Neutral Citation [2015] IEHC 389

THE HIGH COURT

[2009/1681P]

BETWEEN

BRIAN O'SHAUGHNESSY AND MARY O'SHAUGHNESSY

PLAINTIFFS

AND

LIMERICK COUNTY COUNCIL, THE NATIONAL ROADS AUTHORITY, RPS CONSULTING ENGINEERS LIMITED AND EGIS ROUTE-SCETAROUTE S.A. (BEING A JOINT VENTURE IN THE NAME OF RPS /SCETAUROUTE JV AND MIDLAND FENCING LIMITED)

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 18th day of June, 2015

Facts

1. These proceedings arise out of the accidental demolition of the plaintiffs' house known as "the Hollows" at Annoholty, Birdhill, Co. Tipperary on 4th September, 2006 during the advanced contracts phase of the construction of the N7 Nenagh/Limerick motorway scheme (the "scheme"). The case came on for hearing on the 14th of January, 2015 and concluded on the 3rd of February, 2015. Comprehensive submissions were made by counsel on the 6th of March, 2015. At the time of demolition of the plaintiffs' house, the plaintiffs were undertaking substantial works of reconstruction thereto, as a consequence of which the roof had been removed, the gable wall of one end of the house had been removed and the gable wall of an outhouse had also been removed (to the intent of joining the outhouse to the main house). Sundry other works were also underway including the digging of trenches to provide for drainage and services and the removal of plaster from the rear wall of the dwellinghouse. A current planning notice was on display on a front pier of the house, dated 20th July, 2006. The first named plaintiff commenced these works during 2005. He removed the slates on the roof in April 2006 and as late as August 2006 conducted excavations to the rear of the house with a view to creating a driveway.

2. In the course of carrying out works to the house, the first named plaintiff hurt his back during 2006 and had to cease work for a period, from August, 2006. A front porch to the house remained intact and delivery of the plaintiffs' post continued through the door of this porch notwithstanding that the remainder of the dwellinghouse was undergoing such extensive renovations. On 4th September, 2006, the second named plaintiff decided to drive by the house with a view to collecting post only to find that the structure had been demolished.

3. While some efforts were made to resolve the plaintiffs' claim for the damages occasioned to them, these efforts were unsuccessful owing to the fact that the defendants could not agree amongst themselves either which of them was responsible in law for the demolition of the structure or any apportionment of responsibility. However, on the second day of the trial, agreement was reached between the plaintiffs and the defendants as to the amount of damages to be paid to the plaintiffs (the terms of which are confidential as between the parties) and it was further agreed that that amount, together with the cost of the proceedings, should be paid by whichever of the defendants are found liable in the proportions to be determined by the court, following the conclusion of the proceedings. In addition, it was agreed that whichever of the defendants are found to be liable shall also pay to the plaintiffs a further sum in respect of rent payable by the plaintiffs at a rate of €700 per month (or part thereof) from the date of the settlement agreement (15th January, 2015) until the payment date as defined in the settlement agreement. Subsequent to the demolition of their property, and pending the trial of these proceedings, the plaintiffs had been paid, ex gratia, the total sum of €20,000 by the first named defendant.

Background

4. Pursuant to the provisions of a multiple framework contract dated 25th July, 2000 and entered into between Limerick County Council (which together with the second named defendant is hereinafter referred to as "LCC.") and a number of other contracting local authorities (all together therein referred to as the "Contracting Authority") and a number of firms of consulting engineers including MC O'Sullivan & Co. Ltd and Scetauroute (the former of which was later taken over or reorganised and had joined with the latter to become a joint venture enterprise comprising the third and fourth named defendants herein and which are herein after together referred to as "RPS"), the various firms of consulting engineers agreed with the Contracting Authority to provide certain services in connection with the construction of certain roads including the N7 Nenagh/Limerick road scheme. Under the terms of the multiple framework contract, services were to be provided by the firms of consulting engineers pursuant to a "call off" procedure whereby the Contracting Authority would nominate a given firm of engineers to provide services in accordance with the framework agreement. The call off procedure involved a request to provide services pursuant to task orders issued by the Contracting Authority to the firms of consulting engineers under the framework agreement, and in the case of RPS, 6 task orders were issued by the Contracting Authority relating to the design, and services relating to the design of a 38km stretch of high quality dual carriageway between Nenagh and Limerick. Clause 2.1 of the framework agreement defined different categories of services being provided i.e. Normal Services, PSDS Services (Project Supervisor, design stage), EIS Services and Additional Services, as defined. Clause 2.1.1 defined "Normal Services" as being the services described in clause 2 of the model form of agreement between a client and consulting engineers for the design and supervision of works of civil engineering construction published by the Institute of Engineers of Ireland, 1986. Clause 2.1.1 further provided that "Normal Services for the purposes of the model form of agreement were to include those services set out in part 1, schedule 2, of the framework agreement.

5. In general terms it may be said that RPS were appointed as consulting engineers to provide, and/or assist in the procurement of all services required by LCC in connection with the design and construction of a high quality dual carriageway between Limerick and Nenagh, ("the scheme") and to supervise the performance of contractors appointed by LCC in connection with each element of the scheme. This included geotechnical and geological advice, architectural services, safety audits, traffic surveys, traffic modelling, attendance at all meetings, preparation of all necessary tender documentation, property ownership searches and mapping required for design, including accommodation works and attendance at public meetings.

6. The model form of contract requires the consulting engineer, at design stage, to prepare designs and tender drawings and

specifications and schedules and bills of quantities as well as forms of tender and invitations to tender as may be necessary to enable the works (as defined in the model form of contract) to be tendered for or otherwise ordered by the client.

7. Task Order Number 1, which issued from LCC to RPS in May, 2005 stated that it related to the various duties in relation to the design of National Primary Route, N7, Nenagh to Limerick and required the consulting engineers to provide the various services relating to the design of the N7, road in accordance with the provisions of the task order. Clause 2.2 of the task order stated that the consulting engineer was to operate under the direction of the design office project manager to oversee the design of the improvement works. That person was Mr. Ciaran Hegarty of LCC and, in turn, he was stated to be responsible to the Limerick Director of Service, Transport and Infrastructure, namely, Mr. Tim Fitzgerald.

8. The works undertaken by RPS in connection with the scheme in accordance with the aforesaid documentation included the drawing up of the statutory notices in connection with the compulsory purchase of lands for the construction of the scheme and the putting out to tender of various advance works, contracts and the subsequent preparation of those contracts (after the conclusion of the tender process). The advance works included a hedge removal contract and also, most relevant to these proceedings, a contract for the demolition of buildings that interfered with the construction of the road scheme or were otherwise not required by the local authority following the acquisition of the lands upon which such structures were located.

9. RPS prepared the documentation relating to the compulsory acquisition of lands and the compulsory purchase order ("CPO") was published in September 2004. Included in the plots described for acquisition by LCC was a plot designated as plot number 156a in the ownership of a Mr. Lancelot Ryan and comprising 0.2 acres. The site was described in the schedule to the CPO as a "derelict house and land" although there was no visible structure upon the site. This description of this site was a matter of some controversy in these proceedings. The person responsible for this description was Mr. John O'Donovan an experienced engineer working on the scheme on behalf of RPS. Mr. O'Donovan gave evidence on behalf of RPS at the trial of the matter. He informed the court that he was able to confirm that there was no standing structure on the site, but because the site was so overgrown, he was unable to confirm whether or not there was anything on or under the ground, such as, in his own words "the footings of a building or any ground features or sub structure." He was concerned however, that there might have been at some stage in the past, for a number of reasons:

> 1. The site was small and rectangular in shape, comprising about 0.2 acres. While owned by Mr. Lancelot Ryan, it was isolated from the remaining landholding of Mr. Ryan and surrounded by the lands of another landowner;
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> 2. Although modern maps did not indicate that there was ever a structure on the property, he felt that a very old map dating back to 1843 suggested that there might have been a structure on this site at one point in time;
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> 3. There was an ESB pole on the site, which, while servicing other properties, Mr. O'Donovan felt might have been indicative of a dwelling on the site at some time or alternatively a planning application to develop the site.

