuesday and he was not aware at that stage of any difficulty or problem. A couple of weeks later he was contacted by Ms. Markey in relation to issues arising in respect of the tax treatment of the agreement. He was asked for advices in relation to the personal injuries element of the settlement and it was suggested to him on behalf of Mr. Burke that there was part of the sum to be tax free on the basis of being a sum for damages in respect of personal injuries and that the balance would be treated as a capital payment. Mr. Mallon said that he advised that this was not a realistic possibility under the agreement but he

also advised that it was worth seeing if it was possible to treat a small part of the capital sum, approximately £30-40,000 thereof as damages for personal injuries, but no more than that.

19. Mr. Burke then cross-examined Mr. Mallon. Mr. Mallon agreed that there could be no final agreement without the consent of Mr. Burke. He confirmed that Mr. Burke had been advised as to the difficulties that could arise if the case was not settled. There was a risk in relation to costs because of the Calderbank letter. He confirmed that the settlement was written out principally by himself with some amendments and additions by Mr. Stewart. There was some cross-examination as to what was required by Mr. Burke by way of a lump sum and Mr. Mallon denied that it was suggested that he would be happy with a figure of £350,000 after tax. He emphasised that it was incorrect to say that Mr. Mallon advised Mr. Burke that Mr. Burke would receive a figure of approximately £310,000 into his hand. It was emphasised that the capital sum could not be paid without deduction of income tax. There was also some discussion as to the effect on tax in terms of the settlement figures being discussed if the car was included in the settlement figure. Insofar as the question of the payment of salary was concerned, Mr. Mallon said that in respect of the undertaking given to Mr. Justice Kearns that that undertaking in relation to salary was only up to the date of trial. Mr. Mallon pointed out that because of the nature of the breakdown in the relationship between Mr. Burke and Thermo King it was unlikely that a dismissal would be restrained in court proceedings. There was some discussion as to the terms of the undertaking and order made before Kearns J. and insofar as there was a reference in that order to the payment of emoluments, Mr. Mallon did not agree with Mr. Burke's suggestion that that included the possibility of share options. Mr. Mallon was then asked about the pension scheme and indicated that he thought it was unlikely that he had read the rules of the pension scheme. He said that advice was taken from a Mr. Lynch, an actuary.

20. Mr. Mallon was cross-examined as to the stages at which various aspects of the agreement were concluded. It was put to Mr. Mallon that the agreement had been signed by Mr. Burke at approximately 7.40 in the evening, but Mr. Mallon disagreed with this and said that he believed it was between 9.00 and 9.30 in the evening. He agreed with Mr. Burke that at the time the document was signed by Mr. Burke it was not a concluded agreement and it would only have become a concluded agreement if Mr. Stewart on behalf of Thermo King agreed to its terms. Mr. Mallon then described how it was decided to present Mr. Stewart with the signed agreement in order to show the seriousness of the position being taken by Mr. Burke and the finality of the matter so far as any further negotiation was to take place. The stumbling block at that point in time according to Mr. Mallon was the question of payment for tax advice. He described approaching Mr. Stewart and telling him that that was the position and he reiterated that when Mr. Stewart returned having taken further instructions all of the relevant parties with the exception Mr. Burke and his wife were outside the Four Courts. Mr. Stewart came back, accepted the terms and at that stage there was a concluded agreement. Mr. Mallon indicated that a phone call was then made to Mr. Burke. It was put to Mr. Mallon by Mr. Burke that there had been a signed agreement at 7.30 and that Thermo King had refused at that stage to conclude the agreement but as indicated above, Mr. Mallon did not agree with that contention. He was asked by Mr. Burke if he had told Mr. Burke that Mr. Stewart had had difficulty during the day in making contact with the authorities of Thermo King in the US but denied this. He confirmed that on Monday there was a request by Mr. Burke for a copy of a signed agreement. It had not at that stage been signed by the defendant but Mr. Mallon said this was not a pre-requisite. He said that there was a concluded agreement on the Friday night. He reiterated that there was no agreement on that evening that Mr. Burke was to get a full pension payable immediately. He said such an agreement was absolutely not made.

21. Mr. Mallon was then cross-examined by Mr. Burns on behalf of Ivor Fitzpatrick & Co. He was first asked about the Calderbank letter and he reiterated that the reason for entering into negotiations was because of the existence of the Calderbank letter. Mr. Burke's annual salary/package was in the region of £130,000 per annum. The figure mentioned in the Calderbank letter was well in excess of twice that amount. He agreed with Mr. Burns that the courts would often limit the damages in a wrongful dismissal action to a figure in the region of one years notice. Mr. Mallon pointed out that Mr. Burke had received three months paid notice together with a period of payment of salary between July and October as a result of the undertaking that had been given. He said that that would have to be taken into consideration in reaching a final figure. In those circumstances Mr. Mallon expressed the view that Mr. Burke was at serious risk in relation to the proceedings by virtue of the Calderbank letter.

22. He pointed out that on the 5th of October there was a long consultation with Mr. Burke in relation to the upcoming hearing on the 10th of October. Mr. Mallon pointed out that what was concluded on Friday the 6th of October was not a rushed settlement. He described Mr. Burke as having considerable strength of character and that he was a reluctant settler, not the kind of person to be brow beaten. Mr. Mallon said that in his recollection the final issue of difficulty related to the payment for tax advice by Thermo King in relation to the settlement. He described that as the last issue to be agreed. Finally the suggestion that Mr. Burke should leave the Four Courts on the 6th of October was for tactical reasons. It was to demonstrate that there was no more "give" on his side. It was to present the other side with a take it or leave it situation. Mr. Mallon emphasised that there appeared to be no unhappiness or change in the position of Mr. Burke until later on. He never said before leaving the Four Courts that the agreement was off the table. Equally Mr. Mallon said he could not have been under any misunderstanding about the use of the word "gross" or "tax efficient" in the written agreement. Mr. Burke fully understood that there was a potential tax liability in relation to the settlement. Mr. Mallon said that there was never any suggestion that Mr. Burke would have had to have a pension paid immediately as part of the terms of settlement. He also emphasised that a bonus figure was effectively built in to the offer contained in the Calderbank letter. The settlement was intended to incorporate a full and final settlement between the parties.

23. Mr. Mallon agreed that following the settlement an issue arose as to the apportionment of the some of the capital sum to personal injuries. He agreed with Mr. Burke that Mr. Burke had mentioned to him that within the company there was a practice of making a two year payment in respect of someone on a redundancy situation. Finally Mr. Mallon indicated that in relation to all of the issues Mr. Burke had taken advice and had accepted the proposed agreement.

