Neutral Citation Number: [2010] IEHC 313

THE HIGH COURT

2004 18539 P

BETWEEN

EDMUND KELLEHER AND JOAN KELLEHER

PLAINTIFFS

AND

DON O'CONNOR PRACTISING UNDER THE STYLE AND TITLE OF

DON O'CONNOR & COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 16th July, 2010

1. Introduction

1.1 In 2001 the plaintiffs ("the Kellehers","Mr. Kelleher" and "Mrs. Kelleher") were interested in buying a restaurant premises at No. 1 Parkwest, Mallow in Cork. Their purpose was to buy same as an investment with the intention being to let it to a restaurant operator. In that regard, they retained the defendant ("Mr. O'Connor") to act as their solicitor.

1.2 There can be little doubt but that the purchase has turned out to be unsuccessful. The Kellehers say that Mr. O'Connor was negligent in the way in which he handled the transaction on their behalf and bring these proceedings for damages arising out of that alleged negligence.

1.3 The problem with the restaurant stemmed from its status under the Food Hygiene Regulations 1950 as amended ("the Food Hygiene Regulations"). There is no doubt that the restaurant encountered significant difficulties with the authorities in relation to that status. It is said that Mr. O'Connor's handling of the transaction, insofar as it related to dealing with questions under the Food Hygiene Regulations, was negligent. Some further reliance is placed on behalf of the Kellehers on planning issues and the user covenant in the relevant lease.

1.4 Against that general background, it is necessary to turn first to the facts.

2. The Facts

2.1 Mr. Kelleher is involved in the IT business. Mrs. Kelleher, prior to the events which I am about to describe, helped part-time in that business.

2.2 In 2001, the Kellehers saw a restaurant known as "Pat's Chat" for sale. The restaurant was located in one of a series of shop type units which were built on the same campus as the Tesco Store in Mallow. In that context, the Kellehers approached the auctioneer, Mr. Michael O'Donovan, who had carriage of the sale on behalf of the owner, a Ms. Patricia Piggott. At that time, the evidence establishes that the restaurant being run by Ms. Piggott provided a full, if simple, lunch menu with, for example, Roast Beef, Bacon or the like. The Kellehers went to the restaurant themselves to see how it worked.

2.3 The Kellehers entered into negotiations with Mr. O'Donovan and agreed a purchase price of IR£120,000.00. The Kellehers then instructed Mr. O'Connor to act as their solicitor.

2.4 Mr. Kelleher gave uncontradicted evidence, which I accept, that when initially instructing Mr. O'Connor, he asked Mr. O'Connor to make sure that everything under the Food Hygiene Regulations was in order, and that the restaurant was in compliance.

2.5 A contract, dated the 7th July, 2001, was ultimately signed, which provided for a closing date of the 3rd August, 2001. On the Kellehers case it is said that there was a subsidiary agreement to the effect that the premises would be taken over directly by the Kellehers as a going concern. It will be necessary to return to this issue in due course.

2.6 However, in any event, Mr. Kelleher went to the premises some two weeks or so before the anticipated closing date but found that it had already been closed from a date, apparently, around the 13th July. Thereafter, the sale closed in the ordinary way.

2.7 Prior to that closing a potential tenant who wished to rent the premises for use of a restaurant had been identified. A tenancy agreement was entered into providing for a term of four years and eleven months, and a rent of IR£250.00 per week. The intention of the tenant concerned was to open an Indian Restaurant. However, at or around the time when the restaurant was due to open, problems with the Health Authority emerged, which meant that the restaurant did not, in fact, open. Not surprisingly the tenant concerned ultimately left. The Kellehers had discussions with officials from the Health Authority which resulted in alterations being carried out to the premises, which in turn resulted in the premises being registered with limitations for the purposes of the Food Hygiene Regulations. It will also be necessary to return to the detail of the dealings by officials from the Health Authority in relation to the premises in due course. Thereafter, the restaurant operated for a period through tenants at a lower rent but was ultimately run by Mrs. Kelleher herself, which position continues to this day. As a result of the limited certification of the premises, to which I have referred, the number of covers permitted was reduced to 24 (it would appear that, in practice, prior to the sale, the seating was 40). In addition, significant limitations were imposed as to the type of food which could be served. Initially all that was permitted was cold food. Subsequently a limited entitlement to serve certain types of hot food was permitted.

2.8 Against that general background, two other aspects of the sequence of events need to be commented on.

2.9 First, it is now clear (although it would not have been clear at the time of the sale or the completion of same) that concerns had been expressed to the previous owner, Ms. Piggott, by Health Authority officials, some months prior to the sale which is central to

these proceedings. A detailed letter setting out the concerns of the Health Authority had been written. It is clear, therefore, that problems concerning the restaurant had emerged and were already in being, known to Ms. Piggott, but not disclosed to the Kellehers, prior to the events which give rise to these proceedings.

2.10 On the other hand, it would seem that up to the time when Ms. Piggott closed her restaurant (and, therefore, at the time of the contract for sale), the restaurant was properly registered for the purposes of the Food Hygiene Regulations and did not have any limitation on its ability to trade such as came into place in the circumstances which I have already described. Strictly speaking, therefore, the restaurant was, at the time of the contract, registered and does not appear to have been operating outside the terms of its registration in any material respect. It was, however, clear that trouble was coming down the tracks.