10. Because of this uncertainty, and because he felt that the site did not merit the simple description of "land" Mr. O'Donovan saw fit to discuss the matter with Mr. Ciaran Hegarty and suggested that the site should be described as "derelict". According to Mr. O'Donovan, Mr. Hegarty accepted that description of the site. However, according to Mr. Hegarty it was Mr. O'Donovan's decision and he could not approve it because he was never at the site. But in his evidence Mr. Hegarty did not dispute the accuracy of the description. Indeed he said that LCC had not yet excavated or conducted works on the site and that it may well yet turn out to be the case that there is a building underneath the site.

11. During the course of 2004, Mr. Seamus Linehan, a recently employed graduate engineer in the employment of LCC, together with a colleague, a Mr. John O'Keeffe was undertaking what he described in his evidence to the Court as a windshield survey of properties (which included the taking of photographs of the properties) being acquired by the Council for the purposes of the scheme. It is called a windshield survey for the obvious reason that it is conducted from a car. Mr. Linehan gave evidence that he and Mr. O'Keeffe would share the work i.e. the driving and the taking of the photographs and so he could not be certain who took the photographs about which he gave evidence, but he was satisfied that they were taken by either himself or Mr. O'Keeffe. The purpose for which they were taking photographs at the time was to assist with valuations of properties to be acquired in connection with the scheme. At the time this survey was being conducted, there was no fencing on the site and Mr. Linehan gave evidence that because of this they had to rely on the CPO documentation to identify properties being acquired. Mr. Linehan said that he and his colleague noted that the schedule to the CPO stated that there was a derelict house on plot 156a, and that since there was only one derelict house in the vicinity and on the same side of the road as plot 156a i.e. the plaintiffs' house, they photographed that house. Interestingly however, at this time the plaintiffs' house was not in fact derelict, although it might have looked somewhat run down. The photograph taken by Mr. Linehan, or his colleague (Mr. O'Keeffe) was a photograph of a house that was fully roofed with all of its walls intact, although it was not occupied at the time. Mr. Linehan's evidence was to the effect that he and Mr. O'Keeffe were looking for a house that matched the description of a derelict house on the same side of the road as plot 156a. While this was not a very scientific way of identifying the property, it was not unreasonable in the circumstances, especially in view of the fact that the photographs were being taken for internal purposes only and at that stage one would have imagined that the worst that could happen if a photograph was taken of the wrong property is that it would have been surplus to requirements.

12. In any case, Mr. Lenihan assumed the plaintiff's house to be located at plot 156a, and either he or Mr. O'Keeffe photographed it and also labelled it 156a for records purposes. This photograph was then placed in a single hard copy file where such records were kept within the County Council, as well as on an electronic jpeg file. This was the first occasion on which the plaintiff's property became confused with plot 156a.

13. On 19th January, 2006, Mr. Dermot Boland, Assistant Engineer with LCC, sent to Mr. Tony Ambrose of RPS, a spreadsheet of the properties to be demolished for the purposes of the scheme. This included reference to plot number 156a, recorded as being in the ownership of Mr. Lancelot Ryan and comprising a derelict house. Unlike all of the other properties described in this schedule, it did not have a "Designated" number i.e. all the other properties were designated property numbers D1-D19; Property number 7 was divided into D7a and D7b, so there were twenty one properties in total including plot 156a.

14. In early February, 2006 Mr. Liam Barry of RPS sent to Mr. Boland of LCC the first draft of the demolition contract for his comments. This was a normal part of the liaison between RPS and LCC in relation to the scheme. This draft demolition contract did not include the plaintiffs' property or plot 156a. Mr. Boland responded by email dated 7th February, 2006 in which he stated:-

> "Liam, my comments on the Demolition Contract documents that I received last week are attached.
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> 14 of the properties should be available by 1st May to start the demolition contract, however I have marked the other 7

> as provisional as there are still ongoing discussions between Limerick County Council and the owners. Some of them may become free to demolish however, others may be left intact until the main contractor gets on site."

This email was copied by Mr. Boland to Mr. Ciaran Hegarty and also to Mr. Tim Fitzgerald, Senior Engineer with LCC to whom Mr. Hegarty reported. Both Mr. Hegarty and Mr. Fitzgerald gave evidence, but neither had any recollection of reading the email or the attachment.

15. In relation to the plaintiff's dwellinghouse/plot 156a the following is stated:-

> "Page 22: there are 21 properties, Lancelot Ryan has a property called "The Hollows", (derelict house), at Cooleen, Birdhill, Co. Tipperary, plot 156a (photo is attached)."

16. The reference to 21 properties is confusing. These were originally 21 properties listed for demolition in the Environmental Impact Statement prepared for the scheme (hereinafter the "EIS"), but this had been reduced by this time to 20. The addition of the plaintiff's house (bringing the total to 21) may have appeared to Mr. Barry to be consistent with the EIS; but since Mr. Barry did not give evidence this is mere conjecture.

17. The photo attached was of course the photograph taken of the plaintiffs' property at the end of 2004 by either Mr. Lenihan or Mr. O'Keeffe. A similar statement appeared later in the comments of Mr. Boland in relation to page 38 of the draft tender documents. Also, at another point in the document there is a direction "add in Lancelot Ryans' Property".

18. Following upon receipt of the email from Mr. Boland, Mr. Barry proceeded to amend the draft demolition contract tender documentation. In the course of the trial, there was a lot of discussion as to the character of the observations made by Mr. Boland in relation to plot 156a. Mr. Boland maintained that in responding to the draft demolition contract, in his email of 7th February, 2006 he was making RPS aware of any errors that he observed, raising any queries that he had and otherwise commenting upon the draft. He did not agree that he was giving Mr. Barry instructions. While Mr. Barry did not give evidence, Mr. John Shalloe, a Director of RPS and who was project manager of the scheme on behalf of RPS from early 2005, gave evidence of his interpretation of the document. He contended that Mr. Barry was instructed by Mr. Boland to include the plaintiff's dwellinghouse in the demolition contract. I think it is clear that the document was made up of comments, questions and directions. However, Mr. Boland undoubtedly directed the inclusion in the demolition contract of what he thought was a derelict house owned by Mr. Lancelot Ryan and located at plot 156a, but which dwellinghouse was in fact that of the plaintiffs.

19. On the other hand it is clear that Mr. Barry did not feel bound to act on all of Mr. Boland's instructions. In a short response dated 21st of February, 2006 to Mr. Boland's commentary of 7th February, 2006, Mr. Barry answered Mr. Boland's questions, responded to some of his observations and also informed Mr. Boland that another property, which Mr. Boland had suggested need not be demolished, was indeed to be demolished on the instruction of the National Roads Authority. It is clear from the evidence given by Mr. Boland that he and Mr. Barry were engaged in an interactive process the simple objective of which was to arrive at a suitable form of contract to be entered into with whatever contractor was appointed to undertake the work of demolition of the properties that had been identified for demolition for the purposes of the scheme. Other parties were copied with the emails exchanged between Mr. Boland and Mr. Barry, including Mr. Ciaran Hegarty and Mr. Tim Fitzgerald in the Council and Mr. Tony Ambrose of RPS.

20. Subsequently, Mr. Barry, having received Mr. Boland's comments acted upon the observations/instruction of Mr. Boland in relation to the plaintiffs' dwellinghouse, without raising any queries with Mr. Boland about the direction relating to plot 156a/the plaintiffs' house. That is to say, he included the plaintiffs' house in the next draft of the demolition contract and he did so in a most dramatic way, by superimposing the photograph taken by Mr. Lenihan or Mr. O'Brien at the end of 2004 onto that part of the contract demolition map, with an arrow leading from the photograph and pointing to plot 156a i.e. the only interpretation open to anybody looking at the map would have been to the effect that this house was located at plot 156a. Moreover, the photograph was placed over the site upon which the plaintiffs' dwellinghouse was actually located, thereby eliminating what might otherwise have been a potential warning light to anybody looking at the map, because the plaintiffs' dwellinghouse was the only dwellinghouse along this stretch of roadway.

21. The error thus having been made, it was not subsequently discovered until after it was too late i.e. following upon the demolition of the plaintiffs' dwellinghouse.

The Demolition Contract

22. The demolition contract itself was finalised and signed as between LCC and the fifth named defendant, Midland Construction Ltd. ("Midland") and dated July 10th 2006. This contract imposed an obligation on the demolition contractor to be familiar with the site and to be acquainted with the conditions under which the contractor was obliged to work (condition 10.4) and, in addition, to notify the engineer appointed under the contract (RPS) upon becoming aware of any ambiguity, discrepancy or other fault in or between the contract documents (clause 5).

