Neutral Citation Number: [2009] IEHC 45

THE HIGH COURT

COMMERCIAL COURT

2007 5373 P

BETWEEN

ACC BANK PLC.

PLAINTIFF

AND

FAIRLEE PROPERTIES LTD., JERRY BEADES AND NIAL RING

DEFENDANTS

JUDGMENT OF Ms. Justice Finlay Geoghegan delivered the 4th day of February, 2009

1. The plaintiff's claim in these proceedings arises out of three facilities granted to the first named defendant, Fairlee Properties Ltd. ("Fairlee") which were guaranteed by the second named defendant ("Mr. Beades") and the third named defendant ("Mr. Ring"). The first two facilities were commercial facilities granted in normal course. The third facility was not a normal commercial facility and granted after events which gave rise to the counterclaim in the proceedings.

2. All three defendants counterclaim against the plaintiff by reason of alleged negligence, breach of duty and breach of contract of the plaintiff by its loss of title-deeds to properties at Richmond Road and Richmond Avenue, Dublin, and the plaintiff's failure to produce those deeds in June 2004.

3. The plaintiff's claim against Mr. Ring and his counterclaim against the plaintiff have been settled and this judgment does not concern the counterclaim.

4. At the outset of the hearing, it became apparent that there was substantial agreement in relation to the quantum of the plaintiff's claim against Fairlee and Mr. Beades and their liability on the claim, subject to a right of set off in respect of the damages claimed on the counterclaim. There were only two issues in dispute on the claim. The first was the entitlement of the plaintiff to charge interest on the three facilities from 1st July, 2006, until 17th July, 2007, being the date of commencement of proceedings. Having heard submissions and considered the agreed documentary evidence in relation to that issue, I gave a ruling on the third day of the trial in which I determined that the plaintiff was not so entitled to charge interest. The parties are in agreement that the amount of the plaintiff's claim in such circumstances is €6,278,355.24.

5. The second issue is the entitlement of the plaintiff to interest pursuant to the Courts Acts on such sum against the defendants from the date of commencement of the proceedings. I indicated that I would leave over determining that issue until after I determined the counterclaim of Fairlee and Mr. Beades.

Nature of counterclaim

6. I propose in this judgment referring to the first and second named defendants collectively as the defendants and insofar as is necessary to refer to them individually to do so as Fairlee and Mr. Beades.

7. In July 2000, the plaintiff made Facility 1 available to Fairlee. This was a sum in Irish Punts equivalent to approximately €2.6 million. The stated purpose was to enable Fairlee purchase a property at 158-163, Richmond Road, Dublin 1 ("the Richmond Road property"). The facility was secured *inter alia* by a first fixed mortgage/charge over the Richmond Road property and a guarantee and indemnity from Mr. Beades which in turn was supported by a first fixed charge over a site owned by him at 29-31, Richmond Avenue ("the Richmond Avenue property"). In June 2001, the plaintiff made available Facility 2 to Fairlee in a sum of approximately €330,000. Its stated purpose was to enable Fairlee purchase a property adjoining the Richmond Road property. The security included a first fixed mortgage/charge over that property and the securities already granted *inter alia* by Fairlee and Mr. Beades in relation to Facility 1. The plaintiff retained the title-deeds to the properties at Richmond Road and Richmond Avenue at all material times.

8. Facility 1 and Facility 2 were rolled over from time to time. However, the relationship between the plaintiff and Fairlee and Mr. Beades deteriorated. The plaintiff was not willing to make further facilities available. Fairlee sought finance elsewhere and, by November 2003, Mr. Beades had informed the plaintiff that he was seeking finance from Bank of Scotland (Ireland) Ltd. ("BOSI"). The facilities to be obtained from BOSI were to be sufficient to discharge the then liabilities of Fairlee to the plaintiff. Such facilities were approved by BOSI in February 2004.

9. In June 2004, the solicitors for the defendants requested from the plaintiff the title documents *inter alia* to the properties at Richmond Road and Richmond Avenue on accountable receipt for the purpose of preparing the security sought by BOSI in connection with the proposed facilities. The plaintiff was unable to locate the title documents and ultimately, in early July, informed the defendants that the title documents were mislaid.

10. The facilities from BOSI could not be drawn down in the absence of the title documents. The plaintiff commenced a process of reconstituting the title. In July 2005, the plaintiff provided an indemnity to BOSI who in turn granted some facilities to the defendants. In April 2006, following a visit by Mr. Beades to a senior official of Rabobank, the parent company of the plaintiff, in the Netherlands, an additional interest-free facility of €3 million was granted to Fairlee by the plaintiff. Later, in the month of April 2006, the plaintiff found the title-deeds.

11. The defendants counterclaim that the plaintiff was negligent in failing to produce the title documents to the properties at Richmond Road and Richmond Avenue when requested in June 2004. They make alternative claims, alleging breach of contract and breach of trust. They contend that each suffered significant loss and damage arising from the negligence, breach of duty, breach of contract and breach of trust of the plaintiff in failing to keep the title documents securely, and failing to produce them when requested in connection with the redemption of the relevant mortgages or charges given by the defendants to the plaintiff.

Issues

12. There are multiple facts in dispute between the plaintiff and the defendants. Many of the detailed disputes are not relevant to the issues which the Court now has to determine. The parties, with the assistance of their counsel and solicitors, during the course of the hearing reduced quite significantly the relevant issues in dispute. The issues remaining in dispute at the end of the hearing may, most conveniently, be resolved by a consideration of the following:

(i) The relevant findings of fact prior to June 2004;

(ii) The liability of the plaintiff for its admitted failure to produce the title documents in June 2004 in the context of the relevant findings of fact;

(iii) The findings of fact relevant to the defendants' counterclaims for damages and the quantification of those claims.

(iv) The liability of the plaintiff for the defendants' alleged losses.

Findings of fact to July 2004

13. The following are the findings of fact which appear relevant to the issue of the plaintiff's liability, if any, for its admitted failure to produce the title documents to the properties at Richmond Road and Richmond Avenue when requested in June 2004.

14. The title-deeds to Richmond Road and Richmond Avenue were given by the defendants to the plaintiff pursuant to the mortgage/charges granted as security for Facilities 1 and 2 and subsequently retained by the plaintiff as mortgagee or chargee of the properties.

