

THE HIGH COURT

CHANCERY

[2014 No. 127SP]

IN THE MATTER OF A SOLICITOR

AND

IN THE MATTER OF A SOLICITOR'S UNDERTAKING

BETWEEN:

EBS LIMITED

PLAINTIFF

-AND-

GERALD KEAN

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 9th May, 2017**Introduction**

1. Mr. Gerald Kean ('Mr. Kean') is the principal of a firm of solicitors known as Keans Solicitors ('Keans'). This is a case in which Mr. Kean, in his capacity as a solicitor and as the principal in that firm, gave an undertaking, known as an accountable trust receipt ('ATR') to a financial institution, EBS Limited ('EBS'). The ATR undertaking was in respect of title deeds over certain properties owned by his client, Ms. Dolores Corcoran ('Ms. Corcoran'), but mortgaged in favour of EBS, as security for loans extended by EBS to Ms. Corcoran. The ATR undertaking was given by Mr. Kean to EBS to get possession of those title deeds, as Ms. Corcoran planned to re-finance her loans with EBS.

2. The essence of the ATR undertaking is that the solicitor undertakes to return the title deeds to the financial institution on demand or to clear all the loans secured by those title deeds. Since one of the loans, taken out by Ms. Corcoran from EBS and which was secured by the mortgages in question, was not discharged by her, EBS sought the return of its title deeds from her solicitor, Mr. Kean. Mr. Kean is being sued by EBS for his alleged failure to comply with that request and his alleged breach of the ATR undertaking. This case, which was at hearing for 10 days, is concerned with whether Mr. Kean's failure to return those title deeds is a breach of his undertaking to EBS and whether this failure constitutes an act of misconduct by him as a solicitor.

Background

3. Ms. Corcoran owned three properties; 2 Hunter's Way, Castlegrange, Williamstown, Waterford ('Hunter's Way'), Portnahully, Carrigeen, Via Waterford ('Portnahully') and 6, Henrietta Street, Waterford City ('Henrietta Street'). Ms. Corcoran had four loans from EBS which were secured on these three properties. The first two loan accounts, loan account number -08842 ('loan -842') and loan account number -86773 ('loan -773') were secured by the mortgage over Portnahully. The third loan account, number -890017 ('loan -017'), was secured by a mortgage over Hunter's Way. The fourth loan account, number -95243 ('loan -243'), was secured by a mortgage over Henrietta Street. It is relevant to the dispute that is the subject of these proceedings that this fourth loan account, loan -243 was also secured by the mortgages over Hunter's Way and Portnahully ('the two properties').

4. The original intention of Ms. Corcoran had been to re-finance all three mortgages and all four loan accounts. The funds to re-finance the loans were to be provided by Permanent TSB ('PTSB'). However, on the 25th June, 2008, when the re-financing was completed, only three of the four loans (loan -842, loan -773 and loan -017 – hereinafter 'the three loans') were re-financed. Loan -243 was not re-financed, even though it was also security for both Hunter's Way and Portnahully and as will be seen hereunder this is why there is a dispute between the parties regarding the ATR undertaking given by Mr. Kean in relation to these two properties.

5. Funds, in tranches of €330,000 and €150,000, to enable the re-financing of the mortgages over Hunter's Way and Portnahully were duly obtained from PTSB. In order to obtain this aggregate borrowing of €480,000 from PTSB, Mr. Kean gave PTSB an undertaking on the 17th June, 2008, to the effect that it would get a first charge over Hunter's Way and Portnahully, which is a standard conveyancing practice since a financial institution will, in most cases, only provide finance on the basis of it receiving security over the relevant properties. This money was used to pay off the three loans (which amounted to €350,000 approx.) and the balance, after costs, of some €110,000 was paid out by Keans to Ms. Corcoran after this re-financing was completed. Crucially, the sum of €598,652 owing on loan -243 was not paid off as part of the re-financing even though this sum was secured by the mortgages over Hunter's Way and Portnahully.

6. Accordingly, EBS sought the return of the title deeds over those two properties from Mr. Kean pursuant to his ATR undertaking. Since Mr. Kean had also given an undertaking to PTSB that it would have a first charge over the two properties, this placed him in a difficult situation where he had given what might be termed a 'double undertaking' since he had given two undertakings over the same properties to two separate financial institutions. Mr. Kean failed to comply with the request by EBS to return the title deeds over the two properties to them. Instead, pursuant to his undertaking to PTSB, Mr. Kean provided the title deeds to the two properties to PTSB as security for the funds obtained by Ms. Corcoran from PTSB. EBS issued the proceedings in this case seeking an order directing Mr. Kean to return the title deeds to EBS as these title deeds are that institution's security for loan -243 which is still owed by Ms. Corcoran to EBS.

7. Ms. Sharyn Coghlan ('Ms. Coghlan') is the solicitor in Keans who dealt with Ms. Corcoran's re-financing of her mortgage with EBS and in her evidence to this Court she described herself as a "conveyancing solicitor" and Mr. Kean as a "litigation solicitor". However, the proceedings were issued against Mr. Kean personally as he is the principal of Keans Solicitors, which firm acted in this re-financing transaction, but more particularly because solicitors are personally liable on any undertakings given by them and Mr. Kean signed the ATR undertaking in which he undertook to return the title deeds to EBS on demand. EBS also claim that Mr. Kean's failure to comply with his ATR undertaking amounts to professional misconduct by a solicitor.

8. A Special Summons was issued by EBS on the 2nd April, 2014, and the primary relief sought is an Order directing Mr. Kean to

comply with the two ATR undertakings which he gave to EBS in respect of Hunter's Way and Portnahully and to return the title deeds to those properties to EBS. On consent of both parties and by Order of Gilligan J. dated 15th June, 2015, the proceedings were adjourned to a plenary hearing before this Court. In the closing legal submissions EBS stated that the Order it was seeking was one directing Mr. Kean to inform PTSB that he was not entitled to pass over the title deeds to the two properties to it and an Order directing Mr. Kean to retrieve the title deeds from PTSB.

9. Mr. Kean's defence to the claim that he has failed to honour his ATR undertaking to EBS is that, insofar as the -243 loan, which was secured on the two properties was not discharged in full by his client, this was the fault of EBS. It was claimed by Mr. Kean that when Keans discharged the three loans owed by Ms. Corcoran to EBS on the 25th June, 2008, it was not aware that these two properties were also security for the -243 loan, since Keans only became aware of this fact after the redemption of the three loans on the 25th June, 2008. Mr. Kean alleges that Keans' ignorance of the fact that the -243 loan was secured by the two properties was caused by the failure of EBS to ensure that a letter from EBS dated 18th June, 2008, which outlined the amount owing on the -243 loan account and which contained a reference to the security for that loan account and referred to Hunter's Way and Portnahully, was not received in time by Keans and in particular that it was not received until some days after the 25th June, 2008. Mr. Kean's defence is that Keans discharged all loans that Mr. Kean says it was advised by EBS were secured on the two properties at the time of the redemption of the three loans on the 25th June, 2008, and on this basis he has discharged his ATR undertaking to EBS in relation to the two properties, even though the -243 loan is still outstanding.

10. This defence is based on the principle, which is common case, that an ATR undertaking is one in which a solicitor undertakes to hold the title deeds, which belong to a financial institution, until the financial institution requests the return of the title deeds or until the loans which for which the title deeds are security are discharged. Since Keans discharged all the loans that it says it was advised by EBS were secured on the two properties, Mr. Kean claims that his ATR undertaking was discharged. It also appears to be his case that the charges over the two properties in favour of EBS in respect of the -243 loan were automatically released when Keans discharged the loans of which it was advised by EBS, which occurred on the 25th June, 2008. On this basis, he also appears to claim that he was entitled to hand over to PTSB the title deeds of the two properties and that he was entitled to give PTSB a Certificate of Title to the effect that its charge over the two properties would rank as a first charge, even though a first charge was and still is registered on both properties in favour of EBS as security for the fourth loan, loan -243. In this regard, a letter dated 7th November, 2013, was produced in evidence in which Mr. Kean provided the title deeds to Portnahully to PTSB and provided it with a Certificate of Title that it would have a first charge over that property.

Issues in dispute

11. It is clear from the foregoing that Mr. Kean's defence is that his firm was not, nor should it have been, aware of the fact that the two properties were security for the -243 loan when Keans discharged the three loans and in particular when Keans paid out the funds to Ms. Corcoran (which took place on 26th June, 2008). On the 26th June, 2008, when the balance of the funds were paid out to Ms. Corcoran, there was no going back and there was in effect a crystallisation of Mr. Kean's undertaking to PTSB to provide it with a first charge on the two properties. This is because under the terms of the undertakings which Mr. Kean gave to PTSB on the 17th June, 2008, Mr. Kean undertook not to negotiate the loan cheques from PTSB unless Mr. Kean could provide a first charge to PTSB over the two properties and release the first charge held by EBS over those properties.

