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# Supreme Court of Ireland Decisions

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## Judgment

**Title:** Keaney -v- O'Sullivan & ors

**Neutral Citation:** [2017] IESC 23

**Supreme Court Record Number:** 55/09, 62/07, 140/07

**High Court Record Number:** 2006 No 40 Com & 2006 No 593P

**Date of Delivery:** 05/04/2017

**Court:** Supreme Court

**Composition of Court:** Clarke J., Laffoy J., Dunne J.

**Judgment by:** Dunne J.

**Status:** Unapproved

**Result:** Appeal dismissed



## THE SUPREME COURT

**[Appeal No. 55/09]**

**Clarke J.**

**Laffoy J.**

**Dunne J.**

**BETWEEN**

**VINCENT KEANEY**

**PLAINTIFF/APPELLANT**

**AND**

**JAMES SULLIVAN (FIRST DEFENDANT), JOAN SULLIVAN (SECOND DEFENDANT), ST. JOHN CULLIGAN (THIRD DEFENDANT), MICHAEL NOLAN (FOURTH DEFENDANT), TITANIC**

**QUEENSTOWN TRADING COMPANY LIMITED (IN LIQUIDATION) (FIFTH DEFENDANT),  
MAGPIE INTERNATIONAL HOLDING COMPANY LIMITED (IN LIQUIDATION) (SIXTH  
DEFENDANT), TITANIC QUEENSTOWN MEMORABILIA LIMITED (IN LIQUIDATION)  
(SEVENTH DEFENDANT), ALLIED IRISH BANKS PLC (EIGHT DEFENDANT) Q.E.F. GLOBAL  
LIMITED (NINTH DEFENDANT)**

**ROGER DUNCAN, GEOFFREY LEWIS, DAVID MARSH, TOM MOORE, DECLAN O'LUANAIGH,  
NEIL PAYNE, DAVID ISAACSON (CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF  
ORMSBY RHODES AND BKR ORMSBY RHODES) (TENTH TO SIXTEENTH DEFENDANTS),  
TREGAN PROPERTIES LIMITED (SEVENTEENTH DEFENDANT), JULIA NOLAN (EIGHTEENTH  
DEFENDANT)**

**DEFENDANTS**

**Judgement of Ms. Justice Dunne delivered on the 5th day of April, 2017**

This is an appeal by the plaintiff/appellant, hereinafter referred to as "Mr. Keaney", from the judgment of the late Mr. Justice Feeney delivered on the 19th December, 2008 ([\[2008\] IEHC 372](#)) and the order made on the 13th January, 2009, perfected on the 30th January, 2009 dismissing Mr. Keaney's claim against the first, fourth and eighteenth defendant/respondent. The first defendant will be referred to hereinafter as "Mr. Sullivan", the fourth defendant as "Mr. Nolan" and the eighteenth defendant as "Mrs. Nolan".

The procedural history of this matter is complicated. As can be seen from the title hereof, originally, Mr. Keaney initiated proceedings against some eighteen defendants. In the course of the earlier part of the proceedings, Mr. Keaney reformulated his claim against the various defendants in a series of amended statements of claim, some of which were amended with the leave of the High Court, some not. Ultimately, a number of motions were issued by various of the defendants with the result that following a four day hearing before the High Court all claims against the third, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth named defendants were struck out and the claims as against the first, fourth and eighteenth named defendants were limited. (See the judgment of the High Court (Finlay Geoghegan J.) of the 16th January 2007, ([\[2007\] IEHC 8](#).) Subsequently, on the 26th March, 2007 a further order was made striking out all claims against the fifth, sixth and seventh named defendants. (See the order of the High Court (Kelly J.) made on 26th March, 2007 and perfected on 14th April, 2007). At that point it was ordered that a further statement of claim be delivered pleading the surviving causes of action allowed and permitted to be pleaded by the judgment of the Court. Thereafter, a series of statements of claim were delivered in purported compliance with orders of the Court and a number of motions were brought on behalf of the remaining defendants, namely, Mr. Sullivan, Mr. Nolan and Mrs. Nolan, claiming that the statement of claim delivered was not in compliance with previous court orders. Ultimately, on the 26th June, 2008 the High Court made an order directing that portions of the statement of claim be excised so as to ensure compliance with the order of the High Court made on the 26th February, 2007 and a statement of claim in compliance with that order was duly delivered on the 1st July, 2008. It was that statement of claim which was before Feeney J. at the hearing the subject of this appeal. It should also be noted that Mr. Keaney did not proceed against the second named defendant and thus the claim proceeded against Mr. Sullivan, Mr. Nolan and Mrs. Nolan in relation to the eight statement of claim delivered on behalf of Mr. Keaney on the 1st July, 2008. I will refer to the nature of the claims permitted and allowed to be made against Mr. Sullivan, Mr. Nolan and Mrs. Nolan later on the course of this judgment.

**Background**

The background to this matter was set out in the judgment of Feeney J. and I gratefully adopt what he said in this regard in the course of his judgment:

"The plaintiff is a businessman from Cobh in the County of Cork. In the early 1990s he won the lotto and received a seven figure sum. Out of his winnings he bought a number of properties, one of those was the Old Cunard White Star building or Scott's Building in the centre of Cobh. It was the old terminal building used in the period when Cobh was a port on the trans-Atlantic liner route.

