Neutral Citation: [2014] IEHC 654

THE HIGH COURT

[2013 No. 219 SP]

BETWEEN:-

ACC LOAN MANAGEMENT LIMITED

SUBSTITUTED AS PLAINTIFF BY ORDER DATED 21ST OCTOBER 2014

PLAINTIFF

-AND-

FRANCIS GILLESPIE PRACTISING UNDER THE STYLE AND TITLE OF DUNLEVY & BARRY SOLICITORS

DEFENDANT

JUDGMENT of Ms. Justice Donnelly delivered the 12th day of December 2014

Introduction
1. The plaintiff ("the Bank"), a financial institution, originally known as ACC Bank PLC, seeks Orders by way of the special summons brought against the defendant solicitor on foot of alleged breaches of undertakings in respect of the purchase/financing of property at Mountcharles, Co. Donegal. The Bank submits that this is an appropriate case for summary judgment and for an award of damages on a no transaction basis. The defendant says that there is no evidence at all to support the claim that there has been a breach of the undertakings or, in the alternative, that the issue of whether there has been a breach is a matter that can only be determined after plenary hearing. In the further alternative, the defendant submits that there should not be an award of damages on a no transaction basis.

2. The Bank relies upon the affidavit of Eoin Gavigan, special asset manager with the Bank, to ground the special summons. He avers that the undertakings were granted in the circumstances as set out in the following paragraphs.

Facility One
3. Michael McMenamin, Brendan Malone, Kevin Little and Paul Doherty ("the Borrowers") acting as a syndicate of property investors, applied in 2007 to the Bank for various loans to purchase property in or around Co. Donegal. At all material times, the defendant acted as solicitor to the Borrowers in their dealings with the Bank. The Bank made available by way of a facility letter dated the 23rd of April, 2007, loan funds in the sum of €500,000.00 for a term of 24 months for the stated purpose of the purchase of two houses at Mountcharles, County Donegal ("the Mountcharles properties"). The Bank was advised prior to drawdown that the Borrowers had already purchased one house at Mountcharles and, as such, part of the funds were being applied to reimburse the Borrowers for this purchase. The security was to be by way of a first legal mortgage and charge on deeds "to properties being purchased at Mountcharles, Co. Donegal". The defendant, on behalf of the Borrowers, drew down the full amount of Facility One on the 30th of August, 2007. The facility letter provided that the loan would be issued as a single advance, subject to preconditions and the Bank's commercial credit general terms and conditions being fulfilled to the Bank's satisfaction.

Facility Two
4. By way of a facility letter dated the 30th of July, 2007, the Bank approved a loan to the Borrowers for an amount up to €1,900,000.00 for a term of 18 months, unless a demand for early payment was made. The purpose of this facility was to enable the Borrowers to purchase the Bank of Ireland premises at The Diamond in Donegal town. The security required under the facility letter was to include an extension of a first legal mortgage and charge over "two houses on a one acre site at Main Street, Mountcharles, Co. Donegal". A subsequent revised facility letter dated the 30th of August, 2007, was issued by the Bank to the Borrowers. This had the effect of superseding the earlier letter of loan sanction dated the 30th of July, 2007, but was identical in terms, save for an amendment to the rate of interest.

The First Undertaking
5. The defendant provided a solicitor's undertaking dated the 20th of August, 2007, ("the First Undertaking") which denotes the property as "a property at Mountcharles, County Donegal, being part of Folio 10426 Co. Donegal". It is now common case that the particular Folio comprises only one house at Mountcharles. The date of the related letter of sanction is omitted. The undertaking was furnished to the Bank by the defendant under cover of letter dated the 20th of August, 2007. That undertaking was in a form which had been provided by the Bank and contained standard terms typical of these types of undertakings. In general, the defendant undertook to:

a) ensure that the Borrowers obtain good marketable title to the property,

b) secure a valid legal mortgage on the property for the Bank,

c) complete and lodge with the Bank a report and certificate of title and the Bank's security documents,

d) furnish copies of planning permissions and building bylaw approval together with, if issued, a certificate of compliance,

e) pending compliance with the undertaking, to complete and lodge with the Bank the report and certificate of title, to promptly furnish to the Bank any information reasonably required concerning the Borrowers' title for the Bank's security, and to furnish to the Bank copies of any documents in relation thereto, required by the Bank, and to hold the title documents in trust for the Bank.

