THE HIGH COURT

[2024] IEHC 189
2013 No. 6784P

BETWEEN

JIM CAHILL

PLAINTIFF

AND

KARL SEEPERSAD, DESMOND SEEPERSAD and TARA SEEPERSAD

DEFENDANTS

JUDGMENT (No. 2) of Ms. Justice Eileen Roberts delivered on 9 April 2024

Introduction

1. This judgment is the court's second judgment in this case and follows on directly from the court's detailed judgment delivered on 25 October 2023 (the "**First Judgment**")[1]. In the interests of brevity, save where is it necessary to do so, I do not propose to recite in this judgment the background to these proceedings or the evidence adduced at the trial. This judgment should be read in conjunction with the First Judgment.

[1] Cahill v Seepersad [2023] IEHC 583

2. In the First Judgment this court determined a number of issues relating to the nursing home business in which all of the parties have an interest as partners. The court directed that the parties should provide it with an updated partnership statement of account amended to reflect the decisions of this court as set out in the First Judgment. I indicated that I would, on receipt of this amended partnership statement of account, be in a position to determine whether to make a *Syers* Order on the dissolution of the partnership and, if so, on what terms.

3. After the date of the First Judgment, further engagement took place between financial experts engaged by the parties. That engagement has narrowed the gap between the parties but there remains a number of issues to be determined by this court before the partnership accounts are fully settled. Counsel made submissions to the court on 19 March 2024 in respect of those outstanding issues and the orders each party sought from this court in respect of the dissolution of the partnership and the costs of these proceedings.

4. In summary, this judgment deals with the following matters;

(a) The payment due to the defendants to properly account for their interest in the partnership to date. This will require a determination by this court on the remaining disputed adjustments to the partnership's financial accounts as identified by the respective experts.

(b) How to deal with the dissolution of the partnership. In particular, whether this is an appropriate case in which to make a *Syers* Order and, if so, which party should be given the opportunity to purchase the others' interest in the nursing home and on what terms.

(c) Interest.

(d) The costs of these proceedings.

5. I propose to deal with these issues in that sequence.

Final Adjustments to the Partnership's Financial Accounts

6. In light of the findings of this court set out in the First Judgment, the plaintiff re-engaged his expert accountant Mr Declan Walsh of RSM Ireland, while the defendants appointed Mr Tom O'Shea FCA of Kelliher O'Shea Chartered Accountants, to undertake the further work required. I have reviewed Mr Walsh's report dated 11 December 2023 and Mr O'Shea's report dated 25 January 2024.

7. **Agreed adjustments**. There are a number of adjustments which the experts have agreed to the net profit figure of €951,348 recorded in the partnership accounts from September 2009 to December 2020 (inclusive) as follows: –

(a) Adjustments in respect of the plaintiff's 2008 car loan repayments to Friends First are now agreed as an add back of €67,407 to both the plaintiff's drawings and the profits of the partnership. Similar adjustments are agreed on the same basis for:

(i) the plaintiff's disallowed motor expenses in the amount of €56,618.

(ii) the plaintiff's drawings to the sum specified in the First Judgment (at para 197) in the amount of €14,001.

(iii) the plaintiff's sponsorship payments are agreed in the amount of €59,235.

(iv) other payments made to the plaintiff are agreed at €29,714.99 (para 198(l) of the First Judgment.)

(b) Adjustments in respect of the plaintiff's disallowed excess salary amount to €166,177.[2]

(c) Adjustments in respect of Liadh Cahill's excess salary are agreed at €109,150.[3]

[2] This assumes that the plaintiff is not continuing to take the excess salary amount since the First Judgment – if he has continued to take the higher salary than the excess amount should be updated to 30 April 2024.
[3] This assumes that Ms Cahill's actual salary did not exceed the allowed figure since the First Judgment - if she has continued to take the higher salary the excess amount should be updated to 30 April 2024

(d) Adjustments to the defendants' drawings and partnership profits in respect of Bridget Seepersad's loan repayments have been agreed in the amount of €68,950.

(e) Adjustments for other payments recorded as defendants' drawings are agreed in the amount of €26,758.

(f) Adjustments in respect of the legal fees due to Mr Pigot and the costs associated with defending those proceedings are agreed in the amount of €58,029. The defendants drawings have been adjusted accordingly as have the nursing home profits.

8. **Continuing adjustments**. Other figures were not agreed because the defendants' expert assumed they may have continued to be paid beyond December 2021 into 2022 and 2023. Counsel for the plaintiff indicated that no car loan repayments continued but that payments did continue for 2022 and 2023 in respect of the plaintiff's Dublin office and his VHI payments. It would appear therefore that the higher adjustments noted by the defendants' expert in respect of these latter two items are correct and should be accepted by this court. It is also assumed that these payments did not continue beyond December 2023. If they have continued into 2024, adjustments will be required in circumstances where this court has determined that these payments are not properly partnership expenses and cannot therefore be treated as such. In relation to these payments therefore the court determines them in the following amount:

(i) plaintiff's car loan repayments are determined at €32,220.

(ii) plaintiff's maintenance expenses for his Dublin office - €43,622

(iii) plaintiff's VHI payments - €16,749[4]

9. **Legal and Professional fees.** Legal and professional fees were determined by this court at €168,010.41[5]. This is the figure the plaintiff's expert proposes should be the

[4] Assuming these Dublin office and VHI expenses have not continued to be paid by the partnership beyond 31 December 2023 – if so they should be updated to 30 April 2024.
[5] see para 198 (n) of the First Judgment

adjustment. However, a higher figure is suggested by the defendants' expert to account for those additional legal and professional expenses incurred in 2023 by the business on behalf of Mr Cahill personally. The defendants' expert estimates those additional fees at €30,000 bringing his suggested adjustment to €198,010. The defendants' expert does not identify on what information this estimate is based. There is in fact no information before the court regarding what legal and professional fees were incurred by the partnership on behalf of the plaintiff in 2023. This is unsatisfactory. Counsel for the plaintiff indicated that €16,000 was paid by the partnership to Mr Walsh on behalf of the plaintiff in 2023. Clearly that payment comprises additional legal and professional fees beyond those incurred to December 31, 2022. The plaintiff's expert has not sought to include that additional expense or to explain if there are any other such expenses. In the circumstances I am proposing to allow a deduction for €20,000 to deal with the additional legal and professional fees incurred by the partnership on behalf of the plaintiff in 2023. If in fact, through the provision of vouched documentation, it can be established that a figure less than €20,000 was paid by the partnership in respect of the plaintiff's legal and professional fees in 2023 or to date then that figure can be adjusted downwards. Conversely, if there were fees greater than €20,000 paid by the partnership in 2023 or to date on behalf of the plaintiff's legal or professional fees then this figure should be increased to reflect those fees actually paid. The adjustment under this heading should be for €188,010 subject to any further adjustment reflecting fees actually paid in 2023 or to date by the partnership on behalf of the plaintiff.

10. **Plaintiff's travel expenses**. An issue that remains controversial relates to the plaintiff's car expenses /travel expenses. This court has already determined that "*if there are specific and vouched travel expenses that the plaintiff incurred solely for the purposes of the business, then these can be treated as business expenses and not attributed to his*

drawings. However, that will only apply where there are proper vouchers in existence- otherwise travel expenses will be treated the same for all partners and be deducted from their respective drawings." [6]

11. The plaintiff's expert confirms in his report that he has been provided with information on expenditure totalling €31,177.71 over the period 2014-2021 in relation to the purchase of fuel, vehicle repairs and maintenance and motor tax. The plaintiff's expert says it is difficult to separate the element of the expenditure that was solely for business use. He therefore requested the plaintiff to prepare calculations of his business mileage. The claim prepared by the plaintiff comprised 50,662 km over the eight-year period and totalled €32,790.99. The plaintiff expert says he has reviewed this claim by reference to the reasonableness of the journeys claimed, the accuracy of the distances claimed and the accuracy of the mileage rates applied. He says he is satisfied that the journeys claimed are reasonable. Having compared the mileage rates applied by the plaintiff to the civil service rates approved by the Revenue Commissioners he reduced the claimed rates which resulted in a charge of €30,605.26. In circumstances where this sum is materially similar to the sum previously included in the profits of the nursing home (€30,068) the plaintiff's expert believes that no adjustment is required in relation to these expenses.