12. It is clear from the evidence that if Keans, or indeed any solicitor, had known that the -243 loan was charged on the two properties, they would never have redeemed the three loans and they would not have paid out the funds to Ms. Corcoran, since Keans would not have been in a position to provide PTSB with a first charge over those two properties by redeeming only three of the loans but not the fourth loan (the -243 loan).

13. A key issue in dispute therefore is whether at the time when the three loans were being redeemed, Keans knew or ought to have known that the fourth loan, loan-243, was in fact charged on the two properties.

14. A key factual issue in dispute is whether the letter dated 18th June, 2008, from EBS, regarding the balance on the -243 loan and its security (the '-243 redemption letter'), was received by Keans at the same time as similar letters regarding the other three loans, or sometime after the redemption of the three loans as alleged by Mr. Kean. It is EBS' case that the letter in relation to the -243 loan arrived on or prior to the 25th June, 2008, and therefore in sufficient time for Keans to know that if it wanted a release of the two properties, Keans needed to redeem all four loans, while it is Mr. Kean's case that the -243 letter was not received on time.

Relevant facts

15. Keans acted for Ms. Corcoran when she obtained the four loans from EBS which are the subject of these proceedings. Ms. Coghlan was the solicitor who acted for Ms. Corcoran during this financing transaction. The loan agreement dated 21st December, 2005, for loan account -243 states in relation to security:-

"The security on this loan shall comprise:-

(i) a First Legal Mortgage over the property of the Borrower of Henrietta Street, Waterford. The title to this property shall be verified by a Certificate of Title from the Borrowers solicitor in a form acceptable to EBS.

(ii) an extension of EBS's First Legal Mortgage over the properties of the borrower at:

Portnahully, Carrigeen, Via Waterford

2 Hunters Way, Castlegrange, Williamstown, Waterford

(iii) the joint and several guarantee of Michael & Dolores Corcoran to cover all liabilities of the Borrower to EBS plus interest thereon and costs.

It is a condition of the loan that the Borrower's solicitor be satisfied that the security required can validly be implemented and that any property given as security herein is properly stamped to cover this loan, and complies with all relevant planning permissions, building and fire safety regulations."

It is clear therefore that loan -243 was secured on Portnahully and Hunter's Way, as well as Henrietta Street and there is no dispute between the parties regarding this issue.

ATR undertaking in favour of EBS

6. It seems that it was originally Ms. Corcoran's intention to re-finance all four loans that she had with EBS using funds obtained from

PTSB. On the 2nd April, 2008, Keans requested the title deeds for Hunter's Way and Portnahully from EBS. As was made clear by Mr. Michael Carrigan, solicitor, an expert witness on behalf of EBS, this is normal practice in such situations and enables the solicitor to prepare the mortgage documentation for the new lending institution so that it can have a first charge on the property. On the 1st May, 2008, Mr. Kean executed an ATR in favour of O'Keefe Moore & Woodcock, solicitors to EBS, in respect of both properties in which he stated:-

"Received the deeds and documents listed on the attached schedule from O'Keeffe Moore & Woodcock Solicitors of Lincoln House, Lincoln Place, Dublin 2 on whose behalf we undertake to hold same on trust and to return upon demand."

17. As previously noted, there are two ways in which an ATR undertaking is discharged, either by returning the title deeds to the financial institution or by discharging all borrowings secured by the properties.

Undertaking to PTSB

18. The next step in the process was that Mr. Kean signed two undertakings in favour of PTSB both dated the 17th June, 2008, to the effect that he would not negotiate the loan cheques which he was due to receive from PTSB until a charge in favour of PTSB was executed by Ms. Corcoran such that it had a first charge over Hunter's Way and Portnahully, respectively. These two undertakings also provided that any prior charge over these two properties must be redeemed prior to or contemporaneously with the creation of the charge in favour of PTSB.

Redemption request letter by Keans

19. On the same day, the 17th June, 2008, Keans sent four almost identical letters in respect of each of the four loan accounts to EBS seeking the balance on each loan account (the 'redemption request letters'), so that these could all be paid off by Ms. Corcoran. The letter in relation to account -243 states:-

"Our client: Dolores Corcoran

Property: 6, Henrietta Street, Waterford City, Waterford.

Your ref: 50795243

Dear Sirs,

We act for the above named Borrower who has agreed to re-mortgage her property at the above address.

We expect to be in a position to complete the re-mortgage shortly and accordingly would be grateful if you could let us have details of the amount due to you under the above account (or any other accounts that may be relevant) to enable you to release or vacate all mortgages which either directly or indirectly affect the above property. When sending the figures to us, please let us also have a daily rate of interest. "

An identical letter was sent in relation to the other three accounts. For example the body of the -017 redemption request letter is identical to the -243 redemption request letter, save that the heading states:-

"Our client: Dolores Corcoran

Property: 2, Hunters Way, Castlegrange, Williamstown, Waterford.

Your ref: 50189017".

20. All four letters make specific reference to obtaining information regarding other relevant bank accounts, and not just the account for which the balance is sought, where those accounts need to be discharged to release the security. In this regard, the form of wording used by Keans is word for word in the same format as recommended by the Law Society in a *Briefing Note* issued in November 1999. This wording was recommended by the Law Society as a means of reducing the risk of solicitors believing that they had redeemed a mortgage over a property, only to discover subsequently that there were other borrowings which were secured on the property which had not been discharged.

21. The Briefing Note states that:-

"[i]n order to assist practitioners, the committee recommends that the following letter be used by practitioners when seeking redemption figures from lending institutions. In the opinion of the committee, a borrower is entitled to be given a redemption figure which the lender will stand over (that is, one which is not stated to be provisional). Solicitors are reminded that if they give an undertaking to procure the release of a mortgage without having secured a statement of redemption figures which are not provisional or hedged in some way, they are putting themselves at unnecessary risk."

22. It is noteworthy that the risk of what appears to have happened in this case, namely that a solicitor gave an undertaking to redeem a mortgage in favour of one financial institution (PTSB) without all the loans secured on the property in favour of another institution (EBS) having been paid off, is something which is very much to the fore of the Law Society's thinking prior to the relevant time in this case.

23. It is also noteworthy that this is not a case for which this Law Society form of wording appears to have been primarily designed, since this is not a case where Keans were surprised to learn that loan -243 exists, or that they were monies owed to the Bank on that loan account. This is because this is a case where there were three properties charged and four loan accounts charged on those properties and Keans were sufficiently unaware of the fourth loan account (loan -243) to request from EBS the balance on that loan account by letter dated 17th June, 2008. Mr. Kean's argument is that although his firm had requested that loan balance, they did not, and should not, know that when they discharged the other three loans on the 25th June, 2008, that loan -243 was secured on the Hunter's Way and the Portnahully properties.

24. The essence of the four redemption request letters is that Keans said to EBS that their client was refinancing her four loan accounts with EBS and so wanted to know the details of all the money that was owed by her to EBS so that EBS could release the charges over Hunter's Way, Portnahully and at that stage, Henrietta Street (although Ms. Corcoran subsequently decided not to proceed with the re-financing of Henrietta Street).

Issue of redemption letters by EBS

25. In reply, four letters with mortgage redemption figures (the 'redemption letters'), dated 18th and 19th June, 2008, were prepared by EBS in relation to the four loan accounts and outlined the monies owed by Ms. Corcoran. Evidence was provided on behalf of EBS that it was the practice of EBS to both post and fax redemption letters to solicitors.

26. The body of the four redemption letters are identical, apart from the figure stated to be due on the relevant account. Thus, the redemption letter in respect of loan -017 states:-

"Customer Number: 0000601249

Loan account: 50189017

Property Address:

Ms. Dolores Corcoran

2 Hunters Way

Castlegrange

Co. Waterford

Payoff Quote for Loan Account 50189017

Dear Sir/Madam

Further to your recent enquiry we set out hereunder the amount required, at the date specified below, to redeem the above-mentioned loan account.

Where a mortgage protection policy is in force it will be cancelled from the date of redemption.

Where home insurance has been arranged by the Society and you want the cover to continue after the redemption date, please contact our Customers Services Department on 1850 654321 regarding the payment of future premiums.

The redemption figure stated below is subject to all payments received to date being honoured, including direct debit payments which are credited to customers' accounts by the Society on the call date. The redemption of a Home Loan is also subject to all other related loans secured by this property being redeemed.

The amount required to redeem on 18/06/2002 is EUR 154,607.85 and the daily interest payable each day thereafter is EUR 23.66.

Please note these figures will change in the advent of an interest rate alteration, a returned payment or a further lodgement prior to the redemption of the loan."

27. The body of the -243 letter is different from the other letters only in that the figure required to clear the loan was €598,652.56. More significantly the heading of the letter reads as follows:-

"Customer Number: 0000801249

Loan Account: 50795243

Property Address:

Mrs. Dolores Corcoran

6 Henrietta Street, Waterford

& Ext over Portnahully &

2 Hunters Way, Waterford &

G'tee of Michael & Dolores"

Payoff Quote for Loan Account 50795243".

