COURT OF APPEAL

Civil

[Record No. 2014/1394]

[Article 64 Appeal]

MacMenamin J.
Finlay Geoghegan J.
Irvine J.

BETWEEN:

ROSBEG PARTNERS LIMITED

RESPONDENTS

AND

L. K. SHIELDS (A FIRM)

APPELLANTS

Judgment of Mr. Justice John MacMenamin dated the 1st day of June, 2016

Introduction

1. This is an appeal against a judgment of the High Court (Peart J.) wherein he held the defendants/appellants liable for professional negligence. In February, 1994 the plaintiffs (hereinafter "Rosbeg"), who are the respondents to this appeal, bought Unit 520, Western Industrial Estate, Naas Road. They retained the appellants to act for them in the sale. The purchase was completed on the 6th May, 1994. The property comprised five lots, made up of five separate titles. The relevant lot was described as "Lot 3". This comprised both lands which were registered title, (part of Folio 23011F, County Dublin), as well as unregistered title.

2. Had matters proceeded in the normal way, the transfer and conveyance in respect of the entire of Lot 3 would have been part of the documents lodged in the Land Registry. This would have recorded the change of ownership. A new folio would then have been opened in respect of that part of Folio 23011F, which Rosbeg had acquired. This would have left the balance of Folio 23011F in the ownership of the vendor. Each folio would then have shown, by reference to a marked map, what was comprised in that folio, and what remained in Folio 23011F. Unfortunately, this did not occur. A deed of transfer was executed by the vendor regarding the five lots. The deed was stamped on the 8th June, 1994. The correct course of action would have been that the appellants would have lodged both the deed and the other necessary documents, in the Land Registry, in or about 1994 or 1995.

3. The Land Registry raised questions regarding boundaries. Part of the property had not been registered by the time the sale was completed. The appellants undertook the task of registering the transaction with the Land Registry. Despite significant efforts made by a number of solicitors employed by the appellants, the vendor's solicitor did not sort out the mapping problems. As a consequence, and as a result of human error, the difficulty was never addressed, and this omission only came to light in September, 2007, in circumstances which will now be described. There is no issue that there was negligence.

4. In 2007 Rosbeg Partners owed considerable sums of money to its bank, AIB. Their property was next to property owned by Mr. Pino Harris on the westside of Dublin. On the 15th September, 2007, Mr. Harris offered €10 million for Rosbeg's property. This offer was put in writing on the 21st September, 2007. The offer was open until the 28th September, 2007. The offer was subject to confirmation of a total site area of 2.56 acres.

5. One of the key issues in this appeal is whether Rosbeg actually decided to sell for €10 million. The appellants say no such clear decision was ever made, and that Rosbeg were looking for €12.5 million. The trial judge found that on the 24th September, 2007, Rosbeg's financial controller, a Mr. Paul McConvey, wrote to A.I.B., looking for the title deeds of the subject property.

6. Peart J. was "*completely satisfied*" that Rosbeg had decided on the 24th September, 2007 to accept the €10 million offer. The judge observed that it would have been necessary for Rosbeg to satisfy Mr. Harris regarding the precise acreage. Nonetheless, he held that it was "*an overwhelming probability*" that, had it not been for title problems, the sale would have been completed rapidly. These title issues were, first, that the subject property had not been properly registered by the time of the offer, because Rosbeg's ownership of part of Folio 23011F was not apparent from inspection of the records, and, second, that the potential purchasers had become aware of these facts. The judge assessed Mr. Harris, who gave evidence, as a person who liked to do business speedily, and concluded, having heard that evidence, that he would have withdrawn his offer, and "*taken a step backwards*", if the deal could not be done rapidly.

7. As matters transpired, Rosbeg did not communicate acceptance of the offer, even after an extension of the deadline to the 5th October, 2007. The judge held that the acts of negligence caused significant losses to Rosbeg. The issues of factual causation and mitigation of damage are key factors in this appeal. So, too, is the role of a trial judge in making findings of fact and drawing inferences therefrom.

8. At the trial, there was expert evidence from conveyancing solicitors on both sides. The judge noted that there was consensus that a deal could have been completed, whereby the terms of a contract could have been agreed, which would have contained special conditions regarding the purchaser being satisfied as to the acreage. However, matters did not turn out this way. Instead, Rosbeg took it on themselves to sort out the problem regarding the registration of title.

9. The trial judge held the negligence had caused substantial losses, and that there had been no failure to mitigate damage. He held that Rosbeg were not to be criticised for not having explored with Mr. Harris the possibility that he might enter into a conditional contract. He doubted "*very much*" that the potential purchaser would have agreed to such a course of action.