15. Fairlee is a property development company. At all material times, the plaintiff was aware that Fairlee proposed developing the property at Richmond Road, either by assembling the site, adding value by obtaining planning permission and reselling, or by constructing thereon and selling what was built thereon.

16. Mr. Beades is a property developer in his personal capacity. At all material times the plaintiff was aware of this and that Mr. Beades proposed developing the property at Richmond Avenue. The plaintiff was aware since the end of 2003 that Mr. Beades had obtained planning permission for forty-eight apartments on a site at Richmond Avenue comprising the site owned by Mr. Beades, and an adjacent site then owned by a Mr. Frank Murphy.

17. Since at least March 2003, the loan facilities of Fairlee from the plaintiff were in arrears. In October 2003, the plaintiff demanded repayment in full. At latest by this date the plaintiff had decided not to make further loans to Fairlee or Mr Beades.

18. In December 2003, the plaintiff was informed that the defendants were in negotiations with BOSI which proposed granting facilities to Fairlee which would permit it repay in full to the plaintiff Facility 1 and Facility 2.

19. In February 2004, the plaintiff was furnished by the defendants with a copy of a letter dated 24th February, 2004, from BOSI, approving a facility of €4,620,000 to Fairlee. That approval expressly included as a purpose the refinancing of the plaintiff's facilities to Fairlee, then estimated at €3,320,000.

20. The plaintiff agreed at this time, if not earlier, to such an exit strategy for its relationship with the defendants pursuant to Facility 1 and Facility 2.

21. By letter of 20th May, 2004, the plaintiff provided to the solicitors for the defendants the redemption figures for the liabilities of Fairlee to the plaintiff under Facility 1 and Facility 2.

22. The approved facilities from BOSI required, *inter alia* as security, a first fixed charge over the property of Fairlee at Richmond Road and a first fixed charge over the property of Mr. Beades at Richmond Avenue, in support of a guarantee from Mr. Beades for the proposed facilities to Fairlee. On 4th June, 2004, the then solicitors for BOSI sought from the defendants' solicitors the title documents *inter alia* to the properties at Richmond Avenue and Richmond Road for the purpose of preparing the necessary securities.

23. The solicitor for the defendants then sought the title documents to Richmond Road and Richmond Avenue, on accountable receipt, from the plaintiff by email dated 15th June, 2004. These were expressly requested in connection with the refinance being obtained from BOSI for the purpose *inter alia* of redeeming the loans of Fairlee from the plaintiff secured *inter alia* by mortgages/charges on the properties.

24. Initially the defendant's solicitor was informed that there was a difficulty in locating the deeds. On the 23rd day of July, 2004, a meeting was held between representatives of the plaintiff and the defendants' solicitor at which he was informed that the title-deeds could not be found.

25. A letter dated 7th July, 2004, from BOSI offered to Mr. Beades a separate facility of €3,400,000 on the security of a number of properties including a second charge over the Richmond Avenue property. This was accepted by Mr. Beades on 16th August, 2004. The plaintiff was informed of this at latest at a meeting held on 17th August, 2004.

26. In July 2004, the plaintiff informed the defendants through their solicitor that it would reconstitute the titles to the Richmond Avenue and Richmond Road properties and apply for first registration of same. The solicitor for the defendants

agreed to cooperate in the preparation of any necessary documents.

Liability of plaintiff for failure to produce the title documents
27. The plaintiff, in its submissions, does not dispute that its failure to produce the title documents, when requested, in June 2004, was in breach of the standard of care and/or professional service which it would wish to give to its clients. It does not seek on any factual basis to excuse the temporary loss by it of the deeds and its resulting failure to be able to produce the title documents.

28. The only basis upon which it attempts to exclude liability altogether, as distinct from submissions made which seek to limit its liability, is in reliance upon the decision in *Gilligan and Nugent. v. National Bank Ltd.* [1901] 2 I.R. 513. In those proceedings, the first named plaintiff, Mr. Gilligan, was the owner of premises in Middle Abbey Street, Dublin. He had deposited his title-deeds with the National Bank. In the spring of 1900, he wished to sell the premises. His solicitor asked the Bank to see the title-deeds. They were sent to him but they were so damaged by water as to be partly illegible and certain of the parchments were so stuck together that they could not be opened. The title-deeds had been deposited with the Bank as security for advances to Mr. Gilligan.

29. The title-deeds had been stored by the Bank in a strong room in the basement of the bank. On the night of a particular storm the strong room was flooded and Mr. Gilligan's deeds covered by muddy water.

30. A claim was brought in negligence. At the hearing, there was evidence of a probable reduction in a sale price if title-deeds were not produced and also the cost of obtaining a declaration of title. These amounts varied between £500 and £200.

31. The action was tried before the Lord Chief Baron Palles and a city special jury. The questions left to the jury and their answers, insofar as relevant, were:

> (i) Were the defendants negligent in storing the plaintiff's deeds on the lower shelf in the safe in question in the manner in which they were stored? - Yes.
>
> (ii) If so, did the plaintiffs thereby sustain damage, and if so, to what amount? - £350.

The Lord Chief Baron gave judgment for the plaintiffs for £350 with costs.

32. In accordance with the then practice, the defendant sought to set aside the verdict before the Queen's Bench Division. The defendant was successful in having the verdict set aside.

33. The plaintiff herein seeks to rely upon the majority judgment of Madden J. and a concurring judgment of Barton J. In each judgment, for slightly differing reasons, the judge concluded that an action at law for negligence in the safekeeping of title documents did not lie by a mortgagor against a mortgagee, prior to redemption. At p. 534, Madden J. stated:

> "For these reasons I am of opinion that the defendants are bound on receipt of principal, interest, and costs, to hand over the title-deeds to their mortgagor, and if they cannot hand them over in their entirety, to account for their loss or destruction, but that they are under no present liability for their safekeeping, enforceable by action at law."

Each of the judgments turned on a consideration of the fact that the title documents form part of the property which is the subject of the mortgage and therefore became the property of the mortgagee for so long as the mortgage subsisted. Counsel for the plaintiff had argued that there was an implied term in the mortgage that the mortgagee take reasonable care of the documents. This appears to have been the basis of the claim made in negligence. This was rejected upon the grounds that a mortgagee could not be regarded as under an obligation to take reasonable care of its own property. Barton J., at p. 547, summarised his view as follows:

> "In my opinion, an action for damages for negligence in storing title-deeds does not, at all events before repayment, lie at the suit of a mortgagor against an equitable mortgagee by deposit of title-deeds, because the mortgagee is not a pawnee or bailee of the documents, but the absolute owner of them in the eye of the law; and the mortgagor's remedy, if any, is not by an action for damages but by an application for equitable relief."

