Kendall Wilson Securities Ltd v Barraclough

High Court Auckland
20, 21, 22 June, 21 July 1983
31 July, 3 September 1984
Jeffries J

Court of Appeal Wellington
27, 28 November 1985
Cooke, McMullin and Somers JJ

Tort – Negligence – Valuer's duty of care to a solicitors' nominee company – Valuer had negligently prepared a report on the valuation of land – Solicitors' nominee company advanced trustfunds on mortgage in reliance on the valuation – Whether valuer was liable for the nominee company's loss – Whether the nominee company's solicitor/director, who was responsible for advancing the funds, had been contributorily negligent.

In December 1974 a solicitors' nominee company advanced $150,000 to Mercantile Developments Ltd on security of a memorandum of mortgage over a property of about 20 acres. Before the loan was made, the solicitors for Mercantile showed Sturm, one of the nominee company's solicitor/directors, a valuation of the property dated 21 October 1974. This valuation stated that the property was zoned rural, but that the Manukau City Council were contemplating a change of zoning to industrial and the valuer was satisfied, as a result of discussions with the local body's engineers, that the scheme change would go ahead. The valuer considered that the value of the land as potential industrial land was $295,000. The valuation certified that the property offered sufficient security for the advance of trust funds to the amount of $150,000 for up to five years at current rates of interest. Mercantile defaulted under the mortgage. After unsuccessful attempts to sell the property, the partnership of solicitors finally took a transfer of it in November 1978 at a current valuation of $98,000. The nominee company sued the valuer in negligence for moneys due under the mortgage in November 1978 less the transfer price, a total of $94,183.20.

It was not disputed that the valuer owed a duty of care to prospective lenders to whom Mercantile or their solicitors showed the valuation. However, the valuer claimed that the nominee company could not claim on behalf of persons who had become contributories to it at any time subsequent to the advance unless those persons could show that they had relied on the valuation. The valuer also claimed that Sturm had been contributorily negligent in failing to study the report and failing to investigate the borrower's financial position.

In the High Court the Judge found that the nominee company was entitled to sue the valuer, that the valuer had fallen short of the required standard of care when this valuation was furnished, that Sturm had been contributorily negligent in that he had failed to apply the ordinary skill and care of a solicitor responsible for advancing trust funds, and assessed Sturm's negligence at 60%. The Judge awarded the company the sum claimed less 60%. Both sides appealed.

In the Court of Appeal the valuer did not contest the Judge's finding that in furnishing the valuation report he had breached the standard of care required of a valuer.

Held, 1 The valuer knew that his report would be shown to third parties to whom Mercantile applied for finance, and a solicitors' nominee company would be contemplated by the valuer as among prospective lenders. As between the valuer and the nominee company, the source of the funds and changes in the beneficiaries whose funds the company controlled were irrelevant. The valuer owed a duty to the nominee company to take reasonable care in the valuation, so that the funds administered by the company would not be lost by reliance on an erroneous valuation. On

Source: New Zealand Institute of Valuers (1993). Land valuation cases 1965-1992. Hutcheson Bowman & Stewart Ltd, Wellington.

breach of that duty the valuer was liable to the nominee company to make good the loss of funds. Cross-appeal dismissed.

2 On ordinary principles relating to companies Sturm was personified and identified with the nominee company. On its face, the reasoning in the report was not flawed and Sturm was not negligent in relying on it. Nevertheless, there was enough in the evidence to support the trial Judge's finding that Sturm was negligent in failing to investigate Mercantile's financial stability. Sturm's negligence was reassessed at 33 $^{1}/_{3}$%. Appeal allowed in part.

Cases mentioned in judgments of Court of Appeal

Arbitration between the Auckland Hospital Board and the Auckland Rugby League Inc, Re an [1966] NZLR 413.
BT Australia Ltd v Raine & Horne Pty Ltd [1983] 3 NSWLR 221.
Farrington v Rowe McBride & Partners [1985] 1 NZLR 83.
Roe v Cullinane Turnbull Steele & Partners (No 2) [1985] 1 NZLR 37.
Tesco Supermarkets Ltd v Nattrass [1972] AC 153; [1971] 2 All ER 127.
Whareroa 2E Block Re [1959] NZLR 7 (PC).

Cases mentioned in judgments of High Court

Ashcroft v Mersey Regional Health Authority [1983] 2 All ER 245.
Baxter v F W Gapp & Co Ltd [1938] 4 All ER 457; 55 TLR 131.
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582; [1957] 2 All ER 118.
Bradley v Attorney-General [1978] 1 NZLR 36.
Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683, [1963] 2 All ER 432.
Clark v MacLennan [1983] 1 All ER 416.
Czarnikow (C) Ltd v Koufos [1969] 1 AC 350; [1967] 3 All ER 686.
Gold Star Insurance Co Ltd v Dominion Adjusters Ltd [1982] 2 NZLR 38.
Goody v Baring [1956] 1 WLR 448; [1956] 2 All ER 11.
Hadley v Baxendale (1854) 9 Exch 341; 156 ER 145.
Jennings v Zilahi-Kiss (1972) 2 SASR 493.
Ladenbau (G & K) (UK) Ltd v Crawley & de Reya [1978] 1 WLR 266; [1978] 1 All ER 682.
London and South of England Building Society v Stone [1983] 1 WLR 1242; [1983] 3 All ER 105.
McLaren Maycroft & Co v Fletcher Development Co Ltd [1973] 2 NZLR 100.
Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1979] Ch 384; [1978] 3 All ER 571.
Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A /B) [1949] AC 1 96; [1949] All ER 1.
Neagle v Power [1967] SASR 373.
Shaddock (L) & Associates Pty Ltd v Parramatta City Council (1981)150 CLR 225; 36 ALR 385.
South Australia (State of) v Johnson (1982) 42 ALR 161.
Sutherland v Public Trustee [1980] 2 NZLR 536.
Sykes v Midland Bank Executor and Trustee Co Ltd [1971] 1 QB 113; [1970] 2 All ER 471.
Whitehouse v Jordan [1981] 1 WLR 246; [1981] 1 All ER 267.

Action

This was an action by a solicitors' nominee company against a professional valuer for damages of $94,183.20 being moneys allegedly lost as a result of the nominee company's reliance on a negligently prepared valuation report on a property which was used as security for moneys lent by the nominee company on mortgage to a third party.

G R Joyce and C *F Foote* for the plaintiff (Kendall Wilson Securities Ltd).

B H Clark and D *J Harvey* for the first defendant (C T Barraclough) and the second defendant (Barraclough Bros Ltd).

Cur adv vult

Jefferies J. The plaintiff is a solicitors' nominee company, but it is convenient to postpone an analysis of that legal entity until later in the judgment. The first defendant is a registered valuer who has practised as such in the Auckland district for over 30 years. His experience as a valuer precedes that date. The second defendant is the company through which he conducts his business, and as a matter of safety by the plaintiff was joined in this action. I was assured by Mr Clark that for all purposes in this ease there is no point in maintaining the distinction. Therefore throughout I will use mainly the name of the first defendant, Colin Thomas Barraclough.

In the way the hearing was conducted by the respective parties it could be said that there was a narrow way of looking at the case, and a broad way. It was the defendants who adopted the latter approach, it seemed mainly for the purpose of denying a breach of the admitted duty of care, but, probably, more importantly for establishing the plea of contributory negligence. I will commence an account of the facts by adhering at this stage to the plaintiff's version set within the narrow compass .

The plaintiff is a private company incorporated in 1969 by the then partners of a firm known as Messrs Kendall & Wilson, solicitors, Auckland. As stated, Mr Barraclough was, and is, a registered valuer practising in the Auckland district. The evidence was that in the early 1970s there was considerable activity in the development of land for housing purposes in the area south of Auckland in the territory of the Manukau City Council. At this time a company named Mercantile Developments Ltd, which then had as its shareholders a Mr and Mrs R A Manning, was extensively involved, one gathered from the evidence, in land and property development. Mr Manning was its managing director. As a matter of record it came down with the final crash of Securitibank, and is now in liquidation. Formal evidence was called from a chartered accountant, Mr F N Watson, who in June 1981 was appointed its receiver. The company is now in liquidation as a result of an order made in this Court also in June 1981. Mr Watson gave evidence that there is no prospect of moneys for unsecured creditors.

In October 1973 a transfer of 20 acres 1 rood, 19 perches, was registered to Mercantile for the consideration of $75,000. The land is situated in Manurewa east of the Manukau City, a vacant site, and at the material time, that is 1974, was zoned in the operative district scheme of the Manukau City Council as "Future Urban Development Sequence 111". Permitted uses included most forms of farming until the urban redevelopment was approved by the Council. The planning period was 1966-1986 and it was not possible to state accurately when Sequence 11 and 111 land would have been brought in for urban development. A valuer, Mr P J Mahoney, who gave expert evidence was of the opinion Sequence 111 would not have been expected to commence until the early 1980s. It is worth noting that "future urban development" is non specific as to its final use, or zoning. It is convenient to adopt the nomenclature of the valuers and call it the subject land .

Frequent reference was made in evidence and in argument to the buoyant and optimistic commercial climate in housing and land development in 1972/73/74 in the south Auckland area. The Government of the day was interested in purchasing land there and such a buyer helped make the market lively. A change of zoning would have had marked effect on the value of the land, as will be seen, but the unavoidable fact is that in 1974 it was zoned as stated above. The optimism that zoning could change was supported, to an extent, by evidence from witnesses, but the so-called structure plan which was under consideration by the Manukau City Council from 1973 onwards finally did not include the subject land when published in 1975. Also on 26 September 1974 that Council adopted a report of its Town Planning Committee containing a recommendation that the zoning which embraced the subject land should remain in force for the time being. That was a fact easily accessible to valuers, solicitors and the public.

