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THE HIGH COURT

1982 No. 10930p

BETWEEN:

JOHN J. HARTE AND ANOTHER

PLAINTIFFS

AND

[ EDWARD SHEEHY ]

U.C.C.

DEFENDANT

AND

MAURICE NEVILLE PRACTISING AS  
R. NEVILLE AND CO. SOLICITORS

FIRST-NAMED THIRD PARTY

AND

THE AGRICULTURAL CREDIT CORPORATION

SECOND-NAMED THIRD PARTY

Judgement of Mr. Justice Costello delivered the 14th day of  
March 1986.

PART 1

THE PLAINTIFFS' CLAIM

On the 6th of February 1979 the Plaintiffs signed a contract to purchase for the sum of £175,000 an 86 acre farm owned by the Defendant at Skeaf in West Cork. The lands were registered lands and were contained in Folios Number 9044 and Number 9045 of the County of Cork. The Defendant was registered as full owner and he stated in his contract that he held the lands "in fee simple with an absolute title". But there were two charges registered on each Folio; the first charge dated the 27th of August 1965 relating to a fixed sum of £4,000 and the second charge dated the 1st of February 1974 being a charge "for all future advances". The Agricultural Credit Corporation was the owner of both charges.

The Plaintiff paid a deposit of £40,000 on the day the contract was signed and on the next day his Solicitor sent to the Defendant's Solicitors Requisitions on Title. At Requisition 56 it was stated:

"Vendor must prior to closing have charges or burdens noted at Entries 11 and 14" (that is the two charges in favour of the ACC) "respectively on Folio 9044 County Cork released and cancelled on the Folio".

At Requisition 57 this requirement was repeated in relation to Folio 9045. On the following day the Defendant's Solicitors replied to both these Requisitions as follows:-

"The charges on Folio will be redeemed by Vendor and cancelled off Folio but Purchaser will accept personal undertaking by Vendor's Solicitors to do so and the Discharge of these burdens from Vendor's Folio shall not delay or postpone completion of the sale".

The Plaintiffs Solicitors also enquired about the Land Certificate asking (at Requisition 59) "are such Certificates the subject matter of any Equitable Deposit or lien"? They were told in reply that

they were "in custody of ACC and was not subject to any other mortgage by way of deposit or otherwise".

On the 9th of February 1979 the Defendant's Solicitors sent on the executed transfers and the original Land Certificates. By separate letter they wrote as follows:-

"In consideration of the closing of the above sale we hereby personally undertake to let you have sealed Discharge of ACC immediately same is available from the ACC. We also undertake to furnish you with receipts for outgoings up-to-date".

It will be noted that the undertaking given in this letter was merely one to hand over the sealed Discharge immediately it was made available whilst the Reply to the Requisitions had contained an unequivocal agreement that the Vendor would redeem the charges and a personal undertaking from the Vendor's Solicitors that he would do so. (In my view both the Vendor and his Solicitors remained bound by the agreement and the undertaking given in the Reply.)

The closing date was the 9th of March. On that date the Plaintiffs Solicitor sent on the balance of the purchase price (less £3,000 relating to a contingent liability to the Department of Agriculture) stating:-

"With much concern and entirely on the assurance and trust of your most trustworthy Mr. Neville we now release to you £132,000 of the balance of the purchase monies herein".

In July of that year the remaining £3,000 was paid over to the Defendant's Solicitor.

Notwithstanding the agreement and undertaking the charges remained on the Folio and there began from the 18th of January 1980 a long and inconclusive correspondence between the Plaintiffs Solicitors and the Defendant's Solicitors in which the Plaintiffs Solicitors sought in vain for their release. The first letter of the 18th of January was ignored as was a further letter of the

24th of April. A third letter of the 2nd of May was replied to with the laconic statement that the "Defendant is obtaining a loan from the ACC on his farm at Stradbally" and promising "the moment we receive a cheque we will redeem the old charge on his holding at Skeaf". This referred to a farm at Stradbally which the Plaintiffs knew the Defendant had purchased at the time of the sale of his Skeaf lands. Letters of the 7th of May, 6th of June, 30th of June, 8th of July, 7th of November, 26th of November and 1st of December were not answered. The correspondence resumed again on the 9th of September 1981. The parties Solicitors had been in touch over the telephone and on the 14th of September the Defendant's Solicitor wrote stating that:-

"Discharges on this matter are at present lodged with the ACC and upon receipt of same we will forward immediately to you".

This, however, did not occur and on the 13th of April 1982 the correspondence was again resumed in the course of which the Defendant's Solicitor explained the efforts that were being made to obtain the release of the charges. All these efforts, however, proved unavailing; the charges remained on the Folio and in November of 1982 these proceedings were instituted claiming specific performance of the agreement to discharge the charges and damages for breach of contract.

The Plaintiffs Solicitor had relied completely on the undertaking given to him by his colleague and at the time of closing he was unaware of the amounts due to the ACC captured by the two charges. The evidence at the hearing establishes a most serious, indeed, disastrous situation. The Defendant had entered into six different loan transactions with the ACC and in respect of five of them he had owed the ACC on the 30th November 1978 the sum of £29,840.81.

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He entered into the sixth (a bridging loan of £45,000) in December 1978. One loan was captured by the 1965 charge, all the others by the 1974 charge. On the 11th of February of this year the total sums owing on these six loans and charged on the Plaintiffs lands had escalated to the staggering sum of £188,937.97. In addition there is currently a continuing daily liability of £56.74 (or about £20,700 per annum) for interest also charged on the lands.

A defence with a denial of liability had been filed but at the hearing Counsel on the Defendant's behalf admitted liability to pay damages for breach of contract having accepted that his client was bound by the express agreement to discharge the charges. ( It was accepted by the Plaintiffs Counsel that the Defendant was not in a financial position to pay off the debt due to the ACC and thus obtain a release of the charges and accordingly could not specificall perform his contract. So damages in lieu of an order for specific performance were claimed. The Defendant had joined two Third Parties in these proceedings, his former Solicitors and the ACC and Counsel for all the parties were agreed that the Plaintiffs damages were to be measured by reference to the cost now of having the charges released, namely the sum £188,937.97 and an additional sum to be calculated at the rate of £56.07 per day from the 11th of February to the date of release. |

In addition to this head of damage Mr. Dempsey on the Plaintiffs behalf claimed damages for mental distress which both the Plaintiff and his wife had suffered. I propose deferring to a later point in this judgment my assessment of damages and my consideration of the relief to which the Plaintiff is entitled. I will turn instead to the Defendant's claims against the Third Parties and their claims

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for contribution and/or indemnity inter se.