Madden J., in his judgment, also referred to the obligations on redemption. At p.530, he stated:

> "The mortgagor on payment of the mortgage-debt is entitled to have the mortgaged property restored to him in its entirety, unfettered and undiminished in value . . . Part of the mortgage security consists of the title-deeds. If the mortgagee cannot restore this portion of the mortgaged property undiminished in value, the mortgagor is entitled to compensation . . . the reason why compensation is awarded is because the mortgaged property is not restored to the mortgagor in its entirety and undiminished in value."

And further, at p. 533, having referred to the right of a mortgagor to inspect title documents under s. 16 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) he stated:

> "When the time of redemption arrives, if it ever does, the loss caused by the default of the mortgagee in restoring the deeds can be set off in reduction of the amount due on the mortgage."

34. I have concluded that the above decision does not preclude the Court finding that the plaintiff owed a duty of care to the defendants on the facts found above, to take care in the care and custody of the deposited title documents and in particular to file and store the deposited title documents in such a way that the plaintiff could produce them to the defendants' solicitors when requested in June 2004.

35. First, *Gilligan* is distinguishable on the facts. The request made for the title documents in June 2004, was in the context of a proposed redemption. Whilst it is true that some of the statements in the judgment refer to actual redemption, in current banking and conveyancing practice, in particular where redemption is to occur through a refinancing arrangement, it is normal for the documents of title to be produced on accountable receipt, in advance of actual redemption to permit the new lending institution prepare its security so that the granting of new security, draw down of the new facilities and redemption with release of securities can occur on the same day. On the facts herein, I have concluded that the plaintiff had agreed that the security it held from both Fairlee and Mr. Beades could be redeemed by the payment by Fairlee of the redemption figures already provided. Further, it was aware that the source of funds to enable Fairlee to do this was to be the new loan facilities from BOSI. Accordingly, even on the law as stated in the judgments in *Gilligan v. National Bank*, it appears that on the facts herein, ACC was under an obligation to produce to the defendants the title-deeds on redemption. In current practice, this required them to produce the title-deeds on accountable receipt in advance to permit the new security documents which will enable the monies for redemption to be released to be put in place.

36. Second, it must be recalled that *Gilligan* was not about a failure to produce title-deeds. There is, at all times prior to redemption, a statutory obligation to have them available for inspection pursuant to s. 16 of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41). Section 16(1) provides:

> "16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

A request to make title documents available on accountable receipt is similar in substance to a request to inspect and take copies envisaged in s. 16 of the Act of 1881. It is only a more convenient way of doing the same thing.

37. Third, the decision in Gilligan long predates the seminal decision in Donoghue v. Stevenson [1932] A.C. 562 and the development of the "neighbour principle" in the law of torts. The submissions considered by the judges in Gilligan v. National Bank in relation to a potential duty of care were based upon an implied covenant or term in the mortgage. Considering the duty of care owed by the plaintiff to the defendants and their counterclaim for damages for breach of that duty, it is helpful to reconsider the well-known speech of Lord Atkin in *Donoghue v. Stephenson* at p. 580 with, as pointed out by Keane C.J. in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, at p. 133, the introductory passage which is frequently omitted:-

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of *'culpa'*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be related so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Atkin, at p. 581, having referred to the principle established by *Heaven v. Pender* (1883) 11 QBD 503 and a quotation at p. 509, stated:-

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

38. The above principles set out by Lord Atkin must, of course, be considered in the context of subsequent developments and, in particular, the decisions of the Supreme Court in *Glencar Exploration plc.* and *Fletcher v. Commissioners of Public Works* [2003] 1 I.R. 465, which require the Court to consider in addition whether it is just and reasonable to impose a duty of care of the scope contended for.

39. It is not disputed on the facts of this case that the plaintiff had such close and direct relations with Fairlee and Mr. Beades as the owners, at least of the equity of redemption in the properties to which the deposited title-deeds related, that it must have known that they would be directly affected if the plaintiff were careless in the storing of the title-deeds such that they could not produce them when requested. It must have been reasonably foreseeable to the plantiff that if it was careless in the storing of the title-deeds such that they could not produce them on request, that such carelessness would be likely to injure the defendants. As is clear from the subsequent decisions, that, of itself, is not now sufficient to find in law the existence of a duty of care. The Court must consider the reasonableness in the imposition of such a duty of care and public policy may play a role in that finding. I am satisfied on the facts of this case that it is reasonable to impose a duty of care on the plaintiff as mortgagee or chargee who received the title documents to development properties over which it has been given security, to take reasonable care in the storage of those title documents such that it could , at all material times,and in particular in connection with a proposed redemption from an agreed refinancing either produce them for inspection pursuant to s. 16 of the Act of 1881, or, if they are agreeable to do so, make them available to the mortgagor's solicitor on accountble receipt, when requested. It is not suggested on the facts of this application that there was any objection to making these documents so available if they had been found. I will consider further the exact scope of the duty of care in the context of the counterclaims for damages.

40. I have concluded that the plaintiff was in breach of such duty of care in failing to locate and produce the title documents when requested in June 2004 and continued to be in breach of such duty until April when it located the title

documents.

Counterclaims
41. The counterclaims of Fairlee and Mr. Beades raise a number of difficult questions, both of fact and law, which are in dispute between the parties. However, there is also a measure of agreement. Counsel for both parties are agreed that on the applicable legal principles, Fairlee and Mr. Beades must prove, on the balance of probabilites, that the plaintiff's breach of duty is a factual causation of the losses which each of them allege they suffered by reason of such breach of duty and which they now seek to recover. It is, of course, not sufficent for the defendants to establish factual causation. They must also satisfy the Court, in accordance with the appropriate legal principles, that there is, what is sometimes termed, legal causation, or to put it another way, that they are entitled, as a matter of law, to recover from the plaintiff the losses factually caused. However, it is convenient to firstly consider the factual causation and then only consider the legal issues applicable to those losses in respect of which the defendants have established factual causation.