In October 1974 Mr Barraclough was engaged by a firm of solicitors named Messrs Sheffield Young & Ellis practising in Auckland who acted for Mercantile Developments to perform a valuation on the subject land for the purposes of obtaining an advance using it as security. The

report itself was dated 21 October 1974 and the Court deems it necessary to reproduce Mr Barraclough's report in its entirety:

> Re: *Value of property owned by Mercantile Development Ltd corner Popes Rd and Morris Rd Takanini*
>
> As requested I have inspected this area of 20 acres 1 rood 19 perches for the purpose of assessing its value as security for the advance of first mortgage finance and now report as follows:
>
> LEGAL DESCRIPTION:
>
> Lot 1 on Deposited Plan 13421 and being part Allotment 20 Parish of Papakura and being all the land in Certificate of Title 14B/1142.
>
> LAND DIMENSIONS:
>
> Frontage to Morris Rd 843 ft 3 in. Frontage to Popes Rd 989 ft. Area 20 acres 1 rood 19 perches. Contour level.
>
> ZONING:
>
> (1) *This land which is a prominent cornerblock is at present shown on the Manukau City Council Town Plan as Sequence 3 land for future urban development It is however part of a large area of land which is at present being prepared for a scheme change by the Town Planning Department of the Manukau City Council and the Council have stated that they intend changing the zoning to Industrial.* [This emphasis and that hereunder, and the numbering in the margin, were not in the original document and have been added for the purpose of identification for use later in the judgment.]
>
> The adjoining land in Morris Rd on the other side of the Papakura stream, together with other land on the eastern side of Morris Rd was zoned Residential A by the Town and Country Appeal Board and this is m the process
>
> A further large area bounded by the northern side of Popes Rd, Ranfurly Rd, and Redoubt and Hill Rds, is also in the process of a scheme change to Residential by the Manukau City Council, and the Ministry of Works Department have already purchased large areas within this block for housing purposes.
>
> (2) *All these changes are of course still open to objection however from my discussions with the Engineers I am satisfied the scheme change will go ahead.*
>
> Another major development affecting the subject property is the proposed straightening of the Papakura stream, plans for which are in the process of being prepared by Cocks & LePish Engineers and it is possible that this work will reduce the potential industrial area of the block from 20 acres 1 rood 19 perches down to 17 acres 2 roods. Some of the land so taken off would become residential as the adjoining land now is zoned however without finished surveyed plans we have at this stage placed no value on the probable residential land.
>
> In recent negotiations with the Ministry of Works for the purchase or exchange of the adjoining designated School site of 29 acres 1 rood 21 perches on which it is proposed to remove the Education Dept designation the Government Valuation Dept placed a value of $15,000 per acre as potential industrial assessing a value of $440,000 on the 29 acres 1 rood 21 perches.
>
> Another future proposal is to bring a Railway branch line through the existing Industrial C1 land on to the subject land however this improvement is still in the planning stages.
>
> INDUSTRIAL VALUES IN METROPOLITAN AUCKLAND:
>
> I have been concerned in the valuation of industrial land in Auckland for the past 25 years during which I have acted as valuer for three Local Bodies covering large industrial areas.
>
> Land in Penrose has been recently selling at up to $160,000 per acre in 1/4 acre blocks down to $80,000 and $100,000 per acre in larger areas, and good level land in Wiri, Avondale and East

Tamaki has been realising up to $50,000 per acre in 1 to 5 acre blocks.

I have assessed other land in the Industrial C1 area of Takanini adjoining

(3) The Education Dept block at $25,000 per acre and *I am satisfied that the subject property once the industrial zoning is confirmed would sell at $25 000 per acre plus corner influence.*

We are at present going through a period of severe credit restrictions which have seriously affected the value of residential properties through the lack of mortgage finance, at this stage it does not appear to have affected the value of industrial land near so much although there is not so much being transferred but there is still a demand for manufacturing and warehouse space to rent.

Taking into account the present market conditions and the prominence

(4) of this site *I consider that its value as potential industrial land is the sum of $15,000 per acre plus corner influence as follows:*

17 acres 2 roods @ $15,000	$262,500
plus corner influence 12.5% say	$ 32,500
	$295,000

My valuation of the property is the sum of two hundred and ninety-five thousand dollars ($295,000).

RECOMMENDATIONS:

(5) *We certify that we have acted independently of the applicant in this valuation and that under section 10 of the Trustee Act 1956 this property offers sufficient security for the advance of Trust Funds to the amount of one hundred and fifty thousand dollars ($150,000) for up to five years at current rates of interest.*

"If private funds however were being lent I consider that an amount of one hundred and eighty thousand dollars ($180,000) could be advanced with reasonable safety as even if this land were zoned residential it could be sold readily for this figure."

It is clear from the report itself and from the evidence given by Mr Barraclough that he valued the land on the basis that it was zoned industrial when the truth outlined above, is that in the previous month the City Council had resolved to retain the Future Urban Development Sequence 111 zoning. Messrs Sheffield Young & Ellis, who acted for Mercantile, passed Mr Barraclough's valuation to the plaintiff company which in this transaction was represented by Mr Roderick Milton Douglas Sturm, a partner in the firm of solicitors, and a director of the plaintiff company. He gave evidence that on the basis of that valuation he resolved to advance to Mercantile the sum of $150,000 to be used by Mercantile in circumstances which will be outlined in greater detail hereafter. A mortgage document was prepared and executed by Mercantile and over a period of time the total sum of $150,000 went from the plaintiff to Mercantile.

It is convenient here to mention that Mr Barraclough, for Sheffield Young & Ellis, performed a valuation of the self same land on 12 February 1974 then he valued it at $86,000 as rural land. Under s 10 of the Trustee Act 1956 he said the property offered sufficient security for the advance of $50,000 on first mortgage for a term of five years at current rates of interest. It was accepted, of course that the report of October 1974 contains no reference to the earlier valuation of that year and Mr Sturm did not know of its existence when the October valuation came into his hands. In the statement of claim the plaintiff company said that the land at the time (ie October 1974), on the balance of probabilities, would have been worth between $80,000 and $85,000.

The record of contributors to that mortgage was produced and is contained in eight typed pages of ledger entries beginning in December 1974 through to November 1978. That record indicates the advances were commenced by contributors who were solicitor partners, or closely related to partners, but over the years many contributors came and went. I will return to this issue.

Almost immediately Mercantile began to default on its payments under the mortgage and the first Property Law Notice was issued in December 1975. Finally it became necessary to conduct a

mortgagee's sale and it was first placed on the market in March 1978 with a reserve of $180,000 but no bid was received and it was withdrawn. It was placed on the market again in May 1978 with the same result. A valuation of the property was obtained early in 1978 from a valuer Mr P J Mahoney, at $98,000. The partnership of solicitors took a transfer of the land at that price in October 1978 and finally sold it in 1981 for the sum of $112,500. Although originally pleaded there is no complaint now by the defendants of a failure to mitigate damages

The plaintiff claims the sum of $94,183.20 made up in the following way:

Principal sum under the mortgage	150,000.00
Interest on $150,000 @ 15% for period 15/5/77 to 15/5/78	22,500.00
Interest on $150,000 @ 15% for period 15/5/78 to 15/11/78 (2 quarters)	11,250.00
Rates	5,124.60
Valuation fee	166.00
Barfoot & Thompson – auction expenses	1,132.60
Solicitors' charges	2,000.00
Supreme Court application fee on mortgagee sale	10.00
	$192 183.20
Less transfer price	98 000.00
	$94,183.20

On the basis of that transaction the plaintiff sues the defendants in negligence and pleads the following particulars which are contained in para 13 of the statement of claim:

13. The said defendants and each of them, the second defendant being vicariously responsible for the actions of the first defendant, were in breach of the said duty of care in that:
   (a) No reasonably accurate assessment of the value of the property was made –
   (b) No reasonably accurate assessment was made of the security which the land offered for monetary advances;
   (c) There was a failure to make a reasonable selection of the particular facts which were needed in order to make a reliable judgment in formulating the terms of the said representations;
   (d) There was a failure to take adequate steps to establish the reliability of the sources from which the alleged facts upon which the said representations were based were taken-
   (e) If the valuation was not to be relied upon (which is denied) in failing so to warn likely recipients thereof and in particular the plaintiff."

I turn to the defendants' case. Mr Clark indicated to the Court that he accepted as a matter of law a valuer who supplies a trustee valuation must accept that it might pass to another solicitor to be used in the way that Mr Sturm used it. He accepted that there was a duty of care to third parties such as prospective, or actual, lenders. However, at all times in making that concession Mr Clark, on behalf of the defendants, reserved a point concerning the precise status of the plaintiff as a nominee company, and in particular what reliance it could have placed on that report. A central ground of the defence was that a nominee company, by definition, does not contribute funds or suffer loss, and he repudiated the anticipated objection of the submission that it was merely technical. Mr Clark then submitted that it would not be denied that Mr Barraclough's valuation turned out to be wrong, but that was not the same thing as negligence in law. He said he proposed to call evidence, accepting the evidentiary burden rested upon him, showing that there was an explanation which effectively negatived the allegation of breach of duty of care.

