Neutral Citation No. [2011] IEHC 376

THE HIGH COURT

2008 10559 P

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

BRIAN JOHNSTON, PRACTISING UNDER THE STYLE AND TITLE OF BRIAN JOHNSTON & CO. SOLICITORS

DEFENDANT

AND

JOSEPH TRAYNOR & SEAMUS MALLON

THIRD PARTIES

JUDGMENT of Mr. Justice Clarke delivered on the 22nd September, 2011

1. Introduction

1.1 There have already been two substantive judgments in these proceedings. In the first, *ACC Bank PLC v. Johnston* [2010] IEHC 236 ("the main judgment"), I reached certain conclusions concerning the liability of the defendant ("Mr. Johnston") to the plaintiff ("ACC"). In the second, *ACC Bank PLC v. Johnston* [2011] IEHC 108 ("the third party judgment"), I dealt with the liability issues which arose between Mr. Johnston and the second named third party ("Mr. Mallon"). Judgment in default against the first named third party ("Mr. Traynor") had already been given. As indicated in both of the those earlier judgments questions concerning the quantification of the damages to which ACC might be entitled against Mr. Johnston and the damages in respect of which Mr. Johnston might be entitled to an indemnity or contribution from Mr. Mallon (and, indeed, Mr. Traynor) were left over to a further hearing. That further hearing has now taken place and this judgment is directed to those damages questions.

1.2 In addition, and in the context of an issue which arose in the course of that damages hearing, an application was, subsequent to the conclusion of the hearing, brought by Mr. Mallon in which he sought leave to amend his defence to the third party claim brought against him by Mr. Johnston. This judgment also deals with that latter issue.

1.3 As some of the issues which arise both in the context of the damages hearing and the motion to amend have, as their background, aspects of the procedural history of this case, I propose to set out the relevant aspects of that history insofar as same are not already recorded in either of the two judgments to which I have referred.

2. Procedural History

2.1 First, it is important to note the history of the involvement of Mr. Mallon in these proceedings generally. The proceedings as and between ACC and Mr. Johnston had progressed to a reasonable extent before any application to join Mr. Traynor and Mr. Mallon as third parties was made and, in particular, before Mr. Mallon was served with the third party proceedings. The following table sets out the relevant sequence of events including a brief description of the orders made by the court as the case, both as and between ACC and Mr. Johnston and between Mr. Johnston and Mr. Traynor and Mr. Mallon, progressed.

TABLE

A. On the 30th March, 2009, the proceedings were admitted into the commercial list and the usual case management orders were made.

B. The matter was then in for mention on the 29th April, 2009, where matters such as discovery were dealt with.

C. On the 15th June, 2009, an application to join the third parties was granted by Finlay Geoghegan J. The order made included a provision that:-

"in the event of their entering appearance (sic) and delivering a Defence as aforesaid the Third Parties be at liberty to appear at the trial of this action and to take such part therein as the trial Judge shall direct and be bound by the result of the trial and that the question of the liability herein of the Third Parties to make contribution to or indemnify the Defendant be tried at or after the trial of this action as the Judge shall direct or in the event of a compromise of said action as the Judge dealing with same shall direct".

D. By an order dated the 29th June, 2009, the time to serve the Third Party notices was extended.

E. On the 13th July, 2009, Mr. Johnston was granted liberty to amend his defence and ACC was ordered to make discovery under a number of categories. In addition, Mr. Johnston was granted additional time to serve the third party notice on Mr. Mallon.

F. On the 20th July, 2009, an order for discovery was made against Mr. Johnston. On the same date orders regarding the delivery of witness statements and legal submissions were also made. In passing I should note that Mr. Mallon was not served with the third party notice until 20th July. The pre-trial directions given on that day

related solely to the proceedings between ACC and Mr. Johnston.

G. On the 27th July, 2009, Mr. Johnston was granted liberty to issue a notice of motion seeking judgment in default of appearance against both of the third parties. The order also directed:-

"that the Third Party issue be tried at the trial of this action or in the event of a compromise of said action as the Judge dealing with same shall direct and that the said question be set down by the Defendant for trial accordingly".

H. On the 13th October, 2009, Mr. Mallon was directed *inter alia* to deliver a defence within two weeks. It was also ordered that judgment would be entered against Mr. Traynor in default of his entry of an appearance and a defence by a specified date.

I. On the 3rd November, 2009, ACC secured further time to comply with the order directing it to furnish certain expert reports and witness statements.

J. At this hearing, on the 30th November, 2009, after a number of previous delays, the trial was provisionally fixed for hearing on the 2nd February, 2010. The trial (which was only in relation to the issues arising between ACC and Mr. Johnston) went ahead on that and the succeeding days.

K. The main judgment was delivered on the 1st June, 2010.

L. On the 7th July, 2010, Mr. Mallon was granted leave to issue and serve a motion regarding the hearing of a preliminary issue and the issue of an amended defence.

M. Mr. Mallon was then granted liberty to file that amended defence on the 19th July, 2010.

N. Between the 27th July, 2010, and the 19th November, 2010, orders were made regarding, *inter alia*, the delivery of discovery requests and replies, witness statements and amendments to pleadings. All of these orders were in the context of the third party issues.

O. On the 4th March, 2011, it was ordered (as a result of the third party judgment) that Mr. Johnston is entitled to a contribution or indemnity from Mr. Mallon, with the amount to be determined at a subsequent hearing.

2.2 As can be seen from that table, the order made by Finlay Geoghegan J. when joining Mr. Traynor and Mr. Mallon as third parties was in a form usually adopted in making such orders. That order was to the effect that Mr. Traynor and Mr. Mallon would be entitled to participate (as the trial judge might direct) in the case as and between ACC and Mr. Johnston and be "bound by the result of the trial". The reason, of course, why such an order is made in the ordinary course of events is that the underlying basis for the claim against a third party will normally stem from findings which the court makes as and between the plaintiff and the defendant. It is clearly highly undesirable that any of those issues have to be revisited. Thus, the third party is entitled to participate where appropriate in the hearing between the plaintiff and the defendant precisely because the third party may become bound by findings made at that hearing which may have an adverse effect on the determination of questions which might arise between the defendant and the third party.

2.3 Thus, even where the main issues which arise between the defendant and the third party are not to be tried at the same time as the issues which arise between the plaintiff and the defendant, the third party will still be entitled to appear at the trial of the issues between the plaintiff and the defendant and will be entitled to intervene at least to the extent that it may be necessary to protect the third party's interests.

2.4 It does have to be said that none of the subsequent orders of the court made in the course of case management appear to have discharged the original order of Finlay Geoghegan J. concerning the involvement of Mr. Mallon in the issues between ACC and Mr. Johnston. In passing it should be noted that, given that Mr. Traynor allowed judgment to be given against him at an early stage, it is not surprising that he took no further part in the proceedings.

2.5 On the other hand it does appear that it was accepted in the course of case management that the third party issues which arose between Mr. Johnston and Mr. Mallon would not be tried at the same time as the issues which arose in the main proceedings between ACC and Mr. Johnston although no formal order of the court records this. It seems that this occurred because the third party issues were somewhat delayed in being ready for trial and the view was taken that it would be unfair to ACC to postpone the trial of its claim against Mr. Johnston simply because the third party issues were not ready for trial.

2.6 It is, of course, possible for litigation involving a third party to be progressed with a split trial involving, initially, a trial of the issues which arise between the plaintiff and the defendant followed by a separate trial involving the issues which arise between the defendant and the third party, but in circumstances where the third party is entitled to become involved in the first trial so as to protect its interests against any findings which might adversely affect the way in which the third party trial might subsequently be conducted. The record does not suggest that any consideration was given by the parties as to the precise consequences for the involvement of Mr. Mallon in the proceedings of it being agreed or accepted that there was to be a split trial between, on the one hand, the issues which arose between the plaintiff and defendant and, on the other hand, the issues which arose between the defendant and the third party. At the trial of the issues between ACC and Mr. Johnston it was intimated that a watching brief (but not more) was being held on behalf of Mr. Mallon. In the context of the original order of Finlay Geoghegan J., the absence of any order discharging that original order, but also in the context of the way in which the trial ultimately progressed, there are questions as to the extent to which Mr. Mallon can properly be said to be bound by any findings made at the hearing between ACC and Mr. Johnston. That is an issue to which it will be necessary to return.