23. The scope of the works in the demolition contract was stated to be the demolition of "21 properties, a mixture of agricultural and non-agricultural residences and recreational facilities. The locations and pictures of these properties are indicated in drawing numbers MCT0183SC-505 and MCT0183SC-515. The picture of the plaintiffs' dwellinghouse referred to above was included and of course the reference to 21 structures (rather than 20) further imported the error into the demolition contract.

24. Mr. Pat Egan of Midland gave evidence on behalf of the third named defendant and informed the court that both he and his fellow director in Midland were taken on a tour of the site i.e. all of the properties to be demolished by Ms. Jennifer Conway, resident engineer of RPS in or about the 10th July, 2006. Ms. Conway confirmed to them that the plaintiffs' house was to be demolished. The evidence of Mr. Egan in this regard was not contradicted (Ms. Conway did not give evidence in the proceedings).

25. Furthermore, Mr. Egan gave evidence of a conversation he had with Mr. France, the second resident engineer of RPS working on the site at the relevant time, although Mr. France was on holidays at the time of the demolition of the plaintiffs' dwellinghouse. Mr. Egan says that he enquired of Mr. France as to why the plaintiffs' dwellinghouse was numbered D20 when the other structures for demolition in this area were numbered D8 and D9 i.e. it appeared to Mr. Egan that this house was numbered out of sequence. Mr. Egan said that Mr. France did not know the reason for this but simply instructed Mr. Egan to proceed with the demolition of the structure. Mr. France, who also gave evidence, denies that any conversation of this kind took place and points to the fact that he was on holidays at the time when Mr. Egan first suggested that the conversation occurred. Mr. Egan accepted in evidence that he may have been mistaken as to the precise time of the conversation.

26. There is a second version of this conversation recorded in a note kept by Ms. Deirdre Clarke of LCC. This note was prepared by

Ms. Clarke a week after she met with Mr. Egan (and others) on site, the day following the demolition of the plaintiffs' house. In this note, Ms. Clarke records that Mr. Egan said to her that he had alerted Mr. France that there was a site notice i.e. a planning application notice on the front wall of the property, and that the response he received from Mr. France was to proceed with the demolition. Mr. Egan, while recalling a conversation with council officials on the day following the demolition, does not recall speaking specifically to Ms. Clarke and nor does he recall stating this to Ms. Clarke. His only recollection of a conversation with Mr. France related to the site being numbered out of sequence.

27. For reasons that will be apparent later in this judgment, I do not believe it is necessary for me to reconcile the varying accounts of whatever conversation (if any) that Mr. Egan had with Mr. France. What is undisputed is that Midland entered into a demolition contract that required it to tender a price for the demolition of the plaintiffs' house and which contract included a picture of the plaintiffs' house for identification purposes. Moreover, it was confirmed to Midland on site that the plaintiffs' dwellinghouse was to be demolished.

28. It should also be noted that other contractors involved in the project and in particular the demolition contract, were also directed to the plaintiffs' dwellinghouse by the resident engineers prior to its demolition. These included the contractor responsible for conducting a safety survey of all properties to be demolished, namely OHSS Limited which identified a small amount of asbestos at the plaintiffs' property. Arising out of this, Midland was instructed to engage a specialist contractor to remove the asbestos from the property, which it did. Tobar Archaeology was the firm appointed to conduct an archaeological survey of the properties to be demolished and it too undertook a survey of the plaintiff's property. Furthermore, a representative of Tobar attended on site with Midland on the day of the demolition of the property.

Disconnection of electricity supply to plaintiffs' premises

29. LCC took steps to have the electricity supply to the plaintiffs' house to be disconnected by the ESB. This was obviously required prior to demolition. This had to be done by LCC (and not RPS or Midland) because the ESB would only deal with the owner of a structure in relation to disconnection of supply. Ms. Deirdre Clarke of LCC was the person responsible for giving the necessary instructions and information to the ESB. She stated in evidence that in giving these instructions she was required to give the ESB a meter number and meter reading, but because there was no house on plot 156a she could not give this information. Ms. Clarke had previously walked the entirety of the site for the scheme over a number of weeks and was familiar with plot 156a. She was aware that there was no house on the plot and that whatever might be there could only be a ruin although she could not be certain because the site was so overgrown. Ms. Clarke gave evidence that she spoke to somebody by telephone in the ESB (whose name she could not recall) and, since she had no meter number or reading to give, she gave that person the name of Lancelot Ryan. That person then checked the ESB records and could only find a record of Mr. Ryan's dwellinghouse and no other property in his name. Ms. Clarke said she then passed that information on within LCC (she could not remember to whom, but felt it was more than likely to Dermot Boland) and she then had no more to do with the disconnection of electricity supply from the plaintiffs' dwellinghouse.

30. In his evidence in regard to this issue, Mr. Boland stated that, subsequently, as the time for the demolition drew close that he contacted the ESB and gave them a description of the premises to be disconnected i.e. the plaintiffs' premises. Although it is obvious that the Council could not have been recorded as being the customer of the ESB for the premises, nonetheless it appears that the ESB proceeded to disconnect the power supply from the plaintiffs' premises. It is clear from the evidence of Ms. Clarke that she had sufficient familiarity with plot 156a to know that there was no above ground structure on site 156a, or certainly that if there was it could not have been much more than a ruin underneath the overgrowth on the site. For that reason she was not surprised when the ESB informed her that they had no record of a connection to the site in the name of Mr. Lancelot Ryan. However, Ms. Clarke did not relay to Mr. Boland that she was aware that there was no house on plot 156a. This was confirmed by both Ms. Clarke and Mr. Boland in evidence. Upon cross-examination, Mr. Boland accepted that if he had been made aware that there was no house on plot 156a, at this stage, it would have alerted him to make further inquiries and he agreed that had he been so alerted he would have ascertained quickly that the plaintiffs' house was not on plot 156a and that it would have not therefore been demolished.

Earlier complaints from LCC to RPS

31. Finally, of some relevance to the overall background against which the demolition contact was prepared and executed, is that LCC and RPS had exchanged correspondence in February and March 2006 about the performance of RPS in the delivery of services to LCC in connection with the scheme. In a letter of 28th February, 2006 LCC complained about a lack of personnel on site and also complained about the fact that fencing of the site was not yet complete. In a further letter of 3rd March, 2006, Mr. Hegarty complained to Mr. Shalloe amongst other things about the accuracy of the fence line and the manner in which this was being attended to by RPS. Mr. Hegarty complained about lack of leadership and inadequate supervision in this correspondence. While it is fair to say that his specific complaints were dealt with comprehensively in subsequent letters from Mr. Shalloe to Mr. Tim Fitzgerald of LCC dated 6th March, 2006 and to Mr. Hegarty dated 7th March, 2006, nonetheless there is an echo in this correspondence that resonates in these proceedings i.e. a failure to complete the fencing of the site (and this was 6 months before the demolition of the plaintiffs' dwellinghouse) and inadequate supervision on site.

32. In his evidence, Mr. Shalloe denied that there was any deficiency in the supervision on-site. He said that the demolition contract was a straightforward contract that would not have required very much direct supervision and also that at the time that contract was being executed, there was only one other contract – the archaeological resolution contract – underway. He said that the resident engineering staff were being supervised by himself as the project leader and that he had delegated his supervisory duties to one of his colleagues, a Mr. Liam Bohane. He said that Mr. Bohane, for the most part, supervised the resident engineers from the Cork office of RPS and that "resident engineers would not require on-site supervision of themselves". As far as the demolition contract itself is concerned, there was no necessity to be present onsite during a demolition. He said that "the inspection of the works would be the aftermath when it was demolished to ensure that it had been demolished."

33. As far as fencing is concerned, Mr. Shalloe stated that at the time of demolition of the plaintiffs' property, the fencing contract was complete and that the best of his recollection it had been completed by around March 2006. However, in his evidence, Mr. France on behalf of RPS stated that "when I look back to this location it would appear that the temporary fencing and permanent fencing was not complete along this side road leading up to O'Shaughnessys' house. So the CPO line was not clearly defined in that location, and not only that, but there was quite a lot of site clearance still to be carried out in that area." This is also consistent with the evidence of Mr. Egan of Midland.