The Second Undertaking
6. A second solicitor's undertaking dated 28th of August, 2007 ("the Second Undertaking"), was provided by the defendant to the Bank under cover of a letter dated the 29th of August, 2007. This undertaking denotes the property as two houses on a one acre site at Main Street, Mountcharles, County Donegal. The Second Undertaking held by the Bank refers to the applicable letter of sanction dated the 30th of August, 2007. The date in the undertaking appears to read the 10th of August, 2007. In any event, the date 30th of August, 2007, is unusual as that facility letter post-dated the undertaking.

7. In general, the Second Undertaking contained the same undertakings as were given in the First Undertaking. However, after the undertaking to ensure that the Borrowers obtain a good marketable title to the property, there was a handwritten insertion that this was:-

> *"subject to the qualification that the borrowers have entered into a contract for the purchase of the property conditional upon the grant of planning permission for the erection of 30 houses thereon. Compliance with this undertaking is strictly conditional upon the successful completion of the said contract and the granting of the said planning permission."*

The Bank's attempt to seek compliance
8. The Bank first called upon the defendant to comply with the terms of the undertakings provided in relation to the Mountcharles properties by way of letter dated the 9th of December, 2008. The defendant responded by letter dated the 8th of January, 2009, as follows:-

> *"with reference to the Bank's charge over the properties at Main Street, Mountcharles, County Donegal, the undertaking dated 10th August 2007 (a copy of which is enclosed) states that this undertaking was subject to a qualification that our clients would proceed to purchase one of the houses, subject to the granting of planning permission. This particular transaction did not proceed and, as such, our clients do not own the property. Therefore, there is only to be one house at Mountcharles that the Bank is to have security over ..."*

9. The reference there to the 10th of August, 2007, appears to be an error and relates to the second undertaking dated the 28th of August, 2007.

10. Further correspondence ensued. The Bank notified the defendant on the 10th of March, 2009, that, having reviewed its files, this was the first notification that the Bank had received in this regard and sought clarification as to whether this was brought to the Bank's attention prior to completion. The Bank sought further confirmation as to why the entire loan facilities of €500,000.00 were requisitioned in such circumstances. Further reminder letters were sent by the Bank.

11. Conversations took place between an Alan Stewart of the Bank and the defendant. Thereafter, the Bank wrote saying that they had been assured that the defendant was in the process of complying with the undertaking and that the Bank's charge was being registered on Folio 10462 County Donegal. On that basis, the Bank said it would retract any implication that the defendant was in breach. There is a dispute between the parties as to the effect of that letter – the Bank saying that it was based upon an understanding that the undertaking covered both properties. The position at present is that the Bank has obtained security over one of the properties at Mountcharles. That security was realised by way of a receiver sale of the property in early 2012 and those funds were applied in part reduction of the Borrowers' indebtedness pursuant to Facility One.

Alleged breaches of the undertakings
12. The Bank claims extensive and egregious breaches of the undertakings. In essence, they say there were breaches in failing to provide evidence of the Borrowers' title and a failure promptly to furnish to the Bank any information reasonably required concerning the Borrowers' title or the Bank's security pending the lodging and Report of the Borrowers' title and the Bank's security. It says there was a failure by the defendant to relay to the Bank that the conditional contract was in existence.

13. The Bank also claims a breach of the undertakings by that the failure of the defendant to inform the Bank in early course that the contract for the second property at Mountcharles had been rescinded and that the purchase would not proceed. It is claimed that this breach caused the Bank significant loss. According to the Bank, they would not have paid out the money if they had been in receipt of the information. The Bank says it was not adequately informed that the purchase of the second property at Mountcharles was conditional on an exterior event, i.e. planning permission.

