Neutral Citation Number: [2011] IEHC 385

THE HIGH COURT

COMMERCIAL

2010 142 S

BETWEEN

ANGLO IRISH BANK CORPORATION LIMITED

PLAINTIFF

AND

DENIS COLLINS AND BY ORDER MICHAEL KIERNAN

DEFENDANTS

AND

BETWEEN

DENIS COLLINS AND MICHAEL KIERNAN

PLAINTIFFS TO COUNTERCLAIM

AND

ANGLO IRISH BANK CORPORATION LIMITED AND MICHAEL COTTER

DEFENDANTS TO COUNTERCLAIM

JUDGMENT of Ms. Justice Dunne delivered the 13th day of July 2011

This is a claim by the plaintiff ("Anglo") in respect of a number of sums claimed to be due by the defendants to the plaintiff. The overall sum claimed is a sum of €6,882,970.06. These sums are said to be due on foot of loan facilities provided to the defendants and one Richard Fitzgerald and on foot of guarantees signed by each of the defendants in respect of loan facilities advanced to M.D.Z. Limited. A further sum is claimed on foot of a performance bond but that issue has been postponed for the time being. There is no dispute between the parties that the sums in respect of the partnership are due. Further, there is no dispute as to the amount due on foot of the guarantees. However, it is submitted that the plaintiff is precluded from recovering the sums due in respect of the partnership monies and in respect of the sums due on foot of the guarantees by reference to the principle *ex turpi causa non oritur actio*" in respect of an issue arising on foot of the guarantees.

The issue raised related to the admitted alteration by the solicitor for Anglo of the guarantees signed by the defendants and as such whether the alterations made to the guarantees amount to a forgery such that Anglo cannot rely on the documents to recover the sum claimed on foot thereof against the defendants. Further, it as claimed that by virtue of the principle of *ex turpi causa non oritur actio*, the Bank could not rely on previous guarantees signed by the defendants.

The issue raised in respect of the counterclaim was the question as to whether or not the receiver was negligent in his conduct of the receivership and as such it was contended that Anglo was vicariously liable for the negligence of the receiver.

I propose to deal with matters by first considering the arguments made by and on behalf of the defendants in relation to the principle *ex turpi causa non oritur actio*, which is focused on the circumstances surrounding a guarantee entered into by the defendants on the 20th August, 2008. It would be useful in the first instance to set out certain provisions of the Criminal Justice (Theft and Fraud Offences) Act 2001. Section 2(2)(c) provides:-

> "For the purposes of this Act a person deceives if he or she –
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> . . .
>
> (c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship,
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> and references to deception shall be construed accordingly."

Section 30 contains the meaning of false and making and I will refer to s. 30.

Section 30 (1) provides:-

> "An instrument is false for the purposes of this Part if it purports
>
> (a) to have been made in the form in which it is made by a person who did not in fact make it in that form,

. . .

(e) to have been altered in any respect by a person who did not in fact alter it in that respect,

. . .

(2) A person shall be treated for the purposes of this Part as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration)."

Section 25 is also relevant in that it deals with the offence of forgery. It provides as follows:-

"(1) A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person.

(2) A person guilty of forgery is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both."

Section 26 creates the offence of using a false instrument and s. 31 provides a definition of the meaning of the words "prejudice" and "induce".

It was admitted that certain alterations were made to the guarantees by Mr. O'Leary, the solicitor for Anglo, post execution. Mr. Hussey S.C. on behalf of the defendants contended that under the headings contained in s. 30(1)(a) to (g) inclusive of the 2001 Act, each guarantee was a false document. He also referred to s. 30(2) and relied on same. He submitted that the alterations made the document false by altering the identity of the person who signed the guarantee or the capacity in which the guarantee was signed. In his submissions, the guarantees as altered became false instruments within the meaning of s. 30 and consequently he submitted that the Bank has in these proceedings taken a false instrument and used it with the intention that it would be accepted on its face by anyone who read it to conclude that it was genuine. In other words the acts of Mr. O'Leary, the Bank's solicitor, come within the definition of forgery within the meaning of s. 25 of the Act. Reliance was also placed by Mr. Hussey on s. 26 of the Act in relation to the use of a false instrument.

It was the conduct described by Mr. Hussey above as the turpitude that lay at the heart of Anglo's claim in these proceedings and as such, the maxim *ex turpi causa non oritur actio* applies. A number of authorities were referred by Mr. Hussey in support of his contentions in this regard including, *inter alia*, *Holman v. Johnson*, 1 COWP 342, *Bowmakers Limited v. Barnet Instruments Limited* [1945] 1 K.B. 65 and *Stone and Rolls Limited (In Liquidation) v. Moore Stephens* [2009] 1 A.C. 1391. I will refer to these and other decisions subsequently in the course of this judgment.

Mr. Hussey was also critical of the fact that during the course of summary judgment proceedings at an earlier stage in this case, Anglo did not inform the court of Mr. O'Leary's alterations. It is the case that in June 2010, Mr. O'Leary informed Anglo of the making of the alterations but this fact was not referred to by Anglo in its application to amend the statement of claim herein to include a reference to a 2005 guarantee executed by the defendants. Mr. Hussey submitted that Anglo had a fiduciary relationship with the court by virtue of s. 2(2)(c) of the 2001 Act, which I have set out above. Accordingly, he submitted that there was a lack of *uberrima fides* on the part of Anglo towards the court. In essence, the defendants relied on three acts of turpitude alleged to have been committed by Anglo, namely, forgery contrary to s. 25, using a false instrument contrary to s. 26 and a lack of *uberrima fide* on the part of Anglo in failing to disclose to the court in the course of an application to amend the statement of claim that Mr. O'Leary had made alterations in the guarantee. Mr. Hussey's submissions in relation to these points set out the background to the first issue that had to be determined by the court in these proceedings.

It would be helpful to refer to the background to this matter. Mr. Kiernan and Mr. Collins together with one Richard Fitzgerald agreed to purchase and develop lands at Kenmare in Co Kerry (hereinafter referred to as the Glanerought development). The lands were purchased in the joint names of Mr. Fitzgerald, Mr. Collins and Mr. Kiernan. A development company was to be incorporated to seek planning permission and to develop the land. That company was incorporated as MDZ Ltd. Mr. Kiernan and Mr. Collins described themselves in evidence as silent partners in the transactions that took place in this case. Mr. Fitzgerald was the main instigator of the scheme. The development was a mixed development of 92 housing units consisting of three bedroomed semi-detached bungalows, three bedroomed detached houses, three bedroomed semi-detached houses, two bedroomed apartments, three bedroomed townhouses and four bedroomed semi-detached townhouses.

The defendants together with Mr. Fitzgerald obtained a mortgage from the plaintiff which was entered into on the 1st April, 2005 for the purchase of the land. Over the years, Mr. Fitzgerald, Mr. Collins and Mr. Kiernan signed a series of facility letters in respect of the liabilities of M.D.Z. Limited and a guarantee in 2005 in respect of the facilities provided to M.D.Z. Ltd.

I now want to refer to the evidence of Mr. Kiernan and Mr. Collins as to the execution of the guarantees, to consider interrogatories furnished by Ms Crowley, of Barry M.O'Meara, Solicitors who acted for the defendants, Mr. Fitzgerald and MDZ Ltd. in the dealings with Anglo and the evidence of Mr. O'Leary. I will also consider relevant correspondence.

I propose to take matters somewhat out of sequence and to start with the evidence of Mr. O'Leary, a solicitor in the firm of Fitzgerald, Solicitors, in Cork. He confirmed that his précis of evidence in these proceedings was true and accurate. He was instructed by Anglo on the 21st August, 2008, to prepare guarantees in accordance with a facility letter of the 20th August, 2008. He sent three guarantee documents to Loraine Crowley, solicitor, of Barry M. O'Meara and Son, solicitors, that evening. One was for Mr. Fitzgerald and the others were for the defendants herein. Mr. O'Leary explained that he had a suite of documents which had been provided by the Bank for such a purpose. One of the suite of documents was a guarantee form which included a non recourse provision at clause 2.4. The facility letter in this case provided for an unlimited joint and several liabilities on foot of the guarantees. Through inadvertence, the guarantees sent by Mr. O'Leary, included the non recourse provision at clause 2.4. Mr. O'Leary described this as an administrative error. He discovered this error on the 26th August, 2008, and that same day he sent unlimited versions of the guarantees to Ms. Crowley by Email.

He noted a curious feature of the guarantee in that it contained a page for completion by the borrower, saying, that there was absolutely no reason for it. As he said, if there was no execution by the borrower in respect of the guarantee, he would have had no concern as to its enforceability.

There was an exchange of correspondence between Ms. Crowley and Mr. O'Leary after he furnished the correct version of the

guarantees. She asked, in a letter of the 26th August, 2008, "if you would approach your client to see whether they could have these guarantees re-drafted to exclude our clients' principal place of residence". She also asked if her clients had previously signed guarantees and asked for a copy of same, if so. She described her clients in that letter as "Richard Fitzgerald and others". Mr. O'Leary sought instructions from Anglo and no concession was made by the Bank. He confirmed this to be the case to Ms. Crowley by Email of the 4th September, 2008. An issue was raised in the course of the hearing about a letter of the 5th September, 2008, from Ms. Crowley to Mr. O'Leary, which he apparently did not see at the time but nothing turns on this.

Subsequently, the guarantees were returned, not to Mr. O'Leary as one might have expected, but direct to the Bank. Subsequently, they were sent to Mr. O'Leary by the Bank for what is described as a security report.