24. Ms. Marie Claire Markey then gave evidence. She is a solicitor in the firm of Ivor Fitzpatrick & Co. and was an associate in that firm. She was involved in running the proceedings on behalf of Mr. Burke together with Deirdre Courtney. She confirmed that she was present on the 6th of October, 2000, and at every single meeting and at every single application in relation to the proceedings. She described meeting on the 5th of October, 2000, and then subsequently meeting on the 6th of October. She said that Mr. Lynch, the actuary, did not attend the settlement meeting on the 6th of October, 2000. She said that protracted negotiations took place on that date and again described how the document was signed. During the course of the discussions she said that she spoke to Mr. Brennan a cost accountant. She described Mr. Stewart S.C. as being in a situation where he was taking instructions from his solicitor who was in his office. The solicitor was taking instructions from Galway where Thermo King is based and from its office in the US. She confirmed the receipt of the Calderbank letter. She referred to the provision in relation to "a contribution towards costs and indicated that prior to 6pm on Friday she had been in touch with the cost accountant in relation to the settlement. She said that it was much later when the terms of a settlement began to be reduced to writing. At approximately 7.30 Mr. Rogers came back with a definite offer from Mr. Stewart. Prior to that time Mr. Stewart had been sticking to the terms of the Calderbank letter. That had been refused on behalf of Mr. Burke. Now, the offer was for a sum of £310,000 plus the car. This was a substantial increase on what had been available prior to this. The terms were then drafted by Mr. Mallon. It was subsequent to that, that amendments were added by Mr. Stewart. She confirmed that the document was not signed by Mr. Burke until it had first been discussed at length by him with his team. Mr. Burke sat down and read the document on a number of occasions. She too confirmed that the document was signed after

nine o'clock, probably at around 9.30 or so. She also agreed that there was an issue over tax advice but that this was not a major issue. She confirmed also that it had been under advice from the legal team that Mr. Burke signed the document and agreed to return to Galway. The document as signed by Mr. Burke was the deal that he was prepared to accept. When Mr. Stewart returned from making a phone call to confirm that the document as signed by Mr. Burke was acceptable to his client, Mr. Burke had already gone. The outstanding issue at that stage had been in relation to payment for tax advice. She then made a phone call to Mr. Burke and she outlined the length of the phone call. She said that the phone call was a short phone call and she said that there was no demur of any kind from Mr. Burke in the course of that phone call.

25. Ms. Markey rejected the matters alleged in the defence furnished by Mr. Burke to the effect that the terms of the agreement were not as set out in the settlement. She disagreed. She said that the settlement was not agreed subject to additional instructions furnished by Mr. Burke in the course of that phone call. She reiterated that in the terms of the settlement the word "gross" was written into paragraph one and she reiterated that the tax implications of any settlement had been discussed with Mr. Burke at previous meetings. So far as the concept of ascribing certain of the monies to be paid to Mr. Burke to damages for personal injuries were concerned, she said that she could not recall when precisely that issue was discussed. On the question of a pension she was asked whether it was a part of the agreement or the instructions that there was to be a full and immediate pension payable to Mr. Burke and she said that this was simply not the case. She said that there had been many discussions about the pension position with Brendan Lynch, the actuary. Mr. Burke at the time of the termination of his employment had reached a position where he would have been entitled to 22/30 of a pension. As to the question of salary and benefits, they were to continue pursuant to the undertaking that had been given to Kearns J. until the hearing date. She was asked if it had been a term of the settlement or of the instructions that Thermo King was to pay all the legal expenses. She described the discussions during the course of the day with the cost accountant on behalf of Mr. Burke. She had obtained information from Mr. Brennan earlier in the day as to what an appropriate professional fee would be together with counsel's fees and witness expenses etc. She said that the offer that was ultimately made was an offer of a contribution of £60,000 towards costs. She discussed this aspect of the matter with Mr. Rogers and Mr. Mallon. The figure was then discussed with Mr. Burke and explained to him. She explained what the fee would cover and what the fee included. She was asked if in those circumstances Mr. Burke attempted to withdraw his instructions and she said no. She was then asked had it been part of Mr. Burke's instructions that Thermo King would sign an agreement with the above terms incorporated into a document to be prepared at a future date. She said she had no recollection that it should be signed by Thermo King. Indeed she added that it was never agreed that the terms of the agreement were to be signed by both sides that evening. Indeed she emphasised that that issue had never ever been discussed.

26. In relation to the pension provisions she said that there was no misunderstanding on the part of Mr. Burke in relation to the terms of the agreement in that regard. She said that it was quite clear at all times to Mr. Burke what was being stated by Mr. Stewart on behalf of Thermo King. They were not moving from their position that all that Mr. Burke was entitled to was a pension based on twenty two years service out of thirty. Equally there was no suggestion that the pension would accrue at any time other than the normal term. In relation to entitlements to stock options again it was her evidence that all that was on offer was what had already been accrued by Mr. Burke under the scheme provided by the company.

27. She then described how she was involved in trying to finalise matters for some months after the settlement date. She referred to the correspondence and produced same. In relation to the tax advice she said that it had first been suggested by Mr. Burke that Susan O'Donnell should be involved in furnishing advice to Mr. Burke. She apparently felt that she was not the appropriate person to do so as she had acted for Thermo King in relation to tax matters for employees of Thermo King. Ultimately she described how as a result of negotiation between her firm and Thermo King's solicitors that a figure of £30,000 was agreed to be ascribed towards the personal injury element of Mr. Burke's claim against his employer. She indicated that at this period there was much correspondence with Mr. Burke and numerous phone calls. She emphasised that at the time that the case was struck out on the 10th of October, 2000, there had been no issues or indication of any problem raised by Mr. Burke up to that date. Finally she confirmed that the reason why Susan O'Donnell was not in a position to give tax advice to Mr. Burke was that she was in effect too close to Thermo King as a result of her working relationship with Thermo King.

28. Ms. Markey was then cross-examined by Mr. Burke. She too was asked about the exact time of signing the document. She was unable to recollect the precise time. She confirmed with Mr. Burke that at the time he left the Four Courts there was no settlement. She confirmed that what had been signed by him were the terms that he was prepared to accept. Subsequently she rang to confirm that there was a settlement. She described that conversation as lasting less than a minute. On Monday morning Mr. Burke rang looking for a copy of a signed agreement. She assured Mr. Burke that there was no problem because the agreement was not at that stage signed by Mr. Hayes on behalf of Thermo King. There was a discussion as to the tax advice to be obtained and Ms. Markey was of the view that it had been Mr. Burke who mentioned the name of Susan McDonnell of Price Waterhouse Cooper. Mr. Burke asked Ms. Markey why on the basis that the case had been struck out on the 10th of October, 2000, he did not receive monies due under the settlement on that date. She replied that it was not a question of a cheque being written on that date. It was put to her that there was no settlement concluded and she said she did not accept that. She added that if there had been any doubt in her mind she would have raised it with Mr. Mallon and Mr. Rogers S.C. Mr. Burke put it to her that five years on he still did not have a payment under the settlement. Her reply was that Mr. Burke would not agree the manner in which the cheque was to be sent. She pointed out that it was always agreed that the sum due to Mr. Burke would be paid in the most tax efficient manner. There was to be a calculation done in respect of the sum which represented the amount due for loss of office and a further part of the sum was to be in respect of a claim for personal injuries.

29. Mr. Burke then asked Ms. Markey about a meeting which took place on the 20th of March, 2001. He put it to her that at that meeting he was asked whether he accepted that an agreement was concluded on the 10th of October, 2000. When he replied "no" that all those present at the meeting left the room in which it took place. She did not agree with this. She indicated that Mr. Burke had been unhappy after the agreement had been concluded because he was dissatisfied with the advice he had received in relation to the tax implications of the settlement. He had proposed that a figure of £150,000 should be allocated to the personal injury element of the sum. She had pointed out that the claim he had made in his proceedings was not a stress related claim. The legal advisors could not stand over such a proposal. She accepted that there was an element in the claim for personal injury but that the case was in essence a case for wrongful dismissal.

30. Insofar as an explanation as to why five years after the proceedings were supposed to have been settled he had still not been paid, she explained that a cheque was proffered in settlement but that he had refused to take it. She pointed out that various proposals were made in an effort to conclude matters.