14. The Bank claims that the defendant was in breach of the accepted principles of good conduct and practice for solicitors and in breach of his undertaking to the Bank. Furthermore, the Bank says that despite the undertakings, the borrowed funds were not applied for the purpose for which they were borrowed. The defendant was in breach of his duty to inform the Bank that the contract for the second property was conditional but nevertheless allowed the full amount of the facility to be drawn down and did not refund the balance.

15. The Bank also claims that the defendant failed to observe the normal standard of care required in that:-

> (i) the defendant did not in his covering letter of the 29th of August, 2007, draw attention to the qualification on the Second Undertaking;
>
> (ii) the defendant did not inform the Bank when planning permission was not obtained in the contract rescinded;
>
> (iii) the defendant did not return the balance of the loan monies to the Bank after the Borrowers had been reimbursed for the purchase price of the first property;
>
> (iv) the defendant did not draw the attention of the Bank to any vagueness arising from the terms of Facility One of the undertakings.

16. The Bank seek to be refunded the sum equal to the total amount of Facility One, drawn down by the defendant on behalf of the Borrowers, in the sum of €500,000.00 plus contractual interest due to the date of judgment, less any appropriate deductions.

The defendant's reply
17. In his replying affidavit, the defendant refutes that the purpose of the Facility One loan was to purchase two houses at Mountcharles, County Donegal. He says that this facility was advanced for the purpose of granting the Borrowers liquidity so that

they could acquire and develop property during that time. He points to the fact that the plaintiff acknowledges that some of the funds were to repay the Borrowers for one of the houses they had already purchased. He says that this lends itself to the proposition that the money was to be drawn down regardless of whether the contract was completed in relation to the second house. The defendant says that the second house at Mountcharles was being purchased subject to planning permission for houses on the site and he says that this is evident from the fact that the undertaking provided by him on the 28th of August, 2007, was conditional upon the procuring of that planning permission. In relation to the First Undertaking of the 20th of August, 2007, the defendant says that this was confined to the property then owned by the Borrowers and relies on the description of the property in that undertaking. He says that he has complied fully with that, as he has forwarded all documents of title to the Bank.

18. The defendant also says that the First Undertaking never purported to relate to the second house at Mountcharles, as the purchase was always conditional upon the successful planning application on the Lansford 30 houses and he exhibits the contract of sale. That contract dated the 26th of July, 2007, in fact, records that the purchaser is Paul Doherty, *one* of the Borrowers. The defendant says that the undertaking he gave on the 28th of August, 2007, was materially different to the previous undertaking with respect to the properties described therein. The defendant relies upon the handwritten qualification but does not address the issue that the handwritten qualification refers to Borrowers in the plural, whereas the contract refers to a single one of the Borrowers.

19. He says that the Second Undertaking was required because the first one only referred to a single property at Mountcharles. He says that if it was otherwise, there would have been no purpose to the undertaking dated the 28th of August, 2007, as the earlier undertaking would have covered the advance of the money, the subject of the facility letter dated the 30th of August, 2007, and would only require to have been extended.

20. The defendant contends that this had been his position from the outset. He says that he had communicated this position to the Bank and its solicitors on many occasions. Furthermore, he refers to a series of phone calls in or about late October to early December 2009. He says that when he explained his position with regard to the undertaking, he received the particular letter from Mr. Alan Stewart of the Bank referred to above. He says that this is an acknowledgment by the Bank that the only undertaking was in respect of a single Mountcharles property. The defendant says that the Bank cannot make the complaint in circumstances where it knew that the purpose contained in the facility letter did not reflect the true purpose in circumstances where the Borrowers owned one of the houses they were purporting to purchase. He says that, in so far as the Bank finds itself at a loss, such is due entirely to its own lending practices and not any wrongdoing on the defendant firm.

21. The defendant asserts that the anomalies revealed a casual approach by the Bank towards lending monies to the Borrowers, i.e. they were lending on overvalued properties and entered arrangements that purported to be one thing but were, in reality, another. He also says that insofar as the Bank paid out monies on foot of the undertakings, it did so not on the basis of the said undertakings, but because of its own negligence and want of care. He says that the Bank cannot put the blame on him for failing to notify them in the letter enclosing the undertaking that the undertaking itself was conditional. He says that was solely a matter for the plaintiff. He says that insofar as any of the parties have deviated from good conduct in practice, it is the plaintiff that has done so and not himself.

