Neutral Citation Number: [2011] IEHC 174

THE HIGH COURT

2008 546 P

BETWEEN

JOHN KELLY

PLAINTIFF

AND

THOMAS BYRNE (TRADING UNDER THE STYLE AND TITLE OF THOMAS BYRNE & COMPANY SOLICITORS)

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 13th April, 2011

1. Introduction

1.1 On the 22nd October, 2007, the Law Society closed the practice of the defendant ("Mr. Byrne"). That closure followed disturbing allegations made in proceedings brought before the courts concerning the manner in which Mr. Byrne had dealt with various property transactions. The way in which Mr. Byrne handled two large property transactions on behalf of the plaintiff ("Mr. Kelly") is at the heart of these proceedings. However, on Mr. Byrne's case, the proceedings involve a wider consideration of a course of dealing lasting almost ten years between Mr. Kelly and Mr. Byrne. Significant evidence relating in detail to the specific transactions with which these proceedings are concerned and in more general terms with the broad course of dealing between the parties was given. From that evidence as whole an at times disturbing picture emerges, not only as to the way in which Mr. Byrne carried on his business as a solicitor but also as to the way in which the property market and, in particular, lending into that market by financial institutions, was conducted at the height of the property bubble. It will be necessary to touch on aspects of that evidence in due course.

1.2 Mr. Byrne admitted in evidence that many of the actions which he took as a solicitor both in relation to Mr. Kelly and generally were, to put it at its mildest, wholly wrong. However, at the heart of Mr. Byrne's defence to these proceedings is an assertion that Mr. Kelly was as much part of that wrongdoing as he himself was. That allegation is strenuously denied by Mr. Kelly.

1.3 The first specific issue which arises in these proceedings concerns a refinancing arrangement entered into by Mr. Kelly in respect of a property at 45-47 and 48-50 James's Street, Dublin ("James's Street"). Prior to the transaction in question the relevant property was charged in favour of the Educational Building Society ("EBS"). The relevant transaction involved a refinancing of the loan facilities on the property in question which was being provided by IIB/KBC Bank ("IIB"). In simple terms, IIB agreed to provide €9m of loan finance to be secured on the property in question. The existing loan to EBS was something over €6m. The terms of the IIB loan provided that the existing loan to EBS was to be paid off, the mortgage in favour of EBS was to be discharged as a result, and a first charge in favour of IIB was to be put in place. The commercial substance of the transaction allowed Mr. Kelly to secure a so called equity release of approximately €3m in that he was to receive about €3m more from IIB than he had to give to EBS to pay off the existing loan.

1.4 The mortgage arrangement between Mr. Kelly and IIB closed on the basis of undertakings given by Mr. Byrne including an undertaking that he would, out of the loan cheque handed over from IIB at that closing, pay off the sums due to EBS so as to allow for a first legal charge in favour of IIB to be put in place. It is common case that the EBS loan was never cleared off. As and between Mr. Kelly and the EBS that money remains due and owing.

1.5 The second specific transaction with which these proceedings are concerned relates to the purchase of a separate property comprised in Folios 32760F and 20678F of the Freehold Register for County Wexford ("Oilgate"). Mr. Kelly had entered into a contract to purchase Oilgate in late 2006 which, at the beginning of 2007, had not yet closed. A sum of €2.85m was required to close the sale in question. On Mr. Byrne's case there is a connection between the two transactions because the sums required to close the Oilgate transaction and the sums required to discharge the EBS loan had to come, it is argued, from the same pot. In addition, there is a specific issue between the parties as to whether, in truth, Oilgate was purchased as an asset of what Mr. Byrne alleges is a partnership between him and Mr. Kelly. A document transferring title in Oilgate to Mr. Kelly was executed but the proper registration of Mr. Kelly as the owner of the property in question in the Land Registry has not yet occurred because, it is claimed on behalf of Mr. Byrne, Mr. Kelly never made sufficient funds available to pay the stamp duty arising on the transaction.

1.6 In summary Mr. Kelly seeks, in these proceedings, declaratory relief concerning his ownership of Oilgate and also damages against Mr. Byrne in the sum of €6,118,690.00, principally as money had and received, being the amount which Mr. Kelly says Mr. Byrne should have paid to the EBS but did not. Against that general background it is next necessary to turn more specifically to the issues which arise.

2. The Issues

2.1 At one level the issues in these proceedings are fairly net. The first is an issue which came to be called the partnership issue. Mr. Byrne, in his defence, asserted that he was involved in a partnership between himself, Mr. Kelly and a Mary O'Connor (who is the life partner of Mr. Kelly). Mr. Byrne asserted that the relevant partnership commenced in 1998 and was formalised by a written document dated the 1st January, 2001. On that basis it is said that Oilgate was beneficially held by the partnership rather than Mr. Kelly personally. On that basis, in turn, it was argued that the first claim made by Mr. Kelly, which was for a declaration as to ownership of the property, should be refused. The ownership of the lands in question, therefore, turned on the issue as to whether a partnership of the type asserted by Mr. Byrne (or something similar) existed. That question was contested strongly by Mr. Kelly.

2.2 A second, and in all reality a very subsidiary, question arose from the fact that Mr. Byrne, in his defence, denied the existence of a solicitor/client relationship between himself and Mr. Kelly. However, I did not understand Mr. Byrne to deny that, insofar as he acted on behalf of Mr. Kelly with third parties (such as the relevant financial institutions and the solicitors representing those institutions) he acted as a solicitor. Rather, the case made by Mr. Byrne was that the relationship between himself and Mr. Kelly was not the normal solicitor/client relationship where the client conducts the business and the solicitor acts as legal adviser. Rather, it was Mr. Byrne's

case that Mr. Kelly was intimately involved in all aspects of many transactions carried out, was well aware of undertakings and the like given by Mr. Byrne, and, in substance, directed where monies were to go and not go even though those monies may have been the subject of undertakings by Mr. Byrne. In reality that issue is part of the general consideration that applies to the third issue to which I will shortly turn. The solicitor/client issue is concerned with the general relationship between Mr. Kelly and Mr. Byrne and is not, in reality, a standalone question in itself.

