THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 224

Record No. 2014/1324

[Article 64 transfer]

Finlay Geoghegan J.
Peart J.
Hogan J.
BETWEEN/

ACC LOAN MANAGEMENT LIMITED

APPELLANT

- AND –

ANTHONY BARRY, ORLA CUMMINS AND JULIE SHANLEY

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st day of October 2015

1. Does this Court have a jurisdiction to grant a declaration that a solicitor has been guilty of misconduct by failing to comply with the terms of an undertaking? Alternatively, what is the jurisdiction of this Court to direct compliance with the terms of a solicitor's undertaking? These are the important questions relating to the enforcement of solicitors' undertakings which arise on this appeal.

2. In the High Court McGovern J. took the view that the plaintiff Bank had established at most that there had been "some breaches of undertakings of the most technical nature but which, in reality, had no adverse consequences" for it. It was for essentially for this reason that McGovern J. refused to grant the Bank the relief in relation to a solicitor's undertaking which it sought: see *ACC Bank plc v. Barry* [2014] IEHC 322. The Bank now appeals against this decision.

3. The Bank had originally appealed to the Supreme Court, but following the establishment of this Court on 28th October 2014, this appeal was transferred to this Court by the decision of the Chief Justice (with the concurrence of the other members of the Supreme Court) on 29th October 2014 pursuant to Article 64 of the Constitution.

4. The defendants to these proceedings are solicitors who at various times and at various stages have been in partnership with each other. In 2005 the first defendant, Anthony Barry, was the principal of the firm of Anthony Barry & Co., solicitors, in Athlone. He acted on behalf of a Mr. Brian Doyle of Kenagh, Co. Longford. On 31st October 2005 Mr. Doyle borrowed monies from the plaintiff Bank for the purposes of developing land at Glack, Lackagh, Co. Longford ("the Glack property") and Mr. Barry gave certain undertakings to the Bank for this purpose at that time.

5. I should pause briefly at this point to say that Mr. Barry subsequently sold his practice on 1st December 2005 to the second defendant, Ms. Cummins, and the third defendant, Ms. Shanley. There is, in fact, an issue between the various defendants as to who assumed responsibility for this undertaking, but, for the reasons I am about to set out, it is not necessary to address this question. I will assume simply *for the purposes of this appeal* (and for no other purpose) that Ms. Cummins was the person on whom this responsibility for ensuring compliance with that undertaking actually devolved. It is also important to note that at the hearing in the High Court the Bank simply elected not to pursue the proceedings against the third defendant, Ms. Shanley. While it would appear that, by consent, those proceedings were formally adjourned, at the hearing of this appeal it was agreed that this Court could assume that the Bank was not now pursuing the matter as against Ms. Shanley.

6. The first undertaking was itself in standard form. The undertaking was to stamp and lodge for registration in the Land Registry the Bank's deed of charge and mortgage within one month from the date of the initial loan cheque issuing in respect of the Glack property. Mr. Barry gave a second undertaking on 21st October 2005 to furnish to the Bank the sale proceeds of seven apartment units being developed at Glack in permanent reduction of the Bank's debt. It is accepted that the proceeds of sale of the Glack properties have been transferred to the Bank.

7. There was indeed a third undertaking given by Ms. Cummins and Ms. Shanley on 9th February 2007 in respect of the putting in place security in favour of the Bank in respect of further development by Mr. Doyle at Newtowncashel, Co. Longford. This undertaking entailed, *inter alia*, the extension of the first legal mortgage and charge over the Glack site. There is no dispute that in time the Glack loan facility was paid off and a sum of €150,000 was paid in reduction of the Newtowncashel facility.

8. On 19th February 2007 Anthony Barry & Co. signed an extension of the original first undertaking in respect of the Glack property *qua* solicitors for Mr. Doyle ("the extension undertaking"). This extension undertaking was expressed to be in consideration for the Bank agreeing to extend and vary certain loan facilities. The extension undertaking required Mr. Doyle's solicitors to arrange for the stamping and lodging of the various mortgages and charges in order that the Bank obtain a valid first legal mortgage or charge over the Glack property. Some time later, on 24th April 2008, Anthony Barry & Co. wrote to the Bank informing it that Mr. Doyle has sold units, 1, 2, 3, 5 and 6 at Glack and that two units remained outstanding.

