Neutral Citation Number: [2011] IEHC 501

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 the 9th December, 2011

1. Introduction

1.1 There have already been three substantive judgements in these proceedings. Those judgments are concerned with the question of the liability of the defendant ("Mr. Johnston") to the plaintiff ("ACC") in negligence, the quantum of damage caused and whether the second named third party ("Mr. Mallon") is liable to Mr. Johnston for the actions of the first named third party ("Mr. Traynor"). In passing it is to be noted that there has also been a forth decision (Unreported, High Court, Clarke J., 24th October, 2011) which was concerned with the question of costs of the proceedings between ACC and Mr. Johnston.

1.2 In the first judgment, *ACC Bank plc. v. Brian Johnston & Co.* [2010] 4 I.R. 605 (the "main" or "principal judgment"), I found *inter alia* that Mr. Johnston had breached the terms of his instructions from ACC by closing the transactions, the subject of these proceedings, on the strength of undertakings given by "Traynor Mallon", which was the firm name under which both third parties practised. I found that, although Mr. Johnston was not in any way at fault in taking an undertaking from Traynor Mallon as opposed to any other firm of solicitors, he was nevertheless negligent in the manner in which he disregarded the express instructions of ACC in respect of each of the four transactions which were the subject of those proceedings. Having found Mr. Johnston liable to ACC for damages, the question of the quantum of those damages was then left over to a subsequent trial.

1.3 In the second judgment *ACC Bank PLC v Johnston* [2011] IEHC 108 (the "third party judgment"), I ruled that, although Mr. Mallon and Mr. Traynor dissolved their partnership in March 2006, Mr. Traynor nevertheless retained the ostensible authority of Mr. Mallon to carry on the ordinary solicitors business which they had previously carried on, under the style of Traynor Mallon, and had that ostensible authority at all times material to the giving of the undertakings in question. As a consequence I found that Mr. Mallon is responsible, as a partner, for the undertakings given by Mr. Traynor and for Mr. Traynor's failure to comply with them, even though Mr. Mallon was not directly aware of the undertakings concerned. The breach of those undertakings renders Traynor Mallon a concurrent wrongdoer with Mr. Johnston for the purposes of the Civil Liability Acts. The question of the level of contribution or indemnity to which Mr. Johnston is entitled from Mr. Mallon was, thereafter, left over until ACC had made out its loss and that loss had been quantified.

1.4 Finally, in the third judgment, *ACC Bank PLC v Johnston* [2011] IEHC 376 (the "damages judgment"), I had to consider the quantification of ACC's damages claim. Ultimately I came to the view that the appropriate level of damages was €2m and I, therefore, directed judgment in favour of ACC against Mr. Johnston accordingly.

1.5 In the light of those previous decisions the only matter remaining for determination is the extent of the contribution or indemnity which Mr. Mallon must make to Mr. Johnston. In that context, the findings against Mr. Johnston in the principal judgment and Mr. Mallon in the third party proceedings are the appropriate starting point. I, therefore, turn to those findings.

2. The Previous Findings

2.1 In the principal judgment, at para. 6.34, I found that Mr. Johnston did not have ACC's express consent to close on an undertaking. I was also not satisfied that there was any great need for Mr. Johnston to have a closing by undertaking given the underlying facts. While I did find that Mr. Johnston could not, at the level of principle, be faulted for taking an undertaking from Taylor Mallon as outlined above, I nevertheless found that the manner in which Mr. Johnston closed the transaction added an additional layer of risk which the purpose of his employment was to avoid. It followed, therefore, that by adopting, without permission, a different and riskier means of closing, Mr. Johnston was in breach both of his general duty of care to ACC and the terms of his letter of appointment. At para. 6.35, I found that, by handing over further funds in circumstances where Mr. Johnston was relying on an existing undertaking, that (forth) transaction was placed in the same category as the original three loans. It followed, therefore, that, where it was negligent to close the initial loans on foot of the undertaking, it was also negligent to close the forth loan on the same basis, and in particular, without having had sight of materials which ought to have been forthcoming on foot of the undertaking.