The Bank's response

22. Martin Dillon, bank official, in a reply clarifies that it was more correct to say that it was represented to the Bank in March 2007 that one of the Borrowers had paid €230,000.00 of his own money to purchase one of the houses. He says that while this information was a factor in the Bank's decision to lend, it was not material to the provision of funding pursuant to the facility letter. He said the funding was for the purpose of the purchase of two properties in Mountcharles. He says it is an unfounded assertion of the defendant that the advancing by the Bank of a single sum in some way:- *"lends itself to the proposition that the money was to be drawn down regardless of whether the contract completed in relation to the second house (sic)"*. He categorically insists that the facility letter was for the stated purpose of purchasing two houses at Mountcharles and says that the assertion that was given to provide liquidity to the Borrowers is simply incorrect. He says that the loan documentation reflected the agreement between the parties.

23. Mr. Dillon refers to an e-mail from one of the Borrowers in which the cost of the property was set out and indicated that its value would increase greatly if planning permission was granted. He denies that the purpose of the loan was a fiction and he says that the Bank had been informed that one of the properties was to be purchased by the Borrowers from Mr. Little. Mr. Dillon says that, in his view, the use of the word "property" in the First Undertaking was vague in that it could be understood to mean two houses at Mountcharles. He sets out a synopsis of the sums due and owing in regard to the loan of €500,000.00 and says that of the 2nd of October, 2013, the loan value was now €686,382.45.

24. Mr. Dillon also avers that the Bank's attention was not drawn to the fact that the particular Folio referred to in the First Undertaking only comprised one house in Mountcharles. In relation to the Second Undertaking, he said the handwritten qualification was not drawn to the attention of the Bank. He reiterates that the defendant was in breach of his undertakings and, in particular, failed to promptly furnish the Bank with information reasonably required concerning the Borrowers' title or the Bank's security.

Subsequent issue raised

25. In his further replying affidavit, the defendant stated that he had a telephone conversation with Mr. Dillon on or about the 26th day of August, 2008, prior to and regarding the provision of the Second Undertaking to the Bank. He says that the purpose of the phone call was that Mr. Dillon was enquiring as to when the undertaking was going to be forwarded as he was under pressure from the Borrowers to draw down the funds. He says that he advised Mr. Dillon of the fact that the contract was subject to planning permission. The defendant says that he was told to send in the undertaking with whatever qualification he deemed necessary. He makes the point that it was clear from Mr. Dillon's own affidavit that the plaintiff was on notice of the planning application and in that regard refers to the e-mail from one of the Borrowers.

26. Mr. Dillon replies to that affidavit saying that he has no recollection of the conversation with the defendant regarding the qualification to the undertaking. He says that he checked his records and does not have any diary entries or other documentation relating to the alleged phone call and put the matter no further than that. He is surprised, however, that Mr. Gillespie can be so certain about the telephone conversation when it was not referred to at all in his first affidavit. He says that the Bank's perspective is that, fundamentally, they would not have lent €500,000.00 specifically for the purpose of purchasing two houses with a view to development taking place, had it been made aware that only one house would be purchased and that the Borrowers had not secured planning permission.

27. The Bank makes a fundamental point that the matter of a qualification by the handwritten amendment was a false premise on which to consider the undertaking, as all the parties knew that security for loans included a mortgage over the properties at Mountcharles. Why, the Bank says, in the circumstances where a commercial development over the entire site was at issue, would the Bank lend money in respect of part of the site? The defendant refers to casual lending practices of the Bank in that regard and warns that logic in lending decisions by lenders cannot be taken for granted.

The law
28. The leading decision in this area is *Bank of Ireland v. Coleman* [2009] 3 I.R 699. In *Allied Irish Banks plc v. Maguire* [2009] I.E.H.C 374, Peart J. identified eleven principles emerging from the *Coleman* decision to which he added a further linked principle. Peart J. held that the court must have regard to the overall behaviour of the solicitor in a manner somewhat akin to seeing whether the person has come to court with clean hands.