28. Mr. Kean accepts that Keans received the redemption letters in respect of the first three loan accounts prior to 25th June, 2008. It is clear that each of the three letters, which Keans accepts that they received prior to the 25th June, 2008, contained a caveat to the effect that the "redemption of a Home Loan is also subject to all other related loans secured by this property being redeemed".

Effect of caveat in the three redemption letters which Keans accept arrived on time

29. This caveat wording is clearly designed to put the solicitor on notice that EBS is providing the solicitor with the balance for one loan account in this letter, but that the mortgage that they are seeking to redeem may be subject to other loans.

30. In this case, it cannot be disputed that Keans knew, when they received these three redemption letters from EBS in the days prior to 25th June, 2008, that Ms. Corcoran had four, and not three loans. This is because Keans had requested, only a few days previously, in their redemption request letter to EBS dated 17th June, 2008, the balance of the fourth loan, the -243 loan, since Keans stated expressly in that letter that Ms. Corcoran had agreed to re-finance that loan and for this reason wanted to know the balance outstanding.

31. Mr. Michael Carrigan, the conveyancing expert for EBS, indicated that the caveat wording in the EBS redemption letters meant that the balances contained in each of the three redemption letters, which Keans accept they received in time, were qualified.

Indeed, Ms. Coghlan also understood that the effect of that caveat wording in the redemption letters meant that the redemption figures were hedged or "conditional" as she put it in cross examination, since she dealt with this issue as follows:-

"Q: Yeah. And then he says, the next sentence "The redemption of a home loan is also subject to --" So again he's not saying unaffected by, he is saying "subject to all other related loans secured by this property being redeemed". So let's take that in stages. The redemption of a home loan is also subject to; you agree with me that that means that the redemption is affected by and is conditional opinion what follows? Do you agree with me that that is a reasonable interpretation of that plausible sentence? A. Yes. Yeah.

Q. And what follows is "all other related loans secured by this property being redeemed". So the redemption is subject, is conditional upon all other loans, all other related loans secured by this property, the property identified above, being redeemed, isn't that correct?

A. That's correct, yes.

Q. So there is a statement that your redemption of the mortgage on the property above is conditional upon all other loans secured on the property above being redeemed, isn't that correct?

A. Yes. No, I am not disagreeing with that."

32. Keans claimed that the fact that this caveat wording was contained in the letter before the balance of the loan account, rather than after that balance, meant that it had been taken into account by the EBS in calculating the balance. However, this Court is not persuaded by that argument and concludes that the words of warning mean what they say, whether they come before or after the balance of the loan account. In this context it is relevant to refer again to the Law Society Briefing Note which states that:-

"Solicitors are reminded that if they give an undertaking to procure the release of a mortgage without having secured a statement of redemption figures which are not provisional or hedged in some way, they are putting themselves at unnecessary risk".

33. It is clear that the Law Society attached considerable importance to solicitors ensuring that redemption figures were not qualified in any way. In this case, the three letters that Keans accepts it received in time were qualified. Evidence was produced to the Court that the three loan accounts were paid off between the 20th and the 25th of June, 2008. In light of the importance which the Law Society said solicitors should attach to obtaining unqualified redemption figures, combined with the fact that in this case Keans sought the balance on loan account -243 at the same time as the other three loans, no good reason was provided by Keans as to why the redemption of the other three loans was progressed by Keans, if, as Mr. Kean says, the firm received no reply to its -243 redemption request letter of 17th June, 2008 at the time they were redeeming the three other loans.

Effect of the Land Registry search results by Keans

34. The decision by Keans to pay off the three loan accounts in full by the 25th June, 2008, even though Mr. Kean says the -243 redemption letter had not been received at that stage, is exacerbated by Keans' decision to pay off the surplus funds to Ms. Corcoran the following day, the 26th June, 2008, after Keans had received searches which showed that the two properties were each subject to an all sums due mortgage. This is because at 12:13 pm on the 26th June, 2008, Keans received by fax searches of the Land Registry folios for the two properties and these searches showed that an 'all sums due mortgage' was registered in favour of EBS on the folio for Hunter's Way and on the folio for Portnahully.

35. Mr. Patrick Dorgan, the conveyancing expert who gave evidence on behalf of Keans, accepted that these searches should have been done earlier and it seems clear that he was referring to the fact that the searches should have been done and checked before the PTSB funds were released. They were however received by Keans at 12:13 pm which was some time before Ms. Coghlan, at 2.47 pm, instructed the accounts department in Keans to transfer to Ms. Corcoran the balance of the funds received from PTSB, after paying off loans -842, -773 and -187, a sum of €111,458. In his cross-examination, Mr. Dorgan accepted that any reasonable solicitor on reading these searches would conclude that -243 loan was secured on those two properties, since he deals with the issue as follows:-

"Q. So this property, Portnahully, is security against all advances currently due and owing and which may in the future be due and owing. Doesn't that, by definition, include account 243?

A. Yes, I think I have to agree that is the case, Judge.

Q. And your evidence must, therefore, be the same that the account, the search for 2 Hunters Way indicates that the charge for present and future advances is a charge over 2 Hunters Way for account 243?

A. Yes, I think that follows, Judge.

Q. So while, Mr. Dorgan, there is no reference to cross securitisation and that's the where why I asked you to step away from it

A. Mm hmm.

Q. each document, on its own, informs the reader that Portnahully is charged in favour of 243, isn't that correct?

A. I'm reluctant to agree immediately, Judge, I just want to consider this point because obviously it is an important point. Yes, I agree with that characterisation, Judge.

Q. And your evidence must, therefore, be the same in connection with the charge over 2 Hunters Way, isn't that so?

A. Yes, Judge, that follows.

Q. And I said to you the reader and I'm just going to put to you that that would include a reasonable solicitor of reasonable skill and qualification as well?

A. Assuming a solicitor, yes, Judge. Yes."

36. On this basis, this Court concludes therefore that just after midday on the 26th June, 2008, Ms. Coghlan knew, or should have known, that there were charges in favour of EBS over Hunter's Way and Portnahully which were security for all loans owed by Ms. Corcoran to EBS. At this time, Ms. Coghlan also knew that Ms. Corcoran had an outstanding loan, loan -243, from EBS, since Keans had written to EBS to say that Ms. Corcoran planned to redeem that loan. It seems clear therefore to this Court that there could be no basis for concluding that Keans were correct to disburse the PTSB funds and at the same time expect that EBS would provide Keans with a vacate on the two mortgages over the two properties, without also the -243 loan being discharged.

Conclusion if the -243 redemption letter was not received in time

37. Thus, it seems clear to this Court that even if the -243 redemption letter was not received until after all the PTSB funds had been paid to EBS and the balance paid to Ms. Corcoran, Keans should still not have disbursed those funds in that manner because:-

- before any funds were disbursed, Keans knew that Ms. Corcoran had an unpaid loan (loan -243) due to EBS and the three redemption letters which it accepts were received in time specifically stated that the redemption of the security over of the two properties was subject to all other related loans secured by those properties being redeemed, and this statement should have put Keans on enquiry in relation to whether loan -243 of which it was aware, was secured by those two properties, and;
- more significantly, on reading the searches of the folios for the two properties, Keans should have known that Hunter's Way and Portnahully were in fact security for the -243 loan. This was because both properties were subject to all sums due mortgages and on any reading of the -243 loan this loan amounted to "sums due" to EBS, and so those sums and that loan were secured by those mortgages.

38. For this reason, it is this Court's view that Keans made an error in relation to the re-financing of the two properties. It was this error that has led to the situation where Mr. Kean was bound by his undertaking to PTSB to give a first charge over the two properties, and at the same time bound by his undertaking to EBS to return the title deeds to the two properties - because one of the loans secured by those two properties (loan -243) was never redeemed and EBS had a first charge on those properties. Accordingly, it is this Court's conclusion that even if the -243 redemption letter was received late, it is still the case that the cause of the double undertakings, to use that expression, is not the alleged late arrival of the -243 redemption letter, but Keans' failure to appreciate the significance of the searches and the significance of the warning in the three redemption letters, in light of Keans' knowledge that Ms. Corcoran had a fourth loan from EBS which was not being redeemed and it was this mistake that led to loan -243 not being discharged, which discharge was necessary for Keans to be able to provide PTSB with the title deeds and a first charge on the two properties.

Mr. Kean is bound by his undertaking even if -243 redemption letter arrived late

39. For this reason, this Court can find no basis for finding that Mr. Kean is not bound by his ATR undertaking to EBS to return the title deeds to EBS on demand, which he has failed to do. In *Gilligan v. National Bank Limited* [1901] 2 I.R. 513 at 535, in relation to the defendant bank which was the holder of a mortgage, Barton J. stated that:-

"The defendants as mortgagees of these premises were, in the eye of the law, absolute owners of them, and incidentally absolute owners of the title-deeds, subject only to the condition for reconveyance on repayment."

