Neutral Citation Number: [2011] IEHC 503

THE HIGH COURT

2009 3565 P

BETWEEN

JOHN WALSH AND PATRICIA WALSH

PLAINTIFFS

AND

SOUTH TIPPERARY COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 9th December, 2011

1. Introduction

1.1 Access to land is an important question, not least in rural areas. In those circumstances it is hardly surprising that checking the legal entitlement of a prospective landowner to have the specified access to land under purchase forms an important part of the task of a conveyancing solicitor employed on behalf of the buyers of land. The legal entitlement to have access to any particular plot of land can, of course, derive from either public or private rights. In simple cases the land may have direct access onto an acknowledged public roadway. In more complicated cases, particularly in rural areas, it may be necessary to investigate whether an important part of the access to the lands in question over small lanes or minor roadways is to be found in a public right of way or a private right of way. It will be necessary to address some of the differences between public and private rights of way in due course.

1.2 However, in the context of a case where it is said that access is to be obtained over a public right of way, it has become standard practice amongst conveyancing solicitors to seek, on behalf of a buyer, that the seller procure an appropriate form of letter or certificate from the local authority in which the land in question is situate confirming the existence of a public right of way. It is also standard practice among conveyancing solicitors that such a letter then forms part of the documents which are retained as evidence of the title of the buyer and can be used where the buyer sells on the property on a subsequent occasion. While the precise legal status of such letters or certificates may be a matter of some legitimate debate, it seems to me that they can, at least, be described as quasi documents of title.

1.3 That description of the way in which buyers satisfy themselves as to the existence of public rights of way (which may be of some relevance to their access to the land which they seek to buy) forms the backdrop to these proceedings. It is agreed that a mistake was made by the defendant ("South Tipperary Council") in issuing a letter or certificate in respect of a public right of way at Roosca, Cahir in County Tipperary. The letter in question had been written by South Tipperary Council to the solicitors who acted for a predecessor in title of the plaintiffs ("the Walshes" and, where relevant, "Mr. Walsh"). The letter formed part of the documents schedule supplied to the Walshes' solicitor when they agreed to buy the lands in question (which were comprised in Folio No. 4701F County Tipperary) by contract of the 1st July, 2005. The letter specified that a particular laneway, which provided one of two means of access to the lands comprised in that folio, had been taken in charge by South Tipperary Council.

1.4 Some three years later, the Walshes decided to sell the property under, it would appear, some pressure from their bank. In the course of that conveyancing transaction the error was discovered in circumstances to which it will be necessary to refer. The transaction ran into trouble as a result of that error with the consequence that the sale ultimately closed but on significantly less advantageous terms.

1.5 In those circumstances, the Walshes bring these proceedings claiming damages against South Tipperary Council. Against that general background it is necessary to turn to the issues which arise.

2. The Issues

2.1 As pointed out earlier, South Tipperary Council acknowledges that a mistake was made. The circumstances giving rise to the mistake were established in the evidence. It would appear that, from the early days of this State, county councils kept a book and maps in which were recorded all public rights of way. Where new roadways were taken in charge by the relevant local authority, particulars of the additional public right of way were recorded in the relevant books by reference to an appropriate map. On the rare occasions where a public right of way was extinguished, appropriate deletions were made. It would seem that, in the early years of this century, a decision was made to transfer the content of that hard copy information onto an appropriate digital database. The roadway which is at the heart of these proceedings runs from a local, undoubtedly public, road up to an entrance to the lands which were, between 2005 and 2009, owned by the Walshes. The end of the roadway is at a location on those lands where a number of largely disused buildings are to be found. Approximately halfway along the roadway in question there are farm buildings and entrances associated with another landowner in the area who, by coincidence, is also called Walsh. The evidence established that, in reality, the public right of way only went from the main local public roadway as far as those farm buildings and that the balance of the roadway was over lands owned by the second Mr. Walsh, but with a private right of way in favour of the lands comprised in Folio 4701F. Unfortunately, it appears that when the hard copy maps which formerly recorded the scope of public rights of ways in the area were being transferred onto the digital version to which I have referred, an error was made which caused the entire roadway to be included as a public right of way when, properly speaking, only the first half of that roadway should have been so included. It follows that, when an appropriate official of South Tipperary Council was asked, by the solicitor acting for the predecessor in title to the Walshes (a Mr. Rolf Assmuss) to certify the public right of way in question, that official consulted the database and was misled by the error on that database into believing that the entire roadway was taken in charge. On that basis the letter which is at the heart of these proceedings was issued. For completeness it should also be noted that, when the question of the extent of the public right of way over the roadway was raised by the purchaser from the Walshes, the matter was again taken up with South Tipperary Council. The initial response was to confirm that the public right of way extended to the whole of the roadway presumably because the official then consulted was also misled by the inaccurate database. It was only after a direct contact was made, between an engineer employed by the purchaser and a senior official in the Roads Department of South Tipperary Council, that the error was discovered.

2.2 That there was a mistake or mistakes cannot, therefore, be doubted. The issues between the parties stem from the legal consequences of that mistake. The issues may be summarised in the following way.

2.3 First, there are questions as to the status of the letter written by South Tipperary Council, particularly having regard to the fact that the letter was not written to the Walshes but rather was written to the solicitor acting on behalf of Mr. Assmuss when the lands were being sold to Mr. Purcell (who, in turn, sold the lands in question to the Walshes). The extent to which the Walshes can place reliance on that letter was questioned on behalf of South Tipperary Council.

2.4 Second, there are issues concerning the extent to which a public authority, such as South Tipperary Council, can be liable for mistakes of the type which occurred in this case. That is a legal issue to which I will have to turn in due course.