The Bank's mortgage and charge

9. The issue which gave rise to the present proceedings arises from the manner in which the mortgage charge over the Glack property was actually put in place on 12th December 2008. The deed of charge was executed by Mr. Doyle over three years after the date of the first undertaking and over a year and a half since the date of the extension undertaking. While this delay was regrettable and itself amounted to a breach of the undertaking, nothing turns on this since it has not been suggested that the Bank suffered any financial or other loss as a result of this delay.

10. The difficulty which arises instead relates to the form of the charge which was actually put in place. The schedule to the charge (with a description of the property) was written in hand and stated:

> "ALL THAT AND THOSE being part of the property comprised in Folios 5819F and 4447 of the Register County Longford being apartments 4, 7 and 8 as per Land Registry approved map annexed hereto."

11. It is somewhat unfortunate that the charge was expressed in this form, because it draws an unwarranted distinction between the apartment units themselves and the actual property which, of course, comprised not only the apartments themselves, but also the common areas and the car park spaces. Furthermore, it is clear that both the 2005 undertaking and the 2007 undertaking extension both referred to a charge over the property at Glack, Lackagh, Co. Longford as distinct from referring to any individual apartment units. The difficulty may well have arisen from the fact that apartments 1, 2, 3, 5 and 6 had already been sold and the proceeds accounted for at the date of the registration of the charge. It is possible that this is why the charge was expressed in the form which it was.

12. The charge was registered in the Land Registry on 26th January 2009 as against Folio No. 4447.

13. While there can be absolutely no doubt but that the owner has a full marketable title as evidenced by the Land Registry folio, it is also fair to say that the Bank has a perfectly legitimate grievance regarding the manner in which the charge was executed, precisely because the charge does not extend to the entire Glack property remaining unsold as of the date of the charge, as distinct from the individual unsold apartment units.

14. At some unspecified date the Bank subsequently appointed a receiver who wished to sell the three remaining apartments on the open market. It is clear that a receiver who wished to effect such a sale might well encounter difficulties given that the charged property is confined to the apartments themselves and does not extend to the wider property. In other words, a receiver wishing to effect such a sale might well be might met with the objection that by virtue of the extent of the charge as registered he cannot show title in respect of access to the common areas and car parks and all other rights, covenants and easements necessary to secure effective and quite enjoyment of the apartment in question.

15. While it is clear that the Bank might well face such an objection from the solicitors for a prospective purchaser, there is no evidence that this has actually happened as yet. Although the Bank claims that it has been placed in this quandary by reason of the imperfect compliance on the part of the borrower's solicitor with the terms of the undertaking, there is no evidence of any actual loss to date.

16. One may observe at this juncture that the entire issue was a relatively minor one which, with a modicum of good sense and goodwill on all sides, could and should have been resolved. It ought, for example, to have been possible to effect a supplementary deed of rectification of the deed of charge to show that the Bank's charge extended over the entire property and not just by way of charge over the retained apartments. Indeed, the Bank's solicitor wrote to Ms. Cummins on 27th February 2012 indicating that Mr. Doyle had written directly to the Bank stating that he had no difficulty "with you co-operating with the Bank in relation to the security at Glack and that he would co-operate with the Bank in attempts to resolve all outstanding matters in a fair and reasonable manner."

17. In view of this attitude on the part of Mr. Doyle it is difficult to understand how this matter escalated to the point of the present highly acrimonious proceedings. For this it has to be said that the Bank is principally – but perhaps not exclusively – responsible. In many respects the correspondence from the second defendant, Ms. Cummins, was unnecessarily defensive and focussed on the identity of the person who gave the undertaking on the one hand while insisting that the terms of the undertaking had been honoured on the other. It might have been better had such correspondence directly addressed the precise difficulty which confronted the Bank and had advanced any practical suggestions which Ms. Cummins had to resolve this problem.

