

THE HIGH COURT**2004 1003 S****BETWEEN****CAMPION PROPERTY CONSULTANTS LIMITED****PLAINTIFF****AND****BRENDAN KILTY****DEFENDANT****JUDGMENT of Mr. Justice McMahon delivered on the 31st day of March, 2009**

The plaintiff in these proceedings sues the defendant for fees alleged to be due in respect of the sale of the defendant's properties and other services associated therewith.

During the course of these transactions the plaintiff was represented at all times by Mr. Tadhg Campion, a principal in the firm, and for ease of reference the word "plaintiff" in this judgment also refers to Mr. Campion where the context permits.

The defendant was the proprietor of three adjoining properties in Sandycove, Co. Dublin. One of these properties had been his original family home and he acquired the other two residences when he purchased them from neighbours who were moving house. The defendant as a younger man, having taken a qualification in quantity surveying, embarked on a legal career and at the relevant time of these proceedings had been a senior counsel for some years. He also engaged in property development.

He purchased the neighbouring properties with a view to securing planning permission which he hoped would enhance the value of the site and with a view to selling on at a profit. He was hopeful that he would secure planning permission within a reasonable time as the finance he had arranged with the building society was a short-term mortgage.

Unfortunately for him, planning permission on the site was refused and he lost his appeal to An Bord Pleanála. The defendant found himself in financial difficulty as the building society was pressing him for payments on the mortgage. He modified his plans and resubmitted a further application for planning permission. Because, however, the building society continued to press him for payments, he topped up his mortgage and recruited five investors who, between them invested somewhere in the region of €580,000 in the properties. These investors were for the most part friends and acquaintances of the defendant. He set up a limited liability company (Sunreed Limited) which was used as a vehicle for the investors' interest.

In the meantime, the defendant had purchased a new family home in Dalkey and also owned a property on Usher's Quay in Dublin city. The latter had a literary connection with James Joyce, being the location of his famous short story, "The Dead". The defendant proceeded to restore this house to its original condition which project was managed by his close friend, Mr O'Brien, also a quantity surveyor.

On 11th February, 2004, the defendant received word that his second application for planning permission had also been turned down. Consideration of the refusal, however, indicated that a further application in a modified form and with proposals for a development of less density, might eventually meet with approval.

By now the building society's patience had run out as the defendant had continued to ignore its demands. As a result, it commenced High Court proceedings for repossession of the Sandycove properties. The defendant was extremely worried by this time, fearing that the mortgage given by the building society might, since the re-mortgaging, also extend to the new family home. There was a real fear that a receiver would be appointed and that the defendant might be declared bankrupt.

The defendant consulted with his solicitor, Mr. Rory O'Donnell, who, realising the seriousness of the situation suggested that the defendant should engage the services of the plaintiff, Mr. Campion. Mr. Campion was known to Mr. Rory O'Donnell as an auctioneer who had good knowledge of all the developers in the South County Dublin area, where the properties were located. Moreover, Mr. Rory O'Donnell indicated to the defendant that Mr. Campion was "well got" with the chairman of the building society, Mr. Fingleton. The defendant met with Mr. Campion and engaged him to intervene with the building society on his behalf. Mr. Campion met with Mr. Fingleton and it was agreed initially that the legal proceedings would be adjourned, first for one week and later for a further period of six weeks (or thereabouts) to enable Mr. Campion to develop a strategy for bringing the defendant's properties to the market and disposing of them at a good price.

Once breathing space was secured, the defendant instructed Mr. Campion to prepare the properties for sale. Mr. Campion drew up a formal contract setting out the terms of the agreement between the parties which he discussed with the defendant and which he sent to him for his consideration. The defendant had the agreement for more than ten days before he signed and returned it on 11th March, 2004. I will revert to the terms of the agreement later in this judgment. Suffice to say at this juncture that the agreement contemplated that the plaintiff would provide certain services for the defendant in addition to selling the property by private treaty. After some weeks of research and consideration, the parties agreed, and Mr. Rory O'Donnell approved, that it would be better to put the property on the market by way of public auction, rather than try to dispose of it by private treaty as originally envisaged. This plan was explained to the building society which agreed to the new proposal.

The plaintiff then mounted an intensive three week campaign to market the property. This involved designing a brochure

and placing advertisements in the national newspapers as well as placing signs on the site itself and organising viewings. The defendant was fully advised about these developments and in fact he participated and monitored the progress very closely. During this period, the defendant visited the offices of the plaintiff frequently, though he denied visiting daily as Mr. Campion alleged. In addition, Mr. Campion also consulted with town planners and with a firm of architects who considered the site and did some sketches of new proposals for developing the land in question.

One of the earliest offers on the property came from a South County Dublin developer, Mr. Curran (hereafter "the Curran offer"). The negotiations with this developer were carried on through the good offices of Mr. O'Brien, the defendant's close friend. Initially, Mr. Curran offered to buy the property at a price of €2.75m with a further €500,000 to be paid at a later stage depending on the amount of units that might eventually be allowed by the planning authority. It was also conditional on the developer, Mr. Curran, being able to purchase the property of another neighbour, a Mr. Courtney, who owned a fourth property, the corner property, which completed the block on which the defendant's property stood. This neighbour had objected to the earlier planning applications by the defendant and presented a problem for any subsequent development of the property for that reason. This offer was discussed by Mr. Campion, the defendant, and Mr. Rory O'Donnell, the defendant's solicitor. Because it was only a conditional offer which depended on events outside the parties' control it was eventually rejected. Subsequent to this, Mr. Curran returned with another offer of €3.5m with less conditions attached to it, but after taking further advice from the plaintiff and his solicitor, the defendant again rejected this in favour of going forward to the public auction. Another offer from an acquaintance of the defendant was also made in December 2003. This was also for €3.5m, but was also conditional and again came to nothing in the end.