PART 2

THIRD PARTY PROCEEDINGS

(I) Period January 1978 to March 1979

The Defendant's claim from an indemnity or contribution in respect of the damages he admits he must pay the Plaintiff brought against his former Solicitors is based on a claim that they acted negligently in the handling of his affairs. His claim against the ACC is based on an assertion of breaches of contract on their part. Both claims relate firstly to a period falling between the month of January 1978 and the month of March 1979 and I propose to examine the relevant events of this period firstly. Naturally the recollections of events which happened so long ago are infirm and although all witnesses were obviously trying to tell the truth not surprisingly there exists considerable conflicts in the evidence. Assistance however, is to be found from contemporary records and I will set out hereunder the findings of fact necessary to determine the legal issues that arise.

(a) Claim against Second-named Third Party, the ACC

(i) The Cashel farm

At the beginning of the year 1978 the Defendant conceived the idea of selling his farm and purchasing a larger one. At that time land prices in West Cork were particularly high and he was advised by this Auctioneer, Mr. Twomey, that he could purchase a much larger farm in another part of the country for

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the price which he would receive from a sale of his lands at Skeaf. Mr. Sheehy had had a number of dealings with the ACC over the years and was in good standing with them. In August 1965 he had received a term loan of £4,000; in February 1974 another term loan for £3,000; and in July 1975 he received what was called a "world bank loan" of £13,875. Towards the end of January or early February of that year he travelled with his wife to the Regional Offices in Cork of the ACC and met there a Mr. Cronin. Mr. Cronin was very helpful and indicated two things to the Sheehys, (1) that the ACC would consider lending them £70,000 made up to £40,000 to assist the purchase of a new farm and £30,000 as a development loan and (2) that the ACC would "transfer their existing loans" to the new farm (meaning thereby that the ACC would release the charges on the Skeaf lands in exchange for new charges on the lands to be purchased). At that time the Sheehys had in mind a farm in Cashel which was to be auctioned in March. Having visited it they returned to Mr. Cronin to discuss the possible purchase in greater detail and they received from him encouragement and advice about their proposed venture.

A formal application for a loan for £70,000 was forwarded to Mr. Kiernan O'Donoghue in the Skibbereen office of the ACC in the middle of February 1978. In that month he called out to see the Sheehys in their farm at Skeaf and discussed with them its value and their plans for purchasing the Cashel farm. He struck a note of caution with them pointing out the extent of their borrowing commitments if they were to carry out the proposed transaction. He made clear, however, that if it went through the charges in favour of the ACC on the Cork

farm would be transferred to the new farm. In his discussions with them he assumed that the total amount which would be owing to the ACC on the Cashel farm would be about £70,000. Mr. Sheehy had discussed the value of his farm with his Auctioneer and he expressed the view to Mr. O'Riordan that he thought it was worth between £180,000 and £200,000.

Mr. Sheehy attended the auction of the Cashel farm but failed to purchase it. Accordingly, on the 14th of March the application to the ACC for a loan of £70,000 was formally cancelled. The Sheehys were, however, left under the impression (a) that their existing loans could be transferred if they purchased a new farm and (b) that there would be what was termed a "development loan" available to them if they were to purchase a new farm.

(ii) The two new loans

At the time that Mr. Sheehy was considering the purchase of the Cashel farm he also applied for a £3,000 seasonal loan from the ACC. This was passed to Mr. O'Riordan early in February 1978 who sanctioned it. In April of that year he obtained a further term loan for £9,000. Thus from April 1978 there were five loan agreements in existence between himself and the ACC. The term loan made in 1965 had not been fully paid off and it was still subject to the 1965 charge. The other four loans were subject to the 1974 charge. The Sheehys were aware in the autumn of 1978 that they owed on foot of these five loans a sum in the region of £28,000. I will for ease of reference refer to these five loans as the "old loans" to differentiate them from the bridging loan to which



I will now refer.

(iii) The Bridging Loan for the Stradbally farm

The Sheehys renewed their attempt to find a bigger farm in the autumn of that year and with the help of Mr. Twomey they located a farm of about 146 acres near Stradbally, Co. Laois which was to be auctioned at that time. Although Mr. O'Riordan does not now remember it, I am satisfied that Mr. Sheehy 'phoned him to tell him about this farm, that he agreed to have someone from the ACC in the area to have a look at it, that he 'phoned Mr. Sheehy back to talk to him about its purchase. Whilst there was no binding commitment entered into between Mr. Sheehy and Mr. O'Riordan, Mr. O'Riordan again made it clear that there would be no difficulty in transferring what the parties referred to as the "existing loans" to the Stradbally farm.

Early in October Mr. Sheehy instructed his Solicitors (one of the Third Parties herein) in the matter and on Mr. Twomey's advice he decided to purchase the Stradbally farm before selling his own, seek bridging finance from a bank for this purpose and out of the proceeds of the sale of his farm pay back the bank. As a result of negotiations a verbal agreement to pay £175,000 for the Stradbally farm was reached. He believed that he would receive considerably more than this for his own lands and so would have sufficient funds after their sale to pay all the expenses involved in the transaction. The first thing that went wrong with his plans was his inability to raise bridging finance from a bank. And so he turned again to the ACC for help and was introduced by his Auctioneer to

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Mr. Timothy O'Donovan in the newly opened offices of the ACC in Bandon.

It is important to bear in mind that he was not now seeking a "land purchase loan" or a "development loan" from the ACC; what he wanted now was a short term loan (now popularly known as a "bridging loan") of £175,000 to enable him to buy the Stradbally farm which he confidently expected to be able to pay off within a short space of time when he had sold his own farm.

A meeting took place on the 18th of December 1978 in Mr. O'Donovan's office. Mr. and Mrs. Sheehy were there with their Auctioneer Mr. Twomey. Mr. O'Donovan was told of the price of the Stradbally farm, that Mr. Sheehy expected that the Skeaf lands would fetch about £200,000 and Mr. O'Donovan there and then agreed to recommend that a bridging loan of £175,000 would be granted to Mr. Sheehy. The urgency of the matter was however stressed and Mr. O'Donovan explained that it would not be possible to obtain sanction from Dublin for the loan of £175,000 and instead he recommended an application for a £45,000 loan (the amount of the proposed deposit on the purchase of the Stradbally farm) to be followed later by an application for the balance of the purchase price. Mr. Sheehy orally agreed that the money advanced would be repaid from the proceeds of sale of his Skeaf farm. During this discussion reference was made to the charges on the Skeaf lands and Mr. O'Donovan agreed that they would be transferred to the Stradbally farm. Mr. O'Donovan filled in the formal application form for £45,000 and Mr. Sheehy signed it.

Mr. O'Donovan and his colleagues in the ACC worked with considerable dispatch; the loan was sanctioned and a cheque for £44,797.7 issued. On the 21st of December Mr. Sheehy called into the Bandon office, signed an undertaking to sell his own lands within three months and he took away the cheque and the accompanying documents and went to his Solicitor. There he wrote a cheque for the deposit for the purchase of the Stradbally farm, signed the documents given to him by the ACC and signed the contract for the Stradbally lands.