31. Ms. Markey was then cross-examined by Mr. Burns. She said that prior to the 6th of October, 2000, there had been a number of meetings with Mr. Burke. At the time that Mr. Burke left the Four Courts on the 6th of October, the outstanding issue related to the payment in respect of tax advice. She also recalled that there was a tax issue outstanding at that point in relation to the transfer of the car. Those matters were concluded in terms of the written agreement but Mr. Stewart needed approval from his clients in relation

to those two matters. She confirmed that two phone calls were made using Ms. Courtney's phone to inform Mr. Burke on the night of the settlement. The first call was of one second duration at six minutes past ten on the 6th of October. The second call lasted forty six seconds immediately afterwards. She described the course of conversation in which she indicated that Mr. Stewart had agreed with the final outstanding matters and that therefore the case was settled. She was asked if Mr. Burke agreed to the settlement but added that it was subject to additional matters not included in the written document. She said that that was not the case and emphasised that there was no time for that in the course of the conversation.

32. A number of specific documents were then put to Ms. Markey by Mr. Burns. First she was asked about a memo dated the 9th of October, 2000 of an attendance by Ms. Markey on Mr. Mallon in a phone conversation. It referred to some clarification of matters contained in the written agreement namely that tax efficiency implied no additional costs on behalf of Thermo King and that striking out the proceedings included discharging all orders. Ms. Markey confirmed that there was no difficulty with those two items. She also recorded in that attendance that she spoke to Mr. Mallon about the signing of the agreement by a Mr. Christy Hayes on behalf of the Thermo King. That was the only matter outstanding at that stage. She confirmed that on the 10th of October, the matter was dealt with in Court. She was also referred to another memo of an attendance. This memo was dated the 11th of October, 2000, but dictated by her on the 10th of October. It related to the attendance in Court with Mr. John Rogers S.C. when the matter was listed before the President and was ultimately struck out. She said that if she had been told by Mr. Burke that there was no agreement she would have recorded that in the memo.

33. A letter dated the 7th of November, 2000, from Mr. Burke to Ivor Fitzpatrick & Co. was then put to her. In that letter Mr. Burke explained that part of the compensation would have to be in respect of personal injuries. Mr. Burke in the course of that letter expressed the view that a sum of £160,000 could be allocated to damages in respect of defamation and mental distress. Ms. Markey pointed out that it was not suggested in the course of that letter that there had been no settlement. A further letter was put to Ms. Markey which was written by Mr. Burke on the 2nd of December, 2000, to Ivor Fitzpatrick & Co. At that stage Mr. Burke expressed concern at the fact that the settlement had not been implemented. He also expressed concern at the fact that he had not received a monthly salary cheque or expenses at that stage. In the course of that letter he stated "Although, I signed the agreement on the evening of the 6th October at 21.30 hours, I did so on the assumption that if I did not I would be left with substantial legal bills". In the course of the letter Mr. Burke dealt at length with the question of fees in relation to this particular matter. He also referred to the signing of the agreement. He said in that letter that when he received the phone call from Ms. Markey that he understood that there was a signature on the agreement on behalf of Thermo King. He said that on the Monday he told Ms. Markey to proceed with the action and was informed that he could not as there was an agreement and a settlement. He stated that he wanted the proceedings to be reinstated as he was of the view that the settlement terms were not, in his view, binding. In response to questions about this letter, Ms. Markey said that she did not agree with his version of events. She had explained that in regard to the issue of costs she had contacted the costs accountant and had discussed the appropriate figure in respect of a professional fee for the work done by Ivor Fitzpatrick & Co. She also referred again to the effect of the Calderbank letter and to the fact that in that letter an offer had been made of £290,000. She then referred again to the express terms of the agreement which provided that the sum of £310,000 gross was to be paid in a tax efficient manner permitted by law. She repeated again that she did not believe it was possible to attribute the sum suggested by Mr. Burke to a personal injuries claim given that the action was primarily a case for wrongful dismissal. She added that the medical evidence which had been obtained in the case in respect of Mr. Burke wouldn't support a personal injuries claim in the order of £160,000.

34. Finally she was asked about the meeting that took place on the 20th of March, 2001. She said that a lengthy meeting took place that day and she referred to a memo of the meeting which was four pages long and that it recorded the circumstances of the meeting.

35. Mr. Geoffrey Falken then gave evidence. He is the employment law and labour law counsel of Ingersoll Rand. Thermo King is a subsidiary of that company. He said that he had not been involved in the settlement on the 6th of October, 2000. After the settlement, he was advised that it had occurred. He met Mr. Burke on two occasions, once at an annual meeting of the company at head quarters in New Jersey on the 6th of May, 2002. There was a follow up meeting in Dublin. Otherwise he had not spoken with Mr. Burke. It was put to him that Mr. Burke would suggest that he, Mr. Falken, had advised Mr. Burke that the settlement was only approved on the Monday morning following the conclusion of the settlement. He said that this was incorrect. Mr. Falken's recollection was that he could have told Mr. Burke that as he, Mr. Falken, understood the position, agreement was reached on the Friday and the document was signed by Mr. Hayes on the Monday. He was then cross-examined by Mr. Burke. He said that during the course of the meetings with Mr. Burke there was a discussion about his dismissal and the reasons for his dismissal. Mr. Burke asked him was he shown a letter and he confirmed that he was shown a letter about termination. Mr. Burke asked was Mr. Falken asked about a failure to furnish a cheque and Mr. Falken disagreed and said that he was asked about the car. As a result of comments made by Mr. Burke to Mr. Falken arrangements were made for the ownership of the car to be transferred to Mr. Burke. Mr. Falken stated that he did not believe a cheque was mentioned to him. In relation to the car Mr. Falken said that when reference was made to a difficulty with the car Mr. Falken investigated the matter and that eventually the car was transferred to Mr. Burke. The difficulty in relation to the car which was finally resolved in 2003 was based on some misunderstanding between the human resources people and the car hire people. He confirmed that he did not state that approval for the settlement was only given on Monday evening and he was emphatic on this particular point. Mr. Falken stated that he disagreed with the views expressed by Mr. Burke and with his characterisation of what had gone on. Mr. Falken wasn't familiar with a correspondence that was addressed to the Chairman of the company.

36. The next witness was Ms. Deirdre Courtney, solicitor, who is a partner in Ivor Fitzpatrick & Co. She too was dealing with Mr. Burke in relation to these proceedings. She outlined the fact that there had been a consultation with Mr. Burke on the 5th of October, 2000. A meeting was then arranged for the 6th of October, 2000. She described the lengthy negotiation process that took place in the Four Courts on that date. She identified those in attendance at the negotiations. In describing the settlement she said that Mr. Burke had a list of items that he wanted dealt with. Ultimately it was suggested that the terms would be reduced to writing. Many items at issue between the parties were agreed. She stated that Mr. Burke got full advice in relation to all matters and that in particular clause 4 was read through carefully to Mr. Burke by Mr. Rogers. She said that Mr. Burke was unhappy with the terms of settlement but nonetheless he was on risk as a result of the Calderbank letter. She said that at the time that Mr. Burke left the Four Courts it was not known whether there would be agreement. At the stage that agreement was reached they were outside the Four Courts building and when Mr. Stewart confirmed the agreement Ms. Markey telephoned Mr. Burke and told him that the settlement had been agreed. It was put to Ms. Courtney that Mr. Burke was contending that his instructions were that there were other terms outside the written agreement to be agreed before there could be a settlement. She did not accept that. She said that everything that was required by Mr. Burke was in the settlement. There were other conditions that he had wanted earlier on in the course of the day but they simply could not be agreed. The specific items now contended for by Mr. Burke as being matters that had to be agreed were put to Ms. Courtney namely, that the sum of £310,000 was to be the total capital sum payable to him, that the transfer of the car was to be tax free, that he was to receive a full immediate pension, that he was to be paid his salary until the settlement was implemented and that he was to be paid his full legal costs. Other matters in relation to share/stock options were also referred to her. It was also put to her that it was a pre-requisite of a valid agreement that the agreement was to be signed by both sides that night.