2.11 So far as the conduct of the conveyancing process is concerned, a number of facts need to be noted. First, it should be said that Mr. O'Connor did not conduct any pre-contract requisition exercise relating to food hygiene matters. This is an issue to which it will be necessary to return. Second, Mr. O'Connor raised requisitions in the standard form recommended by the Law Society, which included requisitions specific to the Food Hygiene Regulations (Requisition 32). I will refer in more detail to those requisitions and the replies thereto in due course. However, for present purposes it should be noted that the reply to Requisition 32.1.b suggested that there was no evidence available of registration under the provisions of the Food Hygiene Regulations 1950, as amended, while the reply to Requisition 32.2.a suggested that no notice had been served by the Health Authority and that the vendor or her agents had no information of an intention to serve any such notice.

2.12 In general terms it is suggested that those replies ought to have led Mr. O'Connor to conduct further inquiries.

2.13 Against that background, it is next necessary to turn to the issues in the proceedings.

3. The Issues

3.1 The conveyancing issues raised on behalf of the Kellehers suggest that Mr. O'Connor was negligent in four respects:-

A. It is said that he was negligent in failing to raise the food hygiene issues as a pre-contract set of requisitions;

B. It is said that, in the light of the requisition replies to which I have referred, Mr. O'Connor should have engaged in further inquiries;

C. It is said that, because of the specific request made by Mr. Kelleher to Mr. O'Connor concerning the Food Hygiene Regulation regime, at the time when Mr. O'Connor was initially instructed, there was an added obligation on Mr. O'Connor to conduct inquiries (or, perhaps, to advise Mr. Kelleher to conduct inquiries) into the food hygiene situation; and,

D. It is said that Mr. O'Connor was negligent in allowing the premises to shut up for business prior to the closing of the transaction.

3.2 In addition, although these were not central issues in the case, it is said that Mr. O'Connor was also negligent in allowing the sale to go through in circumstances where it is said that use as a restaurant was both in breach of the planning permission in respect of which the unit operated and in respect of a user covenant in the lease under which Ms. Piggott, and through her the Kellehers, held the property.

3.3 The position of Mr. O'Connor in respect of each of those items needs also to be noted.

3.4 While not admitting negligence, I did not understand counsel for Mr. O'Connor to contest the evidence tendered on behalf of the Kellehers to the effect that the recommended and accepted practice for solicitors dealing with the purchase of restaurants was to raise food hygiene matters as a pre-contract matter. Likewise, I did not understand counsel for Mr. O'Connor to contest the expert evidence that Mr. O'Connor should have followed up on the reply to requisitions which asserted that no evidence of registration was available.

3.5 However, under both of those headings, it was suggested on behalf of Mr. O'Connor that there was no causal link between any such inaction and any adverse consequences for the Kellehers.

3.6 So far as the third item is concerned, Mr. O'Connor's position was that there was no evidence to suggest that the ordinary practice of competent solicitors involved making direct inquiries of the Health Board or its officials concerning food hygiene matters. In those circumstances, it is argued that Mr. O'Connor fulfilled any duty of care which he might have by raising the appropriate requisitions.

3.7 So far as the fourth item is concerned, there was some debate about the precise instructions which Mr. O'Connor was bound by, but of greater relevance is the contention made on behalf of Mr. O'Connor to the effect that there was again no causal link between the fact of the closure of the premises by Ms. Piggott in advance of it being handed over to the Kellehers and any of the difficulties which the Kellehers subsequently encountered.

3.8 So far as the allegation that operating the premises as a restaurant is in breach of planning permission is concerned, it is suggested that, on a proper analysis of the relevant planning regulations, a restaurant is a permitted use. So far as the user covenants in the lease are concerned, attention is drawn on behalf of Mr. O'Connor to the fact that no action has been taken by the landlords, notwithstanding the fact that the premises have been in use as a restaurant of one type or another for a very considerable period of time such that, it is said, there could be no question of any adverse consequences now arising.

3.9 Finally I should record that there were serious issues in relation to damages with significant controversy both as to fact and principle.

3.10 I propose dealing with the issues in the order in which I have addressed them, and in that context it is appropriate to turn, first, to the requisitions including the question of whether same should have been raised pre-contract.

4. The Requisitions

4.1 In relation to the issues concerning requisitions I had the benefit of the evidence of Ms. Áine Hynes. Ms. Hynes is an experienced conveyancing solicitor who has also acted as both a lecturer and a tutor in the Law Society since 2000. She is co-author of the Law Society's *Complex Conveyancing Manual*. I have no hesitation in accepting Ms. Hynes' expertise in these matters.

4.2 I also accept Ms. Hynes evidence that it is standard proper conveyancing practice for a solicitor to raise food hygiene matters as a pre-contract requisition. The logic of this position is clear. The reason for raising certain matters pre-contract is that issues might emerge as a result of such inquiries, which might lead either to a recommendation or advice to the relevant purchaser client not to enter into a contract at all or to only enter into a contract provided that appropriate conditions are included to protect the interests of that purchaser client. While there may be problems which, emerging post-contract and in the course of investigation of title, can be adequately dealt with, it is also the case that a contractually bound purchaser may encounter difficulty in dealing adequately with issues which emerge post-contract and which have not been the subject of appropriate conditions. It is for that reason that queries relating to certain matters are recommended to be raised pre-contract. As indicated, I am satisfied that food hygiene queries come into that category.