By its letter of the 20th of December the ACC informed Mr. Sheehy that the loan of £45,000 had been sanctioned on certain terms, namely, the creation of a charge on Folios 9044 and 9045, relating to the Skeaf lands, the payment of interest at 17½ per cent per annum with half yearly rests, and a requirement that the loan be repaid out of the proceeds of the sale of the Skeaf lands or in any event not later than the 30th of June following. Mr. Sheehy agreed to these terms. Two documents marked "A and B" were attached to the letter. Document "A" contained an undertaking from the Defendant's Solicitor to retain the documents of title relative to the property and to comply with the requirements of the law agent of the ACC in relation to them. This undertaking was signed by the Defendant's Solicitor. There was also an undertaking to execute such documents as the ACC's law agent would require, and this was signed by Mr. and Mrs. Sheehy. Document "B" which was retained by the Defendant's Solicitor contained a copy of the Solicitor's undertaking and also instructions from Mr. and Mrs. Sheehy directing him, inter alia, to retain the documents of title relevant to their property. In the event

no new charge was executed by the Defendant in respect of this loan but this was because the loan was captured by the terms of the 1974 charge. As a result the sum of £45,000 together with the sums due on the five old loans were charged on the Skeaf lands.

On the 12th of January 1979 the next meeting between Mr. O'Donova and Mr. Sheehy took place. The auction of Mr. Sheehy's lands was not due until the end of the month and Mr. Sheehy had come into the Bandon office to sign a formal application for the balance of the loan he was to obtain. In the course of this discussion Mr. O'Donovan pointed out that he thought that a loan of £175,000 would not be sufficient for Mr. Sheehy's purposes and he suggested that Mr. Sheehy should now apply for one of £140,000 making the total bridging loan one for £185,000. Quite clearly Mr. O'Donovan realised that there would be expenses associated with the sale and in particular stamp duty on the purchase of the Stradbally farm. Whilst Mr. O'Donovan did not state how exactly he reached the figure of £185,000 it is probable that he had in mind the stamp duty payable as in fact this amounted to a sum of £10,500. In any event, Mr. Sheehy signed a formal application for a further bridging loan of £140,000. The evidence established that early in the month of February this loan was sanctioned by Head Office in Dublin. But for reasons which I will explain in a moment the money was never paid to Mr. Sheehy.

The auction of Mr. Sheehy's farm was due to take place on the 31st of January. Some short time before this Mr. Sheehy's Solicitor called into Mr. O'Donovan's office on behalf of

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another client but he availed of the opportunity to discuss Mr. Sheehy's affairs with him. Mr. O'Donovan quite explicitly confirmed to Mr. Sheehy's Solicitor that the ACC had arranged to give Mr. Sheehy the balance of the purchase price and that it would transfer the existing loans on his farm to the Stradbally farm. I am quite satisfied that this is all that Mr. O'Donovan said. No suggestion was then made that the £45,000 should be "transferred" to the Stradbally farm. At this point of time Mr. Sheehy was full of optimism about the price he was to get for his own lands and he certainly did not instruct his Solicitor to vary in any way the oral and written agreement which he had entered into for the repayment of the bridging loan out of the proceeds of sale of his Skeaf lands.

Unfortunately Mr. Sheehy's optimism was misplaced. The farm was withdrawn at auction and the best that Mr. Sheehy could do was to sell it a few days later to Mr. and Mrs. Harte, the Plaintiffs herein, for £175,000, the same price as that which he was required to pay for the Stradbally farm. After the abortive auction and early in the month of February Mr. and Mrs. Sheehy went into see Mr. O'Donovan. I think their recollection of what occurred at this meeting is not accurate. They realised that there would be no surplus available to them arising from the sale of their Skeaf farm and they went to see Mr. O'Donovan about the possibility of obtaining in addition to the bridging loan a "development loan" in respect of their Stradbally farm. Mr. O'Donovan made clear to them that the sale of the Skeaf farm should first be completed and that they should then go to the local ACC offices in

Portlaoise to see about a development loan. The Sheehys are clearly wrong in their recollection that there was an agreement to give them a development loan of £40,000. Furthermore, no question then arose of "transferring" the £45,000 bridging loan to the Stradbally farm.

I can usefully pause here in the narrative of events to summarise the principal features of the contract which early in the month of February existed between Mr. Sheehy and the ACC.

- (i) Mr. O'Donovan had agreed to recommend that the ACC would grant a "bridging loan" of £185,000 to Mr. Sheehy and Mr. Sheehy had orally agreed to repay it out of the proceeds of sale of his Skeaf farm. Part of this sum (namely £45,000) was formally approved and advanced (less certain charges) to Mr. Sheehy on the 20th of December 1978. He agreed in writing to repay this sum of £45,000 out of the purchase price of the Skeaf farm and in any event not later than the 30th of June 1979. He agreed that this sum should be charged on his lands at Skeaf; and in fact it was so charged under the terms of the 1974 charge.
- (ii) Interest was payable on the loan of £45,000 at the rate of 17% per annum with half yearly rests.
- (iii) The ACC formally agreed to pay the balance of the bridging loan, namely, the sum of £140,000 to Mr. Sheehy but did not in fact do so.
- (iv) The ACC agreed to "transfer" the existing loans to the Stradbally farm after it was purchased by Mr. Sheehy.

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There was thus an agreement by which -

- (a) Mr. Sheehy was not required to use any part of the purchase price of his Skeaf farm to pay off the debts due on the five old loans (amounting then to over £29,000).
- (b) The ACC agreed to execute a release of their two charges on Folios 9044 and 9045.
- (c) Mr. Sheehy agreed to execute a charge on his Stradbally land to secure the repayment of the amounts due on the five old loans.

I am quite satisfied that neither then nor at any later time was there any agreement that the ACC would grant a development loan of £40,000 or any other sum in respect of the Stradbally farm nor was there any agreement that the bridging loan of £45,000 would in lieu of being paid off from the proceeds of sale of the Skeaf lands be charged on the Stradbally lands.

(iv) The first breach of contract of the ACC

A strike occurred in the ACC's offices on the 14th of February 1979. Although formal approval of the loan of £140,000 had been given by Head Office a cheque had not been posted when the strike occurred and because of the withdrawal of labour of the ACC staff it was never sent to Mr. Sheehy. On the 16th of February Mr. O'Donovan (who was not on strike) called Mr. Sheehy's Solicitor on the telephone and explained to him that the cheque could not be sent and discussed how Mr. Sheehy could be helped in the critical situation he now was in as he was required to close his purchase the next day. Mr. O'Donovan agreed to write a letter which could be brought to a bank

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which would contain an undertaking by the ACC to lodge with the bank the proceeds of its loan when the strike was over and he wrote such a letter on the 20th of February by hand and sent it over to the Defendant's Solicitor. But this was of no avail and Mr. Sheehy was unable to find bridging finance from any other financial institution. He was now in an extremely difficult situation. His Solicitor had been able to extend the closing date of the Stradbally contract to the 17th of February but not beyond that date and interest at the rate of 17% per annum was payable in default of closing. His only means of paying the balance was to utilise the money which he was to receive from the sale of his own land but the closing date of this sale was not until the 9th of March.