Insofar as all of these issues are concerned she disagreed with Mr. Burke's contention. She said that it was her view a settlement had been reached in the terms committed to writing. Again she also pointed out that so far as Mr. Burke was concerned he was at risk by virtue of the provisions of the Calderbank letter. There was a potential exposure to an application for costs because of that. In her view the settlement reached was a very good settlement in respect of which Mr. Burke had been carefully advised. Subsequent to his signing the agreement he said nothing that would indicate that the agreement required any revision.

37. Ms. Courtney was then cross-examined by Mr. Burke. She was asked about the proceedings in July. It was put to her that at that stage it had been mentioned that the case was worth €700,000 plus pension. She responded that that is what Mr. Burke was looking for. She said that in proceedings one would push the boat out in order to get a good settlement. She was asked about various matters that occurred in relation to the hearing before Ms. Justice Kearns.

38. She confirmed that the purpose of the meeting on the 6th of October, 2000, was to attempt to negotiate a settlement. There had been a meeting the previous day. She said that Mr. Rogers was anxious to enter into negotiations because of the Calderbank letter. She disagreed that the purpose of the meeting on the sixth of October was to go over the running of the case. She said it was always for the purpose of negotiation. She pointed out that it wouldn't have been necessary to attend the Four Courts for a routine meeting in order to prepare the case. She was then asked about various matters in relation to the agreement. Insofar as share options were referred to she understood that to be a reference for previous work done. In other words an employee would in 1998 receive share options in respect of the year 1997. Her view was that his entitlement was in respect of matters due up to the date of trial. In relation to pension matters she said that advice had been obtained from Segrave, Daly, Lynch, a very competent firm who have been very much involved in advices for Mr. Burke. Information was obtained from Mr. Lynch of that firm. She said that Mr. Lynch had given advice and attended meetings. She disagreed that the first information from Mr. Lynch was received after the settlement in January, 2001. She said that the full pension advice was furnished orally at meetings. She said that Brendan Lynch attended at the hearing in July and that there was a meeting with Mr. Burke and Mr. Lynch on one other occasion. He was not available on the 6th of October, 2000, but his advice had already been furnished at that time and Mr. Burke was aware of his advice. Mr. Burke then went through a number of matters which have already been dealt with by other witnesses in relation to the writing up of the agreement, the calculation in relation to the costs, the time at which the agreement was signed by Mr. Burke, the payment of tax advice by Thermo King. She confirmed that the issue in respect of tax advice was the only matter outstanding at the time that Mr. Burke left the Four Courts. All other matters had been agreed before Mr. Burke left the Four Courts.

39. She was asked about the extent of Mr. Stewart's instructions and she said it was clear to her legal team that he had to obtain instructions in relation to various matters. She was asked if he had full permission to conclude a settlement and she responded that she did not know the extent of his instructions. In regard to the manner in which the settlement was concluded she said that her distinct recollection of the evening was that there was no agreement until ten o'clock. She said that many terms had been agreed and discussed. Ultimately there was a signed document in respect of the terms acceptable to Mr. Burke. All issues had been agreed by both sides save for the payment of tax advice. Finally, after Mr. Burke had left, Mr. Stewart had a telephone conversation; this took place on the street, and the last outstanding item was agreed. She said that this occurred shortly after ten o'clock. She confirmed that at the time that Mr. Burke left the Four Courts there was no agreement. She confirmed that a tactical decision was made that Mr. Burke should leave the Four Courts to indicate that no further negotiation was possible from his point of view. Subsequent to that, confirmation was received from Mr. Stewart and a short phone call was made to Mr. Burke. She disagreed with the concept that the agreement had to be signed.

40. She was asked about Mr. Stewart's difficulty in obtaining instructions and she confirmed that she recalled that Mr. Stewart had some difficulty because the firm of solicitors instructing him were closed at that hour of the evening. However, the case was settled at approximately six minutes past ten.

41. Ms. Courtney was then asked about the position in relation to the taxation in respect of the lump sum agreed. She said that Mr. Burke was adopting a position that was not possible. Insofar as he had suggested that £160,000 of the settlement should be attributed to a personal injury claim she said it simply couldn't be done and that she, as a solicitor, could not stand over that. The position was that the settlement terms provided for the settlement to be concluded in a tax efficient manner. She accepted that there was a possibility of allocating a part of the sum to a personal injury claim and she felt that a figure of £30,000 was sufficient.

42. She dealt with the various other issues namely, the question of a full pension from the date of settlement and she pointed out that this was something that Thermo King would not concede. Mr. Lynch had advised in relation to that issue. She accepted that in relation to clause 3 of the evening of the settlement there was no direct contact with Mr. Lynch. However she said that he had advised Mr. Burke prior to that date but was not available on that night. She confirmed that if he been required it would have been possible to contact him by telephone that evening.

43. She was not cross-examined by Mr. Burns.

44. Mr. Burke then gave evidence. He described attending a meeting on the 5th of October and stated that he was then requested to attend a meeting at the Four Courts the following day. He said that he had emphasised to Mr. Rogers his dissatisfaction in relation to his dismissal and that he was anxious to clear his name in relation to the issues that had arisen. He said that Mr. Rogers put him under pressure to settle the case and that Ms. Courtney said that the courts were going to take a dim view of Mr. Burke if he did not negotiate. He said that insofar as authority was given to settle the case he instructed his team that they could negotiate but not finalise matters without his consent. He described a situation where offers and counter-offers were made. Ultimately Mr. Mallon suggested writing down the settlement terms. Mr. Burke said that he had wanted £500,000 by way of settlement but that all that was on offer was a figure of £310,000. He discussed the various figures and how the sum of £500,000 was made up. He described how a figure of £150,000 could be ascribed to the "SCSB" calculation. A balance of £350,000 was left. He said that he explained that he wanted that figure, including the car, to be ascribed to personal injuries. His argument in this regard was that other employees of Thermo King who ceased employment got the benefit of their company car without any tax implications. In relation to bonuses, it was his view that he was entitled to a bonus in respect of the year 1999. His argument was that it was part of the expression "all emoluments" which was the subject of the undertaking to the High Court in July. In relation to the issue of pension he said that that was for him a big issue. It was of no benefit to him to wait until he was 65 before being paid a pension. He disputed the advice that had been furnished by Brendan Lynch in this regard. Under the pension scheme and revenue guidelines he argued that the earliest age at which he could be paid a pension was 50. This was contrary to the advice he had received. He said that he was advised that this issue could be dealt with by being phrased as being in accordance with the rules of the scheme. He said he understood this to mean that a pension would be payable at the age of 50. Again he discussed the question of legal fees and said that at the end of the day he was happy with the document as drafted on the assumption that he would be paid a full pension at the age of 50 and that the other matters he had raised would be dealt with. He then said that the agreement was signed by him at 7.40 p.m. Before signing the document he said that he asked would he get cash into his hand, namely the £310,000 and a pension at 50. On being assured that that was the case he said he signed the document. Mr. Rogers then returned at that time and said that the settlement was not

agreed, that the other side were not accepting those terms. Mr. Burke said he decided at that stage to go home but Ms. Courtney prevailed on him and said that they would attempt to salvage an agreement.