4.3 However, it seems to me that counsel for Mr. O'Connor was correct when he argued that there was no reason to believe that the replies which were ultimately given to Requisition 32, would have been any different had they been raised pre-contract as opposed to, as it turned out they were, post-contract. Therefore, nothing seems to me to turn on the specific question of the time when these requisitions were raised. Whether Mr. O'Connor's response to those replies was appropriate is the next issue to which I will have to turn. However, the conveyancing process in this case, as it happens, was not influenced by the timing of the raising of requisitions. This is not a case where it can be said that the fact that a party had entered into a contract of a particular type placed them at a disadvantage, which disadvantage could have been avoided had pre-contract requisitions been engaged in. In such a case the timing of the raising of requisitions might well be crucial for there would be a causal link between that timing and the consequences. A party stuck with an unfavourable contract because certain matters were not identified pre-contract, will clearly be able to establish a causal link between whatever problems they are stuck with as a result of that unfavourable contract and the fact that requisitions were not raised at the appropriate time. However, that is not the case here. Nothing actually changed because of the timing of the raising of the requisitions in this case. That leads to the question of Mr. O'Connor's response to the requisitions as were actually raised.

4.4 In this regard I also accept the evidence of Ms. Hynes that the reply to Requisition 32.1.b gives rise to a necessity for further inquiry. Requisition 32 reads as follows:-

> **"32. FOOD HYGIENE REGULATIONS**
>
> 1.a. Is the use of the property one which requires to be registered with the Local Health Authority pursuant to the Food Hygiene Regulations 1950 as amended.
>
> b. If so furnish now evidence of such registration.
>
> c. Furnish evidence of compliance with any conditions of undertakings attached to such registration.
>
> 2.a. Has any notice been served by the Health Authority or has the Vendor or his gents any information of an intention to serve any such notice.
>
> b. If any such notices have been received furnish now full copies thereof stating whether same have been complied with either in full or in part.
>
> c. With regard to any such notices furnish details of any undertakings given in respect thereof."

4.5 Requisition 32.1.a. was replied to as follows:-

> "Yes. Purchaser must Register with the Local Health Authority."

However, Requisition 32.1.b. was simply replied to by:-

> "None available."

As pointed out by Ms. Hynes, it is difficult to see how that answer could have been considered to have been correct or adequate. It was correctly accepted by the vendor in response to Requisition 32.1.a. that the premises needed to be registered. However, under 32.1.b., it was suggested that there was no evidence available of registration. That could only mean one of two things. Either the premises had not been registered, in which case it had been operating illegally – a matter that would undoubtedly be of the very greatest concern to any potential purchaser. Alternatively, the premises had been registered but the vendor was declining to make available evidence of that registration. In those circumstances, as Ms. Hynes pointed out, a serious question arises as to why the vendor is not in a position to make evidence of registration available.

4.6 I am, therefore, satisfied that Mr. O'Connor was also negligent under this heading. However, a question of causation also arises here just as it did under the last heading. The question which arises is as to what action Mr. O'Connor should have taken. It seems to me that there were two ways in which Mr. O'Connor could have pursued the matter. He could have insisted that the vendor's solicitor actually provide the relevant information. Alternatively, he could have sought to check the Register himself. However, the problem with the Kellehers case is that, in either eventuality, nothing untoward would ultimately have shown up. The fact is that the premises were registered. There was no limitation on the Register. The original Register was produced in court. It is a relatively sparse document containing basic details of the proprietor and the premises and also including, where relevant, the fact that there may be a limitation on the certification of the premises concerned. At the material time, that is to say at the time of the sale (whether pre-contract or investigation of title), these premises were registered and had no limitation. Therefore, had Mr. O'Connor insisted on evidence of registration being produced, the vendor's solicitor could easily have produced such evidence which would not have revealed anything untoward. Likewise, if Mr. O'Connor had sought to investigate the registration himself, he would have come up with the same answer. The premises were registered and no limitation was placed on that registration so far as the Register was concerned.

4.7 Again, I agree with counsel for Mr. O'Connor that there is no causal link, therefore, between the undoubted negligence in failing to pursue evidence of registration and any adverse consequences for the Kellehers, for if Mr. O'Connor had pursued evidence of registration, he would simply have identified that the restaurant had indeed proper and unlimited registration.

4.8 I should now move to the fourth question which is as to whether anything flows from the fact that the premises was closed by Ms. Piggott in mid July and was, thus, not continuing to operate as of the date of sale. I turn to that question and will, thereafter, return to question three.

5. The Closure of the Premises
5.1 In relation to the operation of the Food Hygiene Registration system at the relevant time, I had the benefit of the evidence of Ms. Sarah O'Malley who was the authorised officer relevant to the district in which the restaurant was situate for most of the period with which I am concerned. Ms. O'Malley gave evidence that in circumstances where there was a simple transfer of proprietorship and where the new proprietor intended to carry on more or less the same business as the existing proprietor, then it is possible to effect a change in registration by substituting the name of the new proprietor as she put it "on the proviso that the nature and extent of the business does not change". However, in this case Ms. Piggott had closed the business and such a "seamless" transition was not practicable. In those circumstances it appears that it would have been necessary for any new proprietor (whether the Kellehers or a tenant operating from them) to have given 28 days notice to enable a new registration to take place.

5.2 However, it does not seem to me on the facts of this case that a seamless direct transfer of proprietorship would have been open. What the Kellehers intended was to let the premises to a tenant who intended to make a significant alteration in the nature of the business. As pointed out by Ms. O'Malley it is only where the existing business continues largely unaltered that a simple transfer of proprietorship can occur. That would not have been open on the facts of this case.