2.5 Third, and assuming that the Walshes succeed on the first two issues, a question is then raised as to the extent to which the Walshes ought to have known that the roadway in question was not taken in charge at the time when they entered into their contract to sell in the latter part of 2008. That issue largely turns on the situation on the ground. It would appear, for example, that the roadway was resurfaced on foot of a local scheme but only to the extent of the first half of the roadway in question which was, on any view, a public right of way. In addition, it is said that the second half of the roadway was never metalled and that that fact should have drawn attention to the absence of that portion of the roadway being taken in charge. This issue, therefore, largely turns on the facts and will be addressed later in the course of this judgment. In passing it is worthy of note that a road which is said to have been "metalled" is one which has at least been deliberately laid with broken stone or cinders, which are generally used in the construction or repair of roads, and should be distinguished from a laneway, for example, which is laid with clay and scattered loose stone.

2.6 Fourth, and finally, there are issues concerning the amount of any losses which the Walshes suffered which can properly be said to flow from any established wrongdoing on the part of South Tipperary Council. The Walshes make their claim under four headings as follows:-

> (a) A sum of €200,000 which represents the reduction in the sale price between the Walshes and their purchaser as and between the price originally agreed and the price at which the sale ultimately closed. That such a reduction occurred is clearly established. There are however questions as to whether all of that reduction can properly be said to be causally linked to the error in the letter concerning the extent of the public right of way;
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> (b) In addition, it is clear that, when the Walshes originally contracted to sell the lands, it was proposed to retain a small parcel of land which might have been useful as a site and which was located on the far side of the local public roadway which bisected the lands and separated that site from the majority of the lands. It is again clear as a fact that when the sale closed the Walshes included those lands even though they had not been included in the original contract. It is said that it was necessary to include the lands in question in order to ensure that the sale closed. It is agreed between the parties, without prejudice, that the value of the lands in question was €50,000;
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> (c) It is said on behalf of the Walshes that, amongst other consequences, the problems which derived from the erroneous letter from South Tipperary Council led to a delay in closing the sale. The sale should, it is said, have closed around the beginning of October, 2008. It, in fact, closed on the 20th January, 2009. The sale price was €2,500,000. On that basis it is agreed, again without prejudice, that, at the rates then being paid by the Walshes to AIB, an additional sum of €45,743.34 in interest was charged which sum would not, in fact, have been charged had the sale closed on the 1st October. While there is no issue on that calculation as such, there are issues as to whether that sum is properly allowable; and
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> (d) Finally, the Walshes claim a sum of €7,290 (being €6,000 plus VAT) in respect of additional legal costs said to have been incurred as a result of the difficulties that arose with the purchaser. Again, without prejudice, it is accepted that the sum of €6,000 plus VAT was an appropriate amount for the Walshes' solicitor to charge in respect of the additional work which he had to do.

2.7 In addition to the issues in relation to damages already touched on, issues concerning foreseeability, mitigation and causation of those damages arise.

2.8 Against the background of these issues it seems to me be appropriate to turn, first, to the questions of principle which arise under the first and second issues referred to above. Those issues concern the extent of the potential liability of a local authority for an error of the type which arises in this case.

3. The Potential Scope of Local Authority Liability

3.1 The starting point has to be a consideration of the letter which is at the heart of these proceedings and its status. The letter is dated the 18th April, 2005, and is written by an administrative officer in the planning section of South Tipperary Council to Michael J. Kennedy & Co. Solicitors, who then acted on behalf of the original vendor of the lands, a Mr. Assmuss. The letter of the 18th April was in response to a request from Michael J. Kennedy & Co. by letter dated the 14th March which enclosed a map setting out the roadway in respect of which the request was made. It is clear that the map in question describes the entire roadway and not just the portion which, as we now know, had been taken in charge. The letter of the 18th April states in simple terms that:-

> "The road is in charge of the Council"

The letter is expressed to be a reply to the letter from Michael J. Kennedy & Co. of the 14th March "together with enclosed map". There can be no doubt, therefore, but that the letter purports to assert that the entire roadway was taken in charge.

3.2 It is next important to note that there is no statutory basis for the certification by local authorities of roadways as being in charge. It is hardly surprising that there is a statutory framework for decisions being made (after appropriate public consultation) about roadways being taken in charge and, indeed, for dealing with circumstances where it is desired to end the public status of a roadway. However, a letter of the type with which I am concerned seems to me to amount simply to a confirmation by the local authority concerned of the status of the roadway rather than the exercise by the local authority of any statutory function as such. A decision to take a road in charge is undoubtedly a decision made by the relevant local authority under its statutory powers. When the local authority in question has decided to take a road in charge, then a written publication of that fact at the request of an interested party is no more than that description suggests. It is a confirmation of a state of fact or a state of affairs rather than a statutory decision or the exercise of a statutory function.

3.3 One further matter of fact needs to be noted before turning to the relevant legal principles. As indicated earlier, I am satisfied on the evidence that letters of the type with which I am concerned in this case are commonly requested by solicitors engaged in conveyancing transactions and form part of the documents which are typically handed over on closing a sale of a property which might be said to have the benefit of a public right of way. As I understand the expert evidence, in particular that of Mr. Michael Carrigan, the experienced conveyancing solicitor, it may well be that, in a case where the roadway in question is well known to be a public roadway, a certificate from the solicitor for the vendor will suffice. A purchaser would not require confirmation from Dublin City Council that Grafton Street was in charge. However, the evidence confirmed that, in less obvious cases, it was standard practice to require from the vendor a letter of the type with which I am concerned. The evidence also suggested that the form of letter that might typically be expected to be sent out by a local authority might vary slightly from county to county but that most counties had their own standard form. However, the substance of the letter, at least so far as its principal feature is concerned, remains the same. The letter confirms, on behalf of the local authority, that the relevant roadway is in charge. Given that the process for taking in charge is a function of local authorities it is hardly surprising that parties seek such letters and that their contents are relied on.

