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*(subject to editorial corrections)*

**2003 No. 614**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**SANJEEV GURAM**
**AND**
**ANOOP GURAM**

**Plaintiffs;**

**-and-**

**DANIEL McATEER**
**AND**
**AINE McATEER**

**Defendants.**

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Mr. Peter Smith QC sitting as a Deputy Judge of the High Court:

## BACKGROUND

[1] The plaintiffs are brothers to whom I shall refer for convenience in this judgment as Sanjeev and Anoop. From the 1960s onwards their father developed what became a family business which each of the plaintiffs joined when they left school aged sixteen years: Sanjeev is now thirty-eight and Anoop forty-one. Initially the father dealt in textiles but as time went on he diversified the business and eventually he bought some property and, in 1988, he bought a public house in Strabane, County Tyrone. It was then called Kennedy's Bar but was later renamed the Blue Parrot. Since it reopened, having been closed as the result of a fire at the end of 2000, the pub has been called Baker Street.

[2] In or about 1996 the plaintiffs were introduced to the first-named defendant, Mr. Daniel McAteer, who practises as an accountant under the style or title of Duddy, McAteer & Co. He was also a businessman involved in a company called Roe Developments Limited. Roe Developments Limited owned and traded a public house in Limavady, County Londonderry, called the Roebuck Inn. In that year Mr. Guram senior bought the Roebuck Inn in the name of himself and his wife and a few months later Mr. McAteer was engaged by the family to provide accountancy services. There was a dispute between the parties at the trial as to the extent of those services but it was common case that Mr. McAteer provided accounting and book-keeping services and assistance in tax matters. I deal with the question of the nature and extent of the advice Mr. McAteer furnished to the plaintiffs later in this judgment.

[3] Subsequently both the Blue Parrot and the Roebuck Inn were transferred into the names of the plaintiffs and they themselves acquired the Bridgend Bar and the Waterfront Bar, both in Strabane, County Tyrone, the latter through a company called Mysbid Limited.

[4] In November 2001 an agreement was entered into between the plaintiffs on the one hand and Mr. and Mrs. McAteer on the other whereby the plaintiffs agreed to sell the Roebuck Inn to the defendants for £500,000, apportioned as to £480,000 in respect of the buildings and licence and £20,000 in respect of fixtures and fittings. The plaintiffs further agreed to lease the premises back from the defendants for a term of five years at a rent of £50,000 per annum, the plaintiffs having the option during the lease term to repurchase the premises for £500,000 on giving the defendants two months notice of their intention to do so in writing. Furthermore, they were obliged, if they had not already repurchased the premises, to repurchase them for £500,000 on the fifth anniversary of completion.

[5] The Conveyance and Lease are dated 16 November 2001. The purchase price was duly paid and the plaintiffs discharged the legal fees and stamp duty.

[6] On 26 February 2003 the plaintiffs issued a writ against the defendants claiming that they were induced to enter into the agreement by the undue influence of Mr. McAteer and seeking to have it set aside. They also alleged that Mr. McAteer was in breach of fiduciary duty to the plaintiffs and that he was negligent in advising them. The defendants denied all of these allegations.

[7] Mr. John Maxwell of counsel, led by the late Mr. John Thompson QC, appeared for the plaintiffs. Mr. McAteer represented himself. Mrs. McAteer played no part in the trial save to indicate that she adopted as her defence the defence put forward by Mr. McAteer. It appears that at all material times Mr. McAteer acted for and on behalf of his wife and, accordingly, the case against her stands or falls as it does against her husband. Both the plaintiffs gave evidence and Mrs. Nichola Niblock, chartered accountant, was called as an expert witness on their behalf. Mr.

McAteer gave evidence and called Mr. Tony Nicholl, chartered accountant, as an expert witness.

## THE EVIDENCE

[8] What is required in a case of this kind is a "meticulous examination of the facts" (see, for example, National Westminster Bank Plc –v- Morgan [1985] AC 686 per Lord Scarman page 708). I have attempted to meet this requirement. However, this does not, in my view, mean that I must record every piece of evidence given or reach a conclusion on every point that was disputed between the parties. If I were even to attempt these things this judgment would be of inordinate length and I formed the view, rightly or wrongly, that very many of the points raised and argued had little or nothing to say to what I regard as the real issues. What follows are summaries of the parties' cases as articulated in the witness box and the documents introduced in evidence and my conclusions in the light of what I conceive to be the law.

## THE PLAINTIFFS' CASE

[9] Besides providing the services to which I have already referred, Mr. McAteer also acted as the plaintiffs' financial adviser in respect of all aspects of their business. They had no other adviser. In particular, Mr. McAteer advised them as to investments and the restructuring of the business to fund investments and he dealt with the raising of finance to fund the purchase of the Bridgend Bar and the Waterfront Bar. The plaintiffs had faith in Mr. McAteer and always acted on his advice. On the advice of Mr. McAteer they invested in Roe Developments Limited, an Enterprise Investment Scheme (EIS) company, and this afforded them income tax and capital gains tax advantages. Mr. McAteer also advised them to set up Mysbid Limited, also an EIS company that, as I have said, owned the Waterfront Bar. The plaintiffs were unable to quantify the total that they invested down the years on Mr. McAteer's advice but they suggested that it was many hundreds of thousands of pounds. In about 1998, the plaintiffs changed banks from the Ulster Bank Strabane to the Bank of Ireland Business Centre in Londonderry. Mr. McAteer had recommended the move which had been precipitated by friction between Mr. McAteer and the Ulster Bank manager. The Bank of Ireland manager, Mr. Stephen Connolly, also an accountant, was already known to Mr. McAteer. From the time of the move onwards Mr. McAteer dealt with the Bank of Ireland on the plaintiffs' behalf and they rarely saw the manager. Mr. McAteer had total control. Bank correspondence was sent to Mr. McAteer at his office. Much of it was never seen by the plaintiffs.

[10] There was nothing untoward about the plaintiffs' finances until 2001. By that stage they had come to rely on and trust Mr. McAteer with their financial affairs. The fire at the Blue Parrot at the end of 2000 had required additional finance from

the bank pending the receipt of monies for the refurbishment from the Northern Ireland Office and the plaintiffs' insurers. Early in 2001 bridging finance had been arranged with the bank.

[11] Sanjeev could not recall having received a letter dated 8 August 2001 from Mr. McAteer and addressed to both plaintiffs stating, among other things that the bank had expressed grave concern about the business generally (I deal with this letter in more detail later in this judgment). However, Anoop, who was responsible for running the pub side of the plaintiffs' business, accepted that he had received it. Initially it gave him some concern but Mr. McAteer reassured him and he thought that Mr. McAteer would sort things out. He did not consider that there was any urgency at that time. This changed when Mr. McAteer's attitude altered. There was now a sense of urgency, conveyed not by the bank but by Mr. McAteer.

[12] Mr. McAteer said that there was pressure from the bank that had to be addressed or if not the bank would put the plaintiffs "into recovery". Mr. McAteer was asked what this meant and he said that the bank would call in its loans, or words to that effect. He said that this would not be good. What was conveyed was that the plaintiffs would be finished. The situation had to be dealt with very quickly. The plaintiffs asked Mr. McAteer for the return of their EIS money but Mr. McAteer said that this was "locked in" and that retrieval would take time.