Another party who had been identified as a potential purchaser was a well known property developer called Robin Power whose property adjoined the defendant's property on one side. To further encourage interest from developers, Mr. Campion, with the advice of architects he engaged, suggested that the open part of the site might be reconfigured to make it more attractive, particularly to Mr. Power. The suggestion was that part of the large gardens which ran behind the two semi-detached houses might be cut off and included with the third house and that the properties might then be offered in three single lots to maximise the selling potential, as well as offering the three properties as a single entire lot. As the time for the public auction approached, this was the strategy that eventually prevailed: the three houses would be put on the market individually and then the entire property would be put up for auction and whichever yielded the highest price would be the method by which the property would be disposed of.

When the defendant was first referred to Mr. Campion by Mr. Rory O'Donnell and when Mr. Campion was trying to identify possible purchasers he said to the defendant on one occasion:-

"I know who will buy your property. Your solicitor will buy your property. He has just finished a development and would be interested." (or words to that effect)

The position was that the defendant's solicitor, Mr. Rory O'Donnell had indeed been involved in another part of the city in developing land which apparently proved profitable and was now, together with his other partners, looking for a suitable small development site. When the defendant raised this with Mr. Rory O'Donnell, his solicitor, Mr. O'Donnell said that he could not be involved with these properties because there was a clear conflict of interest for him and he ruled himself and his consortium out of the picture.

This was the position which prevailed in the days in the run up to the auction which was fixed for 28th April, 2004.

The events which occurred on the day of the auction are very significant in this case and must now be considered in more detail.

28th April, 2004: The Auction

The defendant phoned Mr. Collins, the assistant solicitor from Mr. Rory O'Donnell's firm, who was assigned to deal with the conveyancing aspects of the sale on the evening of 27th April, 2004. It seems that a problem was drawn to Mr. Collins' attention by a solicitor for some of the defendant's investor friends. Apparently, the consent of Sunreed Limited would be required if the properties were sold at the auction and it also happened that this company had been struck off for failing to file annual accounts. Mr. Collins wanted to draw the defendant's attention to this matter and to take instructions as to what was to be done. A meeting was scheduled for 12 o'clock the next morning so that this matter could be addressed by the defendant and Mr. Collins. According to the defendant, he also mentioned on this occasion that he had not heard from the plaintiff or Mr. Rory O'Donnell about up-to-date bids or interests in the property and he was wondering what was happening. According to the defendant also, Mr. Collins then told him not to worry and that he was aware that Mr. Rory O'Donnell was having a meeting later that evening with the plaintiff, Mr. Campion. The defendant says this raised alarm bells with him as he had no idea why this meeting should take place without him being aware of it and he said he began to suspect that something was amiss. After speaking with Mr. Collins, the defendant also spoke later that night with Mr. Campion on the phone. Mr. Campion indicated that he had a bid of €3.5m for the entire property as well as a bid of €1.85m for the back plot (i.e. the plot that was to include the rear gardens of the semi-detached houses). Mr. Campion did not divulge on the phone who had made the €3.5m bid.

On the morning of 28th April, the defendant decided that he should get someone to accompany him and his wife to the meeting to be held prior to the auction and to act, as he said himself, as "his ears". Having made a few phone calls he enlisted his financial adviser, Mr. Mullan to come to the meeting with him. Mr. Mullan had been previously engaged by the defendant as a financial adviser to assist the defendant with his financial problems. They arrived at the meeting shortly after 12 o'clock and met with Mr. Collins and Mr. Campion. Also present at the meeting were the defendant's wife and a Ms. Delahunt from Mr. Campion's office. At one stage during the meeting, things became heated between the plaintiff and the defendant and the defendant accused the plaintiff of "not doing anything" for him.

Just before lunch, at approximately 12.50, when matters were threatening to spill over between the plaintiff and the defendant, Mr. Rory O'Donnell arrived and calmed matters down. He told the defendant that his consortium was the bidder for the entire lot at €3.5m. He also said that to avoid the conflict of interest, his consortium was prepared to make the bid and to leave the bid on the table until after the auction. Mr. Rory O'Donnell, in his evidence, said that no firm offer had been made by him on behalf of the consortium before that. The only bids he made were made by him personally and were made, first, in the amount of €3.5m and later, in the amount of €3.6m. This would seem to explain why Mr. Campion was not more definite to the defendant on the phone the night before the auction. The effect of this, according to the plaintiff, was that it gave great comfort to the defendant going to the auction knowing that even if it collapsed

altogether there would still be a definite offer from a reliable source of €3.5m. At this juncture the meeting broke up and the defendant and his wife and Mr. Mullan went for luncheon. The parties reassembled in or around 14.00 and on the instructions of the defendant, Mr. Mullan went to Mr. Rory O'Donnell to see whether he could get any improvement on the bid of €3.5m. The defendant asked Mr. Mullan to suggest to Mr. Rory O'Donnell that the consortium might give the defendant an option to buy back the two semi-detached houses (i.e. Ardagh and St. Joseph's) as the defendant said in evidence that he wished to retain those two buildings to cover the interest of the investors. Mr. Mullan said that this offer was rejected by Mr. Rory O'Donnell as, according to the defendant's evidence, Mr. Rory O'Donnell said that he had those two properties valued and they were worth a "million" more. In fact, Mr. Mullan, in his evidence, did not say "a million more" but merely that Mr. Rory O'Donnell said that these two houses were "worth more". In my view, there was no evidence to support the defendant's assumption that Mr. Rory O'Donnell had said otherwise. Mr. Rory O'Donnell, on behalf of the consortium, however, said he would increase the offer of the consortium to €3.6m.