Before the 9th of March a final discussion between Mr. Sheehy's Solicitor and Mr. O'Donovan took place. There is no doubt that at that time the ACC was in breach of contract for it had failed to make the loan available to enable Mr. Sheehy to purchase the Stradbally farm. It is pleaded in paragraph 5 of their defence in the Third Party proceedings in answer to Mr. Sheehy's plea that they had broken their contract to lend him £140,000, that "the Defendant had indicated to the second named Third Party that he did not require the same" and it is clear that reliance is placed on what occurred during this conversation to support this plea. I am quite satisfied that Mr. O'Donovan was told that the purchase of the Stradbally farm was now going to be effected from the proceeds of sale of the Skeaf farm but this was merely an explanation of what Mr. Sheehy was forced to do in consequence of the ACC's failure to honour their contract and did not amount to a rescission of the contract.



or a waiver of its breach. I am also quite satisfied that Mr. O'Donovan did not during this discussion agree in any way that the £45,000 loan would be transferred to the Stradbally farm nor did he confirm any agreement that there would be a development loan of £40,000 given to the Sheehys in respect of the Stradbally farm.

For reasons which I will explain in a moment Mr. Sheehy did not pay back the £45,000 loan to the ACC out of the proceeds of sale and the charges on the Folios were never released. But the situation would have been entirely different if the ACC had not broken its contract. Had the balance of the loan (namely £140,000) been paid as promised this would have been utilised to pay the balance of the purchase price of the Stradbally farm. There would have been no delay in this sale closing. The proceeds of sale of the Skeaf farm (£175,000) would have been available on the 9th March to pay off the bridging loan. It is true that there would have been a shortfall of about £10,000 (assuming that the extra £10,000 lent by the ACC was used to pay stamp duty on the transfer) but all the evidence suggests that at that time Mr. Sheehy was in good standing with the ACC and I do not think that the ACC would have refused to release their charges because of the shortfall. The Stradbally farm was ample security for their old loans (then standing at about £29,000) and, if necessary, a further charge of £10,000.

I conclude that the loan agreement was not rescinded prior to or after its breach; its breach was not waived; its non performance was not excused by the strike of the ACC's

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employees, and that had the breach not occurred the charges would have been released.

(b) Claim against the first-named Third Party, the Defendant's Solicitors

The misfortunes which dogged the Sheehys were not limited to the disappointing price which they received for the Skeaf farm and the strike in the offices of the ACC. In addition they were, I fear, poorly served by the Solicitor they had engaged to help them in the two transactions they were undertaking. I will now examine how the purchase and sale were handled on their behalf by their former Solicitors and in doing so consider not only the claim of negligence they have made against them but the plea of contributory negligence which they have raised in their defence.

(i) The Negligence of the Defendant's Solicitor

The Sheehys called early in the month of October 1978 and met Mr. Neville the Principal in the firm. They explained that they were proposing firstly to purchase the Stradbally farm and then sell their own. They told their Solicitor that they owed money to the ACC and I am satisfied (although Mr. Neville does not now remember this) that Mr. Sheehy mentioned the amount involved was approximately £27,000. He told Mr. Neville, however, of his conversations with the ACC and he informed him that the ACC was agreeable that the loans be transferred to the Stradbally farm. Mr. Neville agreed to act on his behalf. Mrs. Sheehy recollects (and I think her recollection is correct) that he agreed to act for a total fee of £1,200. He did not handle the case himself but instead handed it over to a

conveyancing clerk in his office who acted under his supervision. Up to the end of 1981 the letters were written by the conveyancing clerk and he was principally concerned in both sales and the developments after them.

The first letter in the case is one of the 11th of October 1978. The Defendant's Solicitors wrote to the ACC referring to the proposed sale of Mr. Sheehy's lands and requesting the title documents of the Skeaf farm and adding

"We undertake, of course, to redeem whatever balance which may be outstanding with the ACC. If you do not hold the original Land Certificate perhaps you would let us have a copy of the Folio or at least let us know the Folio number of this holding".

On the 17th of October the ACC replied sending on an Accountable Receipt which was returned on the 19th of October (together with a cheque for £5). As a result, the original Land Certificates were sent to the Defendant's Solicitor on the 31st of October 1978.

The Accountable Receipt was in the usual form. By signing it the Defendant's Solicitors personally undertook, inter alia, to return the Land Certificates to the ACC on demand, to hold them in trust, and not to do any act which would enable the property to be assigned without the consent of the ACC. Unfortunately the Defendant's Solicitors breached this undertaking in circumstances outlined hereunder.

The Defendant's Solicitors then decided to find out what their client owned to the ACC. On the 12th of December 1978 they wrote requesting the ACC "to let us know by return the amount necessary to redeem the loan herein, together with accruing interest day by day". In the letter of the 17th of October 1978 the

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ACC had given a reference as "L.165319 TM/mf" and this reference was utilised in the letter of the 12th of December. It was replied to on the 3rd of January. The title of this letter referred to a "loan of £9,000 issued 10th of April 1978" and the letter stated that the redemption value of the "above loan" was £9,199.91 with interest accruing at £3.76 per day. The Defendant's Solicitors had obviously forgotten that their client had told them that about £27,000 was due to the ACC.

The Defendant's Solicitors were from then on under the mistaken impression that the only money due to the ACC (apart from the bridging loan) was about £9,000. They had forgotten that their client had told them that about £27,000 was due to the ACC; they failed to check the Land Certificate which would have disclosed the existence of two charges and so failed to notice that the information given by the ACC was not the full story. The undertaking given in the Replies to the Requisition that the charges would be released was given under a mistaken belief as to what exactly the ACC was owed, and Mr. Neville stated in evidence that he would never have given his personal undertaking had he known the true position.

On the 21st December the documents required by the ACC in respect of its £45,000 loan were signed. The Defendant's Solicitors could have been in no doubt as to the personal undertaking they gave to the ACC about the Land Certificates in their possession. Equally, they could have been in no doubt as to their clients contractual obligation to re-pay the ACC's loan out of the proceeds of sale of the Skeaf farm.

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The contract of sale of the Skeaf lands was, as I have said, entered into on the 6th February, 1979. On the 9th February the Defendant's Solicitors in breach of their two written undertakings to the ACC handed over the Land Certificates to the purchaser's Solicitors. On the same day a letter was written to the ACC which demonstrated a complete lack of awareness of what had been agreed about the re-payment of the bridging loan and the transfer of the existing loans to the Stradbally lands.