Having set out the claim and defence, the broader issues mentioned earlier in this judgment which the defendants wished to place before the Court as relevant can now be canvassed. Mr Manning and the partners of the solicitors' firm were not strangers to each other in business dealings. There was

a consortium known as the Star Development Syndicate. It was so called because it was concerned with the Star Hotel site in Albert Street, Auckland. The individual members of that consortium apparently were Messrs R J Kendall, R M D Sturm, W Wilson, J M S Strong, A R Galbraith and R J Milne. The first five names are of solicitors then in practice, and directors of the plaintiff company, and they held a 50% share with Mr Milne holding the remaining 50%. The evidence from Mr Sturm at the hearing was not given in such a way that the exact nature of the transaction was disclosed at first, but could be pieced together. For instance Mr Sturm in his evidence-in-chief rather blandly said he acted for a syndicate and it was not until cross-examination the story began partly to unravel. By an agreement dated 24 May 1974 Mercantile, Star Development Syndicate and Raymond John Milne, a builder, were parties to a joint venture. That contract document has now been lost and was therefore not able to be produced. Neither was much detailed information passed to the Court about that joint venture. However it must have been a very valuable property for there was evidence it had a trustee advance limit of $550,000 on first mortgage and that amount was lent. Apparently in the early part of 1974 the Syndicate had negotiated, in effect, a sale of the Star property to Mercantile. What was produced by the defendants through Mr Sturm was an agreement dated 5 December 1974 basically concerned with dispersal of the said mortgage advance of $150,000. The parties to that agreement were Mercantile for one part, Roderick Milton Douglas Sturm, of Auckland, solicitor and Raymond John Milne for the Star Development Syndicate of the second part and Raymond John Milne, builder, of the third part. By the joint venture agreement Mercantile had agreed to indemnify the Syndicate against all payments, outgoings and liabilities on the Star Hotel site from 31 March 1974. The commercial significance of all this is not known. What seems clear is that after May 1974 Mercantile had not maintained the payments and at the date of the agreement (5 December 1974) the amount owing to the Syndicate was $56,981.59. The rest of the agreement provided for the meeting of that sum and future liabilities of Mercantile on the Star site to the Syndicate from the proceeds of the mortgage advance of $150,000. Therefore, at least, a large proportion of the money (probably over two-thirds of it) which reached Mercantile from the plaintiff company following the security given over the subject land was passed to the Star Development Syndicate, constituted as stated above. Mr Clark conceded that he could not take this issue too far because the true documentation of the circulation of the money was not before the Court. However, there was sufficient evidence before the Court for him to submit that the directors of the plaintiff were personal beneficiaries, in the broader sense, of the mortgage advance received initially from the nominee company. In a word the funds were switched. I will return to this point.

The defendant pleaded contributory negligence in this way:

> 18. If they or either of them were in breach of any duty to the plaintiff which is denied) the plaintiff's alleged loss was entirely caused, or alternatively was contributed to, by the plaintiff's own voluntary acts and conduct and/or by the plaintiff failing to exercise proper care in making the advances on the terms and in the circumstances that it did to Mercantile Developments Limited.

In the course of making his final submissions I asked Mr Clark for true particulars in regard to his allegation of contributory negligence. Overall he submitted that the plaintiff, with solicitor partners as its directors, had a duty to exercise cautious judgment at the time of examination of the valuer's report. He gave three particulars as follows:

1. Failure to properly consider Mr Barraclough's report.
2. Failure to take heed of the speculative nature and lack of true substance of Mercantile Developments Ltd.
3. Failure to exercise professional skill and care.

Mr Joyce raised no complaint about the late receipt of these further particulars of contributory negligence. It was part of Mr Clark's case that individual members of the firm of solicitors were themselves deeply involved in land speculation, not just acting for clients. Under cross-examination Mr Sturm, who was the plaintiff's main witness, conceded that the partnership had acted as

managers and developers for a very large subdivision known as Conifer Grove. It was principally for the Commercial Bank of Australia Ltd but there was an acknowledgement by Mr Sturm that part of the management fees, and perhaps other costs, were met by the partners themselves having a 20% shareholding in the venture. Mr Clark went to the extent of calling under subpoena two other partners who would also have been directors of the plaintiff company, namely Mr R J Kendall and Mr J M S Strong. The purpose of this evidence seemed to the Court two-fold. First, that all three solicitor witnesses were at the material time, that is early to mid 1970s, personally involved in land speculation from which considerable profits flowed to them. Also to give the Court some detail about the Star Development Syndicate. Secondly, that such involvement must have personally, and forcefully, brought to their attention the highly speculative nature and danger of such activities which in turn should have been reflected in a much more careful assessment of the valuation report received from Mr Barraclough.

Having set out all the major aspects of the facts for consideration the Court's attention must now fix squarely on the precise issue before the Court: was there a breach of duty of care by Mr Barraclough in his preparation of the valuation report of 21 October 1974 for a firm of solicitors who ultimately passed it to another firm for its use? With the concession by Mr Clark of the duty of care to third parties the fact it was passed to another firm of solicitors from the addressee, with whom there was a contractual duty, may be put to one side. Simply, is the report itself a breach of the duty of care?

First, what in law is the standard of care required? In the circumstances of this case negligence is the doing of something which a reasonably prudent registered valuer would not do, or the failure to do something which a reasonably prudent valuer would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. The amount of caution required of a valuer in the exercise of ordinary care depends upon the conditions apparent to him, or that should have been apparent to a reasonably prudent valuer under circumstances similar to those shown by the evidence. See generally *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, Richmond J at p 108, *Cold Star Insurance Co Ltd v Dominion Adjusters Ltd* [1982] 2 NZLR 38, *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) Lord Edmund-Davies at p 277 citing *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 1 18,121, *Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER 245, 247 and *Clark v MacLennan* [1983] 1 All ER 416. The plaintiff called Peter James Mahoney, a registered valuer, to give expert evidence of standards and valuations of the subject land. On standards it could be said his evidence clearly implied Mr Barraclough had not reached standards of ordinary skill and care in the valuation of 21 October 1974

The Court turns to examine the circumstances in which Mr Sturm received and acted upon this valuation report which the plaintiff says was negligently performed. Through the sale of the Star Hotel site earlier in the year to Mercantile Mr Sturm had been introduced to Mr Manning for whom Sheffield Young & Ellis acted as his solicitors. Approaches had already been made by Mr Manning to Mr Sturm for finance for his property transactions. Offering, in particular, on one occasion to use any funds that might be available to pay outgoings on the Star Hotel property for which his company had become liable. This clearly would have been to the personal advantage of Mr Sturm and his partners as members of the Syndicate. At Mr Manning's request Mr Sturm went to the law offices of Sheffield Young & Ellis sometime in November 1974, it seems. Before agreeing to meet, in his own office, Mr Sturm checked with a partner that they had funds available "from our general pool of funds". The following is an extract from Mr Sturm's evidence-in-chief:

> Did [you] then go to see Mr Young and Manning at latter's offices? – Yes I did.
>
> What transpired at that meeting? – Mr Young handed me a valuation on a property in Takanini [ie, the subject land] completed by Barraclough Bros Ltd and asked that I adopt that valuation as a basis for arranging a loan for Mercantile Developments Ltd.
>
> . . . .

You will see . . . Mr Sturm that the recommendation for investment is to amount of $150,000 [incorrectly $250,000 in notes] for up to 5 years at current rates of interest, was your attention drawn to that in Mr Young's office? – Yes it was.

Were you simply shown the valuation or did you get a copy of it then? – I was given a copy which I read briefly in Young's office and I took it away with me.

. . . had you any personal knowledge of that particular piece of land? – No.

Did you have any particular familiarity in November 1974 with the area? – No.

. . . .

Having read the report did you make any independent inquiry or indeed any inquiry at all of your own as to the matters that were referred to such as planning provisions, consider situation of land, state and so on? – No I did not.

How then did you approach the valuation what way did you take it? – I considered the valuation to be appropriate to enable me to arrange a trustee loan of $150,000 . . . .

Is it your usual practise to rely on valuation report in that way? – Yes.

Do you claim any personal expertise in valuation of land? – No. I would in certain parts of Auckland perhaps consider I had some expertise but certainly not in that area.

In choosing then to accept the valuation in terms of which set what salient things that impressed themselves upon you? – Fact that a trustee certificate had been given for advance of $150,000 and that the recommendation stood good for up to 5 years. . . . I confirmed to Mr Young and Mr Manning that my firm would arrange to advance $150,000 on the security and that we would ask him or his company from that initial advance of $100,000 to pay the outgoings that were due by the company and that the balance would be available to his company in cash for his other purposes.

In short Mr Sturm attended at the offices of a solicitor who had there his client, is shown a valuation with his attention drawn to the bottom line containing the recommendation for a trustee loan. He says he was given a copy "which I read briefly in Young's office". Before he left the office he agreed to the advance and stipulated that two-thirds of it was to be applied to meeting Mercantile's liabilities to the Star Syndicate. This aspect was later reduced to writing in the agreement dated 5 December 1974. On Mr Sturm's part there was no careful reading of the valuation, no analysis, no questioning, no investigation, no challenge, no reflection, no discussion. There was utter and complete reliance upon the bottom line of the valuation report containing the recommended figure for a trustee advance. There was no investigation of the financial stability of the borrowing company. Mr Sturm admitted he did not examine a balance sheet. He drew up the mortgage and the only signatory was the borrowing company. No personal covenants of the two shareholders, Mr and Mrs Manning, were obtained. He knew full well the advance was not to be expended on the security By answers to questions Mr Sturm seemed not to be expecting the subject property to generate any income to service the borrowing on it, and apparently he never inspected it. There is no suggestion it was other than vacant land, perhaps utilised for some rural grazing. Mr Sturm was not asked in the box whether he knew the land had been purchased a year before for only $75,000. However, he did disclaim particular familiarity with land in the area in November 1974 and any personal knowledge of that particular piece of land. One therefore infers he neither knew nor inquired about the sales evidence of the land in question. In making the aforesaid observations the Court is fully aware the action is not against Mr Sturm, or the nominee company, for negligently making the advance but nevertheless many of the aforesaid matters are relevant to Mr Sturm's approach to the valuation report and to the plea of contributory negligence. In agreeing to the advance he was strictly speaking acting as solicitor on behalf of the nominee company in an advance of trust funds. In that capacity he was bound to exercise a detached, professional, critical judgment whether or not he should advance trust funds to that borrower regardless of the ultimate destination of the funds.