18. At all events, matters came to a head at some stage in mid-2012 when Mr. Doyle proposed selling the two remaining apartments. The Bank was unwilling to have the properties sold at what it considered to be an undervalue. On 29th August 2012 Ms. Cummins wrote to the Bank to state that the purchasers had served a completion notice on her client, Mr. Doyle, and that the Bank was impeding the sale. She indicated that in the event of litigation the Bank would have to be joined to the proceedings.

19. In that letter Ms. Cummins stated that she had been informed by Anthony Barry & Co. that a complaint of misconduct had been made by the Bank to the Law Society to the effect that the title deeds had not been returned on foot of the first undertaking to register the mortgage. She pointed out that the title deeds were required to assist in the completion of the sale of the properties. She stated that it was "sharp practice for you now to report a solicitor to the Law Society in circumstances where you are well aware that it is not possible for the deeds to be returned to you. The deeds in question are in our offices and will be held here until such times as the sales complete, which is normal procedure." Ms. Cummins called upon the Bank to withdraw the complaint to the Law Society.

20. This correspondence prompted a sharp retort from the Bank's solicitor who maintained in a letter dated 26th September 2012 that the properties were being sold without the Bank's consent and that the first undertaking remained outstanding as against Mr. Barry. The allegation of sharp practice was refuted and the Bank's solicitor stated that she considered "it sharp practice that you would attempt to sell properties without the consent of the Bank." Ms. Cummins responded immediately by letter of the same date saying that she failed to see how she was "acting outside of the authority of the Bank" and calling upon the Bank to clarify how this was said to be so. She further added that the terms of the undertaking had been honoured following the registration of the charge and that the deeds were being held in her office pending the completion of the sale in accordance with normal practice.

21. The Bank's solicitors then responded on 27th September 2012 calling for the deeds to be returned.

The events of 28th September 2012

22. What followed next was quite remarkable. The Deputy Head of Retail of ACC then wrote a letter on 27th September 2012 addressed to Ms. Cummins. The letter stated that two named Bank officials would attend her office. It claimed that Ms. Cummins "wrongfully" held the title deeds to the properties at Apartment No. 4 and Apartment No. 8 at Glack "without the Bank's consent". Ms. Cummins was then asked to hand over the title deeds to these representatives.

23. On the following day the two representatives from the Bank arrived at Ms. Cummins office at 9.45am. While they bore the letter from their superiors at the Bank they otherwise arrived unannounced. They had no appointment with Ms. Cummins and she had no forewarning that they were arriving.

24. The two Bank representatives met with two secretaries, Ms. Pamela Dowd and Ms. Louise Dowd, who politely asked if they had an appointment. The Bank representatives confirmed that they did not and Ms. Louise Dowd explained that Ms. Cummins had commitments elsewhere that morning. The two representatives indicated that they would wait, although Ms. Louise Dowd asked whether it might not be preferable to make an appointment. After an interval one of the Bank representatives more or less instructed one of the secretaries to procure the title deeds to the two apartments, but she said that she had no authority in this regard. The Bank representative in question said that he had travelled from Dublin and that he was not going to leave without the documents. This representative said that he was going to wait all weekend. In a statement Ms. Louise Dowd stated that she found this statement "bizarre" and asked the Bank's representative if this was a joke. The representative stated that he was serious and that it was not a joke.

25. At that point the Bank representatives were asked to leave. They remained sitting and made no comment: they, in effect, refused to leave. The secretaries were becoming increasingly uncomfortable and nervous. The representatives made further demands regarding the delivery up of the documents and the atmosphere became increasingly tense and unpleasant. Ms. Louise Dowd managed to send a text message by mobile telephone to Ms. Cummins advising her of what was happening. After a further interval the Bank representatives were told that the Gardaí would be contacted and they would be asked to leave. One of the representatives then said that if this occurred he would make a complaint against Ms. Cummins for theft and wrongfully holding documents belonging to the Bank.