[13] It was Mr. McAteer who suggested the sale and leaseback arrangement with the option to repurchase. He described it as a temporary measure to help the plaintiffs out. Mr. McAteer said that there was not enough time to sell an asset. He also said that he, Mr. McAteer, already had the finance package in place. Mr. McAteer did not suggest any alternative.

[14] Mr. McAteer had first put the sale and leaseback arrangement to Anoop when he was in Mr. McAteer's office. He told Anoop that the profit from the Roebuck Inn would pay the rent and leave a surplus of £35,000 or £36,000 per annum. Sanjeev, who was in India, was contacted by telephone and spoken to both by Anoop and Mr. McAteer. Sanjeev was not happy about the deal because up until then he had thought that the problem would be sorted out by the plaintiffs getting their EIS monies back. The conversation between him and Mr. McAteer became heated, Sanjeev describing the proposal as "a shafting exercise."

[15] Subsequently the plaintiffs discussed the proposed deal and decided to go ahead with it as a temporary measure and, as Sanjeev put it, out of a sense of panic. Initially the purchaser was to be Roe Developments Limited but Mr. McAteer changed this to purchase in his own name and then to purchase in the name of himself and his wife. At the time the proposal was put the plaintiffs did not realise that they would have to pay stamp duty and legal fees (which totalled £16,400). Anoop said he was told by Mr. McAteer that these "would be sorted out" through Roe Developments Limited. Without reference to the plaintiffs Mr. McAteer changed the split between buildings and licence and fixtures and fittings from

£450,000 and £50,000 respectively to £480,000 and £20,000 respectively, thereby increasing the amount of stamp duty payable by the plaintiffs. When challenged about this change Mr. McAteer said that the alterations suited him.

[16] The plaintiffs used the same solicitor as Mr. McAteer because Mr. McAteer wanted them to do so in the interests of speed, describing the use of an independent solicitor by the plaintiffs as "ballsing about". Mr. McAteer had given the instructions to the solicitor and he, the solicitor, had given no specific advice to the plaintiffs.

[17] The plaintiffs' case found support in the report and oral evidence of Mrs. Niblock. It is not necessary to refer to every aspect of her report but, among other things, Mrs. Niblock expressed the opinion that Mr. McAteer was clearly providing investment advice to the plaintiffs and she gave a number of examples of this from the documents with which she had been furnished. As far as the sale and leaseback was concerned she thought that Mr. McAteer ought to have evaluated all the options open to the plaintiffs. Mrs. Niblock had not had sight of any document that demonstrated that Mr. McAteer had advised the plaintiffs to approach any lending institution other than the Bank of Ireland or that he had considered approaching any such institution himself on their behalf.

[18] Mrs. Niblock also noted in the report that she had seen no evidence that the possibility of Roe Developments Limited (a company controlled by Mr. McAteer and which lent him £100,000 to assist in the purchase of the Roebuck Inn from the plaintiffs) lending the money directly to the plaintiffs had ever been considered. Furthermore, although the plaintiffs had informed her that they had made considerable investments through Mr. McAteer she had been unable to clarify what investments the plaintiffs owned at the material time.

[19] Mrs. Niblock went on in her report to express the view that after the sale and leaseback the plaintiffs were in a potentially worse position in respect of both profitability and cash flow. £322,892 of the £500,000 they received was needed to repay existing loans (from Diageo at 1.5% and Bank of Ireland at 6.5% - corrected in evidence to 6.25%) the cost of which (at 10% per annum) was £19,233 per annum greater. Moreover, Mrs. Niblock argued that, based on information available at the time of the transaction, the Roebuck Inn's profit before finance costs could not meet the £50,000 rent never mind leave a surplus.

[20] In oral evidence Mrs. Niblock stated that she calculated that comparing the rent of £50,000 with what the £500,000 (borrowed from the Bank of Ireland, Diageo and Roe Developments Limited) was costing Mr. and Mrs. McAteer there was a profit to them of £17,600 per annum or £88,000 over five years. Even if they had to make capital repayments during the five year period the benefit would still remain the same.

[21] Mrs. Niblock was asked for her opinion as to pressure on the plaintiffs from the Bank of Ireland. She said that in her experience the correspondence from the

bank did not suggest that it was extremely concerned or unhappy. She referred, in particular, to a letter from Mr. Connolly of 6th June 2001 in which he wrote "We are not entirely satisfied with this account" and to a bank internal document signed by Mr. Connolly and attached to Mr. Nicholl's report (and which appears to have come into existence in the second half of September 2001) that described the plaintiffs as "a high net worth connection with significant property interests" who would "be able to sustain the lease period" (i.e. pay the rent for the duration of the five year term).

[22] Mrs. Niblock gave oral evidence as to the options other than the sale and leaseback open to the plaintiffs. She referred to assets held by them and their parents totalling £330,000 in value:

(i) £100,000 of shares in Roe Developments Limited purchased in 1997. These shares could not have been sold prior to April 2002 (they were in fact sold at par in that month) without the sacrifice of tax benefits which had already accrued but pending sale they could have been used as security for a loan;

(ii) £100,000 of shares in Roe Developments Limited purchased in 2000. As £50,000 worth of these shares had been second hand they did not attract tax benefits. As to the other £50,000 worth the purchase money had not been appropriately applied within one year of receipt and, therefore, they did not attract tax benefits either. It followed that all of these shares were available for sale without penalty. The fact that the 1997 shares were sold at par in 2002 demonstrated that there were people prepared to buy second hand shares in Roe Developments Limited; and

(iii) £130,000 returned to the plaintiffs' parents by Mr. McAteer in April 2002.

Furthermore, Mrs. Niblock referred to property owned by Sanjeev which, she suggested, could have been used as security.

[23] Another option would have been to seek an alternative source of finance. Mrs. Niblock said that there were a number of sources. There were banks other than the four main banks although the interest rate would have been higher – up to 6 or 7 percent above base, depending on how they viewed the security. There were "the breweries" (I took this to mean Diageo) which, from what Mrs. Niblock understood, had had no problem with the plaintiffs and considered them to be good customers and could have been asked for an additional loan. In order to assist cash flow, a moratorium on capital repayments could have been sought.

## THE DEFENDANTS' CASE

[24] Mr McAteer contended that he had not given financial advice as suggested by the plaintiffs. He, or his firm, had provided an accounting and book-keeping system for the plaintiffs and had provided them with information that enabled them to understand where their business stood at any particular point in time. Although he

had provided the plaintiffs with business advice of a general nature the plaintiffs made all of the executive decisions. They decided what they wanted to do and if they required finance Mr. McAteer would be asked to "do the legwork."

[25] Mr McAteer accepted that he had received correspondence from the Bank of Ireland relating to the plaintiffs but he had communicated the contents to them at regular meetings. The plaintiffs had complete control of their bank accounts and signed all letters of offer.

[26] The plaintiffs had a very poor relationship with financial institutions. In particular they had abused their relationship with the Bank of Ireland with repeated excesses on their overdraft facility caused by low profits and high drawings. Eventually in mid-2001 the bank ran out of patience. There was a series of meetings, including one with Mr. Connolly at which the plaintiffs raised the possibility of asset disposal. As a result of a meeting between Anoop and Mr. McAteer on 8 August 2001 Mr. McAteer wrote the letter to the plaintiffs of the same date (to which I have already referred and will refer to again later in this judgment) and which suggested, among other things, that consideration should be given to "disposal of assets that are surplus to long term objectives."