10. Both in this appeal, and at trial, counsel for the appellant contended that Rosbeg had never made a final decision to accept the €10 million, and that there was evidence that Rosbeg's directors were undecided as to whether or not they would accept the €10 million, or whether they were looking for €10.3 million, or whether, in fact, they were looking for €12.5 million.

11. Peart J. rejected the proposition that Rosbeg were holding out for more money. He held that, if the firm had truly been looking for a greater sum than €10 million, their financial controller, Mr. Paul McConvey, would not have contacted Mr. John Reynolds, Rosbeg's relationship manager in AIB, and told him that the property had been sold for €10 million. Among the witnesses for Rosbeg were Mr. Robert Stewart, the owner of the company, Mr. McConvey, and Mr. Ben Pearson, a valuer who acted on their behalf. The judge held that, if he were to accept the appellants' contention that Rosbeg were looking for more money, he would have to "*reject the evidence of evidence of Mr Stewart, Mr McConvey and Mr Pearson.*" On this, he explicitly stated "*I do not reject that evidence*." Elsewhere, he remarked that he did not doubt the "*veracity*" of the respondent's witnesses.

12. This appeal is highly fact-specific. It does not raise new issues of law, but rather the application of well established principles. One of the main questions is, whether the judge was entitled to reach the conclusions he did on the evidence. He held that the fact that the contract had not been concluded was not the decisive factor in causing the loss, but rather that Rosbeg had decided to accept the offer, but was prevented from doing so. The judge held:

> *"44. I am satisfied to decide this case not by whether or not a contract had been finally concluded following an offer and a full and unconditional acceptance, but on the basis that the plaintiff (Rosbeg) had made a firm decision to accept the offer, and that because the defendant firm had failed to properly register the plaintiff's title to the property, which it had bought in 1994, it lost the opportunity to follow through on that decision and sell the property to Mr Harris after it had made that decision."*

He concluded, therefore, that the omission to register the title of the subject land was a breach of duty, which caused the loss of the sale.

The Terms of the Offer

13. In order to place later events in context, it is necessary now to set out the precise terms in which the offer was made. The offer contained cash terms, and a leaseback arrangement. In an email dated the 21st September, 2007. John Burns, described by the judge as Mr. Harris's "*right-hand man*", wrote to Ben Pearson, the respondent's valuer, in these terms:

> *"I wish to confirm Mr Harris' offer to purchase the above property for €10m (Ten million euro), subject to contract and subject to confirmation of a total site area of 2.56 acres. We would envisage completing and closing the contract quickly, subject to satisfactory completion of the legal work. In the event of the Vendor wishing to remain in occupation Mr Harris is willing to enter into a short term letting agreement to rent the premises back to the vendor (term to be discussed and agreed) at a quarterly rent equal to the 3 month deposit rate available from Anglo Irish bank (sic) on the €10m offer price for the property (currently 4.8%) plus rates and service charges (if applicable).*
>
> *This offer remains open for five working days and lapses if not accepted by 5pm. Friday 28 September 2007.*
>
> *If you need any clarification please let me know."*

14. The judge concluded that Rosbeg's owner, Mr. Robert Stewart, decided to consider the matter over the weekend. Mr. Stewart arranged to meet his valuer, Mr. Pearson, on the following Monday, the 24th September, 2007. Also present were Mr. Paul McConvey, Rosbeg's financial controller, who was a fellow director. The judge found, on the respondents' evidence, that Rosbeg decided the offer should be accepted, even though, in advance of the meeting, Mr. Pearson had drafted a letter which suggested that he felt that they might go back to Mr. Harris to seek a little bit more. The judge held "However, Mr Stewart's evidence, which I accept, is that his decision at that meeting was that the offer should be accepted." Mr. Pearson was then given the task of communicating the decision to Mr. William Harvey (Mr. Harris's valuer), as well as finding out the identity of the solicitor who was acting for Mr Harris. Mr. McConvey was tasked with getting a map of the property from the appellant firm, who, it will be remembered, had acted in the purchase of the property back in 1994. This was in order to satisfy Mr. Harris as to the acreage, and to move matters forward in relation to getting the contracts out.