5.3 Likewise, it is clear that the Health Authority had already expressed serious reservations in writing to Ms. Piggott about her business continuing to operate in the way in which it was at the relevant time. It is clear that that was a problem that was not going to go away. Even if it had been possible to effect a seamless change of proprietorship, it is clear that the problem about the existing business would have emerged sooner rather than later in any event. While a simple transfer of proprietorship might have been administratively easier, it would not have gotten over the problem that there was a serious issue coming quickly down the road about this restaurant in any event. In those circumstances, it does not seem to me that any connection exists between the fact that Ms. Piggott was allowed to close her restaurant and the ultimate problems which emerged. A simple change of proprietorship would not have been available in any event. Even if it was, the problems which ultimately caused significant difficulties for the Kellehers were going to happen anyway and would have happened quite soon.

5.4 That leads to the third question which concerns the inquiries which it is said Mr. O'Connor should have carried out on behalf of the Kellehers. I turn to that issue.

6. The Extent of the Inquiries
6.1 While it is normally logical to consider questions of negligence before questions of causation, for reasons which I hope will become apparent, I propose considering the issues under this heading in the reverse order.

6.2 The reason for taking that approach stems from asking the question as to the circumstances in which it might have been possible for the Kellehers to avoid the problems which ultimately beset them. In order to have avoided those problems, it is necessary that the Kellehers would have to have found out about them before the sale closed. That the problems were there in the background is clear from the evidence given by the Health Authority officials to the effect that serious concerns had already been expressed about whether the building was up to being used at the level which Ms. Piggott was employing. It is clear that many of difficulties that had already been identified were not capable of resolution. The site is completely built on. There was no room for extension. One of the most significant complaints was that the kitchen was too small for the kind of business being done. The only way the kitchen could be extended was by eating into the seating area. Likewise, many of the facilities which the Health Authority felt would need to be in place in order to allow for a more elaborate menu to be provided, were just not capable of being provided within the confines of the building. The problems were not soluble. It follows that the only way in which the Kellehers could have been relieved of the difficulties which they ultimately encountered was if the fact that there were problems and the fact that such problems were likely to be insoluble (in the sense that there were no remedial works that could be carried out to allow a more elaborate business than that ultimately permitted to be carried on) was identified prior to closing. In order, therefore, for there to be a causal connection between any negligence on the part of Mr. O'Connor and the undoubted consequences which the Kellehers suffered, it is necessary that that negligence should be such as would lead to the inference that, had it not been for that negligence, the Kellehers would have become aware of the relevant problems in advance of closing and could, therefore, have legitimately pulled out of the contract.

6.3 In substance, it seems to me that that question comes down to one of analysing whether there were any steps which should have been taken by Mr. O'Connor which would have led to direct contact, either by him or by the Kellehers, with relevant officials of the Health Authority. On the evidence of the Health Authority officials it seems clear that those officials would not have disclosed the letter which they had written to Ms. Piggott, for that letter would have been regarded as a confidential matter between the Health Authority and Ms. Piggott. However, it is equally clear on the evidence of the Health Authority officials that, had they been consulted at any material time prior to the Kellehers taking over the premises, the substance of their concerns relating to the restaurant business then being carried on would have been discussed with the Kellehers or Mr. O'Connor. Indeed, it would appear that it is common practice (and a very sensible one at that) for Health Authority officials to discuss, in advance, with proprietors, the requirements which they are likely to impose so that the relevant proprietor can adjust any proposals in a way that meets any concerns of the Health Authority. There can be no doubt, therefore, that had contact been made, prior to closing, with the Health Authority officials concerned, then the problem and its extent, together with the difficulties in solving it in any way other than the partial solution that was ultimately achieved, would have been identified. The question which arises, therefore, is as to whether there was any negligent act on the part of Mr. O'Connor which resulted in contact not taking place but where, had Mr. O'Connor not acted in a negligent fashion, it would be appropriate to infer that contact with its resulting information would have ensued.

6.4 The evidence does not support the view that it is common or recommended practice for solicitors, acting on behalf of purchasers of restaurant premises, to make direct contact with Health Authority officials to discuss the registration status of a restaurant property. That seems to me to be an entirely understandable position. The details of the requirements which the Health Authority might have, the practicality of complying with those requirements, solutions to problems and the like, are matters which, in an ordinary case, are much more likely to be effectively dealt with directly between the relevant proprietor and Health Authority officials. A solicitor's obligation is to ensure that proper registration is in place and that no adverse notices have been served or are contemplated. Those are the sort of legal matters which are properly within the remit of a solicitor. Practical questions about how the restaurant is actually going to operate are more properly matters to be dealt with between a proprietor and Health Authority officials.

6.5 I am not, therefore, satisfied that there is any basis for suggesting that a solicitor will ordinarily be negligent in not making inquiries himself. The question does, however, arise as to whether, in those circumstances, and in the light of all the other circumstances of this case, it was negligent of Mr. O'Connor not to advise the Kellehers to make contact with the Health Authority officials themselves.