That was the position when the parties left at approximately 15.00 or thereabouts to attend the hotel where the auction was scheduled to start.

Mr. Rory O'Donnell had also requested Mr. Mullan to place the bid of €3.6m at the auction on behalf of the consortium. Mr. Mullan enquired whether he would be making himself liable in the circumstances and was assured by Mr. Rory O'Donnell that it was a mere mechanical offer to indicate to the auction that there was a bid of €3.6m for the entire lot in play. On that assurance, Mr. Mullan decided he would make the bid as requested. The defendant overheard this conversation and made no objection.

When the defendant and his wife and Mr. Mullan arrived at the hotel, the defendant and his wife sat in a small space off the corridor with Mr. Rory O'Donnell. The auction was to be held further on down the corridor in what was described in evidence as a long narrow room. Mr. Mullan went into the auction room.

It appears that there were about 15 or 16 persons in total in the room. The plaintiff sat at one end of the room at a table and his assistant, Ms. Delahunt sat in the front row with her back to the hall. Also in attendance was Mr. O'Malley, the solicitor who acted for Mr. and Mrs. O'Leary, who were investors in Sunreed Limited, the company controlled by the defendant. There were some other individuals present who were recognised by the plaintiff as persons who had made inquiries as well as the person identified by the plaintiff as a representative of Mr. Robin Power who had an interest in the back lot and who had talked about offering €1.85m for it prior to the auction.

The auction commenced at approximately 15.25 or thereabouts, that is 25 minutes after the scheduled time. The evidence was that this was not unusual for auctions in Dublin. Having briefly referred to the properties, the auctioneer/plaintiff then indicated how he was going to proceed. He told the assembly that he was going to put each of the lots individually on the market and that anyone who was interested in individual lots should "put their best foot forward" as the properties would not be revisited once the entire lot was put up at the end. The method of sale, therefore, envisaged opening the bidding on each individual property, parking the highest bid on each property and totalling these three figures before putting the entire lot up for sale. It was acknowledged that this was a somewhat unusual method of proceeding and made the process somewhat "tricky". The plaintiff did not produce to the court a record book of the bidding (it had been misplaced), but gave evidence that is not disputed, that the three bids on the single houses came to a total of €3.3m.

There is a serious conflict of evidence as to what happened next. Several witnesses gave evidence that at that stage the auctioneer/plaintiff took a break and went to consult with the defendant and his wife. When he returned, it was announced that he had a bid for the entire lot of €3.6m and he was putting the lot on the market. There was a further bid then of €3.7m from a Mr. Murphy who was a new bidder and was not part of the consortium. As this was the last bid, the entire property was then knocked down to Mr. Murphy.

The defendant denies that there was any break in the proceedings and emphatically denies that the plaintiff came out of the auction once it had commenced to consult him about how to proceed after the single bids had been totalled. I will postpone for further consideration the serious conflict on this issue.

After the property was knocked down to Mr. Murphy, the defendant says that the auction broke up and the first he knew was that people were coming out congratulating him on the sale of the properties. According to the defendant, a friend of his, Mr. O'Brien, came out and indicated, for the first time, that the property had been knocked down at €3.7m. The defendant then went into the auction room and duly signed the contract.

The solicitor for the defendant, Mr. Collins then indicated that there were two problems that needed to be addressed immediately: the first was the fact that Sunreed Limited had been struck off and that the purchaser's solicitor was entitled to insist that this would be rectified before any deposit was paid or before he was bound by the contract. The second problem related to a judgment mortgage on the property in the amount of €205,000 in favour of a Mr. Pearce who apparently was a builder who had carried out a lot of renovations on the defendant's new family home and had not been paid. Apparently, the fact of the judgment mortgage had never been disclosed to either Mr. Campion or Mr. Rory O'Donnell or Mr. Collins until very late in the day. In the event, the solicitors for the purchaser and the vendor devised a mechanism for dealing with Sunreed Limited and departed for another solicitor's office to formulate the remedy.

Having signed the contract, the defendant was driven back by Mr. O'Brien, his close friend, to the Four Courts, where he had a meeting.

There was another serious conflict of evidence which also involved Mr. O'Brien. A Mr. Curran, who had made an earlier bid for the entire property ("the Curran offer") with his partner, Mr. O'Donnell (not the defendant's solicitor) also attended the auction. In his evidence, Mr. Curran said that although he was not going to exceed the bid of €3.5m he had made some time earlier, he thought he would attend the auction and bid on one of the individual properties so that, in his own words, he might "get a slice of the action". Mr. Curran was an experienced developer in the area of South County Dublin. Mr. Curran alleged that on his way into the auction room and just outside the hotel he met Mr. O'Brien who was also arriving at the same time. Mr. Curran alleges that Mr. O'Brien said to him on that occasion that Mr. Curran could have the property if he bid €3.65m there and then. It is relevant to note that in the previous discussions with Mr. Curran which led to the eventual bid of €3.5m, Mr. O'Brien was the intermediary used by the defendant. Mr. O'Brien denied in court that he ever made such an offer on the day of the auction. Furthermore, the defendant denied that Mr. O'Brien had any authority from him to make any bid to Mr. Curran on that occasion. Mr. Curran, on being recalled, affirmed his evidence in this

regard and said that he came to court with no axe to grind with anyone. This is a factual matter which of course I have to determine. I have considered the evidence of Mr. O'Brien and Mr. Curran most carefully, and have studied the demeanour of each witness and the way they gave their evidence and have come to the conclusion that, on the balance of probability, Mr. Curran's version of this event is more reliable. I hasten to add that I have no reason to believe that Mr. O'Brien consciously misled the court, but I am satisfied that his recall of the incident is mistaken.