26. The other representative then said to Ms. Louise Dowd that he was going to the Garda station to report Ms. Cummins for theft. This was then understood by the secretaries as an endeavour to get them to hand over the title documents. One of the Bank representatives then went to the Garda station while the other remained in the office. A little while later two Gardaí arrived along with the Bank representative who had gone to the station. The Gardaí told the secretaries that Ms. Cummins had telephoned the station and they told the Bank representatives that this was a civil matter and that as they did not have a court order they would have to leave the office. The two representatives then left the office.

27. It is important to state that the accounts given by Ms. Louise Dowd and Ms. Pamela Dowd have not at any stage ever been controverted by the Bank. Yet the Bank apparently thought that it had done nothing wrong. One of the Bank representatives who had arrived at Ms. Cummins' office stated that in his first affidavit that Ms. Cummins "had no reason to complain to the Gardaí" about the visit. Although the statements of Ms. Pamela Dowd and Ms. Louise Dowd were exhibited by Ms. Cummins in her affidavit, the Bank representative in question simply asserted in his second affidavit in reply that he did not defame Ms. Cummins. He noted that defamation proceedings had been issued and that the Bank had entered an appearance to the proceedings. This Court was, however, informed at the hearing of this appeal in June 2015 that the Bank does not now propose to defend the defamation proceedings brought by Ms. Cummins and, indeed, that it has made an offer of amends.

28. Indeed, astonishing as it may seem, the Bank now saw fit to make a formal complaint to the Law Society regarding Ms. Cummins' conduct in contacting the Gardaí. In addition to the complaint regarding Mr. Barry and the non-compliance with the first undertaking, the Bank then made a complaint to the Law Society by letter dated 1st October 2012 regarding Ms. Cummins and the failure to hand over the title documents. The writer added:

> "We have contacted Ms. Cummins and repeatedly asked her to return the title deeds which she has failed or neglected to do. Indeed, we asked two representatives of the Bank to attend her office on 28th September last to ask her politely to return the title deeds which are and remain the property of the Bank and she has refused to do so. The two representatives were removed from her office by the Gardaí on the request of Ms. Cummins and an allegation of threatening behaviour was made against them which is totally false, defaming their good character and reputation, and will be entirely defended by the two gentlemen in question and, indeed, if such a complaint persists, we shall vigorously defend any such allegations and the costs of such a defence will be levied against her.
>
> In the circumstances we would ask the Law Society to intervene by attending at her office and retrieving the title deeds [as] otherwise we shall have no option but to institute injunctive proceedings to prevent the sale and commence professional negligence proceedings against her and request that she notify her insurers."

29. The writer then asked the Law Society to treat the failure to hand over the title documents as misconduct. Ms. Cummins then wrote very full letters in response to the Bank on 2nd October 2012 and to the Law Society on 9th October 2012 explaining her position. She informed the Bank that she took grave objection to the allegations made by the Bank's representatives to her staff and to the Gardaí that she had been guilty of theft. Ms. Cummins told the Law Society that there was "nothing polite" in the conduct of the two Bank representatives and that her two staff members were "still deeply traumatised following the visit from the ACC representatives last Friday."

30. This complaint (along with the earlier complaint regarding Anthony Barry & Co.) was, however, at some stage later withdrawn by the Bank. One of the Bank's representatives stated in his second affidavit that the complaint was only withdrawn "so that the present proceedings could be commenced." It is not altogether clear how the existence of such a complaint could have interfered in any way with the right of the Bank to bring these proceedings.

31. I confess that I struggle to speak with any degree of moderation regarding this entire episode. It is, perhaps, sufficient to say that the conduct of the Bank's authorised representatives was quite inappropriate. The allegations which they made to the two secretaries and to the Gardaí concerning Ms. Cummins were simply outrageous and completely false. Ms. Cummins was perfectly within her rights in seeking the attendance of the Gardaí to have the Bank's representatives removed from her office when they had otherwise refused to leave having been asked to do so, as by that stage they were in fact trespassing on her property. So far as the Bank's complaint to the Law Society regarding Ms. Cummins' conduct in contacting the Gardaí is concerned, the most charitable thing that can be said about it is that it was completely without substance and seems to have been entirely removed from the reality of what in fact had occurred.