6.6 In this regard, it seems to me that the following facts need to be taken into account.

6.7 First, the Kellehers were, to Mr. O'Connor's knowledge, not restaurateurs and had no experience in the restaurant business. They

were purchasing the property for the purposes of investment and intended to let it out to a tenant. Second, Mr. Kelleher specifically asked Mr. O'Connor to make sure that all was right in relation to the Food Hygiene Regulations. Third, as is pointed out in the *Complex Conveyancing Manual* to which I have already referred, compliance with the Food Hygiene Regulations is a matter of considerable importance to those purchasing restaurant businesses. For example, para. 10.4 of the Manual makes clear that a solicitor should advise a client acquiring a food business of the implications of owning a food business and as to the consequences of failing to operate the business in compliance with legislation. Given the Kellehers lack of knowledge of the business, given the importance of the matter, and given the specific request made by Mr. Kelleher in relation to the question of compliance, it seems to me that it was incumbent on Mr. O'Connor, in the circumstances of this case, either to make contact with the Health Authority himself, or, perhaps more realistically, to advise Mr. Kelleher so to do. I am satisfied that, in this regard, Mr. O'Connor was negligent in failing to either take the steps himself or advise Mr. Kelleher to take them. For the reasons already analysed, I am satisfied that there is a causal connection between that item of negligence, and that item only, with the adverse consequences for the Kellehers which form the basis of the claim in these proceedings.

6.8 Before turning to the question of damages, I should also deal with the questions arising in relation to planning and the user covenant in the lease.

7. Planning Conditions and Lease Covenants
7.1 So far as planning is concerned, it seems to me that counsel for Mr. O'Connor is correct in the manner in which he has analysed the relevant Planning Regulations. The planning permission itself makes specific reference to the use of retail units being as per class 1 of Part IV of the Third Schedule of the Local Government (Planning and Development) Regulations, 1977. That class is defined as use as a shop for any purpose with certain immaterial exceptions. Shop is defined in the Regulations in s. 9 in the following terms:-

> "means a structure used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods by retail and includes a structure used for the purposes of a hairdresser, undertaker or ticket agency or for the reception of goods to be washed, cleaned or repaired, or for any other purpose appropriate to a shopping area, but does not include a structure used as a funfair, garage, petrol filling station, office, or hotel or premises (other than a restaurant) licensed for the sale of intoxicating liquor for consumption on the premises."

It is clear from that definition that a shop includes a restaurant, for in excluding, ordinarily, licensed premises, the definition makes clear that a restaurant licensed for the sale of intoxicating liquor is included. It seems to me, therefore, that the planning permission in this case expressly allows for use as a restaurant. There is no merit in that point whatsoever.

7.2 I now turn to the user clause. The permitted use is as a shop. There might be some question as to whether the planning definition of a shop applied so that user as a restaurant was included. However, more importantly the premises has operated as a restaurant for a very considerable period of time without any action. It would be difficult to see how a landlord would not now be estopped from accepting that a restaurant was included within the definition of shop. In those circumstances, it does not seem to me that any case can be made on the user clause either.

8. Conclusions on Liability
8.1 For the reasons which I have analysed, it follows that there is only one item of negligence which I am satisfied occurred and which had a causal link with the adverse consequences for the Kellehers. That was a failure to either inquire of the Health Authority or, perhaps more realistically, to advise the Kellehers themselves to inquire of the Health Authority, concerning the food hygiene status of the premises. However, there is one further consequence of that finding. It follows that had it not been for that negligence the Kellehers would have discovered the problem coming down the road in respect of the restaurant. For the reasons which I have already analysed, most of those problems were not soluble. In the light of those problems and the fact that they could only be solved in part and with consequences for the both the scale and type of operation of the restaurant concerned, the Kellehers would have only had two choices. They could have pulled out of the sale. It seems to me clear from the judgment of Costello J. in *Geryani v. O'Callaghan* (Unreported, High Court, Costello J., 25th January, 1995) that, had the problem been identified, such a course of action could have been adopted. The alternative would have been to try and renegotiate the sale or, alternatively accept the limitations imposed. On the evidence, I am satisfied that the Kellehers would not have gone ahead with the sale in all the circumstances. It follows that this is a "no transaction" case, such as I had to analyse in *ACC v. Johnston* (Unreported, High Court, Clarke J., 1st June, 2010). Before going on to address the question of the calculation of the amount of damages to which the Kellehers are entitled, it is necessary to say something about the legal position in respect of the calculation of damages in such cases.

9. The Law on Damages
9.1 It is important to start with the fundamental proposition that, in almost all cases, the principal function of the award of damages is to seek to put the party concerned back into the position in which they would have been had the relevant wrongdoing not occurred. The differences which are identified in the authorities concerning the proper approach to the calculation of damages for a tort, on the one hand or, a breach of contract, on the other hand, stem from that fundamental proposition. In the case of a tort, the court has to attempt to put the plaintiff back into the position in which that plaintiff would have been had the tort not occurred at all. It is the pre-incident position that the court must look at as a starting point. On the other hand, the wrongdoing which a party sued successfully for breach of contract is liable for, is the failure of that party to comply with its contractual obligations. The position which the court must look at as a starting point is, therefore, the position that should have obtained post-incident in the sense that the court is looking at what would have been the situation had the contract been complied with in accordance with its terms. The court is not, therefore, concerned directly with the position of the aggrieved party pre-contract, but rather what the position of that party post-contract would and should have been had the contract been complied with.

9.2 However, it is important in making that distinction to note that it is necessary to analyse the contractual obligations which have been breached before going on to ascertain the proper approach to the calculation of damages. As pointed out in *ACC v. Johnston*, a solicitor does not contract with her client that she will procure for that client a successful conclusion of a conveyancing transaction. Rather, the solicitor contracts with her client that she will carry out a proper professional job on the conveyancing transaction. Depending on the circumstances, that obligation might lead to the solicitor advising the relevant client not to proceed at all, or only to proceed provided certain assurances or terms can be imposed or the like.