In spite of the late hiccoughs, the deposit was paid to the plaintiff as "stakeholder" and the transaction was completed on 16th July, 2004 when the rest of the money was paid over.

Shortly after the auction, the solicitor for the defendant, Mr. Collins, requested the auctioneer/plaintiff to transfer the deposit to him "to keep the banks happy". With some reluctance the plaintiff agreed to do so.

It subsequently transpired that the price received for these properties was not sufficient to satisfy all the creditors and there was a considerable shortfall. When the plaintiff sent his bill to the defendant on 12th July, 2004 in respect of the sale of the property and the other work he had done, the defendant failed to pay.

The defendant then instructed new solicitors (Messrs Giles J. Kennedy and Co.) to write to the plaintiff and his solicitor did so by letter dated 26th July, 2004. The relevant complaints in this letter are set out hereunder.

"(i) You failed to follow up interested potential purchasers.

(ii) You failed to follow up the purchasers at (i) referred to herein with a view to securing the property for your firm, its servants and agents or a consortium you failed to disclose to our Clients.

(iii) You failed to properly market the property in a manner consistent with the standards of the Auctioneers profession and/chartered surveyors with a view to securing the property for a consortium you represent and failed to disclose to our Clients.

(iv) You failed to properly conduct the Auction with a view to securing the best price possible.

(v) You were in breach of fiduciary duty.

(vi) You failed to undertake negotiations and/or obtain a substantial reduction or any reduction of the monies claimed by the Irish Nationwide Building Society."

The plaintiff commenced these proceedings on 18th August, 2004 and the defence filed by the defendant reflects, in a more refined manner, the letter of 26th July, 2004. No counterclaim, however, was made. The defendant explained this in evidence by alleging that all the facts were not known to him at the time the defence was filed. It is also significant to note that the defence does not allege a sale of the properties at a significant undervalue, nor does it allege that the plaintiff was part of a conspiracy to acquire the property for the consortium, although the defendant canvassed these issues vigorously at the trial.

The above narrative is not really in dispute for the most part. Where there were minor discrepancies, the narrative reflects my preference from the evidence. Where there is a difference of opinion on crucial matters, these will become clear later in this judgment, where I will examine the evidence in detail before determining the facts as I see them.

Both parties swore three affidavits during the course of the proceedings and these were also referred to in the evidence.

The Issues

The issues to be determined by this Court are the following:-

(1) Did the plaintiff have authority to sell the defendant's property on 28th April, 2004?

(2) Was the auction on 28th April conducted in an appropriate and professional manner?

(3) Did the plaintiff provide services which he contracted to provide for the defendant in disposing of the properties on 28th April, 2004? In particular, did the plaintiff promise to negotiate a reduction of the defendant's debt with the building society?

(4) Did the plaintiff conspire or mislead the defendant in any way with others in a way which meant that he did not get the best price for the properties on the day of the auction?

(5) Is the plaintiff entitled to the sum claimed in the amount of €231,862 plus interest?

Before determining these issues the court must determine two factual issues which were hotly contested during the hearing.

(i) Did the plaintiff break in the course of the auction to consult with the defendant?

(ii) Did Mr. O'Brien make an offer to Mr. Curran immediately before the auction that the property could be his for €3.65m?

I have already determined in respect of (ii) that Mr. O'Brien did make this offer going into the auction and I will postpone determination of (i) until later in this judgment.

In determining the relevant issues before the court, it must be borne in mind that the defendant was a man who had a qualification as a quantity surveyor and was an established and experienced senior counsel. He was also a person who was involved in the development of properties. Further, he had nearly two weeks to consider the contract drawn up by the plaintiff before he signed it. There is no doubt in my mind that he was fully aware of what it contained and appreciated all its implications. The financial pressures he was under were not such as to amount to duress of any significance and did not vitiate in any way the consent required and freely given. There is no doubt either that he knew what he was doing when he signed a contract after the auction and the completion documents some two and a half months later.

It must also be noted that the auction on 28th April, 2004 was "most unusual" if not unique, because going in, the defendant had the security and comfort of knowing that there was a firm bid of €3.6m which was to remain on the table even if the auction collapsed. Mr. Rory O'Donnell's consortium allowed the bid to stand because of the conflict of interest problem. Mr. Rory O'Donnell's view was that by identifying that the bid came from his consortium prior to the auction and leaving the bid on the table, the conflict problem was properly addressed. All the auctioneering experts who testified during these proceedings agreed that this was a significant factor in determining how the plaintiff decided to run the auction.