I now want to refer to the form of guarantee at issue in this case. The guarantees as returned to the bank are unlimited guarantees. It is stated therein that they are in addition to all other securities held by the Bank. (See clause 13). This is a provision which has some relevance given that there was an earlier guarantee which is relied on by Anglo in these proceedings.

I now want to look in some detail at the final pages of the guarantees. The first page I want to refer to is one headed, "First Schedule". Under this heading, certain information was recited, namely, the name and address of the guarantor. Below that was a section headed "Second Schedule" and it contained the name of the borrower, M.D.Z. Limited and its address.

The next page was a page intended to be signed by the guarantor. It contained a number of paragraphs including a warning as to the affect of the guarantee to the effect "as a guarantor of this loan, you will have to pay off the loan, the interest and all associated charges if the borrower does not. Before you sign this guarantee you should get independent legal advice." Unfortunately, it is the case that for whatever reason and there has been no evidence on this point, this page was not signed by either of the defendants in respect of the guarantee prepared for their respective signature.

The next page was headed "For Completion by the Borrower". It provided a space for execution by the borrower and also for execution by the Bank. For some strange reason and it appears to be an error that emanated from Mr. O'Leary's office, there was a second page in identical terms headed "For Completion by the Borrower" included in the guarantee. It was this page that was signed by each of the defendants on the respective guarantees in their own name. It is a matter of some curiosity that this should be so, but again one which is not explained, that both defendants separately signed their own guarantees on the page headed "For Completion by the Borrower." Each signature was witnessed by Ms. Crowley. For completeness, I should mention that the guarantees were dated the 30th September, 2008, but the letter sent by Ms. Crowley to Anglo enclosing the guarantees was dated the 29th September, 2008. Again this is curious, but in the overall context of this case is not of any practical significance.

Returning to the evidence of Mr. O'Leary, he received a letter dated the 2nd October 2008, on the 6th October, from Anglo enclosing the guarantees as executed. Although the letter referred to two guarantees, in fact all three guarantees were enclosed, namely that of Mr. Fitzgerald, Mr. Kiernan and Mr. Collins. Mr. O'Leary examined the guarantees. He wrote on the outside of the guarantees on the cover sheet the date which appeared in the body of the document as the date of execution. He said he did this for identification purposes – in other words, one could tell at a glance what the document was. He then noticed that each of the guarantors had signed on the wrong page. He then did something, which in the light of these proceedings, I am sure has caused him many sleepless nights. He put a line through the word "Borrower" on the page headed "For Completion by the Borrower" and wrote in the word "Guarantor". He crossed out the reference to "M.D.Z. Limited" on the same page and wrote in the named of the relevant guarantor in its place on each document so that the documents now read "Signed by Declan Collins" and "Signed by Michael Kiernan" respectively. He went on to say that he was embarrassed by what he had done. He had not done it to prejudice anyone and he had no dishonest intention in so doing. He added that he did not inform the Bank of his actions in this regard. He assumed it was "Ok" to this and of no significance.

Subsequently, he sent a draft security report back to the Bank on the 7th October, 2008. He never gave any further thought to the alterations. It was not until May 2010, that he realised that there was a problem in relation to the guarantees.

In the course of cross examination, Mr. O'Leary explained that he received a communication from P.J. O'Driscoll, solicitors for Anglo as to an issue with alterations or in delineations in the guarantees. At this point, he asked to see the guarantees again. He was furnished with copies of the guarantees on the 18th June, 2010 and by letter of the 21st June 2010, he informed P.J. O'Driscoll as to the alterations he had made in the guarantees.

Mr. O'Leary said that the alterations made by him were to reflect the true position between the parties – they did not alter what agreed. He accepted that there was nothing on the guarantees to show that they had been altered by him on the 6th October, 2008.

Mr. O'Leary then dealt with a number of other issues in relation to one of the allegations made by the defendants to the effect that the guarantee they signed contained a clause in the form of clause 2.4, that is, a non recourse clause. Such a clause was included in the original draft guarantees sent by Mr. O'Leary to Ms. Crowley. That is a separate issue which I am not dealing with at this point, but I will return to it later. Suffice it to say that it is accepted on behalf of the defendants that the guarantees received by the Bank were unlimited guarantees. Mr. O'Leary's evidence overall was to the effect that what he did had been done by him in good faith to reflect the correspondence that had passed between the parties. It had been his understanding that the defendants had signed as guarantors and not in any capacity on behalf of M.D.Z. Limited. He added that if he had any doubt about what he was doing, he would not have done it. He accepted that what he had done was not the optimum practice, but as he understood the position, there was no advantage to him or Anglo in making the alterations.

It was put to him that the document as altered was a "false instrument", a falsification and a forgery. He resented that characterisation and said that he had simply altered the descriptions of the parties. He accepted that he should have sent the documents back for re-execution. Differences in the page intended for signature by the guarantor and the page for signature by the borrower were acknowledged by Mr. O'Leary and he pointed out that the defendants had obtained ample independent legal advice before signing. Finally he noted that there had never been any communication from anyone to the effect that the guarantors had executed in any capacity other than as guarantors. Accordingly, the documents constituted a sufficient note or memorandum for the purpose of the Statute of Frauds.

I now want to consider the evidence of Mr. Kiernan and Mr. Collins in relation to the execution of the guarantees. Mr. Kiernan described signing various documents from time to time in connection to Glanerought. By and large, this was done in either Mr. Fitzgerald's office or in the offices of Barry M. O'Meara. He signed facility letters, guarantees and conveyancing documentation. Mr. Kiernan was advised to get independent legal advice on the guarantee and did so. He had an issue as to whether or not he understood it to be a non recourse guarantee but other than that he said that he had brought the document to Barry M. O'Meara's offices and signed it there. He accepted also that he had signed the facility letter of the 20th August, 2008 prior to this. He was not

sure of the date when he signed the guarantee. He could not say that he read the guarantee before signing it. When he signed he did so at the point he was directed to sign it by Ms. Crowley. He had no recollection of the fact that there were two pages for completion by the borrower. He said he signed it on the basis that it was a non recourse guarantee. He told Ms. Crowley he was prepared to sign on that basis. He confirmed that he had not authorised anyone to alter the document.

In cross examination, he confirmed that he was a business man and he described the nature of his business. He fully understood what a guarantee was. He was asked about documents that he signed in the course of his business from time to time. He said that he did not always read everything. He was familiar with the format of the facility letters and knew that there was a requirement in relation to security that there should be an unlimited guarantee. He could not say that he actually read the 20th August, 2008, facility letter. He was aware, however, that the Bank required a further guarantee – he was informed of this by Mr. Fitzgerald or Ms. Crowley. Mr. Kiernan was cross examined in detail about the signing of the guarantee. He had very little recollection of the details as to the date, who was present, and whether he examined the documents or not. He signed the document but could not recollect doing so. On examining the page he signed headed "For Completion by the Borrower" he said he must have known he was signing that page as guarantor. He could not recall signing the previous guarantee in 2005. He was not aware of the fact that he had an unlimited liability as a guarantor.

There was some difference of recollection between the affidavit sworn by Mr. Kiernan in the summary judgment application and his evidence in court. However, it is clear that he knew sometime after the 20th August, and before the 25th August that he was going to have to furnish a guarantee. He was then advised to get independent legal advice by Ms. Crowley on the guarantee and a copy was sent to Mr. Brian O'Shea, his personal solicitor. He met Mr. O'Shea. After getting advices from him, he said he left with the original guarantee. He then brought it to Ms. Crowley's office within a few days and then he signed it. I should say at this point that it seems to me having regard to the evidence of Mr. Kiernan that he is almost certainly mistaken in his evidence to the effect that he signed the guarantee a few days after meeting Mr. O'Shea. Nevertheless, I do not think that this is an issue of major importance.

Mr. Kiernan then described the guarantee. It was on yellow paper with a border of red lines. He said he vividly remembered this. All of the pages of the guarantee document were lined in this way. Much cross examination explored this issue. In essence the effect of Mr. Kiernan's evidence is to the effect that the guarantee he signed is not the guarantee before the court. What comes across from the lengthy cross examination of Mr. Kiernan in relation to the signing of the guarantee is that he denies signing an unlimited guarantee; he maintains that he signed a non recourse guarantee; he did not read the guarantee before signing it and if, in fact, the guarantee before the court was unlimited, he said that the Bank must have taken the page he signed and put it into a different document that is an unlimited guarantee. He stated this in evidence, despite the very clear statement at an early stage of the hearing by counsel on his behalf to the effect that the document being sued on by the Bank was in the form in which it had been received by the Bank. One thing from the evidence that is abundantly clear, notwithstanding the general lack of recollection on the part of Mr Kiernan as to the circumstances surrounding the signing of the guarantee, is that he was clearly signing a guarantee qua guarantor and not in any other capacity. He certainly was not signing the guarantee in some capacity on behalf of M.D.Z. Limited.

I now want to turn to the evidence of Mr. Collins on this issue. Mr. Collins described signing the facility letter of the 20th August, 2008, in Mr. Fitzgerald's office. He was unhappy about doing so as the project was finished. He was told by Mr. Fitzgerald that there was a guarantee to be signed and he went to Ms. Crowley's office. She told him to get independent legal advice. He took the guarantee away for that purpose. He went to his own solicitor who explained that it was a non recourse guarantee but in any event, his solicitor advised him that he should not sign the guarantee. He had already signed a guarantee in 2005.