15. The judge found the following primary facts, as to what happened after the 24th September:

> *"34. Immediately after the meeting on the 24th September, Mr McConvey got in touch with AIB Bankcentre to find out where the title deeds were so that he could get a copy of the map. He spoke to the plaintiff's relationship manager at AIB, John Reynolds, with whom he had previously had contact in relation to the loan facility. He remembers telling Mr Reynolds that the company had accepted the offer of €10,000,000 for the property. He was glad to be able to do that because the bank had been given an assurance that as part of its loan arrangements with AIB it would be reducing its overall indebtedness by €8 million through the sale of this property by the end of January 2007."*

16. The judge held:

> *"I accept Mr McConvey's evidence as to his recollection of saying this to Mr Reynolds. It makes complete sense, and it corroborates Mr Pearson's evidence and that of Mr Stewart that at the meeting on the 24th September 2007 a decision was taken to accept the offer for the premises, and that what remained to be done was satisfy the purchaser as to the acreage, and to finalise the details about the lease-back so that a contract could be prepared and executed by the parties."*

17. Mr. Reynolds, the AIB relationship manager, corroborated this testimony. He, too, was definite that the price was to be €10 million, even though an internal bank memo suggested that the figure might be slightly greater. The judge also accepted that this €10 million figure was conveyed by Mr. Pearson to Mr. Harris's valuer, Mr. Harvey, during a telephone call. He found as a fact that the same figure had been mentioned to Mr. Tony Hanahoe, of Hanahoe & Hanahoe, Solicitors, when Rosbeg approached him to act in the sale. On all this, the judge said:

> *"All of these pieces of evidence serve to corroborate the fact that the plaintiff had decided to accept this offer, and was taking steps to be in a position to proceed with the transaction."*

18. Rosbeg's case was that by the final deadline, 5th October, 2007, it had done all that was within its procurement to do; that its acceptance of €10 million had been communicated to Mr. Harvey, and that, even if there was no offer and acceptance, the decision

to accept the offer had been made. But for the title problem, the deal would have been done. The judge held that, by reason of the failure to be able to satisfy Pino Harris as to the title, the offer lapsed.

19. In a letter of the 30th October, 2007, Mr. Pearson wrote to Mr. Stewart, recording a conversation that he had had with Mr. Harvey. He wrote:

> *"Bill Harvey has advised me today verbally that his client sees no point in trying to progress the proposed transaction with you, as previously outlined in his letter of offer,* ***as in their opinion we are not in a position to offer good and marketable title to the property ...*** *Mr. Harvey has now suggested we should revert to him once we are in a position to offer 'good and marketable title', and then he will endeavour to seek further instructions from his client regarding this proposed transaction."* (emphasis added)

20. Mr. Pearson went on:

> *"As you are aware, I am extremely concerned that the current market conditions will adversely affect us achieving a sale to Mr. Harris on those terms under which we are seeking to achieve, and very much puts us on the "back foot" in dealing with him in this matter."*

21. This letter was capable of supporting a finding of factual causation, in that, it establishes that the Harris Group believed, correctly, that Rosbeg was not in a position to offer good and marketable title, and it was for that reason that the Harris Group saw no point in trying to progress the proposed transaction. In fact, further correspondence from Mr. Pearson to Mr. Harvey, in the months following October, 2007, all dealt with the outstanding title matter, and that Rosbeg was in a position to negotiate further. Mr. Harris, himself, testified that he would not have gone ahead with the transaction where there were outstanding issues with title. He expressed himself in forceful terms "*deal off*".

22. On the issue of factual causation, it is helpful here to refer to the judgment of Finlay Geoghegan J. in the High Court in *ACC v. Fairlee* [2009] IEHC 45, at page 9. In *Fairlee*, the bank sued the defendant for judgment. The defendants' counterclaimed for negligence, on the basis that the bank had delayed for almost 2 years in providing them with title deeds to various properties. As a result, the defendants claimed they had missed out on the opportunity to sell properties between 2005 and 2007, in better market conditions.

23. On the basis of the evidence before her in the High Court, Finlay Geoghegan J. concluded that the second named defendant, Mr. Gerry Beades, had established, on the balance of probabilities, that the plaintiff's failure to produce the title deeds had delayed him in obtaining the finance necessary to complete the development. As a result, Mr. Beades had been delayed in bringing the apartments to market by almost 2 years. He was entitled, therefore, to recover damages representing the loss of profit arising from the decline in apartment prices during the period of the delay. He was entitled also to be compensated for the fact that the bank had forced him to sell three properties for below market value in order to make repayments. He was also entitled to further compensation by way of damages, by virtue of the fact that he was unable to use the title deeds to raise finance, and was forced to borrow at above market rate. He was also entitled to compensation for having to pay higher commercial rates than would otherwise be payable.

24. An enforceable agreement to sell is not always a necessary proof for a loss of transaction claim. In such cases, it was a matter for the trial judge to decide, on the balance of probabilities, whether a sale would have proceeded, but for the negligence. The presence, or absence, of an agreement to sell may, or may not, dependent upon the facts, be relevant to the judge's assessment of this question. It is noteworthy that, in *Fairlee*, Mr. Beades did not have any enforceable agreement to sell in place in January, 2007, nor yet had he even begun to negotiate a sale, in circumstances where the apartments had not been built.