42. The breach of duty of the plaintiff which I have found is the failure to produce the title documents *inter alia* to the properties at Richmond Road and Richmond Avenue, between June 2004 and April 2006. In the intervening period, the plaintiff had commenced attempting to reconstitute the titles and procure first registration of the titles to those properties. The defendants make a number of allegations against the plaintiff in respect of the manner in which they attempted to do this. However, in the approach I have taken, these do not appear to me relevant. The plaintiff owed a duty of care to locate and produce the title documents, when requested, in June 2004. It was unable to do this until April 2006. Insofar as I am taking that entire period into account, it does not appear to me relevant to examine the allegations made by the defendants against the plaintiff in respect of what it attempted to do in the intervening period. I am satisfied that there is nothing which the defendants did, or failed to do, in respect of the title to the properties which affected the issues in the intervening period. Similarly, it does not appear to me that there is any factual step taken by the plaintiff in relation to the title documents, or the attempt to procure first registration, in the intervening period which reduces its liability. It is appropriate to take into account that the pliantiff the granted an indemnity to BOSI in July 2005, which enabled the defendants to procure facilities from BOSI. which, on the facts, reduced the losses now being claimed by the defendants. Also the interest free facility granted to Fairlee in April 2006 is relevant to the quantum of damages.

43. In deciding whether or not the losses now claimed were, as a matter of fact, caused by the plaintiff's breach of duty in failing to produce the title documents, counsel for the defendants submits that the Court should follow the approach outlined by Stuart-Smith L.J. in *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 W.L.R. 1602 where at p. 1609 he stated:

> "(1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sutained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact . . .
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not . . .
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour."

44. Counsel for the defendants submits that the pliantiff's negligence was an ommission and that the Court must consider what Fairlee and Mr Beades would have done if the title documents had been produced in June 2004. This appears correct. I propose now considering the factual causation of the losses claimed by each of Fairlee and Mr. Beades in accordance, where appropriate, with the above approach.

Counterclaim of Fairlee
45. Ultimately, only one head of significant damage was pursued in the counterclaim on behalf of Fairlee. It was submitted that during 2005 there was an agreement to sell the Richmond Road property to a Mr. Rooney and a Mr. Daly in consideration of approximately €7.85 million but that it did not happen because of the absence of the title deeds. Mr. Beades, as a director of the first named defendant, contended that if that sale had then taken place that it would have resulted in a profit of €3 million to Fairlee and that it has been at a loss of the use of such funds since 2005.

46. Fairlee must establish, in accordance with the approach set out above, that if the title-deeds to the Richmond Road property had been produced in 2004 or were available in 2005, that, as a matter of probability, it would have sold the Richmond Road property to Mr. Rooney and Mr. Daly. I am not satisfied that this claim has been made out on a number of factual grounds. Fairlee did not prove an enforceable agreement with Mr. Rooney and Mr. Daly for the sale alleged. Further, and more particularly, on the evidence adduced, I have concluded, as a matter of probability, that insofar as there were negotiations in 2005 with Mr. Rooney and Mr. Daly (which I accept), that Mr. Rooney and Mr. Daly remained interested in purchasing the Richmond Road property after the title-deeds had been located in April 2006. However, Fairlee did not then sell it to them notwithstanding the title deeds had been found. Accordingly, I have concluded that Fairlee has failed to establish, as a matter of probability, that if the title documents were available in 2005, it would have sold the Richmond Road property to Mr. Rooney and Mr. Daly. Accordingly, I have concluded that the failure of the plaintiff to produce the title-deeds on any date prior to April 2006 was not the cause of the failure of Fairlee to sell the Richmond Road properties to Mr. Rooney and Mr. Daly. This part of Fairlee's counterclaim therefor fails.

47. Fairlee advanced a claim in respect of commercial rates paid on the Richmond Road property. This was on the basis that failure of the plaintiff to produce the title-deeds has caused a delay in the development of that property with a continuing liability to commercial rates for a longer period. I am not satisfied that Fairlee has adduced evidence that it was delayed in the development of the Richmond Road property such that I could allow any loss in respect of commercial

rates paid on that property.

48. Fairlee has not adduced evidence of any other specific loss which it contends was caused by the failure to produce the title documents between June 2004 and April 2006. Whilst I accept it may have been disrupted in its development plans, that, of itself, cannot give rise to a claim in damages. Further, Fairlee had the benefit of an interest-free loan from the plaintiff from April 2006, which was a considerable financial benefit. It is agreed that the amount of interest not charged to Fairlee at the agreed commercial rates for all three facilities is €862,029. Taking into account this benefit, I have concluded that Fairlee has not made out any sustainable entitlement to damages on its counterclaim.

Counterclaim of Mr. Beades

49. The most signficant element of Mr. Beades' counterclaim is that he was delayed in the carrying out of the proposed development of the Richmond Avenue property by constructing forty-eight apartments thereon with a consequent reduction in the probable profits achievable by him on the development.

50. Mr. Beades contends that if the title documents had been available in June 2004 he would have obtained from BOSI the initial finance, which was approved in July 2004, for the purpose *inter alia* of commencing clearance of the Richmond Avenue site. He would shortly thereafter have obtained full development finance from BOSI for the Richmond Avenue site and commenced and carried out the development in approximately 22 months. He contends that he would have been in a position to sell the apartments in 2006. He gave evidence of a funding document that had been prepared on his behalf in April 2004, demonstrating on the basis of sales of the apartments achieving in aggregate €15,280,308 (ex- vat) that there would be a developer's profit (for Mr Beades) of €6,520,872. Expert evidence was adduced on his behalf that the market values achievable for these apartment blocks in mid-2006 were approximately €19.6 million.

51. Mr. Beades submits that, by reason of the loss of the title documents and the plaintiff's failure to produce them until April 2006, he was unable to obtain development finance from BOSI until July 2007. That having done so he commenced the substantial construction in September 2007 (site clearance having been done previously) and estimates that the apartments will not be completed until mid-2009. His evidence was that the development will take approximately twenty-two months to complete. Expert evidence was adduced on behalf of both parties that the sales price achievable for these apartments in 2008 was in the order of €14,000,000 and that, as a matter of probability, the prices would certainly not increase in 2009 and were more likely to decrease. He claims, as his probable reduction in profits, the difference between the sales price achievable in 2006 and those achievable in 2008. The difference is estimated by his valuer at €5,572,000.