34. Mr. Hegarty, in his evidence regarding these matters, stated that the resident engineers (whom he referred to as being young) had the required skill and training for their work, but they were not getting the necessary leadership.

35. Mr. Shalloe agreed in evidence that the resident engineers should have been familiar with the boundaries of the site, which would have been obvious from the maps. Furthermore, he agreed that it was clear from any of the maps showing the site boundaries that the plaintiffs' property was not within the site as shown in the maps.

36. Before leaving these issues it is worth observing that each of the resident engineers, Jennifer Conway and David France were relatively new to the scheme. Jennifer Conway started in November 2005 and David France in July 2006. The material assets part of the EIS which sets out the properties subject to demolition was prepared prior to their involvement in the project. No evidence was presented to Court to indicate that either Ms. Conway or Mr. France were acquainted with the identity of the properties to be demolished in order to ensure that they could supervise the demolition contract appropriately. Likewise, it must be pointed out, Mr. Boland of LCC joined LCC in March 2005 and was working on this project from summer of that year. He confirmed that he did not refer to the EIS in his consideration of the demolition contract. All of this indicates a inadequacy of supervision of and/or instruction given to these key personnel.

Submissions of Counsel

LCC Submissions regarding RPS

37. Counsel for LCC submits that both RPS and Midland each owed a duty of care to the plaintiffs in the work that they were doing on the project. In this regard they rely on the well established principles laid down in the case of *Anns v. Merton London Borough Council* [1978] A.C. 728 which was followed the Supreme Court in this jurisdiction in the case of *Ward v. McMaster* [1988] I.R. 337. They also rely on the authority of *Caparo Industries v. Dickman* [1990] 2 A.C. 605 in which Bridge L.J. stated:-

> "in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

38. This approach was endorsed in this jurisdiction by the Supreme Court in the case of *Glencar Exploration v. Mayo County Council* (No.2) [2002] 1 I.L.R.M. 484 and in the case of *Whelan v. Allied Irish Banks & Ors* [2014] IESC 3.

39. It was further submitted on behalf of LCC that such a duty of care has been held to be owed specifically by construction professionals to third parties. The court was referred to Jackson & Powell on *Professional Liability*, (7th Ed., Sweet and Maxwell, 2012) at 382 wherein it is stated:-

> "It has long been held that architects and other construction professionals owe a duty of care not to cause personal injury to those whom they could reasonably foresee might be injured as a result of their negligence."

40. Jackson & Powell continue at p. 386:

> "Although it might be possible for the law to impose a duty of care only in respect of personal injuries, it is generally accepted that a construction professional will owe a duty not to cause physical damage to property other than that in respect of which he is engaged. Thus in *Northwest Water Authority v. Binnie Partners* there was no argument that the defendant engineers who had been found liable for the personal injury caused to the claimants in *Eckersley v. Binnie Partners* owed a different duty to the Water Authority in respect of damage suffered to its property. Blake J. found that there was no practical difference between the issues that the defendant wished to raise in the second case from those that had it had raised in the first case."

41. LCC lists eight different failures on the part of RPS, any one of which, it submits, had it not occurred would have avoided the demolition of the plaintiffs' dwellinghouse. For expedience, I will also express my view on each of these submissions immediately following upon same.

> 1. "The "mis-description" of plot 156a in the CPO schedule as "derelict house and land." "
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> In my view, this description, even if it may fairly be described as a mis-description, does not amount to a failure on the part of RPS. In my opinion, the description of the site by Mr. O'Donovan, while perhaps overly cautious in nature, was understandable. It was a description arrived at by Mr. O'Donovan, an experienced engineer, after giving the matter due and proper consideration and following upon discussion with Mr. Hegarty. Moreover, the description was one assigned to the site for the purposes of describing the property in the schedule to be attached to the compulsory purchase order and there was no evidence given that it caused the Council any difficulty in connection with the acquisition of lands from Mr. Ryan. Ms. Deirdre Clarke, Executive engineer with LCC, gave evidence that Mr. Ryan was not paid any compensation in connection with any structure upon the site. Furthermore, a CPO schedule is prepared only in connection with the acquisition of lands; a separate list of properties to be demolished was included in the environmental impact statement, also prepared by RPS (in consultation with LCC) in connection with the scheme, at the same time as the CPO documentation. It was clear from Mr. O'Donovan's evidence that he was familiar with this part of the EIS which was being prepared by another one of his colleagues, Ms. Emma Tracey, and that they did a certain amount of work together in assembling the information for this part of the EIS. Photographs were taken of houses that would be likely to be impacted directly by the construction of the scheme. Mr. O'Donovan said in evidence : "we had our defined list of properties that were definitely going to be demolished, and they were ones that were directly on the footprint, and then additional ones that kind of came in and out of the list were for properties that were kind of directly… indirectly impacted by the scheme."
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> 2. "The resident engineers were unaware of the physical location of Mr. Ryan's plot of 156a from the time of the making of the CPO to the date of demolition."
>
> Whatever about at the time of the making of the CPO, it is clear that the resident engineers were not familiar with the precise boundaries of the site in the vicinity of plot 156a in the lead up to and at the time of the demolition of the plaintiffs' dwellinghouse, and this contributed to the demolition of the house.
>
> 3. "The failure by RPS to check the comments made by Mr. Dermot Boland in regards to plot 156a in his email to Mr. Barry of February, 2006."
>
> In my view there is no doubt but that Mr. Boland's request to Mr. Barry to include this property in the demolition contract should have caused Mr. Barry to check either the EIS and/or confer with a colleague who was familiar with the site such as Ms. Emma Tracey, in order to verify that this house was within the perimeters of the lands acquired. Mr. Barry had originally submitted a draft contract that correctly identified the properties to be demolished, presumably having identified those properties by reference to the EIS. He was now being requested to add an additional property and this in itself

should have prompted him to inquire further as to whether this was a new instruction (and if it was, to confirm that the location was within the lands acquired by the CPO) or, if it was not an additional property, to clarify what must otherwise be a misunderstanding either on his part or the part of Mr. Boland. Since he did not give evidence, the Court can only assume that Mr. Barry himself assumed that Mr. Boland was correct i.e. that the plaintiffs' property was the derelict house referred to in the CPO schedule, and to that extent, he too was mislead by the CPO schedule.

4. "The failure by the resident engineering staff of RPS to realise, in the period between January 2006 and the date of demolition, that the plaintiffs' house was outside the construction site."

This is a similar allegation to that referred to at number 2 above. There can be no doubt but that if the resident engineering staff were familiar with the boundaries of the site then Jennifer Conway would not have confirmed to Mr. Pat Egan of Midland that the plaintiffs' dwellinghouse was to be demolished. That the resident engineers on a project such as this should be familiar with the site boundaries is self evident. The fact that they were not may not have been entirely their fault and this was owing at least in part to the fact that the site was not fully fenced at this location. But it was a significant factor in the lead up to the demolition of the plaintiffs' house.

5. "It is clear that RPS staff were aware of the works being undertaken by the plaintiffs and indeed took photographs of the house after the roof structure and gable walls to one end of the house and one end of the adjoining outhouse had been removed."

Ms. Deirdre Clarke of LCC gave evidence that she observed these works in April of 2006 (as she was driving by) and she immediately checked to ascertain if the property was one being acquired by the Council and she satisfied herself that it was outside of the CPO. She was therefore unconcerned about the plaintiffs' works because she was not aware that the property had by this time been included in the tender documentation for the demolition contract. Had RPS staff followed up on this as Ms. Clarke did, then the erroneous inclusion of the plaintiffs' property in the demolition contract would have been discovered. By this time also, the asbestos survey and the architectural survey had been completed in relation to the plaintiffs' property and according to the report of Mr. Shalloe in relation to the demolition of the plaintiffs' property (which report is dated 15th September, 2006 and which he prepared at the request of the Council following the demolition of the property), the resident engineering staff did not attend on site when either of those surveys were being conducted in order to confirm the correct location of the structure.

6. "The failure by RPS staff to act on the presence of a planning notice on the pier of the plaintiffs' house indicating a contemporary planning application in respect of the plaintiffs' property."

I am not inclined to attribute too much significance to the planning notice, not least because Mr. France denied ever seeing the notice and there is nothing to indicate that it was ever seen by any RPS personnel. Also, there had been a planning notice on the property previously and so it is possible that the new planning notice affixed on the property by the plaintiffs in July, 2006 would not have attracted attention.