25. As regards the question of legal causation, remoteness and scope of duty, the law is well established in *Glencar Explorations v. Mayo County Council* [2002] 1 I.R. 84, at page 139. As O'Donnell J., speaking for a unanimous Supreme Court, pointed out in *Whelan v. AIB* [2014] IESC 3:

> *"The Glencar test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson."*

26. There is no basis, therefore, for seeking to rely on a "*fact specific*" application of *Glencar* principles to this case. While the appellant referred, in written submissions, to the decision of the House of Lords in *Banque Bruxelles v. Eagle Star* [1997] AC 191 (SAAMCO), this point was not addressed in oral submissions, and it is not, therefore, necessary to consider the matter further. In any case, the issue of the scope of liability has been definitively determined by the Supreme Court, not only in *Glencar*, and *Whelan*, but in more recent authority also. Even were a different principle to apply, the liability of the appellants in this case was clearly within the scope of that firm's duty.

Subsequent Negotiations and Mitigation

27. The question of mitigation of loss hinges on what transpired after the 5th October, 2007. It is of note that Rosbeg were not aware of the nature of the title difficulties until November, 2007. In fact, Mr. Harris's solicitor, Declan Gardiner, had become aware of the problem because of his involvement in negotiations concerning another property. Thus, the potential purchaser was aware of the weakness of Rosbeg's position between the 3rd and 5th October, 2007.

28. The judge accepted evidence given by Mr. Robert Stewart, that even though the title had not been sorted out by January, 2008, he nevertheless wanted to keep in touch with the "Harris side" about a possible future sale to them. In early 2008, Mr. Ben Pearson again contacted Mr. William Harvey. Mr. Harvey said that, even though Mr. Harris was no longer interested at €10 million, he would take instructions and revert. In mid-February, 2008, Mr. Harvey came back with a verbal offer to purchase for €8 million. Rosbeg's valuer, Mr. Pearson, indicated that his clients would like that offer put in writing. Mr. Harvey came back to Mr. Pearson on the 14th February, 2008. He confirmed that Mr. Harris was interested in purchasing, as he had asked Mr. Harvey if there was any response to his verbal offer. However, Mr. Harvey went on to say that if Mr. Harris was asked to put the offer in writing, he would take this amiss, and as an indication that Rosbeg Partners did not trust him.

29. On the 4th March, 2008, Mr. Pearson reverted to Mr. Harvey, saying that he had taken instructions on the offer of €8 million, but that Rosbeg were not prepared to accept. He went on to say, however, that his clients were prepared to negotiate on the original offer of €10 million. There was no response to that letter.

30. Later, the evidence was that Mr. Pearson again tried to revive negotiations. He was instructed to suggest a sale price of €9 million to Mr. Harvey. There was no response to that overture. By this time, the potential purchaser was in no hurry to agree a price, as the property market was rapidly declining. The market for this type of property had collapsed. Funding from banks was extremely difficult to obtain. Mr. Harris was a special purchaser; he was not a person who required bank finance. He was still interested, but not at €10 million. The judge considered that, in those changed circumstances, it would be not surprising that Mr. Harris, who had no need for bank borrowings, might feel in a dominant position in any negotiations for the purchase of the property, especially bearing in mind the weakness of Rosbeg's position. It had given a commitment to AIB to reduce its borrowings by €8 million. Mr. Stewart's evidence was that he accepted the value had dropped by April, 2008, but not as far as €8 million. By then, his concern was that, if he indicated willingness to accept that offer, which had not been put in writing, he might then find himself negotiating against himself, in circumstances where the title problems had still not been fully resolved. Nonetheless, he was anxious to try and keep matters alive.

31. By July, 2008, Mr. Stewart testified, he was anxious that the property be sold, because AIB was getting anxious, and required progress to be made. He instructed Mr. Pearson to write again to Mr. Harvey to tell him that the title issue had been resolved, and to indicate that Rosbeg was in a position to treat, should Mr. Harris still have an interest. This letter was, the judge considered, "*carefully drafted*" so as not to give any impression of desperation. There was no response. However, another verbal offer came in August, 2008, but this was in the sum of €6 million. By this time, the market was falling even more rapidly. On the 26th August, 2008, Mr. Pearson rejected this offer. He said Rosbeg did not believe that it reflected the true value of the property, notwithstanding the fall in the property market.

32. Mr. Harvey responded to this letter on the 28th August, 2008. He emphasised the drop in property values, but indicated that Mr. Harris was still interested, and was one of the few individuals who could conclude a purchase quickly. Mr. Harvey ended the letter by asking, what was the minimum purchase price that Rosbeg would accept?