2.3 The third issue concerns the monies which were earmarked for discharge of the existing loan which Mr. Kelly had with EBS. As pointed out earlier, Mr. Byrne had given an undertaking to BCM Hanby Wallace (as that firm was then known) who acted as solicitors for IIB to the effect that, out of the loan cheque handed over at closing, all sums necessary to discharge the EBS loan would be paid over to EBS and an appropriate clearance or discharge of the EBS charge over James's Street would be secured. It is also common case that Mr. Byrne did not comply with that undertaking. One might ordinarily think that that would be the end of the case. Mr. Byrne, as a solicitor, gave an undertaking to use monies in a particular way and, by his own admission, did not so use them. One might think that the case was "open and shut" on that basis. Indeed, on Mr. Kelly's case, it is just that simple. Mr. Byrne was obliged to pay the monies in a particular way, did not do so, Mr. Kelly is at a loss, and Mr. Byrne is obliged to compensate him.

2.4 However, Mr. Byrne's case is much more complicated. He asserts that there was a long running relationship between himself and Mr. Kelly as a result of which a large number of property transactions were conducted in an entirely unorthodox way. Mr. Byrne asserted that Mr. Kelly had what he described as an insatiable appetite for money. Mr. Byrne accepted that many of the things which he did as a result of that relationship were wrong, in flagrant breach of the Solicitors Regulations, and, in substance, fraudulent. However, he says that all of those actions were carried out with the knowledge and approval of Mr. Kelly. Indeed, he went so far as to suggest that Mr. Kelly was the driving force in relation to those matters.

2.5 With reference to the specific question as to what happened the monies which came into Mr. Byrne's account by virtue of the paying over of the loan proceeds from IIB, Mr. Byrne says that Mr. Kelly was aware that those monies had not been used to discharge the EBS loan. Mr. Byrne's case it is to the effect that Mr. Kelly had a range of pressing financial obligations at the time in question. In that context, it is said by Mr. Byrne that Mr. Kelly ultimately accepted that the monies in question would need to be paid in other ways because of the more pressing nature of some of those other demands. In substance, therefore, Mr. Byrne asserts that Mr. Kelly gave him instructions not to pay over the monies in question to EBS. In so asserting Mr. Byrne accepted that his failure to pay over the monies in question, in flagrant breach of his undertaking to IIB, was a serious breach of his obligations as a solicitor. It was not in any way asserted that Mr. Kelly's instructions could have justified a failure on the part of Mr. Byrne to pay over the relevant monies. However, it was argued that as and between Mr. Kelly and Mr. Byrne no liability could exist because Mr. Byrne operated on the basis of what Mr. Kelly authorised him to do, even though it was wrongful. The issue which I have to decide is, therefore, whether, as Mr. Byrne asserts, he had Mr. Kelly's authority not to pay over the monies in question or whether, as Mr. Kelly asserts, Mr. Byrne simply did not pay the monies in question, used them for various purposes (some for the benefit of Mr. Kelly and some, it appeared to be accepted, for his own benefit) and left Mr. Kelly exposed to EBS and IIB.

2.6 However, before leaving the issues it is necessary to touch on one aspect of the dispute between the parties under this latter heading which led to significant consequences for the way the case ran. The one thing that became absolutely clear was that the way in which Mr. Kelly and Mr. Byrne did business bore little resemblance to the ordinary way in which one might expect the relationship between a business man and a solicitor to operate. It will be necessary to refer to that course of dealing in some more detail in due course. However, for present purposes it is sufficient to note that much of the dealing between Mr. Kelly and Mr. Byrne did not operate on a transaction by transaction basis with Mr. Byrne paying over to Mr. Kelly what was left after transactions had been completed, or billing Mr. Kelly for the funds necessary to complete those transactions where Mr. Kelly had to put up monies. Rather, the accounting between Mr. Kelly and Mr. Byrne seems to have operated on some rather vague and global basis which made it very difficult to tell with any degree of accuracy as to what money went where. In those circumstances, it became at least arguable (and formed very much part of Mr. Byrne's case) that it was necessary to take a wider look at the dealings between Mr. Byrne and Mr. Kelly in order to understand the financial position as and between them as they would have understood it in or around the time when the transactions with which I am concerned took place. The precise reasons for that suggestion will become apparent in due course. However, the possible need to look at the wider course of dealings between the parties led to a significant procedural hiccup in the conduct of the trial, an issue to which I will next turn. I, therefore, turn to the procedural history insofar as it remains relevant to the issues which I now have to consider.

3. The Procedural History

3.1 The case commenced on Wednesday the 18th March, 2009. In accordance with the rules applicable to the commercial list, the parties had filed witness statements and had exchanged written submissions. Extensive orders for discovery had been made in both directions. However, at an early stage in the proceedings it became clear that there were problems with the discovery. Without being exhaustive the following difficulties emerged. First, on Mr. Byrne's side, it became clear that all of the papers and electronic records relevant to Mr. Byrne's solicitors practice had been seized by the Law Society and, in the main, were in the custody of An Garda Síochána. However, questions were raised as to the adequacy of Mr. Byrne's disclosure of the documents which would have come within the ambit of the discovery requirements which lay on him, both as to documents which might have been in his possession but no longer were (such as those that had been seized in the manner described) and also in relation to his own bank accounts. Furthermore, it emerged at an early stage in the hearing that Mr. Byrne's advisers had not had sight of much of the documentation contained in Mr. Kelly's discovery. There was some confusion as to whether any earlier request for sight of the documents concerned had been made but to the extent that any early request had, in fact, been made, same does not appear to have been pressed on behalf of Mr. Byrne. A request to see documents had been made in the immediate run up to the trial, but there was little practical possibility of much of the relevant documentation being made available in advance of the trial given the lateness of the request in question. It followed that counsel for Mr. Byrne had only had sight of a very small amount of the documentation discovered by Mr. Kelly with much of that documentation becoming available to counsel only as the trial began or progressed.

3.2 On Mr. Kelly's side it also emerged that there were questions as to the adequacy of the discovery which had been made by him. It was suggested that much of his books and records had been destroyed in a flood. Only limited books and records remained available and had been discovered.