7. "The instruction by David France to Pat Egan to proceed with demolition despite being informed by Mr. Egan of the presence of a planning notice on the property."

In view of my conclusions overall, I don't believe it is necessary to arrive at a resolution of the dispute regarding this alleged conversation.

8. "The failure by David France to act on the conversation that he had with Pat Egan of Midland in a jeep in which Mr. Egan queried the necessity to demolish the plaintiffs' house."

This conversation is also denied by Mr. France and again I do not believe that it is necessary to resolve whether or not such a conversation took place.

42. Counsel for LCC also argues that even if the court considers that Mr. Boland "instructed" Mr. Barry to include the property of the plaintiffs in the demolition contract, that any causative connection between that instruction and the demolition of the plaintiffs' property was broken by a number of intervening negligent acts on the part of RPS and Midland, any one of which would constitute a novus actus interveniens. Counsel for LCC relies on the cases of *Conole v. Red Bank Oyster Company Limited* [1976] I.R. 191 and *Crowley v. AIB Bank & Anor* [1987] I.R. 282. I will address the principles established in these cases when considering the submissions made on behalf of RPS.

43. Counsel for LCC further submits that the liability of the defendants in this matter must be viewed in the context of the contractual relationship between the defendants. LCC was at all times the client employing RPS and Midland to provide services to LCC in connection with the scheme, and this was acknowledged by Mr. Shalloe of RPS in his evidence.

44. In this context it was argued on behalf of LCC that, having engaged a reputable independent contractor, RPS, to provide the range of services that it was required to provide in connection with the scheme, and another independent contractor, Midland to conduct the demolition works (following a tender process organised on its behalf by RPS), that the council cannot be held vicariously liable to the plaintiffs for the actions of its independent contractors The following passage from McMahon and Binchy, *The Law on Torts*,(4th Ed., Bloomsbury, 2013) was cited:-

> "Although the general rule is that a person is not vicariously liable for the torts of his or her independent contractors, this does not mean that a person is never liable for torts committed by independent contractors. The employer can always liable where he or she has been personally negligent, for example, in selecting an incompetent contractor. Furthermore, in the torts of nuisance, *Ryland v. Fletcher* [1868] LR 3HL 330, damage by force, breach of statutory duty, liability for wild animals, for example where liability may be imposed irrespective of fault on the defendant's part, the defendant will be responsible even when the acts complained of are committed by his or her independent contractors. Similarly, in the case of Bailments. Hence the law recognised that some duties imposed on an employer are of such a nature that they are non delegable in the sense that the employer cannot escape liability by delegating their performance to an independent contractor. In respect of such a duty, the employer is bound not merely to take reasonable care of himself or herself, but also to see that reasonable care is taken by anyone to whom the task is delegated".

45. It is clear from this passage that, while in general terms a person is not vicariously liable for the torts of his or her independent contractors, there are exceptions and these exceptions include the negligence of the employer, nuisance and damage by force.

46. Alternatively, LCC submits that if the Court holds that LCC is vicariously liable for the wrongdoings of RPS and Midland, LCC is entitled to a full indemnity from those parties (having served a notice of contribution and indemnity upon RPS and Midland), on the basis that each of those parties were in breach of their contractual obligations to " exercise all reasonable skill, care and diligence in the discharge of the duties agreed to be performed by them". As far as RPS is concerned breach of contract is evidenced by the eight failures alleged by LCC against RPS referred above.

LCC submissions regarding Midland
47. As far as Midland is concerned, LCC relies on the same legal principles as in the case of RPS insofar as it is submitted on behalf of LCC that it cannot have liability for the actions of its independent contractor, in this case Midland, and also that Midland was in breach of its contract with LCC in the following ways:

1. Failing to identify the location of site D20 on a map (as distinct from the photograph superimposed on the drawings attached to the contract);

2. Being unaware of the boundaries of the construction site and that the plaintiffs' house was outside the same;

3. Failing to investigate the planning notice clearly displayed on the site prior to demolition;

4. Failing to investigate extensive works clearly visible on site prior to proceeding with demolition.

48. Furthermore, in entering upon and demolishing the property of the Plaintiffs, Midland committed a trespass upon the property of the Plaintiffs for which LCC cannot be held liable.

49. All of the above failures alleged by LCC against Midland, in the submission of LCC, constitute negligence and breach of contract on the part of Midland.

RPS submissions regarding LCC
50. For its part, RPS submits that but for certain errors and omissions of LCC, for which RPS has no responsibility, the plaintiffs' house would not have been demolished, and RPS submits that LCC bears sole responsibility for the following four causative failures, which I will, as with the corresponding submissions of LCC, follow with my own observations:

1. "The first demolition list to include plot 156a originated in LCC."

This is correct; it was included in the list of properties identified for demolition and sent by Mr. Boland to Mr. Barry on 19th January. Interestingly however, when Mr. Barry prepared the draft demolition contract, he did not include this plot. Regrettably, the Court did not have the benefit of receiving evidence from Mr. Barry, but it seems like a reasonable inference to draw that the omission by Mr. Barry of plot 156a from the first draft of the demolition contract, notwithstanding that it was included in the list submitted by Mr. Boland in January, was deliberate. That begs the question therefore as to why Mr. Barry would have proceeded to include it, without discussion with Mr. Boland, in the next draft of the demolition contract, following receipt of Mr. Boland's communication of 7th February, 2006.

2. "LCC made the first association between the plaintiffs' house and plot 156a when employees of LCC photographed the plaintiffs' house and labelled it Lancelot Ryan plot 156a."

In so far as LCC may explain this by relying upon the CPO schedule, RPS submits that this is not a good explanation for the following reasons:

(1) The plaintiffs' house is at a different location than plot 156a as identified on the CPO map;

(2) The plaintiffs' house (as photographed in 2004) was not derelict and;

(3) At the relevant time there were personnel within LCC who knew there was no structure above ground at plot 156a (Mr. Ciaran Hegarty and Ms. Deirdre Clarke)

It is undoubtedly correct that the Council must bear full responsibility for taking a photograph of the plaintiffs' house and labelling it as it did. Nobody could have predicted however that this error, which occurred in 2004, would have the consequences that it ultimately did.

3. The instructions given by Mr. Boland to Mr. Barry to include plot 156a on the list of the properties to be demolished, coupled with the description of plot 156a by reference to the photograph of the plaintiffs' house. RPS submits that but for this email, the plaintiffs' house would not have been demolished and this is clearly correct.

4. RPS further submits that there was a significant and inexplicable break down of communication between Ms. Clarke and Mr. Boland regarding the ESB disconnection and RPS relies upon the admission by Mr. Boland that had there been better communication between Ms. Clarke and himself, the disconnection of electricity at the plaintiffs' house would not have occurred and the plaintiffs' house would not have been demolished.

51. Counsel for RPS argues that causation falls to be determined on the basis of the "but for" test *i.e.* that the plaintiffs' property would not have been demolished but for the clear instruction of LCC to demolish the same. They argue that that establishes factual causation as against LCC and that, provided that none of the acts or omissions of RPS amount to a *novus actus interveniens*, legal causation is also established as against LCC.

52. As it has been pointed out above, counsel for LCC has argued that the various omissions of RPS set out above constitute a *novus actus interveniens* thereby shifting legal causation from LCC to RPS and in this regard counsel relies on the decisions of the Supreme Court in the cases of *Conole v Redbank Oyster Company* [1976] I.R.191 and *Crowley v AIB* [1987] I.R. 282. Those cases are clear authority for the proposition that an original wrongdoer may escape liability in circumstances where an intermediate handler ignores a defect or a danger and subjects the person ultimately injured to that known risk. Counsel on behalf of RPS submits that none of the acts of RPS could be considered in law to be a *novus actus interveniens*. Counsel submits that in order for an intervening act to constitute a *novus actus interveniens* the following must be established:

(1) Foreseeability:

> Where the intervening act was foreseeable by the original actor. Counsel cites the cases of *Smyth v. Industrial Gases (IFS) Ltd*. [1950] 84 I.L.T.R. 1 and the more recent cases of *Breslin v. Corcoran* [2003] 2 I.R. 203 and *Hayes v. Minister for Finance* [2007] 3 I.R. 190 in support of this proposition. I agree with counsel's submissions in this regard i.e. that the authorities clearly establish that where an intervening act is foreseeable then it will not constitute a *novus actus interveniens*. The position has not changed since Maguire CJ said in *Smyth v. Industrial Gases (IFS) Ltd*.:"
>
> "The question as to whether an intervention of a third party should be regarded as breaking the chain of causation depends on whether, in the circumstances of the case, the defendants ought reasonably to have foreseen that such an intervention might take place … putting it in another way, the person guilty of the original negligence cannot escape liability by showing that there was an intervention by a third person, if it be shown that he ought reasonably to have foreseen that there might be such an intervention, and to have foreseen, if such interventions occurred, that injury would result."