33. On 23rd September, 2008, after what the judge considered was "*careful preparation*", Rosbeg Partners indicated that they would be prepared to sell at a price of €8.5 million, subject to vacant possession, and an agreed closing date.

34. Mr. Harvey responded by email dated the 22nd October, 2008, apologising for the delay, and indicating that, by reason of the fact that there was little prospect of any development taking place in the area for some considerable time (possibly years), and in view of the general downturn of the market, Mr. Harris's interest in doing business had been "*seriously dulled*".

35. The judge held that this letter could be taken as confirmation that Mr. Harris was no longer interested in purchasing the property, and not simply that he was not interested in paying any more than €6 million. This ended Rosbeg's efforts to sell the property to Mr. Harris. By the date of commencement of the proceedings, the judge held that the value of the property had slumped to €2.5 million, and by the date of the hearing before him, Rosbeg Partners' valuer put €1 million on the property, and Mr. Harvey €1.5 million. The judge accepted the higher of the two valuations.

36. It has been necessary to set out the evidence in some detail because, in my view, this was very much an "*evidence case".* There was a sharp conflict of the evidence between the two sides. This did not concern the question of whether negligence occurred, but rather whether a contract had ever been agreed, and whether, subsequently, Rosbeg had mitigated its loss. The trial judge found facts and drew inferences, based on which evidence he accepted, and which evidence he rejected. The manner in which an appeal court should address the trial judge's findings and inferences has been laid down in the judgment of the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210, 217. These well known principles are set out later in this judgment. It is necessary to reiterate the point that, in order to persuade an appeal court to reverse a judgment at the first instance, based on evidence, an appellant faces a more serious task than merely showing there was other evidence adduced by an appellant.

The Appellants Case

37. Relying on evidence of Mr. Pino Harris, Mr. John Burns, his "*right-hand man*", Mr. William Harvey, Mr. Harris's valuer/negotiator, and Mr. Declan Gardiner, Mr. Harris's solicitor, counsel for the appellant submitted that what he termed "*independent third party witnesses*", all from the intending purchaser, confirmed that they had made an offer of €10 million, but that this had not been accepted by Rosbeg, who Mr. Harris described as being "*messers*". The appellants' case was, that the offer of €10 million had subsequently lapsed, and that subsequent offers by Mr. Harris were, equally, not accepted. Counsel strongly emphasised the point that Rosbeg Partners had not mitigated its loss, specifically in rejecting the offers of €8 million and €6 million, in circumstances where there was a declining market, and where Mr. Harris was, effectively, "*the only show in town*", insofar as potential purchasers were concerned. Counsel criticised the respondent's negotiating methodology, pointing to the fact that when an offer of €6 million was made, Rosbeg looked for €8.5 million, at a time when Mr. Pearson, Rosbeg's valuer, had informally put a value on the property of between €3 million to €4 million. Counsel for the appellant submitted that this was highly illogical conduct, tantamount to a serious failure to mitigate loss. To put forward a position seeking €8.5 million, when there was a valuation of €3 to €4 million was, counsel submitted, "*absurd*".

38. In the course of oral argument, counsel identified five areas where, he submitted, the judge drew inferences which were not supported by evidence. These were, firstly, the judge's finding that the *overwhelming probability* was that, for the title issue, and the Harris Group awareness of same, the sale would have completed rapidly. Counsel submitted that the judge's usage of the term "*overwhelming probability*", by definition, indicated inference, rather than a finding of fact. Second, counsel referred to the judge's finding "*there was nothing unusual or in any way troublesome or difficult about what had yet to be done before a contract would be exchanged and the sale completed*". Counsel submitted that the judge did not address the question of the missing land certificate which, all of the experts agreed, would have caused a problem, and caused a delay, and would have required special conditions. Counsel submitted that, even had the title issue described earlier been addressed, the sale could not have been completed rapidly. Third, counsel submitted that the Rosbeg's evidence was gainsaid by the evidence of Mr. Declan Gardiner, solicitor, by John Burns and Pino Harris. Counsel pointed out that Mr. Gardener knew, from early on, precisely what the problem was. He said he could be easily addressed by way of a special condition. Mr. Burns had said that, if an issue had arisen in relation to the title, he would simply have gone to Mr. Gardiner, and let him sort it out, because that was not his field, that Mr. Harris had said they were "*just messers*", that he had made them a good offer, which they did not accept it by the deadline, so he sat back. Fourth, counsel criticised the judge's finding that the Harris Group's contention that the offer was never accepted was not the real issue. He submitted it was an inference drawn from the findings, and this was directly contradicted by the evidence by the appellant's witnesses. Mr. Gardiner had said the title issue should not have been a problem. Mr. Burns had said, all that was needed was agreement, so that there would be a document on his desk by the deadline, and the deed could have then been followed through. Finally, counsel criticised the judge's finding that "*Rosbeg cannot be criticized for not exploring conditional contract."*

39. In response to this, counsel said that three witnesses, Mr. Brian Gallagher, solicitor, who testified on behalf of the respondent, Mr. Larney, a solicitor who gave expert testimony about conveyancing on behalf of the appellant, and Mr. Gardiner, had all said that a conditional contract could have been agreed.