Subsequently, Mr. Collins had a meeting with Mr. McCabe from the Bank. He discussed the issue of the guarantee with him. He was advised by Mr. McCabe that the guarantee had to be signed in order to have monies drawn down as provided for in the facility letter. In the meantime, Mr. Kiernan told him he had signed the guarantee. Mr. Collins said that when he signed, Ms. Crowley produced the guarantee for him to sign. He had very little conversation with her and understood he was signing the same guarantee as the one he took to his own solicitors. He also said that he did not authorise anyone to alter the document. He confirmed that the meeting with the bank took place on the 21st September, and he signed a few days later.

In the course of cross examination, Mr. Collins accepted that he was a business man and that he understood the nature of bank facilities, security and guarantees. When he spoke to Mr. McCabe from Anglo and Mr. Whelan, his solicitor, he questioned the need for the additional guarantee given the earlier guarantee. He described signing the facility letter and said that he understood the gist of it. Having spoke to Ms. Crowley, his understanding was that the 2008 guarantee replaced the 2005 guarantee, although he accepted that that was not, in fact, the case. His evidence was similar to Mr. Kiernan in relation to his description of the type of paper on which the guarantee was prepared.

Mr. Collins then described his meeting with Mr. Whelan and ultimately he signed the guarantee some three weeks after having taken advices from his own solicitor. He accepted that the guarantee he signed was unlimited and was consistent with what he had signed up for in the facility letter. He was asked about Ms. Crowley's responses to interrogatories which were delivered to her in the course of these proceedings. He said that at the time of signing, there was not much discussion. He could not recall exactly what Ms. Crowley had said – she could have advised that he had to execute an unlimited guarantee, but he could not recall that. He was not advised that there was a change to the document, that is, from non recourse to unlimited, but he knew he was meant to sign an unlimited guarantee. He understood that he was signing as guarantor.

In relation to the alterations made by Mr. O'Leary, Mr. Collins said that his concern was not so much the amendments made by Mr. O'Leary, so much as the fact that it was an unlimited as opposed to a non recourse guarantee. This contradicted what he had said earlier on affidavit in the course of these proceedings.

There are a number of observations to be made on the evidence of Mr. O'Leary, Mr. Kiernan and Mr. Collins. I also take note of the interrogatories addressed to Ms. Crowley and her responses to those interrogatories. There is no doubt that the guarantees originally sent out by Mr. O'Leary were non recourse guarantees. Mr. O'Leary on realising his error sent out unlimited guarantees to Ms. Crowley. I am satisfied that both Mr. Collins and Mr. Kiernan got independent legal advice in respect of the guarantees. I am also satisfied that they were at all times aware from the date of signing the facility letter that an unlimited guarantee was required. If not, there would have been little point in the Bank looking for a fresh guarantee and equally little point in Ms. Crowley sending them away to get independent legal advice. I have no doubt that when they each went to Ms. Crowley, they understood they were signing the guarantees as guarantors and not in any other capacity. I will return later to their understanding of the nature of the guarantee. It is interesting in this regard to contrast what was said in evidence by Mr. Collins and what he swore on affidavit as to the capacity in which he signed the guarantee. In his affidavit evidence he said that he signed the guarantee on behalf of the company. Mr. Kiernan said the same on affidavit. I am completely satisfied that Mr. Collins and Mr. Kiernan signed the guarantees in their capacity as guarantors and not in any capacity on behalf of M.D.Z. Limited. I am driven to that conclusion having regard to all of the evidence including the sworn interrogatories of Ms Crowley

I now want to turn to the submissions in relation to the alterations on the guarantees made by Mr. O'Leary. I also think I can conveniently deal with the issue of the evidence of Mr. Kiernan and Mr. Collins to the effect that they signed a non recourse guarantee as opposed to an unlimited guarantee at this point. There is no issue but that Mr. O'Leary sent out non recourse guarantees to Ms. Crowley on the 21st August, 2008. He realised his error within a few days and then sent out the correct versions. In the meantime, Mr. Kiernan and Mr. Collins had both taken independent legal advice on the non recourse guarantees. I think it would be unlikely that such advices given without the solicitors concerned having had regard to the earlier guarantee and the facility letter. Precisely what advice was given by Mr. O'Shea and Mr. Whelan respectively, to their clients is not possible to say as neither of these gentlemen was called to give evidence by the defendants. It seems to me that it is likely and I find as a fact that the guarantees were signed on or about the 29th/30th September, 2008. I have come to this conclusion for a number of reasons:

1. The guarantees were dated the 30th September, 2008.

2. They were sent to the Bank by Ms. Crowley under cover of letter of the 29th September, 2008.

3. Mr. Collins in cross examination put the date of signing after his meeting with Mr. McCabe in Anglo Irish Bank. That meeting took place on the 22nd September, 2008. Clearly the guarantees could not have been signed prior to that meeting.

Following the receipt of the proposed guarantees from Mr. O'Leary, Ms. Crowley sought in correspondence to exclude from the guarantees, the possibility of recourse to the defendants private residences. The position of Ms. Crowley is somewhat ambiguous in that she clearly was the solicitor for Mr. Fitzgerald and she acted for M.D.Z. Limited. There appears to be no doubt that she also acted as the solicitors for Mr. Kiernan and Mr. Collins. The only time that she did not do so was when she sent the defendants to their own solicitors for the purpose of getting independent legal advice in relation to the 2008 guarantee. Other than that, I am satisfied that she was acting for and on behalf of the defendants in relation to matters concerning the Glanerought development. Although it was denied in evidence that Mr. Collins or indeed Mr. Kiernan authorised her to make a request to Mr. O'Leary to exclude the defendants private residence from the scope of the guarantee, I am satisfied that she did so on the basis of her instructions from the defendants. It is clear from the evidence that Mr. Collins in particular was very concerned at the request to give a fresh guarantee. He not only spoke to his own solicitor about this, but went so far as to arrange a meeting with the bank, something he had never done before. The meeting was about his reluctance to enter into an unlimited guarantee.

Those are the background circumstances in relation to the allegation made by the defendants that they executed a non recourse guarantee and this was subsequently changed to an unlimited guarantee in the form in which it was presented to the court. I should mention that the pleadings delivered herein by the defendants could not have been more explicit. They accused the Bank of having taken the signature page of the non recourse guarantee and inserted it into an unlimited guarantee. Mr. Kiernan maintained this approach in his evidence to a significant extent, Mr. Collins less so. Surprisingly, this point was never made in the summary judgment affidavit sworn by Mr. Collins. The same is true of Mr. Kiernan's affidavit.

How then does one come to a conclusion on this issue? The first point is that Mr. Hussey on behalf of the defendants expressly and unequivocally at an early part of the hearing, long before his clients gave evidence, withdrew any suggestion that the Bank had done any such thing. To that extent it is somewhat surprising that in their evidence, Mr. Collins and Mr. Kiernan made this point. It is clear from the evidence that both defendants signed the guarantees in Ms. Crowley's presence. She then forwarded them directly to the Bank. If the guarantees were not altered by the Bank in this way, when received by the Bank, one as to ask how could that have occurred? Was it done by Ms. Crowley, someone in her office, the postman or courier who delivered the executed guarantees? These questions have to be considered in the light of the evidence of Mr. Kiernan and Mr. Collins. Mr. Kiernan was a witness who prevaricated, was hesitant and had poor recollection about almost every detail relating the signing of the guarantee, yet he "vividly" recollected the physical appearance of the guarantee. Mr. Collins was not so dogmatic on this issue.

Aside from the evidence of Mr. Kiernan and Mr. Collins, I also had the benefit of the replies to interrogatories sworn by Ms. Crowley. She made it clear that on the day of execution of the guarantees, the defendants knew that they were signing unlimited guarantees and did so sign. It is surprising that given that the defendants have contradicted those sworn replies, they chose not to call Ms. Crowley in these proceedings. Finally, one has to bear in mind the fact that Mr. Collins arranged a meeting with the Bank prior to execution in regard to his concerns about signing the guarantee. He could not have had and would not have had those concerns if the guarantee being signed was a non recourse guarantee. Accordingly, taking all of the circumstances and evidence on this issue into account, I find as a fact that each of the defendants well knew when they signed the guarantees that they were signing unlimited guarantees.

In fairness to Mr. Collins towards the end of his cross examination by Mr. McCann S.C. on behalf of Anglo, he conceded that the allegation that had been made about the substitution or insertion of the signature page from a non-recourse guarantee into an unlimited guarantee, arose because he and Mr. Kiernan believed or assumed that that had happened and ultimately, he accepted that there was no foundation in fact for making that suggestion. Nevertheless, this was an issue that was persisted in doggedly and took up a considerable period of time in the course of the hearing before me when, in truth, there were no grounds to support it.

I want to turn to the submissions which are central to the issue as to the effect of Mr. O'Leary's admitted alterations on the guarantees. The essential point made in the written submissions on this issue is succinct. There is an argument that the signature of the defendants as "Borrower" is not sufficient to fulfil the requirements of the statute of frauds. That issue need not trouble the court any further given that Mr. Hussey during the course of the oral submissions conceded that there was a series of documents which constituted a sufficient note or memorandum. He submitted that it can be concluded that the alterations and the substitution of altered pages amount to a forgery and the Bank may not rely on the documents to recover against the defendants.

Further by reason of the principle of *ex turpi causa non oritur actio* "the Bank may not proceed with the claim based on previous letters of offer on foot of earlier guarantees signed by the parties".

Given the fact that the question of the substitution of pages is now out of the equation, one is left with the argument that the alterations by Mr. O'Leary amount to a forgery and that therefore the Bank cannot rely on the 2008 documents to recover against the defendants either on foot of the 2008 or 2005 guarantees.