3.4 In addition, it is clear on the evidence that it is not common practice, on the occasion of a subsequent sale, for the purchaser to seek a new letter from the local authority but rather the earlier letter will suffice as continuing evidence of the fact that a road has been taken in charge. Given that it is relatively unusual for a road to go back into private status, this practice does not seem unreasonable.

3.5 It is, of course, true that solicitors do not, generally, and did not on the facts of this case, specify the precise reason why the request to the local authority for such a letter or certificate is being made. There may, of course, be reasons unconnected with a conveyancing transaction which might lead a party to request that a local authority confirms whether a particular roadway has been taken in charge or not. However, I am satisfied on the evidence that there is a widespread and acknowledged practice of solicitors seeking such a written confirmation from local authorities in the context of conveyancing transactions. In those circumstances, it seems to me that a local authority must be taken to be aware that there is, at the very least, a significant likelihood that any request for such confirmation arises in the context of a conveyancing transaction. In addition, it seems to me that local authorities must be taken to be aware that a written response confirming that a particular roadway has been taken in charge is likely to form part of the documents which will be handed over on closing a relevant conveyancing transaction, will be retained with the title deeds on behalf of the purchaser and will again come to be relied on in the event that that purchaser should ultimately seek to sell on the property to a new purchaser.

3.6 Against the background of those facts, it is next necessary to turn to the relevant legal principles.

3.7 That there are limitations on the scope of the potential liability of public authorities for negligence in the exercise of statutory duties cannot be doubted. The most recent, detailed and authoritative analysis of the law in this area is to be found in the judgments in *Glencar Exploration Plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84. In that case, Mayo County Council had imposed, in the context of its development plan under the Planning Acts, a mining ban which was found to be ultra vires its powers under the relevant statute. Kelly J. in this Court had found that Mayo County Council was negligent in imposing the ban but nonetheless did not award damages for that negligence. The Supreme Court upheld that decision on appeal. The Supreme Court found that Mayo County Council did not owe the exploration company in question a duty of care. It seems to me to be clear that the analysis which led the Supreme Court to come to that view stemmed from a finding that the relevant statutory regime was for the benefit of the public rather than specifically for an exploration company such as the plaintiff. In particular the Supreme Court rejected the submission that, simply because it was foreseeable that the plaintiff would suffer loss in the event of an ultra vires inclusion of a mining ban in the development plan in question, the plaintiff was entitled to damages.

3.8 As pointed out by Keane C.J. (at pp. 139-140):-

> "In the present case, we are concerned with negligence alleged against a public authority in the performance of a statutory function. The circumstances in which a duty of care can be said to arise in the case of such authorities when exercising statutory functions has also given rise to an enormous volume of decided cases in the common law world, to many of which we were referred. There are, of course, many instances in which a public authority will be liable in negligence because the duty of care imposed by the law on them is no different from that arising in private law generally. Obvious examples are the duties owed by local and other public authorities arising out of their occupation of premises or their role as employers. In such cases, the plaintiff does not have to call in aid the fact that the defendants may have been exercising a statutory function: their duty of care as occupiers, employers, *etc*., is no greater, but also no less, than that of their counterparts in the private sector."

3.9 However, it seems clear that what was under consideration by the Supreme Court in *Glencar* was, in truth, the appropriate approach to a failure to properly exercise a statutory function. Mayo County Council had a statutory obligation to produce a development plan. It was found to have done so negligently. However, development plans are for the benefit of the public as a whole and not for one person or class of persons. In those circumstances there is no duty of care. It seems to me that that analysis is repeated in many cases where the task of the court is to ascertain whether a particular statutory regime is to be taken to be for the benefit of a specific individual or class of individuals so that a breach of the regime in question may give rise to a claim in damages. Here, of course, for the reasons which I have already pointed out, there was no statutory regime involved in the certification process.

3.10 In *Beatty v. Rent Tribunal* [2006] 2 I.R. 191, the Supreme Court again found that, in the absence of criminal or malicious activity, a tribunal exercising statutory adjudicative duties in the public interest was immune from a claim in damages. However, again, the judgments of the Supreme Court make it clear that that analysis derived from the adjudicative statutory function conferred on the Rent Tribunal in the case in question.

3.11 The judgment of the Supreme Court in *Sunderland v. Louth County Council* [1990] ILRM 658 can be seen in the same light. In that case the Supreme Court held that a planning authority, in the exercise of its powers under planning legislation, owed no duty of care towards the occupiers of buildings erected in its functional area, even where same might be defective due to their siting or the construction design set out in the plans for which approval was given.

3.12 That there are, therefore, very significant restrictions on the extent of liability of public authorities who *bona fide* exercise statutory duties cannot be doubted. However, the real question, it seems to me, stems from whether that jurisprudence has any real application to the sort of situation with which I am involved here. As pointed out the letter confirming that the roadway in question had been taken in charge was not a letter written arising directly out of the exercise by the local authority of any statutory function, let alone an adjudicative function of the type under consideration in *Beatty.* Rather, it was simply a confirmation by the local authority of a state of affairs, albeit one which had arisen out of the previous exercise of a statutory function in the form of the taking in charge of the road whenever that occurred (the precise circumstances in which the first half of the roadway came to be

taken in charge were not explored in the evidence).

3.13 Counsel for South Tipperary Council also referred me to *X (Minors) v. Bedfordshire C. C.* [1995] 3 All E.R. 353 where the House of Lords had to give very detailed consideration to the various categories of possible claims against public authorities for damages. However, it again seems to me that the analysis in those judgments was concerned with, amongst other things, an allegation of the negligent exercise of a statutory power given to the public authority in question. It is at least possible that the Courts of the United Kingdom may have taken a slightly different approach to that of the Courts in Ireland in this area for it is suggested in *X (Minors)* that:

> "[…] if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability."