Legal Principles Regarding Fact and Inference

40. The words of Mr. Justice McCarthy of the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210, at 217, are now so well known as almost to have acquired iconic status. Those words lay emphasis on the particular role of trial judges, and appellate courts, in addressing findings of primary fact, and inferences. McCarthy J. stated the principles in this way:

> *"1.An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*
>
> *2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.*
>
> *3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken [1899] 2 I.R. 1, cited by O'Higgins C.J. in The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.*
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> *4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference - in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly."*

41. Each of the observations 1 to 4 are of relevance in the instant appeal. The trial judge, in this case, had the role of assessing the credibility of the witnesses, which this Court has not seen or assessed. This Court has not seen the manner in which the witnesses testified, or their demeanour. If there was credible evidence, which supported the judge's findings of fact, this Court is bound by those findings, even if there was weighty testimony on the other side. Is this a case where this Court should be slow to substitute its own inferences of fact drawn from oral evidence, or recollection? Did the judge apply the right principles? He made specific findings that Mr. Stewart was a credible witness. He held that, taken together, the evidence of Mr. Stewart, Mr. McConvey and Mr. Pearson was credible evidence. He commented that Mr. Stewart "*is not a foolhardy man*", and that he was "*an experienced and careful businessman*". Moreover, the judge observed that the evidence of the respondents' witnesses was corroborated, not only by Mr. John Reynolds, the relationship manager of AIB Bank, but also corroborated by Mr. McConvey's conduct in seeking the title deeds from AIB Bank, and/or, alternatively, from L. K. Shields, as well as the conversation with Mr. Tony Hanahoe of Hanahoe & Hanahoe, Solicitors. Why would these events have taken place, if there was no intention to accept the offer of €10 million? The judge also indicated that his interpretation of the pattern of events was corroborated by the fact that the deadline was extended, and by the fact that a very significant number of telephone calls took place on the last two days before the extended deadline date of the 5th October. Why, he asked himself, rhetorically, would these have been taking place, if there was no acceptance of the price? It is, of course, true, as counsel submits, that the trial judge drew inferences. But, applying the principles enunciated in *Hay v. O'Grady*, the question which must be asked is, whether there was evidence upon which those inferences could be drawn? The answer to that question must be that there was such evidence, and that not only was there a basis for accepting that evidence, but also for rejecting the appellants' evidence. The judge's analysis is internally consistent.

42. Applying the principles of *Hay v. O'Grady*, it is not the function of this Court to parse, sift or delve, selectively, through the evidence in order to ascertain whether there was some "*other evidence*" (see *Hay v. O'Grady*, principle 2). There was, undoubtedly, testimony from what may be called the "*Harris interests*", which contradicted Rosbeg's case. But, the truth of the matter is that the judge, for reasons which he set out, found the Rosbeg evidence credible, and that adduced on behalf of the appellants, not credible. Insofar as there was a question as to whether Rosbeg accepted the offer, the judge found that any dichotomy in the evidence was more apparent than real. The question was, to his mind, that the Harris offer contained a deadline for acceptance by the vendor, but was also subject to the vendor satisfying the purchaser that the area was 2.56 acres. In other words, while the vendor, through Mr. Pearson, indicated to Mr. Harvey that the vendor wished to accept the offer, the deal would not be sealed until the vendor satisfied the purchaser as to the precise acreage. The judge held that it was "*clearly the case*" that Rosbeg had informed the Harris side of its intention to accept the offer, and sell the premises to Mr. Harris for the sum offered.

43. He thought it possible, without going further, that Mr. Harris might have deployed a "*legitimate tactic*", if he considered it to be to his advantage to tell Rosbeg to revert when the title was sorted out, rather than entering into a conditional contract.

44. There were, too, inconsistencies. One might reiterate here, the judge had the opportunity of assessing all the witnesses in giving testimony. He doubted "*very much*" if Mr. Harris would have agreed to the special conditions of the contract. The judge had to face a situation where Mr. John Burns, Mr. Harris's assistant, had testified for a day and a half stating that he was carrying out Mr. Harris's instructions about resolving the title issue. This was to be contrasted with Mr. Harris's own evidence that he had known nothing about the title issue until the day before he gave evidence at the trial.