2.7 In any event, it is clear that the third party issue, so far as Mr. Mallon is concerned, was only truly reactivated when Mr. Mallon brought an application before the court in July, 2010 seeking directions as to how the trial involving the issues against him should progress. While Mr. Mallon sought the trial of a preliminary issue involving, as an initial issue, a quite narrow question, I took the view, and so ordered, that all liability issues between Mr. Johnston and Mr. Mallon should be tried first with all questions of quantum to be left over. That ruling was made in the context of the fact that I had, for the reasons set out in the main judgment, decided not to rule on quantum as and between ACC and Mr. Johnston at that time but had also left over those issues of quantum to a further trial. Thus, the intention was that liability issues between Mr. Johnston and Mr. Mallon would be dealt with at a second trial (an eventuality which occurred) and that all issues of quantum, whether as between ACC and Mr. Johnston and, as a matter of indemnity or contribution, between Mr. Johnston and Mr. Mallon, would be dealt with at a third trial. This judgment follows on from that third trial

which, at least in general terms, occurred as anticipated.

2.8 It also needs to be noted that it was not the original intention of the parties, or the court, that the trial between ACC and Mr. Johnston would be split into a liability module followed by a quantum module. The case closed on the basis that both sides had made whatever arguments and presented whatever evidence or materials they wished both in relation to liability and quantum. For the reasons set out in the main judgment, I came to the view that further matters needed, in the interests of justice, to be gone into in order to reach a just decision on the question of quantum. However, if I had not taken that view then it is clear that the only arguments that would have been considered in determining quantum as and between ACC and Mr. Johnston were those arguments which were put up by the parties at that original hearing. To the extent that it might be said that the position of, in particular, Mr. Johnston has now changed, then that change of position does need to be seen in the context of the fact that Mr. Johnston was on risk that a judgment on quantum would have been made against him without reference to any arguments which he did not choose to put forward at the original hearing. It would, of course, have been very different had the plan all along been to have a modular trial with liability separated out from quantum.

2.9 Finally, it does need to be noted that, in the run-up to the quantum hearing, there were a number of applications to the court during which there was some discussion as to the issues which legitimately remained for determination. Much of the debate between the parties centred on a contention that materials contained in the witness statements filed related to questions which went beyond the scope of the issues which were legitimately before the court. In addition, discovery was sought on behalf of Mr. Mallon which again raised questions as to the issues that remained for trial, for the relevance of any documentation sought was necessarily connected to those issues. At one stage it was intimated on behalf of Mr. Johnston that an application might be made to seek to re-open some of the findings of fact contained in the main judgment, which concerned the credibility of Mr. Johnston and certain of ACC's witnesses, on the basis of what was said to be new evidence, which had come to Mr. Johnston's attention as a result of materials emanating from Mr. Mallon's side, in the context of those pre-trial applications. However, in the end no such application was brought.

2.10 In that context it was clear that Mr. Johnston accepted that the findings in the main judgment and in the third party judgment stood for the purposes of the quantum hearing.

2.11 The question of whether, and if so to what extent, it was open to Mr. Mallon to suggest that ACC had been guilty of negligence in their lending to Mr. Tiernan also arose in the context of those hearings. A lengthy document had been prepared on behalf of Mr. Mallon setting out in some detail the issues which Mr. Mallon wished to pursue at the quantum hearing. However, at the quantum hearing, and having heard counsel on all sides, I ruled that questions concerning any allegation of negligence on the part of ACC were not properly before the court. Mr. Johnston had not pleaded any contributory negligence on the part of ACC in the course of the pleadings which led up to the hearing which gave rise the main judgment. No question of contributory negligence on the part of ACC was, therefore, raised at that hearing and it would have been totally inappropriate, judgment having been delivered on all issues of liability, in the absence of extraordinary circumstances, to allow Mr. Johnston to revisit the question of contributory negligence. In fairness Mr. Johnston did not seek so to do.

2.12 In addition, Mr. Mallon had not alleged in his third party defence (even though that defence went through a number of variations) that Mr. Johnston had failed to properly defend the action against ACC by failing to include any allegation of contributory negligence. Thus I concluded, and so ruled, that the question of contributory negligence (or any like allegation) against ACC (or against Mr. Johnston for failing to raise the matter against ACC) was not before the court on the basis that, even taking a generous view of the pleadings, no such matter was raised. I, therefore, ruled out that issue as a matter for consideration at the quantum hearing. However, counsel for Mr. Mallon intimated that he had, in those circumstances, instructions to seek to further amend his third party defence in the light of that ruling. In those circumstances I indicated that the proper course of action to follow was to complete the hearing on the basis of the existing pleadings but to afford Mr. Mallon an opportunity to bring an application to amend so as to raise such issues should he so wish. The motion to amend, which is also the subject of this judgment and to which earlier reference has been made, arises in that context.

2.13 Against the background of that procedural history it is next necessary to turn to ACC's claim.

3. ACC's Claim

3.1 The starting point for considering ACC's claim has to be the difficulties which I faced at the time of delivering the main judgment. It is unnecessary to revisit the precise questions which caused those difficulties on that occasion. Suffice it to say that I was not satisfied that the basis put forward by ACC for claiming any consequential damage arising out of its lending to Mr. Tiernan was the proper basis for calculating damages for negligence against Mr. Johnston.

3.2 However, at the damages hearing, ACC reformulated its claim. Before going into the figures it is necessary to say something about the evidence tendered on behalf of ACC as to how its lending business at the relevant time was carried out.

3.3 The evidence established (and indeed it was not seriously challenged) that ACC's lending was principally funded by advances made to it by its parent, Rabobank Ireland plc ("Rabobank"). The evidence also established that, at the relevant time, ACC did not use up all of the potential lending which was available to it from Rabobank. Likewise, the evidence established that ACC did not have specific allocations for particular sectors of the lending market. In addition, while there was necessarily a close correlation between the amount of lending done by ACC (other than such lending as it could fund from within its own resources) and funds advanced to it by Rabobank, there was not a one to one relationship between each individual loan which ACC might make and each individual advance that might be made to ACC by Rabobank. Rather, general funding was made available frequently but not necessarily on a day to day basis, to enable ACC to meet any lending obligations which it had undertaken.

3.4 It follows that it is not possible to identify precisely which advance from Rabobank enabled the lending to Mr. Tiernan to take place. It is, however, possible to say in general terms that the lending to Mr. Tiernan was financed by funds made available by Rabobank. In addition, because ACC did not use up its maximum allocation at the relevant time, it follows that the only practical consequence of it lending to Mr. Tiernan was that it drew down an equivalent sum from Rabobank. If ACC had not lent the relevant monies to Mr. Tiernan then it would not have lent them to anyone else and simply would not have drawn them down from Rabobank. This latter point is copper fastened by the fact that ACC did not have sector by sector lending allocations. Had there been such sectoral allocations then it might, of course, have been possible that the overall amount lent to the land and construction sector (of which Mr. Tiernan's loan formed part) had been used up even if the overall amounts available to ACC in other sectors were not. However, on the evidence no such situation occurred.

3.5 Therefore, on the facts, it seems clear on the evidence that, had ACC not lent the relevant monies to Mr. Tiernan, it simply would not have drawn down an equivalent sum of monies from Rabobank and would not, as a consequence, have been liable to pay the cost

of funds, relating to that sum, to Rabobank.

3.6 On that basis ACC says that the amount to which it is entitled from Mr. Johnston is the amount advanced to Mr. Tiernan together with such cost of funds less any amounts recovered or recoverable in respect of the loans. That amount is calculated as follows:-

TABLE

A. The total amount lent to Mr. Tiernan under the four relevant loans was €8,846,000. As at the 15th September, 2010, the total principle amount outstanding was €7,599,000. The cost of funds applicable is €1,021,460 which is based on the 3-month EURIBOR cost of funds and is calculated from the date of respective drawdown to 15th September, 2010. The estimated amount recoverable is €135,000. The evidence tendered by ACC was that the only realisable security that could be attributed to the relevant loans is a property at The Saltings, Blackrock, County Louth, which is valued at €150,000. A discount of 10% was applied to cover the likely recovery costs involved in realising this security. The total claimed is accordingly €8,620,460 less €135,000 or simply €8,485,460.

B. This figure may be contrasted with the total figure from a calculation based on the situation of a hypothetical surrogate borrower to whom ACC might have lent the monies were they not advanced to Mr. Tiernan. In such a scenario using the figure of €10,865,779.35 as a starting point, as it was the sum due on 15th September, 2010, in respect of the four loans advanced under the four letters of sanction which listed the lands at Castlewarden as the intended security, a discount must be then applied to reflect the average actual performance of 2006 new business. Here a discount of 10.38% is applicable resulting in the value of such a borrower to ACC of €9,737,911. The discount is based on a weighted average of all loans for, as already pointed out, there were no sectoral limits in ACC's lending so that money not advanced in one sector could, in theory, be lent in any other sector. The difference between the total said to be due in September, 2010 under respectively the calculations set out at A and B can principally be attributed to the difference between the cost of funds and the interest actually charged to Mr. Tiernan.