3.3 Against that background it was clear that the case was a long way short of being in the state which the court might hope to expect of a case in the commercial list when it came to trial. It is not necessary for present purposes to apportion any blame for that state of affairs. However, it undoubtedly contributed to some of the confusion which reigned during the hearing in March of 2009. In addition, there were significant issues between the parties as to matters said not to have been put to Mr. Kelly when he gave evidence, but sought to be led in evidence from Mr. Byrne. Furthermore, there were questions as to the extent to which the parties (but particularly Mr. Byrne) sought to go outside even a generous view of the evidence set out in the witness statements to which I have referred.

3.4 It was clear that the resources available on Mr. Byrne's side were limited and that his legal team were working within very significant constraints. I would like to think that I made all due allowance for that fact. However, there can be little doubt but that the case which Mr. Byrne ultimately sought to make in the witness box was not fairly and squarely within the parameters of the matters put to Mr. Kelly and/or disclosed in the witness statements filed in advance. Indeed, it would appear that Mr. Byrne carried out certain calculations from the limited records available to him (including those records disclosed by Mr. Kelly and made available in the course of the trial) designed to give an overall picture of the financial dealings between Mr. Kelly and Mr. Byrne at the time in question. This exercise was carried out during the hearing.

3.5 As will become clear when it is necessary to turn to the competing accounts of the parties as to what transpired in the early part of 2007, particular reliance was placed by Mr. Kelly on an email of the 23rd January, 2007, in the following terms:-

> "Thomas
>
> Further to our recent meeting. The items that need to be dealt with imminently are as follows.
>
> 1. Completion of site at Oilgate Co. Wexford. This will require Euro 2.85 million. The vendor will not wait beyond Friday.
>
> 2. Completion of site in Dublin 8, this will require Euro 2.00 million. This is required late next week.
>
> 3. Redemption of EBS on James Street.
>
> A letter will have to be sent TODAY to Ronan at Ulster Bank confirming that the additional three units that Aidan and Co. are buying will be completing in the next 7 days or so.
>
> Also I need to send 250k Euro down to Spain tomorrow by transfer. Can you give me a call to discuss?
>
> Thanks
>
> John Kelly
>
> SINI Holdings."

3.6 The item mentioned at No.1 is, of course, the closure of the Oilgate transaction. The item mentioned at No. 3 in that email is the redemption of the EBS mortgage on James's Street. It is also clear that the financial items specifically set out in the list required a payment of €5.1m. As the redemption of the EBS mortgage required a sum of in excess of €6.1m it was clear that a total of somewhat over €11.2m would have been required to comply with the instructions set out in that email. Mr. Byrne, in evidence, sought to suggest that there just was not enough money available to do all those things and that, in that context, Mr. Kelly had accepted that the EBS loan could not be redeemed at the time in question. That assertion led to much toing and froing with different calculations being put forward by the respective parties. Each calculation was potentially problematic in that one or other party constantly pointed to some transaction which had, or might have had, a counterpart not taken into account. In addition, Mr. Kelly asserted that he had, at most times, a sum of between €1m and €2m standing to his credit in Mr. Byrne's accounts. On the other hand, Mr. Byrne asserted that Mr. Kelly's accounts were almost always in deficit to a significant margin (of the same order of €1m to €2m). In passing it should be noted that Mr. Byrne accepted that if he was correct in that assertion it represented yet a further serious breach by him of his obligations in respect of a solicitor's client account. Be that as it may, by the time the evidence concluded, I was faced with a bald assertion on the part of Mr. Kelly that the starting point for a consideration of the availability of funds during any relevant period ought to be a recognition of his asserted fact that he was in credit to the sum of €1m to €2m. I was equally faced with a bald denial of that assertion on the part of Mr. Byrne and an equally bald assertion on the part of Mr. Byrne that the true position was that Mr. Kelly was in significant deficit. It was at least arguable that establishing the truth or otherwise of those two bold assertions might be of assistance in resolving the real issue between the parties.

3.7 In that context, it is of some relevance to note a point which I raised with counsel for Mr. Kelly in the course of submissions on the 29th April, 2009, (p. 72 of the transcript for that day) when, in reference to the figures then before the court and then under discussion, I noted that Mr. Kelly did not appear to have €11.2m available to him to meet all of the requirements specified in the email to which I have referred. If, on the other hand, as Mr. Kelly asserted, he had started the period in question in credit to the sum of €2m he might well have had sufficient funds to meet each of the obligations mentioned in that email. On the other hand, if he started the period in question in deficit to the tune of €1m to €2m, then he would most certainly not have had sufficient funds to make all of the payments specified.

3.8 Essentially Mr. Byrne's case was that Mr. Kelly knew, at the relevant time, that all of the sums set out in the email could not be met and accepted that the EBS monies could not, at that time, be paid. It was potentially material to assessing the credibility of that case to decide whether Mr. Kelly could reasonably have believed that he had sufficient monies to pay all of the sums concerned. If Mr. Kelly could not have reasonably believed that he had sufficient funds to pay all of those monies, then that would be a factor (and potentially a significant factor) in favouring Mr. Byrne's account. Despite the difficulties to which I have referred concerning the evidence in the case, and the fact that the proceedings had continued, following a break, into the next month being April 2009, counsel for both sides completed the evidence and began making final submissions. In the course of those final submissions I drew attention to the fact that the position of the parties on the question of Mr. Byrne's instructions in relation to the EBS repayment largely came down to what is sometimes described as a "swearing match" where there is little more than the uncorroborated and contradictory statements of both parties to rely on. When the email and the money trail were called in aid, I further indicated that an assessment of the email and the money trail (insofar as it might materially support one side or the other) itself depended on a further "swearing match" as to the overall course of dealing between the parties and whether Mr. Kelly was always in credit or debit. I also commented that it was surprising that I was being left to resolve such a conflict of evidence without the benefit of a more forensic approach to the question of whether Mr. Kelly or Mr. Byrne's version of events concerning their course of dealing over the years was correct.

3.9 In those circumstances counsel for Mr. Kelly indicated that he would wish to put further evidence before the court to seek to advance Mr. Kelly's case in the light of the way the case had developed. In fairness to counsel for Mr. Kelly there was significant weight in his submission at that time that the case made on behalf of Mr. Byrne had altered significantly in the course of the hearing, and by the end did not greatly correspond to the case that might have been anticipated in the light of the witness statements and

written submissions filed in advance. In the circumstances it seemed to me to be appropriate to afford Mr. Kelly the opportunity to put before the court such further evidence concerning the financial dealings between the parties as might be considered appropriate. The case was, therefore, adjourned.