45. There was, too, the incongruity that Mr. Burns, remarkably, had in his file, documents relating to Rosbeg's property which dated to 1995 and 1996. Mr. Burns testified that he received these documents from Mr. Harvey. Mr. Harvey, in turn, categorically denied that he had ever held the documents, but the following day indicated that he wished to withdraw that evidence, in that he accepted that he had given those documents to the Harris interests. Mr. Harvey then testified that he probably held the documents from the time of the previous sale from the earlier vendor to Rosbeg. But, then he faced the further inconsistency that the documents in question post-dated that sale.

46. Additionally, Mr. Harvey testified that Mr. Pearson had told him that Rosbeg knew they had a problem with the title some six months or a year before the negotiations. This must be contrasted with the fact that there was evidence that Rosbeg were not even aware of the fact that they had a problem with the title, in September, 2007, when they did not receive the title documents until 22nd November, 2007. The evidence was that they had been requested many times previously. Moreover, this was to be contrasted again with the evidence from Dermot Gardener, Harris's solicitor, that on the 3rd, 4th or 5th October, 2007, he had informed his client that Rosbeg would have a problem with the title, on the basis of his prior knowledge and experience in the other transaction.

47. It should be emphasised that the Harris Group are not parties to this case. I, therefore, make no adverse findings about them. It is, however, relevant to point to these inconsistencies, in order to demonstrate that there was ample material before the trial judge which would justify him in preferring the evidence of one side over the other. The scenario which the judge described was one which was based on direct evidence, and upon inferences drawn from facts and circumstantial evidence, all of which were consistent with the case advanced by the respondent.

48. This is a situation where, pre-eminently, an appeal court should be slow to interfere with those findings. This is not to say that there was not *evidence* on the other side. It is true that there was a question whether a deal could have been concluded, even by the 5th October, 2007, in light of the fact that the "*lease back details*" had not been agreed. But, nonetheless, this was, clearly, a situation where the judge was entitled to draw the conclusions which he did. These findings have a considerable bearing on the question of mitigation of damage. The appellant's submissions on the issue have been briefly outlined earlier.

Mitigation
49. On the question of mitigation, the judge had this to say:

> *"56. I do not consider that the plaintiff should be regarded as having been guilty of contributory negligence or failing to mitigate his losses by not having accepted either of the later offers of €8 million and €6 million. The sequence of events in 2008 do not demonstrate any culpability on the part of the plaintiff in this regard. In my view it was reasonable for the plaintiff in January/February 2008 not to simply accept the next offer made. One must not yield to the temptation to view these events with the benefit of hindsight. From today's perspective, of course, it seems foolhardy not to have taken the offer of €8 million, or indeed that of €6 million made later on, rather than accept either one of them and be relieved to get them. But Mr Stewart is not a foolhardy man. He is an experienced and careful businessman, or at least that is the impression that I have gained of him from his appearance in this case. He has been a successful businessman for a great many years."*
>
> *57. Mr Stewart was not in my view acting irresponsibly or even negligently when he tried to negotiate further with Mr Harris rather than simply take the offers being made, notwithstanding that the market was in severe difficulty at that time. He did not simply adopt a petulant stance and refuse to try and treat at a lower figure. In my view, he considered carefully how to respond to the unfolding events, conscious of the weakness of his negotiating position. He indicated a willingness to sell at €8.5 million. It was reasonable for him to try and negotiate for the best price, especially where he knew that the 'only game in town' was a person who all accept was at the time a 'special purchaser' given his recent purchase of the adjoining property and his financial strength. The fact that by October 2008 the market had collapsed completely, resulting in Mr Harris's appetite for investment drying up altogether cannot be laid at the plaintiff's door. I reject the defendants' claims for reduction on this account."*

50. The judge's finding on the "*reasonableness*" of Mr. Stewart's conduct is of particular importance in the context of mitigation of damage.

Mitigation – The Law
51. Turning then to the question of mitigation, it is true to say that the quantum of recoverable damage may be reduced, if a plaintiff fails to take reasonable steps to mitigate its loss. The duty is "*to take all reasonable steps*", having regard to the circumstances of the case (see the judgment of Hamilton C.J., and Denham J. in *Kelly v. Hennessy* [1995] 3 I.R. 253).