3.7 Some aspects of that calculation need a little comment. First, there is the question of the interest paid by ACC to Rabobank for the cost of funds. At the level of principle, it seems to me that the cost of funds is an appropriate starting basis for calculating the loss sustained by a bank on foot of a loan where the conclusion of the court is that, but for wrongdoing, the loan would not have been made. There may, of course, be cases where a bank will seek to establish that its losses are greater than the cost of funds. Where the reasonable inference is that the bank could, but for the loan in question, have made the funds available to another borrower, then some appropriate measure of the return which the bank might have achieved by alternative lending may be appropriate. Indeed, as noted earlier, ACC put forward evidence of its average return on funds advanced at the relevant time or more accurately the deduction which needed to be made from the amounts due from a borrower to reflect the average lack of full performance of a typical loan. That evidence suggested that, across the range of lending in which it was engaged, ACC did achieve a return greater than the cost of funds. The figure of €9,737,911 derived from that calculation is greater than the figure derived from the cost of funds calculation. However, given that all of the evidence suggested that, in the absence of lending to Mr. Tiernan, the monies would not have been lent to any other party, it does not seem that there is any basis for suggesting that ACC was at the loss of any return which might have been achieved on those sums. If there were other good lending opportunities out there then ACC would have availed of them from the additional funds which were, undoubtedly, available from Rabobank.

3.8 However, some care needs to be exercised where the cost of funds of a lending institution amounts to payments which that lending institution must make to a connected company (such as, in this case, its parent). The mere fact that a lending institution agrees, as a matter of internal accounting, to pay a particular interest rate for funds used in its lending business, does not automatically mean that that cost of funds is the appropriate rate to use in calculating losses. If the rate charged internally between two connected entities within a banking group was artificially high, then it might well mean that the rate concerned should not be used for the purposes of calculating damages. However, I am satisfied on the facts of this case that the rate used was reasonable. Indeed the evidence tendered (to which reference has already been made) which demonstrated that ACC was making a reasonable return on monies lent at the relevant time such as would have comfortably covered the cost of funds and left ACC with a respectable profit, confirms that the rate used was realistic. I am, therefore, satisfied that it is appropriate to utilise the cost of funds suggested by ACC in the calculations.

3.9 As pointed out earlier, ACC did not receive funding specifically earmarked for each individual loan which it gave out but rather received blanket funding on a regular basis to enable it to meet its lending obligations. It is not, therefore, possible to specify with absolute precision which loans and which terms applying as and between Rabobank and ACC are necessarily attributable to Mr. Tiernan's borrowings. However, I am again satisfied on the evidence that the way in which ACC has approached that question in its calculations is reasonable. The evidence suggested that the funds were re-priced on a three month basis. It follows that the EURIBOR three month rate is appropriate.

3.10 In all the circumstances I am, therefore, satisfied that the calculation set out above does represent the total cost to ACC of having made the loans to Mr. Tiernan. There are, however, a number of bases on which both Mr. Johnston and Mr. Mallon argue that that sum is not the appropriate basis for awarding damages. It is, therefore, next appropriate to turn to the case made by respectively Mr. Johnston and Mr. Mallon.

4. The Case made by Mr. Johnston and Mr. Mallon

4.1 Mr. Johnston argues that there is no causal connection, sufficient to warrant an award of damages, between any losses suffered by ACC in its lending transactions with Mr. Tiernan and any wrongdoing found against Mr. Johnston in the main judgment. The facts relied on are those found in the main judgment and in the third party judgment. There are real questions as to the extent to which it is now open to Mr. Johnston to raise those questions.

4.2 First, it is undoubtedly the case that an argument along the lines of that now advanced was not put forward at the hearing which led to the main judgment. As pointed out earlier that hearing concluded on the basis that all arguments both as to liability and quantum had been advanced. No suggestion was made on behalf of Mr. Johnston during that hearing that there was an absence of causation between any losses which might have accrued to ACC and any wrongdoing which might be established against Mr. Johnston. In addition, it is clear that a significant part of the basis on which Mr. Johnston succeeded in the third party judgment against Mr. Mallon was an argument (which I accepted) to the effect that Mr. Johnston and Mr. Mallon were joint tortfeasors such that Mr. Mallon was, at the level of principle, exposed to a potential order for contribution or indemnity. On the basis of that finding

which was, after all, made at the urging of Mr. Johnston, there may be a difficulty with now holding that Mr. Johnston was not causally linked to any damage at all. The finding concerned was based on a determination that both Mr. Johnston and Mr. Mallon were responsible for the same damage.

4.3 I will turn, therefore, in due course to the questions raised under this heading which involve both questions as to whether it is open to Mr. Johnston to now raise the issue and, if it be so appropriate, the merits of the issue itself.

4.4 Second, Mr. Johnston supports the case made by Mr. Mallon which was to the effect that ACC had failed to mitigate its damages. That is a further issue to which it will be necessary to turn.

4.5 Third, evidence was tendered on behalf of Mr. Mallon which concerned the value of the loan made by ACC to Mr. Tiernan. While it will be necessary to go into the figures in some more detail in due course, in essence the evidence suggested that the lands in respect of which the loan to Mr. Tiernan was made were worth only a fraction of the loan itself (less than half) and were, indeed, significantly less valuable than the monies contracted to be paid for them by Mr. Tiernan. It will be recalled that it became clear in the course of the evidence leading to both the main judgment and the third party judgment that a doctored version of the front page of a standard Law Society Conveyancing Contract was produced both to Mr. Johnston and ACC. The doctored version suggested that the purchase price was €7m. Further evidence was led at this damages hearing from the solicitor who acted on behalf of the vendor to Mr. Tiernan which makes it clear that the true agreed contract price was €4.6m (on the basis of the evidence then available an impression was created at the hearing leading to the main judgment that the sum may have been €4m, although nothing turned on the precise figure). The evidence presented at this hearing suggests that the true value of the lands may well have been below €3.5m.

4.6 On that basis argument is made by Mr. Mallon to the effect that the loan given by ACC to Mr. Tiernan was a bad loan in the sense that it was a loan which was unlikely to be fully repaid. It should be recalled at this stage that the amendment sought by Mr. Mallon to his defence to the third party claim against him, seeks to allow him to raise a defence based on a contention that Mr. Johnston ought to have pleaded in his defence against ACC an allegation that ACC were guilty of negligence in making the loan. On that basis it is sought on behalf of Mr. Mallon to argue that Mr. Johnston was in turn negligent in failing to make that case. I will deal with the amendment application in due course. Suffice it to say that at this stage no such allegation is within the pleadings in the case.

4.7 However, the case made at this damages hearing was somewhat different. It is said that the loan made by ACC to Mr. Tiernan was, in fact, a bad loan (whether deriving from negligence on the part of ACC or otherwise not being relevant for the purposes of this argument). Mr. Mallon is not a defendant to these proceedings. While, for the reasons set out in the third party judgment, I came to the view that Mr. Mallon was, unfortunately, responsible for the wrongful actions of Mr. Traynor, likewise Mr. Traynor is not a defendant in these proceedings. ACC has no direct claim against either Mr. Traynor or Mr. Mallon. It follows that the only potential liability which Mr. Mallon may have is in respect of a claim for contribution or indemnity arises out of whatever damages might be awarded against Mr. Johnston on foot of the negligence found against him in the main judgment. The negligence found against Mr. Johnston was, of course, in allowing the money the subject of the relevant loans to be handed over without having ensured that security was in place. On that basis Mr. Mallon's argument is that the maximum extent of the damages which could reasonably be attributed to Mr. Johnston is the value which the loan would have had had it been secured. ACC's counter argument is that, given that I have found this to be a so called "no transaction" case, for the reasons set out in the main judgment, it follows that ACC is entitled to have its damages calculated on the basis of determining its losses attributable to having entered into any transaction at all. There is, therefore, a legal question as to the proper approach to damages in a case such as this to which it will be necessary to turn. However, as there is also a factual element to Mr. Mallon's argument, I propose to turn to the facts relevant to the value of what a secured loan might have been.