[27] At about the time of this letter Anoop had calculated that there would be a shortfall of about £100,000 in the cost of the Blue Parrot refurbishment. At about the same time, but probably after the 8 August 2001 letter, Anoop had asked Mr. McAteer whether he would buy one of the public houses and there was reference to an earlier conversation in which sale of the Roebuck Inn at £680,000 had been discussed. Mr. McAteer responded that he would not buy but he would do a sale and leaseback. Based on what he knew of the profits of the Roebuck Inn Mr. McAteer believed that he could borrow on their strength.

[28] It was Anoop who had suggested the sale and leaseback and after some negotiation it had been agreed with the plaintiffs by the end of August 2001. It was first of all agreed with Anoop because he was the person responsible for the pubs. In the course of the negotiations Anoop had raised concern about Mr. McAteer demanding that the plaintiffs buy the pub back at short notice when they did not have the money. As a result of this the option period was agreed at five years.

[29] There had been a meeting with the bank at which the intentions of the parties had been explained. This probably took place between 1 and 4 September 2001. In addition to meeting the estimated shortfall on the Blue Parrot works the balance of £500,000 price (£400,000) was to be used to reduce the plaintiffs' borrowings.

[30] Initially Roe Developments Limited was to be the vehicle for the sale and leaseback with the Bank of Ireland and the brewery (Diageo) funding the deal and taking a first and second charge respectively on the Roebuck Inn. Subsequently, however, it was decided that Mr. McAteer would buy in his own name but this, in turn, was replaced by Mr. and Mrs. McAteer buying jointly, an arrangement which

was beneficial from the point of view of their tax planning. It was agreed with a director of Roe Developments Limited, Mr. Gavan McGill (a co-director with Mr. McAteer) that Mr. McAteer would borrow £100,000 from the company repayable on the sale of the Roebuck Inn.

[31] It was agreed that the parties would use the same solicitor, Mr. Joe McElhinney. Mr. McAteer had discussions with him and he had written to both sides setting out his understanding of the deal.

[32] After the deal was done in November 2001 the Blue Parrot (now called Baker Street) was reopened in time for Christmas. In December 2001, January 2002 and February 2002 there were monthly crisis meetings between Mr. McAteer and the plaintiffs that the plaintiffs' parents began to attend as well. They were shown their financial position on a month-to-month basis. However, Mr. McAteer sensed a cooling in the relationship and in early June 2002 a letter was received from another firm of accountants to the effect that they were henceforth to act in Mr. McAteer's place.

[33] The sale and leaseback arrangement was a good deal for the plaintiffs. It enabled them to satisfy the requirements of the bank and was advantageous in terms of cash flow. There was no available alternative save the sale of assets, something that the plaintiffs were reluctant to contemplate.

[34] Mr. McAteer denied that he had been guilty of undue influence or that he had misled the plaintiffs in any way. He did not owe them any fiduciary duty and he had not been negligent.

[35] Mr. McAteer's case found support in the evidence of Mr. Tony Nicholl. In his report he made reference to extracts from letters from the Bank of Ireland in 2000 and 2001 and from Mr. McAteer in 2001 and 2002 and concluded that they clearly indicated "that trade was poor, cash flow was poor, relationship with the bank was deteriorating rapidly and that Mr. McAteer and the plaintiffs were in frequent contact trying to find a basis to enable the plaintiffs to continue to trade out of their cash flow predicament." His report concluded by expressing the belief that the plaintiffs were experienced businessmen who had chosen a course of action in November 2001 to facilitate the completion of the Blue Parrot and to avoid asset disposal. At the time the plaintiffs were dealing with Mr. McAteer primarily as a businessman and not as a financial adviser.

[36] In a supplemental report Mr. Nicholl contended that it could not and should not be assumed that the raising of £100,000 or £160,000 elsewhere at a lower cost, if available, would have solved the plaintiffs' immediate problems with the Bank of Ireland. The bank was seeking an immediate reduction in its exposure which could only be achieved by the sale of assets or refinancing elsewhere. The plaintiffs' account had moved to category 5 ("C5") which Mr. Nicholl defined as:

> "recovery account – account with significant performance problems, typically unable to fund interest from income, adequately secured and in need of assets sale and/or capital injection to reduce exposure and interest."

On reading the Bank of Ireland documentation it was Mr. Nicholl's opinion that the bank would not have been content with the plaintiffs simply raising sufficient funds to complete the Blue Parrot works.

[37] In his oral evidence Mr. Nicholl said that after the completion of the deal there was a saving to the plaintiffs of £43,000 in bank charges and bank interest. He said that the sale and leaseback arrangement was not a bad deal if one calculated the impact of the two sets of stamp duty and legal expenses spread over five years. There had been no evidence to show that there was an alternative source of borrowing at the rates indicated by Mrs. Niblock.

**UNDUE INFLUENCE: THE LAW**

[38] Over the last quarter of a century the doctrine of undue influence has been the subject of considerable judicial scrutiny in the context of the charging of the interests of wives in their matrimonial home in favour of banks. This culminated in Royal Bank of Scotland –v- Etridge (No. 2) [2001] UKHL 44. In his speech Lord Nicholls of Birkenhead described the doctrine in terms with which the other Law Lords agreed as follows (para. [6] et seq.):

> "… Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose …
>
> … The law will investigate the manner in which the intention to enter into the transaction was secured … If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise

> or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.
>
> Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats … The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage …
>
> In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt act of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired …
>
> The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of overt acts of persuasive conduct … the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type …
>
> … [T]here is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."

[39] In Barclay's Bank plc –v- O'Brien [1994] 1 AC 180 Lord Browne-Wilkinson, with whom the other Law Lords agreed, endorsed the classification of undue influence adopted by the Court of Appeal of England and Wales in BCCI –v- Aboody [1990] 1 QB 923 page 953. This is as follows:

"*Class 1: actual undue influence.* In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.

*Class 2: presumed undue influence*. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused the relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

*Class 2A.* Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

*Class 2B.* Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally resposed trust and confidence in the wrongdoer, the existence of such a relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

[40] Although Lord Browne-Wilkinson's description of class 2 came in for some judicial criticism in Etridge (see Lord Hobhouse of Woodborough para. [105] and

Lord Scott of Foscote para. [158]) class 1 seems straightforward enough: actual undue influence is a species of fraud. "Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right." (per Lord Browne-Wilkinson in CIBC Mortgages Plc –v- Pitt [1994] 1 AC 200 page 209B). There is no requirement to show that the transaction was to the "manifest disadvantage" of the person influenced.

[41] An aspect of class 2 undue influence which was clarified in Etridge is the need to show disadvantage. In Etridge (para. [21]) Lord Nicholls said that there are two pre-requisites to the evidential shift in the burden of proof to the defendant: "first, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant; second, that the transaction is not readily explicable by the relationship of the parties." And he went on, in relation to the second prerequisite, to endorse (paras. [25] and [29]) the approach of Lord Scarman in National Westminster Bank plc –v- Morgan [1985] AC 686 pages 703-707 including, and in particular, the need for "… evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it." (page 704).

[42] Lord Nicholls observed (para. [26]) that the label "manifested advantage" attached by Lord Scarman to the second ingredient "has been causing difficulty" and to rule that it should be discarded. Unfortunately, his Lordship did not suggest an alternative label and, as far as I am aware, none has since been identified. I have continued to use it in this judgment but have attempted to apply it in accordance with Lord Nicholls' remarks.