2.2 I would note that I did find that Traynor Mallon had informed Mr. Johnston that an executed transfer had existed in favour of Mr. Tiernan (the purchaser), although it was later proved not to have been the case. Nevertheless I held, at para. 6.36, that Mr. Johnston's duty of care would have required him to make clear to ACC in unequivocal terms that he had not seen direct evidence of the execution of the relevant deed and that he was relying on Traynor Mallon's word for the fact that it existed. I was not so satisfied that Mr. Johnston made that clear to ACC and found that as a result he had again breached his duty to ACC.

2.3 It is worthy of note that, in coming to the above conclusions and as set out in section 5, I first had to make a finding on the conflict of evidence that was presented to the court. In short, at para. 5.15, I was not content to accept Mr. Johnston's evidence as

to specific instructions which he said he received from ACC.

2.4 In the third party judgment, at para. 5.11, having found that, where a firm of solicitors is dissolved but, to the knowledge of those solicitors, the business of the firm is to be continued by one or more of them, those carrying on that business have the ostensible authority of those who are no longer involved unless or until those departing from the business give appropriate public notice of that fact. There was, therefore, an obligation on Mr. Mallon to publicise the dissolution of Traynor Mallon which he did not meet and he was accordingly held responsible for the actions of Mr. Traynor. Those actions, I went on to hold, were in the ordinary course of the solicitors business which Traynor Mallon has previously carried on. As pointed out earlier, I therefore found Mr. Mallon to be responsible for the undertakings given by Mr. Traynor, and with which he did not comply, even though Mr. Mallon was not directly aware of their existence at the relevant times.

2.5 As noted in para. 6.4, Mr. Johnston did not argue that he had any independent claim against Traynor Mallon. As such, I then considered and ultimately found Traynor Mallon to be responsible for the "same damage" as Mr. Johnston and that Traynor Mallon was accordingly a concurrent wrongdoer for the purposes of the Civil Liability Acts with Mr. Johnston. However, in considering that point, it is to be noted that, as set out at para. 6.13, there was no plea of fraud made against Traynor Mallon. The claim was simply an allegation of a breach of undertaking. The nature of that undertaking was complicated by the fact that Traynor Mallon had transmitted a false version of the contract of sale to Mr. Johnston which suggested a purchase price of €7m, instead of the actual figure of €4.6m. I therefore found, at para. 6.14, that the only practical manner in which Traynor Mallon could have properly complied with its undertaking was by retaining the monies received given that there was no reality to a sale actually closing for €7m.

2.6 There are a number of additional considerations which, on the arguments of the respective parties, may need to be taken into account before attempting to apportion blame between Mr. Mallon and Mr. Johnston.

2.7 First, it needs to be noted that Mr. Mallon, at the hearing leading to the third party judgment, put forward a range of additional items of alleged negligence against Mr. Johnston beyond those which had been established by ACC at the hearing leading to the principal judgment. The proper approach to those items both on the merits and as to their potential effect on the contribution issue which I have to decide, was a matter of some controversy to which it will be necessary to turn in due course.

2.8 On the other side of the coin, counsel for Mr. Johnston argued that it is appropriate to view the actions of Mr. Traynor as fraudulent and that the blameworthiness of Mr. Mallon, as someone who is vicariously liable for the actions of Mr. Traynor, needs, therefore, to be assessed as fraudulent activity. Mr. Mallon argued that no case in fraud had ever been pleaded against either him or Mr. Traynor and that, in those circumstances, it would be wrong for the court to reach any conclusions as to fraud such as might affect the court's analysis of the blameworthiness on his part. As both of those issues stem, at least to some extent, from the application of the general law concerning contribution and indemnity between concurrent wrongdoers, it is appropriate to turn to a brief description of that law at this stage.