These witnesses also agreed that selling the property in lots was a very "tricky" business at the best of times. There were suggestions that it might have been more prudent to have adopted a different sequence in putting the properties up for sale – that it would have been preferable, for example, to put the entire lot up first, before inviting bids on the individual lots, and then revisiting the bids on the entire lot, before putting the property on the market for the final time. Mr. O'Toole, the auctioneer called by the defendant, in suggesting this sequence, laboured under a misapprehension that a bid for the entire property could be legally binding and could not be withdrawn once made, which clearly undermined his preferred sequence. The truth, as Mr. O'Malley, the solicitor who was critical of the speed at which the auction was conducted, said in evidence, that whichever sequence was adopted carried its own risks and it is my view that the sequence adopted by the plaintiff could not be faulted on that ground. Mr. Rory O'Donnell, who had attended hundreds of auctions over the years, affirmed as an expert that the way the auction was conducted was the best way to do the job and was the way he would recommend it to be done. To the suggestion that the bid for the entire lot should be parked and the individual properties should have been revisited, he disagreed strongly: "...absolutely no way." Such a sequence would be "far too complicated" and he "would have absolutely nothing to do with it". In fairness to Mr. O'Toole, when it was put to him at the end of his cross-examination, he agreed that a lot of discretion must be given to the auctioneer dealing with the room on the day. The relevant part of the transcript reads as follows:-

"385. Q. ...I think you will agree that in the conduct of an auction it is the experienced auctioneer who will do it the way he thinks best?

A. I would.

386. Q. Other auctioneers might do it differently but that doesn't necessarily mean to say that an alternative is wrong or better, does it?

A. I would broadly agree. Ultimately the objective is to get the best price, and however one does that."

A great deal of evidence advanced on behalf of the defendant related to the nature and necessity of a clear "reserve" to be in place for such an auction. Although the evidence was protracted, it appears to me that there was an agreement that the purpose of a reserve is twofold: first, it indicates a floor-price below which the property is not to be sold; second, when in place, the reserve, authorises the auctioneer to sell the property at that, or a higher price. Instead of focusing on the word "reserve" in the present dispute, given that the floor was effectively set by the consortium's €3.6m bid, the real question for determination is: did the plaintiff have authority to sell the property on the day for €3.7m? Having considered all the evidence I have come to the conclusion that the plaintiff did have such authority. It will be recalled that on the morning of the auction, the consortium put up a bid of €3.5m. After luncheon, through Mr. Mullan's intervention, authorised by the defendant, that offer was increased to €3.6m and it was an offer that was to remain on the table. Mr. Mullan, the defendant's financial adviser, agreed, at Mr. Rory O'Donnell's request, to make the offer on behalf of the consortium at the auction. This must have been with the knowledge, if not the authority of the defendant. Given Mr. Mullan's role on that day, and the agreed tenor of his evidence to the court, it is, in my view, inconceivable that this was not the case. From this conclusion I am also entitled to infer that the defendant must have fully appreciated that this was within the range of what the property was likely to achieve at the auction on that day. Finally, I have already accepted as a fact that Mr. O'Brien made an unauthorised offer to Mr. Curran, going into the auction, that the property could be his for €3.65m. Again, the defendant says that this was not made with his authority. The evidence is, however, that €3.6m was the figure contemplated as the possible price likely to be achieved on that day and anything in excess of this sum might have been hoped for by the defendant, but the reality was that the focus was on a figure within that range and that might be what he would have to settle for at the end of the day. I believe from this construction of the evidence that this was the defendant's frame of mind when the plaintiff went into the auction room and commenced the sale. This also conforms with Mr. Rory O'Donnell's evidence where he stated that the defendant knew that the property would be sold if a bid of more than €3.6m was made (which is what happened) and that it would have been sold at €3.6m if more was not bid. Moreover, Mr. Mullan, the defendant's financial advisor, gave evidence that while €4m might have been contemplated by the defendant in early April, they went into the auction more in hope than in expectation and that when Mr. Mullan negotiated the offer made by Mr. Rory O'Donnell from €3.5m to €3.6m, to remain on the table, the defendant was very relieved to have this as a safety net going in.

Another area of controversy was whether, when the three individual bids were made and "parked", the plaintiff left the room to speak with the defendant and his wife. In summary form, the evidence of the witnesses on this issue was as follows: Mr. Collins, solicitor for the defendant, was firmly of the view that the plaintiff left the room and consulted briefly with his clients. Mr. Collins accompanied him. Ms. Delahunt from the plaintiff's office also gave strong evidence that the plaintiff left the room to consult with the clients as did Ms. Cleary, also from the plaintiff's office who, when it was put to her that Mr. O'Malley said that there was no break, replied: "No, that's not true, there was a break. I remember it clearly. There was a break. Tighe (sic) left the room." Both Ms. Delahunt and Ms. Cleary were also qualified auctioneers. The plaintiff firmly asserted that he left the room and took instructions from his client to put the entire lot on the market. Mr. Rory O'Donnell, who was in the hallway with the defendant and his wife, gave evidence that it was his recollection that

the plaintiff left the auction room, spoke to the defendant and his wife and got instructions to go in and try for more than €3.6m for the entire lot. He had no doubt that Mr. Campion had authority to sell. Mr. Mullan, the defendant's financial adviser, did not recall Mr. Campion leaving the room and Mr. O'Brien, the defendant's close friend, although in the auction room, did not recall any details of the auction itself. The defendant was emphatic that he was not consulted.