32. Thereafter nothing in particular appears to have happened until 15th February 2013 when the present proceedings were issued by way of special summons. The principal relief claimed by the Bank was a declaration that the defendants were "guilty of misconduct by failing to comply with the undertakings given to the [Bank] on 21st October 2005 and 19th February 2007." The Bank also sought an order directing the defendants to comply with their undertakings in this regard. There was, as such, no letter before action on the part of the Bank although the Bank subsequently did send a letter detailing its claim on 20th February 2013.

The jurisdiction of the Court in relation to undertakings

33. The jurisdiction of the Court in respect of solicitor's undertakings was re-affirmed by the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Coleman* [2009] IESC 38, [2009] 3 I.R. 699. In that case Geoghegan J. stated that the purpose of the

undertaking jurisdiction was to enforce honourable conduct on the part of its officer, although he also quoted English authority with approval to the effect that jurisdiction remained a discretionary one which should not be used to oppress solicitors: see, *e.g., Re Grey* [1892] 2 Q.B. 440, 443, *per* Lord Esher M.R.

34. Some of the English authorities are, indeed, a trifle ambiguous on the question as to whether the failure to honour an undertaking necessarily amounts to misconduct on the part of the solicitor in question .In Coleman Geoghegan J. quoted the following comments of Lord Wright in *Myers v. Elman* [1939] 4 All E.R. 484, 508-509 with approval:

> "The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Lord Abinger, C.B. in *Stephens v. Hill*(1842) 10 M. & W. 28, 152 E.R. 368. The matter complained of need not be criminal. It need not involve speculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but of gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. ….It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term 'professional misconduct' has often been used to describe the ground on which the court acts. *It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice.* This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive, but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action." (emphasis supplied)

35. These comments of Lord Wright serve, perhaps, put the jurisdiction in its clearest light. It is clear, therefore, that the jurisdiction to enforce an undertaking is fundamentally compensatory in nature, even if it may well be that in any given case the failure to honour an undertaking might be regarded as professional misconduct or even evidence of fraud or other criminal wrongdoing. For the most part, however, the enforcement of an undertaking may relieve the claimant of the necessity to issue proceedings for negligence or breach of contract. Thus, for example, in *Coleman* itself the Supreme Court held that the defaulting solicitor might well be liable for any loss occasioned to the Bank by reason of the failure to register the mortgage in a timely fashion.

Whether the High Court has a jurisdiction formally to declare that a solicitor is guilty of misconduct by reason of the failure to comply with an undertaking

36. What, however, the Court does not have is a jurisdiction to grant a declaration that the defendants *are guilty of misconduct* by reason of a failure to honour an undertaking as distinct from *granting an order declaring that they failed to comply with an undertaking*. The High Court has no original jurisdiction formally to declare that solicitors are guilty of misconduct, as this is not a cause of action known to the law.

37. Such a jurisdiction would be tantamount to usurping the disciplinary functions of the Law Society. Section 3(e) of the Solicitors (Amendment) Act 1960 (as substituted by s. 7 of the Solicitors (Amendment) Act 2002) defines "misconduct" on the part of a solicitor as including "any other conduct rending to bring the solicitors' profession into disrepute." Of course, a failure to honour an undertaking could well amount in certain circumstances to misconduct in this sense. This, however, would be a matter in the first instance for the Disciplinary Tribunal of the Law Society. If, for example, the High Court had such a jurisdiction but refused in a particular case to make such an order, where would that leave the Disciplinary Tribunal of the Law Society faced with a complaint in respect of the same conduct? Indeed, it may be observed that in the present case the Bank made such complaints of misconduct to the Law Society, but then withdrew them and commenced the present proceedings seeking precisely the same relief from the High Court.