12. The defendants' expert does not agree. He has reviewed the records provided by the plaintiff and note that they lack fundamental detail including dates and the reason for the journeys claimed. He notes that a retrospective approach has been adopted in respect of these mileage claims in an attempt to vindicate the costs incurred in maintaining and running a vehicle owned personally by Mr Cahill. He says he has not seen any vouched travel claims but instead has been presented with a substitute claim to compensate for

[6] See para 198(f) of the First Judgment

expenses already paid by the partnership on behalf of the plaintiff. He is of the view that these expenses were not wholly incurred for the purposes of the trade, have not been vouched to any extent and would not satisfy the Revenue's requirements for recovery of such expenses. He believes that the expenses should therefore be added back to the profits of the partnership and recognised as the plaintiff's drawings.

13. The First Judgment was clear in the requirement for specific and vouched car/travel expenses. That requirement is not satisfied by the retrospective narrative exercise which it appears has been carried out by the plaintiff. The plaintiff was solely in control of the creation and maintenance of all expense documentation. If he did not record such expenses and retain vouching documentation in relation to them to establish that they were wholly and exclusively incurred for the purpose of the business, he cannot complain that such expenses must be deemed to be for his own account. No employer could reasonably be expected to reimburse recovery of unvouched or unexplained expenses. The expenses originally claimed were €30,068. I note that a bigger disallowance is suggested by the defendants' expert of €37,353. This may assume a continuance of claiming expenses at the same level through 2023. However, I have no evidence on this one way or the other. The appropriate adjustment should therefore be for €30,068.

14. **Liadh Cahill expenses**. There is also a dispute regarding the expenses claimed by Ms Cahill. The defendants expert confirms that he reviewed the mileage claim expense forms completed by Ms Cahill. He expresses concern that Ms Cahill has been paid round sum amounts on a monthly basis recognised as a car allowance. Expenses were claimed by her in the amount of €60,128.15. In the First Judgment I noted that I had no explanation or basis to justify the high level of expenses paid to her and save where those expenses could be specifically vouched and classified solely as an expense wholly

and necessarily incurred for the business, I determined they should be deducted in their entirety from the partnership profits and allocated to the plaintiff's drawings.[7]

15. The plaintiff's expert confirms that he has been provided with a breakdown of the expenses paid to Ms Cahill between 2018-2021 together with supporting schedules and vouching documentation. He confirms he has no information on the sum of €2000 paid in 2017 and does not propose that this be deemed an allowable expense. He also confirms that Ms Cahill received a regular monthly payment of circa €476 in respect of mileage. He says he has received detailed mileage claims covering mileage between the nursing home and adjacent towns which he deems are journeys "*consistent with the business*"[8]. In the circumstances he says he is satisfied that these expenses should be allowed as expenses wholly and necessarily incurred for the business and he has recalculated them using revenue approved rates resulting in a reduced sum of €19,428.45. In respect of the remainder of the expenses paid, he confirms he has been provided with vouching documentation in respect of a small portion of €2522.36 which he is satisfied should be allowed as an expense wholly and necessarily incurred for the business. There appears to be no vouching documentation for the balance. Therefore out of the total expenses paid to Ms Cahill of €60,128.15 the plaintiff's expert is satisfied that the sum of €21,950.81 is "vouched" and should be allowed as an expense wholly and necessarily incurred for the business. He has therefore made an adjustment for the sum of €38,177.34 under this heading.

16. The defendants' expert confirms that he has reviewed the mileage claim expense forms completed by Ms Cahill. He notes that Ms Cahill has been paid on a monthly basis round sum amounts recognised as a car allowance and notes that same are specifically

[7] Para 198(p) of the First Judgment
[8] Page 6 Report of Declan Walsh dated 11 December 2023

disallowed as expenses from a taxation perspective and should instead be treated as part of an employee's salary. He says he has not been provided with supporting invoices in respect of the separate claim amounting to €2522.36. He proposes an adjustment of €90,010 which reflects his view that it is likely the payments on an annual basis in the sum of €14,941 continued into 2022 and 2023.

17. The First Judgment placed the onus firmly on the plaintiff to establish the nature of expenses paid by the partnership. Although I have not seen the voucher referred to by the plaintiff's expert in the sum of €2522, I am prepared to accept that he has seen an actual voucher for that amount and is satisfied it is an expense properly payable by the partnership. Subject to that however, it appears that the entire balance of the expenses paid to Ms Cahill must be added back to the partnership profits and treated as part of the plaintiff's drawings. The court has already indicated how much salary should be deemed properly payable to Ms Cahill from the partnership profits. Any amount payable in respect of a car allowance must be comprised within that figure. There appear to be no vouchers to show that the motor expenses claimed were wholly and exclusively incurred for the partnership and therefore I am not prepared to allow them as such expenses, given the level of control the plaintiff and Ms Cahill had in being able to properly vouch and explain such expenses claimed from the partnership. They do not appear to have done so in this case and so cannot complain that these expenses are not allowable as partnership expenses.

18. Deducting the vouched expense of €2522.36 from the claimed expenses of €60,128.15 leaves a balance of €57,605.79. That is the adjustment I am proposing be made in respect of Ms Cahill's expenses. I have no evidence to suggest that unvouched annual expense payments to Ms Cahill continued throughout 2022 and 2023 at the same level

as before. If however such payments were made to Ms Cahill they should be treated as the plaintiff's drawings and added back to the partnership profits.

19. **<u>Ruairi Cahill Expenses.</u>** There is also disagreement regarding the expenses paid to the plaintiff's son Ruairi. In the First Judgment I determined that any expenses paid to Mr Ruairi Cahill "*should be deducted from partnership profits and applied to the plaintiff's drawings, save where they can be specifically vouched and classified solely as an expense wholly and necessarily incurred for the business*".[9]

20. The plaintiff's expert notes that these expenses stand at €47,951.02. He says he has been provided with the breakdown of the constituent parts of the sum and the underlying invoices/contracts and is satisfied that the sums are specifically vouched and that the underlying expenditure appears to be wholly and necessarily incurred for the business. On that basis he recommends that there be no adjustment for Mr Ruairi Cahill's expenses.

21. The defendants' expert confirms that he has been provided with information to substantiate the figure claimed of €47,951.02. Of the invoices reviewed, it appears that a number of invoices were issued to Mr Ruairi Cahill although others were issued to the plaintiff and some to the nursing home. The defendants' experts notes that "*I have to take it at face value that all invoices related to the nursing home; however I cannot be certain*".[10] He is concerned that questions arise in respect of the detail contained on invoices, the manner in which goods were ordered and paid for, the extent to which expenses were deductible against the profit of the business and the probability that an element of this expenditure related to capital items. For those reasons he proposes that

[9] Para 198(q) of the First Judgment
[10] Page 8 Report of Tom O'Shea dated 25 January 2024.

an add back of 50% should be adopted in the amount of €23,975.51 both to partnership profits and the plaintiff's drawings.