52. Following the approach set out above, the first question which must be considered is what, as a matter of probability, Mr. Beades would have done in relation to the development of the Richmond Avenue property if the title-deeds had been produced in June 2004. In doing so, whilst, of course, I take into account the evidence given by Mr. Beades, with the benefit of hindsight, as to what he believes he would have done in the autumn of 2004, I must also examine that evidence and test it against certain other objective facts, including what actually did happen after the title-deeds were found in April 2006.

53. First, it must be recalled that Mr. Beades had obtained full planning permission for the Richmond Avenue site comprising the site which he owned and the adjoining site, then owned by Mr. Frank Murphy, at the end of 2003. The funding document to which I have made reference is dated April 2004. By letter dated 7th July, 2004, Mr. Beades obtained approval for personal finance from BOSI of €3.4 million to be drawn down prior to 30th September, 2004.

54. I am satisfied that Mr. Beades has established, as a matter of probability, if the plaintiff had produced the title documents in June 2004, that he would, as a matter of probability, have obtained the finance approved in July 2004 and subsequently obtained the full development finance from BOSI and have developed the property by the construction of forty-eight apartments thereon. I have reached this view primarily by reason of the fact that he did subsequently obtain such development finance from BOSI in July 2007 and is now carrying out the construction of the forty-eight apartments on the Richmond Avenue site. The more difficult question is when, as a matter of probability, Mr. Beades would have commenced and finished the construction if the title-deeds had been available in June 2004.

55. I cannot accept the evidence of Mr. Beades that, as a matter of probability, he would have commenced construction in the autumn of 2004 and finished in summer/autumn 2006. I accept his evidence that, as a matter of probability, the construction would have taken or will take approximately twenty-two months. However, I cannot accept that, as a matter of probability, construction would have commenced in the autumn of 2004. It appears to me inconsistent with certain other facts.

56. First, even though the title documents became available in April 2006, Mr. Beades did not obtain approval for the development finance from BOSI until July 2007. He explains the first part of the delay by reason of the fact that BOSI, as part of the indemnity agreement with the plaintiff in July 2005, required the plaintiff to procure the first registration of the title to the Richmond Avenue property. It is not in dispute that such registration was only completed at the end of December 2006. Mr. Beades says that this first registration was only required by reason of the indemnity arrangements following the loss of the title documents and that BOSI were not prepared to entertain an application for development finance from him until that was completed.

57. Mr. Beades did not adduce evidence from any person in BOSI. The parties did not seek to open to the Court the indemnity arrangements between the plaintiff and BOSI. The plaintiff did not dispute that first registration formed part of the indemnity agreement. However, that appears a separate question to the reason for which it was still required after the title documents were located.

58. However, even accepting Mr. Beades' evidence that he was unable to apply for development finance until January 2007, it still means that there was a delay of six months from his application to its approval. Mr. Beades has not explained to the satisfaction of the Court why any different period might have occurred if he had applied for development finance in the autumn of 2004. If the title-deeds had been available in June 2004 I am satisfied that Mr. Beades might have applied for development finance in the autumn of 2004. However, having regard, in particular, to the subsequent events, I am not satisfied that he has established that he would have obtained that in a short period of time. It appears probable it might have also taken approximately six months.

59. The second matter which is relevant to the probable date of commencement of the development of the Richmond Avenue property is the position of Mr. Frank Murphy. Mr. Beades gave evidence that if the title-deeds had been produced

he might not have had to buy out Mr. Murphy's interest and that they might have made arrangements to jointly develop the properties. I am not satisfied that he has established this as a matter of probability. The approval from BOSI of 7th July, 2004, refers to the buyout of a partner with an estimate of €1.96 million. The funding document of April 2004 includes amongst the costs an additional purchase of part of the site at €2 million. I accept that it had not been resolved in July 2004, exactly how Mr. Murphy's part of the site would be treated in the development. Nevertheless, I have also concluded that this was an issue which clearly had to be resolved before Mr. Beades would have obtained full development finance. Even if the final solution were not an acquisiton by Mr. Beades from Mr. Murphy, there would then have had to have been other ageements put in place between Mr. Beades and Mr. Murphy in relation to the joint development of the sites. In the events, the contract for the purchase of the additional sites was entered into in December 2004.

60. I have concluded, on the evidence and the above findings , as a matter of probability, if the plaintiff had produced the title documents in June 2004, that Mr. Beades would have obtained full development finance and commenced construction on the Richmond Avenue site by March 2005 but not before. I have further concluded that construction would have taken approximately twenty-two and therefore he would have completed and been in a position to effect sales of the apartments from approximately January 2007.

61. I am not satisfied that Mr. Beades has established that the delay between April 2006, when the deeds were produced, and January 2007, when he applied to BOSI for development finance, was caused by the breach of duty of the plaintiff. Nevertheless, it does not appear to me material to the computation of the losses claimed on the development of the Richmond Avenue property for the following reason. Even if I were to conclude that Mr. Beades, in mitigation of his losses, should have commenced an application for development finance for the Richmond Avenue property within a short period of time of the title-deeds being produced, say, June 2006, on the facts, such finance would not have been obtained as a matter of probabilty until December 2006. This would have meant a commencement of construction in January/February 2007, and an estimated completion date twenty-two months later in November/December 2008. The claim being made is based upon sales prices achievable in 2008, and more precisely, the evidence was that the prices given were at a mid-point in the year. The valuers agreed that prices were not likely to increase in 2009. This being so, having regard to the manner in which the claim is being put forward, it is not relevant for the Court to make any adjustment by reason of the fact that it should assess the damages on the basis that Mr. Beades might have completed the development and then would be in a position to sell the properties by November/December 2008.

62. I propose, therefore, examining the claim for losses on the development of Richmond Avenue upon a finding of fact that if the title documents had been produced, Mr. Beades as amatter of probabilty, would have commenced the development in March 2005, and completed same by January 2007, rather than (for the reasons already explained) what has actually occurred, namely, that he commenced development in September 2007, and is estimated to complete in the summer of 2009, but, nevertheless, is basing his alleged loss upon prices achievable in 2008.