29. It is undoubtedly the case that the court has an inherent jurisdiction in matters concerning the conduct of solicitors as officers of the court including, but not confined to, compliance with their undertakings. It is both a punitive and a compensatory jurisdiction. It is a discretionary jurisdiction requiring each case to be considered on its own facts and circumstances. In matters of undertakings, the court must consider the entire undertaking in order to reach a conclusion as to its real and ultimate purpose. Carelessness or other forms of negligence on the part of the person affected by the undertaking, and in relation to the matter of the subject thereof, may be a factor which the court will have regard to when determining what order may be fair and just in the circumstances. While the courts must not be oppressive to a solicitor, nevertheless gross carelessness or other conduct considered sufficiently egregious by the court will entitle the court, should it consider it just to do so, to order payment of the entire sum which was the subject of the undertaking and not simply a lesser sum in respect of loss actually caused by the breach of the undertaking.

30. Counsel for the Bank made reference to the importance of solicitors' undertakings in the facilitation of commerce. The *Coleman* case referred to the serious risk to the integrity of the lending system in relation to residential mortgages but it appears that the courts must also be conscious of the serious risk to the integrity of the lending system in relation to commercial mortgages as well.

31. Both the High Court and Supreme Court in *Coleman* referred to the decision of Lardner J. in *IPLG Ltd. v. Stewart* (Unreported, High Court, Lardner J., 19th March, 1992). In that case, Lardner J. held that the jurisdiction of the court to compel a solicitor to carry out his undertaking required for its exercise, *inter alia* that the undertaking be clear in its terms and that the whole of the agreement to which it relates be before the court.

32. The *Coleman* case identified that the appropriate proceedings were by way of special summons. This is subject to qualifications. Laffoy J. held that:- "[w]hile it may be appropriate to initiate a claim to enforce the solicitor's undertaking by way of special summons, the summary process cannot be operated in such a way as to perpetrate an injustice on the solicitor defendant." In the *Coleman* case, the defendant had accepted that he had breached his undertaking. In the *AIB v. Maguire* case, the terms of the undertaking were not at issue. In *Danske Bank v. O' Ceallaigh* [2011] I.E.H.C 216, the real issue was one of causality of loss and issues going to compensation and mitigation, rather than the undertakings themselves.

Special summons procedure
33. Under Order 38, rule 9 of the Rules of the Superior Courts, 1986, this court may, on the hearing of the special summons: (i) give the plaintiff judgment for such relief to which it is entitled (ii) dismiss the action, or (iii) adjourn the proceedings for plenary hearing. This is subject to the overriding principle that the court generally may make such an order for determination of questions in issue in the action or matter as may seem just. Order 1, rule 4 of the Rules of the Superior Courts 1986 envisages special summons proceedings as being summary in nature. It was accepted by both sides that I may only give judgment for the plaintiff if it is a proper case for summary judgment.

34. The Supreme Court in *Danske Bank v. Durkan New Homes Limited* [2010] I.E.S.C 22, albeit in the context of a Motion under Order 37, rule 7 of the Rules of the Superior Courts, 1986, stated:-

> *14. Several cases were opened before the Court which have addressed this jurisdiction. These included* Bank of Ireland v. Educational Building Society *[1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law, where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-*
>
> > "Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or *bona fide* defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner."
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> *15. In* Aer Rianta c.p.t. v. Ryanair *Limited [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-*
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> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"
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> *16. In* McGrath v. O'Driscoll *[2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-*
>
> "So far, as questions of law or construction are concerned, the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."
>
> *17. Thus, the issue in this appeal is whether the appellants have satisfied the Court that they have an arguable defence.*

36. Added to the above is the *dicta* of Laffoy J. that the procedure by means of special summons should not be oppressive on the defendant solicitor.

37. The *Coleman* case indicates that the transaction as a whole must be considered. On the other hand, the undertaking itself forms the fundamental basis for a cause of action premised on its breach. An example of an undertaking that did not create the equitable charge that had been contended for is to be found in *Murray v. Wilken*, (Unreported, High Court, Finlay Geoghegan J., 31st July, 2003). The facts of that case are entirely different from those at issue here. Nonetheless, it is illustrative of the fundamental principle that before there can be a breach, there must have been a clear undertaking. Thus, the court must look closely at what has been undertaken before it can find a breach.