Counsel for RPS also cited Kearns J. (as he then was) in *Hayes v. the Minister for Finance* [2007] 3 I.R. 190: "if the third party's act is intended by the original wrongdoer, or is as good as programmed by him, or if it is an inevitable response to the defendants act or is very likely, then the original defendant is still considered to be the operative cause in law. The third party's intervention in these circumstances is not a *novus actus* which will break the chain of causation between the plaintiff's damage and the defendant's conduct".

(2) Knowledge:

> Secondly, counsel on behalf of RPS submits that in order for an action to constitute a *novus actus interveniens*, it is also necessary that the original negligence must be known to and disregarded by the intervenor who proceeds and subjects the plaintiff to the known risk arising out of the original negligence. In *Conole v. Redbank Oyster Co. Ltd.* [1976] 1 I.R. 191, the defendant put a boat to sea, laden with passengers, knowing that the vessel was not seaworthy and consequently the Supreme Court found that the negligence of the third party manufacturer of the vessel (Fairway) was not the cause of the accident that ensued. As Henchy J. stated the fact that:
>
> > "the defendants put to sea at all with passengers when they knew the boat to be dangerously unseaworthy meant that the defendants were consciously undertaking the primary responsibility if an accident happened …"

53. Similarly, in the case of *Crowley v. AIB and O'Flynn* [1987] 1 I.R. 282 a case in which the plaintiff sustained serious injuries while playing on a unguarded rooftop owned by the first named defendant, and designed by the second named defendant, the court held that the negligent omission of the first named defendant, in taking no steps to prevent children from playing on the rooftop when they were aware of that activity, led to a finding that the link between the plaintiffs' injury and the architects' negligence was broken by the fact that the bank knew that boys regularly played on the unguarded roof.

54. Accordingly, counsel for RPS submits, that not only was damage to the plaintiffs property foreseeable from the time that Mr. Boland directed the inclusion of the plaintiffs' property in the demolition contract, RPS was unaware that this was an error and consequently the subsequent inclusion of the plaintiffs' property in the demolition contract prepared by RPS cannot constitute a novus actus interveniens and that legal causation rests with LCC, by reason of its own negligence in directing the inclusion of the property in the demolition contract.

RPS submissions regarding Midland

55. It was submitted on behalf of RPS that Midland bears sole contractual responsibility for a series of errors without which the plaintiffs' house would not have been demolished. Specifically it was submitted that Midland was responsible for the following four causative failures:

> 1. Failure to notify LCC of any "ambiguity, discrepancy, error or omission in or between the tendered documents" in accordance with its contractual obligations. In this regard the evidence established that Mr. Regan had noticed that the condition of the property was very different to its condition as shown in the photograph included in the demolition contract.
>
> 2. Midland was in breach of its obligation to LCC under the contract to be thoroughly acquainted with the conditions of the site and RPS relies upon the same grounds as does LCC in this regard i.e. its failure to identify the correct location of Plot D20; its failure to ascertain the boundaries of the site; its failure to notice the planning notice erected at the site and its failure to notice or take any action in relation to the works visibly underway within the site.

56. It was further submitted that Midland was obliged to notify the engineer under the contract immediately upon becoming aware of any ambiguity, discrepancy or other fault in or between the contract documents and that it failed to confine its activities to the site as defined in the demolition contract.

57. Furthermore RPS submits that as a matter of fact Midland should have been familiar with the site having already carried out the hedge clearance contract and that it therefore had or should have had "on the ground" knowledge of the site boundaries.

58. Midland was under a contractual obligation to confine its activities to the site (as defined in the demolition contract).

59. Midland did not take issue with the withholding of payment due to it by LCC for the demolition of the plaintiffs' property.

Midland Submissions

60. It was submitted on behalf of Midland that it could have no liability to the plaintiffs, or for that matter, to LCC or RPS on the following basis:-

> 1. Long before LCC and Midland entered into the demolition contract, LCC and RPS had control and responsibility for identifying properties for demolition, acquiring ownership of the same and for communicating with owners or occupiers thereof;
>
> 2. There was a consensus among both RPS and LCC and all of LCC's other contractors, before and after contracting with Midland, that the plaintiffs' property was to be demolished;

3. Midland had no responsibility or involvement in the creation of the error whereby the property of the plaintiffs' was included in the drawings for the demolition tender and contract;

4. There wass no contractual obligation on Midland to set about correcting long standing errors or identifying ownership of property or obtaining the consent of occupiers to demolition;

5. Other contractors were also directed to the plaintiffs' dwelling house, i.e. the architectural history consultant, the safety consultant, the asbestos surveyor and the ESB. Midland attended on site to carry out the demolition upon being informed of the time for demolition by the architectural historian;

6. At any time up to the carrying out of the demolition, LCC could have excluded the property of the plaintiffs from the demolition contract.

Analysis and Conclusions

61. It was submitted on behalf of RPS that the court should approach liability on the basis of the "but for" test. Counsel submitted that factual causation is established against LCC on the basis that the plaintiffs' house would not have been demolished but for the instruction given by Mr. Boland to include plot 156a in the list of properties to be demolished.

62. As to legal causation, counsel for RPS submitted that unless the acts or omissions of RPS amount to a *novus actus interveniens*, thereby breaking the chain of causation between the instruction of LCC and the loss sustained by the plaintiff, then legal causation is also established as against LCC.

63. I believe that it is clear that there was no single act or omission or indeed any combination of acts or omissions on behalf of RPS that could in this instance be regarded as a *novus actus interveniens*. From the moment that Mr. Boland directed the inclusion of plot 156a in the demolition contract, by reference to the photograph of the plaintiffs' property, it was entirely foreseeable that this would result in just that and the subsequent demolition of the plaintiffs' property. I should also say at this point that in my opinion there is no doubt at all but that what Mr. Boland said in relation to plot 156a was indeed a direction and not a comment or an observation. I fail to see how the words "add in Lancelot Ryans' property", coupled with the description of that property by reference to the photograph enclosed with Mr. Boland's response to the draft demolition contract, could be construed otherwise.

64. While it is argued on behalf of LCC that the causative connection between the LCC instruction and the demolition of the plaintiffs' house was broken by "not one, but by a number of intervening negligent acts on the part of RPS … each one of which, if they had not occurred would have avoided the accidental demolition of the plaintiffs' house," there is no escaping the fact that the direction given by Mr. Boland made it entirely foreseeable that the damage which was caused to the plaintiffs' property would occur. And so therefore one of the essential ingredients of a *novus actus interveniens i.e*. that the damage caused should be unforeseeable is absent in this case. In McMahon and Binchy, *Law on Torts*, (4th Ed., 2013)at para. 2.79(3) consideration is given to the possibility that there can be a *novus actus interveniens* even where the damage caused is foreseeable, but this appears to arise only in the most extreme of cases:

> "In *Lamb v. Camden LBC* [1981] Q.B. 625, Watkins LJ described the squatters' acts as "unreasonable conduct of an outrageous kind" when he held that the defendant wrongdoer could not be responsible for it. In *Perl (Exporters) Ltd. v. Camden LBC* [1983] 3 W.L.R. 769, the act of thieves, interposed between the defendants' conduct and the plaintiff's injury, meant that the defendants were not liable. If the intervener's act, however, is merely careless, negligent, or perhaps even grossly negligent, it may not be considered sufficiently strong to break the chain of causation between the original defendant and the plaintiff's injury, although much will depend on the facts of the case."

65. Moreover, another essential ingredient in establishing a *novus actus interveniens* is absent in this case i.e. that of knowledge of the original negligence. RPS did not know that Mr. Boland's direction was erroneous.