22. As it appears that these expenses have actually been explained and vouched (at least in the form of invoices) and that the plaintiff's expert has satisfied himself that the sums are specifically vouched and that the underlying expenditure appears to be wholly and necessarily incurred for the business, I propose that there be no adjustment to the partnership profits for these expenses. It does not appear to me that there is an underlying rationale for reducing these expenses by 50% as suggested by the defendants' expert. Accordingly, no add-back is required for these expenses.

23. **Tara Seepersad salary**. This court has determined that the settlement entitled Tara Seepersad to receive a salary €12,000 per annum. An adjustment in the sum of €132,000 has been recorded by the plaintiff's expert in order to reflect the amount owing to Ms Seepersad for salary arrears for the period from December 2012 to November 2023. Ms Seepersad's entitlement did not however end when the First Judgment issued-this entitlement remains until the partnership is dissolved or the parties agree otherwise. Accordingly, a payment of €1000 per month should continue to accrue for her until dissolution of the partnership, which for present purposes should be until 30 April 2024. The experts appear to agree that there is a need to adjust Tara Seepersad's drawings downwards by €29,000 to reflect the fact that in 2010 those salary payments were reflected as part of her drawings rather than a cost to the nursing home.

24. **Depreciation**. The defendants' expert report raises an issue regarding depreciation. In essence the defendants' expert argues that depreciation was charged in the statement of accounts at an inflated amount in years 2012 and 2013 in the absence of a clear accounting policy. He says that this has resulted in an overcharge to the profit and loss account of €358,347 in the period from 2011 to 2023. On the basis that the depreciation

charged in the accounts was calculated with no clear policy to adhere to and differs from and contradicts the policy adopted in 2016, the defendants' expert has revised profit and loss calculations to include this depreciation as an add back. He argues that to proceed without an amendment to this figure would in his estimation be remiss. This point is not addressed at all by the plaintiff's expert. Given the size of this adjustment relative to the overall partnership figures, it is unsurprising that it was a significant point of contention in counsel's submissions.

25. Counsel for the plaintiff argues that the defendants are now trying to reopen the detailed financial analysis conducted at trial although the evidence on these matters is now concluded. He says that to introduce this new adjustment at this point would amount to a reopening of the case, without any evidence, and would be entirely impermissible. Counsel for the defendants argue that the court does not have to revisit evidence on this point. He says that if the plaintiff is not disclosing information he should not benefit from this nondisclosure.

26. I do not believe that the issue of non-disclosure (to which I will return) is relevant to the depreciation adjustment now argued for by the defendants. The extent of the depreciation applied in earlier years was known at the time of the hearing. There were no specific adjustments sought under this heading at the trial. I believe it is simply not open to the court at this stage, in the absence of reopening matters and hearing new evidence, to make the adjustment contended for and I therefore do not propose to allow any adjustment for depreciation.

27. **Net Profits for period 2021-2023**. The appropriate net profits for the period 2021 to 2023 inclusive is contested between the respective financial experts. In summary the experts disagree on the net profits of the partnership for those years to the following extent:

Year	Plaintiff's expert	Defendants' expert
2021	(€49,699)	No profit/loss
2022	€40,000	€111,304
2023	(€90,000)	(€7,126)

28. While it may appear surprising that there would be such a degree of difference between experts regarding the net profits for these years, this is entirely explicable by the paucity of financial information which was available to them.

29. In his report, the plaintiff's expert says he is instructed that the financial statements for 2022 are currently in draft with profit estimated in the region of €40,000. He states that "…*while 2023 is ongoing, the plaintiff has indicated to me that the nursing home will make a loss for the year, estimated by the plaintiff to be €90,000, arising from the ongoing difficulty with HIQA registration*..".[11]

30. In addition, the tax return in respect of the year ended 31 December 2021 was not provided and the return for the period ended 31 December 2022 remains outstanding (although due no later than 15 November 2023). It would appear that neither the 2022 draft accounts nor the completed tax return have been submitted to the Revenue. It appears that in 2021 there is no supporting tax return, and this is the first recorded loss of the partnership since 2009. Further supporting information that was requested by the defendants' expert was provided detailing nursing home residency numbers and occupancy throughout 2022 and 2023. This information was requested by him in an effort to substantiate the plaintiff's projected profit of €40,000 and loss of €90,000 for the years 2022 and 2023 respectively.

[11] Page 7 Report of Declan Walsh dated 11 December 2023.

31. The defendants' expert agrees that occupancy of the nursing home fluctuated considerably particularly in the period July to September 2023. Based on the figures provided to him the decline in turnover amounted to €151,279, a drop of approximately 11%. He also notes that the turnover figure recorded in 2022 was an historic high.

32. The defendants' expert questions the loss recorded in 2021 and proposes a no profit/no loss figure be recorded in its place. However, his report does not provide any explanation for this position. Mindful that the trial proceeded on the basis of the 2021 accounts before the court, I believe that the court must accept the loss figure for 2021 as recorded in that year's accounts.

33. The position in relation to the years 2022 and 2023 is more difficult for the court given the absence of information in the form of financial accounts or revenue records for these years. This absence of information must be viewed against the backdrop that the plaintiff alone has access to and control over the partnership's financial information and where no explanation was provided as to why the now overdue 2022 accounts and revenue returns have still not been finalised. I was advised by counsel that no partnership bank statements for 2023 were provided to the defendants despite request. This is an extraordinary situation in circumstances where the plaintiff has been criticised by this court for failing to disclose financial information and where a court order was made by this court post- trial in March 2023 to expressly order the plaintiff to produce partnership financial documents, notwithstanding the plaintiff's statutory obligation to the defendants to provide this material to them under s28 of the Partnership Act, 1890. That court order specifically required the disclosure of all bank statements by the plaintiff for 2022. I see no basis upon which the plaintiff can credibly continue to refuse to provide such basic partnership financial information to the defendants and I can only deduce that his refusal to do so is motivated by a desire to obstruct the defendants, the

experts and this court in obtaining a clear view of the partnership's true financial position.

34. If, in clear breach of his partnership obligations, the plaintiff refuses to provide this information, he cannot then persuade this court that his estimate of year end losses should be accepted. The plaintiff must not be permitted to benefit from his non-disclosure. If there is a prejudice to the plaintiff in the court adopting this position it is a prejudice created entirely by the plaintiff's own actions. As noted by Wells C.J.N.L. in *Green v Harnum* [2007 NLCA 57] at para 67, a case involving a fishing enterprise partnership dispute where one of the partners, Harnum, refused access to the accounts of the fishing enterprise he carried on with the partnership licences:

" *… the trial judge had little or no alternative but to rely on the estimates provided by[Mr Green's expert] as to the income a fishing enterprise of that nature would have had during those years. To the extent that the allocation of income made by the trial judge is, in any manner, unfair to Harnam, he is the sole cause of that unfairness*".

35. The defendants' expert has compared turnover in 2022 to similar figures which have been submitted to Revenue by the plaintiff. He has identified 2019 as a comparable year in terms of turnover. Adjusting for exceptional increases in Repairs & Maintenance and Motor and Travel, a revised profit figure of €111,304 is arrived at. Applying the same principle to 2023 figures using 2020 as a comparable year in terms of turnover, the losses reduce from the plaintiff's estimate of €90,000 to the defendants' expert estimate of a loss of €7,126. This loss reflects the reduced occupancy in 2023. In the absence of any further information having been provided by the plaintiff I propose to accept the evidence of the defendants' expert regarding the years 2022 and 2023 and those adjustments should be made accordingly.