3. The Law on Contribution

3.1 Section 21(2) of the Civil Liability Act 1961 deals with the question of the contribution between concurrent wrongdoers and provides:

> "In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

3.2 The issue then turns to how the court is to approach the question of "fault" under that section. In *Patterson v. Murphy* [1978] ILRM 85, Costello J. in dealing with the question of the contribution between the defendants made the following comments which are apposite:

> "The Supreme Court in *Carroll v. Clare County Council* [1975] IR 221 considered the meaning of section 34 of the Civil Liability Act 1961 by which, in the case of contributory negligence, the damages recoverable by the plaintiff are to be reduced by such amount as 'the Court thinks just and equitable having regard to the degrees of fault of the plaintiff and the defendant'. It seems to me that I should interpret s.21 of the Act in the same way as the Supreme Court interpreted section 34. In the course of his judgment in *Carroll v. Clare County Council* Kenny J pointed out that s.34 did not require a reduction of damages by reference to degrees of negligence but by reference to degrees of fault, and, having referred to the Supreme Court's decision in *O'Sullivan v. Dwyer* [1971] IR 275 he said:
>
> > 'I think "fault" in s.34 of the Act of 1961 means a departure from a norm by a person who, as a result of such departure, has been found to have been negligent and that "degrees of fault" expresses the extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances. The extent of that departure is not to be measured by moral considerations, for to do so would introduce a subjective element while the true view is that the test is objective only. It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions of the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment.'
>
> Following this test I should consider the blameworthiness of the contribution which each defendant made to the damages which the plaintiffs suffered by reason of the acts complained of — the test of blameworthiness being an objective one and applied by reference to what a reasonable man or woman would have done in the circumstances of the present case."

3.3 In *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321, at 358 *et seq.*, in this Court Keane J. considered the approach of the courts to the machinery for contribution in light of the above jurisprudence. He noted that:

> "However difficult the consequences may be of using blameworthiness as the exclusive criterion for apportioning liability either in cases of contributory negligence or contribution between concurrent wrongdoers, they are less than those caused by any attempt to make causation the criterion."

He then concluded that he was:

> "[…] satisfied that the view expressed by the Supreme Court, that the criterion to be adopted in determining the reduction in a plaintiff's damages because of his or her contributory negligence is that of blameworthiness and not

of causation, is also applicable to the apportionment of liability between concurrent wrongdoers."

3.4 It is clear, therefore, that, in Irish law, the court does not attempt to disentangle the causal effect of the wrongdoing of two concurrent wrongdoers. It must be recalled that, for reasons analysed in the third party judgment, persons are only regarded as concurrent wrongdoers if their wrongdoing can be said to have caused the same damage. If it is possible to determine that some element of damage caused to a plaintiff is solely attributable to one wrongdoer, then, at least so far as that head of damage is concerned, the appropriate course of action is to make an award in respect of the relevant damage solely against the wrongdoer who caused that damage. In respect of that head of damage there will not be concurrent wrongdoers for the damage concerned will be attributable to and caused only by the wrongdoing of one person.

3.5 Counsel for Mr. Johnston also brought my attention to the judgment of Lord Birkenhead in *Dubai Aluminium Co Ltd v. Salaam (HL(E))* [2003] 2 A.C. 366 in which the question of contribution arose in circumstances where an otherwise blameless employer was held to be vicariously liable for the acts of his employee. By reason of the fact that the employer's liability was vicarious, that is, substitutional, it was not personal. The employer was consequently held to be liable for the fault of another and his personal, as opposed to legal, culpability was otherwise irrelevant.