66. It does not however, follow that, simply because I have found that the conduct of RPS does not amount to a *novus actus interveniens*, that legal causation is established as against LCC or against LCC alone. I say this for two reasons. Firstly, liability in this case has to be considered in the light of the contractual relationship between the parties. LCC claims that both RPS and Midland failed to comply with specific contractual obligations that each had undertaken to LCC.

67. Secondly, I think that it is abundantly clear that the damage caused to the plaintiffs' property was not the result of any single act *i.e.* the designation of plot 156a as a derelict house and land in the CPO, or the direction by Mr. Boland to include the plaintiffs' property in the demolition contract, but rather was a consequence of a series of acts and omissions in which each of LCC and RPS played a part. In *KBC Ireland Plc. v. BCM Hanby Wallace (Affirm)* [2013] IESC 32 Fennelly J. said:

> "Questions of causation often present difficult problems of analysis. In one sense, everything can be a cause even of remote events. Events have direct and indirect causes. The law does not usually recognise a mere causa sine qua non (sometimes called "but for" causation) as a sufficient basis for the imposition of liability on a defendant. Many acts, even if negligent, are too remote to provide a just basis for imposition of liability. In some cases, the law resorts to the concept of *novus actus interveniens*."

68. In this case however, the concept of *novus actus interveniens* is not in my view applicable (for the reasons given above) and does not assist in resolving the question of liability. It is probably helpful at this point to sum up the chain of events that led to the demolition of the plaintiffs' dwellinghouse, and the parties responsibility for each:

1. The designation of plot 156a as a derelict house and land in the schedule to the CPO published in September 2004. Mr. O'Donovan of RPS was responsible for this, but only did so after consultation with Mr. Hegarty of LCC.

2. The taking of a photograph of the plaintiffs' dwellinghouse by either by Mr. Linehan or Mr. O'Keeffe of LCC, also in 2004, in the mistaken belief that this was plot 156a, and the labelling of this photograph with the description 156a. This belief flowed from the designation of plot 156a as a derelict house and land in the schedule to the CPO, in circumstances where there was no other property matching that description in the vicinity of plot 156a.

3. The preparation, in January 2006, by Mr. Boland of LCC, of a spreadsheet of properties to be demolished, to include plot 156a.

4. The submission of questions, observations and directions by Mr. Boland of LCC to Mr. Liam Barry of RPS, on 7th February, 2006, including a direction to add plot 156a to the list of properties to be demolished and the submission of a photograph of the plaintiffs' property describing the same as plot 156a.

5. The lack of familiarity of the resident engineers with the precise boundaries of the CPO site, leading to Ms. Jennifer Conway of RPS to confirm to Mr. Egan of Midland that the plaintiffs' house was to be demolished.

6. The failure of the resident engineers to query why works were being carried out on the plaintiffs' dwellinghouse, having noticed the same, in circumstances where at least one of the them, Ms. Conway considered that the house was designated for demolition. This is in contrast to Ms. Clarke of LCC, who upon observing these works, checked to ensure that they were not being carried out upon property being acquired by LCC.

7. A breakdown in communications between Mr. Boland and Ms. Clarke of LCC leading to a disconnection of electricity supply from the plaintiffs' premises. Had Mr. Boland realised what Ms. Clarke already knew i.e. that there was no house located and no electricity supply to plot 156a, then this would not have occurred and nor would the plaintiffs' property have been demolished.

69. It follows from the above, that neither Mr. Boland nor Mr. Barry were sufficiently familiar with the site boundaries and, at least in Mr. Boland's case, with the list of properties correctly identified for demolition in the EIS. Indeed, Mr. Boland confirmed in evidence that he did not even refer to the EIS which was the primary document for identifying the properties for demolition. It is possible that Mr. Barry was sufficiently familiar with this list and construed Mr. Boland's direction as a new instruction to include an additional property to that list, but that seems very unlikely because he was told that the house was in fact the property located at plot 156a and appears to have accepted that to be the case. So it seems probable that Mr. Barry too was unfamiliar (at least at the time of his dealings with Mr. Boland) with the location and physical description of the properties to be demolished as set out in the EIS. Not only that, it is probable that at least part of the reason he accepted Mr. Boland's direction without question was the description in the CPO of plot 156a as a derelict house and land, which description is of course attributable to RPS.

70. It is apparent from all of the above that a variety of acts and omissions of LCC and RPS led to the demolition of the plaintiffs' property. It would be in my view to be wrong to attribute the demolition of the property to a single act or omission of any of the parties.

71. It goes without saying that the plaintiffs' house should not have been demolished. Each of the defendants played a role in its demolition; LCC as the developer of the scheme, RPS as the consultants advising the developer on all aspects of the scheme, including the demolition contract and Midland as the demolition contractor. In my opinion there can be no doubt but that all of the defendants owed a duty of care to the plaintiffs to ensure that the scheme was constructed without causing damage to the plaintiffs' property which abutted the site on which the scheme was being constructed, but no part of those lands were being acquired. In that each of the defendants played an active role in the demolition of the plaintiffs' property, all of the defendants are concurrent wrongdoers within the meaning of Section 11 of the Civil Liability Act, 1961 ("The Act"). That section states:

"11.—(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.

2) Without prejudice to the generality of subsection (1) of this section—

(a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;

(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

(3) Where two or more persons are at fault and one or more of them is or are responsible for damage while the other or others is or are free from causal responsibility, but it is not possible to establish which is the case, such two or more persons shall be deemed to be concurrent wrongdoers in respect of the damage.

(4) – (6) are not relevant for the purposes of these proceedings."

72. "Wrongdoer" is defined in Section 2 of the Act as meaning a person who commits or is otherwise responsible for a wrong. "Wrong" means a "tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible and whether or not the act is also a crime, and whether or not the wrong is intentional." There is no doubt at all that the plaintiffs' property was demolished as a result of a wrong in which each of the defendants played a part with varying degrees of responsibility.

73. Section 21 of the Civil Liability Act 1961 states:

"21.—(1) Subject to the provisions of this Part, a concurrent wrongdoer (for this purpose called the claimant) may recover contribution from any other wrongdoer who is, or would if sued at the time of the wrong have been, liable in respect of the same damage (for this purpose called the contributor), so, however, that no person shall be entitled to recover contribution under this Part from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

74. It is clear from section 21(2) that the Court may apportion liability amongst the parties on a just and equitable basis having regard

to the degree of fault of the various parties in the occurrence of the event that gave rise to the damages of the plaintiffs, and also that the Court may exempt any person from liability to make a contribution. In the case of *ACC Bank Plc. v. Brian Johnston, practising under the style and title of Brian Johnston & Co. Solicitors v Joseph Traynor and Seamus Mallon third parties,* [2011] IEHC 501, Clarke J. considered how the Court should approach the question of "fault" under section 21 of the Act. He cited with approval the interpretation of that word as it appears in section 34 of the Act by the Supreme Court in the case *O'Sullivan v. O'Dwyer* [1971] I.R. 275 where Kenny J. said "it is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions of the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment." While *O'Sullivan v. O'Dwyer* was concerned with contributory negligence, Clarke J. was satisfied that the interpretation of the word fault was equally applicable where concurrent wrongdoers are concerned.

75. Clarke J. also cited Keane J., as he then was, in the case of *Iranród Éireann v. Ireland* [1996] 3 I.R. 321, at 358 in which he stated:-

> "However difficult the consequences may be of using blameworthiness as the exclusive criterion for apportioning liability either in cases of contributory negligence or contribution between concurrent wrongdoers, these are less than those caused by any attempt to make a causation the criterion".

76. Noting himself that "it is clear, therefore, that, in Irish law, the Court does not attempt to disentangle the causal effect of the wrongdoing of two concurrent wrongdoers", Clarke J. went on to do an analysis of the negligence of each of the parties involved. He went on to state "within each category of potential wrongdoing … there is a range or gradation of degrees of blameworthiness. As pointed out earlier, negligence can range from mere inadvertence to falling short of an appropriate standard which is highly culpable." In that particular case, having analysed the respective negligence of the defendant and the third party, he came to the conclusion that the defendant's negligence could be placed towards the midrange of the scale of solicitor's negligence, whereas the deliberate breach of an undertaking on the part of the third party solicitor had to be considered as being more serious than an a act of negligence and consequently he considered that in the scheme of blameworthiness, it was appropriate to apportion blame as between the parties as to 70% in the case of the third party who failed to comply with an undertaking, and 30% in the case of the defendant who he found to have acted within the midrange of negligence.