36. This deals with all of the remaining disputed adjustments. I will require the respective experts to agree the final net profit figure based on the adjustments I have set out above. In addition, it will be necessary to agree a profit figure for the first 4 months of 2024 i.e. to 30 April 2024 assuming that the partnership will be dissolved at or around that time. That figure could be arrived at based on extrapolating profit on the same levels of occupancy and discounting any ongoing expense or salary claims beyond those which this court has allowed. If any of the identified adjustments need to be amended to reflect disallowed payments which have continued beyond December 2023 the experts should agree those amendments accordingly. Once that net profit figure is agreed (and I expect the experts to be in a position to do that), it will then be possible to ascertain the defendants' entitlement to those profits based on their 45% interest. Subtracting their agreed drawings to date from that percentage entitlement figure will yield the balancing payment required to balance the defendants' drawings. I identify this payment as the "**Balancing Payment**" for the purposes of this judgment.

Syers Order

37. In the First Judgment I dealt with this court's jurisdiction to make a *Syers Order* and the particular suitability of such an order in the factual circumstances which arise in the present case.[12] This partnership relates to an operational nursing home. The relationship between the partners has long since wholly broken down such that all are agreed that the current partnership arrangements can no longer continue. All parties are agreed that the residents need to be protected insofar as possible. Given the requirements of HIQA as to the management of nursing homes, the appointment of a receiver and manager over the assets of the partnership would necessitate the entry of the business into a wind-down

[12] See paras 238- 248 of the First Judgment

period resulting in the requirement for all the residents to obtain alternative accommodation as well as all of the staff being made redundant over the course of approximately six months. Between a combination of the operational issues and the costs of a receivership, there is a real benefit in an order requiring one party to buy out the other at a fair valuation so that the nursing home business can continue to operate.

38. At the time of the trial the position of the parties was that each wished to purchase the others' interest in the partnership. Since that date matters have moved on so that the current position is that the defendants acknowledge they are not in a position to seek a *Syers Order* in their favour. The defendants have indicated they will not oppose a *Syers Order* in favour of the plaintiff because it is in the best interests of the residents of the nursing home, even though this means that the plaintiff will have achieved his aim of acquiring the nursing home from them. Counsel for the defendants indicated that the court should make the order it considers just as regards the payment to the defendants on foot of the *Syers Order*. He says that if the plaintiff does not thereafter pay the amount nominated, indemnify the defendants properly against revenue liabilities and secure that indemnity and payment appropriately, the court should then order the appointment of a receiver and the sale of the partnership assets.

39. Counsel for the plaintiff confirms that the plaintiff's preference is to purchase the defendants' interest in the nursing home and that the appointment of a receiver should only be considered as a last resort. However, he says there is a limit to the amount that the plaintiff can be expected to pay for the defendants' interest. If that amount is too high then he says the nursing home may simply have to be sold despite the negative consequences that such an outcome would have for the parties, the residents, the employees and the availability of nursing home beds in the local area.

40. In all the circumstances, I am satisfied that this is an appropriate case in which the court should grant a *Syers* Order. It is now accepted that this order would be framed in terms which specify the purchase by the plaintiff of the defendants' interest in the partnership at a price to be nominated by this court.

41. In *Lindley & Banks on Partnership* (21st Ed) the current editor notes that there is no limit to the factors that can be considered by the court in exercising its discretion to make a *Syers Order* (see: *Malik v Hussain* [2021] EWHC 1405 (Ch) at [28]), although as with any judicial discretion, it must be exercised judicially. It is clear however, that in making such an order a court must ensure that "…*where one of the partners is running the business and would be the accounting party and wishes to continue to use the relevant assets, it may be just indeed to order that partner to pay for his purchase so long as the so- to- speak selling partner does not lose out financially. That of course requires the court to be very certain as regards what would be a fair value in those circumstances.*." (see *Benge v Benge* [2017] EWCH 2124 (Ch) at para 54).

42. I have of course some concern regarding the accuracy and validity of the financial information provided by the plaintiff. The accounts have not been prepared in a manner one would expect from a professional trading entity and information since December 2021 is either missing altogether or is unvouched or still in draft form. I have tried to accommodate these concerns in the manner in which I have addressed the required adjustments to the partnership accounts. That exercise is not an exact science and has undoubtedly been made more difficult by the absence of high-quality financial documentation. However, in so far as possible I believe that the Balancing Payment, once calculated by the experts in accordance with my directions, will enable the court to determine the true extent of the nursing home profits since inception of the partnership

and thus the percentage of same as to fairly reflect the value of the defendants' interest in the partnership profits to 30 April 2024.

43. Insofar as the capital assets of the partnership are concerned, the nursing home property was independently valued on 13 February 2023 on behalf of both parties by CBRE. CBRE were of the opinion that the "*market value of the freehold/long leasehold interest in the property.. as (sic) the date of this report is €720,000 exclusive of VAT*". The property was valued on the alternative basis of a special assumption that vacant possession was readily available for the use of the property in a use alternative to a trading nursing home at €620,000 exclusive of VAT. These valuations are significantly less than the price paid for the nursing home in 2005 even before sums were expended on its renovation. The valuation is also significantly less than the valuation ascribed to the property in the partnership accounts. However, it is the only independent evidence of valuation before the court and for that reason the court must accept it represents the fair market value of the nursing home property, trading as a nursing home. The report details a number of factors impacting the market value of the property including its "*smaller size and dated appearance internally*"[13].

44. The CBRE valuation explains that the valuation is based on an estimate of the maintainable level of trade and future profitability that a competent operator of a business conducted on the premises acting in an efficient manner would expect to achieve. The concept involves estimating the market's perception of the earnings potential of the property having regard to its inherent characteristics and prevailing market conditions rather than the actual level of trade under the existing ownership. Personal goodwill is not expected to remain with the business in the event of the property being sold and thus is excluded from the CBRE valuation.

[13] At page 35

45. The CBRE valuation confirms that they did not review historical trade figures as these figures were not made available to CBRE for the purposes of their valuation. CBRE ultimately relied on their assessment of "fair maintainable trade" assuming sustainable occupancy of 92% and the current Fair Deal rate of €1,110 per week. Additional payments of €20 per week were assumed to be charged to residents. The CBRE valuation confirms that their valuation of the property "*is as a fully equipped operational entity having regard to trading potential on the assumption that there will be a continuation of trading*".[14]

46. It does not appear that the CBRE valuation specifically itemised any trade inventory. However, the CBRE report confirms that for the valuation of the Property as a trading property (namely the higher valuation), items of plant and machinery normally considered as landlord's fixtures have been treated as an integral part of the building and are included in the valuation. Furthermore, the report confirms that "*a number of items that normally might be regarded as tenants fixtures and fittings-such as trade appliances, furniture and equipment-as well as soft goods considered necessary to generate the turnover and profit, are included in our Valuation of the Property*."[15]

47. In light of the above, the CBRE valuation appears to cover both the physical property, its trade - related furniture and contents and the assumed profit it could generate based on an average of 92% occupancy at current Fair Deal rates and a reasonably competent operator. On that basis, the value of the defendant's 45% interest in the nursing home as a trading entity is €324,000 (excluding VAT).

48. A final heading I wish to consider regarding the terms of a *Syers Order* relates to the requirement for protection of the defendants regarding partnership liabilities and in

[14] At page 13
[15] At page 13

particular partnership revenue liabilities. *Lindley* at 23-335 notes that "*Given that all liabilities will be taken into account in the valuation process, it would seem to be a necessary corollary of the order that the partner bought out should be indemnified against those liabilities, in the same way as an outgoing partner*".

49. The plaintiff has indicated that he is prepared to provide such an indemnity to the defendants in the context of a *Syers Order* being granted in his favour. Clearly such an indemnity will be essential in this case. In the First Judgment I highlighted certain matters in respect of which no adjustment was ordered on the understanding that an indemnity would be provided by the plaintiff to the defendants. In particular I highlighted that in circumstances where a suitable indemnity was provided by the plaintiff to the defendant for the tax liabilities of the nursing home, I did not propose to make any adjustment to the plaintiff's drawings or to net profits for underpayment of PAYE/PRSI/USC or for professional fees to regulate partnership tax affairs.