63. Mr. Beades makes his claim for a reduction in profits on the development by reference only to the difference in the the sales prices achievable in 2008, as compared with the sales price achievable at the earlier date upon which he contends he would have completed the development if the title documents had been produced in June 2004. Mr Wallace the accountant who gave expert evidence on behalf of the plaintiff, criticised this approach. He gave evidence, which I accept, that the difference in sales prices achievable does not necessarily translate itself into the same difference in profits. This is obvious. The resultant variation in profits depends also on the variation in costs. The major costs identifed were construction costs and finance costs. Whilst Mr Wallace gave anecdotal evidence of reduction in construction costs in the Autumn of 2008 , the parties ultimately agree that I should have regard to the construction cost index which was put in evidence by agreement. This demonstrates a continual increase in the construction cost index from March 2006 until August 2008, which was the last entry. In March 2005, the index was 260.2, in January 2007 it was 284.4 and the last entry, in August 2008, was 303.6. Even allowing for some recent reduction, it appears to me as a matter of probability, construction costs of a two year development carried out between the beginning of or mid-2007 and the end of 2008 or mid-2009, in aggregate, would be no less than the construction costs of a development carried out between March 2005 and January 2007 and indeed may be greater. No submission was made that finance costs are likely to have been greater for an earlier development than for the delayed development. It would be hard to envisage that this could be so, having regard to the inclusion of the cost of the sites and the delayed carrying out of the development, even if interest rates have reduced.

64. Hence, whilst as a matter of principle, a reduction in selling prices does not necessarily result in a similar reduction in profit, on the facts of this claim, as I am satisfied that as a matter of probability the major costs assocoated with the development did not as a matter of probability reduce for the delayed development I have concluded that the reduction in selling prices is a reasonable estimate of the probable reduction in profit on the delayed development.

65. Expert evidence was adduced on behalf of Mr. Beades and the plaintiff in relation to the probable total market value of the forty-eight apartments, based upon individual selling prices in mid-2004, 2005, 2006, 2007 and 2008. These are, of course, estimates based upon the valuer's expert view and certain comparatives to which reference was made. There was substantial agreement on the 2008 figure. The plaintiff's valuer estimated €14,010,000 and Mr. Beades' valuer €14,042,000. I am satisfied that €14 million is a reasonable estimate for apartments if they had been completed and available for sale towards the end of 2008.

66. There is little disagreement on the mid-2007 figure. The plaintiff's valuer estimates €17,835,000 and Mr. Beades' valuer €17,577,000. The relevant date on my findings for the earlier completion and sales is January 2007. There is substantial disagreement on the mid-2006 figure. The plaintiff's valuer estimates €18,645,000 and Mr. Beades' valuer, €19,614,000. The differential is explained by certain comparators which were taken into account by Mr. Beades' valuer which were not considered appropriate by the plaintiff's valuer.

67. The Court must estimate, on this evidence, the probable market value in January 2007. Having regard to the higher figure for June 2007, of the plaintiff's valuer, the 2006 differential becomes less acute in determining the probable January 2007 figure. In the absence of any specific evidence in relation to January 2007, it appears appropriate to take the mid point between the 2006 and 2007 valuations for each expert. In the case of the plaintiff's valuer, this would give a market value of approximately €18.25 million in January 2007, and on the defendants' valuer figures, approximately €18.6 million. On the evidence given in relation to the 2006 figures, I have concluded that each valuer had reasonable explanations for the evidence given, and that, in the circumstances, a fair estimate is one between the two valuations given. I have concluded that €18.4 million is a fair estimate of the probable aggregate market value of the apartments if they had been

sold in January 2007.

68. On the facts, I am satisfied that the plaintiff has established as a matter of probability, that the failure of the plaintiff to produce the title documents in June 2004, and on any date prior to April 2006, has, as a matter of fact, caused a delay in the development and a consequent reduction in the profits achievable by him on the development of the Richmond Avenue site. Further, that €4.4 million is a reasonable estimate of the probable reduction in profits.

69. The remaining elements of Mr. Beades' counterclaim relate to steps he took, subsequent to July 2004, to obtain monies by reason of the very difficult cashflow situation in which he found himself, because of the failure of the plaintiff to produce the title documents, with the consequent failure to obtain *inter alia* the financing which had been approved for him personally by BOSI in July 2004. I am satisfied, on the facts, that Mr. Beades has established, as a matter of probability, that the failure of the plaintiff to produce the title documents in June 2004 caused his failure to obtain the finance approved from BOSI in the letter of 7th July, 2004, and that he was then, and continued for some time to be, personally under severe financial pressure by reason *inter alia* of his inability to raise finance on his then equity in the Richmond Avenue property. The first part of this claim relates to a number of properties which he contends he was forced to sell in the latter part of 2004 and early 2005, in the form of forced or quick sales, and as a result did not obtain their then full market value. Certain of these properties were not personally owned by Mr. Beades. He has not satisfed me of any basis on which I can take into account the sales of properties not owned by him. There were three properties which he established were owned by him. In relation to each, I am satisfied of the following facts on the evidence:

(i) Mr. Beades owned 52A, St. Anne's Drive, Raheny, Dublin 5. This was sold in October 2004 for €350,000. He had obtained a valuation from Lappin Estates in May 2004 that the property then had a market value of €450,000/€460,000. Expert evidence has been given that the value of this property in 2005 was €520,000. On those facts, I am satisfied that an estimated market value of €480,000 in October 2004 is reasonable and accordingly Mr. Beades achieved a sale price of €130,000 less than the market value in October 2004.

(ii) Mr. Beades owned 118, Connaught Street, Dublin 7. He sold this in November 2004 for €490,000. It was valued by Lappin Estates in May 2004 at €500,000. The expert evidence was that in 2005 it was worth €550,000. In November 2004 €520,000 appears a reasonable estimate and accordingly I have concluded that Mr. Beades achieved €30,000 less than the market value.

(iii) Mr. Beades owned 12, St. George's Avenue, Drumcondra, Dublin 9. He sold this in March 2005 for €420,000. Lappin Estates had valued it at €460,000 in May 2004 and the expert evidence was that it was worth €520,000 in 2005. I have assumed the 2005 figures to be mid-2005 figures. €500,000 appears a reasonable estimate of the market value in February 2005 and, accordingly, I have concluded that Mr. Beades achieved a sale price of €80,000 less than the market value in February 2005.

70. As a matter of fact, I have concluded that the plaintiff's breach of duty in failing to produce the title-deeds has caused the above losses to Mr. Beades on each of the dates identified.