The Bank's contention is that the alterations of Mr. O'Leary did not alter the business effect of the guarantees. They were no more than was intended by the parties. It was submitted that all that was changed was the description of the party signing and that this was not a material alteration. In order to avoid the contract, an alteration had to be material. In making the submission, reliance was placed on the decision in *Raiffeinsen Zentralbank v. Crossseas Shipping Limited* [20001] W.l.R. 1135, a decision of the Court of Appeal. There was misdescription by a signatory and this was put right by Mr. O'Leary. Reference was also made to Norton on Deeds

2nd Ed. pp. 46 to 47 where it was stated:-

> "After a Deed had been executed, one of the parties drew his pen through his own and another party's signatures; it was admitted that the orator was made wilfully, and under the impression that it might influence claims to be dehors the Deed, but no fraud was intended; the Deed contained no ground or covenant by the parties whose signatures were thus erased, and imposed no liability on them; they were simply covenantees. It was held that the erasure was immaterial, and did not avoid the Deed: Cauldwell v. Parker [1869] I.R. 3 Eq. 519; disapproved in Suffell v. Bank of England, 9 Q.B. D. 555, at pp. 565, 571 and 572; . . .
>
> After execution of a mortgage, the name of a mortgagee was altered from "William" to "Edward Thomas", those being the real Christian names of the person intended, "William" having been inserted in the Deed by inadvertence. Held, an immaterial alteration: *Re. Howgate and Osborn's Contract,* [1902] 1 Ch. 451; 71 L.J. Ch. 279."

Reliance was placed on Chitty on Contracts to support the argument that there was nothing to suggest that there was anything illegal or immoral behind the alterations. In essence, Mr. O'Leary made an alteration which the defendants in their evidence accepted reflected the true nature of the transactions. Accordingly it was contended on behalf of the Bank that the maxim *ex turpi causa non oritur actio* did not apply.

Mr. Hussey made the point that the alterations made by Mr. O'Leary were on the page that gave life to the document, that is, the execution page. In the absence of execution there was no document that could be enforced. He pointed out that the page actually competed was entirely superfluous. There was no need for M.D.Z. Limited to complete any part of the guarantee. He submitted that in altering that page Mr. O'Leary was purporting to bring the document to life. When he did that he intended that this was it enable the document to be used to enforce rights under the guarantee. Mr. Hussey also referred to Norton on Deeds and made the point that alterations are presumed to have been made prior to execution. He added that there was no consent to the alterations; there was no request to have the guarantees re-executed and there was no indication that alterations were made post execution.

Mr. Hussey then proceeded to examine the provisions of the Criminal Justice (Theft and Fraud) Act 2001. I have already set out the relevant provisions above. Mr. Hussey contended that the guarantees as executed were false instruments and that that was the way in which the guarantee was intended to used in these proceedings, namely, to induce any person reading the guarantee to conclude that it is genuine. He referred to s. 26 of the Act to argue that the Bank knowing the guarantee to be a false instrument was inducing the court to accept it as genuine. This was being done to prejudice the defendants. He contended that these acts of turpitude precluded the Bank from succeeding in its claim.

I now want to look at some of the authorities referred to by the parties in the course of their submissions. I have already referred to a passage from Norton on *Deeds* relied on by Anglo. Mr. Hussey on behalf of the defendants also referred to a number of passages from Norton on *Deeds* and in particular to the principle set out at p. 32 to the effect that:

> "Alterations and interlineations in a Deed are presumed, in the absence of evidence to the contrary, to have been made prior to execution."

He also relied on a passage at p. 38 which stated:

> "If a material alteration by rasure, interlineations or otherwise, be made, after execution, in a Deed by, or with the consent of, any party thereto, he cannot as plaintiff enforce any obligation contained in it against any party who did not consent to such alteration."

A further passage from Norton on *Deeds* to which I was referred states:-

> "An alteration which, if made before execution, would have effected the position, rights or obligations of any person claiming under the Deed, is material; possibly other alterations may be material."

It was Mr. McCann's contention in relation to this paragraph of Norton on Deeds that the alteration did not affect the position, rights or obligations of any person claiming under the Deed. I mentioned earlier the decision in the case of *Raiffeisen*. In that case part of the guarantee had been left blank at the time of execution, namely the name, address, telex and fax number of the first named defendant who was the agent for service of a Mr. Shah, but was inserted later by an employee of the Bank without the knowledge or consent of Mr. Shah. Creswell J. in the course of his judgment considered the issue of materiality and on appeal Potter L.J. quoted from the judgment of Creswell J. at p. 1139:

> "Turning to the question to the question of materiality, he referred also to the passage where Jessell M.R. stated, 9 Q.B.D. 555, 563:
>
> > Before one considers the question as to whether the alteration is an alteration affecting the contract, one must know what the instrument is, what the alteration is and what the general effect is . . ."
> >
> > 6. The judge then pointed out and emphasised the fact that the instant contract was a contract of guarantee, the central obligations of which were contained in clause 2 (the Guarantee Clause) and clause 3 (the Indemnity Clause). The remainder, save for clause 37, went to the nature, extent and validity of those central obligations. He then referred to s. 64 of the Bills of Exchange Act 1882, relating to avoidance of a bill by reason of material alteration and in particular:
> >
> > "any alteration of the date, the sum payable, the time of payment, the place of payment and, where a bill has been accepted generally, the addition of a place of payment without the acceptors consent."
>
> After observing that the court was here concerned not with a negotiable instrument, but a guarantee, the judge then referred to three particular authorities upon the touchstone of materiality."

Potter L.J. then referred to those three authorities, namely, *Gardiner v. Walsh* [1855] 5 E. & B. 83, 89 as adopted by Scrutiny L.J. in *Koch v. Dicks* [1933] 1 .B. 307 at 320 and thirdly to *Suffell v. Bank of England* 9 Q.B.D. 555, 568. Potter L.J. went on to say at p. 114 as follows:-

> "Thus, the court in *Suffell v. Bank of England* appears to have had little doubt, that in the ordinary way, the appropriate test of materiality in the case of a contract or ordinary commercial instrument is whether or not the alteration complained of altered the contractual obligations of the parties in some particular."

I was also referred to a further passage at p. 1146 in which it was stated:

> "In the course of argument, we have been cited a large number of cases in which the role in Piggott's case has been invoked. In general, it seems clear that the touchstone of materiality has been whether or not there has been some alteration in the legal effect of the contract or instrument concerned simply in the sense of some alteration in the rights and obligations of the parties. Those cases in which an alteration or obliteration have been held to be immaterial have been cases of two kinds. First, those where it either was or could have been said that the alterations either rendered express, or had no effect upon, in the sense of adding nothing to, what the law would otherwise provide or imply . . . Second, there is the class of cases, with which we are not here concerned, where the alteration corrects a "mere misdescription" which can be cured by parole evidence that a person or entity referred to has in fact been misdescribed and that the alteration merely corrects the error in description in accordance with the original intention . . ."

I was also referred to Chitty on *Contracts*, 29th Ed. 16-160 in respect of the maxim *ex turpi causa non oritur actio*. On the topic of tainting it is stated:

> "The maxim *ex turpi causa non oritur actio*, is also applied to the case of an apparently innocent contract which is nevertheless vitiated by the illegality by another contract to which it is merely collateral – the illegality of the latter tainting the former. Thus, in *Spector v. Ageda* the plaintiff loaned money to the defendant to repay a loan which had been made by a third party to the defendant and which was an illegal money lending transaction. The plaintiff knew that her loan was to be used to pay of the illegal loan and the issue which squarely faced the court was, Megarry J. stated, "whether a loan knowingly made in order to discharge an existing loan, it was wholly or partially illegal was itself tainted with illegality". He answered the question in the affirmative; the second transaction was tainted by the illegality of the first and was accordingly unenforceable."

That passage was referred to by reason of the contention on the part of the defendant that the illegality contended for in relation to the 2008 guarantee tainted the enforceability of the 2005.

There are limits to the maxim as was pointed out in para. 16.162 of Chitty on Contracts where is it stated "it is not sufficient, in order to bring the claimant within the maxim, that he should merely be obliged to give evidence to a an illegal contract as part of his case, as for instance where the illegal purpose has not been carried out; for the rule normally applies only where the action is found upon the illegal contract, and is brought to enforce it".

It is part of the defendants' case that the Bank cannot recover on foot of the 2005 guarantee if the 2008 guarantee is found to be void by reason of the alterations and further that the 2005 guarantee is tainted by the illegality, that is, the alleged forgery/use of a false instrument. On the other hand, the Bank argued that it was not necessary to rely on the alterations made as there was in any event a sufficient note of memo of the guarantee. In any event, the Bank maintained that the alterations were minor in nature and the defendants have accepted that they reflect the nature of the transaction.

It was pointed out on behalf of the Bank that the passage from *Raiffeinsen* at p. 1146 makes clear that the test of materiality is whether or not there has been an alteration in the legal effect of the document in relation to the rights and obligations of the parties. Thus, it is clear that an alteration of a guarantee which had the effect of altering the amount of the guarantors' obligation, for example, by changing a figure of €50,000 to €90,000 would be a material alteration.

I was also referred to the decision in *Holman v. Johnson* (1775) 1 COWP 342, which could be described as the *fons et origo* of the maxim. Lord Mansfield in the case stated at p. 1121,

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sound at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa non oritur actio*, or the transgression of a positive law of his country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides the defendant was to bring his action against the plaintiff, the matter would then have the advantage of it; for where both are equally in fault *potior est conditio defendentis*."