[43] Having said this, the meaning of Lord Scarman's phrase "an advantage taken of the person subject to the influence" is not entirely clear. To my mind the literal interpretation is that it is sufficient to show that the dominant person has been advantaged. However, Lord Nicholls did not confirm this interpretation in his speech in Etridge and I note that it is not supported in Snell's Equity (31st Edition; para. 8-28). In Morgan's case (page 705) Lord Scarman quoted "a passage of critical importance" in the opinion of Lord Shaw of Dunfermline in Poosathurai –v- Kannappa Chettiar, LR 47. IA 1 page 4 which begins: "It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid." This suggests that both advantage to the dominant person and disadvantage to the person subjected to the influence must be shown.

[44] It is, perhaps, difficult to conceive of a case in which a plaintiff could succeed in establishing undue influence and in which both disadvantage to the plaintiff and advantage to the defendant are not apparent. In the instant case Mr. McAteer conceded that the deal involved a profit for himself and Mrs. McAteer although he argued that it was on a modest scale. However, notwithstanding what I regard as

the literal interpretation of what Lord Scarman said, I consider that profit to Mr. McAteer would not be enough to meet the second prerequisite: In my opinion even if the plaintiffs were to establish the existence of the requisite relationship disadvantage to them must still be shown for the presumption of undue influence to be invoked.

[45] Reverting to the first prerequisite Mr. Maxwell argued that Mr. McAteer was the plaintiffs' financial adviser and that this relationship fell within class 2A being a relationship which ais a matter of law gave rise to the presumption that undue influence had been exercised. In the course of the trial I ruled against this argument. In doing so I relied heavily on the judgment of Park J in Mitchell –v- James [2001] All ER (D) 116 (Jul).

[46] In Mitchell's case a firm of accountants was instructed by the partners in a filling station and motor repair business to deal with the tax position of the business. The accountants advised that an injection of cash was required and lent what was required on the basis that the firm would become the accountants to the business and would draw fees for the work. If there was a balance of profits after wages and accountancy fees this would be split equally with the owners of the business. The business was then transferred to a company. Many years later the company terminated the engagement of the firm. The accountants sought to enforce the agreement and one of the grounds on which the defendants resisted the claim was that they had been unduly influenced by the firm and argued that the relationship with the accountants fell into class 2A.

[47] Park J concluded (para. 68) that there was no authority which holds that a class 2A presumption of undue influence arises between accountant and client. The learned judge said that he did not believe that he could add another relationship to those which, as a matter of law, raised the rebuttable presumption of undue influence and, even if he could, he did not think it right to do so. There are some affinities between a solicitor/client relationship and accountant/client relationship but there are also significant differences. As a generalisation the accountant is less of a general adviser on all aspects of the client's affairs than is the client's solicitor, and if the generalisation is not true in a particular case, that case is likely to be within class 2B.

[48] If I may respectfully say so, I am not convinced that it is no longer possible to add to the list of class 2A relationships. However, I can discern no theme common to the relationships on the list which is also to be found in the relationship of financial adviser and client. Furthermore, in order to add this relationship it would in my view be necessary for the court to be persuaded that the public interest demands that the heavy burden of class 2A classification be inflicted on all financial advisers, a very large number of people with a very varied range of skills. It may be that in the future the courts will take the view that this would be justified. Suffice to say that neither the evidence before me nor whatever I can take into account by way of judicial notice would even begin to amount to such justification.

[49] Turning to class 2B it seems to me that care must be taken in applying phrases such as "trust and confidence". Trust and confidence almost always exist between adviser and advised otherwise the person being advised would be very likely to seek another adviser. To my mind one must interpret a phrase of this sort as not just descriptive of feelings experienced or a judgment made by the person advised but as requiring such a degree of dependence on the adviser that the material decision of the person advised is not an exercise of his or her own independent will.

**MY FINDINGS**

[50] Apart from what I would call the administrative role Mr. McAteer played in relation to the plaintiffs' affairs he became their adviser in three main areas: in relation to their EIS investments, in particular those they made in Roe Developments Limited, a company which Mr. McAteer controlled; in relation to the raising of finance and in relation to the Bank of Ireland. Focussing on the last of the three, Mr. McAteer advised the Plaintiffs to move to the Bank of Ireland. He had had previous dealings with the manager, Mr. Connolly. It seems that from the time of the move all correspondence from the bank relating to the plaintiffs' affairs was channelled through Mr. McAteer. Although it was addressed to the plaintiffs it was sent to Mr. McAteer at his office and opened and read by him. He did not pass all of the correspondence to the plaintiffs. He decided what information to pass on.

[51] Mr McAteer was unable to give a rational explanation for this extraordinary practice, which does not seem to have been the product of any express agreement with the plaintiffs. Having said this, I do not consider that there was anything sinister about it. But what is clear is that Mr. McAteer to a great extent effectively controlled the flow of information between the bank and the plaintiffs, that he was a powerful factor in the relationship and that there was a quite exceptional degree of reliance on him by the plaintiffs in their dealings with the bank.

[52] The Blue Parrot fire at the end of 2000 necessitated the arrangement of a bridging facility with the bank at the beginning of 2001. By that stage there was an established history of the plaintiffs exceeding their overdraft limit. Nevertheless the bank agreed to make the requisite funds available although in a letter of 15 February 2001 Mr. Connolly referred to "… the business cash flow position [continuing] to be put under pressure by the level of expenditure" and expressed the hope "that some improvement will soon follow".

[53] By the summer of 2001 the bank had become more concerned and began to press for something to be done. It was as a result of this that Mr. McAteer wrote the letter of 8 August 2001 to the plaintiffs.

[54] In his letter of 8 August 2001 Mr. McAteer stated that "… The bank has now expressed its grave concern about the business generally and we think that it would

now be helpful for yourselves to examine in detail your business arrangements." Management accounts for the public houses were enclosed and a profit summary was set out on which Mr. McAteer commented as follows:

> "As you can see from this summary, the profits are not sufficient to cover the interest costs of the business. N.B. The position is break/even (sic) if we discard the results of the Blue Parrot. However, if we consider that
>
> (a) substantial loan repayments have to be made, and
>
> (b) the drawings from the business are high
>
> then the reasons for an increased pressure on the bank accounts become very obvious."

After setting out some more figures Mr. McAteer went on to say the following:

> "As you can see from the above summary, there continues to be an enormous pressure on the working capital of the business. This will repeatedly cause difficulty with the business bankers.
>
> As a potential solution, we would suggest the following course of action;
>
> Review all business activities and identify profitability positions and funding requirements
>
> Separate the business internally along the lines as discussed with you namely;
>
> (a) Operation of pubs … responsibility of Anoop
>
> (b) Property dealings … responsibility of Sanjeev
>
> (c) Investment opportunities … joint responsibility
>
> 3. Consider disposal of assets that are surplus to long term objectives
>
> 4. Implement a new financial strategy

5. Identify funding requirements and adopt a discipline regarding same

6. Examine closely all business processes between now and 31 December 2001

Based on our conversations with you, we understand that the following major items of expenditure are anticipated:

| | |
|---|---|
| Anoop's House deposit | £100,000 |
| Sanjeev's Property Development deposit | £150,000 |

We would of course be delighted to assist you with all of the above areas. Our costs for this would be as follows:

| | |
|---|---|
| Refinance 4 @ £1,200 | £4,800.00 |
| Strategy | £3,500.00 |
| Sale of Bars | £4,000.00 |
| **Total** | **£12,300.00**" |

[55] The excerpts I have quoted from the letter are noteworthy in a number of respects. First, there is no indication that any action by the bank is imminent. Secondly, no deadline for action is mentioned – the only relevant date referred to is 31 December 2001. Thirdly, the "course of action" includes a rather inconsequential suggestion as to the separation of functions (which was already the de facto position) and what might be described as restructuring proposals which would inevitably have taken some considerable time to develop and implement. Fourthly, the terms of the letter and the costs listed in it clearly indicate that Mr. McAteer was acting as the plaintiffs' financial adviser. This view of his role was supported by the expert and other evidence.