The plaintiff decided to develop the old terminal building and set about obtaining urban renewal status for the building. The plaintiff proposed to use the building as a theme pub and restaurant to be called 'The Titanic Bar and Restaurant'. As part of that plan the plaintiff obtained a license at a cost of approximately IR£78,000 in 1999. He also succeeded in his attempts to have the building designated from urban renewal status. The plaintiff's evidence was that he had purchased the building for IR£110,000 and thereafter expended considerable sums in an attempt to bring the project to a stage where it could open. The plaintiff gave evidence that he expended in the region of IR£430, 000 to IR£470, 000 on the project. However, by early 2000 the plaintiff was in financial difficulties and had no more capital. He had also borrowed extensively in an attempt to complete the project. The plaintiff had a loan agreement with Allied Irish Banks in Cobh. By early 2000 the plaintiff had exceeded the limit of his sanction and owed a figure of some IR£475,000. The plaintiff faced real problems in endeavouring to complete the project. He sought investment from third parties. The plaintiff in evidence stated that in or about February, 2000, 'there were a number of people interested in coming on board, coming on board with me to rescue the project'. By this stage the building works had come to a near standstill and urgent investment was needed to enable the project to be brought to completion. The plaintiff summarised the position as of February, 2000, in the following terms:-

"... Mr. Declan Malone was a quantity surveyor and he recommended a costing of the building and the costing of the building was put at X and we engaged an engineer and a very good builder and between the jigs and the reels we discovered that the building ran into trouble due to there was some heavy engineering required that we could not have planned for. So that caused an overrun and AIB in Cobh was a small operation and the overrun ran to the extent . . . . they pulled the plug and felt that project could use superior business acumen and business knowledge. . . . we had gone as far as we possibly could."

It was at that stage that Mr. Keaney came into contact with a number of potential investors and ultimately in connection with Mr. Sullivan and Mr. Nolan. (At this point I should observe that Mrs. Nolan has had little or no hand, act or part in the matters at issue in these proceedings and was apparently sued solely because she was a party to a deed of the 30th September, 2004).

### **The pleadings**

I have already referred to the fact that this case has had a complicated procedural history. As a result of the manner in which the case was pleaded, the statement of claim had to be amended on several occasions. In addition, the case pleaded against a number of the defendants was struck out on the basis that the pleadings did not disclose a reasonable cause of action on the pleadings. Thus so far as the case against the tenth to sixteenth defendant was concerned the basis of the claim against them was that they were vicariously liable for alleged wrongs in the professional or business dealings of Mr. Sullivan. It appears that the basis for seeking to make those defendants liable for any alleged wrong on the part of Mr. Sullivan arose from the fact that both Mr. Sullivan and those defendants practised in Cork from the same premises in 2000. This issue was dealt with in detail by Finlay Geoghegan J. in her judgment previously referred to and she concluded that Mr. Keaney had not established a reasonable cause of action against the tenth to sixteenth defendants by reason of vicarious liability in respect of the alleged wrongs of Mr. Sullivan. Thus she struck out the entirety of Mr. Keaney's claim against those defendants. Finlay Geoghegan J. then considered the claims against Mr. Sullivan and insofar as he was concerned she permitted the claim against Mr. Sullivan to continue insofar as the allegations made against him were in relation to negligence, breach of duty and breach of contract. So far as other claims were concerned, she struck those out on the basis that the pleadings before her were not such as to allow any other claims pleaded to be maintained. In like manner, Finlay Geoghegan J. considered the case being made on the pleadings against Mr. Nolan and as a result of that exercise Finlay Geoghegan J. noted at page 35 and 36 as follows:

"All claims against the fourth defendant are struck out other than

(a) The claim for damages for breach of contract in respect of the alleged agreements of 2000 in relation to the matters pleaded in paragraphs 27, 32(i) and 57 concerning the discharge of debts of Pollyxfen (sic) Design Limited. No substantive objection was made to this claim.

(b) The claim in relation to the deed of assignment dated the 30th September, 2004, between the plaintiff and the fourth and eighteenth defendants as pleaded in paragraph 73(i) - (vi) and the first sentence of paragraph 74 subject to such sentence being amended to be confined to the Deed of Assignment now dated the 30th September, 2004 between the plaintiff and the fourth and eighteenth defendants in respect of the premises Scotts Buildings, Cobh, Co. Cork.

(c) A claim for damages for breach of contract in respect of the agreement and breach thereof alleged at paragraphs 91 and 92 of the statement of claim in relation to the Tregan Building subject to amendment to claim and particularise loss and damage alleged.

...

All claims against the eighteenth defendant are struck out except the claims in paragraphs 73(i) - (vi) and 74 subject to the amendment as directed above."

In order to understand the nature of the allegations made against Mr. Sullivan it is necessary to quote from the amended statement of claim before Feeney J. Paragraph 28 thereof stated as follows:

"28. The First Named Defendant owed the following contractual duties and/or of care, including professional duties, to the Plaintiff in his personal capacity.

(i) To render independent, arms-length professional advice and to negotiate professionally with any potential investor/partner, fearlessly on behalf of the Plaintiff.

(ii) To disclose and/or avoid any potential or actual conflict of interest.

(iii) . . .

(iv) To use all due care and skill in advising the Plaintiff on all accountancy/financial aspects of any proposed dealing with a partner/investor and not to undermine his own advice in conflict of

interest. . . .

29. By his acts or omissions the First Named Defendant acted and/or in breach of his Consultancy contract both express and implied with a Plaintiff and/or in breach of the said duties of care including professional duties of independence and/or negligently, in consequence whereof the plaintiff suffered loss and damage.