Before examining the valuation report itself there is an evidentiary matter to be disposed of. No expert evidence was called by either party from an independent solicitor as to the standards of a reasonably skilled solicitor in assessing such a valuation report. I raised the issue with counsel at the hearing and the Court has reflected upon it since. *Phipson on Evidence* (12th ed, 1976) para 51, says the Court will take judicial notice of the general practice of conveyancers. See also *Neagle v Power* [1967] SASR 373 and *Jennings v Zilahi-kiss* (1972) 2 SASR 493. In England there are cases where solicitors have been called to give evidence: *Goody v Baring* [1956] 2 All ER 11; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113; *C & K Ladenbau (UK) Ltd v Crawley & de Reya* [1978] 1 WLR 266; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384. See *Bradley v Attorney-General* [1978] 1 NZLR 36 and *Sutherland v Public Trustee* [1980] 2 NZLR 536 for New Zealand authority. In this case the Court would have been assisted by evidence of professional standards but has not felt materially affected by the lack of such evidence. However, in a high technology commercial environment a Judge can quickly lose touch with current standards and the bias should be to call such evidence.

The Court now goes to the nub of the case and it is to assess the valuation report prepared by Mr Barraclough and on which Mr Sturm resolved to make an advance. It has been reproduced in its entirety in the judgment earlier. The first point is that the report itself must be judged as a whole document and not from extracted, or isolated parts such as the recommendation at the end. Secondly, the basic issue in this case of alleged negligence resulting in an incorrect investment recommendation concerns the true status of the subject land under the planning legislation. If that be the issue how was it dealt with in the body of the report? I have italicised the direct references to the zoning. The first italicised paragraph indicates the legal zoning is correctly stated as "Sequence 3 land for future urban development". The second sentence of the paragraph states that the land is part of a large area which the Council intends changing the zoning to industrial. The short point is that there is no representation that in fact the land was zoned industrial. The second italicised extract specifically states the changes are open to objection (with all the implications of uncertainty that should indicate to an ordinarily skilled solicitor) and the third italicised extract specifically makes the valuation subject to a zoning change to industrial. In the fourth italicised extract, immediately above the monetary calculation of value, the land is referred to as "potential industrial land". Fifthly, the valuation report concludes with the unqualified recommendation for a trustee investment of $150,000. The second (and very last) paragraph recommends an advance of $180,000 if private funds are used "as even if this land were zoned residential it could be sold readily for this figure". On a strict construction of this last sentence it is difficult to know exactly what Mr Barraclough meant. Does that last part, reproduced above, mean that if it was zoned immediately for residential use (which it most certainly was not) it had a value of $180,000 for that is what he says it would fetch in a sale. If that is the true meaning he was offering an alternative valuation on the basis of presently zoned residential land down by $115,000 on industrially zoned land. However, that construction is not entirely satisfactory for in the same sentence he considered $180,000 could be advanced from private funds (presumably as opposed to trustee funds) "with reasonable safety". A recommended advance of $180,000 cannot be reconciled with a value in the same amount for then there is no safety margin for a lender. These inherently difficult issues were not covered in questions to Mr Barraclough when he was in the witness box. Finally, the central purpose of the valuation was for a prospective mortgage advance, and therefore the potential lender's interests should have been paramount.

It seems to the Court in the very last analysis Mr Sturm chose to lend $150,000 in circumstances already outlined, taking as security land which was zoned Future Urban Development Sequence 111. Knowledge of that exact zoning came to him in a valuation report buried in an avalanche of unwarranted, speculative, optimism with a recommendation for lending based not upon the actual zoning but upon the possibility of a changed zoning to industrial or even residential. The simple truth is that a zone is not changed until it is changed.

Applying the standard of care fixed by the law of ordinary skill and care, assisted by the expert evidence of Mr Mahoney, the Court reaches the view Mr Barraclough was negligent in his preparation of the report. I have said earlier in making the decision on negligence, or not, the whole document must be assessed. If negligence were described as a horizontal line on a graph below which the standard of care was breached it could justly be argued for most of the report the curve began and stayed above the line. The italicised extracts 1, 2 and 3 were suitably qualified and would not have been a breach. The italicised extract 4 brought the curve perilously close but 5 took the curve through intersection and below to breach. Although, as stated, the document must be read as a whole nevertheless the entire recommendations section demonstrates a failure of ordinary skill and care .

It follows an inquiry must now be made of the allegation of contributory negligence. Contributory negligence is the negligence of the plaintiff which in combination with that of the defendant contributes as a cause in bringing about the damage. The total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff. I deal first with the broad issues placed before the Court, namely, the personal involvement of Mr Sturm and his partners in the Star Syndicate which was ultimately to be the beneficiary of the majority of the funds advanced. I specifically hold that such an involvement could not be in law validly described as approximate cause, or a legal cause, of the damage. I do not hold it was a substantial factor in bringing about the damage. Having said that it nevertheless could not be said to be without influence in the failures of Mr Sturm in his approach to the valuation and about to be reiterated.

The cause in bringing about the damage attributable to Mr Sturm was his failure to apply the ordinary skill and care of a solicitor responsible for advancing trust funds. The exact circumstances of the advance have been outlined in detail. He briefly read a fairly complicated report and without assessment, analysis as to its true meaning, or further investigation of any kind made an immediate substantial advance of trust funds. The shortest period of calm, detached appraisement of the valuer's report would have revealed its speculative, flawed reasoning to its final recommendations. I also hold Mr Sturm's failure to make a detached and professional investigation of the financial viability of the borrowing company a contributing cause to the damage. I find the proportion to be attached to the negligence of Mr Sturm to be high and I fix it at 60%.

The plaintiff is a solicitors' nominee company. The Council of the New Zealand Law Society in 1969 approved the establishment of such companies by firms of solicitors to be used in conjunction with a practice. The need arose out of the inconvenient and expensive documentation required when the time came for substituting one mortgage contributory with another. Using a nominee company as mortgagee the advantages were considerable in convenience and cost. The company structure obviated the necessity of transfers when one mortgagee is replaced with another. The company acts as a bare trustee for clients' funds and shareholders' funds are exiguous for practical purposes. The New Zealand Law Society by rules and its Code of Ethics seeks to exercise strict control and regulation over the nominee companies of its members. The internal accounting procedures required by the Society to be followed for the identification of transactions is strict, but need not be further detailed for the purposes of this judgment. One thing is certain, as the eight pages of ledger sheets of the plaintiff's evidence shows, in the course of a term mortgage, and any extensions, contributors are able to board and alight from a mortgage advance like passengers on a city bus.

It seems Mr Clark's legal argument was even if the original contributors relied upon the valuation report there is no evidence many other contributors over the years did, numbering dozens, and therefore a vital factor in establishing liability Is not proven. He reinforced the argument by showing from the ledger sheets contributors were joining the security in 1977 and 1978 when to the certain knowledge of the directors of the plaintiff company the security was bad, if not rotten, to use his words,

I have reached the view the defendants cannot avail themselves of this argument. There may have been irregularities in the conduct of the nominee company over the security but that is not the issue for this Court in this litigation. In developing the argument Mr Clark seemed to be saying the nominee company: was a bare trustee and not therefore the loser. At the Court's suggestion to him this might involve piercing the corporate veil Mr Clark answered that the nominee company was the agent which was not the same as the incorporation argument but did not expand that statement further. However put the Court rejects the argument. Mr Sturm was authorised, and did act, on behalf of an incorporated: company and I cannot see the justification legally for the Court exploring behind that incorporation. If an individual has passed money to the nominee company and has thereby suffered loss in circumstances whereby he has a grievance against the company, or the solicitors, let him look to his remedies. There is no evidence before this Court such a person exists. This is a Court of law, not of professional discipline, or ethical conduct.

Mr Clark made a brief submission that the loss was 552,000 which figure was arrived at by simply deducting $98,000 from $150,000. The Court is not satisfied that either in evidence or argument the issue of damages was dealt with in such a way the question can be satisfactorily decided upon in this judgment. If damages cannot be agreed upon leave is reserved to re-open that issue. It follows the question of costs is reserved.

[After hearing argument, on 31 July 1984, on the question of damages from Mr G R Joyce for the plaintiff and Mr B H Clark for the defendants, Jeffries J delivered the following final judgment on 3 September 1984:]

Jeffries J. The hearing of this case took place over three days in June 1983 and I delivered judgment on the liability question in July 1983. I held that the plaintiff succeeded in its claim for negligence against the defendants, but I said that I was not satisfied that either in evidence, or argument, the issue of damages had been dealt with in such a way the question could be satisfactorily decided upon in that judgment. Agreement was not reached by counsel on the issue of damages and has been re-argued before me.

On p 581 of the previous judgment I set out the claim of the plaintiff and reproduce it here.