5. What Value would a Secured Loan have had?

5.1 The starting point has to be to recall the sequence of events leading up to the handing over of monies from ACC to Mr. Traynor in his capacity as solicitor for Mr. Tiernan. ACC had, in its internal documents, recorded that the lands which were the subject matter of the loan (and over which security was to be given in favour of ACC) had development potential. This led to the lands being described in the relevant loan facility letters as "103 acres of land (zoned residential/amenity) located at Castlewarden, Naas, Co. Kildare". That description is undoubtedly inaccurate. A planning expert, Mr. Barry McGann of Fahy Fitzpartick Consulting Engineers, was called on behalf of Mr. Mallon who produced copies of the files documenting the entire planning history of the lands.

5.2 The evidence before the court was that ACC relied on a valuation to the effect that the lands were worth approximately €7,000,000. It is worth noting that the valuer in question, Mr. Arthur Connell Nugent of E. P. Nugent Ltd., although on a list of approved valuers held by ACC, was nevertheless chosen by Mr. Tiernan. The valuation described the lands in the following terms:-

> "Although presently in agricultural use, these lands must have potential for future high density residential development use. They are presently zoned as strategic land reserve in the County Development Plan. This means that development will be permitted once services and infrastructure are in place."

5.3 It was, at least in part, on foot of this valuation that ACC internally recorded the lands as "zoned residential/amenity" and the suggestion that there was developmental potential entered the frame. This description is undoubtedly inaccurate. It was contended that the valuer had failed to take into account the full planning history of the lands in coming to his valuation. Indeed his single page valuation made no mention of the planning history of the lands. This was a glaring omission in light of a significant number of failed attempts to secure planning permission which were revealed by that documentation.

5.4 The Castlewarden lands straddle the counties of South Dublin and Kildare, with approximately one quarter in the former and the remainder in the latter county. While the portion within South Dublin, according to the South Dublin County Council Planning Section, has never been the subject of a planning permission application, the portion within Kildare, again according to the Kildare County Council Planning Offices, has been the subject of no less than 15 applications. These applications were for various single bungalow-type dwellings, and could in no way be taken to constitute high density residential development. In summary, one application was granted permission, six were withdrawn and the final eight were refused permission following third party appeals to An Bord Pleanála. The primary reasons for refusal of the various applications are fivefold, namely that: the development would be excessive in a rural area; it would lead to demands for the uneconomic provision of public services and communal facilities; the lands are zoned agricultural and their development would be contrary to a landscape resource of the county; development would impinge on views of natural beauty and interest which are identified in the Council Development Plan; and development of the land would generate additional traffic on a national primary route where junctions are hazardous and any additional turning movements caused by the development would interfere with the safety and free flow of traffic on the N7. In this light, it would be difficult to even attempt to disagree with the expert view tendered which was to the effect that any development potential for lands with such an adverse planning history was remote in the extreme.

5.5 There was a suggestion that, perhaps, planning permission for one or two isolated houses on individual sites might have been secured. However, the extent to which such a planning permission would have enhanced the value of the lands would have been relatively small and even securing that type of planning permission was a long way short of likely given the planning history. No explanation was tendered as to how it was that ACC, in its internal documentation and in the letters of loan sanction, appeared to accept whatever assurance was given to it as to the planning potential of the lands. It may be that this was just yet another example of the sloppy way in which monies were handed out during the boom years of the Celtic Tiger. Be that as it may there is no basis, in my view, for any suggestion that these lands had development potential anytime soon, such as would have given a significant uplift to the current value of the lands. Even a "hope value" which sometimes attaches to lands where there may be a prospect of rezoning or other changes in planning rules which might ultimately benefit the lands would, in the circumstances of this case, have been based on a "hope" remote in time and could only have had a very marginal effect on value.

5.6 Likewise, there was little dispute between the professional valuers as to the agricultural value of the lands. While the experts called on behalf of ACC had not specifically valued the lands in question (their evidence was directed towards other lands which Mr. Tiernan owned in the context of the failure to mitigate argument), there seemed to be broad agreement as to the upper limits, at the relevant time, of the value of agricultural land in the area.

5.7 Taking into account the potential for one or two sites but also discounting that potential for the fact that it might well have been some considerable period of time before any planning permission in respect of such sites could have been achieved, I have come to the view that the value of the lands at the relevant time (that is when the loan was made) was of the order of €3.3 to €3.5m. This sum needs to be contrasted with the contract price of €4.6m and the price which ACC believed (along with Mr. Johnston) was the true price of €7m.

5.8 I was struck on a number of occasions during these lengthy proceedings by how they could be characterised as a production of Hamlet, not only without the prince but with either no or only cameo performances on the part of other leading players. Mr. Tiernan did not give evidence. Mr. Traynor was called in the course of the third party hearing but was only asked a small number of questions in chief and was not cross examined at all. Neither side asked him to enlighten us as to precisely what had happened to the monies or how the doctored €7m version of the Contract for Sale had come about. Questioning was confined to very brief issues concerning the handing over of Mr. Mallon's interest in the partnership to Mr. Traynor. If Mr. Traynor had at least that cameo performance, the valuers who gave comfort to ACC in respect of the loans were not called at all. As those valuers did not have an opportunity to explain themselves, my comments on this aspect of the case must necessarily be carefully made. However, two things need to be noted. The first is that the circumstances surrounding the procuring of the relevant valuation report were not absolutely clear. Some comment on this question is made in the main judgment. It certainly appears that the valuation was obtained for Mr. Tiernan as borrower rather than directly by ACC. The valuers in question were, it would appear, on a general panel which ACC regarded as acceptable.

5.9 However, on the basis of the evidence available to me, I find it very difficult indeed to see how anyone could have valued these lands at €7m at the time question. I saw no evidence to suggest that an agricultural value of the lands could have been significantly more than the figure in the lower €3m range which I have already identified. The second point to note is that the only basis for a higher value would have been to place some development potential on the lands. In the absence of any evidence, it is impossible to explain the view of those valuers as to development potential beyond the sparse comment already noted. However, on the evidence which was presented in court as to the planning history of these lands, it is difficult to see how anyone who investigated that planning history could form anything other than the most pessimistic view as to the likely development potential of the lands. It is, as I have said, in all the circumstances, extremely difficult to see how a valuation of €7m could have been provided.

5.10 Indeed, the purchase price of €4.6m clearly was somewhat over the odds. As questions of the possibility of recovering monies from the vendor to Mr. Tiernan will need to be dealt with under the heading of "Mitigation of Damages", it might now be convenient to record the evidence given by the solicitor to that vendor. The evidence was that a contract was entered into for €4.6m in the ordinary way. A standard form contract was sent to Mr. Traynor as the solicitor nominated on behalf of Mr. Tiernan. That contract had the purchase price at €4.6m. The first the relevant solicitor knew of a version of the contract with €7m included as the purchase price was in the context of the controversy which has led to these proceedings.

5.11 No suggestion for a three way closing with the vendor was made to the solicitor in question so that the account given by Mr. Traynor to Mr. Johnston was clearly false. It will be recalled that Mr. Traynor used, as his excuse to Mr. Johnston for going back on the proposed three way closing, that there were logistical difficulties given that the relevant solicitors were located in different parts of the country. I can only conclude that Mr. Traynor just made that up because he wanted to avoid a three way closing for all the reasons that have been explored in both the main judgment and the third party judgment. While I have noted that the purchase price was above the odds, it does have to be said that the overpayment was, perhaps, of a scale that was not entirely unusual during the bubble. There is nothing in the evidence to suggest that, from the perspective of the vendor, this was anything other than a straightforward transaction in which he had perhaps secured a very good price and in which he was entitled to obtain the balance of the purchase price before handing over title. I will return to this question in the context of mitigation of damages.

5.12 Further evidence was tendered by experts called on behalf of ACC in the context of the mitigation of damages aspect of the case which suggested that a minimum figure of 10% of the value of lands needs to be deducted in valuing a secured loan to reflect the costs that are likely to be associated with selling the lands by a relevant financial institution on foot of its security. The parties seemed to agree that that was an appropriate figure and, indeed, it was accepted that the figure might well be higher if significant difficulties were encountered in a forced sale.

5.13 Whether it is relevant to the calculation of damages in this case is a question to which I will need to turn having regard to the appropriate legal principles. However, I am satisfied as a fact that, had security been put in place in favour of ACC, the value of that security, as of the time in question, would have been of the order of €3m. That figure is derived from deducting €300,000 to €500,000 for costs of realisation from the true value of the lands which, for the reasons already analysed, I have put at €3.3m to €3.5m. In simple terms, ACC lent €7m in respect of a transaction where they believed that the lands in question were worth €7m but where in truth the lands were worth less than half that sum and where the value of any security which they might have obtained was, for the reasons set out, €3m. On the evidence there was, in truth, little likelihood of Mr. Tiernan repaying the loan from his own resources. The value of the loan was, in substance, the value of the security.