50. Counsel for the defendants argues that in the context of a *Syers Order*, this court should take account of the defendants uncertain and vulnerable position vis-à-vis the Revenue Commissioners arising from the liability continually declared over the years on their behalf by the plaintiff while simultaneously not paying the income to them underpinning that liability. This behaviour has exposed the defendants personally to potentially significant interest and penalties on their own personal tax liabilities. Obviously, there is little the court can do about those liabilities *per se* but it is suggested that the court could provide protection for the defendants to the extent necessary to enable them to engage professionals to negotiate with Revenue on their behalf in relation to interest and penalties. Counsel argues that the uncertain tax implications for the defendants personally arising from any partnership dissolution, where the liability has been

generated on their behalf by the plaintiff without their involvement, should also be factored into the court's considerations and determinations.

51. I determine that in the context of a *Syers Order* in favour of the plaintiff, a necessary requirement is the provision of an indemnity by the plaintiff in favour of the defendants in respect of all liabilities of the partnership, in particular revenue liabilities. I also believe that in the particular and unusual circumstances of this case where the defendants may have a liability to interest and penalties in respect of unpaid personal tax on income which the plaintiff did not pay to them when due, although returning details of same to the Revenue, the indemnity should include an indemnity limited to €25,000 (inclusive of VAT) for the defendants in respect of vouched professional fees incurred by them to advisers in negotiations with the Revenue in an effort to reduce those liabilities. This is necessary in my view to do justice between the parties in the context of a *Syers Order* in the particular circumstances of this case.

52. The plaintiff's indemnity needs to be meaningful and properly secured so that it is an indemnity of substance for the defendants and enforceable by them.

53. It is also a condition of my granting a *Syers Order* to the plaintiff that he be required to discharge the payments he personally owes to the defendants in respect of damages and interest as part of the court determined buy out figure. The damages and Interest awarded by this court are of course payable whether or not the plaintiff takes up the *Syers Order*. However, it would clearly be unjust for the plaintiff to be permitted simply to buy out the defendants' interest in the partnership assets while not also discharging the damages and Interest due to the defendants in respect of the plaintiff's actions as a partner pre-dissolution.

54. I will turn now to consider the question of interest claimed by the defendants.

Interest pursuant to the Courts Act 1981

55. The defendants claim interest pursuant to the Courts Act 1981. Section 22 gives the court power to order payment of interest on awards, including damages, on the whole or any part of the sum awarded in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment. The rate of interest is fixed by reference to the Debtors (Ireland) Act 1840. It was 8% per annum simple interest until 1 January 2017 (down from a previous rate of 11%) and has been 2% per annum since that date[16].

56. The defendants rely on the decision of the Supreme Court in *Reaney v Interlink Ireland Limited (trading as DPD)* [2018] IESC 13. In that case the court noted that the granting of interest under the Courts Act 1981 was neither mechanical nor automatic, neither was it instinctive or intuitive. However, the case confirms that in general, to the extent to which a trial judge concludes that a party ought to have paid the money earlier, then interest could be properly awarded. Where there is a genuine dispute that required to be resolved, and perhaps some merits on either side, it might be much more difficult to say that the sum awarded ought to have been paid at a much earlier date and therefore that interest ought to accrue. Interest is not awarded simply as a remedy against inflation but rather reflects the fact that there is a cost in not having the use of money for a certain period.

57. The defendants argue that this is an appropriate case for the court to exercise its discretion to award interest as the plaintiff has dragged out the proceedings and has had the use of the partnership assets and by extension the defendants' rightful funds for the last 12 years and continues to do so. When questioned further by the court as to what an order for interest might cover in this case, counsel for the defendants suggested that

[16] Courts Act 1981 (Interest on Judgment Debts) Order 2016 (S.I. No 624)

interest could be awarded on the damages or on Tara Seepersad's salary or on the withheld drawings. Counsel for the plaintiff argued that it was the defendants who dragged their heels in this case and that much of the delay was due to their actions. He submitted that the plaintiff should not have to pay any interest. He said that the court had awarded aggravated damages and should not then award interest in respect of the same damages.

58. O'Donnell J (as he then was) in *Reaney* at paragraph 13 notes that "*The logic that money has a time value should in theory be reflected in an award of interest*." At paragraph 18 of his judgment he states that "*In general,… to the extent to which it can be said that, at the conclusion of the case, a trial judge can conclude that the defendant ought to have paid the money earlier, then interest could properly be awarded*". Of course in the present case it was the plaintiff rather than the defendants who owed the money.

59. In deciding how to deal with this claim of interest I have considered the following points: –

(a) there have been delays on both sides since the commencement of proceedings.

(b) in December 2015 the defendants consented to the appointment of a receiver, being the relief sought by the plaintiff. The proceedings nevertheless continued without any payment to the defendants.

(c) The plaintiff has always known that he owed money to the defendants in respect of their partnership entitlements. He determined that he would not make any payment to them unless there was an overall settlement. In adopting this course of action, the plaintiff deliberately withheld payment he knew was due to the defendants, even if there was some scope for argument on the exact quantum due from year to year.

(d) The Settlement provided in general terms for specific payments to the defendants until August 2015 (recognising that payments for Karl's education would continue until 2017 if he was availing of them). Those early years of the Settlement were crucial years during which the defendants were finishing their education and preparing themselves for financial independence. From August 2015 onwards the prescribed payments were to cease save that if the defendants' share of the profits were insufficient to meet the payment of their family home mortgage then the nursing home would meet any shortfall and same was to be considered a loan to the defendants repayable from their future profits thereafter.

(e) The prescribed payments under the Settlement were not made by the plaintiff with significant adverse consequences for the defendants. This court awarded damages against the plaintiff to include (i) special damages for additional mortgage interest incurred by the defendants and estimated additional costs each will incur in belatedly recommencing and completing their education;(ii) general damages to each defendant for pain and suffering arising from the plaintiff's breach of fiduciary duty owed to them and (iii) aggravated damages to each defendant in recognition of the added hurt and insult caused to them to date.

(f) The damages seek to compensate the defendants for the foreseeable adverse consequences, pain and suffering and the additional expenses they incurred as a result of the plaintiff's breach of the Settlement. I do not propose to award interest on these damages.

(g) The damages do not however compensate the defendants for the time value of being without their partnership profits when they fell due. This factor is exacerbated by the admitted fact (even on the plaintiff's own numbers) that the plaintiff had overdrawn his entitlements and had the use of the money which the defendants ought

to have been paid. While there may have been some scope for argument on the quantum of those drawings, there was no argument that they were due in some amount and that the plaintiff was aware of this.

(h) I do not wish the parties to expend further time and cost on complicated interest calculations.

(i) I do not propose to award interest on Tara Seepersad's salary, noting that this was a disputed item throughout the proceedings. However, as previously set out, this salary should run until the date of the dissolution of the partnership.

60. I propose in all these circumstances to award Courts Act interest to the defendants to date on their 45% split of the net profits as they fell due in the amounts specified in the partnership accounts from 2016 -2021 inclusive. The plaintiff cannot contend that he was unaware of those figures or that he misunderstood the requirement to pay the defendants their share at the time. I appreciate that this calculation does not reflect the full extent of the defendants' entitlement to drawings (even for that period) as it does not account for the adjustments ordered by this court. However, those adjustments have only recently been determined by this court, as has the net profit figures for 2022 and 2023.