Perhaps the strongest evidence in favour of the defendant on this issue, came from Mr. O'Malley, the solicitor in attendance with his clients who were two of the investors in the defendant's property company, Sunreed Limited. He said that the plaintiff did not leave the room and that there was no break. Mr. O'Malley was contacted by the defendant sometime after the auction and he gave strong evidence that the auction was conducted with unusual speed. He had made a note at the auction of the various bids and the sequence of the bidding. He dictated a longer memo to himself of his recollection of the auction some three months later after he was contacted by the defendant. Clearly, it is difficult to reconcile this conflict of evidence, but again on balance, having paid close attention to the witnesses giving the evidence, I favour the conclusion that the plaintiff left the room to consult briefly with the defendant and his wife and that he got instructions to put the property on the market at that juncture. From this, it follows that in knocking down the property to Mr. Murphy at €3.7m, the plaintiff carried out his client's instructions. It is also important to note that Mr. O'Malley did not give evidence that a higher price could have been got at the auction. I should hasten to add that I do not for a moment think that those witnesses who gave evidence critical of the speed of the auction, especially Mr. O'Malley, were anything other than honest witnesses trying to give an honest account of their recollections of the occasion to the best of their ability. The balance of evidence, however, before this Court is against them.

The defendant also, in his evidence, made suggestions not only that the best price was not achieved at the auction, but that there was some collusion between the plaintiff and Mr. Rory O'Donnell to secure the property for the benefit of Mr. Rory O'Donnell's consortium at less than market value. The defendant's suspicions, according to himself, were based on learning that Mr. Rory O'Donnell and the plaintiff were having a meeting the night before the auction without his knowledge, that Mr. Campion was not willing to disclose to him the night before the auction who were the bidders behind the €3.5m offer and finally, an alleged remark by Mr. Mullan, before the auction, to the effect that Mr. Rory O'Donnell had said that the two semi-detached houses "were valued at more".

These are very grave allegations and on the basis of these suspicions, the defendant complained about Mr. Rory O'Donnell to the Law Society some two years after the auction. The Law Society examined the complaint and rejected it. According to the defendant, the Law Society rejected the complaint because it held that the defendant had adequate opportunity to instruct another solicitor and auctioneer and because the price exceeded expectations, something the defendant disputed. The defendant's suspicions seemed to have been retroactively fed in his own mind by the way the auction was conducted: allegedly, with unseemly haste. It is my view, that there is no evidence before this Court to support such a serious charge against the plaintiff and Mr. Rory O'Donnell. The defendant's suspicion borders on pure speculation. Apparently, no strong suspicion was there immediately after the auction when he signed the contracts or two months later when he completed the transfer. His explanation for signing the contract was that he thought that the auctioneer/plaintiff had bound him and he could not back out at that point. This, however, would only be true if the auctioneer/plaintiff had no authority, actual or apparent, which could have been challenged there and then if it was in doubt. If he did express concern to his friend, Mr. O'Brien, when he was being driven back to the Four Courts, after the auction, it was at a time when he was "high", to use Mr. O'Brien's words and somewhat exercised. He certainly did not raise any objections to either the plaintiff or Mr. Rory O'Donnell until after he received an invoice from the plaintiff, which, even his own expert witness, Mr. O'Toole, said one would have expected, if it was a real concern at the time. The first time these concerns were expressed was in a letter dated 26th July, 2004 from the defendant's new solicitors, Giles J. Kennedy and Co. sometime after he had been invoiced. Finally, his explanation that he did not file a counterclaim in these proceedings is weakened by the fact that he could have applied to amend his pleadings when he learned of the full facts had he been so disposed to make the application. In any event, the property was knocked down to Mr. Murphy of whom there was not a shred of evidence that he was anything other than an independent purchaser.

The defendant also suggests, in support of his case, that the way the auction was conducted with extreme haste supported his theory that his best interests were not being looked after. In my view, the evidence does not support his accusations. The strongest evidence in relation to the speed of the auction was given by Mr. O'Malley, the solicitor in attendance with his clients, two of the investors in Sunreed Limited. I have already outlined some of Mr. O'Malley's evidence which I accept, as being his honestly held view of the proceedings on that day.

I should refer in more detail to his evidence as to the speed at which the whole auction process was conducted. Mr. O'Malley said that although he had not previously attended an auction conducted by Mr. Campion, he thought it unusual that Mr. Campion did not engage in any significant preliminary chat by way of "talking up" the properties. Having taken individual bids totalling €3.3m for the first three lots, he said Mr. Campion moved quickly to the last lot, for the entire property. The auctioneer/plaintiff then said words to the effect that as he was bid €3.6m, the entire property was on the market. He then got a bid of €3.7m and the property was sold. This occurred, according to Mr. O'Malley too, in "a matter of seconds". The whole process in his view took no more than three and a half minutes. Mr. O'Malley's view is summed up in the following answer:-

"He seemed to be in a tremendous hurry, a tremendous hurry. It might have been the quickest auction I was ever at in my life."

The rest of Mr. O'Malley's evidence, including, his answers in cross-examination, were to the same effect. When it was put to him, however, was he saying that there was more money available at the auction, he replied: "I am not saying that, no". Mr. Collins, the defendant's solicitor at the auction, stated that he would have been very concerned if bidders "were not given the opportunity, ample opportunity, to make their bids known".

But even if it is an accurate account as to what happened, it by no means follows that the way in which the plaintiff conducted the auction was wrong in the particular circumstances of the sale, much less that it spoke of conspiracy or collusion. There were serious reasons why it was very important to get a good price on the day. I will not dwell again on these pressures: that planning permission had been refused twice, that there was a difficult neighbour and that there was pressure from the building society to secure a satisfactory outcome. Suffice to say that the expert evidence from all the auctioneers who gave evidence on the matter clearly indicated that the auctioneer on the podium on the day must be given a great margin of discretion as to how "to handle the room". I refer in particular to Mr. O'Toole's evidence already quoted above. Mr. Stephenson, another auctioneer called by the defendant, having agreed in cross-examination that

every auctioneer's style is different and every auction is unique, when the question was put to him "The way in which an auction is conducted and progresses depends on what happens at the time in the room?", replied "I have said that. Yes". Mr. Walsh, the auctioneer from Gunne Estate Agents, called for the plaintiff, in response to the question put by Mr. Dwyer for the plaintiff "...would it have made a difference to the speed at which you would accept the 3.7?" answered "An auction depends on how many people are there and how many people are bidding and it is up to the auctioneer to read who is real and who is not real." Mr. Walsh finished his evidence by saying that the price secured of €3.7m was "a very good price".