3.6 It is to be noted that Lord Birkenhead then went on at p. 384 to suggest that the financial circumstances of any contribution to be ordered may fall to be considered by the court in coming to its conclusion. The position in Ireland seems to be different. As O'Flaherty J. makes clear in the Supreme Court decision in *Iarnród Éireann v. Ireland*, (at p. 377) due to the core principles of civil liability, although it may have unfortunate consequences, the financial positions of the parties subject to an order for contribution are not relevant. As such, while I find that the logic of the reasoning found in *Dubai Aluminium* to be persuasive in respect of the position of those who may be vicariously liable, in light of the Irish jurisprudence in this area, I am not otherwise persuaded by that decision. In passing it is worthy of note that the respective approaches of the Irish and English courts seem to have diverged to the extent that while blameworthiness is the primary criterion here, causative potency is favoured by the courts of England and Wales. This is particularly evident from the decision in *Furmedge & others v. Chester-le-street District Council* [2011] EWHC 1226 (QB) (otherwise "*Dreamspace*") at para. 168. Nevertheless unless or until the Supreme Court decide otherwise the law here is settled.

3.7 I have already determined that the damage which in this case was caused both by Mr. Johnston and by Mr. Mallon (in the sense that he is vicariously liable for the actions of Mr. Traynor) is the same damage and have assessed that damage in the sum of €2m. It follows that my task is not to attempt to determine the respective causal effects of the actions of Mr. Johnston and Mr. Traynor in giving rise to that common loss of €2m, but rather to assess the blameworthiness of both sides. It also follows that the blameworthiness of Mr. Mallon must be assessed by attributing to him the blame attaching to Mr. Traynor.

3.8 However, it does seem to me that an analysis of causal effect remains of some relevance. The starting point for the court's consideration is a determination that the wrongdoing of both of the concurrent wrongdoers has caused the same damage. It seems to me to follow that the wrongdoing that needs to be put into the balance in assessing the blameworthiness of the respective concurrent wrongdoers must be the wrongdoing that caused the damage rather than any separate wrongdoing which cannot be said to have any causative effect on the damage concerned. To take a simple example, it could hardly be said that the fact that a driver who, some 10 kilometres up the road from the scene of an accident, was driving recklessly but in a manner which had no effect on the actual accident, could be required to bear any increased contribution to the damage caused by the accident concerned simply by reason of that unconnected reckless driving. It might well have been very blameworthy for the driver concerned to have driven in the reckless manner described in the evidence. However, unless that reckless driving had some causative effect on the accident then it is, in my view, in truth no more relevant than how the same driver drove the previous day or the previous week. Likewise, it seems to me that, where a solicitor is found guilty of professional negligence, it is only the negligence which causes the common loss that can be taken into account in assessing the blameworthiness of the solicitor for the purposes of determining the extent of any relevant contribution or indemnity. Other negligence which did not have any causative effect in giving rise to the common damage does not, it seems to me, properly come into the balance. It will be necessary to address the additional claims of negligence made by Mr. Mallon against Mr. Johnston (above and beyond the negligence already found against Mr. Johnston in the principal judgment) on that basis.

3.9 However, before going on to conduct that assessment it is necessary to deal with an issue which has arisen concerning the findings against Mr. Traynor and, through Mr. Traynor, against Mr. Mallon as his partner. That raises the pleading issue to which I have already referred. I, therefore, turn to the allegation of fraud against Mr. Traynor.

4. The Allegation of Fraud against Mr. Traynor

4.1 It is clear that no allegation of fraud was included in the third party proceedings filed by Mr. Johnston against Traynor Mallon. When this issue arose at the hearing, counsel for Mr. Johnston, not unreasonably, pointed to the fact that evidence of fraud was not really available to Mr. Johnston at the time when the third party claim against Traynor Mallon was formulated. It is, of course, the case that the ethical rules applicable to legal representatives caution against including a plea (especially in a matter as serious as fraud) without some realistic basis for believing that the relevant fraud claim could be sustained. It seems to me that the position initially adopted by Mr. Johnston in not pleading fraud was reasonable in those circumstances.