On the 9th March the sale was closed (the agreement and undertakings relating to the release of the charges to which I have already referred having been given in the Replies to the Requisitions) and the balance of the purchase price less £3,000 paid over to the Defendant's Solicitors. With this it was possible to complete the purchase of the Stradbally farm on the 15th March.

Notwithstanding the breaches of the two written undertakings the position after the 9th March was by no means irretrievable. The Defendant had of course incurred a financial liability to his auctioneers and his Solicitor and in addition would require £10,500 for stamp duty on the purchase of the Stradbally farm. But the principal and potentially the most serious liability was the contractual liability to the ACC to re-pay it the loan of £45,000 out of the proceeds of sale of the Skeaf farm. The evidence satisfies me that had Mr. Sheehy and his Solicitors gone to see Mr. O'Donovan that it would have been possible to have negotiated some further assistance to enable at least the stamp duty to be paid, and had he been approached

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with the proceeds of sale that the bridging loan would have been paid off and the charges released. But this did not happen.

On the 9th March Mrs. Sheehy called to her Solicitor. She explained that she and her husband urgently needed money to buy cattle and to carry out improvements and development work on their new farm. Her Solicitor informed her that she owed money to the ACC, but did not inform her that she was contractually bound to pay it out of the proceeds of sale of the Skeaf farm or that he had given personal undertakings in relation to the transaction. Nor did he advise her of the possible consequences of not paying off the ACC and that not only would there be a danger that the charges might not be released but that interest at the rate of 17% was charged on the loan. She stated that she and her husband would see that the ACC were paid off, and as a result of this conversation her Solicitors paid her the sum £9,000 on the 9th and a further sum of £11,000 on the 16th March. Not only did he allow his clients to incur fresh obligations in the improvement work which he was informed they proposed to carry out, but the Defendant's Solicitors without further reference to his clients paid out of the monies they had received, £2,825 in auctioneers fees on the 20th March and a sum of £3,500 in respect of their own fees (obviously having forgotten the agreement to charge a fee of £1,200 in respect of the two transactions). A sum of £10,500 in respect of stamp duties was paid on the 15th September and as a result of a further request from the Sheehys the balance in the hands of the Defendant's Solicitors (£1,680) was paid over to them on 1st November, 1979.

Counsel has submitted that the conduct of the Defendant's Solicitor on the 9th March must be judged in the light of what he knew at the time he permitted the Sheehy's to break their contract with the ACC. That is true enough. I agree that Mrs. Sheehy pressed her Solicitor for money, but I do not think that she told him that she had been promised a development loan from the ACC of £40,000. The Sheehy's had not in fact been promised it and I think that the most that Mrs. Sheehy would have said was to indicate that they hoped that they would get it. But this did not justify her Solicitor allowing her and her husband break their contract both with the ACC and their purchaser, or to fail to advise them of the consequences of their actions. Nor was there any question that she told her Solicitor that the ACC had agreed to waive their rights under the bridging loan agreement and take a charge in respect of the £45,000 debt on the Stradbally farm. I fear that the Defendant's Solicitors simply took a chance that the matter would be sorted out when the strike at the ACC was concluded. The Sheehys trusted their Solicitor. Had the proper advise been tendered they would have accepted it.

(ii) Summary of Solicitors negligence:

I can summarise the acts of negligence of the Defendant's Solicitor as follows:

- (a) As to the Undertakings given by the Defendant's Solicitors on the 19th October and 21st December, 1978, relating to the retention of the Land Certificates. The breach of these undertakings exposed the Defendant's Solicitor to personal liability to the ACC. But in addition it involved a breach of the duty of care owed to the Defendant, for by failing to



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honour them they exposed their client to the danger of a claim for damages. Had the Defendant's Solicitors refused to transfer the Land Certificates without the consent of the ACC this consent would only have been forthcoming in circumstances that would have ensured the re-payment of the bridging loan to the ACC out of the proceeds of sale. Had this occurred the ACC would undoubtedly have carried out its part of the bargain and released its charges.

- (b) As to the undertakings given by the Defendant's Solicitors in the replies to the Requisitions to ensure that the charges would be released. This was a personal undertaking and was binding even though a less onerous one was given by the letter of the 9th February 1979. But they owed a duty of care to their own client to carry it out for reasons similar to those just mentioned at (a). They took no adequate steps to carry it out before the sale was closed and its proceeds distributed. Had they done so the charges would have released.
  
- (c) As to their client's agreement with the ACC to discharge the bridging loan of £45,000 out of the proceeds of sale. They should have been aware that a breach of this agreement would have disastrous consequences for their client. They should have advised their client of the consequences of its breach and in particular that the non-payment of the bridging loan could result in a breach of contract with the purchasers due to the non-release of the charges. I am satisfied that had they been properly advised the Sheehys would have deferred the purchase of cattle and the expenditure on improvements they wished to undertake, and that they would have agreed to



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comply with their contractual obligations to the ACC. The result would have been the release of the charges.

- (d) As to the agreement contained in the replies to the Requisitions that the Defendants would ensure that the charges were discharged. The Defendant's Solicitors had a duty to advise their clients of the existence of this agreement and the need to comply with it and of the serious consequences of breaching it. They failed in that duty. Had they fulfilled with it I am sure the Sheehys would have taken their advice, and the charges would have been released.
- (e) As to the failure of the Defendant's Solicitors to appreciate the amount due to the ACC. It is clear that at the time of this transaction the Defendant's Solicitor mistakenly believed that the debt due to the ACC (apart from the bridging loan) was about £9,000. Mr. Neville stated in evidence that had he known the true position (namely that on foot of the old loans his clients owed over £29,000 and that these were caught by the charges) he would not have given the undertaking he gave in the reply to the Requisitions. I think he was negligent in not appreciating the exact position. He had in fact been told it by his clients at their first meeting, but he had not kept a written note of his instructions and the figure escaped his memory. The letter to the ACC did not ask for a statement of all their client's liabilities. The nature of the reply and the existence of two charges on the Land Certificates should have alerted them to the fact that the figure given by the ACC must have referred to liability on only one loan. Had they known the true position the personal undertaking in relation to the

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charges would not have been given. The Plaintiffs Solicitor only closed because of the "assurances and trust of your most trustworthy Mr. Neville". In the absence of the personal undertaking the purchasers Solicitor would have insisted on the charges being released before closing, and the present Plaintiffs claim would not have arisen.

It seems to me that each of the acts of negligence to which I have referred was a material element and a substantial factor (the test of causation suggested by Prosser in "Handbook of the Law of Torts", quoted in McMahon and Binchy "Irish Law of Torts" at page 37) in producing the situation which resulted in the failure to have the charges of the Skaef farm released, and as this was a reasonably foreseeable result the first named Third Party is liable in negligence to the Defendant.