That same sentiment, with a slight refinement in scope, was later described in the same decision in the following terms:

> "If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) given rise to common law liability. [*sic]*"

That view may not be wholly consistent with the views expressed by the Supreme Court in *Glencar.*

3.14 It seems to me that *Ministry of Housing and Local Government v. Sharp* [1970] 1 All E.R. 1009 is a case which is much closer to the facts of this case. An employee of a local council negligently carried out a search of a register which listed cases where compensation had been paid relating to land for which planning permission had been refused under the relevant planning law of England and Wales. As a result of the negligent search, the Ministry suffered loss. The issue for the Court of Appeal was as to whether that loss was recoverable. There was a statutory basis for maintaining the register in question and the council was paid a fee for the search. However, in all other respects the case seems quite similar to that with which I am faced. A negligently erroneous certificate was issued which gave rise to foreseeable loss. The Court of Appeal concluded that damages were allowable. Salmon L.J. at p. 1026 said the following:-

> "The only negligence we have to consider is the alleged negligence of he council or of their servant who conducted the search and for whose negligence they admit they would be responsible. The servant and certainly the council must, or should have known that unless the search was conducted and the certificate prepared with reasonable care, any chargee or incumbrancer whose registered charge or quasi-charge was carelessly omitted from the certificate would lose it and be likely to suffer damage […] it is true that in *Donoghue v. Stevenson* [[1932] A.C. 562] it was physical injury that was to be foreseen as a result of the failure to take reasonable care whereas in the present case it is financial loss. But his no longer matters, and it is now well established that, quite apart from any contractual or fiduciary relationship, a man may owe a duty of care in what he writes or says just as much as in what he does: see *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*. [[1964] A.C. 465]"

3.15 It should also be noted that Lord Denning indicated that it would be open to provide an immunity by legislation. There is, of course, no such immunity on the facts of this case for the certification in question is not a statutory one.

3.16 It seems to me that Sharp also represents the law in this jurisdiction. In the absence of a statutory immunity, a public authority which issues a negligently inaccurate statement as to a relevant factual state of affairs is liable, within the ordinary rules of proximity and forseeability, to any person suffering loss as a result. Such cases are to be distinguished from those where the public authority is exercising a statutory function where the authority concerned is required to exercise a discretion or an adjudicative role. In such cases the public authority will be immune from a claim in damages save where there is an abuse of office or other serious wrongdoing. Support for the distinction can be found in Spencer Bower, Turner & Handley on Actionable Misrepresentation (4th Ed.) at p. 296 where the learned authors say the following:-

> "The liability of public authorities for negligent misrepresentation has given rise to a number of difficulties. The earlier decisions upholding liability for the negligent provision of information on record to members of the public who requested it are uncontroversial. It was reasonable to seek information from the public authority and to act on it. The provision of this information did not require 'special skill' or the exercise of a statutory discretion but only care and diligence."

3.17 The contrasting decision (to *Sharp*) in *Reeman v. Department of Transport* [1997] 2 Lloyd's Rep. 648 needs some analysis. In that case the relevant United Kingdom department issued a certificate of seaworthiness which turned out to have been negligently made. A purchaser of the vessel concerned claimed for loss. The court held that the certificate in question was designed for the protection of the public generally rather than potential purchasers of vessels, and the claim thus failed. It seems to me that Reeman fits into the line of Irish authorities which exclude liability in respect of a public authority's exercise of a statutory adjudicative function or discretionary power.

3.18 I am, therefore, satisfied that a distinction can be made between what Spencer Bower *et al.* describe as the negligent provision of information on record, on the one hand, and the negligent exercise of a statutory role or adjudicative function, on the other hand. In principle liability can arise in the former case. In the absence of abuse of office or other serious wrongdoing, liability cannot arise in the latter.

3.19 There remains the question, however, of whether the Walshes, as not being the party to whom the statement was made, can bring an action in damages. In that context, South Tipperary Council relies on a passage from the judgment of Lord Bingham C.J. in *Reeman* at p. 685 where it is said that:-

> "The statement (whether in the form of advice, an expression of opinion, a certificate or a factual statement) must be plaintiff specific: that is, it must be given to the actual plaintiff or to a member of a group, identifiable at the time the statement was made, to which the actual plaintiff belongs."

3.20 Taken at face value, that test would exclude the Walshes. However, there is a gloss placed on the principle by the Australian courts in *Perre v. Apand PQI Limited* [1999] 198 C.L.R. 180, where, at para. 32, Gaudron J. said the following:-

> "[…] it is not necessarily fatal to the recognition of a duty of care that the duty is owed to a class whose members cannot be identified with complete accuracy."

3.21 In addition, in the same case, at para. 107, McHugh J. said:-

> "However, it is not the size or number of claims that is decisive in determining whether potential liability is so indeterminate that no duty of care is owed. Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable 'in an indeterminate amount for an indeterminate time to an indeterminate class'."

3.22 It seems to me that the refinement of the principle identified in *Perre* is persuasive and represents the law in this jurisdiction. It, therefore, seems to me that the proper principle is that the class of persons to whom a negligent misstatement can be said to have been published must be capable of being defined with some accuracy at the time the statement was made even though there may be subsequent events, foreseeable at the time the statement was made, which will lead to a person coming within the class. On the evidence I am satisfied that it was foreseeable, at the time the statement was made, that it would be used by the then vendor, Mr. Assmuss, to satisfy his purchaser, Mr. Purcell, and that, in turn, the statement would be relied on by others who, in the future, might purchase the property with the benefit of the letter or certificate. While the fact that the Walshes might become members of that class was not ascertained at the time when the negligent misstatement was made, the class itself was capable of easy and rigorous definition. In the circumstances I am satisfied that South Tipperary Council owed a duty of care to persons within that class (being persons who might purchase the property in question with the benefit of their letter) and that the Walshes fall into that class. It follows that South Tipperary Council owed the Walshes a duty of care and are guilty of negligent misstatement in breach of that duty.