45. At that stage he said that Ms. Courtney wrote down a number of matters on a yellow pad, namely the figure of £310,000 in the most tax efficient manner, the car and the pension. He went over to the Legal Eagle at this point and further efforts were made to settle the case.

46. He said that at some stage Mr. Rogers advised him that there was no agreement that he should prepare for court and he was advised that he would be required to attend in Dublin on Monday. He confirmed that the Calderbank letter had been mentioned to him and that there could be a huge legal bill in that regard. He said that the position was at that time that a proposal had been made by his side but it had been rejected by the other side. He then left.

47. He then described the phone call he received from Ms. Markey. He said that she advised him that "we believe we have a settlement". He asked her was he going to get a full pension, the full amount and VHI. He said that he wanted the agreement signed that night and he indicated to her that provided that all that he wanted had been agreed that was satisfactory. He said that if everything he had wanted had been agreed that there would have been a settlement that night.

48. He then described how on Monday morning he went through the terms of the settlement with a Mr. Redmond, a friend of his. During the course of this Ms. Markey rang and he asked for a copy of the agreement. She advised him that at that stage it had not been signed by both parties. He said that in those circumstances counsel had had no permission to settle the case on his behalf. He said that Ms. Markey and his legal advisors had lied to him on Friday. He emphasised that his instructions had not been followed. Subsequently he received a further phone call from Ms. Markey in the evening; apparently no-one was available from Thermo King to sign the document and accordingly he said they were to go into court. He said that his understanding of the situation was that there was no agreement. As far as he was concerned he had been given a warranty that the other matters he had mentioned, namely the payment of the £310,000 in full, the payment of a full pension and so on, was all part of the agreement.

49. Mr. Burke was then cross-examined. He was asked about the meeting that took place on the 5th of October and on the 6th of October. He confirmed that he had been asked would he enter into negotiations on the 5th and he confirmed that he would. He was told that on the 5th Mr. Stewart was unavailable. Therefore he did not commence negotiations on the 5th of October. An affidavit sworn by him in the proceedings before Mr. Justice Smyth was then put to him, but he said he had no recollection in relation to that particular matter notwithstanding that the contents of the affidavit were at odds with his evidence.

50. He was then cross-examined about the course of negotiations on the afternoon of the 6th of October. It was put to him that Ms. Markey went through the settlement document and explained it to Mr. Burke. He said that the terms of the agreement were not explained prior to signing it but that there was a discussion when the terms were being written out. He said that he verified that he was getting certain warranties in relation to the matter, namely the cheque into his hand, the car tax free and all stock options up to the 6th of October and an immediate pension. He was cross-examined at length in relation to his pension entitlements. A letter dated the 5th of May, 2000, containing information from the company on pension entitlements was referred to Mr. Burke. He confirmed that he was aware of that letter. The summary of the rules of the pension scheme were put to Mr. Burke and it was put to him that the terms of the scheme did not allow for or provide for the payment of an immediate full pension. He disagreed with this.

51. In relation to the issue of the payment of the sum of £310,000 he disagreed with the concept that to attribute the sum of £160,000 to the personal injuries element of his claim would be contrary to public law and he disagreed with this. It was put to him that insofar as personal injuries were concerned that there had been a two month period which could be described as giving rise to personal injuries. He denied that to attribute the £160,000 to personal injuries would amount to tax evasion. It was his case that the money could have been so attributed. Insofar as this issue was concerned he said that his legal advisors did not have a difficulty with this concept on the night of the 6th of October, 2000. It was put to him that they had not in fact given him any specific advice of the particular sum that could be dealt with by way of personal injuries on the night in question. It was put to Mr. Burke that the only question that arose in this regard occurred after the settlement had taken place. Reference was made again to the memo dated the 9th of October, 2000. Mr. Burke's response to this was that the money was to be given to him any way that he wanted it. Insofar as the words "tax efficient" were used he said that he had objected to this but had been advised by Mr. Mallon to put it in and that it could be changed later. He disagreed that the payment of the sum in that way would amount to a fraud on the revenue. Finally it was put to him that the wording of the terms of agreement in this regard were very carefully written, namely that "the defendant will pay to the plaintiff the sum of £310,000 gross in the most tax efficient manner permitted by law", to make it clear that such tax as is required would have to be deducted. It was put to him that on that basis he could have had no expectation that the full amount could be tax free. He replied that he had had too much faith in his legal team. Finally in this particular aspect of the matter he reiterated that he told his legal team that there would be no settlement unless he got £310,000, if need be, all of that figure being attributed to personal injuries if that was what was required. He added that counsel told him he would get some of the money tax free. He said that what was involved was not tax evasion but tax avoidance.

52. In relation to the question of the signing of the agreement, he confirmed that he left the Four Courts before ten o'clock that evening but reiterated that there was a document signed by him as early as 7.45. He said that when he signed the document at 7.40 approximately, it was rejected by Mr. Stewart, he had no doubt in his mind to that effect. He was then asked again about the phone calls made to him by Ms. Markey. He confirmed that the first call was cut off after approximately a second. The second call lasted forty seven seconds. It was put to Mr. Burke that that conversation that he contended for never took place, namely that he told Ms. Markey that the matter was settled as long as he got his full pension, life insurance, VHI, the payment of the sum of money tax free and that the agreement had to be signed. He insisted that that occurred during that conversation.

53. During the course of his cross-examination Mr. Burke, on a number of occasions, insisted that the agreement was signed by him before 7.45 in the evening. He reiterated a number of times that he asked was he getting all of the matters that he had referred to, namely the full pension, the capital sum free of tax and the car free of tax and the VHI. He agreed with counsel that the matters referred to now were not referred to by him in the affidavit sworn by him on the 5th of July, 2001, in relation to the application before the High Court to reinstate the proceedings.

54. Mr. Burke confirmed that subsequent to the settlement there were discussions between the respective solicitors as to the allocation of an amount in respect of personal injuries, the issue in relation to the precise pension arrangements and he agreed that a medical report dated 4th October, 2000, from a Dr. Tony Lundon, was furnished to Matheson Ormsby Prentice on behalf of Thermo King in regard to the personal injury aspect of the case. A letter dated the 26th of January, 2001, was received by Ivor Fitzpatrick & Co. from Messrs Matheson Ormsby and Prentice and subsequently by a letter dated the 19th of February, 2001, agreement was reached in relation to a figure of £30,000 in respect of the figure for personal injuries. In this regard Mr. Burke said he was never consulted about the allocation in respect of the figure for personal injuries.

55. Mr. Burke said that on the 9th of October, it was his view that the case would be adjourned for a month and he insisted that there was no agreement as of Monday, the 9th of October, 2000. There would have been no agreement unless Mr. Burke got cash in hand and an immediate pension. He stated that he didn't realise that the case was going to be struck out. His understanding in relation to his pension payment was that it was to be at the earliest date possible under this pension scheme.

56. He was asked about the use of the word "gross" in relation to the figure of £310,000 and whether he had any doubt as to what that meant. In regard to the suggestion that Mr. Burke was making to the effect that he would be under no tax liability in respect of that sum it was his response that on the night of the 6th of October that is what was stated to him. He then went on to state that so far as he was concerned the position was that a settlement had been reached in relation to the proceedings without his permission. Following that particular evening he was not entirely aware of the full extent of the negotiations and correspondence between the respective solicitors. Reference was then made to a letter of the 21st of March, 2001, from Matheson Ormsby Prentice to Ivor Fitzpatrick & Co. setting out precisely the pension arrangements and what was payable in that regard under the terms of the settlement. A reply dated the 27th of March, 2001, from Ivor Fitzpatrick & Co. to Messrs Matheson Ormsby and Prentice indicated that they were having a difficulty receiving instructions but Mr. Burke indicated that in this incidence it was a case of Ivor Fitzpatrick & Co. not taking instructions.