(c) The plea of contributory negligence

The Defendant's Solicitors (but not the ACC) have raised a plea of contributory negligence. I will deal with one aspect of it now. It is said that the insistence by the Sheehys that they be paid part of the proceeds of sale demonstrated a lack of care for their own obligations and amounted to contributory negligence at law. I cannot agree. Undoubtedly the Sheehys were in a difficult financial situation and they needed money badly for the purposes of their new farm. But they were completely dependent on their Solicitors for advice and had no idea of the consequences of non-compliance with their contractual obligations or indeed any clear idea of what they were. Had they been properly advised of the consequences of not paying off the ACC's bridging loan I do not think that they would have insisted in requiring payment to them out of the proceeds of sale and when they phoned again in the following November, again no advice was given to them as to the very serious situation in which they were involved. In these circumstances I cannot hold that they were guilty of contributory negligence as alleged.

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PART 3

THIRD PARTY PROCEEDINGS (continued)

The post-March, 1979 period

I must now turn to events which occurred after the sale of the Skeaf farm had been completed to explain how it came about that the two charges remained on the Folios and to examine (a) whether the Defendant's Solicitors were guilty of any further acts of negligence during this period, (b) whether the ACC were guilty of any further breaches of contract and (c) whether the Defendant was guilty of any contributory negligence during it. The developments which occurred are also of relevance in considering whether the Defendant has a claim for a full indemnity or merely one for a contribution arising from the damages he must pay the Plaintiff and also for the purpose of considering the claims between the Third Parties inter se. I will examine firstly the position concerning the Land Certificate in respect of the Stradbally farm (because the ACC based one of their submissions on its non-production to them), then the charge which was later effected on it in their favour and later the correspondence which took place between the Defendant's Solicitors and the ACC.

(a) The Land Certificate of the Stradbally lands

When the Defendant and his wife signed the contract to purchase the Stradbally farm on the 21st December 1978 his Solicitor had amended the closing date to the 18th January 1979; later he obtained agreement to amend the closing to the 16th February. Because of the strike in the ACC the Defendant was

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unable to close on that day and actual closing did not take place until about the 15th March, a few days after the sale of his own land had been completed. Arising from this delay the vendor Mr. Parkinson sued the Defendant in the Laois Circuit Court and refused to hand over the Land Certificate in respect of the lands, claiming a lien on it for his claim for damages. The Defendant counterclaimed for an Order for the delivery of the Land Certificate. The action was not heard until June 1981; Mr. Parkinson's claim failed and he complied with a court order requiring him to hand over the Land Certificate. In fact that Land Certificate had not been issued at the date of the contract for sale and was not issued until November 1979 (as appears from a note on the Folio) as the lands had only been vested and consolidated the previous year. The effect of the action (which would not have occurred but for the ACC's breach of contract) was to hold up the negotiations for registering a charge on the Stradbally farm (involved in the agreement made at the time of the negotiations for the bridging loan that the old loans would be transferred to the Stradbally lands.)

(b) The Charge on the Stradbally lands.

On the 5th May 1980 the Defendant's Solicitors wrote to the ACC stating that "we understand that you are advancing a loan to our client on the security of a charge on his farm at Stradbally". This was incorrect. It was partly rectified on the 9th July, 1980 when the Defendant's Solicitor wrote stating that there was an outstanding loan charged on the Skeaf farm and that the Corporation "is now willing to transfer the loan charge and to create a new charge" on the Stradbally lands. The Manager of Security replied on the 2nd September, stating that they had obtained a copy of the Folio relating to the Stradbally farm and enclosing a Deed

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of Charge and an Agreement for completion. It is to be noted that the letter contained no denial of the agreement "to transfer the loan charge" from the Skeaf farm. The Agreement and the Charge were both undated. They were sent by the Defendant's Solicitor to Mr. and Mrs. Sheehy who returned them after signing them. They were sent on the 16th December 1980 to the "Manager of Securities" together with a Deed of Discharge in respect of the lands at Skeaf with a request that it be treated as an engrossment. The ACC wrote back pointing out that in the absence of the Land Certificate the matter could not proceed further. The Land Certificate was (after the conclusion of Mr. Parkinson's action) lodged in the Land Registry for the use of the ACC and on the 9th June the ACC was so informed. The ACC dated the two documents, that is the Agreement and the Charge, as of the 7th October 1981 and they registered the charge as a burden on the Folio on the 9th October. The terms on which it was granted make it clear the charge related to the £45,000 bridging loan and not to the sums due on the five old loans.

Considerable confusion existed in the Head Office of the ACC as to what had occurred in relation to the two sales and at one time it was thought that the sale of the Skeaf farm had not in fact taken place. It is now accepted by the ACC that the 1981 charge was executed in error and that it should have been one to effect the agreement (which the ACC acknowledged existed) to charge debts due on the five old loans and not the debt due on the bridging loan. It would seem that the section in the ACC dealing with new securities was unaware of the correspondence which the section dealing with releases was having with the Defendant's Solicitors. When the Land Certificate became available steps to register the

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deed of charge were taken without regard to the objections which had been raised in the correspondence with the Defendant's Solicitor.

The ACC refused to execute the Deed of Discharge in respect of their charges on the Skeaf farm which had been sent to them. Different reasons were given in letters written by different officers at Head Office. But on the 17th August, 1981 it was stated that there could be no release of their charges until the Bridging Loan had been repaid. This was repeated on the 13th November. On the 6th January, 1982 another official of the ACC wrote (after a telephone discussion with Mr. O'Leary an apprentice in the Defendant's Solicitors office who was then dealing with the matter):-

"We fully agree that the existing loan balances with the exception of the Bridging Loan are to be transferred to the Laois Holding. However, the position in regard to the Bridging Loan is entirely different. That loan, which was secured by a charge on the Cork farm was to be repaid from the sale of the proceeds of the Cork holding but in any event not later than the 30th June, 1979. When the Bridging Loan is repaid we will release our charges on the Cork holding".

Despite further efforts by Mr. O'Leary the attitude of the ACC did not change. Indeed it hardened as the amounts due on the loans increased and the value of the Stradbally farm declined (along with land values elsewhere). In the result, the ACC retains its two charges on the Cork lands and claims to enjoy a further charge in respect of the debt due on bridging loan on the Stradbally lands. I am not required in these proceedings to express any view on the validity or otherwise of the present charge on the Stradbally lands. Quite clearly, however, it refers to the bridging loan and liability in respect of the five old loans is not captured by it. And quite clearly the ACC failed to "transfer" the five old loans to the Stradbally farm as they had agreed to do. But I do not think that it is necessary for me to decide whether this breach was excused by the Defendant's failure to pay off the £45,000 bridging

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loan out of the proceeds of sale of the Skeaf farm because the breach of this subsidiary term would give the Defendant only a right of contribution in respect of the damages he has to pay, whilst the breach of the principal term (the agreement to advance the balance of the bridging loan) gives a right to a complete indemnity. A further point is to be made about this correspondence; it clearly constitutes an offer on behalf of the Sheehys to charge their Stradbally lands with the liability on foot of all six loans in exchange for a release of the two charges on the Skeaf lands.