What has been undertaken?
38. In this case, it is agreed that the Folio number referred to in the First Undertaking does not include the second property (i.e. the property that was not conveyed to the Borrowers). The plaintiff says that, nonetheless, the court must look at the transaction as a whole. They also submit that the facility letter is, in effect, incorporated by reference. What is curious about that latter submission is

that the First Undertaking does not even include the date of the sanction letter. The letter enclosing the First Undertaking refers to an "undertaking already furnished" which "does not include the property at Mountcharles being part of Folio 10426 Co. Donegal." That earlier purported undertaking is not furnished and was not referred to by the parties. The first letter of sanction required the security for the loan as:-

(a) a first legal mortgage on deeds to properties being purchased at Mountcharles, and;

(b) an extension of an existing first legal mortgage over a 0.5 acre car park at The Diamond, Donegal Town.

It may be a reasonable construction that the earlier mentioned undertaking only referred to the Donegal Town property. I simply refer to this fact as indicative of the possibility of separate undertakings being given in respect of separate properties being offered as security.

39. Given the different loan letters in existence at the time of the giving of the undertaking, the question arises as to which loan letter is the Court to incorporate? Is it the letter of the 23rd of April, 2007, or is it the letter dated the 30th of August 2007, (or indeed is it supposed to be the 30th of July, 2007)? If it is the first letter, there was a clear reference to "properties" being purchased at Mountcharles. If it is the second letter, there was a reference to two houses on a one acre site. Perhaps an inference from the second letter is that the two houses comprised a single site and therefore would be expected to be on a single Folio. On the basis of the evidence before me, there is a real lack of clarity as to which letter was incorporated into that undertaking. Furthermore, it is the case that the Bank knew that the Borrowers owned one of the houses at issue and that they were seeking to buy a second property. Certainly the Bank was on notice that there were two different properties at issue in Mountcharles. In the context of the request for summary judgment, it is surprising to see the Bank Official refer to the word "property" in the First Undertaking as "vague" and therefore "could be understood to mean two houses at Mountcharles." If the word in the undertaking is "vague", how can the court decide on summary judgment that it must include the second property?

40. The Second Undertaking refers to the Letter of Sanction of either the 10th of August, 2007, (which does not exist) or the 30th of August, 2007. This undertaking contains a qualification that the Borrowers have entered into a contract that is subject to planning permission. The Bank's claim is that the letter enclosing the Second Undertaking should have notified them of the qualification in the undertaking. That question is compounded by the factual issue, albeit raised late in the exchange of affidavits by the defendant, that he had, in fact, notified Mr. Dillon verbally of that fact the day before. That is a factual matter which it is not possible to resolve on the affidavits before me.

Requirement to draw the attention of the Bank to restrictive matters in an undertaking

41. Restrictions appear on the face of both the First and Second Undertakings regarding the extent of each undertaking – the restriction being more obvious on the face of the Second Undertaking than the First. The Bank argues that those restrictions do not affect the nature of the undertaking that is in fact being given. Their argument is that the general terms of the undertaking concerning obtaining good marketable title etc., means that a solicitor, in giving an undertaking that arises from a loan facility, must specifically draw to the attention of the lender that the undertaking he is giving is limited to part of the property listed as the security for the loan facility.

42. This raises questions of law as to the extent of the obligations on both sides. Are the Bank entitled to rely upon the fact that they sent the usual undertakings and received the signed document back to justify a claim for breach of undertaking, even if that undertaking, as completed, was more limiting? Does an alteration in the usual undertaking that might render it meaningless, require the solicitor to notify the Bank of that fact? Is the undertaking in law and in fact rendered meaningless by a purported restriction in light of the general conditions contained in the body of the undertaking?

The defendant's claim that no relief is warranted.