I was also referred to *Bowmakers Limited v. Barnet Instruments Limited* [1945] 1 K.B. 65. That case concerned a contract unlawful by virtue of the Defence (General) Regulations 1939. Du Parcq L.J. having referred to the facts and arguments noted that there was an infringement of the order, that neither party knew of the order and that accordingly, "their error was involuntary". The issue in the case turned on whether the defendants were entitled to retain goods which they had acquired on foot of the illegal contract. They had contended that the plaintiffs could not recover the goods because they could not sue on the illegal contract. Du Parcq L.J. reiterated the general principle in the course of his judgment in a passage relied on by Mr. Hussey at p. 70 where it was stated:

> "Prima facie, a man is entitled to his own property and it is not a general principle of our law (as was suggested) that when one mans goods have got into another's possession in consequence of some unlawful dealing between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interest and advancement of public policy is certainly not obvious. The suggestion that it exists is not in our opinion supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the defendant in *Pierse v. Brooks* supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle, which is, in truth, followed by the court is that stated by Lord Mansfield, that no claim founded on an illegal will be enforced, and for this purpose the words "illegal contract" must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words "founded on an illegal contract". The form of the pleadings is by no means conclusive . . ."

Accordingly in that case the plaintiff was entitled to recover the goods concerned.

I was then referred to the decision in the case of *Stone and Rolls Limited (In Liquidation) v. Moore Stephens* [2009] 1 A.C. 1391.

Mr. Hussey placed particular reliance on para. 16 of the judgment of Rimer L.J. at paras. 12 to 16. Rimer L.J. had quoted from the decision of Lord Browne-Wilkinson in his judgment in *Tinsley v. Milligan* [1994] 1 A.C. 340 at p. 376 where it was stated:-

> "In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction."

Rimer L. J. then continued as follows:-

> "That statement of principle was expressed in the context of the facts of *Tinsley v. Milligan*, a property dispute. But it is one I regard as applying generally and which Langley J. conveniently described as a "reliance" test. The relevant question it identifies is whether, to advance the claim, it is necessary for the claimant to plead or rely on the illegality. If it is, the Tinsley case decided that the axe fall indiscriminately and the claim is barred, however good it might otherwise be. There is no discretion to permit it to succeed. The absence of any such discretion emerges from all their Lordship's speeches. Lord Goff of Chieveley, who was in the minority with Lord Keith of Kinkel, gave the leading speech for the rejection of the "public conscience" test, with which the majority agreed. The essential difference between the minority and the majority views was whether the touchstone for the application of the *ex turpi causa* maxim was the reliance test favoured by the majority or the wider test favoured by the minority and regarded as applicable to the particular facts before the court. But once the maxim is engaged, it applies indiscriminately. After referring to *Holman v. Johnson* 1 COWP 341 and the subsequent application of Lord Mansfield, C.J.'s principle, Lord Goff said [1994] 1 A.C. 340, 355:-
>
> > 'It is important to observe that as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.'"

Reference was made by contrast by Mr. McCann to a passage from the judgment of Lord Phillips of Worth Matravers, where he stated at p. 1451 as follows:-

> "In order to assist in following this lengthy opinion I propose at this stage to summarise my conclusions. (1) Under the principal of *ex turpi causa* the court will not assist a claimant to recover compensation for the consequences of his own illegal conduct. (2) This appeal raises the question of whether, and if so how, that principle applies to a claim by a company against those whose breach of duty has caused or permitted the company to commit fraud that has resulted in detriment to the company. (3) The answer to this question is not be found by the application of Hampshire Land or any similar principle of attribution. The essential issue is whether, in applying *ex turpi causa* in such circumstances, one should look behind the company at those whose interests the relevant duty is intended to protect. (4) While in principle it would be attractive to adopt such a course there are difficulties in the way of doing so to which no clear resolution has been demonstrated. (5) On the extreme facts of this case it is not necessary to attempt to resolve those difficulties. Those for whose benefit the claim is brought fall outside the scope of any duty owed by Moore Stephens. The sole person for whose benefit such duty was owed, being the sole person for whose benefit such duty was owed, being Mr Stojevic who owned and ran the company, was responsible for the fraud. (6) In these circumstances *ex turpi causa* provides a defence to the claim."

Mr. McCann relying on that passage submitted that the Bank was not suing to recover a benefit arising from Mr. O'Leary's wrongdoing. There was an underlying obligation to the Bank on foot of the original guarantee and the completion of the facility letter by the defendants. Accordingly he submitted that the "wrongdoing" did not taint the earlier guarantee or the entitlement of the Bank on foot of the defendants' obligations.

Conclusions on the Arguments

The first question I have to consider in this case is whether the alterations made by the Bank's solicitor, Mr. O'Leary, amounted to a material alteration. There are several points to note.

> (1) The defendants were required by the facility letter of the 20th August, 2008, to enter into fresh guarantees. That facility letter referred expressly to the security held (including the 2005 guarantee) and the security required. Thus, it was always clear that the Bank intended to rely on the 2005 guarantee in addition to the 2008, guarantee. This was subsequently confirmed in writing by Mr. O'Leary.
>
> (2) The defendants signed the facility letters.
>
> (3) Mr. Collins had a meeting with Mr. McCabe who told him that it was a requirement of the Bank that a further unlimited guarantee be furnished for the purpose of obtaining further advances.
>
> (4) The defendants obtained independent legal advice, albeit that was in respect of the non recourse form of the guarantee. The Bank declined a request from Ms. Crowley to exclude the private residences of the defendants from the scope of the guarantees.
>
> (5) The defendants at the time they each executed the guarantees were aware of the fact that the guarantees were unlimited in form.
>
> (6) The executed guarantees were returned to the Bank by Ms. Crowley under cover of letter dated the 29th September, 2008, which stated:-
>
> > "Re. Our Clients: Richard Fitzgerald and Others
> >
> > Guarantee – Anglo Irish Bank to M.D.Z. Limited
> >
> > Dear Sirs

Please find enclosed herewith guarantees duly signed by Denis Collins and Michael Kiernan for your attention. . . ."

(7) The defendants intended to and did in fact execute the guarantees in their capacity as guarantors and not in any other capacity. There is no evidence at all to suggest that they in fact executed the guarantees in any capacity on behalf of M.D.Z. limited.

(8) That being so, I am satisfied that the alterations made by Mr. O'Leary reflected the intention of the parties, were minor in nature and could not be described as material. The alterations did not affect the nature of the rights and obligations of the defendants. The position would be otherwise if there was evidence to the effect that the alterations changed the nature of the rights and obligations of the defendants.

There has been no explanation at all as to why the defendants signed the page headed "For Completion by the Borrower" and not the page to be completed by the guarantor but as I accept that they intended to and did execute the document as guarantors, I have come to the conclusion that the alterations were not material. The defendants executed what they knew to be guarantees in their capacity as guarantors and in no other capacity. That was their understanding and intention.

I now have to consider the effect of the provisions of the Criminal Justice (Theft and Fraud) Act 2001. Mr. O'Leary has been accused in no uncertain terms of forgery and the Bank has been accused of using false instruments. These are serious offences carrying a maximum sentence of imprisonment for a term not exceeding ten years or a fine, which is unlimited. I am prepared to accept that the alterations made by Mr. O'Leary come within the terms of s. 30 of the Act for the purpose of considering this issue. I would hesitate to say that what occurred comes within all of the headings contended for by Mr. Hussey in respect of s. 30(1) of the Act and my hesitation is coloured by the fact that the alterations were obvious - the word "Borrower" was crossed out and "Guarantor" was written in and the name M.D.Z. Limited was crossed out and the name of each defendant was written in, in the appropriate guarantee. My view is also coloured by the fact, as I have found, that the defendants intended to execute the document in their capacity as guarantors. Nevertheless the guarantees were altered post execution and no consent was obtained by Mr. O'Leary for the alterations and the guarantees were not re-executed.

I am satisfied however that to constitute the offences created by s. 25 and by s. 26 it is necessary that the person making the alteration should do so with the intention specified in those sections, namely inducing "another person to accept it as genuine . . . and by reason of so accepting it, to do some act, or to make some omission to the prejudice of that person or any other person". Section 26 is in similar terms.

Section 31 of the Act defines the words "prejudice" and "induce".

I think it would be useful to look at something that was said in relation to the equivalent provisions of the UK statute, the Forgery and Counterfeiting Act 1981, which are in identical terms to the relevant provisions in the 2001 Act. In Archbold, *Criminal Pleading Evidence and Practice* 2005, the concept and rationale behind the English legislation was described as follows:-

"The concept of forgery and the rationale of the offence were summarised in paras. 41 to 43 of the Law Commission Report:

'By the middle of the 19th century it was established that for the purpose of the law of forgery that fact that determined whether a document was false was not that it contained lies, but that it told a lie about itself. It was in R. v. Windsor (1865) 10 Cox 118, 123 that Blackburn J. said: 'forgery is the false making of an instrument purporting to be that which it is not, it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing'. This test was applied in the court of appeal in *R. v. Dodge and Harris* [1972] 1 Q.B 416. . . . as we have said . . . the primary reason for retaining a law of forgery is to penalise the making of documents which because of the spurious air of authenticity given to them likely to lead to their acceptance as true statements of the facts related in them. We do not think that there is any need for the extension of forgery to cover falsehoods that are reduced to writing. . . . the essential feature of a false instrument in relation to forgery is that it is an instrument which 'tells a lie about itself' in the sense that it purports to be made by a person who did not make it (or alter it by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered."