30. The First Named Defendant (James Sullivan) *inter alia*:-

(a) Negligently and in breach of contract failed to disclose to the Plaintiff his conflict of interest in that -

(i) he had acted as agent/accountant/business associate of the Fourth Named Defendant and in relation to multiple companies controlled by the Fourth Named Defendant;

(ii) . . .

(iii) AIB Midleton was the branch repeatedly used by the Fourth Named Defendant, the First Defendant's associate. This explains why the Bank never informed the Plaintiff of irregularities.

(iv) Mr. Sullivan acted negligently and in breach of contract as an undisclosed agent for the Fourth Named Defendant in the negotiations which led to the said 2000 Heads of Agreement.

(b) He failed to negotiate in an independent manner with Mr. Edwin Fitzgibbon as a potential investor, and ultimately assisted the Fourth Named Defendant in paying him off so that the Plaintiff's only realistic potential partner or investor became the Fourth Named Defendant; who was (as it turned out) a wholly professionally inappropriate choice.

(c) He failed to advise the Plaintiff of the financial disadvantage of entering into the said 2000 Heads of Agreement with Mr. Nolan, where effectively all the Plaintiff was to get was the £165,000 Pollexfen debts to be paid, in return for his first half title (and this new money did not even happen).

(d) James Sullivan negligently and in breach of contract negotiated, and did so aggressively, as undisclosed agent of the Fourth Named Defendant, to make the Plaintiff enter into the said 2000 Heads of Agreement when he should have been protecting the plaintiff.

(e) . . ."

### **Judgment of the High Court**

It will be seen that insofar as Mr. Sullivan is concerned, a number of distinct matters require to be considered, namely the contractual arrangement between Mr. Sullivan and Mr. Keaney, the negotiations that took place with Edwin Fitzgibbon and the alleged undisclosed conflict of interest arising because of Mr. Sullivan's business connection with Mr. Nolan. The hearing before the High Court commenced on the 22nd July, 2008 and was at hearing on the 23rd, 24th, 29th and 30th July. The matter was then adjourned for legal submissions which were heard on the 24th and 31st October, 2008. Thereafter a comprehensive written judgment was furnished by Feeney J. on the 19th December, 2008.

A number of crucial findings of fact were made by Feeney J. in the course of his judgment as regards the role of Mr. Sullivan and the nature of the contractual arrangement between Mr. Keaney and Mr. Nolan.

First of all Feeney J. concluded that Mr. Sullivan's involvement with Mr. Nolan was known to Mr. Keaney. It was through that connection that Mr. Sullivan was in a position to introduce Mr. Keaney to Mr. Nolan. Mr. Sullivan was in a position to show Mr. Keaney around the Oyster Bar, another public house business owned by Mr. Nolan. Mr. Sullivan met him in the Oyster Bar and was able to show him around the premises demonstrating various systems including the stores and giving Mr. Keaney an explanation as to how the bar and financial systems operated.

Secondly, Feeney J. concluded that there was no contractual arrangement between Mr. Keaney and Mr. Sullivan. He accepted the evidence given by Mr. Sullivan that his role was that of a "dealmaker" between potential business parties. Neither Mr. Keaney nor Mr. Nolan were employing him in this regard. Feeney J. accepted that Mr. Sullivan had sought to be professionally engaged on a fee *per* day basis but that such proposal had been expressly refused by Mr. Keaney. This was confirmed by Mr. Keaney in his evidence. As Feeney J. concluded (at p. 13):

"The evidence is clear that Mr. Sullivan offered to work for Mr. Keaney for a fee and that such offer was refused and that no fee was ever paid by Mr. Keaney."

Thus there was a clear finding by Feeney J. that there was no contractual relationship between Mr. Keaney and Mr. Sullivan.

Nevertheless it was also contended by Mr. Keaney that Mr. Sullivan owed him a duty of care. The duty of care alleged by Mr. Keaney against Mr. Sullivan was "to render independent, arm's length professional advice and to negotiate professionally with any potential investor/partner, fearlessly on

behalf of the plaintiff". Having outlined the nature of the tort of negligence against a professional person, Feeney J. examined the nature of the claim against Mr. Sullivan, namely that he failed to render independent, arm's length, professional advice. Feeney J. analysed the allegations made against Mr. Sullivan and commented (at p. 40):

"There can be no basis for that claim in the light of the evidence. The evidence establishes that Mr. Sullivan was providing the produce of his work to both Mr. Keaney and Mr. Nolan and that both of them were aware of such fact. The evidence shows that after the discussion documents were produced by Mr. Sullivan, that they were considered by Mr. Keaney and Mr. Nolan, who had direct negotiations with the assistance of independent legal advice. Such duty of care as may have been present on Mr. Sullivan was limited to the duty to provide services so as to facilitate the negotiations and discussion between Mr. Keaney and Mr. Nolan. There is no evidence whatsoever that any action taken or words spoken by Mr. Sullivan were in breach of that duty or were in any way negligent."

He concluded (at p. 41):

"In those circumstances it would be impossible, on the facts of this case, for the plaintiff to establish the necessary causative link between any action undertaken by Mr. Sullivan or words spoken by him and any alleged damage suffered by Mr. Keaney."