"The plaintiff claims the sum of $94,183.20 made up in the following way:

[1]	Principal sum under the mortgage	150,000.00
[2]	Interest on $150,000 @ 15% for period 15/5/77 to 15/5/78	22,500.00
[3]	Interest on $150,000 @ 15% for period 15/5/78 to 11,250.00	
[4]	Rates	5,124.60
[5]	Valuation fee	166.00
[6]	Barfoot & Thompson – auction expenses	1,132.60
[7]	Solicitors' charges	2,000.00
[8]	Supreme Court application fee on mortgagee sale	10.00
		$192,183.20
[9]	Less transfer price	98,000.00
		$94,183.20"

Items 1 and 9 above are not in any dispute. The loss there is $52,000 and is conceded by the defendants as payable. Items 5, 6, 7 and 8 are now conceded and will be met. Items 2, 3 and 4 are in dispute, not as to the quantum claimed of those items but whether or not they are properly payable as damages by the defendants to the plaintiff. Mr Clark for the defendants disputes causation. The claim for interest is for the period from 15 May 1977, being the date of default through to 15

November 1978 which, in effect, was to about the date of the final auction which yielded the $98,000. As stated the defendants acknowledge liability for the shortfall of $52,000 plus the items 5 to 8 amounting to $3,308.60, making a total of $55,308.60. On the other hand the plaintiff claims the full amount of $94,183.20.

One of the subjects in the law that has attracted an enormous volume of legal writing in textbooks, learned articles and judgments is that of damages. Throughout the common law world the Courts have found it convenient to approach damages as a two stage measurement. The Courts have readily enough been prepared to give general damages which are the ones that Courts believe "generally" flow from the wrong perpetrated by the defendant. These damages are usually concerned with value measurement which is heavily biased towards protection of capital rather than other interests. The really challenging problems have been in the field of special damages and the proclivity of the Courts to impose limitations on their recovery by the doctrines of certainty and remoteness. Many a valid claim has been denied on one or other of those grounds.

The problem in this particular case arises out of a tortious wrong and is concerned with remoteness. Whilst admiring the judgments of those Courts which have undertaken recondite reviews of the authorities, many of them cited by both counsel in argument, most of which have been consulted, this Court without difficulty avoids attempting to add such a contribution but adopts a somewhat different emphasis, on the basis of authority, which is the only course for Courts of first instance.

The problem of remoteness has troubled both contract and tort. It may not be very fashionable to do so but I would like to pass a remark or two in favour of *Hadley v Baxendale* (1854) 9 Exch 341 because I think it is of some influence in assessing tort damages as well. I do not think it is to be overlooked that Alder-son B was deciding how juries were to be directed (in the days well before universal education and literacy), who were expected to follow that direction in the only contract damages question a particular jury would ever decide. That seems to this Court to imply strongly a decision was to be made primarily on the facts of the case and that is a point which should never be overlooked m the assessment of damages. One way of looking at *Hadley v Baxendale* is that most famous passage beginning "Now we think the proper rule in such a case as the present is this: . . ." is a kind of code (the Court itself in deciding the case was said to be influenced by the French Civil Code) and should be used as such. If we in New Zealand decided to codify the assessment of damages in a statute surely the most influential factor would be *Hadley v Baxendale*. It was for the United States with the Uniform Commercial Code, which has been adopted by every State excepting Louisiana. Foreseeability at the time the contract was made on the basis of the facts known to the parties at that time is a very good general rule. It is then the duty of the Courts to apply that rule to the facts of each case and not to attempt to force the facts into some judicially stated formula. I do not pretend I am saying anything that has not been said before from greater authority, and far more eloquently. See *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, Upjohn LJ at p 712 and that extract from the speech of Lord du Parcq reproduced hereafter. Until there is a statutory code the Courts must keep developing the rule in *Hadley v Baxendale*. It sets the mainsail and the Courts do the trimming.

In a tort case the damages question has material differences from a consensual action. See *C Czarnikow Ltd v Koufos* [1969] 1 AC 350. The scope of general damages may be wider than that might be expected would arise naturally and logically from the tortious conduct. For special damages the wrongdoer in a tort action is charged with all injuries which naturally flow therefrom and were foreseeable at the time of the misconduct. See *Shaddock (L) & Associates Pty Ltd v Parramatta City Council* (1981) 36 ALR 385 and *State of South Australia v Johnson* (1982) 42 ALR 161. But it is hard to better the speech, on a contract case, of Lord du Parcq in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at p 232 for he tells a lower Court how to go about its task, which is of inestimable value:

> "I do not doubt the wisdom of the judges who, in *Hadley v Baxendale* and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend Lord Wright, and Lord Haldane in the passage cited by him, have emphasized, that in the end what has to be decided is a question of fact, and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

All cases are unique but some are more unique than others. This was a claim, in effect, by a firm of practising solicitors against another professional man alleging negligence in the preparation of a valuation report. My previous judgment held that the defendant valuer was negligent for the reasons set out. A very important part of that judgment was the view the Court took of the conduct of the plaintiff (through the solicitors) and held, rightly or wrongly, the contributory negligence reached 60%, again for reasons that are set out in the judgment. The case was of some complexity and the Court's task was not made easier by the obliquity with which the facts of the sub plot were placed before the Court, if I might put it that way. I refer, of course, to the part played by the Star Development Syndicate. I said the transaction had to be pieced together. This was a case that had definite undercurrents which observably disturbed the surface of the case rather than breaking it.

For some of the aforesaid reasons alter deciding liability I reached the conclusion, as stated in the judgment, that I was not satisfied either in evidence or argument the issue of damages had been dealt with in such a way the question could have been satisfactorily decided upon then. For a case with the unique features of this, especially where liability itself was so ardently contested, it was not surprising the damages question tended to take a secondary position at the hearing. Counsel requested the Court to rehear the argument on damages which was done on 31 July 1984 in Auckland. Neither side sought to call further evidence. Generally the arguments advanced by opposing counsel were heavily weighted on the side of legal submissions founded mainly on selected passages from judgments which were used to support the respective cases. The plaintiff's counsel made almost no use of the facts at all, and the defendants' counsel some, but not extensive. By implication the argument of each counsel was that the authorities would decide the issue of remoteness if only the Court could recognise the truth. By specifically mentioning evidence as well as legal argument in the first judgment the court meant to convey it regarded that as at least of equal importance as the authorities. For example the factual issue of what was the amount to advance on a proper valuation was not canvassed at all. See *London and South of England Building Society v Stone* [1983] 2 All ER 105.

The plaintiff company on the basis of a valuation made an advance of $150,000 to Mercantile. The plaintiff's case is that but for the valuation it would never have made the advance. This is the "but for" rule which establishes the link between injury and damages. See *Baxter v F W Gapp & Co Ltd* [1938] 4 All ER 457 at p 465. It is the causal relationship. Now the defendants do not contest that causal link for they agree to meet some of the damages claimed, but in particular the $52,000 which is the difference between the principal sum and the price the security was sold for, I will return to this aspect.

I think it is of importance in this case that the losses occurred for two reasons, not one. The first reason is that the borrower failed to meet its obligation under the contract. If it had been an asset rich company it could simply have been sued on the contract and the judgment executed. There would then have been no loss. The defendants have suffered through the weakness of the borrower but have been relieved somewhat by the finding on contributory negligence. The second reason for loss

is that the security was weak as well as the borrower. If some of the ifs of the valuation report had been different the land itself might have been strong enough as security to compensate for the weakness of the borrower's covenant to repay. It was not to be. The defendants were very much responsible for this second aspect of the loss. The security was right in their province.

The argument of neither counsel was grounded in a difference between general damages and special damages. The split between general damages and special damages is a device Courts have traditionally used to assist in the analysis of damage. There is confusion in the cases on the terms "general" and "special" so much so that *McGregor on Damages* (14th ed, 1980) § 21 is most unsympathetic to their use. *Halsbury's Laws of England* (4th ed) vol 12, para 1113 seems to see value in them. In the statement of claim all the items were specifically pleaded and there was no sum claimed for general damages. On that basis the whole claim must be understood as special damages and that appeared to be accepted by the defendants. The defendants' counsel did not specifically agree to pay the $52,000 because it was general damages. It was simply agreed to be paid together with four other items. The items of interest and rates were regarded as special damages and the argument on both sides was on the remoteness issue. Why do the defendants concede the $52,000? Could it be said this particular loss is of the kind that the law would imply or presume was not excluded by the remoteness rule and is such as would be generally suffered by a plaintiff who acts upon a negligently prepared valuation? That is the general damages definition. Such payment is the subject of an agreement in this case, but I think that fact is of some importance in deciding whether the interest and rates are to be met. If the defendants, as apparently is the case, agreed to meet the $52,000 as special damages there does not seem to be any reason in policy or logic why interest and rates should be excluded. If the land had been re-zoned in a way particularly attractive to the market it might have fetched say $225,000 at the auction and there would have been no injury because the plaintiff would have recovered its full losses including interest. The defendants have not argued the loss was solely the first reason namely the weakness of the borrower. They concede, I think rightly, it was the concatenation of the two reasons, and agree to meet the loss calculated by the difference between the principal sum advanced and the auction price. With that I see no justification for drawing the line there and refusing to meet the interest losses and rates. The damage naturally flows from the wrong and was foreseeable.

Finally is the answer, or result, different if the $52,000 is characterised as general damages? I do not think so. The $52,000 is arrived at by a loss of value measurement which is the usual way of calculating general damages where tangible property such as land is involved. Earlier I referred to the "but for" rule and as evidenced by the decision on liability the Court decided that the plaintiff would not have advanced the funds if it had not been for the valuation report. That report was faulty and it was the responsibility of the defendants. Interest was lost and the security was not good enough to recoup the lender. The lender is just as entitled to recover the interest and rates as the capital loss. This seems consistent with the object of damages which is to make the plaintiff whole, not to make it rich at the defendants' expense. Loss of interest is proximate and directly related to the injury.

It was never part of either case that there was some intermediate position over interest and rates: they were to be allowed or disallowed simpliciter.

Judgment is for the plaintiff in the sum of $94,183.20, but subject to the finding of 60% on contributory negligence which yields an amount or $37,673. There will be interest from 18 November 1978 (issue of proceedings) to date of this judgment at 11%. The plaintiff is entitled to costs on the final amount on which judgment is entered at scale, and I certify for three extra days. I certify for second counsel for three days.