9.3 While it is true to say that a solicitor can be sued in breach of contract or in negligence, it does not seem to me that it is likely, at least in the majority of cases, that there will be any practical difference between the approach to damages in either case. If the proper conduct of the conveyancing transaction by the solicitor concerned ought to have led the relevant client not to go ahead with the transaction at all, then the proper approach of the court to the assessment of damages in such a case is to look at what would have happened had there been no completed transaction.

9.4 Counsel for the Kellehers sought to argue that having a restaurant as an investment which could be let at a rent was a

foreseeable consequence of the transaction. It was undoubtedly foreseeable, from the point of view of Mr. O'Connor, in that he knew that such was their purpose. However, Mr. O'Connor did not contract to get the Kellehers a restaurant which was suitable to be let. Rather he contracted with them that he would carry out the conveyancing task entrusted to him in a proper fashion. Mr. O'Connor was not, therefore, in breach of contract in failing to deliver an easily lettable restaurant with no problems on the food hygiene front. There was nothing he could have done to procure that. No breach of contract on his part led to that. Rather, for the reasons which I have analysed, Mr. O'Connor was negligent in allowing the transaction to complete at all. This case must, therefore, be approached on the basis of it being a "no transaction" case. If Mr. O'Connor had not been negligent, then this transaction would not have gone ahead, the Kellehers would not have spent any money, and they would not have had the impaired asset which the restaurant ultimately turned out to be.

9.5 In that regard, I should comment on the decision of Vos J. in *Joyce v. Bowman Law Ltd*. [2010] EWHC 251 (Ch). In that case the defendant was firm of licensed conveyancers. A contract for the purchase of property by the relevant plaintiff was discovered to contain a seller's option, whose importance had not been appreciated by the firm of licensed conveyancers concerned. The plaintiff's claim involved an assertion that he had intended to demolish the cottage built on the property and replace it with a new house. He sought to recover the profit that he would have made had he been able to carry out that development. It was, therefore, a loss of bargain case to that extent.

9.6 It is true that, on the facts of the case, the court did approach the calculation of damages on that basis. However, it is clear from a careful analysis of the judgment that counsel for the plaintiff conceded, and the court accepted, that it was necessary to make an appropriate reduction in the damages by reference to the risk that, had the problem with the option been properly identified by the licensed conveyancers concerned, it might not have been possible to remove or suitably ameliorate the option by renegotiating the terms of the contract.

9.7 What *Joyce v. Bowman Law* makes clear is that there may be intermediate cases in between what I might term a pure "no transaction" case, on the one hand, and a case where it is clear that, in the absence of negligence, a proper and complete conveyance could have taken place. It might perhaps be useful to term such a case as a "completed transaction" case. It is important to note why that is the case. In order to analyse the consequences of negligence on the part of a solicitor (and this analysis applies equally to a breach of contract on the part of the solicitor stemming from the same facts), it is necessary to look at what would have happened had the solicitor not been negligent. In some cases it may be clear that, had the solicitor not been negligent, no transaction would have taken place. At the other end of the spectrum, it may be clear that had the solicitor not been negligent, the solicitor's client might have obtained good title to the relevant property. For example, if, due to an error in drafting the relevant deed of assurance, the deed does not actually pass title to the solicitor's purchaser client, then it may well be possible to argue that, had the deed been properly drafted, the client would have obtained proper title. In many such cases it might well, of course, be possible to rectify matters so that title could still be procured with the only damages flowing being whatever costs might be associated with remedying the matter. However, it is possible to envisage circumstances where, for example by virtue of intervening events, it is no longer possible to remedy matters. In those circumstances, the proper approach to the calculation of damages is to look at what would have happened had the conveyancing transaction been properly conducted. On the hypothesis with which I am dealing the purchaser client would have obtained proper title to the property and in such a case it is appropriate to assess damages on that basis.

9.8 However, there may well be intermediate cases where it is not possible to say for certain what would have happened. *Joyce v. Bowman Law* is one such case. There was an adverse clause in the contract. The licensed conveyancer should have noticed it, advised his client about it, and, almost certainly, raised it with the vendor. What would have happened next was not absolutely clear. The vendor might not have been willing to renegotiate the terms of the contract, in which case there might well have been "no transaction". On the other hand, the vendor might have been willing to renegotiate the term. In those circumstances there would have been a "completed transaction". In intermediate cases the court is faced with the situation where there is a hypothetical event which never occurred precisely because the conveyancer concerned was negligent, but where the court has to make some assessment as to the likelihood or otherwise of the conveyancer having been able to successfully deal with the problem had it been identified at the time. In those circumstances the proper approach of the court, for reasons similar to those identified in *Phillip v. Ryan* [2004] 4 I.R. 241, is to assess the possibilities, form a view as to the likelihood or otherwise of each of them occurring and award damages, having regard to the proper calculation on a "no transaction" basis, the proper calculation on a "completed transaction" basis and the likelihood or otherwise of either of those eventualities having proved to be the case in the hypothetical circumstances that the problem had been identified and an attempt had been made to negotiate a solution to it.