Thus, having analysed all the evidence and the particulars alleged against Mr. Sullivan, Feeney J. stated that (at p. 45):

"Mr. Keaney has failed to establish that Mr. Sullivan was negligent or in breach of duty. He has also failed to establish a breach of contract and indeed has failed to identify or establish any contract. Further it is clear that in relation to all the matters alleged against Mr. Sullivan, which were permitted to be pursued by the order of Ms. Justice Finlay Geoghegan, that such actions as were undertaken by Mr. Sullivan or such statements as were made by him did not result in or cannot be said to have caused the plaintiff to take any step which has caused him any damage. All the plaintiff's claims against the first named defendant must be dismissed."

The claims against Mr. Nolan were summarised by Feeney J. as including the following:

"(a) alleged breach of contract concerning a claim that the fourth named defendant was obliged to discharge the debts of Pollexfen Design Limited, and

(b) that the fourth named defendant breached the 2000 agreement by failing to discharge the debts due by Pollexfen Design Limited. The defence denies that there was the 2000 agreement as alleged and contends that the only agreement is to be found in a letter dated the 19th July, 2000 from the fourth named defendant to the plaintiff and signed by the plaintiff on the 20th July, 2000 and further that such agreement makes no provision for the discharge by the plaintiff of any Pollexfen Design Limited debts.

Another remaining claim against the fourth named defendant concerns the Tregan building and claims a breach of agreement by the fourth named defendant and seeks declaratory relief. ... The defendant denies that any such agreement was concluded and claims that such agreement as was concluded made no reference to Tregan shares and further that such offer as was made in relation to the Tregan shares was not accepted or acted upon by the plaintiff. The final claim relates to the deed of assignment dated the 30th September, 2004. It is to be found at paragraphs 42 and 56 of the final statement of claim. It alleges that the deed has been interfered with by the fourth named defendant in a number of ways and that the figure identified for consideration was blank on the day upon which the plaintiff signed the deed and that no cash consideration passed and that the deed does not have a true or correct consideration inscribed thereon and that the true value and nature of the transaction was not disclosed to the Revenue and it is claimed that by reason of the foregoing the deed is void or voidable and it is claimed that the

deed is properly to be dated the 24th July, 2003. . . . There is a full denial of all claims by the remaining defendants."

As can be seen from the above a key issue related to what is contended to be the 2000 Agreement. This centered around two specific dates. As can be seen from the judgment of Feeney J. much of the consideration concerned whether or not Mr. Keaney and Mr. Nolan had entered into an agreement on the 27th March, 2000 by reference to a document entitled "Heads of Agreement" of that date. Mr. Nolan by contrast contended for an agreement entered into on the 20th July, 2000 which he sent to Mr. Keaney on the 19th July, 2000 and which was signed by Mr. Keaney on the 20th July, 2000. The significant difference between the two agreements was that in the March 2000 Heads of Agreement of it was proposed that Mr. Nolan would discharge the debts of a company called Pollexfen Design Limited whereas the July 2000 agreement made no such provision. From the point of view of Mr. Keaney this was a significant issue. Feeney J. dealt comprehensively with the pleadings, evidence and submissions in respect of Mr. Keaney's contention that the March Heads of Agreement constituted a binding agreement between Mr. Keaney and Mr. Nolan. He noted that as of the 27th March, 2000 when it was contended that this alleged binding agreement had been concluded between Mr. Nolan and Mr. Keaney, Mr. Keaney had already entered into an agreement with a Mr. Edwin Fitzgibbon on the 24th March in similar terms in relation to the ownership and operation of the Titanic project. On the day that Mr. Keaney entered into that agreement with Mr. Fitzgibbon he also made arrangements to have Mr. Nolan discharge an outstanding invoice from a builder who was carrying out work on the project. Feeney J. referred to the evidence given by Mr. Keaney in which Mr. Keaney said that the March 2007 Heads of Agreement "should have been draft Heads of Agreement to be honest" and that he went on to describe that document as one of many proposed Heads of Agreement. He expressly stated that the Heads of Agreement of the 27th March, 2000 was not a final document. He agreed that the March 2000 Heads of Agreement was drawn up by Mr. Sullivan but that he, Mr. Keaney, was going to be guided by his solicitor in relation to same. Feeney J., in the light of the pleadings, the evidence and the submissions, commented as follows (at p. 17):

"In the light of the above evidence it is remarkable that the case was pleaded and opened on the basis that there was a binding agreement between the plaintiff and Mr. Nolan as of the 27th March, 2000. On the plaintiff's own evidence and from a cursory examination of the documents, including the document of the 27th March, 2000 itself, there was no basis for such contention. It is also noteworthy that such a plea was made in circumstances where the plaintiff had already entered into an agreement with a third party in respect of the same project."

Feeney J. went on to conclude that there was not and could not have been a binding agreement between Mr. Nolan and Mr. Keaney as of the 27th March, 2000. He then went on to describe the other discussions that took place between the parties which led ultimately to the document of the 19th July, 2000. Having reviewed the evidence in relation to the letter of 19th July, 2000 sent by Mr. Nolan to Mr. Keaney, Feeney J. concluded that that letter constituted the agreement between them. As he stated, at page 30 of the judgment:

"The agreement between Mr. Keaney and Mr. Nolan is to be found in the document of the 19th July, 2000. When Mr. Keaney signed his name, as the Court is satisfied he did, beneath the words 'I confirm my agreement' he was accepting Mr. Nolan's offer and an agreement was concluded. Matters discussed prior to that date and not included in the agreement do not form part of the agreement. Mr. Keaney seeks to incorporate certain matters into the 'agreement' but fails to give any evidence of terms being agreed outside the 19th July, 2000 document either in writing or orally and gives no evidence of any term coming into existence by both offer and acceptance."