77. Applying these principles, I will deal first with the liability of Midland. Midland were shown a photograph of the property and were asked to tender a price for its demolition, (along with other buildings to be demolished). Midland representatives were taken on a tour of the site by Ms. Jennifer Conway, resident engineer of RPS and it was confirmed that the plaintiffs' property was to be demolished. Following a safety survey of the property, Midland were requested to organise the removal of asbestos from the property which they did. Midland were requested to attend on site at the same time as the representative of Tobar Archaeologists on the date on which the property was scheduled for demolition.

78. It was suggested that Midland should have been able to identify from the maps furnished that the plaintiffs' property was not within the boundary of the map furnished with the demolition contract. I do not accept this submission for several reasons. Firstly, Midland are demolition contractors and not consulting engineers. While they were contractually obliged to familiarise themselves with the site, I believe they discharged this obligation by touring the site with the resident engineer and confirming the structures to be demolished. Had there been any obvious ambiguities, I believe Midland would have been under an obligation to clarify same, but given the fact that they were given a picture of the structure and had it confirmed to them by a resident engineer of RPS and the other factors above, I do not think it would have been reasonable to expect Midland to do anything further to confirm that the plaintiffs' dwellinghouse was actually within the site boundaries as shown on the CPO map. Furthermore, this would in any case have been difficult for Midland to do because the super-imposition of the photographs of the plaintiffs' house on the map furnished with the demolition contract was done in such a way as to eliminate from the maps supplied the actual location of the plaintiffs' house.

79. Secondly, it was submitted that there was sufficient evidence of recent works on the plaintiffs' property to require Midland to pause before demolishing the structure and to make appropriate enquiries as to who may have been carrying out the work. The most obvious of those works were the removal of the roof structures and the gable walls of the house and outbuildings. Mr. Egan stated in evidence that he assumed that the former owners of the property i.e. the plaintiffs were extracting materials from the site in order to realise their salvage value. In my view this is a perfectly rational explanation and I think it is also striking that the representative of Tobar Archaeology saw fit for the demolition to proceed also, or at least there was no evidence before the Court that the Tobar representative thought otherwise.

80. While there were also works of drainage and preparatory works for the laying of a carparking surface, these did not attract Mr. Egan's attention. However, Mr. France in his evidence stated that he visited the site on between five and ten occasions and he did not notice any works of this kind either.

81. It was also suggested that Mr. Egan should have seen the planning notice on the site of the plaintiff's dwellinghouse, which he denied seeing on the day of the demolition. He also said in evidence that even if he had seen it, he would have ignored the notice. Planning notices can remain on properties for a long time after they have any relevance. And while the evidence given in this case was that the notice was recent, it does not follow that it would have attracted any more attention than an older planning notice. But in any case, given the somewhat overwhelming character of all of the other instructions and information given to Mr. Egan, and his interaction with the RPS resident engineers and other advance contractors, I do not believe that Mr. Egan was given any reason to pause before proceeding with what he believed was his contractual obligation to demolish the structure on the site.

82. It was further submitted, on behalf of RPS, that since Midland had also been awarded the contact for the removal of unwanted hedges on lands acquired for the scheme, and since it had performed that contract in the months leading up to September, 2006, that it would have been familiar with the site boundaries including those in the vicinity of the plaintiffs' house. I do not accept this submission for two reasons. Firstly, it assumes that the same personnel were involved for Midland in performing the hedge contract and the demolition contract, whereas in fact Mr. Egan confirmed that performance of the hedge contract of Midland was undertaken by his colleague, Mr. Austin. Secondly, it also assumes that in performing the hedge contract, Midland would have observed the site boundaries and would therefore have learned that the plaintiffs' house was outside of the site. This is clearly incorrect because the site boundaries were not defined by a fence line in the vicinity of Plot 156a/the plaintiffs' house and this was confirmed by Mr. France of RPS.

83. It was also submitted that the fact that Midland did not pursue LCC for the payment due to it by LCC in connection with the demolition of the plaintiffs' property was an admission of wrongdoing. Mr. Egan in his evidence said it would not have been a cost effective exercise for him to pursue LCC for the amount due, which was €3,500, and this is, to me, a good answer to that submission.

84. For all of these reasons, I do not believe that Midland was negligent in proceeding to demolish the plaintiffs' property and that it

would not be appropriate to attribute any blame to Midland for doing so. Accordingly, I am satisfied that Midland is entitled to a full indemnity from LCC and RPS in respect of any liability it may have to the plaintiffs in these proceedings.

85. As to LCC and RPS, while each were negligent in acts and omissions that resulted in the demolition of the plaintiffs' property, the significant distinction between them is that RPS was retained by and paid for its services by LCC. Therefore RPS not only had a duty of care to the plaintiffs but it had separate duties and obligations to LCC under the terms of the multiple framework contract of 25th July, 2000 and the model form of agreement between a client and consulting engineers which applied to the scheme. While LCC, as with most road authorities, would have expertise of its own in relation to the undertaking of road improvement schemes and the statutory processes associated with such schemes, the very reason that it retained RPS was because of the scale and complexity of this particular scheme which meant that LCC required external assistance from experienced and well resourced consultants such as RPS. Of its very nature what that means is that LCC was reliant upon RPS to undertake its services in a competent and diligent manner and part of this obligation necessarily means being alert to and correcting any errors that may be made by LCC in its interaction with RPS in the implementation of the scheme. Furthermore, some of the very factors that contributed to the circumstances that resulted in the demolition of the plaintiffs' property had previously been raised by LCC in correspondence with RPS and while those issues may have been responded to satisfactorily by RPS at the time (in correspondence at least, whatever about on the ground), nonetheless that correspondence should have served as a warning light to RPS that all was not as it should be on site.

86. While it is unnecessary, in the words of Clarke J. "to disentangle the causal effects of two concurrent wrongdoers", it is clear that each of LCC and RPS played their part in the events that unfolded. LCC gave a mistaken instruction to RPS, and RPS should have realised that the instruction was made in error, or should have raised queries or investigated it further in order to be satisfied that it was possible to implement the instruction before proceeding to incorporate it into the demolition contract, particularly in circumstances where the first draft of the demolition contract prepared by RPS had correctly identified the properties to be demolished.

87. In determining blameworthiness as between LCC and RPS the Court must have regard to the contractual relationship between RPS and LCC and furthermore it should take into account the fact that some of the very matters that contributed to the circumstances that resulted in the demolition of the plaintiffs' property had previously been raised by LCC in correspondence with RPS. Against that background, it is my view that RPS failed in its duty to LCC to provide its services to LCC with all reasonable care and diligence. But even if RPS considered that it had dealt satisfactorily with the earlier concerns expressed by LCC in correspondence, RPS in any case failed in its duty of care under the terms of its contract with LCC, in failing to supervise the site properly, in failing to ensure that the resident engineers were sufficiently familiar with the boundaries of the site in failing to ensure the site boundaries were complete in the vicinity of the plaintiff's property and in failing to check that the premises shown in the photograph provided by Mr. Boland was located at plot 156a, or that it was one of the premises scheduled in the EIS for demolition.

88. For its part however, there can be no doubt but that LCC was negligent in instructing RPS to include plot 156a in the demolition contract; in incorrectly identifying plot 156a as the plaintiffs' property, and also in failing to ensure that its personnel who were working on the project were sufficiently familiar with site boundaries and project documentation, such as the material assets part of the EIS which included the list of properties to be demolished. While LCC has submitted that it cannot be held vicariously liable for the acts of its independent contractors, I do not think that this defence avails LCC in circumstances where it has itself been found to be negligent. In considering blameworthiness, it is in my view just and equitable to apportion a measure of responsibility for the damages suffered by the plaintiffs to LCC also.

89. Having regard to the separate duties owed by RPS to LCC under the terms of the multiple framework contract and the model form of agreement, I think it appropriate to apportion blame as between LCC and RPS in the proportions of 30% to LCC and 70% to RPS for the purposes of section 21(2) of the Civil Liability Act, 1961. In view of my earlier finding that Midland is entitled to a full indemnity from LCC and RPS, I hereby exempt Midland from liability to make any contribution to the plaintiffs' damages. It follows from the above that the amount payable under the terms of the settlement agreement between the parties, including the plaintiffs' costs shall be paid as to 70% by RPS and 30% by LCC.