On this basis it is clear that in this case, EBS was the absolute owner of the title deeds and there were therefore no grounds for Mr. Kean to refuse to hand back the title deeds to EBS and this Court will therefore make the Orders set out at the end of this judgment.

40. That is the end of the matter as far as this Court is concerned, but for the sake of completeness, this Court will also make a finding in relation to the other issue which was in dispute between the parties, namely whether the -243 redemption letter was received at the same time as the other three redemption letters and if so whether its terms put Keans on notice that the -243 loan was secured on the two properties.

Was the -243 redemption letter received in time?

41. Ms. Coghlan gave evidence that she believes that the -243 redemption letter was received by Keans after the 25th June, 2008, which was after the first three loans had been discharged. However, this Court believes that Ms. Coghlan is mistaken in her recollection of events which it must be acknowledged took place nine and a half years ago.

42. On the balance of probabilities and based on an analysis, inter alia, of the actions and reaction of Keans after the 25th June, 2008, this Court is of the view that the -243 redemption letter was in fact received by Keans at the same time as the other three letters and that due to human error its significance was not appreciated at the time of the redemption of the first three loans. This may have been because it related to the -243 loan which Ms. Corcoran had decided that she was not, after all, going to redeem. For the reasons set out below, this Court concludes that on the balance of probabilities, although received in time, the -243 redemption letter was only read properly in or around the 7th July, 2008, when it was realised by Keans that the -243 loan was secured on the two properties. By using the PTSB funds to pay off the three EBS loans and to pay the balance of €111,458 to Ms. Corcoran by the 26th of June, 2008, Keans had crystallised its obligation to PTSB to provide it with the title deeds, without realising that the title deeds were also charged to EBS for the fourth EBS loan, which realisation only appears to have occurred to Keans on the 7th July, 2008.

43. In considering the evidence of the reaction of Keans to what it claims was the late arrival of the -243 redemption letter, but what EBS says is the late discovery by Keans of the import of the -243 redemption letter which arrived on time, it is important to consider whether that reaction is consistent with the late arrival of the -243 redemption letter or its timely arrival, but late discovery of its import.

44. In this respect, it is crucial to appreciate the considerable significance of the late arrival of the -243 redemption letter, as alleged by Keans, with its news that the -243 loan was secured on the two properties. When it is alleged that the -243 redemption letter arrived, namely after the 25th June, 2008, and probably on the 7th July, 2008 (since this is the first recorded reaction to its contents), Ms. Coghlan would have known that Mr. Kean was bound by his undertaking to PTSB to provide it with a first charge over the two properties. However, as a result of the alleged late arrival of the -243 redemption letter, it would have been clear to any solicitor dealing with this matter that Mr. Kean was not going to be able to get a release of the charges over the two properties and so was in the position of having given a double undertaking over the two properties.

45. For any solicitor, not being able to comply with a solicitor's undertaking is a major event. This is because a solicitor's very right to practice, and therefore his or her right to earn a livelihood and indeed his or her good name within the profession, depends on honouring undertakings which are a crucial part of conveyancing in Ireland. Any breach of such an undertaking is a matter of

professional misconduct and can lead to a referral of that solicitor to the Solicitors' Disciplinary Tribunal, which could ultimately lead to a solicitor being struck off the Roll of Solicitors. Accordingly, there are few more significant events in a solicitor's practice than his or her inability to comply with a solicitor's undertaking by having given double undertakings. It follows that if the -243 redemption letter, with such significant consequences for Mr. Kean had arrived *after* the redemption of the three loans due to the error by EBS, this would have been a major event for Keans. It would have put in headlights the fact that due to this alleged error of EBS in not ensuring that the -243 redemption letter was received in time by Keans, Mr. Kean was now in the very serious position where he had given an undertaking to PTSB which could not be complied with, since EBS had a first charge on the two properties. One would expect Ms. Coghlan or Mr. Kean to contact EBS as a matter of urgency to advise them that EBS needed to do something very quickly to ensure that the solicitor was not in breach of the undertaking to PTSB, as this was a most serious matter for the solicitor and was all the fault of EBS.

46. It is this Court's view that the reasons/evidence, set out below in chronological order, of the reaction of Keans is not consistent with the double undertakings being caused by the error of EBS. Rather it seems to this Court that this evidence is consistent with the error being internal to Keans, namely that the -243 redemption letter arrived in time in Keans but its significance was not appreciated until the 7th July, 2008.

Reason 1 - muted reaction of Ms. Coghlan in her file note to realisation of problem

47. The first recorded reaction on Keans' file to the import of the -243 redemption letter appears to be a file note in Ms. Coghlan's handwriting which appears to be dated 7th July, 2008. This states:-

"7 July 2008

Sought redemption figs 17 June 2008

Received reply

Portnahully 51308842 2 Hunters Way Paid these accounts

50186773 50109017

20 June 2008 25 June 2008

Problem a/c 50795243 ??

extension".

48. Thus, in this file note there appears to be a clear recognition of account -243 being an issue for Keans, but significantly there is no reference to the late arrival of the -243 redemption letter being the cause of the problem.

Reason 2 - muted raising of query to EBS in first letter to EBS regarding the problem

49. This is then followed by an equally muted letter to EBS, particularly when one considers that it is alleged by Mr. Kean that he is at this stage in a situation where he has given double undertakings all due to the alleged error by EBS. This is a letter sent by Keans to EBS dated 7th July, 2008, which insofar as relevant, states:-

"We refer to the above and wish to confirm that we recently satisfied the following accounts in full:

1. Account No. 50189017 in respect of 2, Hunters Way, Castlegrange, Waterford;

2. Account Nos. 51308842 and 50186773 in respect of the property Portnahully, Carrigeen, via Waterford.

We would therefore be most obliged if you could please revert to us confirming that neither of these properties are held in conjunction with the above account No. 507952423".

50. At this stage Keans knew that it had given an undertaking to PTSB to the effect that PTSB would get a first charge over the two properties. It seems clear therefore that the only reason why Keans would be writing to EBS on the 7th July, 2008, asking it to confirm that those two properties were not held as security for -243 is because Keans have just realised that the -243 redemption letter states that the two properties are security for the -243 loan. This seeking of confirmation that the two properties are not security for the -243 loan is not the reaction of a firm that, as a result of an error by EBS, received the -243 redemption letter late and had found itself having given double undertakings as a result. Rather, this letter is in essence a query as to whether the -243 loan was secured on the two properties and is not an assertion that an alleged error by EBS had led to double undertakings. In this Court's view, this letter is more akin to a letter written in the hope against hope that the -243 redemption letter does not mean what Ms. Coghlan accepted in evidence it did mean, namely that the two properties were security for the -243 loan.

Reason 3 - Continued muted reaction to EBS regarding the problem

51. This benign reaction contained in the letter of 7th July, 2008, from Keans to EBS is repeated in the letter from Keans to EBS dated 25th August, 2008. This letter contains a request to EBS to release the charges over the two properties. It states:-

"Our client: Dolores Corcoran and Michael Corcoran

Property: Portnahully, Carrigeen, Via Waterford

Your Ref: 51308842 and 50186773

Dear Sirs,

We refer to the above and to our redemption of the above loan accounts under cover of our letter dated 20 June, 2008, copy which is enclosed herewith for ease of reference.

We would be obliged if you could now arrange to furnish us with the vacated Mortgage in this regard.

We look forward to hearing from you”.

52. It is relevant to note that there is no assertion in this letter that the reason that the charges should be released is because the -243 redemption letter was not sent by EBS in time.

53. A similar letter dated 25th August, 2008, was sent in respect of Hunter's Way. This approach is repeated in the letter of 1st September, 2008, from Keans to EBS. A reminder letter dated 1st September, 2008, was also sent from Keans to EBS in relation to Portnahully. The first letter from EBS after the date of these letters is a letter dated 3rd September, 2008, which is identical to the -243 redemption letter, save that it sets out a slightly higher figure for the redemption of the mortgages attaching to the two properties, due to the accrual of interest.

Reason 4 – Similar muted reaction to Ms. Corcoran

54. In the first relevant letter sent to the client, which is dated 15th September, 2008, but was sent on the 16th September, 2008, there is again no assertion of an error by EBS which had led to the issue of double undertakings. Instead, the issue is stated in passive and neutral language, since this letter states, insofar as relevant, that:-

“In the process of redeeming the above mentioned accounts it became apparent that there was a subsequent account held with EBS Building Society under account no. 50795243. This would appear to be a charge held over 6, Henrietta Street, Waterford and extensions over Portnahully and 2 Hunters Way along with a guarantee of both you and Michael. Please see the attached redemption figures dated 3 September 2008 from EBS Building Society wherein you will note that the sum of approximately €600,000 is due in respect this Charge.

You will note from the enclosed copy correspondence to EBS Building Society that I have requested that they remove the property at Portnahully and 2, Hunters Way from this account as they are currently held as security with Permanent TSB and it is not possible to have two banks with an interest in respect of the same property.”