Having considered the provisions of the 2001 Act, I am satisfied that there is no evidence of the requisite intention on the part of Mr. O'Leary or the Bank. If one considers the meaning of prejudice as provided for in the Act, neither of the defendants could be said to have lost anything by the alterations, equally it could not be said that the Bank gained an advantage as a result of the alterations. The documents already in existence prior to the execution of the guarantee, included the guarantee of 2005, the facility letter signed by the defendants on the 20th August, 2008, and the letter of their solicitor returning the guarantees, all bear testimony to the existing obligation of the defendants and the Bank's entitlement to enforce that obligation. The defendants had an obligation to pay the sums due in any event. The alterations made in this case are such that it can safely be said that the guarantees are not instruments which tell a lie about themselves. On the contrary, it could be said that the alterations made by Mr. O'Leary were designed to ensure that the guarantees were altered to tell the truth about themselves. The defendants have failed to establish that Mr. O'Leary acted in breach of the criminal law in making the alterations he did.

It cannot be gainsaid that Mr. O'Leary was unwise, to say the least, to have made the alterations to the guarantees. I presume that the Bank would not have advanced further facilities to M.D.Z. Limited until the draft security report was furnished by Mr. O'Leary to the Bank. In those circumstances, it was open to Mr. O'Leary to have the guarantees re-executed. No doubt there were time pressures on all concerned, but it would have been relatively straightforward to do this. Having said that, to characterise the conduct of Mr. O'Leary as amounting to the commission of a serious criminal offence is, to my mind, unfair. His conduct is far removed from constituting the commission of such a serious criminal offence.

It is in those circumstances that I am also satisfied that there was no wrongdoing on the part of Anglo.

Accordingly, given that I am satisfied that there was no wrongdoing by Mr. O'Leary or on the part of the Bank in relying in the guarantees as altered, the maxim does not apply and does not give rise to a defence to these proceedings.

The Bank and the Receiver's Duty to the Defendants

The final element of this case concerns of role of the receiver, the allegation that he was negligent in the exercise of his functions and the submission that Anglo was vicariously liable for the alleged negligence of the receiver. The receiver, Michael Cotter, was

appointed pursuant to the provisions of the mortgage deed of the 1st April, 2005, in respect of the lands at Glanerought. Clause 8.3 of the mortgage deed provided *inter alia* that:-

> "Such receiver shall be agent of the borrower insofar as is allowed by law and the borrower shall be solely responsible for his acts and defaults and/or his remuneration."

The case made by the defendant's against the receiver and against Anglo in this respect was, *inter alia*, that they owed a duty of the defendants not to hastily sell the units at a knockdown price, not to conduct themselves in such a way as to unfairly prejudice or damage the viability of the development or the credibility of the property on the marketplace and not to do anything which would render the property unmarketable and unmortgagable. It was contended that the receiver and by implication Anglo were in breach of this duty in a number of ways.

I think some of these can be disposed of very briefly. Complaint was made in the course of the proceedings as to the removal of the existing selling agent and solicitor having carriage of sale. Criticism was made of the appointment of a selling agent who was "less familiar with the Kenmare market". Evidence had been given by Mr. Daly, Sherry Fitzgerald Daly, on behalf of the defendants, to the effect that a Kenmare based auctioneer should have been appointed. The evidence of Mr. Tyrell of that firm indicated that the firm deals with property in the Munster region namely covering the Counties of Cork and Kerry. Mr. Tyrell replaced Mr. Daly of Sherry Fitzgerald Daly, a firm of auctioneers based in Kenmare. Mr. Daly had been involved in the sale of the properties on the Glanerought development between January 2006 and 2009.I have to say that there is nothing in the evidence before me to support the contention that the appointment by the receiver of the firm of Cohalan Downing, a Cork city based firm was in any way inappropriate.

It was also pleaded that the replacement of the existing solicitor was unsatisfactory and that the title which was furnished was unmarketable and unmortgageable. In respect of these issues I have to say that there was little or no appropriate evidence to support these contentions. The only witnesses who gave evidence in this regard were the defendants themselves and Mr. Daly. No witness capable of giving appropriate expert witness was called on behalf of the defendants to establish that the receiver furnished a title which was unmarketable and unmortgagable. Mr. Daly purported to give evidence to the effect that the title offered was unmarketable and ummortgageable, but he is clearly not someone capable of giving expert evidence on the issue of title. Mr. Daly did raise a number of practical issues which would be required to be dealt with before the sale could be completed, for example, issues in relation to compliance with planning permission, the necessity for home bond cover or similar insurance to name but two matters. These are all matters that can be dealt with in the run up to the closing of a sale and are not, strictly speaking, title matters. In any event, there is simply no evidence before me to the effect that the receiver furnished a title which was unmarketable and/or unmortgageable. Finally, I know of no basis upon which it could be suggested that the receiver was not entitled to appoint his own solicitor for the sale of the properties comprised in the Glanerought development.

Other Issues Relating to the Role of the Receiver
Following his appointment, the receiver, Michael Cotter, arranged a meeting which took place on the 31st August, 2009, with Mr. Fitzgerald, Mr. Kiernan and Mr. Collins. The receiver outlined his strategy for the receivership. A memorandum of the meeting noted that the receiver did not intend to engage in a fire sale of the assets. The difficulty in valuing the properties involved was also noted. It was pointed out that a long term view would be required in assessing the value of the properties. As set out above, the receiver appointed Mr. Tyrell of Cohalan and Downing as selling agents. They were to provide an opinion on values and to advise on marketing and the sale of the properties concerned. By letter of the 30th September, 2009, Cohalan Downing furnished its advices to the receiver. No issue has been taken with the general strategy set out in that letter from Mr. Tyrell

Mr. Daly was the principal witness on behalf to the defendants in relation to the actions of the receiver and those of Mr. Tyrell. A significant contention on the part of Mr. Daly was that the value placed on the various properties by Mr. Tyrell in his letter of the 30th September, 2009, was too low. Mr. Tyrell had furnished a suggested price range in respect of each of the property types on the estate. Mr. Daly was strongly of the view that those values were simply too low. Mr. Daly accepted that the prices at which the properties were being sold prior to the appointment of the receiver were too high. He said he had tried to obtain instructions to offer the properties at reduced prices when he was still acting as auctioneer in respect of the properties, but he was unable to get such instructions. He recognised the need to reduce prices, but his view was that any reduction should have been less than that proposed by Mr. Tyrell. As an example Mr. Tyrell valued a property, a three bed roomed detached house at €165,000, but Mr. Daly placed a value of €190,000 on the same property.

I heard lengthy evidence from Mr. Daly, Mr. Tyrell and from Ms. Margaret Kelleher, an auctioneer of some twenty years experience, a partner in Lisneys, based in Cork. She gave evidence on behalf of Anglo and the receiver. The tenor of her evidence was that the prices at which the properties were valued by Mr. Tyrell were fair and reasonable. Having regard to the evidence that I have heard on this issue, I have come to the conclusion on the evidence before me that the prices at which Mr. Tyrell proposed to sell the various properties were fair and reasonable.

Another significant issue surrounded the marketing of the properties. As I said, Mr. Tyrell had outlined his strategy in general terms in the letter of the 30th September, 2009. Essentially, there was to be an open day following a marketing strategy. As part of his strategy Mr. Tyrell spoke to a journalist with the Irish Examiner, Tommy Barker. An article appeared in the Irish Examiner on the 7th November, 2009, under the headline "Kenmare Firesale Begins". This was the day before the first open day planned by Mr. Tyrell. It is an understatement to say that this article was viewed as unhelpful by Mr. Daly and Mr. Tyrell alike. However, Mr. Daly was very critical of the appearance of the article in the newspaper and Mr. Tyrell's role in relation to its publication. Mr. Daly became aware of the publication of the article in advance and was concerned at the effect of the article on other properties in Kenmare and the general area. He was so concerned that his son Senator Mark Daly contacted Mr. Aynsley, chief executive of Anglo Irish Bank, in advance of the open day. Mr. Daly said that having become aware of the article, if he had been dealing with the matter he would have tried to have the article pulled. He accepted in general terms the value of getting an article written about the forthcoming sale, but his concern was focused on the adverse effects of the headline.

I accept that no one involved in this case wanted to see the property marketed as a "firesale" but in my view this was something which cannot be laid at the door of the receiver, and in fairness, I cannot see on the evidence, how any blame can attach to Mr. Tyrell for the headline which appeared in the Irish Examiner. It must also be observed that the article did not stop potential purchasers from coming to the open day on the 8th November, 2009. The evidence established that a significant number of people turned up for the open day. To that extent it seems to me that there is no evidence to support any contention that the appearance of this article impacted adversely on the sale of the properties.

The next issued raised by Mr. Daly concerns the events that occurred on the open day and thereafter. He had a number of complaints in relation to the conduct of the open day by Mr. Tyrell and in respect of matters leading up to that day. I have already indicated that I am satisfied that there is no issue on the question of whether or not there was a marketable and or mortgageable

title to various properties. However, Mr. Daly raised a number of issues that had to be resolved in relation to the properties before any sale could be completed. There was, as mentioned, an issue with Home Bond or similar insurance cover. This was a problem inherited by the receiver and one that had to be resolved by the receiver. Apparently M.D.Z. Limited had not registered a number of properties appropriately with insurers. An issue in relation to compliance with planning permission had to be resolved. The issue of BER certificates had to be dealt with and there was an issue with the management company which had been struck off and had to be reinstated. It was reinstated on the 31st October 2009, well before the open day but nonetheless, people in attendance at the open day had raised queries about the management company. The point made by Mr. Daly was that these issues should have been dealt with prior to the open day. Mr. Tyrell and Mr. Cotter in their evidence explained that the purpose of the open day was to gauge public interest in the properties. They indicated that it was never the intention that any properties would actually be sold on the open day as such. Deposits would not be taken, but details of expression of interest from potential buyers were taken on the day.