3.10 Further discovery was directed which included the necessity of making appropriate orders to allow Mr. Kelly's advisers access to those records of Mr. Byrne which were held either by the Law Society or by An Garda Síochána. Further discovery was directed against Mr. Kelly (and Mr. Byrne personally) directed to their financial records. A forensic exercise was carried out by Mr. Richard Durkin, an accountant, on behalf of Mr. Kelly. That exercise was scrutinised by Mr. Liam Grant, the forensic accountant, on behalf of Mr. Byrne. The case came on again for hearing for the purposes of the tendering of the additional evidence to which I have referred concerning the financial dealings between the parties over the years. By virtue of gaps in the disclosure of the financial records of Mr. Kelly which became apparent while Mr. Durkin was giving evidence, it became necessary to further adjourn the proceedings and direct more complete discovery. In fairness to Mr. Kelly's advisers it should also be noted that consistent complaints were made during this time that Mr. Byrne's discovery was far from complete; even making all appropriate allowance for the fact that much of his records were no longer in his possession and were held by either the Law Society of An Garda Síochána. That theme continued to the end of the trial.

3.11 In any event, further discovery was directed and a position was reached where it was accepted on all sides that there was little to be gained by pursuing the question of discovery further. It does, however, have to be noted that the exercise was one directed towards seeking to ascertain whether there was any objective basis (based on the money trail) on which one could assess the competing assertions by Mr. Kelly and Mr. Byrne as to the "normal" position that would have pertained in relation to the account between them. It is obvious that any meaningful assessment of that position could only be made in circumstances where there was complete disclosure of all relevant financial records. As will become clear when assessing the evidence, the amounts which passed through Mr. Byrne's accounts to the credit of Mr. Kelly were extraordinary, being, at a minimum, of the order of €110m. The analysis which required to be conducted to attempt to establish the net position at any given time was, therefore, complex. Any significant omission of relevant financial records was likely to render the exercise of little or no value. It will be necessary to address what conclusions, if any, can be drawn from that forensic exercise in due course. However I had, in the end, the benefit of the evidence of both of the experts to whom I have referred concerning the way in which the business and professional dealings between Mr. Byrne and Mr. Kelly progressed over the years.

3.12 Against the background of that procedural history it is appropriate to turn to the simpler issue concerning whether there was a partnership between the parties.

4. Was there a Partnership?

4.1 The starting point under this heading has to be a consideration of the document dated the 1st January, 2001. That document in its printed or typewritten form relates to three specified properties set out in a schedule. It seemed clear on the evidence that the project and properties contemplated by the written partnership agreement never came to pass. Certainly the partnership agreement makes no specific reference to Oilgate. Mr. Byrne gave evidence that there was a general understanding between him and Mr. Kelly that he was to be a partner in all of Mr. Kelly's projects. He stated that his understanding was that he was to be a one third partner along with Mr. Kelly and Mr. Kelly's life partner. However, at another time in his evidence, he indicated that he might have been a 50% partner in respect of a particular Walkinstown project (Mr. Byrne's practice was in Walkinstown). No documents were produced to suggest any written evidence of any wider partnership between the parties whether on the basis asserted by Mr. Byrne or on any other basis. Mr. Byrne acted as solicitor for Mr. Kelly in the acquisition of many of the properties which went through Mr. Kelly's hands over the years. In respect of Oilgate, the usual certificate appears as to Mr. Kelly being the sole beneficial owner.

4.2 Indeed, Mr. Byrne in evidence (and, indeed, in evidence in chief) indicated that, from at least 2004 or 2005, he considered that Mr. Kelly was simply telling him that "things would be split three ways just to appease me". In truth, it seemed to me that Mr. Byrne had all but abandoned any reliance on the existence of a partnership in the course of his evidence.

4.3 In my view, the evidence falls a long way short of the standard necessary to establish that there was an all reaching partnership in existence between Mr. Byrne and Mr. Kelly and Ms. O'Connor as a result of which all of the property acquisitions made were to be split three ways. Mr. Byrne's evidence as to any representations made by Mr. Kelly were vague and, to a large extent, were not put to Mr. Kelly in the course of Mr. Kelly's evidence. There is no documentary record beyond the written partnership agreement to which I have referred. As pointed out the properties specifically referred to in that document were not, in fact, acquired. None of the transactions in which Mr. Byrne acted as solicitor make any reference to a beneficial interest in favour of the alleged partnership. In addition, when Mr. Byrne got into difficulties in respect of his solicitors practice the matter came before the President of the High Court under the Solicitors Disciplinary Process. In that context, Mr. Byrne was required to swear an affidavit as to means. In that affidavit he makes no mention of any interest in properties held in partnership with Mr. Kelly, either alone or in conjunction with Ms. O'Connor.

4.4 In all the circumstances it seems to me that I must conclude, on the facts, that there was no partnership agreement which is in any way material to the ownership of Oilgate. Even if some vague comments or half promises were made from time to time by Mr. Kelly, same do not, on the evidence, go anywhere near establishing the creation of the legal relationship of partners. I am, therefore, satisfied that no material partnership existed and that Oilgate must be declared to be in the full beneficial ownership of Mr. Kelly. As already noted the question of the status of Mr. Byrne as solicitor to Mr. Kelly arises only in the context of the more general issues surrounding their professional business and financial relationship to which it will be necessary to now turn. I, therefore, turn to the question of whether Mr. Kelly authorised Mr. Byrne not to repay the EBS loan.

5. Was Mr. Byrne authorised not to repay the EBS Loan?

5.1 Before going on to consider the specific issues which arise under this heading, it is relevant to record a number of general observations. The first concerns a *modus operandi* which Mr. Byrne accepts formed part of the way in which he conducted business, as a solicitor, on behalf of Mr. Kelly. It should be noted that, on Mr. Byrne's case, Mr. Kelly was a full part of the operation while on Mr. Kelly's case that is strongly denied.