3.23 It is next necessary to turn to the question of whether the Walshes ought to have known that the road was not taken in charge for its full length prior to the time when they proposed to sell on the property. If it were established that the Walshes ought to have so known, then there would be a real question as to whether any losses deriving from the problems encountered in the sale could truly be said to be linked in a causative way with the negligent misstatement of South Tipperary Council. I, therefore, turn to that question.

4. Should the Walshes have Known?

4.1 As pointed out earlier, a number of facts are relied on for the purposes of suggesting that the Walshes should have known that the road was not taken in charge. First, it would appear that, at the time when the Walshes purchased the land, the roadway was not in the best of condition but it seems that the part of it down as far as the other Mr. Walsh's farm buildings was metalled, whereas the remainder was not. Evidence was tendered, which I accept, on behalf of South Tipperary Council, that it is the universal practice of all local authorities to metal all roads which are taken in charge. On that basis it is said that, save for an occasional brief period between when a road is taken in charge (assuming it not already metalled) and the necessary works being done, the fact that a road is not metalled can be taken as a clear indication that it is not in charge.

4.2 On that basis, the roads engineer in question indicated that it should have been obvious that the road was only taken in charge for the first part. It may well have been obvious to a road engineer or someone else experienced in roads matters. I am not, however, satisfied that it is obvious to an ordinary intelligent member of the public. I have to confess that it was a fact of which I myself was unaware prior to hearing the evidence in this case.

4.3 Second, attention is drawn to the fact that, applying a local scheme which allowed for a contribution from local landowners and some public funds, a significant resurfacing of the roadway down as far as the other Mr. Walsh's farm buildings did occur while the Walshes were in occupation. No such resurfacing for the second half of the road took place at that time. There is no doubt that Mr. Walsh in particular was aware of this fact. However, it does not seem to me, on all the evidence, that that fact of itself would necessarily draw the attention of a party to the fact that a clear certification given by the relevant local authority was inaccurate. Likewise, it is clear that the other Mr. Walsh did intimate to the first named plaintiff that there was only a private right of way over the second part of the road. However, I accept the first named plaintiff's evidence that he took comfort from the fact that he had a clear certification from the relevant local authority, that he checked with his solicitor, obtained a copy of the certification and dropped it into the neighbouring Mr. Walsh's house in circumstances where the matter was not then raised again.

4.4 Finally, it is worth noting that when the issue did raise its head in the course of the sale by the Walshes, which is at the heart of these proceedings, the matter was again checked with South Tipperary Council and was again confirmed. It seems clear, therefore, that even if Mr. Walsh had gone back to South Tipperary Council to check matters arising out of any doubts that had been placed in his mind by any of the matters relied on, the situation would have been confirmed to him so that nothing, on the facts, seems to me to turn on the issues raised.

4.5 I am not, therefore, satisfied that there is anything in the facts which ought to have led the Walshes to doubt the validity of the certificate which they had had handed over to them on closing up to the time when they entered into a contract to sell the property. It seems to me to follow that the Walshes are entitled to whatever damages for misrepresentation as can be said to be causally linked to that negligent misrepresentation and which are foreseeable. I, therefore, turn to the question of damages.

5. Damages

5.1 As pointed out earlier, four items of damage are claimed. There is no dispute as to the calculation of the amounts claimed under each heading. It is accepted that the purchase price was, in fact, reduced by €200,000.00. It was accepted that, when the sale closed, the site on the far side of the road referred to earlier was included (rather than being excluded as per the contract) so that the Walshes lost that site which had an agreed value of €50,000.00. It is accepted that the delay in the closing of the sale led to an additional interest charge in the sum of €45,743.34. Finally, it is accepted that it was reasonable for the Walshes' solicitor to charge an additional sum of €6,000.00 plus VAT for the extra work which had to be done arising out of the problems that emerged. The Walshes claim the total of those four amounts which come to just over €300,000.00.

5.2 A number of issues arise as to whether those sums can properly be claimed (or be claimed in those amounts). The first question concerns foreseeability.

5.3 In that context, it seems to me to be important to emphasise that foreseeability is concerned with the question of whether damage of a particular type or character could reasonably have been foreseen at the time of the wrongdoing. It is first important to note that the wrongdoing occurred at the time when the letter confirming that the roadway was in charge was issued for it is the misrepresentation published to Mr. Assmuss's solicitor at that time that is actionable. While it is true that the real mistake occurred earlier (when the hard copy map formerly kept was transferred onto the new digital version), that mistake, of itself, did not constitute any actionable wrongdoing, for it was only when that mistake was incorporated into a representation made on behalf of South Tipperary Council that any actionable wrongdoing could be said to have occurred. Foreseeability must, therefore, be seen in the

context of the foreseeable consequences of issuing an erroneous letter describing a public right of way.

5.4 Second, and perhaps of more importance on the facts of this case, it is important to look at whether damage of the particular type or character claimed can be said to have been foreseeable as result of that misrepresentation. It does not seem to me that the fact that the quantum of damage might, from the perspective of the time of the wrongdoing, be surprising, is the real question.

5.5 A driver who knocks down a young man causing a relatively straightforward broken leg (likely to be fully cured within six months) might be very surprised indeed to find a claim in damages which included an allegation of lost earnings running to many millions of euro. However, if it transpired that the plaintiff was a young South American football star having a brief holiday in Ireland before going to sign an arranged contract with a major premiership football club, then a loss of wages for a football season running into numbers of millions would be likely to be sustained. The fact that the quantum might be surprising is not the issue. It is foreseeable that causing an injury to a party may lead them to be unable to work and that there will be a loss in the shape of a loss of wages. Once a loss of wages is foreseeable the fact that, in the peculiar and unusual circumstances of the case, the amount might be surprisingly large does not render those damages unforeseeable.