The issue in relation to Home Bond or similar insurance cover was finally resolved by March 2010. BER certificates were available for all but four of the properties by mid January and three of the properties could not be sold because they were not built in accordance with planning permission.

In an ideal world I would have thought that the matters referred to above would have been dealt with before a marketing campaign took place. This was not an ideal world. This is not a launch of a new development but an attempt to kick-start a sale of properties in a development that had been on the market since 2006. All of the matters that had to be dealt with should long since have been sorted out by those previously involved in the development. The only outstanding matter that could not have been dealt with in advance of the open day was any issue or query raised about the status, management and role of the management company. It would have been difficult to anticipate the nature of any concerns or queries in advance of the open day.

There was no evidence from the defendants as to why these various matters had not been dealt with previously. In fairness to the defendants, they described themselves as silent partners in the development and it has been clear throughout the evidence that the main moving party in relation to the development was Mr. Fitzgerald.

I accept that it was never the intention or expectation that anyone would enter into contracts to purchase any of the properties on the open day. Indeed, not all of the properties were being actively marketed on the open day. The purpose of the exercise was to gauge the level of interest. The intention originally was to market the apartments in the development first.

At the open day it appears that there were a significant number of people in attendance. Mr. Tyrell explained that if there had been a good level of interest, it might have been possible to get an increase in prices as things moved along. On the open day itself, whilst there were many people interested, there were a lot of enquiries about the status of the management company. Mr. Tyrell made inquiries with the solicitors acting on behalf of the receiver PJ. O'Driscoll, Cork, in relation to this issue. One of the other issues mentioned by Mr Daly in the course of evidence was a problem with planning in respect of the sale of holiday homes. Mr. Tyrell's evidence was that there was no particular query raised by potential purchasers on this issue on the open day.

Subsequently by the 12th January, 2010, Mr Tyrell was satisfied that he was in a position to commence sales and by the 26th January, 2010, he had sent out a number of contracts in relation to the properties to people who had expressed an interest at the open day. By this time a letter had been received from Brian O'Kennedy and Associates Limited, Consulting Engineers, dated the 18th January, 2010, dealing with a large number of issues including the question of planning permission, BER certificates and so on.

Mr. Tyrell also explained that at the open day, he informed those who were interested in the properties that he would clarify any legal issues and get back to them subsequently. He said that he worked his way through the enquiry list in the aftermath of the open day but was unable to generate any sales by Christmas.

I mentioned earlier that Ms. Kelleher of Lisneys gave evidence on behalf of the receiver. In the course of her cross examination on behalf of the defendants she was asked as to whether outstanding issues should have been resolved before the holding of an open day. She agreed in her evidence that in an ideal world, issues of title would be sorted out before a property goes on the market. She expressed the view that what may happen in an ideal world may not always be practical. There were wider issues involved in this case. She referred to the collapse in the property market and the setting up of NAMA. She noted the legal issues that were queried related to matters raised on the open day. These had to be clarified and it was her evidence that it was reasonable for Mr. Tyrell to clarify any queries. It has to be said that although Mr. Daly was strongly critical of Mr. Tyrell in relation to what he described as "legal issues" that required to be resolved before the opening day, there was no evidence from anyone who came to the open day and had queries about matters such as planning compliance, BER certificates. As Mr. Tyrell indicated in his evidence, the main questions focused on the position of the management company.

I think it is clear from the evidence that following the open day, Mr. Tyrell contacted those who had been present and had expressed an interest in the properties and advised them that he would clarify legal issues. I have to accept his evidence, which has not been contradicted, that the legal issues centred on the status of the management company. It is quite clear that other issues had to be resolved, even if not to the forefront of potential purchasers minds on the open day, but these are the sort of issues that typically have to be resolved in the time between the signing of the contract and the closing of a sale. In other words, a number of matters would have to be dealt with before a sale was completed but it was not essential to have these matters concluded before a marketing exercise took place. As I have said previously and as was stated by Ms. Kelleher, in an ideal world one would expect these matters to be dealt with prior to the marketing of the properties.

It is interesting to note the responses made to Mr. Tyrell by some of those who attended the open day in a document headed Schedule of deposits taken. Two had concerns about the price and whether it was still too high. One had a problem obtaining finance and a few had issues about the fact that there was a management company for the estate and the fact that this could involve costs in the future.

There was one other issue raised in the course of the evidence which I have not previously dealt with and that related to the state and appearance of the Glanerought development at the time of the open day. Mr. Daly had given evidence as to what he considered to be the unsatisfactory nature of the appearance of the development. I have heard the evidence of Mr. Cotter and Mr. Tyrell in regard to this issue. I have to say that I was less than impressed by Mr. Daly's evidence in this regard. Mr. Daly produced a photograph depicting a Christmas tree left on part of the development. Clearly that had been there for a considerable period of time and indeed must have been present during the time when Mr. Daly was the auctioneer dealing with the sale of the property. I note that Mr. Cotter was obliged, following his appointment as receiver, to let go the existing caretaker on the estate and further, that steps were taken to maintain the appearance of the estate. For these reason I reject the evidence of Mr. Daly on this point.

Submissions

Having outlined the evidence that was given in relation to these matters, I now want to consider the legal submissions made on foot of the evidence herein. I propose to consider in the first instance, the submissions made by Mr. Hussey. He referred to the duties of a receiver and placed reliance on the case of *Standard Chartered Bank v. Walker* [1982] 1 W.L.R. 1410 and to a passage from the judgment of Denning M.R. at p. 1415 where he stated:-

> "We have had much discussion on the law. So far as mortgages are concerned the law is set out in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949. If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself to clear off as much of the debt as he can, but also to the mortgagor so as to reduce the balance owing as much as possible, and also to the guarantor so that he is made liable for as little as possible on the guarantee. This duty is only a particular application of the general duty of care to your neighbour which was stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, and applied in many cases since . . . The mortgagor and the guarantor are clearly in very close 'proximity' to those who conduct the sale. The duty of care is owing to them - if not to the general body of creditors of the mortgagor. There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time, he must exercise a reasonable degree of care.
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> So far as the receiver is concerned, the law is well stated by Rigby L.J. in *Gosling v Gaskell* [1896] 1 QB 669, a dissenting judgment which was approved by the House of Lords [1897] AC 575. The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor.
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> If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly."

I am satisfied that that passage encapsulates the principles of law applicable. Mr. Hussey in his submissions stated that in this case the Bank approved the appointment of the estate agent, that the Bank approved the prices recommended by the estate agent and decided that they were going to sell as mortgagees in possession. The receiver negotiated on behalf of the Bank with the purchasers. On that basis, Mr. Hussey contended that the receiver was the agent of the Bank and that therefore the Bank was responsible for his actions and insofar as he have acted negligently the Bank are responsible for that. He noted the passage in which it was said that if the mortgagee or the receiver has not used reasonable care to realise the assets to the best advantage then the mortgagor is entitled to an allowance and he contended that that is what should happen in this case. He submitted that on the basis of the evidence there were sufficient inquires made at the open day to allow for the entire sale of the estate and that as a result of being told that there were legal issues, the confidence of the public was seriously dented and that there was a lost opportunity.

A second point made by Mr. Hussey was that because the form of sale taking place was a sale by the Bank as mortgagee in possession that the receiver could only be acting as an agent of the Bank. It was further contended that if the open day turned out to be a totally lost opportunity that the loss incurred is what the receiver hoped to sell at, i.e., a total figure of €5.015 million. If one took the prices set by Mr. Daly a further €1.5 million should be added to the figures.

Mr. McCarthy S.C. on behalf of the receiver also referred to the nature of the duty owed by a receiver. He referred to a number of passages from Halsbury's *Laws of England*, Vol. 77, 2010 at para. 479. I will just refer to one brief part of what was cited because it is of assistance. It is stated:-

> "A receiver and manager owes the same duty in equity to the mortgagor and all subsequent encumbrancers and guarantors as the mortgagee to exercise his powers in good faith and for the purpose of obtaining repayment of the debt owing to the mortgagee. . . . A receiver exercising his power of sale also owes the same specific duties as the mortgagee. The receiver is entitled (like the mortgagee) to sell the property in the condition in which it is without awaiting or effecting any increase in value or improvement of the property. The receiver is not obliged before sale to spend money on repairs to make the property more attractive before marketing it, or to "work" an estate be refurbishing it or to apply for planning permission . . .
>
> The duties owed by a receiver and manager do not compel him to adopt any particular course of action, such as selling the whole or part of the mortgaged property, carrying on the business of the company or exercising any other powers and discretions vested in him. The primary duty of the receiver is to be debenture holders and not to the company. The primary objective of the receivership is to enforce the security by recouping the monies which it secures from the income or assets of the company subject to the security, and when recoupment is complete to hand the remaining property back to the control of the company."

Reference was also made to the decision in *Mooreview Developments Limited and Others v. First Active Plc and Others* [2009] I.E.H.C. 214 in which Clarke J. stated at para. 12.1:-

> "There is no doubt but that a receiver who sells the assets of a company may be liable, both at common law and under statute (s. 316A, Companies Act 1963, as inserted by s. 172 Companies Act 1990) for failing to realise the true value of the asset concerned."

I was also referred to the decision in *Irish Oil and Cake Mills Limited and Another v. Donnelly* (Unreported, High Court, Costello J. 27th March, 1983), in which he noted:-

> "The receiver derives his appointment and his authority from the contract entered into between the parties. In this case, as is usual the parties agree that he is to be treated as the agent for the mortgagors, the plaintiffs herein. This provision protects the debenture holders from liability as mortgagees in possession and establishes the relationship between the receiver and the company."