[56] Unlike Anoop, Sanjeev may not have seen the letter of 8 August 2001 at the time it was received but I am satisfied that he would have been aware of its contents. However, neither plaintiff viewed the situation as requiring immediate or drastic action and they relied on Mr. McAteer to sort things out. I, like both of the expert witnesses, would have expected that in the light of the bank's concern alleged in the letter Mr. McAteer would have identified with the plaintiffs all of the available options as to the raising of funds, but this he did not do. Instead, over the few weeks after the letter was sent Mr. McAteer set about arranging the finance for the

sale and leaseback of the Roebuck Inn, and he did not broach the idea with the plaintiffs until the finance was in place. During this period there were discussions with the plaintiffs but the only possibilities discussed were the outright sale of the Roebuck Inn (something which Mr. McAteer knew that the plaintiffs were reluctant to contemplate), the sale of the Bridgend Bar (which would not have met the plaintiffs' needs) and the return of the plaintiffs EIS monies (which Mr. McAteer successfully resisted).

[57] I digress at this point to record that I do not accept the suggestion Mr. McAteer put to Anoop that he had proposed the sale and leaseback arrangement to Mr. McAteer. I believed Anoop when he denied this. Furthermore, I consider that the proposal of a relatively sophisticated fundraising device of this sort is much more likely to have come from someone like Mr. McAteer, who would readily have understood it, rather than from one of the plaintiffs, who clearly had difficulty in grasping precisely what was involved. But the fact that Mr. McAteer suggested that it was Anoop's idea seems to me to be significant in the context of Mr. McAteer's veracity on other, more important, issues.

[58] Both parties made use of documents made available by the Bank of Ireland. However, no one from the bank was called as a witness to comment on or explain them and I feel, therefore, that I should approach their interpretation with a degree of caution. One of the documents, dated 10 September 2001, refers to a meeting with "the customers" (it also refers to "customer") and suggests that by this date the plaintiffs had agreed to the sale and leaseback proposal. However, Mr. McAteer thought that this meeting was with Anoop alone and that Sanjeev's agreement may have come by way of the telephone call when he was in India. Yet Sanjeev did not arrive there until 14 September 2001.

[59] My conclusion is that having arranged the funding for the sale and leaseback by early September 2001 Mr. McAteer mooted it with Anoop with whom he was in closer and more frequent contact and who, in my view, was rather more susceptible to Mr. McAteer's influence than Sanjeev. At the same time he began to apply pressure on Anoop. Anoop became disposed to agree to the deal (and this, I believe, is what is reflected in the bank document of 10 September 2001 to which I have referred) but this was subject to Sanjeev agreeing. However, Sanjeev departed for India before the proposal could be put to him. There was then a delay for a period the length of which I cannot accurately determine but which was probably weeks rather than days. This was due to difficulty in communicating with Sanjeev because the part of India he was in did not have mobile telephone links at that time. Sanjeev learned what was proposed when he was telephoned from Mr. McAteer's office. The conversation between himself and Mr. McAteer became heated because prior to leaving Northern Ireland Sanjeev had believed that whatever pressure there was from the bank was to be relieved by release of the EIS monies.

[60] Sanjeev was still reluctant about the sale and leaseback even after the telephone conversation when he was in India. However, both he and Anoop eventually went through with the deal because:

(i) Mr. McAteer told them the situation had to be resolved urgently;

(ii) Mr. McAteer led the plaintiffs to believe that if they did not do the sale and leaseback deal the Bank of Ireland would withdraw its loans and put them out of business;

(iii) Mr. McAteer told them that in the time available there was no other option; and

(iv) Both plaintiffs depended on Mr. McAteer to deal with the Bank of Ireland on their behalf and in relation to the raising of finance and were going to take whatever advice he gave.

[61] In my view Mr. McAteer significantly overstated the degree of urgency. While the bank wanted the situation to be addressed there is no indication in any of the Bank of Ireland documents of any deadline being imposed by it or any other pressure for completion. It is true that the bank considered (mistakenly, in my view) that agreement had been reached between Mr. McAteer and the plaintiffs by about 10 September 2001 but there is no evidence of concern on the part of the bank as September became October and October became November and still nothing had been signed although the overdraft excesses continued. Had there been the urgency as portrayed to the plaintiffs by Mr. McAteer I would have expected this to have been recorded by the bank and for it to have insisted that the formalities be completed at a much earlier stage. In fact, according to Mr. McAteer the opposite was the case, the bank having been responsible for a six week delay.

[62] The bank's relatively relaxed attitude can be contrasted with that of Mr. McAteer himself. According to him he substituted himself and then himself and his wife as purchasers and lessors in place of Roe Developments Limited because it would be quicker. He preferred the use of one solicitor by both parties for the same reason and in his letter to the plaintiffs of 19 November 2001 explicitly refers to "the urgency with which this matter was to be dealt with."

[63] Mr. McAteer asserted that he did no more than inform the plaintiffs that if they did not bring their excesses under control the bank would "put them into recovery" and that this was true. However, I have come to the conclusion that he went further and said words to the effect that the plaintiffs "would be finished" if they did not agree to the sale and leaseback. I believe that he induced what Sanjeev described as panic by overstating the threat to their business existence. It is true that had the plaintiffs simply done nothing the bank would eventually have been constrained to call in its loans. But in my view this would not necessarily have caused the collapse of their business. After all, the Bank of Ireland itself described

the plaintiffs as "a high networth connection" in the internal document attached to Mr. Nicholl's report and to which I have already made reference. Furthermore, I accept Mr. McAteer's view at the material time that on the basis of the last year for which there were figures the Roebuck Inn appeared to be profitable to the tune of over £80,000 before finance costs.

[64] I do not accept that there was no available option other than the sale and leaseback deal, particularly as the time available was significantly longer than Mr. McAteer indicated to the plaintiffs. What they required in the summer of 2001 was relatively short term finance to eliminate the excesses on their overdraft and provide the extra money they needed to complete the refurbishment of the Blue Parrot – indeed in the course of his evidence Mr. McAteer himself described the sale and leaseback as a one or two year holding exercise. The expectation was that once the Blue Parrot was open and trading again this and the continued profitability of the Roebuck Inn would provide the solution in the longer term. The total involved was of the order of £177,000 (£77,000 for the excess and £100,000 for the Blue Parrot) - as I shall explain I do not accept Mr. Nicholl's view that the introduction of this sum would not have satisfied the Bank of Ireland – and it had to be structured in such a way as not to have a significant negative impact on cash flow. I accept Mrs. Niblock's evidence that there were a number of possibilities which should have been looked at at the material time and which (or a combination of them) would have produced an alternative solution. In his addendum report of 12 October 2007 Mr. Nicholl stated that "the Gurams had numerous alternatives available to raise additional finance."