(c) The negligence of the Defendant's Solicitors in the post-March, 1979 period:

It was submitted that during this period the Defendant's Solicitors were guilty of further acts of negligence in not suing the ACC. It is true that the Defendant's Solicitors appeared to be confused both as to the factual position and their clients rights. But after Mr. O'Leary commenced to handle the matter a conscious decision was taken that it was better to attempt to retrieve the situation by negotiation rather than by confrontation. That was a judgment which could reasonably have been made at the time and so I consider that the failure to sue the ACC on foot of its breach of contract did not, in all the circumstances, constitute a fresh ground of negligence. The liability of the Defendant's Solicitors is limited therefore to the acts of negligence to which I have already referred.

(d) The second plea of contributory negligence:

It remains to consider the plea made on behalf of his Solicitors that after the purchase of the Stradbally lands the Defendant was guilty of contributory negligence in not repaying the loans, at least in part, out of the farming operations he carried on at Stradbally and that if any damages are recoverable by him they



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should accordingly be reduced.

The evidence establishes that from March 1979 until August 1982 no payments were made by him to the ACC. Thereafter he paid (up to February, 1985 - see letter of 6th February of that year) different amounts totalling in all £20,922.10. When making the payments he did not specify which of the six loan agreements they related to and it was left to the ACC to apportion the re-payments as they thought fit. It is to be noted, in this connection, that there was apportioned to the bridging loan on which the interest charge was 17% with half yearly rests only £1,000 of all sums paid. The Defendant explained why he had made no re-payments for over three years. The farm he purchased was in very poor condition. He had tried in May 1979 to obtain a development loan for it from Mr. Lillis in the Portlaoise Office of the ACC and was told that this would not be possible until the bridging loan had been repaid. He therefore used what profits he made to improve the lands. The onus is on the Defendants to establish their plea and I think they have failed to discharge it. They have not shown what profits the Defendant made or should have made or that the Defendant had money which he could have utilised to re-pay his indebtedness to the ACC before August 1982 or at a greater rate than that he actually achieved after that date. It is true that the Defendant did admit that he improved his lands, out of farming profits, but the Defendants have failed to establish that a reasonable and prudent farmer in the very difficult situation in which the Defendant found himself would not have acted as he did. I must therefore reject this plea.

PART 4

I will now (a) assess the Plaintiffs damages, (b) determine the



Defendant's claims against the Third Parties and (c) decide what proportion of the Defendant's damages each Third party should bear.

(a) The Plaintiffs damages.

The Plaintiffs having accepted that the agreement to release the charges cannot be specifically enforced have submitted that they are firstly entitled to such damages as will enable them to secure the release of the charges. I have been told that the Plaintiffs if put in funds intend to take steps to have these burdens removed from the register and I am satisfied that the ACC will (and, indeed, must) release the charges on payment of the amounts due on the old loans and the bridging loan. On the 11th February 1986 the amount required was £188,937.97, and I propose to give damages against the Defendant for this sum. But there will obviously be some delay in effecting payment to the ACC and interest charges at the rate of £56.74 per day are running from the 11th February. I propose to adjourn for further consideration the amount of damages arising from that date, give liberty to re-enter the matter and I will order that in default of agreement an account be taken (an account which I would propose to take myself) of further damages suffered by the Plaintiff. In taking the account I will bear in mind any delays by either party in the steps to be taken to secure the release of the charges.

There is another heading of damages claimed, namely damages for mental distress. It is submitted that, as a matter of law, such a claim arises even though the Plaintiffs claim is based on a breach of contract and reliance is placed on the recent decisions in which damages for mental distress

have been awarded in breach of contract cases relating to holiday contracts. Jarvis .v. Swans Tours Ltd. (1973) 1 Q.B. 213 was such a case. In the course of his judgment in the Court of Appeal, Denning M.R. (at p. 238) stated:

"In a proper case damages for mental distress can be recovered in contract just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment the distress the upset and the frustration caused by the breach".

But this case is not concerned with a contract to provide entertainment or enjoyment - it relates to a contract for the sale of land. I think it is fairly safe to assume that in every case in which a contract for a sale of land is broken annoyance, if not distress and anger, is occasioned to the injured party, but it does not follow that the law allows an award of compensation to be made under this heading. I am in fact being asked to extend the law to a point which it has not yet reached either in this country or in England, and I do not think that it is the function of this court to do so. So, I will limit the Plaintiffs damages to the headings I have already mentioned.

(b) The Defendant's claims against the Third Parties

I have found that the Defendant's claims that the first-named Third Party (his former Solicitors) were negligent and that the second-named Third Party (the A.I. were guilty of breach of contract are well founded. The Defendant says that the damages which each has to pay is to be measured by the damages he has to pay the Plaintiff; that is, in effect, that he is to be completely indemnified by em.

Two points are made against the claim to a complete indemnity. The first is this. It is said that if the Defendant is now paid by either of the Third Parties damages which will include sums to recoup him the payment he will make to the Plaintiff to enable the release of the charges to be effected (namely, the sum of £188,937.97) that in effect this will mean that the monies which the Defendant borrowed and the interest which is due by him on outstanding balances will have been paid on his behalf - indeed that he will have dramatically benefited from the entire transaction and his own wrong.

- But this argument fails to take into account the contractual obligations of the Defendant to the ACC and the legal effect of the release of the charges. There are six contracts in existence, (apart from the two Deeds of Charge) and under them the Defendant is obliged to re-pay monies he borrowed from the ACC as well as interest on outstanding balances. If from monies received from the Defendant the Plaintiff pays money to the ACC and obtains a release of the charges in return, the release will certainly be effective to have the burdens removed from the Folio on the Cork lands. But it is important to note that the releases will not discharge the debt due by the Defendant under the six loan contracts. Rule III of the Land Registration Rules, 1972 provides that on the application in the prescribed Form by the owner of a registered burden the Registrar may cancel a burden. The form prescribed, Form 71 A, is a request that either a "note of discharge" "or satisfaction" of the charge be entered on the register. As pointed out by McAllester "Registration of Title" p. 196 this Form does not provide for a recital that the sums due on foot of the charge have in fact been paid, and the cancellation of the charge does not necessarily

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mean that the charge has been paid. This means that the ACC can validly release the charges without releasing the Defendant's contractual obligation to them arising on the six loan agreements. So, if the ACC, for example, recoups in full the Defendant the damages he pays to the Plaintiff, and the Plaintiff in turn pays the ACC sums sufficient to have the charges released, the Defendant is still liable on foot of his contractual obligations to the ACC. In addition, of course, it should be borne in mind that the payment by the Plaintiff to the ACC of the damages he receives in exchange for the release of the charges will not effect the legal obligations which exist between the ACC and the Defendant arising from the 1978 agreement to transfer the old loans to the Stradbally farm and the 1980 offer made on the Sheehy's behalf to have all six loans charged on the Stradbally farm in exchange for the release of the charges on the Skeaf farm. This first submission is not, therefore, well founded.