5.2 Part of the background to Mr. Byrne's way of operating are the practices which seem to have been widespread in relation to some significant commercial property transactions at the height of the property bubble. It would appear that at least some such transactions closed on the basis of some form of solicitors undertaking as to how monies paid over were to be dispersed. The facts of this case are a good example. The monies paid by IIB to Mr. Kelly on foot of the relevant loan agreement were handed over to Mr. Byrne, as Mr. Kelly's solicitor, on his undertaking to discharge the EBS loan. It is true that in some such cases the practice would appear to have been to provide two cheques or bank drafts on closing so that the money designed to repay a pre-existing mortgage would be represented by a specific draft made payable to the relevant institution. There is no doubt that such a practice gave an added degree of security. However, it seems that there were at least some cases where a single cheque was handed over and it was

left to the relevant solicitor to put that cheque through his solicitor's client account and pay out the appropriate sum to discharge an earlier loan.

5.3 While there is clearly some risk in such a course of action (see my comments in *ACC v. Johnston* [2010] IEHC 236) the real problem seems to stem from the fact that the speed with which the financial institutions (and their solicitors) who had the benefit of such undertakings came to chase up on compliance with the relevant undertakings became very slow indeed.

5.4 Obviously obligations to pay over monies to banks could arise in other circumstances as well. On the general facts of this case it would appear that there were monies owing by Mr. Kelly arising out of the sale of apartments which had been developed by Mr. Kelly and where the relevant monies were due to be paid over to a financial institution who had funded the development. The evidence suggests that, at least in some cases, there was a fairly casual attitude on the part of some financial institutions to chasing up on compliance with undertakings of that type. Furthermore, it would appear that Mr. Byrne frequently did not arrange for the payment of stamp duty on relevant transactions involving Mr. Kelly unless and until it became necessary to pay the stamp duty in question so as to comply with pressing obligations to third parties. Mr. Byrne says that this was Mr. Kelly's *modus operandi*. Mr. Kelly denies this.

5.5 In his evidence Mr. Byrne accepted that a practice developed whereby he would defer complying with undertakings until it became absolutely essential for him to do so because of the pressure being exerted to produce evidence of proper compliance. Given the lax attitude adopted by many financial institutions and their solicitors, it seems that quite a significant period could elapse between the giving of an undertaking and Mr. Byrne being put under pressure to comply with it. During that period significant additional funds were available. Indeed, it would appear that Mr. Byrne's general intent was that those funds would be deployed where necessary (and, by definition, in breach of his undertaking) in the hope that, when pressure finally came on to comply with the undertaking, funds could be secured in a similar way from other transactions where again there was a reasonable expectation that a significant period would elapse before pressure would come on to comply with the undertakings given in that latter transaction.

5.6 Thus, when Mr. Byrne came under real pressure to comply with his undertakings in transaction one, he would simply seek to set up a further transaction where it might be hoped undertakings could be given thus providing him with sufficient funds to comply with his obligations under transaction one while leaving his obligations under transaction two outstanding until he came under pressure, in turn, to comply with his undertakings in that latter transaction. In truth, it seemed to me that what was described by Mr. Byrne could reasonably be described as a lawyer's version of a Ponzi Scheme where any funds needed to pay off earlier investors are secured from later investors.

5.7 In addition, it seems that Mr. Byrne was able to succeed in giving more than one undertaking, operative at the same time, in respect of the same property. Again if it had been the case that those who received such undertakings were diligent in insisting on evidence of compliance with the undertakings in question, it might well have been that Mr. Byrne's scheme would not have lasted very long. However, the lax attitude to seeking evidence of compliance with undertakings which seems to have been present in at least some cases at the height of the boom, facilitated persons such as Mr. Byrne in being able to get away for a significant period of time with not complying with undertakings and using that as a means of generating cash flow. Finally, on this aspect of the case, it is of some relevance to note that Mr. Byrne made full and frank admissions in the witness box as to the practices in which he was engaged and his acceptance that those practices were unlawful under many headings. I do have to comment that, in the light of those admissions, it is very surprising indeed that no further action against Mr. Byrne seems, as yet, to have been taken.

5.8 The second area of general comment concerns a broad description of the dealings between Mr. Kelly and Mr. Byrne. It will be necessary to look at some of the differences between the approach of Mr. Durkin and Mr. Grant in due course. However, the broad picture of the course of dealings between Mr. Byrne and Mr. Kelly seems clear from both of their reports. First, there is the question of scale. There are some disputes in relation to a small number of transactions as to whether they are, truly, referable to dealings between Mr. Kelly and Mr. Byrne. However, on any view a sum of at least €110m passed through Mr. Byrne's client accounts referable to Mr. Kelly in the approximately nine year period between the commencement of their relationship and the closure of Mr. Byrne's practice. The sums grew over the period in question so that much of the movement of funds occurred in the latter part of that time. Second, it appears absolutely clear that the way in which many transactions were recorded in Mr. Byrne's client accounts was at total variance both with Mr. Byrne's obligations under the relevant regulations and, in many cases, with the true position. Money seems to have moved around a great deal with payments in and payments out being apparently referable to third parties. There is no evidence of any regular accounting by Mr. Byrne to Mr. Kelly. Indeed had such regular accounts been produced, one of the key issues in this case would have been a lot easier to decide. It is, indeed, surprising that Mr. Kelly did not seek and Mr. Byrne did not give some level of regular account from which the net position of Mr. Kelly could be ascertained. The inferences to be drawn from the absence of any such accounting are a matter to which I will return. The scale of the dealings between Mr. Byrne and Mr. Kelly appears to have grown over time. In the later years some transactions were conducted in Mr. Byrne's own name. There was again a dispute as to the basis of those transactions. In at least some cases Mr. Byrne asserted that he engaged in borrowings designed to shore up the increasingly precarious financial position that was emerging in relation to Mr. Kelly. On the other hand Mr. Kelly asserts that those transactions were ones which Mr. Byrne engaged in for his own ends.

5.9 A further observation concerning the internal banking documentation produced in this case is worth making. That documentation bears an uncanny resemblance to other documentation which the judges of the commercial list have seen in recent times. Financial institutions seem to have been almost falling over themselves to secure the business of persons believed to be of high net worth. Certainly some of the documentation produced in this case concerning Mr. Kelly is wholly consistent with that general pattern. Assessment of the net worth of individuals frequently (and this is certainly so in Mr. Kelly's case) seems to have been a form of self-assessment where a list of assets and liabilities is produced with very little or no external verification. On the basis of such documentation clients or potential clients are deemed to be of very high net worth and their business (whether new or continuing) is likewise deemed to be very valuable to the financial institution concerned.