5.14 Again the question of its relevance will need to be addressed in due course but it also needs to be noted that the value of the lands have, not surprisingly, fallen further since the time in question. The expert evidence supports the view that the lands in question are worth of the order of €1m today (or perhaps less) and, thus, the value of the security, if it were in place, would be somewhat under that figure (allowing for costs of sale).

5.15 Against the background of those facts it is clear that there are important legal issues concerning the appropriate approach to the question of damages. On the one hand the case is, undoubtedly, a "no transaction" case so that if Mr. Johnston had not been negligent ACC would have not entered into the transaction at all. On that basis the full losses claimed might appear to be the appropriate amount of damages. On the other hand it might be said that by awarding ACC damages in that sum, ACC would obtain a windfall gain. €7m had been agreed to be lent against a security which, as it turns out, was worth only €3m. Mr. Johnston was not engaged to assess the value of the security but rather to ensure that it was put in place. It is undoubtedly true that, for the reasons set out in the main judgment, Mr. Johnston was negligent in allowing the monies to be paid out without the security being in place. However, on one view, €4m of ACC's underlying loss is attributable to the fact that it had entered into a bad loan rather than anything that Mr. Johnston did by way of failing to ensure proper security. It is, of course, the case that, had Mr. Johnston not accepted a closing on undertakings, the transaction would never have gone ahead and ACC would have been saved from the consequences of having entered into a bad loan. It is the proper approach to the calculation of damages in those unusual circumstances that needs to be addressed. However, before so doing it may be convenient to deal first with the issues of failure to mitigate raised against ACC by both Mr. Mallon and Mr. Johnston.

6. Was there a Failure to Mitigate?

6.1 I should start by referring briefly to the legal principles applicable to assessing the obligation on a plaintiff to mitigate damages. *McGregor on Damages* (18th Ed. 2009, Sweet & Maxwell, London) at para. 7-019 notes that the onus of proof on the issue of failure to mitigate is on the defendant. In *Saunders v. Williams* [2003] B.L.R. 125 CA the court held that, where the defendant fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply. On the question of whether a party is obliged to embark on uncertain litigation in order to mitigate his loss, it should be noted that in *Pilkington v. Wood* [1953] Ch. 770, at 777, the court held that:-

> "the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party".

I did not understand the parties to disagree with those general principles.

6.2 Two possible bases for a failure to mitigate have been raised. The first concerns a failure to collect any monies from Mr. Tiernan. The second derives from an alleged failure to seek to trace the monies actually paid over to Mr. Traynor from Mr. Johnston.

6.3 So far as the former is concerned, significant evidence was called on behalf of ACC as to searches which had been carried out attempting to identify any assets held by Mr. Tiernan. A number of assets turned up on the relevant searches. Valuation evidence was also called in respect of those assets. Insofar as possible evidence was also available as to other charges which were in place against those assets. Having reviewed all of that evidence, I am not satisfied that there is any basis for the contention that ACC could, with any greater level of diligence, recover more monies from Mr. Tiernan than that for which credit has been given. ACC have a judgment against Mr. Tiernan for the full sum due by him. That judgment has not been met. Given current property values (or, indeed, property values at any earlier time when ACC might have been reasonably expected to take action) it is not clear that there would be any net sums available to ACC deriving from any of those assets. Indeed ACC faced, in my view, a very real risk that attempting to pursue enforcement of its debt against Mr. Tiernan would have amounted to throwing good money after bad. ACC has given credit for the sum of €135,000 referred to earlier. I am not satisfied that any greater sum could be or could have been recovered from Mr. Tiernan. Under the first of the above two headings I am not, therefore, satisfied that any failure to mitigate has been made out.

6.4 The second heading concerns the monies actually paid over by Mr. Johnston, on behalf of ACC, to Mr. Traynor, on behalf of Mr. Tiernan. We know from a comprehensive report compiled on behalf of the Law Society, which was proved in evidence at the third party hearing, where the bulk of those monies went. However, there seems to me to be a fundamental problem with any attempt to recover those monies. It is, to say the least, arguable that the monies, in the hands of Mr. Traynor, were held on a voidable title. ACC would have been entitled to void the transaction on the basis of the fraudulent conduct which has already been identified in both the main judgment and the third party judgment. However, until such time as ACC had acted to avoid the transaction, title would have remained in Mr. Traynor and/or Mr. Tiernan. Provided any monies were transferred for good consideration (and for the reasons set out by me in *Headstart Global Funds Limited v. Citco Bank NV & Ors* [2011] IEHC 5, the payment of a bona fide existing liability amounts to good consideration), then the recipient of those monies is likely to be regarded as a *bona fide* purchaser for value without notice against whom no claim could be brought. Indeed in that context it is interesting to note that it would appear from the relevant Law Society report that a part of the relevant €7m was actually paid by Mr. Traynor to Mr. Mallon as part of the consideration which Mr. Traynor was liable to pay Mr. Mallon in order to buy out Mr. Mallon's share in the Traynor Mallon Partnership.

6.5 It must be remembered that in the third party judgment I found that Mr. Mallon had agreed to sell his interest to Mr. Traynor for €1.5 million. Of this Mr. Mallon received approximately half by way of bank draft and cheques. In October 2009 Mr. Mallon obtained a judgment against Mr. Traynor for the balance, some €834,615, which included interest. Precisely how some of the monies came to be used by Mr. Traynor to pay his liabilities to Mr. Mallon in this way (given that the monies were Mr. Tiernan's) was never explained.

6.6 However, a simple tracing exercise would suggest that Mr. Mallon would have to give back those monies just as much as any other recipient. On the other hand, for the reasons which I have just set out, it seems to me that any claim against Mr. Mallon for the return of those monies would be fraught with extreme difficulty for there is little doubt but that Mr. Mallon was *bona fide* entitled to be paid the monies and had no notice of their tainted source.

6.7 Finally, it is necessary to come to that portion of the monies which were paid to the solicitor for the vendor in part discharge of the purchase price. It will be recalled that the purchase price was €4.6m. In the ordinary way a 10% deposit of €460,000 was paid (from Mr. Tiernan's own resources) leaving a balance, which would ordinarily have been due on closing, of €4,140,000. A sum of €3m was paid by Mr. Traynor to the solicitor for the vendor at which stage title documents were handed over in return for an undertaking to hold them in escrow pending the payment of the balance of €1,140,000. The title documents were ultimately given back by Mr. Traynor when the balance was not forthcoming. The balance of the purchase price has not, of course, been paid. What claim could ACC have pursued in respect of those monies? The tracing claim would have been fraught with the same difficulties which I have already identified. The money was due to the vendor. The vendor had no notice of the problems attaching to the monies.

6.8 It might appear that some claim could be made to the effect that the vendor cannot, as it were, have his cake and eat it. He cannot keep the monies and the lands. There are, however, two significant difficulties with any such claim being mounted. The first concerns how ACC could make such a claim. The contract was between Mr. Tiernan and the vendor. Whatever claim Mr. Tiernan might have had, it is by no means the case that ACC could simply step into his shoes. Any claim by ACC which sought to step into Mr. Tiernan's shoes would have had significant legal difficulties. However, even if that difficulty could be overcome, a further practical problem would ensue. For the reasons already noted, the value of the lands has fallen significantly. Even viewed from the perspective

of Mr. Tiernan, there would be a significant practical difficulty with this situation. In order to close the sale he would be required to put up an additional €1.140m together with, doubtless, significant interest. Even if ACC were able to step into Mr. Tiernan's shoes, ACC would be faced with the same situation. The vendor has done no wrong. The vendor is entitled to keep his lands until he is paid in full. What would be the point today of paying the balance to the vendor when the lands themselves are worth less than the balance. Even if the vendor were to treat the contract as having been repudiated by Mr. Tiernan he would, *prima facie*, be required to hand back the monies paid over but would also be entitled to a significant claim in damages being the difference between the contract price and what he could now secure. The sum for damages would be likely to be set off against the funds required to be returned. It is by no means obvious that that calculation would lead to a positive sum.

6.9 ACC were, therefore, faced with both significant legal difficulties and practical financial difficulties concerning how they might have sought to recover monies arising out of the specific contract which was the subject of the loan.