5.6 Likewise, in the oft quoted case of the injured party with the so-called "eggshell skull" it can, on occasion, turn out that, due to some weakness or predisposition, a particular injured party suffers much more severe consequences from a relatively innocuous incident than might be expected. However, it again remains the case that, if personal injury is a foreseeable consequence of whatever wrongdoing is concerned (say the negligent driving of a motor vehicle), then the fact that those injuries may, in the peculiar circumstances of the case, be much more severe than might have been expected, does not deprive the injured party from an entitlement to recover whatever may be appropriate for those injuries. In McMahon, B. & Binchy, W., *Law of Torts* (3rd Ed.), at para. 3.32, the authors describe the rule in the following terms:-

> "The 'egg-shell skull' rule has survived the reasonable foreseeability rule introduced by Wagon Mound (No 1) [[1961] 2 WLR 126]. According to this rule if the defendant could foresee a particular type of physical or psychological injury to the plaintiff then he or she will be liable for all the physical or psychological injury that follows on account of the plaintiff's particularly vulnerable pre-accident condition, even if it turns out that the injuries to the plaintiff were far more than might reasonably have been expected in normal circumstances. […]"

Wagon Mound (No 1) therefore provides authority for the proposition that a type of injury which was not foreseeable by a defendant at the time of an accident cannot be the subject of any order for compensation whereas, in contradistinction, the egg-shell skull rule provides that a plaintiff will be liable for the consequences of a foreseeable injury regardless of the severity of that injury.

5.7 Following on from that restatement, in *Doran v. Delaney (No. 2)* [1999] 1 I.R. 303 Geoghegan J., when faced with a claim in negligence and misrepresentation by disappointed purchasers against their solicitor, having considered the relevant authorities on remoteness and damage, concluded, at 315, that:

> "It can be seen from these passages, therefore, that loss is not too remote if it could have been reasonably within the contemplation of the parties at the time of entering into the contract (in the case of breach of contract) or at the time of making the misrepresentation or committing the breach of duty (in the case of tort)."

5.8 It seems to me that it is entirely foreseeable that a mis-description of a public right of way in a letter, such as that which was written in this case, could lead to the vendor of a property which might be thought to have the benefit of the public right of way described running into difficulties in relation to a subsequent sale of the property. It is foreseeable that a purchaser will, at a minimum, want to ensure that there is at least a private right of way demonstrated as being in place. It follows that there is likely to be delay, at a minimum, while that matter is being sorted out. In addition, it seems to me that it is foreseeable that, in times of market depression, a purchaser, who finds the market turning against him, and finds, thus, that the price agreed to be paid now looks generous, might seek to use a demonstrated problem about a public right of way which was contracted to be present, as a means of seeking to extricate himself from a contract which no longer looks attractive. It will be necessary under the heading of failure to mitigate to look further at the extent of the concessions made by the Walshes in order to secure that the sale closed. However, at the level of principle, it seems to me that it is foreseeable that, in addition to delay, a vendor may have to make concessions to a purchaser in order to secure a closing where the vendor can no longer give the agreed title in the shape of a public right of way.

5.9 It is obvious that someone who holds a property with the benefit of what seems to be a public right of way (by virtue of an appropriate letter from the relevant local authority) is likely to sell the property with a description which includes the benefit of that public right of way. It follows that it is foreseeable that such a party is likely to find themselves in a situation where they have contracted to sell something which they cannot deliver. That situation is likely to lead to demands for concessions from the purchaser and an inevitable delay. The fact that the quantum of the concessions made (if they be justified – a point to which I will shortly turn) were, in the peculiar circumstances of the case, larger than might have been expected, does not alter the fact that damage which has the character of losses attributable to having to make some concessions to deal with a purchaser (who had the whip hand by having the benefit of a contract on which the vendor cannot deliver), are foreseeable and are, at least the level of principle, allowable.

5.10 I am not, therefore, satisfied that there is any lack of foreseeability in respect of the heads of damages put forward on behalf of the Walshes. Concessions required to ensure that the property is sold and additional legal work and delay associated with sorting out the problem are entirely foreseeable.

5.11 There is, however, a significant issue between the parties as to whether the Walshes failed to mitigate their damage together with a connected question as to whether all of the damage is, in truth, causally linked to the misrepresentation by South Tipperary Council. In order to understand the points which arise under this heading it is necessary to look briefly at the facts as to what transpired in the course of the transaction between the Walshes and their purchaser.

5.12 As mentioned earlier, the problem was first noticed by an engineer employed by the purchaser who was convinced that, having regard to its condition, the second part of the roadway in question could not be in charge. Despite the further written assurance from South Tipperary Council to the effect that it was in charge, the engineer in question pursued the matter with a senior roads engineer as a result of which the matter was clarified. From then on it was clear that the second part of the roadway was not in charge.

5.13 An initial proposal was made to the Council to then take in charge the remainder of the roadway. The appropriate statutory process was initiated but ran into difficulty when an objection was made by the neighbouring Mr. Walsh. The basis of that objection was that turning the upper part of the roadway into a public right of way would have adverse consequences for his land use, given that he had farmland on both sides of the road which was used in a way that required the roadway, on occasion, to be blocked off.

That proposal was dropped.