61. For the avoidance of doubt the relevant net profits and defendants' share on which Courts Act interest should be calculated at the relevant rate are as follows:

YEAR	2016	2017	2018	2019	2020	2021
NET PROFIT	123,411	€47,912	€53,782	€8,548	52,150	Loss 0
45% SHARE	**€55,535**	**€21.560**	**€24,202**	**€3846**	**23467**	**0**

62. The experts should agree the calculation of interest to 30 April 2024 on the defendants' 45% profit share as set out above, assuming payment each year should have been made on the 31 December (the **Interest**").

63. The final issue for determination in this judgment is the costs of these proceedings and I will now deal with that aspect.

Legal Costs

64. These proceedings, conducted over 12 years, involved several motions, discovery, a hearing over seven days, supplementary legal submissions to the court on the evidence and the First Judgment which took another two days, as well as several engagements between experts both pre and post- judgment. The legal costs are therefore likely to be significant and, unfortunately, a material liability for the party responsible to pay them. Costs are however a risk that parties assume once they become involved in litigation and this is why a proactive approach to resolving disputes out of court should always be considered.

65. In *Twomey on Partnership* (2ed) at para [20.115] the author notes that:

"*the general rule in a partnership action is that the costs of all the parties are paid out of the assets. This is very much a general rule and is of obvious application in cases where one partner's actions alone have not led to the court proceedings e.g. dissolution proceedings, actions for an account on a dissolution and the appointment of a receiver. However, where the action is for damages, specific performance, an injunction or an account without a dissolution, the costs are likely to follow the event*".

66. At para 20.117 *Twomey* states that "[O]*bviously, where one partner's misconduct is responsible for the incurring of additional costs in the partnership action, the court will order the costs to be paid by that partner*".

67. The starting point in a partnership dissolution case is no order as to costs. This principle is derived from the case of *Hamer v Giles* [1879] 11 CH D 942, more recently approved and applied by the English Court of Appeal in *Ma'Har v O'Keefe* [2014] EWCA Civ 1684. In the words of Sir George Jessel MR in *Hamer*, this rule applies "*where there is no fault on either side*" and where the taking of the accounts are dealt with as all other costs of necessary administration of the partnership. He went on to note that "[O]*f course, where an action for dissolution is rendered necessary by the misconduct of a partner-as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so-the court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct*".

68. Counsel for the defendants argues that the action brought by the plaintiff in this matter was not a proceeding for the dissolution of the partnership as an administrative exercise but rather was, in his words, "vindictive litigation" commenced by the plaintiff to obtain an advantage and an adjudication on a disputed claim prosecuted over an extended period. He argues that the plaintiff's misconduct is responsible for the incurring of significant additional costs over a 12 year period during which he, and his family, continued to profit from the partnership assets and business while effectively depriving the defendants of their partnership entitlements. Counsel for the defendants argues that in such a case the plaintiff should be held responsible for the legal costs the defendants were unavoidably and unreasonably obliged to incur to protect their partnership entitlements. I agree that this case is not one to which the general default rule of partnership dissolution costs should apply – it clearly involved partner misconduct. It is appropriate therefore to look to the general principles regarding the awarding of costs in legal proceedings.

69. The general legal provisions which apply to the determination of legal costs are sections 168 and 169 of the Legal Services and Regulation Act 2015 (the "**2015 Act'**) and the recast O. 99 introduced by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019. The relevant sections of the 2015 Act came into force on 7 October 2019 and the new provisions of O.99 took effect from 3 December 2019.

70. These are the principles I propose to adopt in this case (without objection from the parties) noting also that these proceedings were instituted prior to the commencement of part 12 of the 2015 Act. I do not believe the application of the pre 2015 Act regime would produce a materially different result in the circumstances of this case.

71. As outlined by Murray J in *Chubb European Group S.E. v The Health Insurance Authority* [2020] IECA 183, at para 19, the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

"(a) *The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).*

(b) In considering the awarding of costs of any action, the Court should ' have regard to' the provisions of s.169(1) (O.9, r.3(1)).

(c) In a case where the party seeking costs has been ' entirely successful in those proceedings' , the party so succeeding ' is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to ' order otherwise' the court should have regard to the 'nature and circumstances of the case' and ' the conduct of the proceedings by the parties' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings,

and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is ' partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been ' entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).''

72. The Court has the power under s.168(2)(a) to make an order in favour of a party to the extent that they were *'partially successful'* in the proceedings. That power extends to awarding '*costs relating to the successful element'* of the proceedings. As Murray J noted in *Chubb* at para 31:" The *difference between the two provisions is important: the party who prevails entirely has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order for costs in respect of the successful aspect of its claim if, having regard inter alia to the criteria specified in s.169(2), it is appropriate to award them*."

73. The plaintiff argues that the reconciliation of drawings and profits was a matter for the benefit of all parties and not an event *per se* on which it could be said one side or the other was successful. The plaintiff submits that he has succeeded entirely on the central issue pursued by him, being the opportunity to purchase the nursing home - an issue on which he was fully resisted by the defendants until now.

74. The plaintiff says that the defendants failed on a number of points raised in their defence and counterclaim including that (1) the property of the nursing home was not part of the

original settlement, (2) that the settlement agreements should be set aside as an unconscionable bargain, (3) that the life assurance policy had been wrongly used to clear the mortgage on the nursing home instead of their family home and (4) that they wished a receiver to be appointed. The plaintiff also says that the defendants pivoted their position to assert that they should be given the opportunity to purchase the nursing home and only moved from this position at the last minute. He says that the defendants have only succeeded in obtaining a small fraction of the sums claimed in their counterclaim and that recovery under a number of the specific heads of damage claimed by them was denied.

75. On the basis of these arguments, the plaintiff submits that he should be awarded his costs of these proceedings. Without prejudice to that position, he contends that he has at the very least been partially successful and that in those circumstances this court should consider the factors outlined in s169 (1) (a)-(g) of the 2015 Act.

76. With regard to those factors, counsel for the plaintiff made the following submissions:

(a) conduct before and during the proceedings. - The plaintiff says that the defendants caused vexatious complaints of fraud and collusion on the part of the plaintiff and Mr Squires in order to gain a litigation advantage. They have persisted in making these allegations including an allegation against Mr Squires on social media. The defendants refused to join in appealing the decision of HIQA to refuse registration of the nursing home and have failed to cooperate with this in any way.

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings - the plaintiff submits that it was entirely unreasonable for the defendants to contest the ownership of the nursing home and to pursue a counterclaim for rescission of the settlement agreement. He said this required the additional evidence of Mr Pigot and took up additional court time.

(c) the manner in which the parties conducted all or any part of their case - the plaintiff notes that the court excluded in its entirety the expert evidence tendered on behalf of the defendants. The plaintiff says that he raised the expert's lack of independence as an expert prior to and again at the commencement of the trial and that the defendants were expressly put on the hazard in respect of the expert by O'Moore J at a pre-trial stage but they accepted and acknowledged this risk and relied on the expert anyway.

(d) whether a successful party exaggerated his claim -the plaintiff says that while the defendants succeeded in part in their counterclaim for damages, other claims were grossly overstated and were not based upon any evidence but rather were inappropriately expanded by their expert and this increased the plaintiff's costs in having to meet those claims.