43. The defendant submits that the First Undertaking clearly only referenced the property which was, in fact, already bought by the Borrowers. He also submits that the Second Undertaking was clearly qualified. On this basis, it is submitted that the plaintiff is not entitled to any relief. I do not accept that matters are so clear cut. Even if the First Undertaking on its face only referred to a single house, the issue arises as to whether that was something which should have been brought to the attention of the Bank. This is in light of the facility letter and indeed the knowledge of the Bank that this was a commercial venture in which it was proposed to develop the entire site.

44. Similarly with the Second Undertaking, there is a clear legal issue as to whether the qualification was brought specifically to the attention of the Bank and, more importantly, whether it should have been brought to the attention of the Bank. Furthermore, there is an issue as to whether the Second Undertaking is correctly subject to that qualification when, in fact, it was only one Borrower who had entered the contract.

45. For those reasons and for the further reasons referred to below, I am not in a position to determine at this time that the Bank is not entitled to any relief.

Whether to refer to Plenary hearing

46. The issue for me to decide is whether the defendant solicitor has an arguable defence. Primarily those defences are that:-

a) the peculiar circumstances of this loan facility was such that the undertaking might reasonably only refer to the property owned already by the Borrowers,

b) the solicitor is entitled to limit an undertaking in a manner which cuts down on the extent of his obligations regarding the security underlying the loan facility;

c) that it is unacceptable for the Bank to assert that the meaning of, or restriction in, an undertaking must be specifically brought to the attention of the Bank,

d) the limited nature of the second undertaking that was brought to the attention of the Bank.

47. The defences raise issues of fact and of law. I have made reference to the context of those arguments above. For the reasons set out therein, I do not consider these are matters which are "very clear" in the sense referred to in the relevant case law. Furthermore, I do not view them as matters that are simple, relatively straightforward and easily determined within the framework of these summary proceedings. This case can be distinguished from the cases opened to the Court concerning solicitors' undertakings resulting in summary judgment, as those cases did not appear to have, as their central concern, the meaning and extent of the

undertakings actually given.

48. Apart from the disputed issues of fact to which I have referred to above, issues of law of some complexity arise. Those issues would have implications for all solicitors' undertakings and require more consideration than the Special Summons format permits. More importantly, I am of the view that there could be an injustice for this defendant in determining those issues in the limited framework of summary proceedings. Some of these issues of law that arise can be distilled as follows:

> 1. Does an undertaking necessarily incorporate the entire terms of a letter of sanction (especially with reference to the property put forward as security for the loan)?
>
> 2. If so, do the express terms of the undertaking limiting it to a particular property, give way to a requirement to make good marketable title of the property referred to as security in the letter of sanction?
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> 3. If the terms of the letter of sanction are incorporated, does a handwritten insertion into the undertaking by a solicitor limit the extent of any incorporation by reference?
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> 4. Is the solicitor obliged to tell the lender when the undertaking does not refer to all the property in the letter of sanction?
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> 5. Is the solicitor obliged to tell the lender that the property is subject to a conditional contract in addition to stating this on the undertaking?
>
> 6. Is the solicitor ever entitled to hand over the loan money prior to completion of the conveyance of the property intended to be secured without expressly indicating to the lender that the undertaking he is returning permits him so to do?

49. Other issues raised in the defence are whether there was an estoppel raised by the letter of the Bank in which it was said they were withdrawing the allegation of breach of undertaking if, in fact, the property was registered. That may well need to be teased out in greater detail. There are other matters raised in relation to, e.g. conditions precedent and the question of the stated purpose of the loan being for two houses when one was already purchased, which in light of the decision I make, it is more appropriate not to comment upon.

Damages
50. In light of the above decision, it is perhaps not necessary to deal with the issue of damages. Suffice to say, that the Bank in this case has claimed damages on a "no transaction" basis. They rely on *Bank of Ireland v. Coleman, AIB v. Maguire* and *ACC v. Johnson*. The defendant disputes this. He relies upon the allegation of negligence in the Bank's lending policy. He also says that, like the situation in *ACC v. Johnson*, there is an evidence deficit here in calculating the Bank's true losses.

51. I am quite satisfied that even if I had been in a position to hold that the defendant was in breach of his undertakings, a full hearing would be necessary to calculate the Bank's true losses in this case.

Directions
52. I propose to give directions as to how the case should proceed following discussion with counsel.