5.14 In the meantime, discussions continued between the solicitors acting on behalf of the Walshes and the solicitors acting for the purchaser. Those discussions ultimately led to the sale closing on the terms I have already described. However, two aspects of those negotiations, in particular, are relied on by South Tipperary Council to suggest that either the Walshes failed to mitigate their damage or that there is not a true causal link between at least some of the damage and the misrepresentation which represents the cause of action. The first point relied on is the fact that, at an early stage, there was what appears to be an open letter from the purchaser's solicitor which offered that a sum of €20,000.00 be retained on joint deposit with a further agreement that, in the event that the public right of way issue was sorted out the money would be released to the Walshes but in the event that it could not be sorted out, the money would be retained by the purchaser. In circumstances to which it will be necessary to turn, that offer was not accepted.

5.15 Second, reliance is placed on the terms of the standard form Law Society contract used in this case. The relevant clause is as follows:-

> "Differences – errors
>
> 33(a) In this Condition 'error' includes any omission, non-disclosure, discrepancy, difference, inaccuracy, mis-statement or mis-representation made in the Memorandum, the Particulars or the Conditions or the Non-Title Information Sheet or in the course of any representation, response or negotiations leading to the Sale, and whether in respect of measurements, quantities, descriptions or otherwise
>
> (b) The Purchaser shall be entitled to be compensated by the Vendor for any loss suffered by the Purchaser in his bargain relative to the Sale as a result of an error made by or on behalf of the Vendor provided however that no compensation shall be payable for loss of trifling materiality unless attributable to recklessness or fraud on the part of the Vendor nor in respect of any matter of which the Purchaser shall be deemed to have had notice under Condition 16(a) nor in relation to any error in a location or similar plan furnished for identification only
>
> (c) Nothing in the Memorandum, the Particulars or the Conditions shall:
>
> (i) entitle the Vendor to require the Purchaser to accept property which differs substantially from the property agreed to be sold whether in quantity, quality, tenure or otherwise, if the Purchaser would be prejudiced materially by reason of any such difference
>
> or
>
> (ii) affect the right of the Purchaser to rescind or repudiate the Sale where compensation for a claim attributable to a material error made by or on behalf of the Vendor cannot be reasonably assessed
>
> (d) Save as aforesaid, no error shall annul the Sale or entitle the Vendor or the Purchaser (as the case may be) to be discharged therefrom."

As is clear from that clause the situation in respect of a mis-description is that, if it be sufficiently serious in accordance with the terms of the clause, the purchaser can walk away. If it is not sufficiently serious, then the sale must close but the purchaser may be entitled to a reduction in the purchase price to reflect the mis-description. Both the issue of principle as to whether the purchaser can walk away and the question of the calculation of any reduction in the purchase price are the subject of arbitration in accordance with the terms of the contract. It is clear on the evidence that neither the Walshes nor their solicitor considered seeking to invoke that clause.

5.16 It also needs to be noted that the background to these events was that the Walshes were under significant pressure from AIB to sell the lands in question. I am also satisfied on the evidence that the market for agricultural lands had begun to turn at the time in question and that there was, undoubtedly, a likelihood that, if the sale in question fell through, there might be difficulty in securing a new purchaser or, at the very minimum, a new purchaser at the existing price. Indeed Mr. Quirke, the experienced auctioneer, who gave evidence on behalf of South Tipperary Council, did describe the price as being a strong one in any event. The Walshes were, therefore, faced with the situation where they had secured a good price but where, particularly against a falling market, the outlook would not be positive if the property had to go back on sale.

5.17 I propose dealing with the question of using the provisions of the contract of sale first. It seems to me that there was a failure to mitigate by reason of the failure to at least bring the relevant provisions of the contract of sale into play. I accept that, in the circumstances of this case, the Walshes were entitled to be cautious about the risk of losing the sale altogether. Leaving aside the pressure which they were under from AIB, the Walshes were, in any event, operating in a falling market so that having to put the property back on sale would have been likely to have led to a significant reduction in the purchase price that could have been obtained, particularly in light of the fact that the price was, for the reasons which I have already set out, a strong one. It was, therefore, in my view, reasonable for the Walshes to avoid taking any unnecessary risks with losing the sale altogether.

5.18 However, it is difficult to avoid the conclusion that, had an arbitration under the terms of the standard Law Society contract been invoked, the Walshes would at least have placed themselves in a better position or given themselves a significant bargaining chip. The purchaser would then have faced the risk that he might have been held bound to the contract with, potentially, a relatively small reduction in price to reflect the difference between a public right of way and a private right of way. The only evidence on that difference was evidence given by Mr. Quirke which placed it at €14,000 to €16,000.

5.19 There can, of course, be differences between the benefit which a property may derive from a public right of way over that available under a private right of way. The extent of a private right of way will be dependent on the means by which the right of way is created. If by deed, then it will be necessary to consider the purposes for which the right of way is expressly conferred and any other factors set out in the terms of the right of way as defined. Also a private right of way will only be for the benefit of the so called dominant tenement, that is the property in whose favour the right of way was created. The existence of a private right of way can, in those circumstances, lead to difficulties concerning the level or type of use and the extent to which the right of way can be used to access other lands beyond the dominant tenement. Such problems do not arise in respect of a public right of way. Where a private right of way has arisen by prescription rather than by express grant, even greater difficulties may arise in being able to determine with any great precision the extent of the rights held. It follows that there can be a real difference between the benefit of a public right of way as opposed to a private right of way.