Again, in view of all the evidence I am not prepared to conclude that the actual auction was handled in an improper way or to conclude that the best price was not achieved on the day. Certainly Ms. Cleary and Ms. Delahunt, both employees of the plaintiff and both of whom were in the auction room, gave evidence to that effect, which was credible. It is worth recalling that when Gunne Estate Agents put the property up for sale some two years prior to this auction it got no offers in excess of €2m. The plaintiff's view was that nothing was definite, not even the consortium's bid of €3.6m, which was to remain on the table, until the contract was signed and the deposit paid over.

The defendant also argues that the plaintiff did not deliver what was promised from the building society. The defendant argues that the plaintiff did not negotiate a deduction in the sum owed. It must be recalled what was in play when Mr. Campion was enlisted to assist the defendant in February/March 2004. The building society was in the High Court seeking repossession and threatening to appoint a receiver. The defendant was very frightened that he would lose not only these properties but also his family home and there was also the possibility of being declared a bankrupt which would threaten his very livelihood. The most urgent matter was to get an adjournment and to buy time so that the defendant and his advisers could implement a plan for an orderly disposal of the properties at the best possible price. Mr. Campion was identified as a person who was "well got" with the chairman of the building society, and who could hopefully, by his intervention, secure the time required to devise an alternative strategy for the disposal of the properties. Mr. Campion succeeded in getting an adjournment of seven weeks, and undertook to sell the property by private treaty at what all hoped would be a good price. He got the building society to agree to this programme. Mr. Campion worked with some architects and got sketches and rough plans for possible future development of the site in an effort to attract developers' interest. After some time, it was decided, with the defendant's consent, that the best way to market the property was not by private treaty but by public auction. A marketing strategy was put in place, involving an advertising campaign, appropriate signage, designing, printing and distributing a good quality brochure and arranging viewings of the properties, etc., over a concentrated three week period which was the usual duration for such a campaign. The defendant was heavily involved in all of this. He visited the plaintiff's office regularly and occasionally twice a day. He spoke with the staff directly involved and on occasions took breakfast with them in the kitchen of the plaintiff's office. It is fair to say that he had a very much "hands on" role for the duration of this campaign. I accept the evidence of Ms. Cleary and Ms. Delahunt on these matters.

At the hearing the defendant's counsel criticised this campaign as being inadequate for three reasons:

- (i) Not properly marketing the property in the commercial sections of the newspapers as being an opportunity for commercial development. In addition, the defendant said that the plaintiff promised an "editorial" for the property in the Irish Times;
- (ii) Failing to follow up on an earlier bid of €3.5m from Mr. Curran (the Curran offer);
- (iii) Failing to phone around, before the auction date, and remind people who had viewed the properties and to whom brochures were sent.

I am not satisfied that it was incumbent on the plaintiff or his staff to phone and remind people of the date of the auction. There was no evidence that this was the norm. If people were really serious about purchasing, I have no doubt that they would have noted the date and if they were not, a phone call was unlikely to stimulate their interest in the property. A reminder phone call would only be worthwhile if it was made to a person seriously interested in the property and who had forgotten the date of the auction. A somewhat unlikely event, I suggest.

With regard to seriously entertaining Mr. Curran's earlier offer of €3.5m or following up on the offer I have this to say. When the offer was first brought to Mr. Campion's attention by the defendant, through Mr. O'Brien, a meeting to discuss the offer was held in Mr. Rory O'Donnell's office. The plaintiff was somewhat sceptical when the offer was not in writing, but the defendant was sent away to think about it overnight. The defendant returned and decided to reject the offer and proceed to auction. Mr. Rory O'Donnell, when asked whether it was rejected by the plaintiff out of hand, said it was nonsense to think that a senior counsel would let an estate agent decide what to do and it was not in accordance with what happened. Mr. Curran gave firm evidence at the hearing that he had no notion of increasing that offer once it was made in March 2004. He had conveyed that to the plaintiff in no uncertain terms. Assessing Mr. Curran at the hearing, I have come to the conclusion that once he had made up his mind, he would communicate clearly his decision. He did not strike me as a man who would easily change his mind. Mr. Curran has bought and sold many properties, and had been involved with many developments in South County Dublin and it seems that he had many other opportunities to satisfy his investment needs at that time. He indicated that he was not desperate for the site. He said he would have been glad to get it at the price of €3.5m, but if it was not available at that price he would have no regrets in letting the property go. Further, as was pointed out at the hearing, chasing Mr. Curran might indicate a sign of weakness and the best way of flushing him out was to hold an auction. This conclusion is supported by Mr. O'Brien's own evidence which is worth quoting:-

"So at that stage I was always under the impression that that was their final bid. Mindful of the fact that we had been talking since 2002, their final bid was 3.5. Obviously they knew the auction was on but 3.5 was their final bid and they would not bid at the auction, and they made that very clear to me."

