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Damages for a breach of undertaking

The Irish Supreme Court has recently considered the compensation to which a lender is entitled from a solicitor who misapplies monies advanced on foot of an undertaking. The court concluded that compensatory damages were payable to the lender.

The undertaking in this case was given by a firm of solicitors to Allied Irish Bank plc. The solicitors had undertaken to discharge from the AIB loan a debt owed to another lender, so that AIB would have a first ranking charge against the relevant property.

AIB advanced the loan in June 2007 on foot of its standard form solicitor's undertaking. In breach of the undertaking and of professional ethics, the solicitor concerned applied the AIB loan to another project in which the borrower was involved, rather than repaying the prior lender's loan. None of the partners in the firm had any role in the wrongdoing.

AIB sought to enforce the security which the solicitors had undertaken to put in place and discovered the breach in early 2009. By that time, Irish property values had collapsed.

The solicitors argued that AIB's losses over and above the value of the security arose from making a bad loan, rather than the solicitor's failure to comply with the undertaking.

At first instance, the High Court ordered the solicitors to repay to AIB all sums which had been advanced on foot of the undertaking, plus interest. It did so in the exercise of the inherent jurisdiction of the High Court in matters concerning the conduct of solicitors.

Having reviewed relevant authorities, the High Court had concluded that there could be cases involving conduct so grossly careless or egregious that the court would be entitled to order payment of the entire sum which was the subject of the undertaking, and not simply a lesser sum in respect of loss actually occasioned by the breach of undertaking. In the Supreme Court, Clarke J did not reach the same conclusion. He found that the position on the authorities was not fully clear as regards departing from compensatory damages where there has been a breach of undertaking.

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Without deciding the issue, Clarke J hinted that there might be cases where awarding more than compensatory damages would be warranted, for example, where monies are misappropriated by a solicitor for his or her own benefit. In this case, however, there was no benefit to the solicitor personally or to his firm in breaching the undertaking.

The main types of damages that can be awarded are:

- compensatory damages awarded as compensation for and measured by the material loss suffered by a plaintiff
- aggravated damages awarded when the motives and conduct of the defendant aggravate the injury to the plaintiff
- exemplary damages awarded to reflect the proper indignation of the public and to reflect disapproval

The Supreme Court remitted the case back to the High Court for the calculation of damages, with the following guidance:

- It would be too simplistic to calculate damages by reference to the agreed value of the property in January 2009 (€650,000, when AIB called in the loan, having discovered that it in fact had no security) or the date of trial.
- The true measure of AIB's loss should start with the value of the security at some time soon after the breach of undertaking (which occurred in June 2007). The court should determine the value of the security lost within a realistic timeframe after the breach of undertaking. This would not necessarily be when AIB might have – in the ordinary course of events – come to enforce its security.
- The court should consider whether AIB – as the holder of a second ranking charge on the property – would have obtained some value for that security after discharging the prior lender's loan. If so, credit should be given in the calculation of the loss of the value of AIB's security.

The Supreme Court was fully cognisant of the huge devaluation of the security as a consequence of the collapse in the property market. By deciding that damages should be calculated by reference to the loss of the value of the security at a time soon after the breach of undertaking (2007) and rather than a later date (for example, 2009), the damages to be awarded by the High Court will not be reduced by the collapse in property prices.

Since the enactment in 2010 of regulations prohibiting solicitors from providing undertakings in commercial property transactions, there is less scope for a case like this to arise in future. This judgment will, nonetheless, be a useful addition to case law on the quantification of damages in cases involving a breach of a promise, whether an undertaking or a contract.

[Allied Irish Bank plc v Maquire & others](#) (Unreported, Supreme Court, 13 October 2016) [2016] IESC 57

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