5.20 On the facts of this case, it does need to be acknowledged that there were two entrances into the property acquired by the Walshes. The first was a direct entrance onto an undoubted public roadway. The second is the entrance at the end of the roadway

which is the cause of controversy. The roadway in question was not, therefore, the only means of access. However, it was the access which led directly to such buildings as there were on the site (even if they were at the relevant time somewhat dilapidated). In addition, the evidence suggested that in winter time access to portions of the site would have been a lot easier from the controversial roadway as opposed to the access directly out onto the main local public road. On the other hand it does have to be acknowledged that Mr. Walsh accepted that, during his period of ownership, the extent of the right of way never caused any difficulties for him in gaining access up the roadway notwithstanding the private nature of the right of way for the second half of same. In those circumstances, at least so far as Mr. Walsh was concerned, the difference between the public and private nature of the right of way over the roadway did not seem to have had any significant effect. Whether that difference would necessarily apply in the case of any other land user would of course depend on the circumstances of the case. It is in those circumstances that the valuation referred to, from Mr. Burke, was given. Those factors would also have been relevant to the question of whether the purchaser might have been able to persuade an arbitrator that he was entitled to walk away from the sale by reason of the materiality of the mis-description contained in the contract which referred to the roadway as being a public right of way.

5.21 If an arbitration had been invoked, then the purchaser would also have been at risk. While it would have been reasonable, in all the circumstances, for the Walshes to buy off the risk of losing the arbitration altogether (that is the risk that there might be a finding that the purchaser could walk away) the existence of an arbitration, or even the threat of it, would have placed the Walshes in a position to bargain. The fact that such a course of action was not even mentioned (or even, it would appear, considered) seems to me to be a failure to mitigate.

5.22 However, I am satisfied that, even had an arbitration been initiated or threatened, a number of consequences would have flowed. First, the Walshes would have been reasonably entitled to compromise such an arbitration on generous terms (so far as the purchaser was concerned) so as to remove any risk of losing the sale altogether. Second, the delay which in fact occurred would have been likely to have arisen in any event while the arbitration was progressing and thus, the additional interest charge claimed would have occurred in any event. Finally, the additional legal costs might well have been even larger for it might well have been necessary to pay the costs of the arbitration. In my view, it would have been reasonable for the Walshes to accept a settlement of a reduction of up to €80,000 in the purchase price in such an arbitration, reflecting the undoubted fact that some reduction would be awarded by the arbitrator and the need to buy off the risk of the purchaser being found to be entitled to walk away. In such a scenario the Walshes would also have lost something of the order of €45,000 for interest and might well have incurred legal and other costs associated with the arbitration which, when added to the costs which were in fact incurred, might come to a total (inclusive of VAT) of €25,000. I am thus satisfied that, if the Walshes had invoked the arbitration clause, a reasonable outcome could have been expected to have reduced their losses to the total of the above sums or an amount of €150,000.

5.23 It is also necessary to say something about the principle of allowing the claim in interest in this case. The evidence disclosed that the Walshses had, in all probability, over extended themselves and had purchased a number of properties leading to the build up of significant debt. They were, undoubtedly, under pressure from AIB. It was not absolutely clear as to which loans were intended to be repaid by the sale price whose receipt was delayed. However, it does not seem to me that that issue really matters. It is undoubtedly foreseeable that a party who suffers a delay in closing a sale attributable to wrongdoing may well incur additional interest charges. The interest claimed is simply the interest that would have been saved had the purchase price become available, as expected, in early October rather than, as happened, the following January. In that context it does not really matter as to what loan would have been paid off. Had the sale closed on time the Walshes would have had the use of the money over two and a half months earlier, and it is clear that it was foreseeable that a delay of that length of time was both a possible consequence of problems emerging concerning the status of the right of way and further that, in turn, interest costs would have been incurred as a result of such a delay. I am, therefore, satisfied that interest cost is an appropriate head of damages in all the circumstances.

5.24 I am not convinced that the failure to accept the offer of placing €20,000 on joint deposit amounts to a failure to mitigate. The situation was very fluid at the time in question and was complicated by the fact that South Tipperary Council seemed initially to confirm the public nature of the roadway in question. The Walshes' solicitor gave evidence that, at the time the offer was not accepted, he took comfort from the confirmation by South Tipperary Council of the status of the roadway. It is also appropriate, at this stage, to comment on the argument put forward to the effect that it would have been very difficult for the purchaser to secure any greater reduction at an arbitration than the sum of €20,000 which was openly offered at that stage. However, it seems from the contemporaneous correspondence that amongst the arguments put forward on behalf of the purchaser was that the delay had led him to miss a planting season. It is the case, it would appear, that the intention of the purchaser was to use the lands for the planting of pampas grass. Just how strong a case he might have had for the loss of a season's planting is impossible to estimate. However, it cannot be ruled out that the purchaser might have persuaded an arbitrator that he had, in fact, lost a significant opportunity in respect of a season's planting and that the consequences of the mis-description had grown by virtue of that fact so that the €20,000 offer made at an early stage was no longer a reasonable measure. In any event, the offer in question was not on the table for any significant period of time and was soon followed by negotiations during which it proved difficult to pin the purchaser's solicitor down to any specific terms. On the facts I do not consider that the Walshes can be found guilty of a failure to mitigate under that heading.

5.25 In addition, I have assessed the amount that might reasonably have been expected to have been lost in the event that the arbitration process had been invoked by reference to a reasonable outcome in the light of a falling market. I have not taken into account any pressure from AIB for the precise attitude that AIB might have taken was not established in the evidence. It seems to me that the losses which I have identified are, therefore, causally connected to the negligent misrepresentation of South Tipperary Council.

6. Conclusions

6.1 It follows that the sum of €150,000 can be said to be that portion of the losses actually suffered by the Walshes which are not covered by the failure to mitigate which I have identified and that the Walshes are entitled to recover that sum. For the reasons already analysed I am satisfied that, notwithstanding the fact that it might have been surprising at the time when the negligent misstatement occurred, to have anticipated that losses of that scale might have arisen, nonetheless the character or nature of those losses (being concerned with concessions made to secure closure in a falling market and losses attributable to delay) were foreseeable.

6.2 It also follows that the Walshes have been out that money since January, 2009. In the circumstances it seems to me that the Walshes are entitled to Courts Act interest from the 1st February, 2009, to date.