5.10 The banking memoranda in this case, like many others which the court has seen in recent times, suggest a fear on the part of many institutions that they will "lose" such valuable clients to other banks who might be willing to offer better terms or greater funding or both. The ability of someone such as Mr. Kelly to fund his lifestyle on the basis of equity release was, at least in significant part, facilitated by the fact that financial institutions seemed to be willing to outdo each other in lending more money on existing properties, at least in part for the purposes of securing the business of perceived high net worth individuals. It is one thing for a financial institution to be prepared to consider offering competitive terms for a new transaction which an individual is contemplating. It is, it seems to me, quite another thing for financial institutions to offer money to refinance existing transactions solely or mainly for the purposes of allowing equity release in the hope of securing the business of a new high net worth client, most particularly when very little rigorous analysis seems to have been conducted as to whether, in truth, the person concerned was a high net worth individual or, even if so, whether the apparent high net worth of the individual concerned was vulnerable to any appreciable drop in the property market.

5.11 Finally, it is necessary to note that during this period it does not appear that Mr. Kelly had any significant net income. While Mr. Kelly's tax position appears to be a matter still under consideration between his advisers and the Revenue Commissioners, various returns that were made in the past were produced in evidence and were the subject of analysis. Mr. Kelly had very significant borrowings indeed. The interest on those borrowings was, correspondingly, very large. Some of the assets which Mr. Kelly had acquired were producing rental income. However, in most of the relevant years the rental income was wholly or largely eaten up by interest payments and, indeed, in some of the years was not even sufficient to meet the relevant interest payments. When these matters were put to Mr. Kelly he accepted that he was living on the proceeds of equity release. The transaction which is at the heart of these proceedings provides an example in point. Mr. Kelly owned James's Street which had increased in value (or so it appeared). A bank (IIB) was willing to lend more than the existing mortgage. On that basis (even if the EBS loan had been repaid) a cash sum was available although the price to be paid for that cash injection was, obviously, that Mr. Kelly's equity in the relevant property was reduced. Sometimes it would appear that cash generated in that fashion was invested into other projects. But some of that cash was actually used by Mr. Kelly to fund his lifestyle. In essence, Mr. Kelly was living off monies generated by borrowing larger and larger sums against an increase in the value of the properties against which the sums in question were borrowed. That process could only continue as long as the property market itself continued to increase at a significant rate. Even if the much vaunted soft landing had occurred and the property market had levelled off rather than collapsed, it would no longer have been possible for Mr. Kelly to borrow further monies because he would have no increased equity in his properties which he could release. It did not need the property collapse for Mr. Kelly's model to come to a sorry end.

5.12 It is then necessary to turn to the key issue. On the balance of probabilities which account should be favoured? Counsel on behalf of Mr. Kelly set out a number of considerations which, it was said, ought lead the court to doubt significantly Mr. Byrne's credibility and to favour Mr. Kelly's account. I propose to start by analysing each of the reasons put forward together with some additional factors urged by counsel on behalf of Mr. Kelly before coming to an overall conclusion. I will leave until last an analysis of the forensic trawl through the accounts of both parties to which I have referred.

5.13 The first point relied on is the fact that the relevant documentation between IIB and Mr. Kelly clearly refers to the EBS loan and the obligation to repay it. It is clear, therefore, that any scheme which involved not paying the EBS loan (or even delaying repaying the EBS loan for any significant period of time) would clearly amount to a fraud on IIB. Likewise, indeed, the non-payment of the EBS loan was a clear and flagrant breach of the undertaking given by Mr. Byrne to the solicitors representing IIB. It is clear, therefore, that, even on his own case, Mr. Byrne was involved in deliberately fraudulent activity. It is said that that should mitigate against his credibility. There is no doubt that it is a factor to be taken into account. However, it also needs to be taken into account that Mr. Byrne frankly and candidly admitted his wrongdoing. Furthermore, this specific issue does not seem to me to provide any great assistance on what is, in truth, the key issue between the parties. Mr. Byrne admits his fraud. His case is that Mr. Kelly was part of it too. If Mr. Kelly was part of it as well, then the documentation with IIB would be just as much evidence of Mr. Kelly's fraud as Mr. Byrne's fraud.

5.14 That leads to the second point. Counsel for Mr. Kelly points out that there was no guarantee, in advance, that IIB and their solicitors would make a single cheque or draft available to Mr. Byrne rather than making two payments available, one of which would have earmarked the specific sum required for redemption of the existing loan and would have involved a cheque or draft made payable to EBS. On that basis it was argued that it could not have been anticipated by Mr. Kelly that an opportunity to engage in fraudulent activity would have been present. Put another way, it was said that this could not have been a preconceived plan, of which Mr. Kelly was part, because it could not have been anticipated that the opportunity to put the plan into operation would have become available. That point is valid so far as it goes. However, I am not sure that it is a point of great weight. If Mr. Byrne's assertion as to the general way in which he operated with Mr. Kelly is correct, any opportunity that became available to obtain funds was availed of with the need to regularise the payment being postponed until it became absolutely essential so to do resulting from pressure being brought to bear from outside agencies such as relevant financial institutions. On the basis of Mr. Byrne's general description of the way in which he and Mr. Kelly worked, there was no need for there to be a preconceived plan to avoid paying EBS. Indeed, it may well not have been the intention, at the beginning, so to do. Rather, on Mr. Byrne's case the situation which presented itself the following January was that there just was not enough money around to do all the things that Mr. Kelly wanted done. In those circumstances, the opportunity presented itself to defer complying with the EBS undertaking and use the relevant monies for other purposes. Subject to an analysis of the money trail, to which I will subsequently turn, that is at least as theoretically possible an explanation as Mr. Kelly's. In other words there did not necessarily have to be a preconceived plan to avoid paying off EBS. Rather, a source of funds in the short term became available when the entire IIB loan was paid into Mr. Byrne's account. It is at least possible that a subsequent decision was taken to exploit that situation when it has arisen.