57. Mr. Burke conceded that in the application to reinstate the proceedings which took place before Mr. Justice Smyth, Mr. Justice Smyth refused to re-enter the proceedings.

58. Reference was then made to a letter dated the 5th of April, 2001, written directly to Mr. Burke from Messrs Matheson Ormsby and Prentice. A reply was furnished by Mr. Burke, dated the 23rd of April, 2001. He was asked if it was the case that the agreement made was as clear cut as contended for by Mr. Burke, why he had not referred to that in the letter of the 23rd of April, 2001. He explained that this letter was written by himself, a lay individual. He again said that there was no agreement made on the 6th of October, 2000. He was asked about subsequent efforts made by Messrs Matheson Ormsby and Prentice to implement the settlement even after the order made by Mr. Justice Smyth. A number of other solicitors were involved on his behalf subsequently but he repeated that there has never been an agreement or a settlement of the proceedings.

59. Mr. Burke was then cross examined by Mr. Burns on behalf of Ivor Fitzpatrick & Co. He was asked about the meeting that took place on the 5th of October, 2000. That meeting lasted for approximately two and a half hours. He agreed that the Calderbank letter was discussed and the effect that that could have on proceedings. He was advised about the period of notice that was applicable to somebody in his situation and that it was unlikely that he would be given, by way of a reasonable period of notice, more than a year. Mr. Burke confirmed that the tax implications of the settlement were discussed and in particular the Carvill case was referred to. He conceded that he was told that it was open to the defendants to admit that Mr. Burke was wrongfully dismissed and simply leave the matter to be decided on the basis of a payment in lieu of what would have been reasonable notice. He also conceded that he was advised that the case he was bringing would be worth in the region of £131,000, being his salary for one year. He also accepted that he was advised that that figure would be reduced by the amount of salary received since the notice period given to him expired and that the offer contained in the Calderbank letter was twice the value of the case. The memorandum of that meeting was put to him and he indicated at the meeting that he would possibly take £300,000 plus his bonus plus two thirds of his full pension at age fifty five and that would involve bringing forward his pension ten years. He agreed that Mr. Rogers told him at that point to "cop on" and that he was not at the races. He agreed that he was told that no-one would give him that sort of money. It was at that point that the particular meeting ended and Mr. Rogers then went to have some discussion with Mr. Stewart.

60. In relation to the 6th of October, 2000, Mr. Burke confirmed that he gave Mr. Rogers instructions to enter into negotiations on his behalf and that those negotiations were then entered into. He agreed that a set of terms were reduced to writing following to-ing and fro-ing between the parties. He said that he signed the agreement between 7.30 and eight o'clock in the evening. He accepted that in the letter of the 2nd of December, 2000, from himself to Deirdre Courtney he said that he had signed the agreement at 9.30 in the evening. He said that he signed the agreement prior to Ms. Courtney giving him a list of terms and he then left the Four Courts at approximately ten o'clock. Again he reiterated that he had told Mr. Rogers that he wanted a minimum of £500,000 plus a pension and that he had been told by Mr. Rogers in response that the maximum that he could get was £310,000. He acknowledged that it had been wrong of him to make unauthorised use of someone else's password to access the company computer network at a time after he had been dismissed. He reiterated again that insofar as the terms of settlement were reduced to writing that they were the minimum terms and that there were other terms in addition to those which were his terms. It was put to him that it was false for him to suggest that the legal team had said to him that he would receive the figure of £310,000 into his hand. Then Mr. Burns went through the details of the terms of the agreement. He said that he had asked Mr. Rogers and Mr. Mallon on the 6th was he getting the sum of £310,000 into his hand and that he was assured that that was the position by both Mr. Mallon and Mr. Rogers. He said that after he had signed the agreement he was told it had been rejected by Thermo King. He disagreed with the evidence of Mr. Mallon that a tactical decision had been made that he should leave the Four Courts after signing the agreement.

61. In relation to the phone call received by him from Ms. Markey he said that she did not say that the case was settled, it was his understanding that his legal team were waiting for a signed agreement. He said that it was his understanding that the case was settled if he was getting the VHI payments, the full sum of £310,000, confirmation of tax advice and so on. He said that he had referred to all these matters in the course of the phone call.

62. Mr. Burke was then asked about the conversations with Ms. Markey on the 9th of October, and the memos in relation to the conversations with him on that date and in respect of the 10th of October were put to him. Correspondence was also put to him in relation to the efforts to finalise the exact amounts payable on foot of the agreement. It was put to Mr. Burke that he simply became unhappy with the terms of settlement when he realised that he would have to pay some element of income tax on the figure of £310,000. He stated that he had been put into a corner in relation to the settlement and said that the agreement he had signed had certain warranties attached to it. He was referred to the letter of the 2nd of December, 2000. He expressed the view in that letter that the settlement terms were not binding on the basis that the defendants i.e. Thermo King, had not complied with the conditions set out in the agreement.

63. The next issue of importance put to Mr. Burke related to the meeting arranged for the 20th of March, 2001. Mr. Burke stated that in that meeting, John Rogers arrived in and asked Mr. Burke "was the case settled", he said that he replied "no" and that Mr. Rogers then walked out. He said that prior to Mr. Rogers' arrival at the meeting a general discussion had taken place until Mr. Rogers entered the room. Mr. Burke said that the meeting didn't last two minutes after Mr. Rogers asked that question. He said that there had been a discussion before Mr. Rogers arrived for approximately thirty minutes. He said that within one and a half minutes of his arrival Mr. Rogers asked the question referred to and that the meeting then finished. It was put to Mr. Burke that he was mistaken as to the timing but he disagreed. A memo of that meeting was put to Mr. Burke. It should be noted that present at that meeting which took place in Mr. Rogers' rooms in Church St. were Mr. Rogers, Tony Burke, Tom Mallon, Brendan Lynch, Deirdre Courtney and Mary Claire Markey. It may be useful to quote from part of the memorandum "John Rogers said that if he accepted this case was settled then

they were in the position to help him and then they would look at the agreement. Otherwise, if he was saying this case was not settled we would not be further involved. Tony Burke took up the agreement and said that looking at it he said he was not worried as long as he got a cheque for £310,000. John Rogers said again that as far as he was concerned the case was settled and that the deal was done in the Four Courts at the moment Mary Claire telephoned him. He said this was done with a full acquiescence and he confirmed that the deal was done. He said he was not going to discuss something which Tony Burke says is not an agreement. Tony Burke said that the terms did nothing but screw him. By this stage the exchanges between Tony Burke and John Rogers had become very heated. John Rogers said that the case was settled on Tony Burke's terms and warned him that he should try to pull it on him. He said Tony should not try to put him to believe that it wasn't. He had spent a day and a half at the Law Library discussing what his pension rights were and advised Tony accordingly. Tony said he never accepted that pension. He then said where could he go from here. John replied that if he didn't accept there was a deal he would have to go and get independent legal advice. Tony said that the company could give this £310,000 tax free. John said they could not. He asked why couldn't they. John Rogers replied that it was against the law. We said that we had come back to him with the best advice but he could not accept this advice. He said that the problem that we have here is that Tony Burke was rejecting the deal because he didn't like the tax advice that he was given. Tony Burke then said we were getting hung up on technicalities. John Rogers replied that we could not participate in a suggestion that the agreement did not exist."