6.10 As pointed out earlier, it is clear that a plaintiff is not obliged to engage in speculative litigation which might (depending on how things turned out) reduce his losses but which might equally incur significant costs which would have the effect of increasing his claim. After all it is not the plaintiff who has put him or her self into such a position, it is the defendant's wrongdoing. A plaintiff cannot be judged too rigorously as to the decisions made in difficult circumstances imposed by the defendant's wrongdoing. I am not satisfied that there was any easy or obvious course of action available to ACC to mitigate their damages on the facts of this case. Any possible recovery was fraught with difficulty and was, in my view, at least as likely (if not more so) to have increased ACC's losses rather than reduce them. I am not, therefore, satisfied that ACC has been guilty of any failure to mitigate.

6.11 It follows that the question of the true amount of damages to which ACC are entitled as against Mr. Johnston must be determined by a resolution of the questions concerning causation and windfall gain, which I have briefly outlined earlier. I, therefore, turn to the proper approach to the calculation of damages.

7. The Proper Approach to Damages Calculation

7.1 As indicated earlier there are two separate sets of issues which arise under this heading. The first concerns the argument put forward on behalf of Mr. Johnston as to causation. As pointed out earlier the argument which Mr. Johnston now seeks to make on causation carries with it two practical difficulties in the light of the way these proceedings have run to date. The first stems from the fact that no such argument was made at the hearing which led to the main judgment. Clearly if the causation argument raised was to be relied on by Mr. Johnston, it would have and should have been raised by him at that hearing. However, counsel for ACC did not object to the issue being raised at the damages hearing to which this judgment relates. With some misgivings I am, therefore, prepared, in the main, to overlook the fact that a pure causation argument is being raised for the first time at a quantum hearing.

7.2 The second point does, however, create a difficulty for Mr. Johnston. In section 6 of the third party judgment I had to consider the arguments put forward by Mr. Mallon to the effect that he could not be regarded as a concurrent wrongdoer with Mr. Johnston. As pointed out at para. 6.3 of the third party judgment, Mr. Johnston was only entitled to claim against Traynor Mallon "if either Mr. Johnston has an independent, stand alone claim against Traynor Mallon, or if Mr. Johnston and Traynor Mallon can be taken to be concurrent wrongdoers".

7.3 Having noted that Mr. Johnston did not argue that he had an independent claim against Traynor Mallon, I went on to consider whether Mr. Johnston and Traynor Mallon could be said to concurrent wrongdoers. It is clear from that judgment that it was only on the basis that Mr. Johnston and Traynor Mallon could be taken to be concurrent wrongdoers that Mr. Johnston could have succeeded against Traynor Mallon for if they were not concurrent wrongdoers, and in the absence of any suggestion that Mr. Johnston had an independent claim against Traynor Mallon, then there was no basis on which Traynor Mallon could have been responsible to indemnify or contribute towards Mr. Johnston's damages.

7.4 It is also important to note that no suggestion was made at the hearing which led to the third party judgment to the effect that the argument concerning Mr. Johnston and Traynor Mallon being concurrent wrongdoers was being made in the alternative or as a fallback to any suggestion that there was no sufficient causal link between any losses suffered by ACC and the negligence found against Mr. Johnston. In truth, if the argument now put forward on behalf of Mr. Johnston is correct, then the third party judgment is incorrect, for if Mr. Johnston is not a wrongdoer who has a liability to ACC then he cannot be a concurrent wrongdoer because he cannot be responsible for the "same damage" if he is not responsible for any damage. If the argument be correct, then Mr. Johnston was entitled to succeed in his defence against ACC and there would have been no need to bring the third party proceedings on for trial against Mr. Mallon at all. The position now adopted by Mr. Johnston is, in my view, entirely inconsistent with the position which he adopted at the hearing which led to the third party judgment. Indeed, as I have pointed out, there would have been no need for the third party judgment or the hearing which led to it, if the argument now sought to be relied on had been put forward at an earlier stage and had been successful.

7.5 Having elected to run the case in the way in which he has, first, by not raising the causation issue now sought to be relied on at all at the hearing which led to the main judgment and second, and perhaps more importantly, by running the trial which led to the third party judgment on the basis (without reserving his position in any way or indicating that it was a fallback or alternative position) that he, Mr. Johnston, was a wrongdoer with a liability for damage and that, therefore, he and Mr. Mallon were concurrent wrongdoers, it seems to me that it would be totally unsatisfactory and unjust to now allow Mr. Johnston to go back on the position which he has previously adopted and, in effect, rerun the case on an entirely different basis. For that reason alone, it seems to me that it would be incorrect to allow Mr. Johnston to now make an argument based on causation for the first time at a quantum hearing.

7.6 Lest I be wrong in that view, I now go on to consider the merits of the substantive argument made.

7.7 In truth the argument which Mr. Johnston now seeks to make is analogous to that which Mr. Mallon made at the hearing leading to the third party judgment, which argument is dealt with in section 7 of that judgment. Reliance is placed on cases such as *Canole v. Redbank Oyster Company Limited & Anor* [1976] 1 I.R. 191.

7.8 In that context I should recall what I said at para. 7.2 of the third party judgment:-

> "However, it seems to me that this is not the sort of case where something occurred to break the causal link between Traynor Mallon's breach of undertaking and any loss suffered by ACC. True it is that Traynor Mallon might not have had an opportunity to breach the relevant undertakings if Mr. Johnston had not been negligent in accepting them. But the loss did not occur simply by the monies being handed to Traynor Mallon. The loss occurred when Traynor Mallon dealt with those monies other than in accordance with its undertaking. There is not, in my view, therefore, any basis for suggesting that there is a lack of causal link between Traynor Mallon's breach of undertaking and any losses which ACC may have suffered."

7.9 The argument put forward by Mr. Johnston is that the subsequent actions of Traynor Mallon, in the way in which that firm failed to comply with the undertakings given, amounted to a break in the causal link. In that context it is perhaps appropriate also to refer to the findings which I made at para. 6.14 of the third party judgment in the context of considering the concurrent wrongdoer issue which was to the effect that the damage caused by both the negligence of Mr. Johnston and the breach of undertakings of Traynor Mallon was the same. I noted that the damage caused in both cases was that "the money is gone". It might, perhaps, be more complete to say that the money was gone and security was not put in place. The function of Mr. Johnston, as solicitor to ACC, was to procure that money would not be handed over unless proper security, in accordance with the terms of the facility letter in favour of Mr. Tiernan, was in place. Likewise, the undertaking given by Mr. Traynor on behalf of Traynor Mallon (in order to secure the release of the funds by Mr. Johnston to Mr. Traynor), was to the effect that the monies would not be released by Mr. Traynor save to close the sale with the vendor in circumstances where the immediate consequence of the sale closing (given that Mr. Johnston already held an appropriate deed of mortgage and charge executed by Mr. Tiernan) would have been to put in place security in favour of ACC. The substance of the undertaking given by Mr. Traynor on behalf of Traynor Mallon was, therefore, to the same effect. It was that the monies would not be parted with unless and until proper title including security was in place in favour of ACC. Therefore, the direct consequences of both the negligence of Mr. Johnston and the breach of undertaking by Traynor Mallon was the same. The money was gone but there was no security in place.

7.10 Reliance is placed on behalf of Mr. Johnston on a line of authorities culminating in *Breslin v. Corcoran & Anor* [2003] IESC 23 being cases where a knock-on effect as a result of the stealing of a motor car (where its theft was facilitated by negligence) was an injury arising from the driving of the motor car on a subsequent occasion. The underlying rationale of that line of cases is that, while it remains the case that the accident would not have happened had the car not been stolen and that the car could not have been stolen without the negligence of the defendant, nonetheless the injured party could not succeed against the car owner. The extent of the duty of care was considered in *Breslin v. Corcoran* by Fennelly J. where he made the following apposite comments:-

> "Keane C.J., in [*Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84], citing *Council of the Shire of Sutherland v. Heyman* [(1985) 157 C.L.R. 424], referred to the need to maintain the distinction between duties on the moral plane and those whose breach could be invoked in the law of negligence. He went on:
>
> 'It is precisely that distinction between the requirements of altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in *Anns v. Merton London Borough* [1978] A.C. 728, as it has subsequently been interpreted by some. There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of "proximity" or "neighbourhood" can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in *Ward v. McMaster* [1985] I.R. 29 by Brennan J. in *Sutherland Shire Council v. Heyman* [1985] 157 C.L.R. 424 and by the House of Lords in *Caparo plc. v. Dickman* [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a prima facie duty of care restrained only by undefinable considerations…"'.
>
> I consider that this passage represents the most authoritative statement of the general approach to be adopted by our courts when ruling on the existence of a duty of care. It seems to me that, in addition to the elements of foreseeability and proximity, it is natural to have regard to considerations of fairness, justice and reasonableness. Almost anything may be foreseeable. What is reasonably foreseeable is closely linked to the concept of proximity as explained in the cases. The judge of fact will naturally also consider whether it is fair and just to impose the liability. Put otherwise, it is necessary to have regard to all the relevant circumstances."