5.15 The next point made is that an analysis of what happened the EBS monies suggests that some of them were used to repay obligations of Mr. Byrne personally rather than obligations which were those of Mr. Kelly. That point is again correct so far as it goes. However, the point needs to be seen in context. There is no doubt that Mr. Byrne was coming within the radar of the Law Society at the time in question. His account is that Mr. Kelly agreed to certain monies being paid so as to avoid Mr. Byrne running the risk of getting into significant difficulties with the Law Society. Again if one were to treat Mr. Byrne's overall description of the relationship between himself and Mr. Kelly as being correct, then that would be a perfectly logical thing for Mr. Kelly to do. If, in truth, Mr. Byrne and Mr. Kelly had been playing the system for a number of years and exploiting what I have described as a lawyer's version of a Ponzi Scheme, then it would logically follow that Mr. Kelly would be highly anxious to avoid any unnecessary scrutiny from the Law Society being applied to Mr. Byrne's practice. Mr. Kelly agreeing that some of the monies be applied to pay off obligations of Mr. Byrne in circumstances where a failure to meet those obligations could have led to Mr. Byrne coming under even greater scrutiny from the Law Society, is, therefore, every bit as consistent with Mr. Byrne's overall account of events as it is with Mr. Kelly's.

5.16 The next point made relates to the email to which I have already referred. It is clear that that email gives an instruction to pay a number of sums of money including discharging the EBS loan. It is certainly consistent with a view that Mr. Kelly intended, at that time, that the EBS loan be repaid. However, for reasons which I have already set out in the section of this judgment dealing with the procedural history of the case, it seems to me that Mr. Kelly could only have believed that there was enough money to meet all of the obligations specified in that email if he truly believed that he started the period in question with a significant balance in his favour in Mr. Byrne's client account. If he did not start the period with such a balance (and even more so if, as Mr. Byrne asserts, he started the period with a negative balance), then it is not clear how all of the requirements set out in the email could have been met. In that scenario Mr. Byrne's account would not be illogical. Mr. Byrne says that it became clear to Mr. Kelly that there was not enough money around to pay all of those items, that the items other than the EBS were pressing, and that Mr. Kelly directed that the EBS redemption monies not be paid at that time. Given that there was every reason to believe, for the reasons which I have already set out, that no pressure for the repayment of the EBS monies would arise for some period of time, then it would not be illogical for Mr. Kelly to direct that the more pressing obligations be met first. A view on this issue and its relevance to the credibility question of both parties must await an analysis of the money trail for it clearly has at least the potential of casting some light on the competing positions.

5.17 While dealing with this issue it is also important to note that Mr. Kelly's bank accounts show that he continued to make payments to the EBS by direct debit throughout 2007. The making of those payments would, of course, have been inconsistent with the EBS loan having been repaid. Mr. Kelly's evidence was that he believed that the EBS loan had been repaid soon after the time of the email being sent. Mr. Kelly's explanation for the continuing payments to EBS was that he had not noticed them. That factor too must be taken into account in assessing the overall credibility of the parties.

5.18 Counsel for Mr. Kelly also places reliance on the partnership issue. I clearly have found against Mr. Byrne on that question and that is undoubtedly a factor that needs to be taken into account in relation to his credibility.

5.19 Likewise, counsel for Mr. Kelly places reliance on the contents of a report from KPMG into the affairs of Mr. Byrne's practice (for Law Society purposes), which undoubtedly discloses wholesale and very serious irregularities. However, I am not sure that that fact, of itself, can weigh very heavily in my considerations. Mr. Byrne, on oath, admitted those irregularities. Mr. Byrne's case is that Mr. Kelly was just as much a part of them as he was (if not more so).

5.20 The next issue that needs to be considered is the evidence of Mr. Sean Lynch, the handwriting expert. A series of documents purporting to have been signed by Mr. Kelly were produced to Mr. Lynch. His evidence was that it was probable that the purported signatures of Mr. Kelly were forgeries. He did qualify his report by noting that he had only had access to Photostats and that it is sometimes possible to be able to express a view with a greater degree of certainty by analysing originals. However, no competing expert evidence was tendered on behalf of Mr. Byrne. It also seemed to me that Mr. Lynch's evidence stood up to cross examination. His reservations might have had some relevance in a case which needed to be proved beyond reasonable doubt. They seemed to me to be of no relevance (in the absence of a competing expert view) in a case which needs to be determined on the balance of probabilities. I have no hesitation in finding that the documents in question are forgeries. It seems to me to be probable, therefore, that at least in some cases, Mr. Byrne forged Mr. Kelly's signature. That is a factor that needs to be taken into account in the overall assessment of credibility as well.

5.21 Finally, reliance is placed on the fact that it would appear that Mr. Byrne did not comply with his discovery obligations in a proper way. That undoubtedly seems to be correct. Mr. Byrne was under an obligation to disclose the existence of any of his bank accounts. Even if the relevant documentation was not available to him by virtue of being held by either the Law Society or An Garda Síochána, there remained an obligation, of which he was well aware, to disclose the existence of all accounts within his knowledge. There was undoubtedly evidence to suggest that a number of accounts were not disclosed.

5.22 As at least some of the matters to which I have referred have the potential to be influenced by an analysis of the money trail, it is next necessary to turn to that question.

6. The Money Trail

6.1 As indicated earlier, the exercise engaged in while the case stood adjourned was that a report was procured from Mr. Durkin which sought to analyse all transactions between Mr. Byrne and Mr. Kelly from the beginning of their relationship. Mr. Durkin was provided with the electronic records of Mr. Byrne's solicitors practice together with such other documents as could be made available. In addition, copies of Mr. Kelly's bank accounts were obtained from the banks in question. It remains open to some doubt as to whether the relevant records were absolutely complete. That is a question to which I will return. In any event, what Mr. Durkin sought to do was to reconstruct Mr. Byrne's accounts insofar as they were relevant to Mr. Kelly. I will return to his findings in early course.