55. Not only does this letter not apportion blame to EBS, it uses passive language regarding how the account “became apparent” to Keans, when in fact it is clear that it was Keans who wrote to EBS seeking details of the -243 account on the 17th June, 2008. Also, it was Keans who, in their letter of 7th July, 2008 to EBS, were the first, after the redemption of the three other loans, to raise the issue with EBS of whether the -243 loan was secured by the two properties.

Reason 5 – Seeking release from EBS “in the circumstances”

56. On the 16th September, a letter was sent by Keans to the Redemptions Department of EBS in reply to the EBS redemption letter dated 3rd September, 2008, which states, insofar as relevant, that:-

“As you will be aware, our client recently discharged the following loan accounts 51308842, 50186773 (Portnahully, Carrigeen, Via Waterford) and 50189017 (2, Hunters Way, Castlegrange, Williamstown, Waterford). We understand that the only account outstanding is the above-mentioned account number 50795243 which appears to be over the property at 6, Henrietta Street, Waterford City, Waterford and refers to an extension over Portnahully and 2, Hunters Way, Waterford in conjunction with a guarantee of both Michael Corcoran and Dolores Corcoran.

Under the circumstances we would be obliged if you could confirm that the extensions over Portnahully and 2 Hunters Way can be removed as security for this loan account leaving the property at 6 Henrietta Street to stand alone with the guarantee of Michael Corcoran and Dolores Corcoran.”

57. This again is not an assertion of a right on the part of Keans to have the two charges released, but rather a request that EBS remove the charges “in the circumstances” which are referred to therein as being the fact that the other three loans have been paid off. This again is very far removed from an assertion of EBS’ error having led to the double undertakings. It is not the type of letter that one would expect to see being sent to a financial institution that was the cause of a solicitor being in breach of his undertaking, since it is a polite request of EBS to see if it would consider removing the two properties as security and relying on the security over Henrietta Street and the guarantee of Mr. Corcoran and Mr. Corcoran.

Reason 6 – Seeking to “agree” a release with EBS based on values of property

58. On the 19th September, 2008, Ms. Coghlan spoke with Ms. Lucy Ferley of EBS and the Keans file note, insofar as relevant, states:-

“Going by the valuations that they have on file it would only be possible to release Hunters Way which would mean that they would still request a Charge. As previously explained on the file this is not possible as Permanent TSB now have an interest in the property to the tune of €330,000. I feel that this matter has been brought to the attention of Dolores and she now must obtain up-to-date valuations on the three properties and negotiate some form of release of Portnahully from the current charge that is in place in respect of EBS Building Society”.

59. Again, it is telling that in this file note there is no record of Ms. Coghlan asserting a right to the release of the charges because of the alleged error by EBS. On the contrary, Ms. Coghlan is enquiring as to whether EBS might agree to release the two charges. This interaction with EBS is followed by a letter to Ms. Corcoran on the 10th October, 2008, to outline the current valuations of the three properties that EBS have for the three properties and it states, insofar as relevant that:-

“EBS explained that under the above valuations the only properties that they could release would 2, Hunter's Way, in order to have the two properties standing together along with the joint and several personal Guarantee of both yourself and Michael.

As explained previously, this is not the ideal situation as Permanent TSB have an interest in Portnahully to the tune of €330,000 as well as the extension from EBS Building Society and you can not have two lenders having an interest in the one property

Therefore, I would strongly suggest that you urgently get up-to-date valuations in respect of the three properties and

approach EBS Building Society with a proposal to fully release Portnahully and 2 Hunter's Way from their security, which would leave both Portnahully and PTSB (€330K), Hunter's Way PTSB (€150K) and 6Henrietta Street with EBS (€600K)

Alternatively I would discuss the matter urgently with your Broker and look at redeeming the current charge with EBS through PTSB and using all three properties as a cross securities. This issue must be resolved as quickly as possible."

60. It is significant that in this letter there is no suggestion that the problem, which Ms. Corcoran is advised to resolve urgently by getting up to date valuations or by getting funding from PTSB to pay off EBS, is not her problem but in fact EBS' problem due to its failure to send the -243 redemption letter in time.

Reason 7- Muted first involvement of Mr. Kean

61. The first involvement of Mr. Kean in dealing with the "problem" identified by Ms. Coghlan in her attendance of 7th July, 2008, is a letter dated 9th December, 2008, to Ms. Corcoran. He states in this letter that:-

"We have just noticed that we have run into a little problem.

EBS has a mortgage in charge over Henrietta Street.

EBS was to release their interest and charge over the other two properties at Hunters Way and Portnahully.

They indicated that they will release their charge over Hunters Way but not Portnahully as they are not satisfied with the valuations.

We have already given an undertaking to register Permanent Building Society charge over Hunters Way and Portnahully.

I need to discuss this with you at your convenience as I do not want to be personally exposed.

Can you email or fax to me the name of the gentleman who arranged these loans for you?

It might need somebody on the ground to try and negotiate a little harder with EBS!"

62. Considering that this is Mr. Kean, who on his own version of events has given double undertakings because of EBS' error, it is to be noted that there is no reference to this "little problem" being all the fault of EBS, but rather there is a recognition that the two properties are validly charged in favour of EBS and that a resolution of the problem will require negotiation with EBS.

Reason 8 - Ms. Potterton's description of problem as absence of cross references

63. One of the most significant reasons for this Court's conclusion that the -243 redemption letter arrived on time in the Keans office is the memo from Ms. Pamela Potterton to Mr. Kean. This memo is a summary of the dispute between EBS and Keans regarding the ATR undertaking. Ms. Potterton is the solicitor who dealt with the file in Ms. Coghlan's absence on maternity leave. This memo states:-

"Date 9th February 2009

To Gerald

From Pamela

Re Dolores Corcoran

Properties @ 2, Hunters Way, Castlegrange, Waterford

Portnahully, Carrigeen, Waterford

6, Henrietta Street, Waterford City, Waterford

Ref: 17559/17560/17561

A/C Ref:

Gerry,

I refer to the letter from EBS Building Society dated 13th January 2009 wherein they advised they gave us redemption figures for four accounts which would need to be redeemed in order to release the property. We requested redemption figures on the 17th June 2008 from the EBS advising that our client envisaged re-mortgaging 6 Henrietta Street, Waterford in early course and asking for redemption figures for same. EBS furnished redemption figures by letter dated the 18th June 2008 for Account No. 50795243. The security held by this account was over 6, Henrietta Street, Waterford with an extension over Portnahully and 2, Hunters Way.

We requested redemption figures for Portnahully, Carrigeen, County Kilkenny under reference No. 51308842 on the 17th June 2008 advising that our client envisaged soon to re-mortgage her property and asking for redemption figures for that property and all associated properties. The EBS reverted by letter dated the 19th June 2008 and furnished us with figures for account numbers for 50186773 and 51308842. These were the two redemption letters furnished by EBS for Portnahully, Carrigeen. We in turn furnished them with a cheque in the sum of €210,547.63 by letter dated the 20th June 2008 to redeem the mortgage over that property.

When we asked for the redemption figures required to redeem Portnahully, Carrigeen, County Waterford the EBS did not mention Account No. 50795243. The redemption figures for that account were furnished only when we specifically advised the EBS that we envisaged being in a position to redeem the mortgage over 6, Henrietta Street.

We requested redemption figures from the EBS by letter dated 17th June 2008 over 2, Hunters Way, Castlegrange, Williamstown, Waterford. Our letter referenced the Account No. 50189017. In response to this letter EBS furnished us with a letter dated 28th June 2008 referencing on a Loan Account No. 50189017 advising the sum required to redeem 2 Hunters Way for €154,607.85. Again, the redemption figures received from EBS in relation to 2 Hunters Way made no reference to the requirement to redeem the mortgage over 6, Henrietta Street pursuant to Loan Account 50795243.

Gerald, I still think we are perfectly entitled to submit to the EBS that while they did furnish redemption figures for Loan Account 50795243 which provided security over 6, Henrietta Street and extension over Portnahully and 2 Hunter's Way, they furnished these redemption figures when we sent them a letter requesting redemption figures specifically on this account relating to 6, Henrietta Street. I presume that at this stage the client was also considering redeeming the mortgage over 6 Henrietta Street but did not proceed with same. When we requested redemption figures for Portnahully and 2 Hunter's Way EBS did not advise that any sums would be required to be discharged from the Loan Account over 6, Henrietta Street being Loan Account No. 50795243.

On this basis Sharyn deemed the Mortgage Accounts on File No. 17559 for Portnahully and File No. 17561 for 2 Hunter's Way as advised by the EBS.

I am attaching a draft reply letter to the EBS for your attention in this regard. I think we are perfectly entitled to advise them that the three separate files for each of these three properties and while they did give us redemption figures for 6, Henrietta Street when we asked for redemption figures for that specific property they did not advise us when we sought redemption figures on the file for Portnahully and the file for 2 Hunter's Way that we would also need to redeem the Mortgage over 6, Henrietta Street. I would be very insistent on this point and I think the files reflect this.