Judgment accordingly.

Solicitors for the plaintiff: *Kendall, Sturm & Strong* (Auckland).
Solicitors for the defendants: *Earl, Kent & Co* (Auckland).

Appeal
The plaintiff appealed and the defendants cross-appealed.

C R Joyce QC and CF Foote for the appellant (Kendall Wilson Securities Ltd).
B H Clark for the first respondent (C T Barraclough) and the second respondent (Barraclough Bros Ltd).

Cooke J. In the High Court in this case Jeffries J delivered his main judgment on 23 July 1983 and it was supplemented and completed by a judgment dealing with damages delivered on 3 September 1984. The action was by a solicitors' nominee company Kendall Wilson Securities Ltd (which may be referred to as Securities) against a registered valuer Mr C T Barraclough and his company (together conveniently referred to as the valuer).

In December 1974 Securities advanced $150,000 to Mercantile Developments Ltd ("Mercantile") on security of a memorandum of mortgage over a Takanini property of about 20 acres. Securities, in the person of Mr Sturm hereinafter mentioned, had been shown by the solicitors for Mercantile a valuation of the property by the valuer dated 21 October 1974. It certified that the property offered sufficient security for the advance of trust funds to the amount of $150,000 for up to five years at current rates of interest. Mercantile defaulted under the mortgage and after unsuccessful attempts to sell the property on the market the partnership of solicitors finally took a transfer of it at a current valuation price of $98,000 in November 1978.

The claim by Securities against the valuer was for $94,183.20, representing the principal sum and other moneys due under the mortgage in November 1978 ($192,183.20) less the $98,000. The Judge awarded the sum claimed less 60% for contributory negligence, ie $37,673, together with certain interest. Both sides appeal.

The appeal
The plaintiff's appeal is directed to the finding of contributory negligence and the apportionment. Subject to particular points regarding the position of a nominee company which are raised by the cross-appeal, the defence does not on appeal question the finding of the Judge that the valuer was negligent in the valuation and has at all times accepted that the valuer was under a duty of care to prospective lenders to whom Mercantile or its solicitors might show the report. The report was addressed to Mercantile's solicitors but records that the purpose was to assess the value of the property as security for first mortgage finance. The valuer knew that it would be shown to third parties to whom Mercantile applied for finance. The ingredients of a duty of care were obviously present, as is accepted.

In order to consider the findings as to contributory negligence it is necessary to analyse the uncontested finding of negligence. Although the valuation did not expressly say so, the site was zoned rural and used only for grazing. The Manukau City Council were contemplating a change of zoning to industrial. The valuation, after correctly recording that the land was at present shown on the town plan as "Sequence 3 land for future urban development", went on to say that the changes were still open to objection. Then came an important sentence: "However from my discussions with the Engineers I am satisfied the scheme change will go ahead". Saying that he was satisfied that once the industrial zoning was confirmed the property would sell at $25,000 per acre plus corner influence, the valuer allowed some margin in valuing it at $15,000 per acre plus corner influence of 12.5%; thus arriving at a figure of $295,000. The report then concluded with the following recommendations:

> "We certify that we have acted independently of the applicant in this valuation and that under section 10 of the Trustee Act 1956 this property offers sufficient security for the advance of Trust Funds to the amount of one hundred and fifty thousand dollars ($150,000) for up to five years at current rates of interest.

> "If private funds however were being lent I consider that an amount of one hundred and eighty thousand dollars ($180,000) could be advanced with reasonable safety as even if this land were zoned residential it could be sold readily for this figure."

In the event the scheme change did not go ahead; there was an economic downturn and a fall in the market for industrial land. The Judge found that the various references to zoning in the valuation were suitably qualified and even that the $295,000 valuation as potential industrial land was not negligent, but that, in his words "the entire recommendations section demonstrates a failure of ordinary skill and care". The absence of any challenge to this finding by the respondent makes it superfluous to underline the finding. It is enough to note that on 12 February 1974 the valuer had valued the property, then slightly larger in area, at $86,000 and as sufficient security for a first mortgage trustee advance of $50,000.

As to contributory negligence the Judge's findings turned on the part played by Mr Sturm, who was the partner in the firm of solicitors primarily concerned in the dealings with Mercantile regarding the advance. He was also a director of Securities. At first in Mr Joyce's argument in this Court counsel questioned whether for the purpose of the Contributory Negligence Act 1947, s 3, any negligence on the part of such a person could be attributed to the company. As the argument developed in the course of discussion with the Bench Mr Joyce did not press this point, and I think rightly not. A lender may not normally be identified with his solicitor for the purposes of the contributory negligence legislation – we need not go into that – but on ordinary principles relating to companies I think that in the transaction with Mercantile Mr Sturm personified and was identified with the nominee company. The well-known words of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170, apply except in so far as they refer to guilty mind, a reference made by Lord Reid because he was speaking of a criminal case:

> "I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

It will be seen that the contributory negligence found is under two heads: failure to study the report and failure to investigate the borrower's financial position. As to the first of those, Mr Joyce was able to demonstrate, I think, in his argument in this Court that on its face the reasoning in the report was not flawed. The final recommendations even appear conservative by comparison with the potential industrial value of $295,000, which in turn might appear conservative by comparison with a full industrial value of more than $425,000. Everything turned of course on the scheme change, and any competent solicitor would know that this could not be guaranteed. But the valuer was very experienced and had gone as far as to say that he was satisfied from discussions with the engineers that it would go ahead. There was no evidence of professional practice to the effect that a reasonably prudent solicitor would not rely on such a report. I cannot avoid the conclusion that Mr Sturm was entitled to rely on it and that the finding on this head cannot stand.

The finding on the second head is in a different category. The financial position of Mercantile towards the end of 1974 was not explored in any detail in the evidence, and even the Judge's views about it are to be gathered mainly by inference. Mr Sturm said that he knew that it had a substantial

equity in a number of properties. He thought that inspection of its balance sheet would be of no real value and m truth he seems to have made no investigations. Mercantile was in the business of land development or speculation.

A facet of the case which I think may well have influenced Jeffries J, and justifiably, is that partners in the Kendall Wilson firm and a builder, Mr Milne, were associated with Mercantile in a joint venture concerning the Auckland property on which stood the old Star Hotel. The partners belonged to the Star Development Syndicate. There was a joint venture contract dated 24 May 1974. That agreement provided that Mercantile would indemnify the syndicate against liabilities on the Star site and development after 31 March 1974. An agreement dated 5 December 1974 confirmed that Mercantile had paid certain Star outgoings for April and May 1974 but stated that other outgoings totalling $56,981.59 were due. Most of these had been due since June, July or August. The December agreement provided that out of the $150,000 advance Mercantile would pay the $56,981.59 forthwith to the syndicate; a further $50,000 was earmarked for future payments to the syndicate. This suggests that Mercantile had experienced some difficulty in meeting its obligations under the joint venture contract. We know too that from at least August 1975, and perhaps earlier, Mercantile was in default to Securities for mortgage interest and that a Property Law Act notice was served in December 1975.

It is true that the economic change to which reference has already been made was occurring about the time of Mercantile's defaults under the mortgage. Nevertheless I think that there was enough in the evidence to support the Judge's obvious opinion that some reasonably possible investigation of Mercantile's affairs by Mr Sturm would have revealed a less than assured financial position. Jeffries J was entitled to find that reasonable prudence dictated such an investigation rather than total reliance on the security. In the light of all the evidence just touched on, I would not disturb the finding of contributory negligence on the second head.

It was argued for the appellant that any failure to investigate the borrower's finances and the value of the borrower's covenants was immaterial. I agree with Mr Clark that what he called Thomist logic is not appropriate in the application of the Contributory Negligence Act. The loss of part of the mortgage advance and other sums should be regarded as damage suffered my Securities partly as a result of the company's own fault and partly as a result of the valuer's fault. The damages should be reduced to such extent as the Court thinks just and equitable having regard to the share of Securities in the responsibility for the damage. The apportionment made in the High Court cannot survive the elimination of the first head of contributory negligence. Some weight should still be given to the general impression formed by the Judge, but we must make our own assessment with such help as we still obtain therefrom together with our own appreciation of the facts. Instead of the 60%, I would favour reducing the damages by one third.

The cross-appeal

Turning to the cross-appeal, one can reject quite briefly a contention that most of the indebtedness of Mercantile to Securities arose from the prior syndicate dealings and not from reliance on the valuation. The $150,000 advance was made in reliance on the valuation and it is this that we are concerned with. Apart from that point Mr Clark made two substantial submissions, on lines similar to his argument in the High Court.

The first was put in various forms but essentially invokes the particular function of a solicitors' nominee company. The memorandum of association of Securities states its first object in these words:

> "To act as a nominee company holding mortgages charges debentures instruments and securities (including documents of title) of all kinds (whether contributory or otherwise) or any interest therein upon a bare trust for the legal or beneficial owner or owners thereof and as such nominee to lend moneys."

Mr Clark's argument is that Securities made the advance simply as trustee or agent for such investors as at that time had funds with Securities; that the contributors to nominee companies change from time to time, as occurred here; that the contributors in 1978 when the security was sold were not the same as those in 1974 when the advance was made; that the nominee company had suffered no loss; and that it could not sue on behalf of contributors who themselves had not relied on the valuation or suffered loss in consequence. Counsel added that, as in contract, the legal relationship or vinculum juris should be seen as between the principal and the third party (the valuer), the agent dropping out of the picture.