Thus it is clear so far as the judgment of Feeney J. is concerned that the agreement between the parties was that concluded and signed off by Mr. Keaney on the 19th July, 2000 and was not the alleged agreement set out in the 27th March Heads of Agreement.

A number of other issues were dealt with by the learned trial judge in the course of his judgment. One of those issues related to the purchase of a building known as the Tregan Building. Following the sending of the draft Heads of Agreement dated the 27th March, 2000, further correspondence took

place between Mr. Keaney and Mr. Nolan. On the 31st March, 2000, Mr. Nolan sent a document including terms which Mr. Nolan was prepared to agree with Mr. Keaney and in that letter reference was made to the future development by reference to the possible acquisition of the Tregan Building. In that letter it was indicated that if it was possible to acquire the building next door "And I can raise the majority or all of the finance personally then it will be included into the project without any dilution of shares". Based on that paragraph Mr. Keaney has asserted an entitlement to an interest in the Tregan Building which was subsequently acquired by Mr. Nolan and his wife when they bought in the shareholding in Tregan Properties Limited. Mr. Keaney claimed a 50% shareholding in Tregan Properties Limited. Feeney J. concluded that the offer made in relation to the Tregan Building in the letter of the 31st March, 2000 was not accepted. In the course of his evidence, Mr. Keaney indicated that the Tregan Building was to be purchased on the basis that each party would contribute IR£100,000 to purchase the building together with borrowings for which each would be jointly and severally liable in respect of any balance. Mr. Keaney accepted that he did not pay IR£100,000. Accordingly, Feeney J. concluded that the Tregan Building/shares were purchased by Mr. Nolan from his own assets and that no contribution was made by Mr. Keaney. In the course of the judgment Feeney J. went on to describe how it had been intended by Mr. Keaney that he would finance his contribution by means of a sale of another property. At the time when the purchase was completed by Mr. Nolan and his wife, the agreement had been entered into on the 19th July, 2000 and there was no agreement in relation to the Tregan Building in that agreement as the possible purchase of that building was at that time an aspiration only. Subsequently Mr. Nolan in his evidence was willing to have Mr. Keaney take an interest in the property when it became available for purchase but this was always predicated on the basis that Mr. Keaney would put in IR£100,000 into the purchase of the property. This was never done by Mr. Keaney and in those circumstances Feeney J. rejected the contention that there was a purported agreement relating to the purchase of that building to be found in the letter of the 31st March, 2000. As Feeney J. said the Tregan Building/shares was not included in the agreement which was agreed in the document of the 19th July, 2000. At that point in time the future purchase of the Tregan Building/shares was an aspiration. It was only at a later date when the building shares became available that a separate agreement was concluded. That agreement was dependent upon Mr. Keaney paying his portion of the purchase price. He never paid anything. The offer which Mr. Nolan made to Mr. Keaney to provide him with an opportunity of joining in the acquisition of the Tregan Building/shares on terms was an offer which was never accepted by Mr. Keaney. Feeney J. concluded that there was no legal basis upon which Mr. Keaney can now seek to enforce an alleged contract.

After the 19th July agreement was concluded, a company, Titanic Queenstown Company Limited was set up to operate the business. Mr. Sullivan was engaged as a consultant/financial/professional adviser and was paid by the company. A number of issues arose in relation to the banking arrangements in respect of the company and in particular Mr. Keaney had claimed that Mr. Sullivan was negligent and in conflict of interest "by engaging in negligent banking practice". As Feeney J. pointed out such an allegation was in an earlier version of the statement of claim but such claims in that regard were struck out by Ms. Justice Finlay Geoghegan. Accordingly the plaintiff was precluded from maintaining such allegations. In any event, Feeney J. considered that there was no evidence to support any such claim. In those circumstances it is not necessary to consider the issues in relation to banking.

Unfortunately the business was unprofitable. As a result, Mr. Nolan, who had continued to invest in the project, ultimately came to the conclusion that he was not in a position to continue to do so in respect of a loss-making business. Accordingly the business ceased to operate on the 2nd December, 2002. This led to further negotiations between the parties and ultimately a further Heads of Agreement document was signed by them on the 2nd July, 2003. Both Mr. Keaney and Mr. Nolan had the benefit of legal advice during the course of the discussions leading to that agreement. The basis of that agreement was described by Feeney J. as being that Titanic Queenstown Trading Company Limited was to be taken over 100% by Mr. Nolan with a guarantee in relation to its debts and that Mr. Nolan would lease back the property to a new company to be incorporated by Mr. Keaney at an agreed rent and there was also a buy-back option contained in the agreement. A series of legal documents were then prepared by the respective solicitors for Mr. Nolan and Mr. Keaney and those agreements and documents were signed and completed on the 24th July, 2003. In order to understand the issues that arose in this regard it is appropriate to refer in some detail to the judgment of Feeney J. in some detail. At page 50 he stated as follows:



"Those agreements included firstly, an agreement relating to the sale of Mr. Keaney's shares in the company to Mike Nolan. Secondly, there was an option agreement whereby Mike Nolan and Tregan Properties Limited gave an option to Titanic Cobh Trading Company Limited (Mr. Keaney's new company) to acquire the Scott's building and the Tregan building. Thirdly, there was a contract for sale of Mr. Keaney's share of the Scotts building to Mike Nolan. In the special conditions of that contract the parties agreed the value of Vincent Keaney's share of the property at a figure of €525,000 and further agreed that that sum was paid or satisfied by Mike Nolan taking over responsibility for the mortgage on the property which at that time was in the joint names of Mike Nolan and Vincent Keaney. The uncontested evidence available to the Court was that that sum of €525,000 was the agreed consideration arrived at following discussions between Mr. Keaney's and Mr. Nolan's representatives. The evidence as to how that sum was precisely calculated was unclear at the hearing before the Court. However what was clearly established was that the figure was agreed. The fourth document forming part of the suite of agreements of the 24th July, 2003 was a deed of release made between Mike Nolan, Q.E.F., Magpie International Trading Company Limited, Vincent Keaney and AIB Bank. Q.E.F. and Magpie were two companies owned and controlled by Mr. Nolan who had provided various services to the company. The purpose of the deed of release was to provide a clean break between the parties with each of them releasing the other, including their related companies, from 'every form of liability, indebtedness, and obligation'. The parties waived and released 'any claims against each other, against any and all loss of liability of any nature incurred directly or indirectly by any party as a consequence'. The intention of the deed of release was to ensure that if there were any outstanding liabilities between Mr. Nolan and Mr. Keaney, that those liabilities would be covered by the release. The fifth and sixth documents were new leases for the Scott's building and the Tregan building to Titanic Cobh Trading Company Limited. The seventh document was an agreement between Mr. Nolan, the company, Mr. Keaney and Titanic Cobh Trading Company whereby Titanic Cobh Trading Company Limited agreed to take responsibility for a leasing agreement with Woodchester Bank."

One of the documents concerned was an option agreement which allowed Titanic Cobh Trading Company Limited to purchase the Scott's building and the Tregan Building for a consideration of €2.8m at any time during the period from January 2004 to January 2009 subject to certain terms and conditions. Unfortunately Titanic Cobh Trading Company Limited ultimately ended up being in breach of its obligations under the leases and as such the option ceased and became null and void. That was a point made by letter from Mr. Nolan's solicitor to Titanic Cobh Trading Company Limited on the 24th September, 2004. Feeney J. concluded that he was satisfied that there was no breach of any agreement by Mr. Nolan with Mr. Keaney but that even if he had concluded otherwise he was satisfied that Mr. Keaney would not be entitled to maintain any claim in relation to alleged breaches by virtue of the agreement encapsulated in the deed of release dated the 24th July, 2003. He concluded (at p. 53):

"The plaintiff has failed to identify any basis upon which the deed of release can be impugned. Mr. Keaney entered into the deed of release with the advice of his solicitor. He is bound by the terms of that document."

Feeney J. then went on to consider the final issue raised by Mr. Keaney. That concerns a deed of assignment dated the 30th September, 2004. The deed of assignment was in respect of Scott's building and effectively transferred Mr. Keaney's interest in the building to Mr. Nolan and his wife. Mr. Keaney sought to argue that the deed of assignment was void and in that respect he raised a number of issues. They include an allegation that the date of the deed was the 24th July, 2003 and not the 30th September, 2004 and that the deed was post-dated in order to evade stamp duties, penalties and interest. The second issue raised concerned the consideration recited in the deed in respect of the assignment. Feeney J. in the course of his judgment summed up the complaints made in this regard as follows (at p. 55):

"In the submissions to the court counsel for the fourth and eighteenth named defendants identified ten matters which were alleged in those paragraphs [in the final statement of claim], namely:-

- (1) The date of the first execution was properly 24th July, 2003,
- (2) The date inscribed on the deed is a deliberate and misleading date,
- (3) Mr. Nolan perpetrated the misrepresentation in July 2006 in open Court,
- (4) Mr. Cahalan perpetrated the lie as to the date of true execution in the memorial of the deed,
- (5) The alleged post-dating of the deed was to evade stamp duty penalties and interest,
- (6) The recited consideration on the deed was in fact blank on the day on which the plaintiff signed,
- (7) No cash consideration passed on the day as recited,
- (8) The deed had not the true or the correct consideration inscribed thereon,
- (9) The deed had not been stamped on the basis of fifty per cent of correct market value,
- (10) The connectedness of the deed to other events or documents was not disclosed for stamping purposes."

In the course of his judgment Feeney J. then set out in detail the evidence given in relation to this aspect of the matter. He set out the evidence given by Mr. Denis Cahalan who had acted as a solicitor for Mr. Nolan but who was called in evidence by the plaintiff. Insofar as the date of the deed was concerned he rejected the contention of Mr. Keaney that it had been signed on the 24th July, 2003. He concluded, having heard from a number of witnesses on this issue, that the evidence established that the date of the deed was the date of signing by Mr. and Mrs. Nolan and was inserted in accordance with normal practice, and therefore he accepted that it was signed on the 30th September, 2004. Insofar as the issue in relation to the stamping of the deed was concerned he concluded as follows (at p. 63):

"It is also clear that there was no attempt to avoid any stamp duty and that it cannot be contended, on the facts of this case, that there was any intent to defraud or deceive."

He concluded that even if there was an error in the dating of the deed that would not result in it becoming invalid or rendered a nullity.

Insofar as the complaints made in relation to the consideration were referred to, Feeney J. stated as follows (at p. 64):

"The evidence of the two solicitors establishes that there is no factual basis for the claim that the recited consideration of the deed was blank upon the day upon which the plaintiff signed. The plaintiff's own solicitor's evidence clearly demonstrates otherwise.