4.2 However, the problem stems from the fact that at no stage did Mr. Johnston seek to amend his claim against Traynor Mallon to include a plea of fraud. It seems to me that this is more than a mere technical pleading point. For the reasons already analysed it is clear that the relative liabilities of two concurrent wrongdoers are determined on the basis of blameworthiness. That blameworthiness must be assessed on the basis of the allegations pleaded against the respective concurrent wrongdoers to the extent that those allegations are made out at the trial. It follows that, in approaching the trial of the third party issue in this case, Mr. Mallon was well aware that, in the event that the case which he made as to why he should not be regarded as vicariously liable for Mr. Traynor failed, he would face an assessment of his contribution to the damages in these proceedings, which would be based on whatever blameworthiness might, on the pleadings and as sustained by the evidence, be found against Traynor Mallon. Mr. Mallon would, in that context, have been aware that the only case pleaded against Traynor Mallon, and through that firm as against him, was one of failure to comply with an undertaking. Had a plea of fraud been in place, then Mr. Mallon would have had the opportunity to consider whether there was any evidence which he might have tendered either to displace the allegation of fraud against Mr. Traynor or, at a minimum, to mitigate the blameworthiness of any such fraud. In a following section of this judgment I will analyse the extent to which there is, within any particular type of wrongdoing, a gradation of seriousness. There can be negligence in which there is a minor breach of the standard inherent in the relevant duty of care and there is negligence which can reasonably be described as gross (see generally section 8 of my decision in *ICDL GCC Foundation FZ-LLC & Anor v. European Computer Driving Licence Foundation Ltd* [2011] IEHC 343). Likewise, there are breaches of contract which can range from the inadvertent to the deliberate. While any finding of fraud is necessarily serious there can, particularly by reference to an individual participant in a fraud, still be a gradation of blame.

4.3 It will be recalled (see the damages judgment) that when Mr. Traynor was called to give evidence he was not asked by either side any questions concerning the series of transactions which are at the heart of these proceedings. If there was an accusation of fraud

against Traynor Mallon on the table, then Mr. Mallon would have had to decide whether to seek to lead evidence which might have had the effect of mitigating or minimising the blameworthiness to be attached to Mr. Traynor in the context of that fraud. In the absence of a plea of fraud, it made complete sense for Mr. Mallon not to go down that road. Having chosen not to amend the pleadings by the inclusion of a claim in fraud, it seems to me that it is now too late for Mr. Johnston to seek to argue that I should characterise Mr. Traynor's actions as fraudulent and thus to attribute blame to Mr. Mallon, on the basis of vicarious liability, attributable to fraudulent activity. To do so would run the risk of being significantly unfair to Mr. Mallon and to deprive him of the opportunity of putting forward whatever case there might have been put forward to mitigate (or, possibly, although it must be doubtful, entirely explain away) any fraud on the part of Mr. Traynor. It is next necessary to turn to the additional allegations of negligence made by Mr. Mallon against Mr. Johnston.

5. The Allegations of Negligence made against Mr. Johnston

5.1 In circumstances where Mr. Mallon did not take any active part in the hearing leading to the principal judgment Mr. Mallon was, therefore, entitled to raise issues at this subsequent hearing which, had he taken part in the earlier part of the trial, he could then properly have raised. One such issue, and on which considerable emphasis was placed, was that of the conduct of Mr. Johnston, insofar as it may be said to have a bearing on the court's assessment of the respective fault of the parties in coming to a conclusion on the consequential contributions to be made, which went beyond the findings made against Mr. Johnston in the principal judgment.

5.2 Mr. Mallon alleged that Mr. Johnston failed to carry out a number of significant tasks which were otherwise and ordinarily required of a solicitor acting in Mr. Johnston's position in a transaction of the kind which occurred. They were:

> "(1) to investigate the Title in respect of the lands at Castlewarden;
>
> (2) to raise pre-Contract queries;
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> (3) to raise Requisitions on Title upon receipt of the Contract of Sale;
>
> (4) to receive/consider Replies to the Requisitions;
>
> (5) to raise Rejoinders in respect of any such Replies;
>
> (6) to conduct Planning Searches in respect of same;
>
> (7) to conduct Land Registry Searches in respect of same;
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> (8) to conduct Judgment Searches in respect of the Borrower/Purchaser Mr. Tiernan;
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> (9) to conduct Bankruptcy Searches in respect of same;
>
> (10) to conduct Sheriff Searches in respect of same;
>
> (11) to arrange a three-way Closing of the Sale of the lands at Castlewarden;
>
> (12) to obtain the original Contract of Sale, fully executed and completed;
>
> (13) to obtain properly executed Mortgage/Charge documentation;
>
> (14) to ensure that the Transfer was consistent with the Contract of Sale."