38. The Supreme Court has made it clear that where the determination of certain legal rights and obligations have been assigned by law to other administrative bodies such matters fall outside the original jurisdiction of the High Court envisaged by Article 34.3.1 of the Constitution: see, e.g., Tormey v. Ireland [1985] I.R. 289, 294-296, *per* Henchy J. and *Grianán an Aileach Interpretative Centre Co. Ltd. v. Donegal County Council* [2004] IESC 41, [2005] 1 I.L.R.M. 106, 116-119 *per* Keane C.J. Thus, for example, in *Grianán an Aileach* the Supreme Court held that the High Court had no original jurisdiction to grant a declaration that the plaintiff was legitimately entitled to hold certain cultural and entertainment events under the terms of its planning permission. As Keane C.J. observed ([2005] 1 I.L.R.M. 106, 118):

> "… in the present case, if the [statutory] jurisdiction of the planning authority or An Bord Pleanála….were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court."

39. Much the same could be said by way of objection as far as exercise by the High Court of any supposed jurisdiction to declare that a particular solicitor was guilty of gross misconduct is concerned.

40. It is true that in *Coleman* Geoghegan J. stated ([2009] 3 I.R. 699, 721) that:

"The only Irish case which seems to be of relevance is *I.P.L.G. Limited v. Stuart*[1992] IEHC 372. This was a High Court decision of Lardner J. delivered the 19th March, 1992. The importance of this case and its relevance to the case at hand lies in Lardner J's clear affirmation that the inherent jurisdiction of the court in respect of solicitors' misconduct still existed in Ireland notwithstanding that the Solicitors Act, 1960, did not provide that solicitors were officers of the court but created the well known procedures of hearings by a disciplinary committee of the Law Society followed by hearings by the President of the High Court. That legislation followed the striking down, as unconstitutional, of certain provisions of the Solicitors Act, 1954. I accept the reasoning of Lardner J. and accept that the inherent jurisdiction still exists."

41. Despite the passing reference to "misconduct" in that passage, it seems nonetheless clear from the authorities that the inherent jurisdiction as traditionally understood was simply to enforce undertakings, but that it did *not* extend to a jurisdiction to grant a formal declaration that the solicitor was guilty of misconduct *as such*. Indeed, we were informed in the course of this appeal that the jurisdiction to grant a declaration that the solicitor was guilty of misconduct by reason of a failure to honour an undertaking was a new development which had simply evolved as a matter of practice in the High Court in recent years. It is scarcely surprising that McGovern J. described the relief of this nature sought by the Bank as "most unusual."

42. I will merely say that if there is such a practice in the High Court it should cease forthwith, as it has no proper legal foundation. It is manifest that a jurisdiction whereby a court could declare formally that a professional person was guilty of misconduct would have enormous implications for that person's good name as protected by Article 40.3.2 of the Constitution. Given that Article 40.3.2 obliges the State by its laws "to protect as best it may from unjust attack and, in the case of injustice done, vindicate" that good name, the existence of a new jurisdiction to declare formally that a professional person was guilty of misconduct could not simply evolve as a matter of judicial practice. The protections required by Article 40.3.2 mean that the creation of any such new jurisdiction would have to be provided for in legislation enacted by the Oireachtas and could not be created simply by judicial decision or practice.

43. In addition, it is clear that any such jurisdiction of this kind would have to be attended by the most careful procedural and substantive safeguards. This all clearly emerges from the recent judgment of the Supreme Court in relation to professional performance: *Corbally v. Medical Council* [2015] IESC 9, [2015] 1 I.L.R.M. 395.