[65] The possibilities would have included the following:

(i) A loan from another source. I accept Mrs Niblock's evidence that a loan could have been obtained from another bank or lending institution at a high, but not prohibitively high, rate of interest. The £100,000 of EIS money due to become available in April 2002 would have been available by way of security;

(ii) Money from the plaintiffs' parents. £130,000 was returned to them by Mr. McAteer in the spring of 2002. Mr. McAteer asserted that they would have been reluctant to allow their money to be used in the pub business and Sanjeev accepted that this was possible. However, there was evidence that subsequently they made a sum of this order available for litigation connected with the plaintiffs' business activities and they had other assets. Given that the pub business as it stood in 2001 was an evolution of what had not long before been the family's and, before that again, the father's business, I do not believe that the parents would have refused point blank to help had it been put to them that the use of their money (or its use as security) was the best way to solve a short term problem;

(iii) Other options (besides selling a public house) are listed in Mr. Nicholl's addendum report. These included (and I quote):

> "(i) Raise £100k by way of additional gearing on private residence …
>
> (ii) Sell 10 Eden Terrace, 38 Bridge Street, 15 Newton Street and 7 Hazelwood raising approximately £100k …
>
> (iii) Sell 10-12 Bridge Street available equity unknown possibly in excess of £250k …
>
> (vii) Seek additional funding from parents through additional gearing on private residence or commercial properties.
>
> (viii) Refinance total borrowings.
>
> (ix) Seek funds from high risk lender.
>
> (x) Withdraw funds from Roe Developments Limited."

[66] I appreciate the sale of assets to solve a short term problem may have been unattractive to the plaintiffs but clearly the other options described by Mrs. Niblock and listed by Mr. Nicholl, or a combination of them, could have been utilised as an alternative – in my view a much better alternative – to the sale and leaseback deal. However, they were neither mentioned nor pursued by Mr. McAteer. His argument was that in negotiating the sale and leaseback he was not acting as the plaintiffs' adviser but at arm's length as just another businessman. This I categorically reject. At all material times Mr. McAteer was the plaintiffs' adviser and he put himself forward as such in his letter of 8 August 2001. No steps were taken by him to terminate that relationship and substitute a different relationship at any time prior to the completion of the deal. Mr. McAteer knew that the plaintiffs were dependent on him. The only way that he could have begun to justify the sale and leaseback would have been to make it clear to the plaintiffs that he had ceased to act on their behalf and to advise them to obtain independent financial advice. It is, perhaps significant that Mr. McAteer did appreciate that the plaintiffs required advice. But the advice provided – which Mr. McAteer arranged – was legal advice. The issue in this case was not whether the plaintiffs understood the legal consequences of what they were doing. What they required was independent expert advice as to their options, which they could then have considered freed from their dependence on Mr. McAteer.

[67] Before leaving this aspect of the case I record that I have not taken into account either the 2000 £100,000 EIS investment referred to by Mrs. Niblock or "the Sandhu loan". The latter was of £100,000 and it was advanced by the plaintiffs in April 2001 to help the intended son-in-law of an uncle in England to buy a house.

The parties disputed whether and how far these sums or any part of them would have been available to the plaintiffs in the second half of 2001. Resolving this dispute would have taken me far from the central issues in this case and the related question of what money Mr. McAteer received from the plaintiffs down the years and what became of it is currently the subject matter of other proceedings. Accordingly, as it is unnecessary for me to decide these issues I have not attempted to do so. This does not imply criticism of any of the parties.

[68] As to Mr. Nicholl's view that the introduction of £177,000 would not have satisfied the Bank of Ireland I reiterate that I do not agree with it. In reality, the sale and leaseback introduced only approximately £160,000 when the £14,400 for stamp duty and £2000 legal fees are taken into account. This seems to have been sufficient for the bank, the plaintiffs' subsequent downgrading to C6 ("account with significant performance problems, typically unable to fund interest from income and there is inadequate security resulting in the bank having to raise a provision against the account") in 2002 having been caused by the failure of the Blue Parrot, now Baker Street, to live up to expectations in terms of income and a collapse in the Roebuck Inn's profits. To view the deal as having any greater benefits than the introduction of this sum seems to me to be unreal. There was a very substantial degree of replacement in the funds provided by the sale and leaseback. The Bank of Ireland was itself providing half of the funding. Diageo was replacing money lent directly to the plaintiffs by money it was lending to the defendants. The security made available to these creditors was the same security – the Roebuck Inn – as they already held in relation to their advances to the plaintiffs. The only really new money was £100,000 from Roe Developments Limited.

[69] One thing I do accept is that because it did not involve a repayment of capital until the plaintiffs exercised the option the sale and lease back gave rise to a not insignificant cash flow advantage immediately the price was received and applied. However, the concomitant outgoings in the form of stamp duty and legal expenses significantly reduced, if not eliminated, this advantage and I am satisfied that if all available resources had been fairly scrutinised at the material time a package could have been put together which would have had no cash flow disadvantage.

[70] At this point it is instructive to look at the sale and leaseback from Mr. McAteer's point of view. As I have already pointed out, initially Roe Developments Limited, a company controlled by Mr. McAteer, was to have been the purchaser/lessor. Assuming that the company would have been able to borrow at the same amounts from the same lenders at the same interest rates as the defendants, the annual rate of return on the company's £100,000 would have been £33,375.

[71] Whenever Roe Developments Limited was replaced by the defendants the benefit to them was, on the face of it, very much less because, it was alleged, the balance of £100,000 which was required over and above what was advanced by the

Bank of Ireland and Diageo was borrowed by Mr. McAteer from Roe Developments at 15% per annum.

[72] The only written record of this obligation as far as Roe Developments Limited is concerned is the following, under the heading "Transactions with Directors" in its accounts for the year ended 30 June 2002: "During the year a loan was used to a former director, Daniel McAteer, to assist with the purchase of licensed premises that would be held on trust for the company. The balance outstanding at 30 June 2002 was £108,750."

[73] While it is possible to extrapolate the interest rate of 15% per annum from this rather Delphic statement Mr. McAteer was unable to explain what was meant by "held on trust for the company." Furthermore, no loan agreement between himself and Roe Developments Limited exists and Mr. McAteer told me that although the loan was to have been charged on the Roebuck Inn the solicitor had failed to complete the paperwork.

[74] I do not believe that Mr. McAteer gave me the full picture. I have concluded that the deal was much more beneficial to him than he cared to admit. Furthermore the transaction was of significant benefit to Mr. McAteer in another way. The Bank of Ireland charge on the Roebuck Inn also secured Mr. McAteer's practice account which was also graded as C5. Mr. McAteer told me that he did not realise this at the time. I do not believe him. In my view Mr. McAteer knew perfectly well that the security was taken by the bank in respect of all advances to him. This tends to strengthen my view that the plaintiffs' testimony on the issues in dispute was more reliable.