7.11 However, there is a long line of English authorities on the duty of care owed which make clear that where the very thing which the defendant is employed to prevent occurs (even if it be due to an unexpected act of criminality), the defendant cannot escape from liability for the foreseeable consequences of the criminal act. See for example, *Fry's Metals v. Durastic* (1991) SLT 689 OH. A security firm employed to protect a premises has, as its principal duty, the prevention of break-ins to the premises. If, due to negligence, there is a break-in, then the security firm will be liable for any foreseeable consequences of that break-in. The fact that a criminal act intervened between the negligence of the security firm (for example, by leaving the premises unguarded for a period) and those consequences (for example, a fire caused by an intruder) will not absolve the security firm concerned from liability for those consequences. A criminal act intervening after an act of negligence will frequently place the consequences of that criminal act outside the scope of the damages to which a person injured by that criminal act may be entitled to recover even though the perpetrator might not have had an opportunity to commit the relevant criminal act were it not for some previous act of negligence on the part of the defendant.

7.12 There is, as a further refinement, a line of authority from the United Kingdom, following the decision (commonly called *SAAMCo*) of *Banque Bruxelles S.A. v. Eagle Star* [1997] A.C. 191, and including, in particular, *Bristol and West BS v. Fancy & Jackson* [1997] 4 All E.R. 582. These decisions provide that where a professional, who was under a duty to take reasonable care to provide information on which someone else would decide upon a course of action, was negligent in the provision of that information, he was not responsible for all of the consequences of that course of action. Instead, he was only responsible for the consequences of that information being wrong. Accordingly, the correct measure of damages is the loss attributable to the inaccuracy of the information suffered by the plaintiff through embarking on the course of action on the assumption that the information was correct.

7.13 In the former case Lord Hoffman provided the following example which illustrates this point effectively:-

> "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

Hoffman LJ then said that in such circumstances the doctor should not be liable for the injury, which the reason being:-

> "It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a

contract or as a tortious duty arising from the relationship between them."

7.14 Lord Hoffman's mountaineer example might be described as a finding in that hypothetical situtaion that it was a "no travel" case. Were it not for the doctors negligence the mountaineer would not have travelled and would not, therefore, have been injured. However, even though it is a "no travel" case no damages would be awarded because the damage was not directly linked to the negligence but rather was attributable to a separate event. It is also clear from *SAAMCo* that such points may operate to reduce damages (to those which can properly be said to flow from the negligence) below the actual loss on the transaction concerned even though the transaction might not have gone ahead in the absence of the relevant negligence.

7.15 The preceding legal analysis provides the backdrop against which the present case should be viewed. This in turn leads to the question as to what the factual situation is here. The very thing which Mr. Johnston was employed to prevent was ACC's money passing out of his control without security being in place. Due to his negligence Mr. Johnston allowed that to happen. The very thing that he was employed to do was to prevent ACC from being at the added risk that they were dependent on an undertaking given (without their permission) by a third party solicitor. Given that the whole purpose of Mr. Johnston's instructions was to prevent that sort of thing happening (i.e. to prevent or at least to minimise to the maximum extent possible the risk of ACC being left without both its money and its security), it seems to me that the point raised by Mr. Johnston in respect of causation would have no merit in any event. While it is true that, in the absence of a breach of undertaking by Mr. Traynor, no loss would have flowed from Mr. Johnston's negligence, Mr. Johnston's duty was to prevent ACC from being exposed to an added risk that, for whatever reason, the relevant security would not be put in place but the loan monies be gone. The fact that Mr. Johnston did not expect that Mr. Traynor would not honour his undertaking is, in that context, neither here nor there. The very thing which Mr. Johnston was employed to minimise was the risk that something might go wrong in putting in place the security concerned after the money had been handed over.

7.16 However, that is not the end of the matter. It seems to me that a similar point might still be of some relevance to the question of the calculation of damages. I, therefore, turn to that question and in particular the case made by Mr. Mallon which draws attention to the fact that ACC had, through its own actions, and for whatever reason, entered into what must objectively be considered to be a poor lending transaction.

7.17 In that context reliance was placed by counsel on behalf of ACC on *SAAMCo* and *Bristol & West*. In *SAAMCo* a firm of valuers were found to have negligently valued lands over which a financial institution obtained security. The evidence suggested that the relevant financial institution would not have lent the monies had it been appraised of the true value of the lands. Notwithstanding this the House of Lords decided that:-

> "The negligence of the valuers concerned was the difference between the value placed on the lands by the valuer and the true value of the lands at the relevant time. Any greater losses were not, in the view of the court, attributable to the negligence of the valuer concerned even though, on one view, it might be said that had the financial institution concerned not entered into the loan transaction at all, it might have avoided those losses."

That case would seem to assist the argument put forward by Mr. Mallon.

7.18 However, counsel for ACC noted that *SAAMCo* was considered in *Bristol & West* which involved a finding of negligence against a firm of solicitors. On the facts of that case it was held that, had the solicitors concerned not been negligent, the relevant financial institution would not have entered into the loan transaction at all. Having analysed *SAAMCo*, the court nonetheless came to the view that the financial institution concerned should be entitled to recover all of their losses on the transaction. On the face of it *Bristol & West* might be said to support ACC's argument.

7.19 However, it seems to me that *Bristol & West* requires careful analysis. It is important to identify the negligence which was found against the solicitors in that case. The specific instructions given by the financial institution to the relevant solicitor required that solicitor to report on any matters coming to the solicitor's attention which might cast doubt on the lending transaction concerned. In a number of respects the solicitors were found to have failed to report to the society certain curious features of the transaction which the court held ought to have been reported in accordance with the instructions to which I have just referred. The court accepted the evidence of the financial institution that, had those matters been reported, the society would simply have withdrawn from the loan. It seems to me, therefore, that *Bristol & West* can be seen as an example of the "very thing" jurisprudence to which I have referred. The "very thing" (or at least one of the "very things") which the solicitors concerned were asked to deal with was the existence or otherwise of any suspicious circumstances surrounding the loan. Given that the relevant solicitors had failed in their duty to do the "very thing" which they were required to do (that is, warn the financial institution about those suspicious circumstances) then it is, perhaps, hardly surprising that the court took the view that the financial institution was entitled to its entire losses. The direct consequence of the relevant solicitor's negligence was that the transaction was entered into.

7.20 However, it seems to me that the situation with which I am faced is more analogous to that which pertained in *SAAMCo*. While there is, doubtless, a general duty on a solicitor instructed to act for a financial institution in a lending transaction to report any suspicious matters to the financial institution concerned, no such obligation is relevant to the finding of negligence against Mr. Johnston in this case. Detecting suspicious circumstances and reporting them to ACC was not "the very thing" that Mr. Johnston was employed to do. Rather, Mr. Johnston was employed to put in place security (and not to part with the monies until that had been done). The specific terms of reference of the solicitors in *Bristol & West* and, perhaps more importantly, the specific negligence found against them both related directly to ascertaining and reporting on suspicious circumstances. No such requirement was part of the specific terms of reference of Mr. Johnston and, even though he may have had a general obligation to report such circumstances, no negligence was found against him which derived from a failure to report such matters. The responsibility for the commercial sense of the loan in this case (including the probity of the borrower and the capacity of the borrower to repay) rested on ACC and ACC alone. ACC did not seek Mr. Johnston's help or advice in that matter. In those circumstances it seems to me that it would be unjust to fix Mr. Johnston with damages which are, in truth, more properly found to flow from ACC's own decision to lend rather than anything which Mr. Johnston did negligently.