At first sight that argument might appear to have some validity if one approaches the case solely from the point of view of the law of trusts. It seems to me, however, that the right starting point is elsewhere. We are concerned with the law of negligence and duties of care. Solicitors' nominee companies are familiar in the finance market and would be contemplated by the valuer as among prospective lenders. In my opinion the relevant duty may be defined as a duty owed to the company to take reasonable care in the valuation, so that the funds administered by the company would not be lost by reliance on an erroneous valuation. As between the valuer and the company, the source of the funds and changes in the beneficiaries whose funds the company controls are irrelevant: res inter alios acta. There appears to be no obstacle to our adopting that view. Any other would be artificial and destructive of part of the utility of solicitors' nominee companies .

Accordingly I would hold, in substantial agreement with Jeffries J on this point, that the duty was as just stated and that on its breach the valuer is liable to the company to which the duty was owed to make good the loss of funds.

We are not concerned with whether any individual investor could have a cause of action against a valuer in similar circumstances. It may be added, however, that the judgment of Wootten J in *BT Australia Ltd v Raine & Horne Pty Ltd* [1983] 3 NSWLR 221, though that case is not on all fours on the facts, may in allowing recovery to the third plaintiffs (who were trustees) reflect a view on the same lines as just stated regarding the nominee company. Be that as it may, I favour that view in principle.

Mr Clark's other submission was that certain interest and rate liabilities were not recoverable from the valuer. He conceded that in principle some lost interest could be recovered and that the question is one of degree, but he contended that these liabilities were too remote, having accrued from the latter part of 1977. Failure to mitigate damages, as by selling the security earlier, is disclaimed as a defence. The short answer to this argument is that some loss of interest and similar incurring of current liabilities is the very kind of thing to be expected if, on default by the mortgagor, the mortgagee has to resort to the security. As a matter of degree I would not dismiss these items as remote and consider that the Judge rightly allowed them.

The Court being unanimous, the appeal is allowed to the extent of changing the proportion by which the damages are to be reduced for contributory negligence from 60% to $33^1/_3$%. The cross-appeal is dismissed. Having succeeded to the foregoing extent, the appellant is entitled to some award of costs. We fix these at $1000 together with disbursements, including the reasonable cost of preparing the case and the travelling and accommodation expenses of counsel, to be fixed by the Registrar.

McMullin J. On 24 May 1974 a syndicate known as the Star Development Syndicate, comprising the members of the legal partnership of Kendall & Wilson and a builder, entered into an agreement called a joint venture agreement with a company called Mercantile Developments Ltd ("Mercantile") for the sale to Mercantile of the Star Hotel in Auckland. In the course of discussions relating to that transaction Mr Sturm, a member of both the partnership and the syndicate, met a Mr Manning a director and one of the two shareholders of Mercantile. Under the provisions of the joint venture agreement Mercantile undertook to pay certain outgoings due on the Star Hotel property. Mr Manning asked Mr Sturm if he could arrange finance for Mercantile and offered to apply any such advance in payment of the outgoings on the Star Hotel for which Mercantile had become liable

under the joint venture agreement. Mr Sturm told him that any advance which he could arrange would have to be secured by a first mortgage supported by a trustee valuation Later in 1974 a valuation dated 21 October 1971 made by the first respondent, Mr C T Barraclough, was handed to Mr Sturm by Mercantile's solicitors and Mr Sturm agreed on behalf of the appellant ("the nominee company") to make an advance of $150,000 on the first mortgage of a block of land near Papakura owned by Mercantile.

This summary of the circumstances in which the nominee company, through Mr Sturm, agreed to make the advance on mortgage is given because it provides a short statement of the background for a consideration of the issues raised on this appeal and cross-appeal. While the nominee company's claim that the loss for which it sued in the High Court was caused by the negligence of Mr Barraclough in making the valuation report referred to in respect of the subject property was in issue in the High Court, in this Court Mr Clark did not contest the finding of Jeffries J that in furnishing the particular valuation report Mr Barraclough had fallen short of the required standard of care expected of a valuer.

The present appeal by the nominee company raises a number of issues. In particular the nominee company contends that Jeffries J was wrong in finding that Mr Sturm failed to apply the ordinary skill and care expected of a solicitor responsible for advancing trust funds, and in holding that his failures in this respect, if established, were a contributory cause of the damage suffered by the nominee company, and in fixing the proportion of its responsibility at 60%. Other issues are raised which I deal with later in this judgment.

It is convenient now to record that in the course of the argument on appeal Mr Joyce conceded, quite rightly I think, that in considering issues of contributory negligence Mr Sturm, irrespective of any liability which he or his partners or the directors of the nominee company may have to those who have contributed funds to this contributory mortgage, is to be identified with the nominee company in that he acted not only as its solicitor but also as one of its directors and so in a sense personifies it.

The first ground of appeal is against the Judge's finding of contributory negligence against Mr Sturm. The Judge found that he was negligent in two respects:

> (a) In failing to read carefully, analyse, question, investigate, challenge or respect on or discuss Mr Barraclough's valuation before authorising the advance by the nominee company; and
>
> (b) In failing to investigate the financial stability of Mercantile in that he did not examine the company's balance sheet, and insist on personal covenants from Mr and Mrs Manning, the two shareholders, when he knew that the whole advance was not to be expended on the security and he did not expect the subject property, grazing land, to generate any income to service the borrowing on it.

In making his finding of contributory negligence the Judge effectively decided that Mr Sturm should have looked behind Mr Barraclough's valuation report. In this report, which is set out fully in the judgment under appeal, Mr Barraclough dealt with the zoning of the subject land. At the time that the report was given this land was shown on the Manukau City Council town plan as Sequence 3 land for future urban developed. However, Mr Barraclough reported that the Council had stated its intention of changing the zoning to industrial. He went on to say that all the changes were still open to objection but on his discussion with the engineers he was satisfied that the scheme change would go ahead. Later he said "I am satisfied that the subject property once the industrial zoning is confirmed would sell at $25,000 per acre plus corner influence". Then in making his valuation he said "Taking into account the present market conditions and the prominence of this site I consider that its value as potential industrial land is a sum of $15,000 per acre plus corner influence" making in all a total of $250,000. Finally there was the recommendation that this property being a trustee investment would support an advance of $150,000 for up to five years at current rates of interest.

In making a valuation it is axiomatic that a valuer should value the land as it is at the relevant date, making proper allowance for potentialities for change: *Re Whareroa 2E Block* [1959] NZLR 7. This method of valuation, which reflects the well-settled principle that the capital value of land is the sum which the owner's interest might be expected to realise if offered for sale in the open market, is also reflected in the numerous cases involving the valuation of land for the assessment of rent where restrictions of a town planning nature and the possibility of such restrictions being removed are to be taken into account: *Re an Arbitration between the Auckland Hospital Board and the Auckland Rugby League Inc* [1966] NZLR 413.

Where Mr Barraclough fell into error in making his report was in promoting what was no more than a suggestion for a scheme change, which in fact never eventuated, into a virtual certainty. It was this which led him to overvalue the land. That he erred in this way is not now in issue and Mr Clark has not challenged the finding of the Judge on that point. But it does not seem to me to follow that Mr Sturm failed to exercise reasonable care in acting upon that valuation. There may be cases where a lender or solicitor acting for a lender may be negligent in failing to pick up some mistake or erroneous assessment or assumption in a valuation even though it contains a recommendation for a trustee investment which on its face would justify the amount advanced. But in the present case I cannot see that Mr Sturm was remiss in accepting the valuation and the certificate included in it. Although he may have had some experience in land dealing he was not a valuer, there is no reason why he should have doubted Mr Barraclough's proficiency and experience as a valuer, and there is no reason why he should have queried the anticipated zoning which was an assessment said to have been made upon a factual inquiry made by the valuer. For these reasons I think that there was no basis for finding that Mr Sturm was negligent in this respect.

However I think that the finding of contributory negligence on the part of Mr Sturm in failing to investigate the financial stability of Mercantile was justified on the evidence. It is apparent from a reading of the evidence that Jeffries J considered that no adequate inquiries had been made as to the value of a personal covenant in the mortgage given by Mercantile. At the end of Mr Sturm's evidence the Judge asked a number of questions. These revealed that Mr Sturm did not know the amount of Mercantile's capital when he made the advance although he claimed he knew that it was substantial; that he had not examined a balance sheet of the company; that he had never made a previous advance to the company and that he did not get a personal covenant from Mr and Mrs Manning. In questioning Mr Sturm as he did the Judge effectively served notice at an early stage of the proceedings that the adequacy of Mr Sturm's inquiries into the standing of Mercantile was troubling him. It was not surprising that when the Judge asked Mr Clark at a later stage in the trial for a specific formulation of his allegations of contributory negligence, Mr Clark nominated Mr Sturm's failure to take heed of the speculative nature and lack of the true substance of Mercantile as one. No doubt he always had it in mind in formulating the plea of contributory negligence.

It is true that there appears to be little evidence as to what would have happened had Mr Sturm made inquiries of this kind. But there is material from which the Judge was entitled to infer that the financial position of Mercantile at the date of the advance was far from healthy. On 5 December 1974 Mercantile entered into an agreement with the Star Development Syndicate in which it acknowledged that, in terms of its obligation under the joint venture agreement to meet certain outgoings on the Star Hotel property, it then owed $56,981.59 to two lenders of which the nominee company was one. A statement prepared by the nominee company's solicitors dated 9 December 1974 showed that of the $58,487.39 which was the initial advance under the mortgage from Mercantile to the nominee company $58,487.39 was paid to the syndicate. Moreover, Mr Sturm in his cross-examination gave this material answer to the following question:

> "Is it a fact that prior to December 1974 there were payments due under joint venture agreement [that] had not been made to those entitled to them? - Yes".