44. In that case the question was whether an single, one-off error and mishap in the course of a medical procedure could in and of itself amount to poor professional performance within the meaning of Medical Practitioners Act 2007. The Supreme Court held that it could not. As Hardiman J. explained ([2015] 1 I.L.R.M. 395, 413):

> "This case illustrates with painful precision why exactly this is so. Although it is true to say that the sanction proposed was the very lowest available, the effect on Professor Corbally's reputation and standing was nothing less than drastic. This resulted from adverse findings against him, which are not regarded as serious by the Medical Council, made by a majority vote of a committee consisting of a Professor of General Practice and two lay persons. The Committee held its proceedings in public and this enabled extensive publicity, some of which, as I have said, was lacking in fairness and moderation. I do not think it proper to subject any person to what happened to Professor Corbally except in relation to a serious matter. Moreover, if a failing does not need to be "serious" then a medical practitioner may be treated as Professor Corbally has been in respect of a non-serious or even trivial once-off failing. I do not consider this to be fair or just. *More specifically, I do not consider it to be an adequate vindication of the constitutional rights of a person in Professor Corbally's position, especially his right to his good name and his right to earn a livelihood.* Still more to the point, I do not consider it to be what the Oireachtas expressed in enacting the Medical Practitioner's Act 2007." (emphasis supplied)

45. The comments of McKechnie J. in his concurring judgment are also relevant ([2015] 1 I.L.R.M. 395,450):

> "To agree with the submission of the Medical Council would mean that any lapse or mishap, no matter how trivial, minimal, devoid of effect or consequence, or truly *de minimis* in every respect, would be capable of constituting poor professional performance. If this should be the result of the amendment in 2007, the same resulted in the creation of a harsh or even ruthless regime, making the practice of medicine over one's career almost hazardous to the point of virtual folly: it would indeed be few who could navigate that journey without having to berth at some point at the port of the Fitness to Practice Committee. I cannot believe that such was intended nor do I accept that such would be in the public interest: such would not reflect an appropriate balance between practice and protection. Therefore I would refuse to adopt such an interpretation of the term, unless coerced into so doing. Thankfully, that is not the situation. For the reasons above stated, it follows therefore in my view, that the definition of poor professional performance must be read as if qualified by the word "serious" in the same manner as the phrase "professional misconduct" is."

46. While accepting that the position of solicitors is slightly different from that of other professionals in that they are also officers of the court, much of the reasoning of *Corbally* is nonetheless applicable at least by analogy to the present case. The giving of undertakings is a necessary and indispensable feature of the life of every conveyancing solicitor in particular. It is inevitable that from time to time even the most conscientious and scrupulous solicitor will make omissions and mistakes or will otherwise encounter difficulties with regard to the enforcement of undertakings which he or she has given. Is to be said that an isolated error made in the course of the registration of a security document is therefore in itself to be equated with professional misconduct such that the High Court could formally pronounce this to be so?

47. If that were indeed so, it would mean that, adopting the words of McKechnie J. in *Corbally*, the High Court could by a novel judicial practice create a "harsh or even ruthless regime" which, in the words of Hardiman J. in the same case, would fail to vindicate the Article 40.3.2 right to a good name of the professional person concerned. All of this underscores the conclusion that there is in fact no jurisdiction to grant a declaration that a solicitor is guilty of misconduct in failing to comply with an undertaking: there is, rather, simply a jurisdiction to grant a declaration that a solicitor has failed to comply with an undertaking. This is a critical and importance difference.

48. It follows, therefore, that the plaintiff is not entitled to the principal relief claimed in these proceedings since the High Court has not been vested with an original jurisdiction to grant a declaration that the defendants solicitors are guilty of misconduct by failing to comply with the undertakings given to the Bank. Even if there were such a jurisdiction it would be inappropriate to make the declaration sought in circumstances where it was clear that the error in question was an isolated error made *bona fide*. For all the reasons set out in *Corbally* a *bona fide* error of this kind could not in and of itself be equated with professional misconduct.

Should the Court grant the alternative relief sought by the Bank, namely, an order directing the defendant to comply with their undertakings to the Bank?

49. There remains the question of whether the Court should grant the alternative relief sought by the Bank in the present case, namely, an order directing the defendants to comply with their undertakings to the Bank. It is clear from *Coleman* that this is a discretionary jurisdiction but one which is to be exercised on the basis of settled principles.