Please review the draft letter attached hereto and send out as you require.

If I can be of any further assistance please let me know.

Pamela".

64. When one considers the significance of the double undertakings problem that was caused by the alleged late arrival of the -243 redemption letter, it is not credible that this memo would not mention that the complaint against EBS was that it had failed to ensure that the -243 redemption letter would arrive in time, if this was the case. Instead the complaint against EBS is characterised in this memo simply as its failure to include the details contained in the -243 redemption letter in the other three redemption letters.

65. The only reference to the arrival of the -243 redemption letter is in fact an acknowledgement that it did arrive and implicit in this neutral reference is the fact that there was nothing untoward regarding the time when it was received. This is because it would have been obvious to any solicitor dealing with the problem of double undertakings that a possible defence to the problem would be the late arrival of the -243 redemption letter, yet it is not mentioned in this memo. Given the significance of the -243 redemption letter not coming in on time, as alleged, it is most surprising that this would not be front and centre of this memo, if this was what actually happened.

66. It is this Court's view that the late arrival of the -243 redemption letter was not mentioned in this memo, and instead the defence of absence of cross referral between the four redemption letters is mentioned, for the very reason that it was not a defence at that time because the -243 redemption letter had not in fact arrived late.

Reason 9 – First letter of complaint from Keans to EBS to the effect that there was no cross reference in the four redemption letters

67. Equally as significant as the memo of 9th February, 2009, from Ms. Potterton to Mr. Kean is the letter from Keans to EBS of 26th February, 2009, which clearly was based on Ms. Potterton's memo. As in the memo, there is a clear acknowledgment in this letter to EBS of the receipt of the -243 letter. It states:-

"By letter dated 18th June 2008 EBS Building Society furnished redemption figures fro the property at 6, Henrietta Street being Loan Account No. 50795243. Our client subsequently did not proceed with the re-mortgage of 6, Henrietta Street, Waterford City."

68. It is telling that nowhere in this letter is there any suggestion that the -243 redemption letter was received late. After accepting that the -243 redemption letter was duly received, the complaint is similar to that in the memo from Ms. Potterton to Mr. Kean, although it is expressed in slightly different terms. There is a reference in the letter to separate files for the three separate properties, since three separate files were opened by Keans in relation to the three properties which were intended to be re-mortgaged. On this basis, the complaint in this letter against EBS is that when EBS was replying to Keans in answer to the four redemption request letters, each of which related to one file/property, EBS as well as referencing account numbers, did not refer to loan -243 in the reply to each of the three letters relating to the first three loans, but rather referred to loan -243 in a stand alone letter:-

"we received two letters from EBS Building Society both dated 19th June, 2008 for two loan accounts the first being Account No. 51308842 and the second being Account No. 50186773. No redemption figures were furnished for this file in relation to mortgage over 6, Henrietta Street being Account No. 50795243".

69. Thus, while Keans sent four letters quoting four loan accounts and seeking four loan balances on those loan accounts and it received four replies to those letters, its complaint in this letter is not that the -243 letter was received late, but that letters in relation to loan -842 and loan -773 (both secured on Portnahully) and loan -017 (secured on Hunter's Way) should have referred to the fact that loan -243 was also secured over Hunter's Way and Portnahully, rather than this information being contained in four different letters.

70. This Court concludes that if the position was, as now suggested by Mr. Kean, that the -243 letter was late received, this letter to EBS would have made clear in very stark terms that EBS had caused the double undertaking problem by the late arrival of the letter and not by making a complaint that the four letters should have been differently drafted.

Reason 10 – False claim to EBS' solicitors that the -243 letter was not received

71. The letter of 22nd July, 2010, from Keans to O'Keefe Moore & Woodcock, the property solicitors for EBS at that time, is also inconsistent with the claim that the double undertakings were caused by EBS' error in not ensuring that the -243 redemption letter was received by Keans in time. It states:-

"Re: Our Client: Dolores Corcoran

Properties: 2, Hunters Way, Castlegrange, Williamstown, Waterford

Portnahully. Carrigeen, Waterford City, Waterford

6, Henrietta Street, Waterford City, Waterford

Dear Sirs,

We refer to the above matter and to your previous correspondence in relation to the return of title documents regarding the above mentioned properties.

In relation to 6 Henrietta Street, title deeds to this were returned to you under the cover of ours dated 9th & 12th January 2008, copy of said letter enclosed for ease of reference, we note however that we did not receive an acknowledgement of receipt and would be obliged if you could now attend to same.

In relation to the properties 2 Hunters Way and Portnahully effectively we sought redemption figures 17th June 2008 in respect of these properties and received redemption figures 18th June 2008 in respect of accounts 51308842 & 50186773 which referred to the Portnahully property and account 50189017 in respect of 2 Hunters Way. We redeemed these accounts in full as these were the only redemption figures that we received. You will note our attached redemption figure letters both requested that EBS furnish us with redemption figures for the above *'and or any other account or accounts that may be relevant'* [emphasis in original]. We were not furnished with any other redemption figures for any other accounts.

It subsequently transpired that there was another account that was a cross security over the three properties mentioned above but as we were not advised of this account at the time same was not redeemed as we could not redeem an account that we were not made aware of.

We have still not received vacates/discharges/deeds of releases in respect of the accounts that we have discharged and we urgently require same. We would be obliged if this could be immediately attended to."

72. It will be seen that this letter refers to the three loan accounts, other than loan -243 and it states that "we redeemed these accounts in full as these were the only redemption figures that we received" and also states that "[w]e were not furnished with any other redemption figures for any other accounts". Tellingly, there is no reference in Keans' letter to how it "subsequently transpired" that there was another account that was cross secured on the two properties, since there is no reference to the fact that a redemption request letter for loan -243 was actually sent by Keans and there is no reference to the receipt of the -243 redemption letter, let alone the alleged late receipt of that letter. It is also to be noted that Keans attach to this letter the three redemption letters received by Keans, but not the -243 redemption letter received by Keans.

73. The kindest characterisation of this letter from Keans is that it would mislead the reader into believing that only three redemption letters were received by Keans. However, if as Mr. Kean is now alleging, the -243 redemption letter arrived late, there would have been no basis for this misleading letter, since this letter could have said that the -243 redemption letter was received late due to EBS' error and this is why Mr. Kean cannot comply with his ATR undertaking.

74. Instead, its misleading contents support this Court's conclusion that the -243 redemption letter was in fact received by Keans on time and the true purpose of this letter was to seek to avoid the consequences of such an admission by implying, by omission, that it was never received at all.

Reason 11 – Incorrect suggestions that the -243 redemption request never sent by Keans

75. It would be clear to any solicitor considering the issue of whether Mr. Kean was bound by the ATR undertaking to EBS that the key issue since June 2008 was whether, first, Keans were aware of the existence of the -243 loan at the time the other three loans were discharged and secondly, whether they were aware that the -243 loan was secured on the two properties, before Keans redeemed the three other loans. Obviously, if Keans were not aware of the -243 loan, it would be in a stronger position to claim that it should not have been aware that such a loan was secured on the two properties. It follows that a crucial piece of evidence in this case is the fact that on the 17th June, 2008, Keans sent the -243 redemption request letter to EBS seeking the balance on the -234 loan account. This is because the fact that Keans sent this letter illustrates beyond any doubt that Keans were well aware of the -243 loan. In a case where Mr. Kean is seeking to establish that Keans could not have known that this loan was secured on the two properties, the significance therefore of this letter cannot be over emphasised. In light of the significance of the -243 redemption letter, it is relevant that on three occasions, there were either express or implicit denials on behalf of Keans that such a redemption letter in respect of loan -243 was ever sent, even though that such denials are plainly false.

76. The first occasion was in Ms Coghlan's affidavit dated 21st May, 2014, which she corrected on the first day of her direct examination before this Court. This is because her affidavit contained an averment to the effect that Ms Corcoran "was seeking to re-mortgage two of her properties" (when in fact she was seeking to re-mortgage her three properties, including of course the Henrietta Street property which was security for the -243 loan, which loan was also secured on Hunter's Way and Portnahully). It is also relevant that Ms. Coghlan did not exhibit the -243 redemption request letter in her affidavit, but only exhibited the redemption request letters for the three other loans. Her affidavit therefore contained a very significant implication, which was wrong, that Keans had never requested redemption figures for the -243 loan, with the implication that Keans would not therefore have been aware of its existence, albeit an error she corrected on the first day of her evidence before this Court.

77. The second occasion of a denial, albeit by omission again, that a -243 redemption request letter was ever sent by Keans was made by Keans, some four years prior to this affidavit, by letter of 22nd July, 2010, to O'Keefe Moore & Woodcock. In that letter no reference was made to the -243 redemption request letter and instead it states:-

"In relation to the properties 2 Hunters Way and Portnahully effectively we sought redemption figures 17th June 2008 in

respect of these properties and received redemption figures 18th June 2008 in respect of accounts 51308842 & 50186773 which referred to the Portnahully property and account 50189017 in respect of 2 Hunters Way."