He also referred in the course of his submissions to the decision in the case of *Ruby Property Company Limited and Others v. Raymond Kilty and Superquinn,* (Unreported, High Court, McKechnie J. 21st January, 2003). In the course of his judgment in that case McKechnie J. helpfully summarised the law in relation to the duty and obligations of a receiver. In the course of that judgment it was also pointed out that the onus of proof is on the party asserting negligence on the part of the receiver.

Having referred to the general principles of law applicable Mr. McCarthy then referred to the facts of this case. It was pointed out that although serious allegations were made against the receiver in the course of these proceedings, not one complaint was made to Mr. Cotter until such time as there was a replying affidavit furnished in the course of the summary judgment proceedings in May 2010. Mr. Kiernan and Mr. Collins never made any contact prior to this with the receiver to say that there was anything wrong with the conduct of the receivership. Nothing was done by the defendant until they were themselves served with these proceedings.

The second point made by Mr. McCarthy was that there was no independent expert testimony furnished to the court as to the conduct of the receivership. The main evidence given on behalf of the defendants was that of Mr. Daly. Mr. Daly was not an independent witness and there was simply no expert evidence as to the alleged negligence of the receiver. The only point of substance that could be raised was that which arose in the course of the cross examination of Ms. Kelleher to the effect that the open day may have been a missed opportunity. Mr. McCarthy went through the amended defence and counterclaim and examined the various allegations made against the receiver. He pointed out that under a significant number of the headings raised in the defence and counterclaim no evidence of any kind was led to demonstrate any negligence on the part of the receiver. The high point of the evidence from the point of view of the defendants was the view expressed by Ms. Kelleher that the fact that Mr. Tyrell contacted a number of people after the open day to say that there were legal issues (in relation to the management company) amounted to a missed opportunity. It was submitted by Mr. McCarthy that it was a reasonable thing to obtain clarification for those parties who had raised issues about the management company, a point accepted by Ms. Kelleher. The fact that this had to be done did not render the entire site toxic. It had always been the expectation that contracts would begin to go out to interested parties subsequent to the open day and in fact they started going out from mid to the end of January. It was submitted that there was nothing negligent in adopting the course of action taken by Mr. Tyrell and Mr. Cotter. Accordingly, he submitted that there was no basis of a claim in negligence against the receiver.

I should refer briefly to the submissions of Mr. McCann on this issue. Mr. McCann emphasised the fact that the receiver was the agent of the borrower in accordance with the terms of the mortgage deed. He pointed out that if there was default by the receiver it did not attach to the Bank. In order for a claim in tort to be maintained, it was not enough to show wrongdoing, there had to be wrongdoing and a loss caused by the wrongdoing. He submitted that there was no evidence of any negligence on part of the Bank in relation to the sales process. Equally, there was no evidence of any higher sales price being achievable because of something the Bank or did not do. Further, there was no evidence of an actual loss. He also reiterated the fact that there was no expert testimony from any expert in insolvency or from an independent auctioneer. Finally, he emphasised that there was no evidence form anyone to indicate why people did not purchase.

Decision
In general terms I should say that there seems to me to be little or no dispute between the parties as to the extent and nature of the duty owed by a receiver to a borrower and indeed to a mortgagee. The question is whether anything occurred in the course of the receivership in this case that amounted to negligence. The issue centres on the role of Mr. Tyrell. In general terms, I have already indicated my view as to the fixing of prices in respect of the various properties at Glanerought. There was no real conflict between the parties as to the approach and strategy adopted by Mr. Tyrell. I have already indicated that I do not accept that Mr. Tyrell was in any way responsible for the unfortunate headline that appeared in the Irish Examiner. It was appropriate for Mr. Tyrell to have attempted to obtain editorial material in the newspapers as part of the marketing strategy. One thing that can be fairly said is that the strategy did in fact work as large numbers turned up at the open day and Mr. Tyrell was in a position to take details from a considerable number of interested people.

This case comes down to a very net issue. Was there any wrongdoing on the part of the receiver through his agent, the auctioneer appointed by him to handle the sale of the properties comprised in the Glanerought development and if so was the alleged negligence such that it caused loss to the defendants. Following the open day, Mr. Tyrell got back to a number of parties who had expressed interest and he did confirm that he would seek clarification on the legal issues. The legal issues described by Mr. Tyrell in his evidence related to the management company. As indicated previously the management company had been struck off and had subsequently been re-instated prior to the open day. Mr. Daly referred to other matters as being "legal issues" which required to be complied with. There were a number of such other issues, but it is clear from the evidence of Mr. Tyrell, and it is the only evidence I have on this point, that these issues were not matters of concern for interested parties.

Other than the evidence that there was an issue on the open day in relation to the management company and that this resulted in Mr. Tyrell contacting parties who had expressed interest to advise them that that issue would be clarified, there is nothing else in the evidence before me that could in any shape or form amount to negligence on the part of the receiver in the conduct of the receivership.

Accordingly, I need to consider the evidence of Ms. Kelleher. As I have pointed out, her evidence is the high point of the case that can be made on behalf of the defendants. In the course of her cross examination, Mr. Hussey had said to Ms. Kelleher that the fact that, having generated interest at the open day Mr. Tyrell then went back to the interested parties and informed them that there were "legal issues" to be clarified and that he would get back to them, was an opportunity wasted and Ms. Kelleher agreed with that comment. In the course of this part of the cross examination, Mr. Hussey accepted that his complaint in this regard did not centre on whether or not there were, in fact, legal issues but rather centred on the marketing approach taken by Mr. Tyrell in this regard.

Ms. Kelleher was then re-examined by counsel on behalf of the receiver and in the course of re-examination, she said that as matters were raised by interested parties on the opening day, that it was absolutely appropriate for the auctioneer, Mr. Tyrell, to clarify those issues. She confirmed that after an open day, she would expect contracts to go out some four to six or eight weeks afterwards.

Therefore it can be seen that although Ms. Kelleher accepted that the open day was something of an opportunity wasted, she accepted in re-examination that it was perfectly reasonable for Mr. Tyrell to clarify the issues raised by interested parties.

Unfortunately, the facts of the matter are that although there were parties who were interested in the properties at Glanerought following the open day it transpired that turning that interest into completed contracts for sale was something that proved to be very difficult. Although there had been some 200 inquiries arising from the open day, very few contracts in fact went out. There were in fact four completed sales and only a couple of other potential sales.

It is in that context that I have to consider whether or not the events immediately following the open day were such as to amount to

negligence on the part of Mr. Tyrell the servant or agent of Mr. Cotter the receiver. On the open day there were a number of inquiries from interested parties about the properties on offer. It is also clear that there were a number of queries in relation to the management company. Mr. Tyrell had an obligation to resolve those queries. It is clear from Ms. Kelleher's evidence that this was a reasonable approach to take. What he did, apparently, was to indicate to those who had raised queries that there were legal issues to be resolved and when they were resolved he would contact the parties concerned again. I think it is clear from the evidence that Mr. Tyrell was in contact with those who had expressed an interest on a number of occasions subsequent to the open day.

The only evidence that supports the contention as to negligence is one sentence in the evidence of Ms. Kelleher. If one examines all of her evidence, particularly her view that it was reasonable for Mr. Tyrell to clarify the issues, together with the rest of the evidence in this case, it is impossible to reach a conclusion to the effect that there was negligence on the part of the receiver. The defendants have failed to establish a breach of the duty undoubtedly owed by the receiver to them.

Even if I was wrong in coming to that conclusion, there is another problem from the point of view of the defendants. There is not a scintilla of evidence to show that any loss has flowed to the defendants as a result of the handing of the open day and its aftermath. On the contrary, the evidence shows that the property market at the end of November 2009, was in a very bad state. To say that it was in freefall may not be an exaggeration. Mr. Daly in the course of his evidence had explained that he had difficulties in the sale of properties in Glanerought and he attributed that to the fact that he could not get a reduction in prices from Mr. Fitzgerald. I have had the benefit of the expert evidence of Ms. Kelleher, including her report. I have also had regard to the evidence of Mr. Tyrell. It is clear from all of these witnesses that there were great difficulties in the market at the time. I simply cannot see how it could be said that the failure to sell more than a handful of the properties by the receiver is for any reason other than the extremely depressed state of the property market. Certainly, there is no evidence before the court to satisfy me that, were it not for the actions of the receiver and/or Mr.Tyrell, the properties would have sold. After all it has to be borne in mind that according to Mr. Daly, these properties were being sold at a considerable undervalue. Mr. Tyrell had a list of interested parties and he worked through that list with a view to trying to get those interested parties to enter into contracts for the purchase of the properties at Glanerought. Despite his best efforts, this simply did not happen save for a small number of sales. Glanerought was a development that had been on the market since 2006. Sales had stagnated to a large extent by the time of the appointment of the receiver. Unfortunately, the problems manifest at Glanerought happened in many other parts of the country and are reflected in the collapse of the property market throughout the country.

To conclude, I can only say that the defendants have fallen far short of providing to this Court the necessary evidence to show that they have suffered any loss by reason of the actions of Mr. Cotter or Mr. Tyrell. In those circumstances I do not have to consider the question as to whether or not Anglo Irish Bank Limited could be liable in respect of any wrongdoing on the part of the receiver.

In conclusion, it seems to me that the plaintiff is entitled to judgment for the sums claimed herein. There is an issue which was postponed in relation to performance bonds and I will hear the parties as to that aspect of the case at a later stage.