64. Asked about this part of the memorandum, Mr. Burke denied that Mr. Rogers had engaged in any of the conversations described therein. He said he couldn't remember the heated exchanges that were referred to and said that he did not remember the comment made about obtaining independent legal advice. He described the memorandum of that meeting as a fantastic document and that what was set out therein never happened. All that had occurred was as Mr. Burke had indicated namely, that Mr. Rogers came into the room, asked a question and having received a negative response walked out again.

65. The next witness called by Mr. Burke was a James Redmond. He had been a colleague of Mr. Burke for twenty years at Thermo King. On the morning of the 9th of October, 2000, he visited Mr. Burke at his home. Mr. Redmond indicated that he had been told by Mr. Burke about the settlement and the details of the settlement. Mr. Burke was quite pleased with the result of the proceedings and indicated that there was a satisfactory outcome in relation to share options and pension and so on. During the course of the discussion a phone call was received from Ms. Markey when it became apparent to Mr. Burke after he asked for a copy of the agreement that it transpired she did not have a signed copy, Mr. Redmond said that Mr. Burke became very agitated and was confrontational on the phone. At that stage he said to Ms. Markey on the phone "We don't have an agreement. Proceed to Court". He confirmed that he heard Mr. Burke say that in his opinion there was no agreement and they were to go to Court.

66. Mr. Redmond was not cross-examined on behalf of Thermo King. Mr. Burns cross-examined Mr. Redmond and Mr. Redmond confirmed that Mr. Burke made no complaint about having been pressurised into a settlement or having any difficulty or problem with his legal team. He was happy and elated. He indicated that he had been asked to recollect the conversation that took place between Mr. Burke and himself and between Mr. Burke and Ms. Markey some two years ago. He conceded that he had only heard one side of the phone call. Insofar as the conversation between Mr. Burke and Ms. Markey was concerned he accepted that to some degree he was speculating about the nature of that conversation.

67. The next witness called was Anne Burke. She is the wife of Tony Burke. She described again the nature of the to-ing and fro-ing during the course of the evening. She said that the document upon which the terms were written out had been rejected by Mr. Stewart and that at that stage she and her husband had gone to the Legal Eagle public house while negotiations continued. Ultimately they were told to go home as there was no agreement. Subsequently there was a phone conversation in which it was said that the legal team were going to get a signed agreement. Mr. Burke said that he would be happy if he got money in his hand, the full pension and so on. Insofar as reference was made to a signed agreement Mrs. Burke said that Ms. Markey had said that she was getting a signed agreement therefore they presumed that that was the position. She said it was a big issue to have a signature on the agreement.

68. Mrs. Burke was then cross-examined. She said that she had a clear recollection of the events. She recalled the piece of paper with the terms in writing and the circumstances in which the parties had negotiated. She remembered the use of the word "gross" in the agreement and how that had been initialled by her husband. She said that Mr. Burke asked was he getting the capital sum into his hand and he was told it was the case. She said that word was inserted in the agreement when her husband asked was he getting the full amount into his hand. She said the purpose was to ensure that he was to get the full sum into his hand. Again in relation to a signed agreement she recalled that Ms. Markey had indicated in the course of the telephone conversation that she was going back to Mr. Stewart's office to get a signed agreement. She couldn't recall a mention of the phrase "the case is now settled". Finally she said that in regard to the conversation between Mr. Burke and Ms. Markey she recalls her husband mentioning the phrase "into my hand", and she was asked what Ms. Markey's response to this was and she said she could not remember and didn't know what Ms. Markey said.

69. She was then cross-examined briefly by Mr. Burns. She was asked by him if the case had been discussed over the previous five years many times with her husband. She responded by saying not necessarily. Insofar as Mr. Burke's legal team were concerned, she said that they would have told him anything to get his signature on the agreement. She said that it was Mr. Mallon who indicated to Mr. Burke that he would receive the full sum of £310,000 into his hand.

70. That concluded the case on the part of Mr. Burke.

71. John Rogers S.C. was then called on behalf of Ivor Fitzpatrick & Co. He confirmed that he had acted for the plaintiff in the proceedings and he referred to the meeting that took place on the 5th of October, 2000. The meeting went on for a number of hours on that evening. It took place in his room in Church St. and in attendance apart from Mr. Burke were Mr. Mallon and Mary Claire Markey. He was referred to the memo of the meeting and explained that the main concern at that stage related to the Calderbank letter. He pointed out that such a letter carried a real risk for a plaintiff in circumstances such as those of Mr. Burke. The reality was that it would create difficulties in relation to costs. He stated that he was anxious to get across to Mr. Burke that there would be a terrible dilemma for Mr. Burke if he did not do better in court proceedings than the offer contained in the Calderbank letter. Mr. Rogers was anxious to advise Mr. Burke to try and settle the case. He was of the view that Mr. Burke had unrealistic ideas apart altogether from the implications of the Calderbank letter in relation to the case. That evening Mr. Rogers spoke to Mr. Stewart who advised him that Thermo King were not going to move from the terms contained in the Calderbank letter. Nonetheless they arranged to have a settlement meeting the following day.

72. Mr. Rogers then described the course of the discussions during the following day. He made the point that there was some difficulty in relation to the negotiation because of the fact that Mr. Stewart had to obtain instructions by phone. At a later stage in the evening, terms were written down. He, Mr. Rogers, had asked for a figure of £367,000 at one stage early on in the negotiations. Initially the counter offer from Thermo King was the same contained in the Calderbank letter, namely, £290,000. Finally this went up

to a figure of £310,000. Mr. Rogers said that Mr. Burke had totally unrealistic views about the position in respect of pension. Mr. Rogers put his views to the other side but they were rejected. Insofar as the written terms were concerned, Mr. Rogers said that the word "gross" was inserted to demonstrate that that was not the net figure payable to Mr. Burke and to indicate that the tax had to be paid on that figure. Mr. Rogers emphasised that he did not give an assurance to Mr. Burke that the sum of £310,000 would be paid into Mr. Burke's hand. In this regard he said "I couldn't have said that, wouldn't and didn't."

73. Mr. Rogers went through the other terms in the agreement in relation to pension, taxation advice and so on. He pointed out that the last issue to be resolved related to the payment in respect of taxation advice. He said that the final proposal in relation to the settlement of the matter was what was contained in the terms of settlement and this was put to Mr. Burke who knew exactly what was in it and agreed to it. At the point the agreement was signed by Mr. Burke the only outstanding matter was Mr. Stewart's agreement in relation to the issue of payment for taxation advice. Mr. Rogers said that he was happy with the deal, that it was a good deal for Mr. Burke. It was discussed in great detail with Mr. Burke. He never received any subsequent instructions from Mr. Burke before the hearing on the 10th of October indicating that the case was not settled.

74. Mr. Rogers was aware that Mr. Burke had issues in relation to the settlement and consequently there was a lengthy meeting which took place on the 20th of March, 2001. He described that meeting as a difficult meeting. He re-read the memo in relation to the meeting on the day before giving evidence and was of the view that the memo was a fair record of the meeting. By the time of that meeting he, Mr. Rogers, was of the view that he had a professional difficulty in relation to the matter at that time. So far as Mr. Burke suggested that Mr. Rogers had been in attendance at the meeting for one or two minutes only before asking the question is the case settled and leaving, Mr. Rogers reflected that this was somewhat strange given that the meeting was taking place in his rooms. He said that he was hardly going to leave Mr. Burke in his room. There were substantial discussions about Mr. Burke's concerns on that occasion. He emphasised that in his, Mr. Rogers', view the settlement obtained was a great result for Mr. Burke. Mr. Rogers indicated that he had been quite forthright throughout the meeting and that he was somewhat robust in his views as was Mr. Burke.