78. The third instance is the fact that the -243 redemption request letter was missing from the file and the index for that file that was provided on behalf of Keans to Mr. Dorgan, their own conveyancing expert who was charged with providing his expert report to the Court in this case. As a result of this, Mr. Dorgan, through no fault of his own, bases his Expert Report dated 5th May, 2015, on the following facts, as outlined by him:-

"the Firm wrote three identical letters to EBS, quoting the respective account numbers in respect of the properties, namely, Portnahully and 2, Hunter's Way [...] The firm did not specifically request a redemption figure for 6, Henrietta Street, account 243 [...] It appears to be the case that only the Hunter's Way and Portnahully properties were being remortgaged with PTSB".

79. It is clear that each of these statements made by Mr. Dorgan are incorrect, since Keans wrote four redemption request letters, including of course the -243 redemption request letter and these four letters made it clear that three, not two, properties were to be re-mortgaged.

80. This significant error in Mr. Dorgan's Expert Report, through no fault of Mr. Dorgan's, was raised for the first time by solicitors for Mr. Kean to solicitors for EBS on the 27th March, 2017, which was after four days of evidence in this trial. They did so in the following terms:-

"Kindly note that Mr Dorgan acknowledges that there was in fact a redemption figure requested by Keans solicitors for 6 Henrietta Street, Account 243, and will be giving his evidence on that basis."

81. Mr. Dorgan's conclusions in his Expert Report are based on Keans never having issued a -243 redemption request letter and for this reason he wrongly believed when he wrote his Report that the -243 redemption letter arrived unsolicited, or "in a vacuum" as he calls it, and on this basis he concludes:-

"I do not accept that the issue of the 243 redemption figures in a vacuum discharged EBS's duty. It was reasonable for the Firm, in circumstances where the 243 loan was not then being discharged, to disregard this letter."

82. It may be simply coincidental that an explicit or implicit denial of the existence of the -243 redemption request letter occurred on three separate occasions. However, to this Court, because the existence of that letter is damaging to Keans' case, it does seem noteworthy that its existence is denied on three separate occasions, particularly when one notes that it is referred to specifically in other parts of Keans' file, e.g. in Keans' letter to EBS of 26th February, 2009, in which it is stated that "[B]y letter dated 17th June 2008 we requested redemption figures for the account to redeem 6, Henrietta Street".

Reason 12 - Reasonable for Mr Kean to 'disregard' the -243 letter per his own expert

83. As previously noted, Mr. Dorgan states in his Expert Report that it was reasonable for Keans to disregard the -243 redemption letter. This is a significant statement since it implies that Keans disregarded the -243 redemption letter. No such admission was made by Mr. Kean in these proceedings since Mr. Kean has always denied that Keans disregarded the -243 redemption letter when it was received. This is because it is Mr. Kean's case is that it was read as soon as it was received, but that it was received late.

84. When Mr. Dorgan was asked in cross examination whether he reached the conclusion that Keans had disregarded the -243 redemption letter based on his instructions or his own inference, he stated that:-

"I would imagine, Judge, it's an inference from me because there weren't -- I don't believe I received instructions in relation to the specifics of all of these matters."

85. Mr. Dorgan assumed that it was his mistaken inference that led him to state that the -243 redemption letter was disregarded by Keans, rather than representing the instructions of his instructing solicitor (Holohan Law Solicitors) or client (Mr. Kean). Mr. Dorgan, when put on the spot and forced to choose between two options chose to blame himself rather than his instructing solicitor's client. It is not therefore a criticism of Mr. Dorgan that this Court is of the view that it is more likely that his conclusion, that the -243 letter was disregarded, was reached as a result of instructions rather than inference on his part. This is because Mr. Dorgan knew that there was a dispute as to when the -243 letter arrived, since he states in his report that "I am instructed that there is a dispute about when this was received". In this Court's opinion therefore, it would be unusual for a solicitor as experienced as Mr. Dorgan to draw an inference that such a significant letter had been disregarded by Mr. Kean, unless he had been instructed that this had occurred.

86. After all, his making such a significant inference would amount to his inferring that this letter was disregarded (which was clearly a prima facie negative conclusion for the client of his instructing solicitor) and then attempt to justify this negative inference by concluding that it was reasonable to do so, even though he had not been instructed that the letter had not been disregarded in the first place. On balance, this Court is of the view that it is difficult to imagine Mr. Dorgan inferring a negative for his instructing solicitor and client and going on to justify that negative for the benefit of his instructing solicitor and client, unless he was instructed by Mr. Kean and/or Ms. Coghlan and/or Holohan Law Solicitors or counsel, that the -243 redemption letter was in fact disregarded by Keans.

87. Once again, it may simply be coincidental, but nonetheless it is noteworthy that what Mr. Dorgan says he wrongly inferred happened in this case, is exactly what EBS say actually happened, namely that the -243 redemption letter, which they say arrived in time, was disregarded by Keans. EBS say that Keans disregarded the -243 redemption letter, in the sense of not paying sufficient attention to its contents, because Ms. Corcoran decided not to go ahead with her re-financing of the -243 loan. The thrust of Mr. Dorgan's Report is that the -243 redemption letter was not sufficient notification of the cross security and that Keans should not be held to have been aware of the cross security because it acted in the original financing in 2006. It is telling that, based presumably on the instructions he received, Mr. Dorgan only makes passing reference to a dispute about when the -243 letter was received. The thrust of his Report, while acknowledging in passing that there is a dispute about the time of the arrival of the letter, makes no issue of the time of arrival of the -243 redemption letter and that it is his expert opinion that it was reasonable for that letter to be disregarded because Mr. Dorgan wrongly believed that it arrived in "a vacuum", since it was unsolicited.

Conclusion regarding when the -243 redemption letter was received

88. For all of the foregoing reasons, this Court is of the view that the -243 redemption letter was received by Keans at the same time as the other three letters and not late or after the 25th June, 2008 as alleged on behalf of Mr. Kean.

Did the -243 redemption letter put Keans on notice that the -243 loan was secured on the two properties?

89. For the sake of completeness, this Court having concluded that the -243 redemption letter was received in time, will also address the issue of whether that letter was sufficient to put Ms. Coghlan on notice of the fact that the -243 loan was secured on the Hunter's Way and Portnahully. It is clear that this was the case. This is because Ms. Coghlan, dealt with the issue in her direct examination in the following manner:-

"Q. Let's just presume for a moment that the Court decides that in favour of the Plaintiff and the Court decides that this letter was sent on the date they say it was sent and faxed, from your experience of a conveyancing solicitor, would that notation up on the right-hand corner that we see there alert you to a cross-security issue or to an extension of a legal mortgage?

A. It would."

90. The following day, she sought to clarify that answer having considered the matter, by making it clear that her answer was based on the assumption that the -243 letter of redemption was received at the same time as the letters of redemption for Ms. Corcoran's loans which were paid off, i.e. on or before the 25th June, 2008. She stated:-

"A. Well, just first of all, clearly my knowledge today is a lot greater than my knowledge back in 2008 and casting my mind back to 2008, some nearly eight years ago, it's somewhat different. So I think the question was just to say whether I would have thought that the reference on the top right hand corner would have referred to cross securities over properties, that's not correct. It wouldn't have raised any question of cross securities. However, had that letter come in, in connection with the other three letters at the same time with a cover letter attaching to it I would have raised a question as to what the reference to the extensions made on it. However, that letter was not received by me until we had in fact redeemed all the previous, the three other accounts attaching to the two other properties. So I just wanted to make that clear.

Q. That if the four letters had come in together it would have raised a question for you?

A. Absolutely, yeah. Because it would be read in totality, but it wasn't received at the same time so therefore wasn't read in connection with the others."

91. In Ms. Coghlan's cross examination, she also accepted that when she read for the first time the -243 redemption letter (regardless of when it was received), which appears to have occurred on the 7th July, 2008, this put her on notice of the fact that the -243 loan was also secured by charges over Hunter's Way and Portnahully. This was why she noted in her file note of 7th July that the -243 account was a "problem account".

92. The fact that the terms of the -243 redemption letter were sufficient to put her on notice that the -243 loan was secured on the two properties, was also clear from the fact that on the 3rd September, 2008, EBS sent Keans a letter which was identical to the -243 redemption letter, save for a different date and a different balancing figure. It is clear that Ms. Coghlan understood the import of that letter, since she wrote to EBS on the 16th September, 2008, and explicitly referred to this letter of 3rd September, 2008, and the fact that based on this letter it was her understanding that it referred to security over Hunter's Way and Portnahully in relation to the -243 loan, which she requested EBS remove.

93. It follows that it is not an issue in this case whether the terms of the letter of 18th June, 2008, in respect of loan -243 were sufficiently clear to put a reasonably careful solicitor on notice that the -243 loan account was secured on Hunter's Way and Portnahully, since that letter obviously was sufficiently clear to put Ms. Coghlan on such notice.