52. Here, again, the trial judge's assessment of the reasonableness of efforts to mitigate is highly relevant. The second principle in *Hay v. O'Grady* is engaged. Where a plaintiff has provided an explanation for a failure to take certain steps to mitigate loss, and the trial judge has accepted that explanation, an appellate court should be slow to overturn that assessment, unless there was no credible evidence to support it. (See the judgments of Hamilton C.J. and Denham J. in *Kelly v. Hennessy*). In that authority, the Supreme Court declined to engage in any substantive assessment of the reasonableness of mitigation. The trial judge's findings were based on an acceptance of the plaintiff's evidence, which was sufficient to dispose of that ground of the appeal. It has not been suggested that *Kelly* was erroneously decided, or can be distinguished on the facts.

53. It is well established, that reasonableness of a plaintiff's efforts to mitigate is a question of fact, not a question of law (*Payzu v. Saunders* [1919] 2 KB 581; *The Soholt* [1983] 1 Lloyd's Rep 605). In general, courts, both here and elsewhere, rarely find it appropriate to interfere with conclusions of a trial judge either based on evidence, or the lack of satisfactory evidence. The onus lies on a defendant (here the appellant) to establish, on the basis of satisfactory evidence, that there was a failure to mitigate. By way of illustration, it would have been necessary for the appellant here to demonstrate, by evidence, that there *would* have been a deal at €6 million. There was no cogent evidence on this.

54. In the passages referred to earlier, the learned trial judge held that the conduct of Mr. Stewart, of the respondent, was reasonable in the period of January to October, 2008. He held that Rosbeg were not negligent, in the sense of being guilty of contributory negligence. In fact, contributory negligence was not pleaded. The judge's findings here were of fact. The judge held that "*The sequence of events in 2008 do not demonstrate any culpability on the part of the plaintiff".* He concluded that Mr. Stewart had "*considered carefully how to respond to the unfolding events, conscious of the weakness of his negotiating position." He held it was "reasonable for the plaintiff in January/February 2008 not to simply accept the next offer made. One must not yield to the temptation to view these events with the benefit of hindsight."* He held:

> *"It was reasonable for (Mr. Stewart) to try and negotiate for the best price, especially where he knew that the 'only game in town' was a person who all accept was at the time a 'special purchaser' given his recent purchase of the adjoining property and his financial strength."*

He held that Rosbeg "*did not simply adopt a petulant stance and refuse to try and treat at a lower figure."* There was, therefore, credible evidence to support the judge's findings. There was insufficient, or no, evidence to discharge the onus which devolved upon the appellant to demonstrate a failure to mitigate.

55. The situation here was one where the appellant, through human error, had omitted to do what should have been done. Speaking of mitigation in the context of breach of contract, in *Banco de Portugal v. Waterlow* [1932] AC 453, Lord Macmillan pointed out in the House of Lords:

> *"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an*

emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult position by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken." (at page 506, and quoted with approval in Lennon v. Talbot Motors, High Court, Unreported, 20th December, 1985, Keane J.). On the facts, these observations are as applicable here.

56. The judge held that Rosbeg made repeated efforts in 2008, in an endeavour to resuscitate the deal. He held that Rosbeg's failure to accept the lower verbal offers did not constitute an unreasonable failure to mitigate loss. The judge pointed that with the benefit of hindsight, perhaps, it might be said, the respondent should have accepted the lower offers. But, this was only with the benefit of hindsight, in circumstances where, within an 11 month period, the offer of €6 million made in August, 2008, was a reduction of 40%, against the offer of €10 million made the September before. The High Court held it would not be appropriate to impute to the respondent a degree of foresight regarding the collapse of the market in September, 2008, which many others did not foresee. Moreover, the evidence disclosed that, even if Rosbeg had accepted one of the offers, being €8 million or €6 million, the title issues which prevented the sale were not fully resolved until September, 2008. This was a finding of fact on the basis of evidence both of Mr. Harris, and his solicitor, Mr. Gardiner. At the time the verbal offer of €8 million was made, on 14th February, 2008, Rosbeg did not have good marketable title to the property, and had not even received any indication as to when there would be rectification by executing the necessary deed of transfer. Even by the time of the offer of €6 million, in August, 2008, the title defects were not fully resolved.

57. In summary, therefore, I would conclude that the respondent retained the appellant to ensure it got good title. Regrettably, there was negligence. The respondent was left without good title. When they received a good offer, they were unable to sell, and suffered loss. In such circumstances, the law requires that Rosbeg be compensated for the extent of that loss. While the factual background is somewhat complex, the principles of law which apply are well established in this case, which stands on its own facts.

Conclusion

58. The conclusions of the trial judge were based upon findings of fact and inferences properly drawn from those facts, based on credible evidence, and hence these may not be interfered with by this Court on appeal. I would dismiss the appeal, and uphold the judgment of the High Court. The question of damages has been dealt with in the High Court.