This then was the case of a mortgagor which at the time the mortgage advance was made was in debt for a substantial sum in respect of overdue liabilities. It is apparent that if it ever recovered from this

state of indebtedness it did so but briefly because on 11 December 1975, when notice under s 92 of the Property Law Act 1952 was given, there had been a default in the payment of interest due under the mortgage as at 15 August 1975 of $11,250. This sum, if taken at the interest rates fixed in the mortgage, amounts to more than two quarters' interest indicating that the quarterly payments due on 15 May and 15 August 1975 had not been made. A personal covenant is an integral part of a mortgage and where the mortgagor is a corporate entity it may be important, see *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 98. *Roe v Cullinane Turnbull Steele & Partners (No 2)* [1985] 1 NZLR 37 (Quilliam 1), is an instance where a firm of solicitors was held liable in damages for professional negligence in respect of an advance made to a company where a personal covenant was not obtained.

In the light of these facts I think that the finding that Mr Sturm ought to have made further inquiries concerning the financial stability of Mercantile was justified. I would therefore uphold the finding of contributory negligence under this latter head, but would adjust the finding of 60% contributory negligence made by the Judge to a lesser percentage. I would concur in the finding that contributory negligence should be found in the figure of $33^1/_3$%.

I turn now to the cross-appeal. Mr Clark contended that whether or not the valuer was at fault the appellant as a nominee company had no claim for any loss suffered over the failure of the security. He said that a nominee company could not claim on behalf of persons who had become contributors to it at any time subsequent to the advance unless those persons could show that they had relied on the representation; that any contributors to the nominee company who joined it subsequent to the advance had their remedy against the solicitors.

The answer to this submission is that the representation was one which was made directly to the company itself. The report, as might have been expected by the valuer, came to the notice of the nominee company or its solicitors because it was the company which acted upon the representation in the report. The memorandum of association of the nominee company anticipated that the company as such would make advances and the mortgage executed in respect of this particular advance of mortgage records that the money was lent and advanced by the nominee company. I think, therefore, that Mr Joyce was on sound ground in saying that the valuer knew or ought to have known that the nominee company was within the category of persons who might be induced to make an advance by the representation contained in the report. Therefore I would hold that the nominee company had a good cause of action to put itself in the same position that it would have been in hut for the making of the misrepresentation. The fact that the contributors may have an alternative or an additional cause of action against those solicitors does not bar the nominee company from suing in tort.

Mr Clark also submitted that the nominee company had no claim for loss of interest from 15 May 1977 to 15 November 1978. He contended that this loss was not caused by and did not result from the nature of the valuation advice given by the valuer. However, he did not dispute that the nominee company had suffered the loss claimed; he did not claim that it had failed to mitigate its loss; and he conceded that a claim for some loss of interest was reasonable. The question therefore is one of degree. The test of recoverability of damages in an action for tort is whether the damage is of such a kind as a reasonable man should have foreseen. The recommendations in the valuation report concerning the mortgage advance related to an advance for up to five years at current rates of interest. If then the security proved to be deficient it was reasonably foreseeable by the valuer that the mortgagee would suffer a monetary loss both in the form of principal and interest. For these reasons I am in substantial agreement with Jeffries I on the two points raised in the cross-appeal. Accordingly I would dismiss the cross-appeal and allow the appeal by reducing the finding of contributory negligence on the part of the nominee company from 60% to one-third.

Somers J. Logically the first issue for consideration arises on the cross-appeal. It is whether the plaintiff nominee company Kendall Wilson Securities Ltd (to whom I will refer as Securities) could

recover from the valuer at all. What is said is that it was a bare trustee, a lender as a fiduciary agent only, and that accordingly it suffered no loss itself and could not recover on behalf of those for whom it was a nominee.

I doubt whether it is open to a valuer who has put loan advice into circulation to inquire into the relationship with other persons of one who has acted in reliance on it. But in any event I do not think the nexus between trustee and beneficiary provides a solvent in this case which is an action in negligence. Securities is described in its memorandum of association as a "bare trustee" of mortgages and other securities. But it must have active duties in the lending of money including the making of inquiries into the financial capacity of borrowers and as to the quality of security offered. These surely are reflections of its duty to those who entrust moneys to it to see that such funds are not lost. Because it is precisely in these areas that the advice of a valuer is sought and given I consider the duty owed by the valuer in this case, namely to take reasonable care in making his valuation, was a duty to the company itself. It should be emphasised however that the case is not one in which a mortgage has been assigned or transferred and in which the assignee/mortgagee seeks to recover on the grounds of a careless report to the original mortgagee. Of such a case I say nothing for here Securities has been the mortgagee throughout.

I would add that I do not think it can properly be said that Securities suffered no loss. In the circumstances of this case it would be surprising if the clients of the legal firm who contributed to the mortgage did not have an action against Securities .

These conclusions are sufficient to dispose of other cognate submissions on behalf of the valuer to the effect that subsequent contributors did not and could not have relied on the report. It is enough that Securities did.

The next issue is also the respondent's point. It is a claim that interest from 15 May 1977 and rates on the property paid by the mortgagee are too remote to be recovered. I am of opinion that this submission must fail and can say why shortly. It is not disputed that the negligent report of the valuer played a real and substantial part in the making of the loan. The valuer is accordingly liable for such foreseeable loss as is necessary to restore Securities to the position it would have been in had the negligent report not been made. That loss must include not only unrecovered principal sums lent but also interest on such sums which is also unrecovered. Such interest is damage of the kind a reasonable valuer ought to have foreseen would flow from a loan made as the result of a want of care on his part. It was not claimed that Securities had not acted reasonably to mitigate its loss by selling the security earlier.

The last group of issues has to do with contributory negligence. The valuer in his statement of defence pleaded that the loss was wholly caused by or was contributed to by the lender's own "voluntary acts and conduct and/or by its failure to exercise proper care in making the advances on the terms and in the circumstances that it did". The Judge found that Mr Sturm was strictly speaking acting as solicitor on behalf of the nominee company in the advance of trust funds and failed to apply the ordinary skill and care of a solicitor advancing trust funds.

This is not a case however in which either Securities or the valuer claimed to recover from Mr Sturm as a defendant or by way of contribution or indemnity under a third party notice. It is a case in which the plea is that Securities failed to take reasonable care of its own interests. It is not a case either in which Securities sought to rebut such an allegation by saying that it acted reasonably by engaging a solicitor to look after its affairs. It is a case in which Mr Sturm, who is a solicitor, was a director and substantially the alter ego of Securities in this transaction of loan.

Mr Joyce submitted that the trial Judge was strong in law in holding that negligence on the part of Mr Sturm amounted to contributory negligence on the part of Securities. This is a claim that negligence of Mr Sturm as a solicitor is not the negligence of Securities. For the reasons mentioned I do not think that there is anything in this point. Vis-à-vis Mr Barraclough, Mr Sturm was either a director or the agent (as solicitor) of Securities. His acts or omissions were the acts or omissions of the company.

Then it was submitted that the Judge was wrong in law in holding that a plea of contributory negligence was available to the valuer in the circumstances. The submission is that once there is a reliance on a negligent statement there is no room for contributory negligence by the person who so relies. I think the short answer to that submission in this case is that the valuer was entitled to expect that considerations additional to his advice would be influential in the decision as to whether or not a loan would be made.

I do not go further into those two grounds because in the end Mr Joyce placed little if any reliance on them.

Mr Joyce's principal submissions in this area of the case were that the Judge was wrong to find that Mr Sturm had failed to make a detached appraisement of the valuer's report which would have "revealed its speculative, flawed reasoning to its final recommendations" and had failed to make a detached and professional investigation of the financial viability of the borrower.

I am persuaded that the first finding cannot stand. Mr Barraclough in his report considered the value of the land "as potential industrial land" was, in all, $295,000. He had earlier said as the result of his discussions with the engineers of the local body that he was "satisfied the scheme change will go ahead" – ie that the zoning of the land would be changed to industrial. When therefore he recommended the property as a security for up to $150,000 of trust moneys or $180,000 of prize money I do not think it evident that this conclusion was formed on speculative or flawed reasoning. In the case of trust moneys the amount recommended is little more than one-half the value he put on the land – it is well short of two-thirds of his valuation. I consider Mr Sturm was entitled to rely on the recommendation in the report.

But I would uphold the second finding of the Judge – that Securities failed to make an investigation into the financial viability of the borrower. I have no doubt that the ordinary prudent lender would inquire into the ability of a possible borrower to meet his obligations without resort to any proffered security. McMullin J adverted to this in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 98. No inquiry was made in the instant case. It may have been that familiarity had bred assurance – Mercantile was involved with some members of the firm of Kendall Wilson in a property venture. In fact Mercantile needed the loan to meet its obligations in that undertaking and it may be that the venture's need for moneys clouded Mr Sturm's judgment in this area.

There is not much evidence to show what an inquiry would have disclosed. The loan was made in November 1974, default was made in payment of interest due on 15 August 1975. Exhibit B, a deed entered into between Mercantile, the property venturers, and a builder shows that Mercantile had not paid moneys due by the enterprise and which, as between the members of the venture, were payable by it. These totalled $56,981 at 5 December 1974. Some of the items were evidently due for payment by Mercantile much earlier. Other features of the deed suggest anxiety about Mercantile's position.

It is implicit in the Judge's reasoning that an inquiry was likely at least to have put a lender on guard. I think the evidence justifies such a conclusion and would uphold his finding of contributory negligence by the plaintiff.

These conclusions call for a reassessment of the degree of Securities' responsibility for the damage. I agree with the figure of one-third suggested by other members of the Court as appropriate in this case.

Appeal allowed in part.
Cross-appeal dismissed.

Solicitors for the appellant: *Kendall Sturm & Strong* (Auckland).
Solicitors for the respondents: *Earl Kent & Co* (Auckland).