9.9 *Joyce v. Bowman Law* was an intermediate case. For those reasons it was entirely appropriate for the court to assess damages on the basis of a completed transaction but reduced appropriately for a weighting derived from the risk that it would not have been possible to secure a successful conclusion even had the problem been identified. In one sense such a case may be viewed as one of a loss of opportunity. The consequence of the solicitor's negligence was that there was no opportunity to seek to negotiate a solution to the adverse option clause. There was no certainty that, even had the problem been identified, it would have been possible to achieve that end. However, it was possible. The client lost the chance of doing it due to the licensed conveyancer's negligence. The measure of those damages was properly viewed as being a reduced version of the full loss of bargain for there was no certainty that the bargain could have been gained, but the relevant plaintiff had lost the opportunity of seeking to gain the bargain concerned.

9.10 I am, therefore, satisfied that the overall approach which the court should adopt in cases of solicitors negligence in the conveyancing field is to first identify whether, on the evidence, it is proper to regard the case as a "no transaction" case where in the absence of solicitors negligence the transaction simply would not have gone ahead, a "completed transaction" case, where in the absence of solicitors negligence a successful conclusion to the transaction would have occurred or an intermediate case. Where there is no significant difference in the calculation of the damages under either heading, it may not make much difference. Where, however, as was undoubtedly the case in *Joyce v. Bowman Law* (or in other such cases where there is a loss of bargain involved or the relevant property is of particular value to the purchaser), there is a significant difference in the proper approach as and between the two cases, the court, in an intermediate case, must take a view on how likely it was that the problem concerned could have been solved and asses damages somewhere between the "no transaction" value and the "completed transaction" value, having regard to the likelihood that a successful conclusion could have been reached in the event that the solicitor concerned had not been negligent.

9.11 However, it seems to me that this case is firmly in the no transaction camp. There was nothing Mr. O'Connor could have done to have solved the Food Hygiene Regulation problems. All he could have done was identify them, and saved the Kellehers the problem of buying into a problematic restaurant.

9.12 It follows that it is necessary to assess damages in this case on the basis that, had Mr. O'Connor not been negligent, no transaction would have taken place, the Kellehers would not have paid out any money but equally would not have been left with the restaurant. I, therefore, proceed to consider the proper calculation of those damages.

10. The Calculation of Damages

10.1 It is fair to say that the basis on which the Kellehers put forward their claim for damages was, at the commencement of the case, somewhat unclear. For logistical reasons the case took place in two parts. At the end of the first three days hearing, I gave directions that further details of the basis on which the Kellehers wished to put forward their claim to damages should be furnished. Ultimately, the Kellehers formulated their claim on the basis of suggesting that there was a capital loss resultant from the reduction in value of the property by virtue of the impaired food hygiene registration status, losses attributable to the alterations which had to be carried out to secure the limited registration which was ultimately obtained, and losses in rent in the intervening period.

10.2 However, on the other hand, counsel for Mr. O'Connor suggested that the proper basis to look at the damages was to look at the value of the asset obtained by the Kellehers and compare it with what they had, in fact, paid for it.

10.3 I am satisfied that the approach suggested by counsel for Mr. O'Connor is an appropriate starting point. For the reasons which I have already sought analyse, what would have happened, had Mr. O'Connor not been negligent, was that the Kellehers would not have paid for the property, but equally, would not have had the property. The simplest way of looking at such a situation is to compare the value of the property actually obtained with the price paid. There was a conflict of evidence concerning that valuation. Two valuers were called on behalf of the Kellehers and one on behalf of Mr. O'Connor. Two of those valuers (including the valuer called on behalf of Mr. O'Connor) came in with relatively modest figures for the difference between the price paid and the then actual value of the property, warts and all. In addition, it was not clear as to what exactly was being valued. In my view, the proper comparator was the value of the property as it stood after purchase and without any additional works carried out. The third valuer, who was assessing the difference at a different time, and, in truth, on something of a different basis, did not seem to me to approach the task on a realistic basis.

10.4 Insofar as there were any differences between the two valuers who placed a modest amount on the difference concerned, their views were not based on a detailed analysis of comparators, but, rather, on an estimate based on their experience. The competing views are not, therefore, capable of detailed analysis. All in all, I have come to the view that the property, as it stood after purchase, was worth IR£15,000 less than the price paid for it.

10.5 The next question concerns whether that is an appropriate basis for assessing damages. A party faced with having acquired an impaired asset as a result of negligence is faced with a number of choices. The relevant party can, obviously, dispose of the asset and sue the negligent party for the difference between the price paid for it and what they can secure for it, given its impairment. There may, of course, in all the circumstances of any particular case, be reasons for not taking that course of action. It may not be easy to dispose of the asset. There will, in any event, be costs associated with its disposal. A party is, however, obliged to act reasonably. If the party decides to keep the impaired asset, for whatever reason, then it seems to me that, unless it can be demonstrated that there was some good reason for keeping it, rather than selling it, then it is difficult to see how the negligent defendant can be fixed with any knock-on consequences that would not have occurred had the asset been disposed of.

10.6 On the facts of this case, if the Kellehers had disposed of the asset, it would have cost them the IR£15,000 loss, which, I estimate, they would have suffered on a sale, together with the costs of sale (auctioneering and legal) which, having regard to a property worth of the order of IR£100,000, might have come to some IR£5,000 inclusive of VAT. If, therefore, the Kellehers had cut their losses at that stage, those total losses would have come to something of the order of IR£20,000. The actions taken by them need to be viewed against that background.