94. Accordingly, if the Court determines, as it has, that the -243 redemption letter was received before the redemption of the three other loans on the 25th June, 2008, this means that it would have been received along with the other three letters. As accepted by Ms. Coghlan in her own evidence it would have been understood by her as meaning that loan -243 was secured on Hunter's Way and Portnahully.

Conclusion that -243 letter arrived on time and that Keans were on notice of security

95. For this reason, even if this Court were wrong about Keans being aware that the -243 loan was secured on the two properties because of:

- (i) the -243 redemption request letter sent by Keans on the 17th June, 2008;
- (ii) the caveat in the three redemption request letters which Keans accept it received; and.
- (iii) the knowledge which Keans must be deemed to have as a result of the searches,

it is this Court's view that the -243 redemption letter was in fact received by Keans on or prior to 25th June, 2008, and Ms. Coghlan would, if she had read it, have been aware at that time, that loan -243 was secured on the two properties. On this ground therefore, there is no basis for Mr. Kean claiming that the ATR undertaking was discharged by him because EBS had not notified Keans in time that the -243 loan was secured on the two properties.

Mr. Kean's alleged misconduct

96. What happened in this case amounted to a simple human error, which can and does happen to most professionals at some stage during their career. In many cases, no loss or harm will result from an error made by a professional. Indeed, in this instance, it could end up being the case that this error by Keans will have no significant financial or non-financial consequences for EBS. This will be the case if Ms. Corcoran pays off the -243 loan in full, in which case there will be no need for EBS to rely on the security granted for that loan and so no need for it to have possession of the title deeds.

97. However, the fact that EBS has not to date suffered a loss is not the same as this Court concluding that EBS is not within its rights to take the proceedings in this case. EBS was within its rights to seek the Order it has sought since it has suffered the loss of being deprived of the title deeds and so could not enforce its security, if it needed to do so, or if it needs to do so in the future.

98. While EBS has maintained that at the heart of these proceedings is human error, it has alleged that the actions of Mr. Kean, in how he dealt with this error amounted to misconduct.

99. It seems clear to this Court that the conveyancing error was exacerbated by the reaction of Mr. Kean to this error and it appears to this Court that this reaction is why this case became one about Mr. Kean's misconduct and not just one about a conveyancing error. In particular, it seems that EBS' discovery of Mr. Kean's handing over of EBS' title deeds to PTSB, is a key factor in these proceedings being pursued to a full hearing and why these proceedings also involve a claim by EBS that Mr. Kean is guilty of misconduct.

Giving of possession of EBS' title deeds to PTSB

100. Keans were requested by EBS to provide the title deeds of the two properties for the first time on the 2nd December, 2008. Thereafter, Keans were requested to provide the title deeds on several subsequent occasions and with increasing urgency over the succeeding five years period. The requests were first made by EBS directly, then by EBS' property solicitors and finally by EBS' litigation solicitors, and the last request appears to be on the 13th November, 2013, which was a short time before these proceedings were instituted.

101. Despite these increasingly urgent demands, Mr. Kean, who was a trustee of the title deeds for EBS under the terms of the ATR undertaking, ignored these urgent requests and instead he handed over what was effectively EBS' property to PTSB, and without informing EBS that he had done so. This is clear from his letter to PTSB of 7th November, 2013, which relates to the title deeds of Portnahully and states:-

"Dear Sirs,

Enclosed please find Certificate of Title and Title documents duly scheduled in respect of the above matter as requested.

A duplicate schedule is attached for you to sign and return to us in order to acknowledge receipt of the enclosed Title documentation.

We confirm that we are pursuing EBS Building Society for the Vacated Mortgage Deed and shall keep you updated in this regard".

The attached Certificate of Title expressly states in relation to Portnahully that:-

"We hereby certify that your Mortgage ranks as a first Legal Mortgage/Charge over the Property."

102. In EBS' view, up to this point, Keans were guilty merely of making a mistake, but the deliberate handing over of EBS' title deeds to PTSB exacerbated this mistake since it meant that EBS now required a court order to seek to ensure that PTSB would hand back the title deeds. In addition, the undertaking in the Certificate of Title that PTSB would get a first charge over the two properties was given despite the fact that Mr. Kean knew that EBS had a first charge on the properties, that it had refused Keans' many written requests for this charge to be vacated in the previous five years and that EBS had demanded back its title deeds over the two properties, backed up by the threat of litigation.

103. It is difficult to understand why after five years of the stand-off between Mr. Kean and EBS that Mr Kean would hand over to PTSB the title deeds, which were charged in favour of EBS, particularly when this was done in the teeth of previous express written advice to Mr. Kean by his conveyancing solicitor, Ms. Potterton. The thrust of the memo dated 9th January, 2009, from Ms. Potterton to Mr. Kean is that it was obvious that the title deeds should not be handed over to PTSB (then called Irish Life & Permanent Plc) in circumstances where EBS had, and still has, a first charge over the two properties:-

"Obviously we are not in a position to return Title Deeds to Irish Life & Permanent Plc until such time as we receive vacates from ESB [sic]."

104. It is difficult to understand Mr. Kean's actions because when he handed over the title deeds to PTSB, he would have known that EBS was and remains the holder of a registered charge on the two properties and so from PTSB's security perspective, while having the title deeds may be better than not having them, it did not give PTSB a first charge over the two properties, and he was handing the title deeds which belonged to EBS to PTSB.

105. As Mr. Kean chose not to give evidence, Ms. Coghlan was in the difficult position of trying to answer the allegation of misconduct against her employer. She was also in the unenviable position of having to explain why Mr. Kean had handed over the title deeds even though his own conveyancing solicitor had expressly told him that he should not do so. In his letter to Ms. Corcoran dated 9th December, 2008, Mr. Kean stated that he did "not want to be personally exposed" in the dispute with EBS. It is of course possible that his decision to hand over the title deeds to PTSB might have reduced this personal exposure to which he refers, by giving PTSB some security for its loan, instead of none, namely the possession of the title deeds, particularly as EBS already had some security for its loan, namely the charge over Henrietta Street.

False statement by Mr. Kean that proceedings instituted

106. In support of their allegation of misconduct against Mr. Kean, EBS also referred in evidence to the letter dated 31st January, 2014, to PTSB from Mr. Kean. This letter is a reply to PTSB's query regarding the fact the folio for Hunter's Way in the Land Registry had an EBS charge registered, particularly as Mr. Kean had given PTSB an undertaking that it would have a first charge over Hunter's Way. In his reply, Mr. Kean stated in relation to Hunter's Way that:-

"Please note that we have issued proceedings against EBS for a Declaratory Order in the High Court seeking from them a vacate in respect of the said charge."

107. This was, and remains, a false statement by Mr. Kean, since no proceedings were ever issued by Keans against EBS. Indeed, based on this Court's judgment, any such proceedings would not have been successful in any case. Since evidence was presented to the Court on behalf of Mr. Kean that he was a litigation solicitor, it is curious, to say the least, that a solicitor with litigation experience, who would understand the significance of a solicitor's letter containing such a false statement, would issue a letter with this blatantly false statement.

Consequences for Mr. Kean

108. This Court finds that Mr. Kean should not have handed over the title deeds to PTSB and should not have made a false statement

that he had instituted proceedings against EBS. As regards the consequence of these findings, in its legal submissions, EBS highlighted the fact that it had produced expert evidence to the Court that the act of refusing to return title deeds to EBS was a breach of the ATR undertaking by Mr. Kean, that the act of passing the title deeds to PTSB was a breach of the ATR undertaking by Mr. Kean and that a breach of a solicitor's undertaking constitutes an act of misconduct. On this basis EBS has asked this Court to find that Mr. Kean was guilty of an act of misconduct.

109. The judgement of Hogan J. in the Court of Appeal case of ACC Loan Management v. Barry [2015] IECA 224 is relevant to a consideration of this application by EBS. At paragraphs 35 et seq. of his judgment Hogan J. refers to the Supreme Court decision of Bank of Ireland Mortgage Bank v. Coleman [2009] IESC 38 and states:-

"35. [...] 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 tending 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."

110. Based on the foregoing, it is clear that this Court does not have jurisdiction to declare that Mr. Kean is guilty of misconduct, since this is a matter for consideration at first instance by the Solicitors' Disciplinary Tribunal and accordingly this Court will make no order in relation to the alleged misconduct of Mr. Kean.

Conclusion

111. Thus the Court finds that Mr. Kean should not have handed over EBS' title deeds to PTSB and that he should not have made a false written statement to PTSB that Kean had issued proceedings against EBS. However, this Court does not have jurisdiction to find that these actions amount to misconduct by Mr. Kean, as this is a matter, at first instance, for the Solicitors' Disciplinary Tribunal. Accordingly, the Order which this Court will make is one directing Mr. Kean to inform PTSB that he was not entitled to give it the title deeds to Hunter's Way and Portnahully, an Order that he retrieve those title deeds from PTSB and that he return those title deeds to EBS.