71. Mr. Beades next claims the cost of obtaining finance in October 2004, in excess of normal commercial rates, pursuant to an agreement entered into between himself and Anthony Slein, Bob Lee and Ronan Melling, dated 28th October, 2004. This was in the nature of a "put and call" option of certain of the proposed apartments at Richmond Avenue. The evidence, which I accept, is that at that time Mr. Beades was paid by the other parties to the agreement a sum of €568,000. In the event that the apartments were not fully completed by 31st March, 2006, he became obliged, in certain circumstances, to repay that sum, together with the sum of €284,400 by way of interest costs and compensation. This latter sum was considered as the cost of the finance obtained. The expert accountants were agreed that the normal cost of such finance for the amount and period was €109,957. On the evidence, I am satisfied that following proceedings by the other parties, Mr Beades is obliged to pay the sum of €235,000 which gives rise to an additional cost of €125,043.

72. I am satisfied that Mr Beades' inability to raise finance on the security of the title deeds to Richmond Avenue in July 2004 caused him to have to obtain finance at higher that normal commercial rates.

73. In addition to the additional cost of this funding, Mr. Beades claimed the legal costs associated with the proceedings brought against him by the other parties to the agreement. I do not accept that he has established as a matter of probability that legal costs of proceedings were caused by the breach of duty of the plaintiff. Having entered into the agreement, it was a matter for Mr Beades to take steps to avoid litigation.

74. Mr. Beades entered into a similar type of an agreement with a Philip Donnelly in February 2005. However, Mr. Beades has not adduced evidence which permits the Court to determine the probable additional sum paid or to be paid by him over the commercial cost of funding received by him under the 2005 agreement with Mr. Donnelly. He has given evidence of the fact that he had to enter into a further agreement in December 2007 in relation to the earlier funding with Mr. Donnelly which creates certain liabilities. I am not satisfied that Mr. Beades has discharged an onus of establishing, as a matter of probability, that his liabilities under the second agreement are caused by the failure of the plaintiff to produce the title deeds prior to April 2006. Accordingly, this part of the counterclaim fails.

75. Mr. Beades makes a claim for the commercial rates paid on the Richmond Avenue property for the years during which he might have already commenced and/or carried out the development if the title-deeds had been produced in 2004. It appeared to be common case that the commercial rates would not have been payable once Mr. Beades demolished the existing buildings and prepared the site for construction. I have already determined that if the title-deeds had been produced, as a matter of probability, the work on the development would have commenced in March 2005. I have also determined that whilst the works actually commenced in September 2007, Mr. Beades has not explained that the delay between June 2006 and January 2007 and that a commencement date of January 2007 (allowing for six months to obtain development finance) was a reasonable estimate of the delay caused by the plaintiff's breach of duty. In those circumstances, I have determined that I should allow the claim in respect of the commercial rates paid on the Richmond Avenue site in 2005 and 2006 which in accordance with the report of Mr. Foster and not disputed are €2,173 and €2,256 respectively, making in aggregate €4,429.

76. The final claim pursued by Mr. Beades was that he was at a loss of the use of the probable profit on the Richmond

Avenue property from the date he should have completed the development and sold the apartments. On the findings I have made, the completion and sale of the properties would have commenced as a matter of probability in January 2007. This finding is based upon an estimated time to complete the development of twenty-two months. If sales were then entered into, it is probable that they would have been completed over the succeeding months. Obviously, the profit would derive from the final sales after the discharge of all the relevant costs. It therefore appears to me probable that the profit would have been earned by Mr. Beades in mid-2007. These proceedings commenced on 17th July, 2007. I am satisfied from the earlier findings that it follows that Mr. Beades' loss of use of the probable profits from the development from, say, June 2007, was caused by the plaintiff's negligence and breach of duty. It appears appropriate, on the facts, that I should deal with a quantification of this claim by considering whether I should exercise my discretion to award interest on an amount pursuant to the Courts Act.

Liability of plaintiff for Mr. Beades' losses

77. To succeed in recovering the losses which I have held were factually caused by the plaintiff's breach of duty Mr. Beades must establish that the plaintiff is legally liable to him for such losses. The losses or damage suffered by Mr. Beades must, of course, be of a type which were reasonably foreseeable to a person in the position of the plaintiff in June 2004. It also appears from the recent decisions of the Supreme Court, that in determining the imposition of liability for damage, that the Court should also consider whether it is fair and just to impose the liability. Fennelly J. in *Breslin v. Corcoran & Anor.* [2003] 2 I.R. 203, at p. 208, cited Keane C.J. in *Glencar* where he stated:

> "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 at p. 481, 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…"

Fennelly J. then continued:

> "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 liability. Put otherwise, it is necessary to have regard to all the relevant circumstances".

78. I have already held that Mr. Beades is a property developer and that his property at Richmond Avenue was development property and, further, this was known to the plaintiff. I have also held that the plaintiff owed a duty of care to Mr. Beades to take reasonable care in the storage of the title documents given to it in connection with the security granted by him over his development property at Richmond Avenue, such that it could, at all material times and, in particular, in connection with a proposed redemption, either produce them for inspection pursuant to s. 16 of the Act of 1881, or, if agreeable to do so, make them available to Mr. Beades' solicitor on accountable receipt. The first issue is whether it was reasonably foreseeable to the plaintiff that if, by reason of its negligence, it was unable to produce the title documents when requested in connection with a proposed redemption, Mr. Beades would suffer loss or damage of the types I have found to have been factually caused by the plaintiff's breach of duty.

79. The first loss is the reduction in the profits achievable on the Richmond Avenue development by reason of a delay in the carrying out of the development. I have concluded that loss or damage of this type was reasonably foreseeable to a person in the position of the plaintiff which had custody of the title documents to the development property as part of its security. A person in the position of the plaintiff must be aware that a developer requires his title documents as security to raise development finance. Further, that he requires development finance to carry out the development. It also appears to me to be reasonably foreseeable to a person in the position of the plaintiff that if a development is delayed this may result in a reduction in the profits achievable by the developer. This may be for a multiplicity of reasons, including additional time carrying the finance on the site purchase costs, potential increases in construction costs and potential variation in the market prices for the development being constructed, in this case, apartments. It is well established that what must be foreseeable is damage of the type suffered, but not necessarily of the exact nature or extent. See, for example, *Burke v. John Paul & Co. Ltd.* [1967] I.R. 277, at p. 285. The nature of the damage claimed is reduction in profits on a delayed development. This was foreseeable. It was also foreseeable that profits might be affected by variations (up and down) in market prices. It is not relevant that the extent of the variation or extent of the loss was not foreseeable.