75. Mr. Rogers was then cross-examined by Mr. Burke. Mr. Burke went through the various issues with Mr. Rogers in relation to the events of the 6th of October. He confirmed that the opening bid in respect of the capital sum was £375,000. Mr. Rogers confirmed that he wasn't in a position to recall whether he had read the rules of the share option scheme or the rules of the pension scheme. He did indicate that there had been a considerable amount of discussion in relation to pension matters. Mr. Rogers denied saying to Mr. Burke at any stage that he would have a cheque in his hand for the sum of £310,000. He added that no warranty about other matters such as the payment of a full pension was given to Mr. Burke. Again Mr. Rogers said that he did not mention to Mr. Burke the possibility of an early payment in respect of the pension. He added that it was never represented to Mr. Burke that a pension could be paid at the age of fifty or fifty five. So far as it was suggested by Mr. Burke that Mr. Rogers or anyone else on the legal team had given Mr. Burke any warranty Mr. Rogers said that they were not in a position to give any such warranty. Mr. Rogers confirmed that the final issue outstanding in relation to the completion of the settlement was the question of payment for tax advice. Eventually it was indicated that Thermo King were prepared to pay for taxation advice and at that point Mr. Rogers indicated that there was a deal. Equally it was his view that Mr. Burke well knew that that was the case.

76. Mr. Rogers then described the events of the 9th and 10th of October and confirmed that the case was settled and was struck out on the Tuesday, the 10th. It was put to Mr. Rogers that the case was struck out without Mr. Burke's permission but Mr. Rogers reiterated that the case was settled on Friday and accordingly was not going on.

77. Mr. Burke then referred to the meeting that took place on the 20th of March, 2001. He put it to Mr. Rogers that that meeting, so far as Mr. Rogers was concerned, involved two and a half minutes of his time. Mr. Rogers did not agree with this. He described what occurred during the course of that particular meeting. He indicated that the meeting was not a short meeting but he was not in a position to say precisely how long the meeting lasted and he observed that the contents of the meeting were noted by Ms. Markey and that her attendance caught the mood of the meeting. That concluded the evidence.

78. Written submissions were furnished by Mr. Connaughton S.C. on behalf of Thermo King. In those submissions he identified the issue to be determined as being whether the evidence relating to the negotiations that took place on the 6th of October, 2000, established that a concluded agreement had been entered into in the terms contended for. He outlined in his submissions the reasons why he contended the position was that there was indeed a concluded agreement. He argued that Mr. Burke had given express authority to his legal team to conduct negotiations on his behalf.

79. Mr. Burke stated in his submissions that what he understood and knew to be the case was that when he left the Four Courts on the 6th of October, 2000, there was no concluded agreement. He added that he was told that there was going to be a signed agreement and he had no difficulty with the concept of a signed agreement provided he had that together with the warranties. On the Monday morning it transpired that there was no signed agreement. He said that he then instructed Ms. Markey not to have the case struck out on Tuesday. He made the point that even though everyone has told him that there was an agreement, he has still not had any benefit from the agreement except the car which he did not receive finally until August, 2003. He has been left effectively without anything.

80. I am satisfied as to certain matters having considered the evidence in this particular case.

1. Mr. Burke is an accountant.
2. Mr. Burke must have known and understood what was meant by the very clear and unambiguous terms of paragraph 1 of the terms of settlement.
3. If Mr. Burke didn't understand the terms of the settlement, which as I have just stated I do not accept, I am satisfied that the terms were explained to him carefully at length on the 6th of October, 2000.
4. I am satisfied that prior to the settlement meeting on the 6th of October, 2000, Mr. Burke had been told exactly what to expect from court proceedings and what he could expect from a settlement negotiation. I am also satisfied that the effect of a Calderbank letter was fully explained to him.
5. It is clear from all of the evidence that Mr. Burke was a reluctant settler at all times. It seems to me that Mr. Burke was anxious to have his day in Court.
6. On a number of specific matters, namely:

- (a) Was Mr. Burke told he would receive £310,000 into his hand?
- (b) Did he agree to a settlement subject to the "warranties" as to matters not referred to in the written document, e.g. VHI, full immediate pension, etc.
- (c) The time at which Mr. Burke signed the agreement.
- (d) What was said to Mr. Burke in the course of the forty seven second phone call?
- (e) What was said on Monday the 9th of October in the conversations between Mr. Burke and Ms. Markey.
- (f) What occurred at the meeting on the 20th of March, 2001.

81. So far as all these matters are concerned, I am satisfied that Mr. Burke's evidence and recollection is wrong. The evidence of his wife does not impress me as being of much value in resolving the issues. I prefer the evidence of the other witnesses to the evidence given by Mr. Burke on all of these issues. I am satisfied however that he was concerned about the lack of a signature on the terms of settlement on Monday morning the 9th of October. Equally, I am satisfied that he was reassured on this point by Ms. Markey.

82. I am also satisfied that on Monday the 9th of October, 2000, Mr. Burke had not expressed a view to Ms. Markey that there were certain matters not included in the written agreement which were part of his demands for a settlement.

83. I am also satisfied that before, during and after the conclusion of the settlement on the 6th of October, 2000, Mr. Burke was fully and carefully advised on all matters relating to compensation for loss of employment, pension entitlements, stock and share options and costs etc.

84. Throughout the course of this case Mr. Burke has stuck stubbornly to the same line in respect of a number of issues. Although the evidence in relation to the meeting of the 20th of March, 2001, does not of itself assist in determining whether or not a settlement was concluded on the 6th of October, 2000, it is of assistance in demonstrating Mr. Burke's insistence on sticking rigidly to his view of what occurred in the face of very clear evidence to the contrary. In this regard I refer to his specific insistence that Mr. Rogers had been in attendance at that meeting for a period of two and a half minutes before walking out of that meeting. Equally, in the course of giving evidence about the telephone conversation between Ms. Markey and himself on the evening of the 6th of October, 2000, Mr. Burke stuck rigidly to his account of that conversation notwithstanding the clear and irrefutable proof that that phone call lasted no more than forty seven seconds. If nothing else, this makes it clear to me that Mr. Burke's recollection on key issues is unreliable and that he is unable to contemplate any version of events other than that which he has now formed. This is reinforced by the fact that throughout this case he has insisted that he signed the terms of settlement at approximately 7.45pm on the evening of the 6th of October notwithstanding the evidence of the other witnesses but more importantly notwithstanding what he himself stated as being the time at which he signed the terms of settlement in the letter dated the 2nd of December, 2000.

85. I have little doubt that following the conclusion of the settlement, Mr. Burke gradually became more and more dissatisfied as to the amount of the capital sum he would receive after the deduction of income tax. As a result, it seems to me that Mr. Burke has managed to convince himself on the one hand that the terms of settlement provided for the payment of a capital sum of £310,000 into his hands whilst on the other hand he has tried to maintain that there was no concluded agreement at all. Unfortunately this has led to a situation where the terms of settlement have not been implemented and where Mr. Burke has been at the loss of that which is his entitlement under the terms of settlement.

86. I am satisfied therefore that the evidence before me has clearly established that on the 6th of October, 2000, a concluded agreement was negotiated on behalf of Mr. Burke, with his full authority and instructions, which was accepted by the other side.

87. I will hear the parties as to the appropriate orders to be made at this stage.