10.7 First, significant sums were spent on altering the premises in order to satisfy the requirements of the Health Authority officials. However, there was no evidence that any proper analysis was carried out prior to incurring that expenditure. Some expenditure related to what might reasonably be called betterment or improvement in the premises. In the course of the hearing, it was agreed that a sum of a little over IR£26,000 was actually expended on items necessarily required to meet the requirements of the Health Authority officials. There does not seem to have been any basis for suggesting that that money was well spent. All of the evidence supported the view that the price paid for the property was the market rate for a restaurant which was permitted to carry on business in the way in which Ms. Piggott had been carrying on business. For the reasons which I have sought to analyse, I am satisfied that the premises, with its impaired position, was worth some IR£15,000 less. The expenditure of a significant sum to meet the Health Authority official's concerns would not seem to have added that amount to the value of the property. Indeed, it would seem that the net position after that expenditure was a loss. The property, even after that expenditure, was still partially impaired. No evidence was given to suggest that, viewed from the perspective of the time, things looked differently. Rather, the Kellehers just seem to have gone ahead, spent the money, tried initially to let the property, and subsequently ran it themselves. They were, of course, entitled to take that course of action. However, having taken it, without any real analysis as to whether that course of action was going to increase their losses, it does not seem to me that it is open to the Kellehers to now seek to place the much greater losses which have flown from that decision on Mr. O'Connor.

10.8 As identified in many of the cases, not least, *County Personnel (Employment Agency Limited) v. Alan R. Pulver & Company (A Firm)* [1987] 1 WLR 916, the starting point for the assessment of damages is that same should be considered as of the date of the wrong. However, given the overall requirement to attempt to put the wronged party back in the position in which that party would have been, had the wrong not been committed, it may, in appropriate cases, be necessary to take a different approach. The starting point indicates, therefore, that the proper measure of damages in this case ought to be, as of 2001, IR£20,000. Had the Kellehers simply sold the property, then they would have been IR£20,000 worse off at that time.

10.9 For the reasons which I have sought to analyse, I am not satisfied that there is any legitimate basis for taking a different approach to the date of calculation of damages on the facts of this case. Had it appeared to the Kellehers, on the basis of a proper analysis of their situation in 2001, that persevering with the impaired asset was likely to be a better course of action than selling it (or even that there was not much to choose between the two), then there might well be some justification for taking such an approach. It should be emphasised that parties who have to make judgements as to their actions as a result of being placed in a difficult position due to the wrongdoing of others, cannot be judged unduly harshly if, with the benefit of hindsight, their judgements turn out not to be right. However, no evidential basis was put forward for there being any good reason for persevering with the impaired asset in this case, rather than selling it. Certainly, there was no evidence that it looked to be a more advantageous way of minimising loss, viewed from the perspective of 2001, and without the benefit of hindsight. In those circumstances, I am satisfied that the proper way to assess damages is to look at them in the manner in which counsel for Mr. O'Connor argued, and that the basic loss is to be viewed as IR£20,000, as of 2001.

10.10. That leads to the question of interest. Counsel for Mr. O'Connor argued that, in the light of the way in which the case was presented, interest should not be allowed. In that regard, I do have to comment on the evidence of the Kellehers' accountant, Mr. Gerard Piggott. In the course of the proceedings, a claim was, as I have pointed out, maintained by the Kellehers in relation to the loss of rent on the property. For the reasons which I have sought to analyse, I am not satisfied that approaching the question of

damages on that basis is correct. However, the claim was maintained and evidence was produced in relation to it. The results of running of the business, when it was taken over by Mrs. Kelleher personally, were, of course, relevant to such a claim. Accounts for each of the relevant years, prepared by the Kellehers' accountant, were supplied. On analysis, in the course of the evidence, it became absolutely clear that those accounts were wrong and misleading. Each of the accounts contained a purported significant sum in relation to rent, in circumstances where no rent was paid. I have to confess that I found the evidence of the Kellehers' accountant in this regard to be highly unsatisfactory. When pressed on the question of why he had prepared incorrect accounts, his answer was to state that Mrs. Kelleher knew the true position and that the accounts would only be misleading if they were produced to a third party. He also stated that the accounts had been properly adjusted when being submitted as part of the Kellehers' tax returns. Why, however, a qualified accountant should produce accounts which he knows would be misleading when seen by any third party, I fail to understand. Indeed, I had even more difficulty in comprehending why the relevant accountant did not seem to see that there was a problem.

10.11 Be that as it may, it is also fair to say that the precise formulation of the Kellehers' claim lacked precision until a very late stage in the case. However, it does not seem to me that it is appropriate to penalise the Kellehers, themselves, for any of the above matters. It does, therefore, seem to me to be appropriate to award interest.

10.12 I should also add that I am not satisfied that this is an appropriate case for general damages. There can be no doubt but that the Kellehers had a difficult time in having to deal with this property. However, if they had taken the sensible course of simply selling it as soon as they discovered the problem, then all of those difficulties could have been avoided. For the reasons which I have already sought to analyse, I am not satisfied that there was any good reason not to sell the property. Indeed, even without the benefit of hindsight, it would seem that it was always likely to be a much more beneficial way of minimising losses.

11. Conclusions

11.1 On the basis of that analysis, I am satisfied that the proper measure of damages in this case is IR£20,000 converted to Euro and with interest at the Courts Act rate from 2001 to date. On the basis of evidence tendered at the hearing, I am satisfied that, as IR£10,000 converted to Euro with the relevant interest comes to the sum of €21,839, it follows that IR£20,000 converts to €43,678.

11.2 There will, therefore, be judgment in favour of the Kellehers in the sum of €43,678 for damages for negligence and for breach of contract.