7.21 It is true that I have already found this to be a "no transaction case". That remains the position. Were it not for Mr. Johnston's negligence, ACC would have got lucky by escaping from a bad loan. However, it seems to me that the "no transaction" jurisprudence is primarily directed to ensuring that a plaintiff cannot recover a loss of bargain which that plaintiff may suffer by reason of a transaction not going ahead in circumstances where, even had the relevant defendant not been guilty of negligence, the transaction would not have gone ahead anyway. The "no transaction" jurisprudence is designed to exclude such damages. It does require that the starting point for a consideration of the plaintiff's proper damages is, therefore, to calculate what would have happened had the transaction not gone ahead. However, it is also clear from cases such as *SAAMCo* that not all of the losses which may arise from the transaction going ahead may be recoverable. Where the primary breach of duty found against the defendant is such as leads to the inference that that breach of duty was directly responsible for the transaction going ahead then, as per *Bristol & West*, the full losses

may be recoverable. But where, as here, the fact that the transaction might not have gone ahead in the absence of negligence is only a tangential or highly indirect consequence of the negligence and where, as a result, it is possible to divide the losses on the transaction between those which are directly attributable to the negligence of the defendant and those which are, in truth, attributable to the underlying disadvantageous nature of the transaction itself, then it seems to me that the justice of the case requires the court to calculate the damages by reference to that portion of the losses which derive directly from the negligence of the defendant.

7.22 On the facts of this case it seems to me that those losses are the value of the security for it is the fact that the loan money was gone but no security was in place that was the direct consequence of Mr. Johnston's negligence. If it had happened that security could have been put in place without Mr. Johnston detecting any problem (for example, if, contrary to the facts of this case, the vendor were part of the fraudulent conspiracy) then no adverse consequences of Mr. Johnston's negligence would have occurred at all. Why, in justice, should ACC recover significantly more damages on the happenstance (which was nothing to do with either them or Mr. Johnston) that the vendor was not part of the conspiracy, in which circumstance ACC would have had no claim had security been in place? That analysis suggests that any recovery by ACC above and beyond the value of the security would be to recompense ACC for a windfall gain which it would not be appropriate to take into account in the calculation of damages.

7.23 It follows that ACC's damages should be calculated by reference to the value of the security. A final question arises as to the time at which that security should be valued.

8. At what time should the Security be Valued?

8.1 As a matter of practicality it seems highly improbable that any attempt would have been made to place reliance on any security provided for a period of time. It would have been necessary for Mr. Tiernan to be in sufficient default for ACC to run out of patience with him. ACC would then have needed to attempt to put in place whatever means of enforcement it considered necessary. All of this is relevant in the context of the fact that, for the reasons which I have already analysed, the value of the security was, in my view, €3m at the time the first relevant set of transactions closed but would now be worth less than €1m.

8.2 It must be recalled that some time after the original transactions closed in the summer of 2006 a further sum of in excess of €1m was advanced to Mr. Tiernan at a time when ACC believed that he remained a customer in good standing. It would inevitably have been quite some time after that before any decision to seek to realise ACC's security would have occurred. All in all I have come to the view that the monies which ACC could have hoped to have recovered on foot of the security which it was entitled to expect would have been put in place, would have been of the order of €2m or a little less. To expect any higher recovery would be to anticipate that ACC would have moved against Mr. Tiernan much earlier than the evidence suggests would have been likely. In those circumstances it seems to me that the appropriate measure of damages to be awarded against Mr. Johnston is that sum of €2m.

8.3 If ACC got what it bargained for, that is a loan to Mr. Tiernan with security as per the facility letters, I am satisfied that ACC would only have recovered that sum. It is, therefore, that sum which is directly attributable to Mr. Johnston's negligence. The balance of ACC's losses on this transaction are, in my view, attributable both to the fact that this was a poor lending transaction in the first place (whether that be ACC's fault or not, not being relevant) and the significant fall in the value of lands (which was a risk inherent in lending of the relevant type in any event). In coming to that figure of €2m, I have taken into account the fact that ACC might have hoped to have recovered that sum or something like it a little before now so that ACC would have saved the cost of funds on such a sum between a potential date of recovery and today's date. On the other hand, it seems to me that the risk of recovery would be on the down side of €2m, so that those two factors cancel each other out. There will, therefore, be judgment in favour of ACC against Mr. Johnston in the sum of €2m.

8.4 For the reasons indicated earlier, the question of the extent of any contribution or indemnity which Mr. Mallon (and indeed Mr. Traynor) must make to that sum has been left over. It remains only to deal briefly with the question of the amendment sought by Mr. Mallon.

9. The Proposed Amendment to the Third Party Defence

9.1 As pointed out earlier there have already been a significant number of amendments to the third party defence. A further amendment arising in the middle of the hearing which would raise an entirely new issue (rather than merely pleading a further basis on which facts already before the court might be argued as a matter of law) is something which a court will be reluctant to allow because of the obvious likely prejudice that might arise. On the facts of this case there would, indeed, be even greater prejudice to Mr. Johnston by allowing such an amendment.

9.2 Had Mr. Mallon pleaded the matters which he now seeks to plead (i.e. a failure on the part of Mr. Johnston to defend ACC's case on the basis of contributory negligence) at an earlier stage, then doubtless Mr. Johnston would have had the opportunity to consider whether he should, in fact, seek to amend his own defence by raising such a plea against ACC. If Mr. Johnston were now to be fixed with losing some of the indemnity or contribution to which he might otherwise be entitled on the basis of the plea now sought to be raised by Mr. Mallon, in circumstances where it is now too late for him to seek to rely on that plea to reduce his own damages to ACC, then the prejudice to him would be obvious. There is no suggestion on anyone's part that it would be appropriate to now allow Mr. Johnston to raise such a plea against ACC.

9.3 Having regard to that prejudice, it seems to me that it would only be appropriate to allow Mr. Mallon to amend his third party defence at this stage if there were compelling evidence which placed at least a significant portion of the blame for Mr. Mallon not being in a position to raise this question before now squarely on Mr. Johnston's shoulders. As the hearing which was conducted before me in relation to the proposed amendment did not focus, at least to a significant extent, on that question, it seems to me that I should, in any event, afford both parties a further opportunity to put forward evidence from which I could reach a conclusion as to whether, and if so to what extent, it may be possible to blame Mr. Johnston (rather than circumstances generally) for any failure on the part of Mr. Mallon to have been in a position to put forward the defence, on which he now seeks to rely, at any earlier stage.

9.4 However, before any such resumed hearing takes place it seems to me that it is necessary for Mr. Mallon and his advisers to consider whether there is, in truth, any longer any practical relevance in the point which they seek to make. For the reasons set out in this judgment I have come to the view that the proper approach to the calculation of damages is as analysed in the proceeding sections of this judgment. It may well be that, even if Mr. Mallon was to persuade me that an amendment of the type sought should be allowed and even if Mr. Mallon were to succeed on the defence as amended, same might make no real difference to the calculation of damages. If a claim in contributory negligence against ACC were made out, then it might well be that the only effect of any such claim would be to reduce the damages which might be capable of being claimed by ACC to a sum which might well be calculated in much the same way as I have, in fact, found that the damages in this case should be calculated even in the absence of any finding

of negligence against ACC. If that be correct (and I obviously make no decision on this point same not having being argued), then a finding that Mr. Johnston had negligently failed to plead contributory negligence would be of no relevance to the calculation of damages for, even with a finding of contributory negligence, the damages to be awarded against Mr. Johnston (and thus the damages in respect of which Mr. Mallon might be ordered to make a contribution or indemnity) would be exactly the same damages as have in fact been awarded.

9.5 Before, therefore, the parties incur further expense in putting evidence along the lines indicated above before the court and before further court time is allocated to these proceedings (which have, of course, already taken up a great deal of court time), I would like serious consideration to be given by Mr. Mallon and his advisers as to whether, in the light of the approach to damages which I have adopted in this case, there is any point in going ahead with their application to amend. It would, of course, be reasonable for Mr. Mallon, in any event, to reserve his position to revisit the application to amend in the event that any relevant findings which I have made were overturned on appeal so that there might, in those circumstances, be real practical consequences of his potentially succeeding on the defence which he now wishes to put forward.

9.6 If, however, Mr. Mallon wishes to proceed with the amendment application I will hear further argument based on such evidence (of the type identified earlier) as the parties wish to put forward. I will also require to hear further from Mr. Mallon on the question of whether he can now seek (even if a collateral way) to go behind the main judgment by arguing that a defence not raised in the argument which led to the main judgment should have been raised.

10. Conclusions

10.1 For the reasons set out I am, therefore, satisfied that ACC is entitled to recover €2m from Mr. Johnston.

10.2 I propose giving Mr. Mallon an opportunity to consider whether he wishes to pursue the amendment application or whether he simply wishes to reserve his position to reactivate that application in the event that there may be a result on any appeal from my judgment which might change the relevance of the amendment in all the circumstances.

10.3 In addition it will be necessary, in any event, to deal finally with the question of the extent of any contribution or indemnity which Mr. Mallon (and Mr. Traynor) may be obliged to make to Mr. Johnston.