The fact that no consideration passed on the day was well known to the plaintiff and his advisers. There was no expectation or agreement that the plaintiff would be paid cash in consideration for the transfer of his half interest in the lease of Scotts building. The agreed consideration, well known to the plaintiff and his advisers, was that Mr. Nolan agreed to take responsibility for all the indebtedness relating to the property in question. The consideration agreed and identified was in fact conferred on the plaintiff. . If there was any doubt in relation to that it is confirmed by paragraph 11 of the special conditions in the contract which was initialled by Mr. Keaney which stated: -

'The vendor acknowledges that the purchase price for the property in sale is paid by the purchaser taking over the AIB loan attaching to the property. The parties agree that the

value attributable to the property in sale is €525,000.”

Feeney J. went on to conclude that there was no evidence that cash was to be paid and that the plaintiff acknowledged receipt of the consideration and that it was not open to him to go behind the recital contained in paragraph 11 of the special condition and there was no evidence to support an attempt to go behind that recital. Accordingly, Feeney J. rejected the complaints of Mr. Keaney in that regard. It was pointed out also by Feeney J. that attempting to call into question the consideration for the deed of assignment was in conflict with the judgment of Finlay Geoghegan J. Nevertheless Feeney J. was satisfied that there was an agreed consideration. In those circumstances he concluded that there was no legal basis as to why the deed was not valid and enforceable. Accordingly, Feeney J. concluded his judgment by stating that the plaintiff had failed in all his claims and all claims against the first, fourth and eighteenth defendants were dismissed.

## Discussion

This Court has had the benefit of having the transcripts of the hearing before Feeney J., the judgment of Finlay Geoghegan J., the judgment of Feeney J. and the written submissions on behalf of Mr. Keaney, Mr. Sullivan and Mr. and Mrs. Nolan. The Court also had the benefit of oral submissions.

In the course of the submissions, it was contended on behalf of Mr. Keaney that Feeney J. was wrong in concluding that there was no contract between Mr. Keaney and Mr. Sullivan. Mr. Keaney is critical of the conclusions of the learned trial judge and has asserted that Feeney J. failed “to take properly into account many materials facts and inferences presented to him and even as evidenced in his judgment, that the first defendant was engaged . . .”. Reference is then made to some of the evidence in the case. It is also contended that the trial judge misdirected himself when he held that Mr. Sullivan was a deal maker providing professional services to both Mr. Nolan and Mr. Keaney and that both were aware of that. Further Mr. Keaney is critical of the finding of the learned trial judge in relation to the allegation that Mr. Sullivan failed to disclose his existing relationship with Mr. Nolan. Running through the submissions is a contention that there was a valid and binding agreement entered into on the 27th March, 2000. Thus, for example, it is contended that “the signed Heads of Agreement dated the 27th March 2000 drafted by the first defendant strongly favoured the fourth defendant”.

Turning to the position of Mr. Nolan and Mrs. Nolan, again, the findings of the learned trial judge are put in issue and the following questions are raised:

“The questions under appeal can be summarised into:

- (1) Which was the guiding agreement between the parties - an agreement dated the 27th March, 2000 or that of 19th July, 2000 and other subsequent agreement(s)(?).
- (2) Did consideration pass between the plaintiff and the defendants in either of the agreements dated 27th March, 2000 or 19th July, 2000? If so was it full consideration?
- (3) What of the second deed dated 30th September, 2004? Did the respondents give consideration?
- (4) Are parties to a deed of conveyance allowed to insert a random sum as consideration?
- (5) Does deed of release, release all events both future and past events between the parties therein even when the deed of the release was entered under a material mistake of fact.”

In the course of the submissions on behalf of Mr. Sullivan it was submitted that the trial judge correctly determined that there was no contract between Mr. Keaney and Mr. Sullivan and no negligence or any causal connection between Mr. Sullivan’s actions and any losses allegedly sustained by the appellant. It was noted that Mr. Keaney persisted at trial and appears still to persist in relying upon the purported “agreement” of the 27th March, 2000 even though at that time he had entered

into a binding agreement with another party. Reference is made to the comments of Feeney J. in that context. Nevertheless even though Feeney J. concluded that there was no contract between Mr. Sullivan and Mr. Keaney, Feeney J. went on to consider whether or not Mr. Keaney had made out a claim in negligence and/or breach of duty against Mr. Sullivan and it was pointed out that Feeney J. concluded that on the facts of the case it would be impossible for Mr. Keaney to establish the necessary causative link between any action undertaken by Mr. Sullivan or words spoken by him and any alleged damage suffered by Mr. Keaney and in those circumstances he dismissed any remaining claim against Mr. Sullivan.