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so that date, terms and circumstances of that offer - the plaintiff says he made several attempts to resolve this matter without the need for court time and resources, including by mediation. He made an open offer of €900,000 prior to the commencement of the trial and this is outlined in the First Judgment. He submits it was wholly unreasonable and wasteful of significant costs for the defendants to reject this offer and say that they wanted the case to go to court anyway. I am now advised that at the end of the first day of the trial an increased offer was made by the plaintiff on a without prejudice as to costs basis to buy out the defendants' interest in the nursing home for the sum of €1,050,000 - comprising payment of Mr Pigot's fees of €40,000, a contribution to legal costs of €150,000 inclusive of VAT and the balance of €860,000 being paid in instalments over a three-year period with the initial portion of €560,000 to be made immediately. The plaintiff also agreed to provide the defendants with an indemnity for

any revenue liabilities arising from the partnership, excluding the defendants' own personal tax affairs and tax liabilities. In return, the defendants were to withdraw all and any complaints of professional conduct against Mr Squires, discontinue the present proceedings as well as all proceedings against O'Connor & Bergin solicitors and against D.R. Pigot and Co solicitors. The offer remained open for 24 hours but was rejected by the defendants, with no counter offer.

77. Counsel for the plaintiff, relying on the decision in *Reaney* noted that O'Donnell J (as he then was) held at para 37 of his judgment that "[*T]here is a very stark difference between just beating the lodgement and recovering all costs, and just failing and being required to pay all the plaintiff's own costs and the bulk of the defendant's. In principle there should be a more graduated approach. In fact, however the order permits the court to "otherwise direct" and depart from the indicated order, but for special reasons recorded in the order of the court*".

78. The plaintiff submits that these principles are equally applicable to the consideration of the exercise of the court's discretion on costs in the face of a *Calderbank* offer and the consequences for a party not beating or only marginally beating that offer. The plaintiff suggests that if this court were to come to the view that the plaintiff's success vis-à-vis the *Calderbank offer* was somewhat marginal (either way) then a graduated approach such as that advocated by Mr Justice O'Donnell in *Reaney* might be considered.

79. The plaintiff concludes that in light of the above, if the court is to adopt the "*broad brushstroke*" approach urged in *WordPerfect Translation Services Ltd v Minister for Public Expenditure and Reform [2023] IECA 189*, given the complexities of this case the only appropriate order is no order as to costs.

80. In effect, the plaintiff has adopted varying positions and arguments ranging from him being awarded the costs of the proceedings as the successful party, through to a

deduction of costs on the basis of him being partially successful and then to a suggestion that no order as to costs be made with each party being responsible for their own legal costs.

81. Unsurprisingly, the defendants adopt a different position on legal costs.

82. Counsel for the defendants argues that it cannot be disputed that in circumstances where the defendants have been awarded both general and aggravated damages against the plaintiff, the "event" in these proceedings has been determined entirely in their favour. He points out that the defendants from 2015 said they would consent to the sale of the nursing home but that the plaintiff would not do that despite it being the relief he sought in his pleadings. He argues that the plaintiff did not prosecute the proceedings diligently or efficiently and that there was a well flagged information deficit which the plaintiff failed to address in advance of the trial commencing, which delayed the court's final determination of these proceedings. He says that even though the plaintiff may ultimately be rewarded by his obtaining a *Syers Order* in respect of the nursing home, it cannot be said that he has been successful as this order is granted not on the merits of the plaintiff's position but rather because this court is understandably concerned for the residents and is keen to ensure that all the partnership assets are not subsumed by the costs of a receivership if that can be avoided.

83. The reality is that neither party was successful on every point they raised in these proceedings. While the plaintiff may ultimately have achieved his (unpleaded) objective of gaining control of the nursing home through a *Syers Order*, this does not mean that he has been the more successful party in this litigation. In my view the defendants have succeeded to a significantly greater degree and this should, prima facie, entitle them to a costs order in their favour on the basis that costs follow the event. The defendants succeeded in obtaining a proper account of their partnership interests which had been

denied to them by the plaintiff. It was necessary for them to resort to litigation to obtain this information and the resulting benefit. While the plaintiff complains that the defendants would not settle with him, this can hardly be surprising in circumstances where the plaintiff consistently refused to provide even basic partnership financial information to them and indeed, regrettably, continues to do so.

84. The defendants also succeeded in establishing breach of contract and breach of fiduciary duty by the plaintiff. This resulted in an award of damages in their favour (to include both general and special damages and indeed aggravated damages in light of the egregious nature of the plaintiff's actions). They have also succeeded in this judgment in obtaining limited Court Act interest on undisputed sums that ought to have been paid to them since 2016. The third named defendant was successful in securing an order for her unpaid salary. The defendants were successful in securing payment of third party legal fees promised to them.

85. The plaintiff did not plead the relief he actually wanted. The defendants confirmed as far back as 2015 that they would consent to the appointment of a receiver. At that point the plaintiff could have accepted this consent but instead he persisted with this litigation to achieve a different objective. That was the plaintiff's choice.

86. It is of course true that the defendants pleaded a number of defences on which they did not succeed. However, and key to the impact on legal costs, at the very outset of the trial, counsel for the defendants indicated that those matters were not being pursued at trial. I dealt with those additional matters arising from the pleadings at page 115 of the First Judgment in a section that comprises less than 2 pages of the 126 page judgment. I do not believe that these issues, not advanced at trial, materially increased the legal costs of the trial. Undoubtedly, they may have increased the costs of pleadings, legal submissions and witness statements – although trying to estimate the extent of such an

increase is extremely difficult. As Murray J noted in *Chubb* at para 31: "*It is not possible to achieve a mathematically perfect allocation of time, effort and cost*". I am also conscious that the allocation of costs as between different issues in a case has the potential to create multiple ancillary costs disputes which generally should be avoided, unless those costs represent a material aspect of the costs overall. As stated by Donnelly J in *Word Perfect* at para 50 of her judgment :"… *the focus of the trial judge on costs ought to be the big picture rather than a nit-picking of every single item or minute spent by each party in the course of the litigation*". I do not believe that it was in any sense improper for the defendants to plead the defences they did, even though they did not succeed on some of them. Wisely, the defendants did not pursue those pleas at trial and those issues did not therefore increase the length of the hearing or the costs associated with it. I have no evidence of any material increase in costs associated with the pre-trial pleading of these defences (which were denied in full by the plaintiff). I therefore do not propose to make any deduction for the fact that the defendants did not ultimately advance or succeed on these pleas.

87. One aspect of this case however on which the plaintiff succeeded related to the admissibility of the evidence of the defendants' expert. For the reasons set out in the First Judgment I accepted the plaintiff's arguments and held that evidence to be inadmissible. It is of some considerable relevance that the plaintiff had canvassed his concerns regarding this expert at pre-trial motions and in some detail at the opening of the trial. Although aware of these objections, the defendants nevertheless persisted with this expert and in my view, clearly assumed the costs risk of doing so. The expert commenced his evidence at 15.28 on day six of the trial. He finished his evidence (including cross-examination) at 15.09 on day seven of the trial. Although spread over two separate days, in reality this expert's evidence consumed one day of the trial. I

propose to disallow the costs of the expert report which I held entirely inadmissible. I also propose to disallow the defendants the costs of his evidence for a one day period and instead to award the costs of this day to the plaintiff. Because this expert later engaged in preparing a joint report with the plaintiff's expert which was of considerable assistance to this court, I confirm that those later costs are allowed.

88. It is worth briefly dealing with the plaintiff's arguments regarding the factors set out in s169 (1) (a)-(g) of the 2015 Act that this court should take into account in determining costs. I do so for the purposes of considering if there is anything relevant to changing how this court might deal with the defendants' costs:

(a) conduct before and during the proceedings - while I have already given my view that it was inappropriate for the defendants' expert to participate in complaints to professional regulatory bodies on behalf of the defendants, I do not believe that the complaints made by the defendants as partners regarding their inability to access partnership documentation are such as to disentitle them to an order for costs in these proceedings. On the other hand, the First Judgment heavily criticises the plaintiff's own conduct before and during the proceedings and I do not need to recite those criticisms again.