[75] To complete my findings on the events leading up to the signing of the contract and the completion of the agreement in November 2001, Sanjeev left India on 18 October 2001 and would have been back home a couple of days later. At that time, although both plaintiffs had indicated that they were prepared to go along with the deal Sanjeev, particularly, appears to have still been reluctant. There were discussions between the plaintiffs and their father. Meanwhile, Mr. McAteer was pressing them in frequent telephone calls. My conclusion is that by this stage Mr. McAteer was becoming anxious not to lose what was a good deal for him and was frustrated by the delays which he blamed on the bank and the solicitor. However, as I have said, the urgency came from Mr. McAteer and not the bank. Eventually the plaintiffs went ahead with the deal.

[76] Some weeks after completion an event occurred which to my mind exemplifies the degree of Mr. McAteer's control over the plaintiffs and, conversely, their reliance on him. On 10 December 2001, and without reference to the plaintiffs, Mr. McAteer contacted the solicitor altering the split in the £500,000 from £450,000 for buildings and licence and £50,000 for fixtures and fittings to £480,000 and £20,000 respectively therefore increasing the amount of stamp duty the plaintiffs had to pay.

[77] I have concluded that the plaintiffs have proved that they were induced to enter the sale and leaseback agreement by the undue influence of Mr. McAteer. In my opinion at the material time there was a relationship of dependency between the plaintiffs and Mr. McAteer and that the false representations he made to them caused them to enter the agreement with the defendants.

**ACTUAL/PRESUMED UNDUE INFLUENCE**

[78] In my opinion the undue influence in this case falls to be characterised as actual undue influence. However, as I have held that there was a relationship of dependency between the plaintiffs and the defendant which played a part in causing them to agree to the deal the view might be taken that the real or proximate cause of the plaintiffs entering the transaction was that relationship and, that as Lord Nicholls' second prerequisite has been met (see below), this is a case of presumed undue influence.

[79] In Etridge (op. cit. para. [219]) Lord Scott said that "[a] finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another."

[80] In my respectful opinion his Lordship's statement has no application to the instant case. I interpret his statement to relate to causation: if a plaintiff asserts that he/she was caused to confer a benefit on the defendant by reason of a false representation and it is held that this was not the case it is clearly impossible for him or her to then be heard to say that something else (namely the defendant's undue influence arising out of their relationship) caused it. However, this is not the case here.

[81] In this case I have accepted that a number of factors put forward by the plaintiffs played a part in causing them to agree to the sale and leaseback. In my view this is a totally different situation from that envisaged by Lord Scott and, therefore, the plaintiffs must succeed whether one characterises the undue influence as actual or presumed.

**MANIFEST DISADVANTAGE**

[82] If this case is not properly characterisable as one of actual undue influence for the plaintiffs to succeed they must establish disadvantage as defined by Lord Scarman in National Westminster Bank –v- Morgan.

[83] In his closing submission Mr. Maxwell graphically illustrated how the sale and leaseback arrangement would have proved extremely expensive to the plaintiffs if, as intended, it had been utilised to tide them over for a relatively short period. Taking the period of fifteen months from completion of the deal (which I regard as

reasonable) he calculated that including the rent and two sets of stamp duty and legal expenses the total cost of the £500,000 to the plaintiffs would have been £95,300. In my opinion this sum would have far exceeded what it would have cost the plaintiffs to raise what it was thought that they needed at the material point in time had they been properly advised.

**BREACH OF FIDUCIARY DUTY**

[84] The difficulties in defining the scope of fiduciary duty and a fiduciary are apparent from Snell's Equity (op. cit. para. 7-04) in which a fiduciary is described as "someone who owes fiduciary duties" and a fiduciary relationship as "a relationship between two or more persons in which one, the fiduciary, owes fiduciary duties to the other (or others)." Furthermore, although the description of a fiduciary relationship as "a relationship of trust and confidence" (per Millett LJ in Bristol and West Building Society –v- Mothew [1998] Ch 1 page 18) might suggest that the dominant person in all relationships of undue influence is a fiduciary the authorities on undue influence do not support this proposition.

[85] I have concluded that the claim that Mr. McAteer was a fiduciary adds nothing to this case. Being a case of actual undue influence the remedies available to the plaintiffs (including entitlement to deprive the defendants of any profit they have or would have made) are exactly the same as those that would be available if Mr. McAteer were to be viewed as a fiduciary. If, on the other hand, and contrary to my view, this is a case of presumed undue influence then breach of fiduciary duty does not, in my opinion, arise.

**NEGLIGENCE**

[86] My findings of fact also mean that Mr. McAteer was guilty of breach of his duty of care to the plaintiffs. His duty was to act in the plaintiffs' interests and not in his own and in this he failed. Having said this I do not intend to deal further with this cause of action at this stage as the plaintiffs' remedy under this heading may be subsumed by the relief to which they are entitled on foot of my finding of undue influence.

**NO CASE TO ANSWER**

[87] At the end of the plaintiffs' evidence Mr. McAteer applied for a direction that the defendants had no case to answer. I rejected the application and said that I would explain in this judgment.

[88] In my opinion it is readily apparent from the description of the evidence adduced on the plaintiffs' behalf and set out above that, taken at its height, a

reasonable tribunal of fact properly directed could find in the plaintiffs' favour, as I have, in fact, done.

**TWO PLAINTIFFS**

[89] Mr. McAteer pointed out that in none of the authorities opened to the court had there been more than one person who had allegedly been the subject of undue influence.

[90] While I accept that, on the face of it, it is inherently more unlikely that two people will be unduly influenced than one, there does not seem to me to be any reason in principle why two or more people cannot succeed in establishing this cause of action: it is, at the end of the day, a question of fact.

[91] Although it is not surprising that two partners in a business should develop a similar attitude to one of their advisers, I have borne Mr. McAteer's point in mind and I have carefully considered the case made by and against each of the plaintiffs separately. Although I do not think that the factors on which I have based my finding of undue influence operated on both plaintiffs in quite the same way (for example, I believe that Anoop was somewhat more dependent on Mr. McAteer than Sanjeev and Sanjeev was more influenced by the representations) I have, nevertheless, been persuaded that both were unduly influenced.

**ELECTION**

[92] This issue arose in two ways:

(a) In the course of the trial Mr. McAteer referred to a letter of 24 June 2003 from the plaintiffs' then solicitors to the defendants' then solicitors which sought to rely on a covenant in the lease which requires the lessor to insure the premises. Mr. McAteer pointed out, correctly, that this was inconsistent with the plaintiffs' claim that the lease was null and void. This seemed to me to raise the issue that the plaintiffs had elected to affirm the transaction.

The plaintiffs' solicitors' letter was written approximately four months after the proceedings were commenced. Apart from the letter, there is nothing to indicate that at the time it was sent to the plaintiffs or either of them had decided to abandon their claim to have the sale and leaseback agreement struck down. Furthermore, the plaintiffs' solicitors do not appear to have appreciated the potential significance of the letter. On 2nd July 2003 the defendants' then solicitors replied asking: "Is there a Lease by which [the plaintiffs] are bound or is there not?". The plaintiffs' solicitors did not reply. Instead, they delivered the Statement of Claim on 10th July 2003.

In my opinion the purported reliance on the provision in the lease was an error which did not constitute or signal a decision on the part of the plaintiffs to affirm the sale and leaseback transaction.

(b) Subsequent to the agreement the plaintiffs threatened to cease supplying Guinness products in the Roebuck Inn on the basis that they had no tie with Guinness in respect of that pub. This, according to the defendants, implied reliance on the sale and leaseback agreement which had, in effect, transferred the tie from the plaintiffs to the defendants.