80. Counsel for the plaintiff submitted that the Court should not find the plaintiff liable for the reduction in probable profits suffered by Mr. Beades on the Richmond Avenue development, as such reduction was caused by a fall in market prices. He sought to rely upon the speech of Lord Hoffmann in *South Australia Asset Management Corporation v. York Montague Ltd.* [1997] A.C. 191, where at p. 211 he stated:

> "A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

And later at p.218

> "A plaintiff has to prove both that he has suffered loss and that the loss fell within the scope of the duty."

That appeal concerned a negligent misrepresentation by a valuer as to the value of certain property which a lender proposed to take as security for a loan. The lender made a loan it would not otherwise have done; the security was negligently overvalued and market prices also dropped. The loss claimed was the total loss. On the facts of that case, it was held that the lender was not entitled to recover a loss greater than the difference between the negligent valuation and the true valuation and not the loss resulting from the reduction in market value. The analysis and decision principally turned on the scope of the duty owed by the valuer who was held to be providing information as distinct from advice.

81. That decision has subsequently been the subject of consideration on more than one occasion by the House of Lords, and in *Aneco Reinsurance Underwriting Ltd. v. Johnson & Higgins Ltd.* [2002] 1 Lloyd's Rep. 157, was explained by Lord Lloyd in his speech as the particular application of the well established principle that a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care in the particular context of negligent misrepresentation by a valuer. It does not appear to me that the general principle set out by Lord Hoffmann in *South Australia Asset Management Corporation v. York Montague Ltd.,* and as subsequently explained, differs from the principles set out by the Supreme Court in the decisions to which I refer, and by which, of course, I am bound.

82. Those decisions indicate that damage suffered by an injured party will be within the scope of the duty of care of the wrongdoer where it is foreseeable by a person who owes a duty of care to another that a failure to act in accordance with that duty by act or omission may result in damage of that type and that in all the relevant circumstances it is fair and just for the court to impose liability on the wrongdoer for the damage. I am satisfied that the reduction in probable profits on the Richmond Avenue site is damage of a type which comes within the scope of the duty of care of the plaintiff on the facts of this application. It was reasonably foreseeable by a person in the position of the plaintiff in June 2004 and it is fair and just to impose the liability on the plaintiff on the facts found herein.

83. Mr. Beades' claims, in respect of the loss by reason of his failure to sell the three properties at the full market value and the obtaining of finance, pursuant to the Slein agreement at higher than normal commercial rates, are, in my view, the same type of damage and one that was reasonably foreseeable to a person in the position of the plaintiff. The title documents were required in 2004 for the purposes of redemption of the security granted to the plaintiff so as to make them available to Mr. Beades to obtain other finance on their security. It must have been reasonably foreseeable to the plaintiff that if Mr. Beades did not have his title documents to give as security for commercial borrowing he would face a difficult cash flow situation and would be forced to raise money, either quickly or at higher than normal commercial rates, thereby incurring either loss or additional financial cost. Counsel for the plaintiff did not make any submission in principle against the liability of the plaintiff for the losses resulting from the sales below market price of three properties set out above and the greater than normal commercial cost of the funding obtained under the Slein agreement.

84. The payment of commercial rates for longer than otherwise necessary by reason of delay in commencement of development on the Richmond Avenue property was also foreseeable damage to a person in the position of the plaintiff in June 2004.

85. I have concluded all of the above damage was foreseable and that it is fair and reasonable to impose liability on the plaintiff for such damage. It is therefor within the scope of the duty of care of the plaintiff to Mr Beades. It was caused by the plaintiff's breach of duty and hence the plaintiff is liable for same. In summary, the losses recoverable are:

(i) Reduction in probable profits on Richmond Avenue development:

€4.4 million

(ii) Loss on sales below market value;

52A, St. Anne's Drive: €130,000

118, Connaught Street: €30,000

12, St. George's Avenue: €80,000

(iii) Additional cost of Slein funding:

€125,043

(iv) Commercial rates: €4,429

giving a total award of €4,769,472.00 on Mr. Beades' counterclaim.

Interest

86. The plaintiff claims interest pursuant to the Courts Act on the sum of €6,278,355.24 which it is agreed it is entitled to recover from each of Fairlee and Mr. Beades, subject to any right of set-off on the counterclaims. On the findings made, Fairlee has no right of set-off. Mr. Beades has a potential right in the sum of €4,769,472.00. In addition, Mr. Beades has a further claim for the loss of use of probable profits on the Richmond Avenue site from mid-2007 which I indicated I would consider in relation to interest.

87. In all the circumstances of this claim and counterclaim, I have concluded that I should exercise my discretion under the Courts Act by not granting interest, either on the claim or any element of Mr. Beades' counterclaim. This includes the sums lost by selling at below market value in 2004 and 2005. Whilst Fairlee has not been successful on its counterclaim, it appears to me that its counterclaim was inexorably linked on the facts with the counterclaim of Mr. Beades. In all the circumstances, both defendants were entitled to await making payment on the plaintiff's claim until the final determination of both counterclaims. It appears to me that the most appropriate and fair way of dealing with Mr Beades claim for the loss of use of probable profits on the Richmond Avenue development from mid-2007 and the plaintiff's claim for interest from the date of commencement of proceedings on the net amount due to it, is to make no order on any aspect of the claim or counterclaim pursuant to the Courts Act. I have also taken into account in respect of Mr. Beades' claim for loss of use of profits the fact that his liability, as guarantor of the debt of Fairlee, has been reduced by reason of the fact

that no interest was charged on the facilities to Fairlee from April 2006.

Relief

I indicated at the end of the hearing that, prior to making final orders, I would hear the parties on the precise form of orders, having regard to the findings made, and the fact that the claim of the plaintiff against Mr. Beades is as guarantor of the same debt in respect of which it is entitled to judgment against Fairlee. I indicated I would give the parties an opportunity of considering the question of the appropriate relief in relation to Mr. Beades' counterclaim and any set-off in such circumstances.

I propose hearing counsel at a convenient date in relation to this and the question of costs.