Moreover, I have already found as fact that Mr. O'Brien, on the way into the auction indicated to Mr. Curran that the property was available to him at €3.65m and Mr. Curran refused it. I do not think there is any merit to the defendant's argument that failure by Mr. Campion to chase him would have yielded a higher price.

With regard to the other contention, that the plaintiff promised an "editorial" and failed to advertise the property in the commercial section of the Irish Times, my comments are as follows. I do not believe that a person like the defendant could have interpreted the plaintiff's promise of an "editorial" as anything more than a promise to try to get such a prominent feature for his property. Mr. Campion said he asked the relevant person in the Irish Times, but was told that because the advertising of the properties had also been placed in the Irish Independent, there would be no editorial in the Irish Times. On the evidence, I cannot accept that the plaintiff's promise, if made, in that regard was anything more than a promise to try. It would be unreasonable to interpret it as a promise to deliver. It was also incorrect to say, as the defendant did, that the property was not advertised in the commercial section of the Irish Times i.e. the Wednesday, 7th April, 2004, issue of the paper. A copy of the Irish Times dated 7th April, 2004 was handed into court and there is clearly an item headed "Sandycove Houses with Potential". This appears on the top left hand corner of the page and at the head of the column and measuring (9 cm x 7 cm). Further, a larger advertisement measuring 9 cm by 7 cm together with pictures of the three properties was published in the Irish Times on Thursday, 8th April, 2004 (the residential sales issue) and was repeated again on Thursday, 15th April, 2004. It is my view that one could not say that the advertising was deficient on the evidence.

Finally, the defendant claimed that the plaintiff failed to get a reduction in the sum owed to the building society as the plaintiff had promised. As in the previous paragraph, I have difficulty in accepting that what the plaintiff promised in this regard was anything more than a promise to use his best efforts to secure a reduction. No specific promise guaranteeing a result in this regard is to be found in the agreement itself or in any other documents relating to the contract. Further, I am of the view that a reduction before the auction would not be considered by the building society. Why should the building society agree such a reduction at that time, when it might transpire that a price far in excess of its debt would be achieved at auction? The only possibility of a reduction in my view, and there was evidence before the court to this effect, would be if the price achieved at auction was less than the sum owed to the building society, and then only if it was a marginal deficiency. It was also suggested in court that the Irish Nationwide Building Society was not known for its generosity in such dealings. Mr. Mortimer, for the building society gave evidence to that effect and said it would not be normal to give a reduction when an auction was scheduled. Mr. Campion gave evidence that he did ask Mr. Fingleton for a reduction but that it was refused. There is a further difficulty in accepting the reasonableness of the defendant's position when it is recalled that the plaintiff was never given the total indebtedness of the defendant at any time in the run up to the auction. The defendant did not disclose that there was a judgment mortgage of approximately €0.2m on the property nor did he inform Mr. Campion that he had other investors with an interest in the property who were owed somewhere in the region of €0.58m. Furthermore, although the defendant had established that his indebtedness to the building society was €3.4m days before the auction, he had not disclosed this to his own financial adviser, Mr. Mullan or to Mr. Campion. In fact, he made Mr. Campion phone the building society at the meeting in the offices of O'Donnell Sweeney, solicitors for the defendant, on the morning of the auction to get the figure from the building society in spite of the fact that the defendant knew it himself. It was always open to the defendant to request from the building society what his redemption figure was. Further, the question of the redemption figure was of less significance in this case as the properties had to be sold anyway even if the highest bid did not reach the redemption figure. The building society wanted its money. Mr. Campion had also been told by Mr. Rory O'Donnell not to negotiate with the building society close to the auction and his help was never enlisted after the auction when the lawyers took over. Mr. Campion was never briefed fully by the defendant as to his total indebtedness; he was never equipped to enter into meaningful negotiations with the building society.

Sometime after the auction Mr. Mullan, the defendant's financial adviser, got detailed figures of all of the loans issued by the building society to the defendant and from an examination of the figures came to a conclusion that an argument could be made that the defendant was being overcharged in interest by a sum of €94,000. At the hearing it was suggested that Mr. Campion was somehow at fault in not establishing this figure and using it as leverage in negotiations with the building society before the auction. This argument does not convince me. First of all, Mr. Campion never held himself out to be a financial adviser and it would be unreasonable to expect that he would be aware or could make himself aware that there was a miscalculation of the interest due on these loans. Secondly, there was no way that Mr. Campion could credibly negotiate a reduction when he was not given the full picture from the defendant of his financial position. Thirdly, when Mr. Mullan tried to make the same argument with the building society after the auction he failed to persuade the building society of the correctness of his calculations. No reduction was negotiated in the end by Mr. Mullan. The suggestion that even though this argument was not ultimately successful to convince the building society, it might have been used successfully as leverage prior to the auction, does not persuade me. The truth is that Mr. Mullan, in advancing this proposition, never said more than that his calculations might have provided Mr. Campion with an argument. Not only was this advanced at the hearing with a large measure of hindsight, but the merits of Mr. Mullan's argument were rejected by the building society subsequently and never pursued by the defendants.

Conclusion

From my above view of the facts and the evidence before the court I am compelled to find for the plaintiff. Accordingly, I make an award in favour of the plaintiff in the amount of €356,386.99.

As a matter of law it also seems to me that by signing the contract on the day of the auction and by completing the sale some months later, the defendant also ratified his agent's conduct, which ratification is retrospective. (See *Firth v. Staines* [1897] 2 Q.B. 70). Once there has been such ratification, the agent is relieved from any liability to the principal and is entitled to recover his commission and expenses (see *Keay v. Fenwick* [1879] 1 C.P.D. 745).