In my judgment the threat did no more than recognise the reality that at the material time the plaintiffs no longer had a contractual relationship with Diageo. It seems to me to be impossible to extrapolate from it that the plaintiffs were somehow electing to waive their right against the defendants to rescission of the agreement.

**MAXIMS OF EQUITY**

[93] It was argued on the defendants' behalf that they were entitled to rely on a number of maxims of equity in defence of the plaintiffs' claim of undue influence. In my view they have no application to a case of actual undue influence as in such a case the plaintiff is entitled as of right to have the transaction set aside and, in any event, they seem to me to relate to relief rather than the substantive issues. However, in case I am wrong I record my views on them below. The maxims referred to were as follows:

(a) He who seeks equity must do equity.

It was argued that at any time during the five year option period the plaintiffs could have paid £500,000 to the defendants and received the Roebuck Inn back. The plaintiffs having accepted that there was some interest payable on the money, the only issue was the rate of interest. The plaintiffs have come to court to renegotiate the interest rate.

Implicit in this argument is the assertion that the plaintiffs ought to have been prepared to "do equity" by affirming the sale and leaseback by exercising the option conferred by it, a proposition that is patently absurd. Furthermore, I do not understand the plaintiffs to have accepted that "some interest" was payable on the £500,000: rather their position is that having had the benefit of the £500,000 they are prepared to make a payment in respect of its cost, which I view as perfectly proper. Accordingly, the maxim has no application.

(b) He who comes to equity must come with clean hands.

It was argued that the plaintiffs are motivated by a desire for revenge. I do not agree. In my judgment they are understandably angry about their treatment at the

hands of Mr. McAteer who misled them and used his influence over them to procure an arrangement which was favourable to him and disadvantageous to them.

It was further argued that the maxim should be applied on a number of grounds relating to other proceedings brought by the plaintiffs against Mr. McAteer and misconduct by the plaintiffs in relation to aspects of the instant case including delay causing damage to the defendants, the withholding of documents, submitting false accounts, misrepresenting that documents had been destroyed and the giving of false evidence. The defendants also relied on the matters I have already discussed under the heading of election.

Much of the material relied on is irrelevant to or remote from the issues in this case. Some of it involves case management issues which ought to have been raised and dealt with on an interlocutory basis and which I was not prepared to entertain in the course of the plenary trial. Furthermore, I do not believe that the plaintiffs gave false evidence on any material issue.

In my view this maxim has no application.

(c) Equity Looks at the Intent Rather Than the Form.

One of the aspects of this case which I found puzzling was Mr. McAteer's position in relation to whether the deal was what it appeared to be on the face of the legal documents or whether it was, in essence, a loan. This seemed to me to be an important question because if he viewed it purely as a sale and leaseback this would have meant that in the event of default by the plaintiffs in lawfully exercising their buy back option the defendant would have ended up with an asset which Mr. McAteer accepted was worth of the order of £680,000 in August 2001 for £500,000.

I understood this to have been resolved when, in the course of his evidence, Mr. McAteer said not once but twice that the transaction was not a real sale and purchase of the Roebuck Inn.

However, in his written submissions and under this heading Mr. McAteer said the following:

> "The transaction is a 'sale and leaseback' agreement. This is what was intended and this is what the documents show. Mr. Maxwell for the plaintiffs has tried to argue that the substance of the transaction was that this was a loan rather than a 'sale and leaseback'.
>
> …The transaction was a 'sale and leaseback', a common tool used by businesses that are asset rich but that require cash."

I cannot reconcile these passages with Mr. McAteer's oral evidence. I do not attach a great deal of significance to the possibility of a windfall to the defendants in the event of default of the plaintiffs (I accept Mr. Nicholl's evidence that this was highly unlikely to occur). However, the discrepancy seems to me to be a stark illustration of Mr. McAteer being prepared to say whatever he thought suited his case rather than tell the truth.

The maxim has no application to this case.

(d) Delay Defeats Equity

The defendants' argument in relation to this maxim is really only a repetition of part of their "clean hands" argument. The delay complained of against the plaintiffs is not in bringing but in prosecuting the claim which, in my opinion, is not within the scope of the maxim and, if the plaintiffs were indeed in delay, fell to be dealt with by the defendants utilising the machinery available to them at the interlocutory stage.

**THE STRENGTH OF THE EVIDENCE**

[94] Mr. McAteer understandably relied on the remarks of Lord Nicholls in Re H (Minors) [1996] AC 563 pages 585-7 to the effect that the more improbable the event the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established and that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability: "Fraud is usually less likely than negligence."

[95] What seemed to me to be crucial in this case was the performance in the witness box of the parties who gave evidence. The plaintiffs were not always entirely accurate: for example, Sanjeev had to correct his statement that he had first heard of the obligation to buy the Roebuck Inn back at the time of the signing of the memorandum of sale. But on the major issues I formed the clear belief that they were telling the truth and that their evidence was substantially correct.

[96] In contrast, I concluded that Mr. McAteer was not a truthful witness, particularly on the vital issues of the degree of influence he enjoyed over the plaintiffs and as to whether he caused them to agree to the sale and leaseback by deliberately misleading them.

[97] I was heavily influenced in my assessment of Mr. McAteer by watching and listening to him when he was in the witness box. He is obviously highly intelligent and extremely articulate and I was struck by the power of his personality. It was easy to imagine how the plaintiffs would have been impressed by his energy and

expertise. Although neither is stupid or inexperienced both plaintiffs clearly lacked what Mr. McAteer appeared to provide.

[98] But there are other aspects of Mr. McAteer's personality: he also presented as cunning, dogmatic, obsessive and ruthless. It does not, of course, necessarily follow from these characteristics that Mr. McAteer was dishonest in giving his evidence, but to my mind my assessment of him is entirely consistent with his taking control of the plaintiffs' relationship with the Bank of Ireland and their becoming dependent on him in that respect and with him misleading the plaintiffs for his own advantage.

[99] Apart from the fact that I found Mr. McAteer generally unconvincing in his refutation of the material allegations made by the plaintiffs, there was one aspect of his evidence, in particular, which seemed to me to exemplify his preparedness to dissemble when it suited him. This was his denial that he was the plaintiffs' financial adviser. This was not a matter of opinion but of fact. Mr. McAteer could not have seen himself in any other light by the summer of 2001. I think that he lied on this important issue because he believed that if he conceded the existence of the relationship it would make it impossible for him to justify both his failure to examine options other than the sale and leaseback on the plaintiffs' behalf and to ensure that they received independent financial advice. He had to pretend to me that at the material time he could reasonably have been viewed as just another businessman suggesting a transaction at arm's length. This was patently untrue, and the fact that Mr. McAteer was prepared to assert it seems to me strongly to indicate that he was not telling the truth about the other material aspects of the case which were in dispute.

[100] To these observations, I would add the following matters (which are not exhaustive): Mr. McAteer's lack of candour as to the loan from Roe Developments Limited; his untruthful denial that he was aware that the Roebuck Inn secured his practice account; the vague and evasive nature of his evidence in relation to many of the events between 8 August 2001 and the completion of the deal; and his preparedness to say whatever suited him illustrated by the conflict between his evidence and written submission as to the true nature of the transaction.

**RELIEF**

[101] I will hear the parties as to remedies.