In their submissions, counsel on behalf of Mr. and Mrs. Nolan placed particular reliance on the deed of release entered into on the 2nd July, 2003 but notwithstanding that, went on to argue that there was no basis for overturning the learned trial judge's conclusions on the nature of the contract concluded between Mr. Keaney and Mr. Nolan. Thus it is contended that there was no binding agreement entered into on the 27th March, 2000 and that the binding agreement was that found in the letter of the 19th July, 2000 sent by Mr. Nolan to Mr. Keaney and signed by Mr. Keaney on the 20th July, 2000. There is criticism of the submissions furnished on behalf of Mr. Keaney which does not refer in any shape or form to the evidence given by Mr. Keaney in which he disavowed that the Heads of Agreement of March 2000 were a final and binding contract and further why there was no explanation in the submissions as to why the document of the 20th July, 2000 did not represent the entire deal between Mr. Nolan and Mr. Keaney. Indeed as was pointed out, Mr. Keaney in his present submissions argued that the document of the 19th July, 2000 was "no more than a record of work in progress in terms of dealings between the parties". It certainly is not a contract for the very simple reason that it is not complete, it is not specific as to the debtors of the plaintiff's previous company and has no direction, time and actual consideration for the contract. In the course of their submissions, counsel on behalf of the Nolans went on to outline the evidence in relation to the claim to shares in respect of the Tregan Building and the issues raised in relation to the deed of assignment of the 30th September, 2004. In the context of the Tregan Building, Feeney J. had concluded that there was nothing in the document of the 19th July, 2000 as to the acquisition of the Tregan Building. Insofar as the deed of the 30th September, 2004 was concerned, the learned trial judge dealt with this issue in detail and concluded that the issues raised by Mr. Keaney seeking to have that deed declared void were not made out. In any event, reliance is placed on the deed of release insofar as that might have a bearing on some of the issues raised by Mr. Keaney.

In the course of this judgment I have set out at length the allegations made by Mr. Keaney against Mr. Sullivan and Mr. Nolan. I have referred at length to the judgment of Feeney J. and in particular to his findings of fact in relation to the evidence before him in respect of the allegations made against Mr. Sullivan and Mr. Nolan. I have done so in great detail for the purpose of highlighting and demonstrating the care with which Feeney J. dealt with the allegations, summarised the evidence and explained the findings he had reached in relation to the issues before him based on the facts and circumstances as presented in the course of the evidence.

## Decision

This is a case which centres around the findings of fact made by the learned trial judge in relation to the various allegations and issues raised by Mr. Keaney. Thus a key question was whether or not there was an agreement between Mr. Keaney and Mr. Nolan entered into on the 27th March, 2000. Likewise issues were raised in relation to the role of Mr. Sullivan, the circumstances leading to the acquisition of the Tregan Building by Mr. Nolan, the issues surrounding the deed of assignment of the 30th September, 2004 and so on. Mr. Keaney has challenged head on the various findings of fact made by the learned trial judge. The role of the Supreme Court on appeal from a judge in first instance was stated in the well known case of *Hay v. O'Grady* [1992] 1 I.R. 210 as follows (at page 217):

"(1) An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

(2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

(3) Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "*Gairloch, The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

(4) A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference - in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

(5) These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

Taking the last of those principles first, I think it can be said that a perusal of the judgment of Feeney J. as a whole indicates that Feeney J. followed precisely the approach to be taken by a trial judge in that he very clearly set out in the course of his judgment on the various issues raised his findings of primary fact, the inferences to be drawn and the conclusions that followed from those findings of fact and inferences. I cannot see any basis upon which Mr. Keaney has demonstrated that the findings of fact made by the trial judge in this case were not supported by credible evidence. That being so, this Court is bound by those findings. Equally I cannot see any basis upon which it could be said that the trial judge erred in relation to any of the inferences of fact drawn by him. If I were to highlight one aspect of the case that illustrates this, perhaps better than any other, it concerns the assertions made on behalf of Mr. Keaney in relation to the draft Heads of Agreement of the 27th March, 2000. In that context although the case was opened on the basis that the draft Heads of Agreement of the 27th March, 2000 constituted a concluded agreement between Mr. Keaney and Mr. Nolan, Feeney J. found as a fact that as of the 24th March, 2000, Mr. Keaney had entered into a legally binding agreement with a Mr. Fitzgibbon. He went on to refer to the evidence given by Mr. Keaney in respect of the Heads of Agreement document where Mr. Keaney stated:

"It says 'Heads of Agreement', I would take absolute umbrage to that, because it should have been draft Heads of Agreement to be honest."

Feeney J. went on to recite the fact that in cross-examination Mr. Keaney expressly stated that the Heads of Agreement was not a final document and that in his view there were serious omissions in respect of the document and that "what Mr. Sullivan had done was draw up a draft Heads of Agreement and he, Mr. Keaney, was ultimately going to be guided by his solicitor, Mr. Donegan and any sound solid legal or financial adviser". Feeney J. was rightly critical in the course of his judgment as to the manner in which the case was opened by asserting that the 27th March, 2000 Heads of Agreement document was being relied on as a contractually binding agreement notwithstanding the evidence that was in fact subsequently given by Mr. Keaney which contradicted that position. One might observe rhetorically that when Feeney J. came to the conclusion that the 27th March, 2000 Heads of Agreement was not a concluded agreement what other finding could have been made by him? However, suffice it to say that this Court is satisfied on this issue that there was ample credible evidence not just from Mr. Sullivan and Mr. Nolan but also from Mr. Keaney himself to the effect that the 27th March 2000 Heads of Agreement was no more than a draft document. I would also make the observation that it is still apparently contended notwithstanding that evidence given by Mr. Keaney himself that Feeney J. was wrong in reaching that conclusion. It is quite inappropriate to maintain

that position at this stage of the proceedings having regard to the evidence given by Mr. Keaney himself.

In short this Court is satisfied that Mr. Keaney has not established any basis upon which to challenge the judgment of Feeney J. and this Court is satisfied that the findings of fact, inferences drawn and conclusions reached by Feeney J. were supported by credible evidence and that there is no basis for overturning his decision. In those circumstances I would dismiss the appeal in this case.

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