5.3 The consequence, it was argued, of failing to carry out those tasks, and in particular the searches described, was that Mr. Johnston did not uncover a number of facts which would have led to the conclusion that Mr. Tiernan represented a high risk regarding any possible future repayment of the proposed €7m loan and which Mr. Johnston would or ought to have brought to the attention of ACC. In addition, it was said that had Mr. Johnston carried out a normal investigation of the planning history of the lands in question then he would have come to a similar (pessimistic) conclusion as the court (see para. 5.9 of the damages judgment) regarding the development potential of the lands.

5.4 As a preliminary point it must be recalled that, at para. 7.20 in the damages judgment, I found that, in part in light of the instructions given by ACC, Mr. Johnston was not employed to detect suspicious circumstances and report them and as such the responsibility for the commercial sense of the loan in this case (including the probity of the borrower and his capacity to repay) rested on ACC and ACC alone. It was for that reason that I held 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. Accordingly, this court has already considered Mr. Johnston's actions (and inactions) in coming to a decision on quantum. Similar considerations seem to apply to the question of planning searches. Mr. Johnston was not asked by ACC to verify the development potential of the lands.

5.5 To the extent, therefore, that it remains for the court to consider the substantive merits of Mr. Mallon's allegations against Mr. Johnston's actions, it would appear that a causation question arises. For the court to engage in an assessment of those steps which Mr. Johnston is said to have failed to carry out in the context of contribution would result in the court engaging in a causative analysis of the extent to which Mr. Johnston's behaviour resulted in the loss suffered by ACC. However as Keane J. makes clear in *Iarnród Éireann v. Ireland* the criterion to be applied is not that of causation but of blameworthiness. As such the court need not consider the causative effects of Mr. Johnston's failure to carry out specific tasks, save that, to the extent that the court is satisfied that those failures may have had some form of causative effect on the losses suffered, they might then properly form part of the overall assessment of Mr. Johnston's blameworthiness for his part in the losses suffered by ACC.

5.6 In reviewing the additional claims made by Mr. Mallon, it seems to me that a great number of them do not have any causal connection with the loss in this case. Other than the fact that the deed of transfer from the vendor to Mr. Tiernan was not executed there were, in fact, no title problems. There is no evidence to suggest that, had the vendor executed a deed in favour of Mr. Tiernan, good title would not have passed and ACC would not have had good security over the lands.

5.7 Insofar as the remainder of the suggestions concern searches which might have disclosed that Mr. Tiernan had a small judgment debt or which might have disclosed the adverse planning history of the property, I am not satisfied that those matters really add anything of any great significance to the overall assessment of the blameworthiness of Mr. Johnston. Mr. Johnston's role did not include assessing Mr. Tiernan's creditworthiness or the planning status of the lands.

5.8 Against that background, it is necessary to turn to an assessment of the relative blameworthiness of Mr. Mallon and Mr. Johnston.

6. The Relative Blameworthiness

6.1 I should start by making a number of general observations on the assessment of blameworthiness. As touched on earlier, it seems to me that, within each category of potential wrongdoing (such as the negligence and failure to comply with an undertaking with which I am concerned in this case) there is a range or gradation of degrees of blameworthiness. As pointed out earlier, negligence can range from mere inadvertence to falling short of an appropriate standard which is highly culpable.