50. As I have already noted, the present proceedings issued on 15th February 2013 without any advance letter before action. Paragraph 36 of the special summons contains four particulars of failure to comply with the undertaking. One of the four particulars relies on the delays in securing registration of the charge and the other particulars relate to the failure to provide a certificate of title. It is, I think, fair to say that no reliance is being placed by the Bank on these matters at this stage. It is true that, as I have already pointed out, there was a regrettable delay in registering the charge, but since the Bank suffered no loss of priority or other loss as a result, this is not now a matter of any consequence.

51. Nor is there any evidence that the Bank has suffered loss as a result of the failure to provide a certificate of title. As McGovern J. pointed out in the court below, the registered title in respect of Folio No. 4447 speaks for itself.

52. The remaining particulars were in the following terms:

> "The Lackagh [Glack] mortgage was not correctly registered in the Land Registry as required by clause 2(e) of the 2005 Undertaking in that it is recorded as 'affecting property number 2 only', when the Lackagh Mortgage was executed in respect of apartments 4, 7 and 8 of the Lackagh property."

53. It is acknowledged by the Bank – as it was in the High Court – that this particular is inaccurate insofar as it suggests that the charge was confined to property number 2. Property Number 2 in Part 1A of the Folio refers to the building comprising apartments 4, 7 and 8 of the apartment block. It is further agreed that the undertakings never extended to apartment no. 4.

54. As the Bank now acknowledges, the real issue is a slightly different one, namely, that the charge as registered did not include the rights, easements and access to the common areas and car parks. This would present no difficulty where the mortgagor, Mr. Doyle, was selling the remaining units in his own right (as he remains the full owner of the site less the apartments which have already been sold), but it might well present difficulties for the Bank where the units were being sold by the receiver. In that situation the receiver's title to sell would be confined to the particulars of the registered charge and the Bank could well encounter real difficulties in effecting title to a prospective purchaser.

55. While acknowledging that this is a legitimate grievance on the part of the Bank, I would nonetheless affirm the decision of McGovern J. in the High Court and decline to grant the Bank the relief it now seeks. It is clear that recourse should be had to this inherent jurisdiction only in the plainest of cases and where the case for judicial intervention is manifest and obvious. Can it be said that the present case falls into this category? I believe that, for the following reasons, this question must be answered in the negative.

56. First, it should be noted that no letter before action calling upon the solicitor to honour the undertaking was sent before the proceedings were actually issued. Absent urgent or other special cases, no proceedings of this kind should generally be issued without having given the solicitor in question an opportunity to address this question.

57. Second, the Bank never acted on foot of the approach made by Mr. Doyle in February 2012 whereby he offered to assist it to resolve the problem. As I pointed out earlier, this is at heart a minor issue which ought really to have been solved with a modicum of common sense and goodwill on all sides. It is a matter of regret that the common sense and the goodwill have both been in short supply. While I accept that the error must have been a vexing one for the Bank and was one which might well have caused real difficulties had the receiver sought to sell the two apartments on his own account, these difficulties would probably have evaporated had the Bank obtained Mr. Doyle's co-operation for this purpose. Given that he had offered to do so as far as February 2012, it is puzzling that the Bank did not thereafter actively seek his co-operation for this purpose. Certainly, there is no evidence of such an endeavour by the Bank before this Court.

58. Third, there is no evidence of any actual loss which the Bank has as yet suffered. At the moment the matter remains entirely hypothetical. There is, of example, no evidence from the receiver of any difficulties he has actually encountered with any prospective sale, much less any loss which actually had been occasioned by reason of his inability to make title. It is clear from the Supreme Court's decision in *Coleman* that the Bank's real remedy was to seek an order for damages pursuant to this inherent jurisdiction against the solicitor responsible for the undertaking where it had suffered loss by reason of the error. *If* it had transpired that a sale of the two apartments had been delayed or even lost by reason of the reason of the error in which the charge was registered, then as *Coleman* demonstrates, any solicitor in default in respect of compliance with an undertaking might well be liable for such loss. This matter remains, however, entirely hypothetical as, to repeat, there is as yet no evidence of loss.

Conclusions

59. In summary, therefore, for the reasons stated I would dismiss this appeal and I would affirm the decision of the High Court.