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings - I accept that the defendants did not succeed on all grounds they pleaded. However those issues were not pursued at the trial and in my view did not materially increase the trial costs.

(c) the manner in which the parties conducted all or any part of their case - The only issue which I believe to be material is the introduction of the defendants' expert evidence, despite prior objection, and I will allow a discount for that aspect given its impact on the overall length of the trial. I do not believe that Mr Pigot's evidence materially impacted

the costs of the trial. In any event, his evidence was important on a number of issues including the circumstances in which the 2012 Settlement was executed**.**

(d) whether a successful party exaggerated his claim – While not successful on all aspects of their claim, I do not believe that the defendants exaggerated their claim in an inappropriate or improper manner. They did not succeed on a loss of earnings claim but this was for the reasons set out in the First Judgment and not because of any deliberate exaggeration on their part.

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so that date, terms and circumstances of that offer - the evidence shows that the 2012 offer made by the plaintiff to acquire the defendants' interest in the partnership was self-evidently at a gross undervalue. It is clear that further efforts were made by the plaintiff to settle this dispute with the defendants. The evidence is however no settlement would be entered into by the defendants in the absence of financial information. The plaintiff refused to provide this. Counsel for the plaintiff sought to make an argument regarding the open offer made by the plaintiff at the commencement of the proceedings and, the without prejudice as to costs offer made at the end of the first day of hearing. It is clear that the defendants succeeded in beating those offers. Counsel for the plaintiff did not suggest that the defendants had recovered less than offered but, relying on *Reaney,* he sought to argue that the offer was "in the ballpark" and so should be considered in some manner by this court.

In *Reaney* the margin was less than €6000 from a total award of €356,200 with the court noting that margin was in truth even smaller when regard was had to a number of possible variables in the case. As the court observed in that case, the fundamental question was whether a party acted reasonably in pursuing a claim notwithstanding the lodgment made. O'Donnell J (as he then was) held (at para 39) that "… *I consider that if the plaintiff's*

claim comes very close to the amount of a lodgment, and certainly within the range of 5%, the trial judge is entitled to consider that that in itself is a reason to otherwise direct, and is entitled to consider the broader question whether it was reasonable for the plaintiffs to pursue the claim notwithstanding the lodgment. If the difference was more than 5% it would require very weighty factors in an individual case to consider departing from the presumptive rule under O.22, r.6 RSE". McKechnie J dissented from the majority on this point noting that *"[T]he lodgment is beaten or it is not*".[17].

There was of course no lodgment in the present case although an open offer can have the same effect. I am satisfied that neither the open offer nor the offer without prejudice as to costs is effective to alter the allocation of legal costs between the parties in this case. While the Balancing Payment and interest has yet to be calculated, it is clear that the amount to be recovered by the defendants in this matter will exceed the figure offered. Furthermore, the offer was not a straightforward one but included legal costs and the requirement to discontinue other proceedings and complaints. In the circumstances I do not propose to give any "credit" to the plaintiff, as urged by his counsel, for the offers made in settlement.

89. I understand that there have been nine motions in this case. The defendants were required to pay the costs of a motion for particulars in which an order was made on 19 October 2015. Those costs were stayed until the determination of the proceedings but will now fall due for payment by them. There were six other motions in which costs were reserved and two case management motions which were adjourned in which no order was made as to costs. I will allow the plaintiff his reserved costs of his motion for substituted service dated 11 November 2013. I make no order for costs in relation to the plaintiff's motion dated 27 January 2014 which was struck out. I award the defendants

[17] At para 96 of his judgment.

the costs of their motion against the plaintiff for discovery dated 17 May 2017. I also allow the defendants their costs in respect of the plaintiff's motion to strike out their defence dated 16 March 2020, the defendants' short service motion on 12 October 2022 and the costs of the post-trial motion for further disclosure made on 23 March 2023. I will make no order as to costs in respect of the two case management motions on 19 October 2022 and 16 December 2022.

90. Otherwise I order that the plaintiff should pay the party and party costs of these proceedings, same to be adjudicated in default of agreement, on the basis that there will be no recovery of costs by the defendants in respect of their initial expert report of Mr Stafford (although I allow the costs of the joint expert report) and the costs are to be calculated on the basis of a five-day trial (and not the actual seven day trial). This deduction recognises that the defendants have not been allowed their costs of the one day's hearing when Mr Stafford gave evidence and that they are responsible for the plaintiff's costs of that same day.

Conclusion and Orders to be Made

91. For the reasons set out in this judgment, I make an order that the plaintiff be permitted to buy out the interest of the defendants in the partnership they operated together comprising the nursing home property and the business conducted therein, on the following terms:

A Payments to be made by the Nursing Home/Partnership

(1) The Balancing Payment calculated by the Experts in compliance with this judgment.

(2) Arrears of salary payment to the Third Defendant in the amount of €136,000 (to bring these arrears up to date to 30 April 2024).

B Payment to be made by the Plaintiff

(3) Mortgage interest payment of €39,583 (to be brought up to date to 30 April 2024).

(4) Educational loss payments as set out in the First Judgment - €20,000.

(5) General and aggravated damages - €150,000.

(6) Purchase of 45% share in nursing home property/business - €324,000.

(7) Interest to be calculated by the experts in compliance with this judgment.

(8) The plaintiff must provide a suitably secured indemnity to the defendants in respect of all liabilities of the partnership, in particular revenue liabilities up to the date of dissolution. In the particular and unusual circumstances of this case where the defendants may have a liability to interest and penalties in respect of unpaid tax on income which the plaintiff did not pay to them when due, although returning details of same to the Revenue, the indemnity should include an indemnity for the defendants limited to €25,000 (inclusive of VAT) in respect of vouched professional fees incurred by them in relation to negotiations with the Revenue in an effort to reduce those liabilities.

92. In the event that the plaintiff opts to take up the Order at the court determined price, the defendants must cooperate with him in the re-registration of the business into the plaintiff's sole name. The defendants must execute all and any documents necessary to effect the transfer of their interests in the nursing home property to the plaintiff within 21 days of being requested to do so.

93. The respective experts should agree the calculation of the Balancing Payment and Interest in compliance with this judgment within 14 days. I will list this matter for mention at **10.30am on Thursday 25 April** at which time I expect the parties to advise me of the final agreed figures and whether the plaintiff intends to take up the option to purchase the defendants' interest on the court appointed terms. If the plaintiff does not intend to avail of the option to purchase the defendants' interest on these terms I will

make an alternative order which may, inter alia, include the appointment of a receiver over the partnership assets. In that instance I determine that the defendants' interests are to be valued on the basis set out in this and the First Judgment. The plaintiff will remain liable to pay the defendants the monies identified above at B (3), (4), (5) and (7) whether or not he opts to purchase their partnership interests.

94. I direct that the plaintiff pay the costs of these proceedings on a party and party basis allowing for a reduction in those costs for the reasons set out in this judgment. The net effect of this costs order is to direct the plaintiff to pay the costs of these proceedings assuming a 5 rather than a 7 day hearing and to disallow the costs of Mr Stafford's expert report, but not his engagement in respect of the Joint Expert Report.

95. In relation to the costs of the nine motions issued in this case I direct, as set out in this judgment, that no order as to costs be made for 3 such motions; that the defendants pay the costs of two motions and that the plaintiff pay the costs of the remaining four identified motions. All costs are to be adjudicated in default of agreement.

96. I will hear the parties on 25 April regarding the precise terms of the final Orders to be made to conclude matters, including details of any proposed indemnity and payment terms. The parties should also be in a position to indicate the exact amount payable to each of the defendants personally if that is required to be reflected in the court's order.