The second submission (one made on behalf of the ACC) related to the fact that the Defendant did not have in his possession the Land Certificate for the Stradbally lands until June of 1981. It is said that before that date he could not have performed the agreement on which he relies and grant a charge on the Stradbally lands in return for the release of the charges on the Skeaf lands; and so damages should be limited to the interest payable from that July 1981 only, a figure calculated at approximately £80,000.

As I have pointed out the Land Certificate was not issued until November, 1979. But the Defendant would undoubtedly have obtained it then but for the claim in the proceedings brought against him by Mr. Parkinson. Those proceedings

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arose from the delay between the 16th February and the 15th March 1979 in closing, a delay caused, as I have said by the ACC's breach of contract in failing to provide the balance of the bridging loan. I do not think that they are entitled to a reduction in the damages they must pay arising from a situation brought about by their own breach of contract. Had this not occurred, the Stradbally purchase would have been concluded in time. The absence of the Land Certificate at that time would not have caused any delay in releasing the charges on the Skeaf lands as there was nothing unusual in the delay in issuing it, nor would it have caused any problems in the execution of new charges on the Stradbally lands.

There will therefore be judgment against each Third Party (a) for the sum of £189,937.97 and (b) for the amount (if any) found due by the Defendant to the Plaintiff on foot of the inquiry I have ordered.

(c) The claims for contribution inter se by the Third Parties.

Rules of court permitted the Defendant to serve Third Party Notices on his former solicitor and the ACC and no objection was taken to their adoption in this case. Each Third Party whilst denying liability to the Defendant, served on the other a claim for an indemnity or contribution, thus accepting that the statutory provisions under the Civil Liability Act, 1961 relating to concurrent wrongdoers could be applied. This means that I must consider what contribution would be just and equitable to order one party to pay the other having regard to the degrees of fault of each Third Party. The task of apportioning degrees of fault is not an easy one when one wrongdoer's "wrong" is a tort and the other's is a breach of contract. No doubt there may be cases where one wrongdoer was guilty of a slight degree of

carelessness and the other of a serious breach of an important term of a contract. But such a plain situation does not exist here, and I do not think that I can differentiate between the degrees of fault involved in the two wrongs which have been committed. One wrongdoer I am satisfied departed in a marked degree from the standard of care which should have been observed by a professional adviser and the other broke the most important term of the contract that the parties had entered into. I think, therefore, that the degrees of fault were equal, and that but for an important aspect of this case to which I will now refer both Third Parties should contribute equally to the damages payable by the Defendant.

The wholly unusual feature of this case is that the damages which the Plaintiff will receive will be paid back to one of the Third Parties. The Plaintiffs claim is primarily one for specific performance of a contract and it is only because the Defendant is not financially able to complete his agreement to have the charges released that damages in lieu of an order for specific performance are to be awarded. But the Plaintiff intends to use the damages to pay off the sums captured by the charges in exchange of their release. Thus, indirectly the effect of the court's order will be that the contract relating to the charges will be performed.

It is necessary to look a little closer at what will happen. If the ACC as a result of the order indemnifying the Defendant pays the damages which have been awarded to the Plaintiff and are then given a cheque for the same amount ~~by the Plaintiff in return for the release of the charges~~ it will suffer no financial loss as a result of court's orders,

and it will still be owed the same sum by the Defendant on foot of the six loan agreements. Should the first named Third Party then be required to contribute fifty per cent of the sums paid by the ACC to the Defendant two possible results would follow. If this payment could legally be regarded as a reduction in the Defendant's indebtedness on foot of the six loan agreements, then this would mean that the first named Third Party would have paid off half this indebtedness to the ACC. But in addition a benefit would have been conferred on the ACC in that an immediate and uncovenanted reduction in the large sums due to it by its client would have been effected. Alternatively, if the contribution would not legally discharge Mr. Sheehy's indebtedness to the ACC, then the ACC would have financially benefited by the court's order to a very considerable extent. So it seems to me that in the special circumstances of this case it would not be just and equitable, having regard to the fault of the ACC in this matter, to order that any contribution should be made by the first named Third Party to any sums paid by the ACC to the Defendant. It also follows that should the Defendant require the first-named Third Party to pay the damages recoverable by the Plaintiff they should be indemnified in full by the ACC. Otherwise (unjustly and inequitably) if the ACC only contributed fifty per cent of the damages to the first-named Third Party it would receive them in full from the Plaintiff, and still enjoy its contractual rights against Mr. Sheehy under the six loan agreements after it had released the charges.

I will order then that in respect of any claim for costs payable by the Defendant that each Third Party be liable to the extent of fifty per cent, but that in respect of

damages payable by the Defendant to the Plaintiff that the first named Third Party be indemnified in full by the second named Third Party for any payments made by them, and that the second named Third Party is not entitled to any contribution from the first named Third Party in respect of any sums it may pay to the Defendant.

PART 5

Conclusion:

I propose to put a stay of one month on today's order. I appreciate that one or other of the parties may wish to appeal my judgment to the Supreme Court. But if there is no appeal I think I should give the Defendant and the Third Parties an opportunity to consider it. If the ACC is now prepared to release the two charges and if the Defendant is prepared to execute a new charge in respect of the sums due to the ACC on the Stradbally farm, then I could make an order for specific performance in the Plaintiffs case. This course has obvious attraction; the costs of a possible inquiry would be avoided; the Plaintiffs problems of executing a judgment would be obviated; the transfer of a large sum of money between the parties which would eventually produce the same result avoided: and an end brought to any possible dispute on the existing charge.

It is obviously in the interests of all concerned that this unhappy saga should be speedily concluded. I trust that I will not stray outside my proper functions if, in the hope of achieving this, I express the view that in my judgment the ACC would not infringe its statutory responsibilities if in considering what sums should now be charged on the Stradbally farm and the interest rates on any outstanding loans it were to bear in mind not just their strict



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legal rights under their six loan agreements but also the realities of what burdens the Stradbally farm can bear and the fact that Mr. Sheehy can properly be regarded as an unfortunate victim of an industrial dispute in which he was in no way involved.

Approved

JL

19-3-86