6.2 Likewise, it seems to me that a breach by a solicitor of an undertaking can have its own internal range. A solicitor might, for example, due to inadvertence give an undertaking with which he is unable to comply. The solicitor concerned might, nonetheless, be liable but his blameworthiness might be at the lower end of the scale and might be comparable to a similar act of negligence due to inadvertence. Likewise, the nature of an undertaking may be one where the breach itself might be due to inadvertence. For example a solicitor might give an undertaking to file the relevant papers in respect of a debenture with the company's registration office within 21 days. An error might lead to the documents being filed late and there might, of course, be serious consequences which flow from that late filing. The solicitor might well be liable in such circumstances but again his blameworthiness would be at the lower end of the scale.

6.3 On the other hand, there will be circumstances where the action of a solicitor in failing to comply with an undertaking is deliberate in the sense that the solicitor will have had it within his power to comply with the undertaking and will either have simply refused to do so for no statable reason or will have taken actions which will have made it impossible for him to comply with the undertaking in circumstances where it will have been clear to the solicitor concerned that taking the actions in question would leave him in a position where he could no longer comply with his undertaking. Such action is likely to be viewed at the higher end of the scale.

6.4 In applying those general principles to the facts of this case, I have come to the view that Mr. Johnston's negligence can be placed towards the midrange of the scale of solicitor's negligence. It goes beyond mere inadvertence or a minor error. However, it needs to be remembered that closing on undertakings was a common practice in at least certain types of conveyancing transactions at the time in question. There was nothing inherently or intrinsically wrong with closing on an undertaking as such. In those circumstances, it seems to me that it would be equally wrong to characterise Mr. Johnston's negligence at the gross negligence end of the scale.

6.5 However, I do have to find that Mr. Traynor's breach of undertaking is at the serious end of the scale relevant to breaches of undertaking. Mr. Traynor had the money. It is clear from the report by the Law Society, proved in evidence before me, that Mr. Traynor dispersed the monies so that they were all gone at a time when he knew that he had not secured title to the property. For the reasons already analysed, it does not seem to me to be appropriate to have regard to any possible involvement of Mr. Traynor in the undoubted fraud which occurred. However, even disregarding the fraudulent end of the transaction, it is clear that Mr. Traynor deliberately put himself into a position where he knowingly could not comply with his undertaking to produce an executed deed and to only use the monies which he had been given in order to secure that end. Mr. Traynor's breach of undertaking must, therefore, be characterised as a conscious and deliberate act. It must, therefore, place Mr. Traynor's breach of undertaking at the upper end of the scale.

6.6 While there may, of course, be similarities between certain acts of professional negligence on the part of a solicitor and certain breaches of undertakings on the part of another solicitor (the example given earlier where a solicitor, through inadvertence, gives an undertaking which he cannot comply with may not be much different from a similar inadvertent act of negligence), nonetheless it seems to me that having regard to the high professional obligations placed on a solicitor to comply with undertakings, it would, ordinarily, be the case that the court would be likely, everything else being equal, to view a breach of undertaking as being more serious than an act of negligence.

6.7 Having regard, therefore, to the fact that a breach of undertaking (particularly a conscious and deliberate one) must be viewed more seriously than an act of negligence and having regard to the fact that, for the reasons already analysed, I view Mr. Traynor's breach of undertaking as being at the higher end of the relevant range while viewing Mr. Johnston's negligence as being in the mid level of the range, it seems to me that it is appropriate, as and between them, to apportion blame as to 70% to Mr. Traynor and 30% to Mr. Johnston.

7. Conclusion

7.1 As judgment in the sum of €2m has already been given against Mr. Johnston in favour of ACC, it follows that the appropriate order that can be made on the third party apportionment issue is to direct that Mr. Traynor and Mr. Mallon (in his capacity as a party vicariously responsible for the actions of Mr. Traynor) are liable to make a contribution to Mr. Johnston in the amount of 70% of the award which Mr. Johnston has to meet.

7.2 It follows that Mr. Johnston is entitled to an award of €1,400,000 against Mr. Mallon as a contribution from a concurrent wrongdoer to the damages which Mr. Johnston is obliged to pay ACC on the basis of the assessment of blameworthiness in which I have engaged. There will be judgment on the third party issue accordingly.