6.2 However, in any event, that report was furnished to Mr. Grant. Essentially Mr. Grant's report amounts to a critique of aspects of the methodology adopted by Mr. Durkin. I should say at the outset that I do not accept some of the more serious accusations made against Mr. Durkin by Mr. Grant. It is important to be precise as to the exercise in which Mr. Durkin was engaged. This is not a case where Mr. Kelly is suing Mr. Byrne for the balance due on an account. Rather, it was a case where Mr. Kelly is responding to an argument put forward by Mr. Byrne to the effect that Mr. Kelly knew that there was not enough money available at the relevant time to meet all of his obligations. It is fair to say that Mr. Grant properly placed some reliance on the fact that it was surprising that Mr. Kelly did not have his own records from which his position could be determined. It is striking that the vast majority of the information that ultimately formed part of Mr. Durkin's report came from Mr. Byrne's reconstructed accounts rather than from information provided by Mr. Kelly. In many cases it was possible to cross reference transactions into the copy bank accounts of Mr. Kelly which Mr. Durkin had secured. However, with the exception of those bank accounts, there were very few records indeed available on Mr. Kelly's side. That is not, of course, Mr. Durkin's fault. Mr. Durkin could only work with the materials which he was given.

6.3 It also needs to be noted that the overall picture portrayed in Mr. Durkin's report changed from time to time. An initial report was provided. In the light of the position taken by Mr. Grant on that report, adjustments were made by Mr. Durkin. The net position changed on quite a few occasions and, indeed, continued to change during the course of the hearing.

6.4 While it might have been hoped that a rigorous forensic exercise of the type conducted could have brought some clarity to the question of whether, immediately prior to the transactions with which I am concerned, Mr. Kelly owed Mr. Byrne money or Mr. Byrne owed Mr. Kelly money, I am afraid that it has proved largely unhelpful. There seems to me to be a number of reasons for that state of affairs.

6.5 First, it is by no means clear that all relevant records were available to either expert. While it seems likely that most of the records had, by the end of the process, been made available, the problem with which I am faced involves determining a balance of plus or minus €1m to €2m against a series of transactions involving over €110m. Such an exercise does not allow for much margin of error. Even a small number of transactions being either omitted or incorrectly assigned has and had the potential to alter quite radically the overall picture. Even in the course of the hearing Mr. Grant was able to point to some transactions in respect of which there was at least a very credible basis for suggesting that their treatment in Mr. Durkin's analysis had been incorrect.

6.6 Second, there were a series of transactions, highly material to an overall view as to the net position between Mr. Kelly and Mr. Byrne, which were themselves controversial. There were disputes between Mr. Kelly and Mr. Byrne as to whether certain transactions involving third parties were properly characterised as being truly transactions involving Mr. Kelly and Mr. Byrne. For example, Mr. Byrne gave evidence, strongly contested by Mr. Kelly, that he, Mr. Byrne, had from time to time arranged for other clients of his practice to "lend" monies to meet Mr. Kelly's financial needs. Thus, it was argued, transactions involving such third parties ought properly be taken into account.

6.7 Third, there remained significant disputes between the parties as to the proper characterisation of some transactions in which Mr. Byrne was, at least so far as the relevant documentation was concerned, the party himself rather than simply a solicitor acting on behalf of Mr. Kelly. Mr. Byrne gave evidence, again hotly contested by Mr. Kelly, that at least some of those transactions were

designed to provide additional funds for Mr. Kelly's enterprises to Mr. Kelly's knowledge.

6.8 The confused position is significantly contributed to by the fact that Mr. Byrne, on any view, did not keep his client account records in a manner remotely resembling the way in which they would have been kept had he complied with his professional obligations. It is also contributed to by the fact that Mr. Kelly seems to have no records of his own other than those which could be reconstructed by acquiring copy bank accounts. Mr. Kelly's knowledge of his precise financial position at any given time can, perhaps, best be judged by the explanation which he gave for not noticing that a significant amount of money was going out of his account every month to pay the EBS loan in circumstances where, on his evidence, he believed that loan to have been repaid by Mr. Byrne. If that explanation is to be accepted, then it suggests that Mr. Kelly had a very lax attitude to his financial affairs. Everyone is aware of the possibility that monies can be taken from their account by standing order in circumstances where the relevant monies should not, in fact, have been paid. However, the likelihood of someone missing the fact that a payment of that type continues to be made over a significant number of months is, perhaps, dependent on two factors. First is the degree of attention which the person concerned pays to their financial affairs. The second is the scale of the payment in the context of the income of the person concerned. To someone of modest means an inappropriate payment out of €100 a month would not be likely to be missed. For someone lucky enough to have a higher level of income, then perhaps a more sizeable payment might be missed without the person in question noticing it. At the time in question the EBS loan was for over €6m. The payments were quite substantial allowing for Mr. Kelly's income and even allowing for the scale of funds going through his accounts generally. If he truly did not notice that the payments were going out, then it says a lot for the attention which he paid to his financial affairs.

6.9 All in all I have come to the view, having considered all of the evidence, that the forensic exercise engaged in does not, at the end of the day, add significantly to the case one way or the other. It is, frankly, inconclusive. Any attempt to rigorously analyse the position between the parties depends on the credibility of the evidence given by Mr. Kelly and Mr. Byrne on a range of separate questions which go to the proper analysis of some of the relevant transactions.

6.10 Courts faced with a "swearing match" will often seek to find what are sometimes referred to as "islands of fact" where there is clear and objective evidence which tends to support one version or another. Debris on the road or tyre marks left after a car accident in which the respective drivers give very different accounts of how the accident occurred is a case in point. Sometimes a forensic analysis of clear facts such as those can be found to support one account rather than the other. However, sometimes such analysis is ultimately inconclusive. I am afraid that this is one of those cases. Despite Mr. Durkin's best efforts, I am not satisfied that the relevant records are anything like sufficiently clear to enable any meaningful conclusions to be drawn on the question of the true balance between the parties at any material time. Mr. Byrne's own records are wholly unreliable. They formed the starting point of Mr. Durkin's analysis. I make that point not to be in any way critical of Mr. Durkin for, in the absence of Mr. Kelly having any of his own records, it is hard to see where else Mr. Durkin could have started. However, it seems to me that it has transpired that the whole exercise was one of attempting to build a structure of substance on sand. The underlying records on either side are just not up to the kind of analysis which would allow any meaningful conclusion to be reached as to where the financial balance between the parties stood at any relevant time.

6.11 It is, therefore, necessary to go back to the points made as to the credibility of the parties. In addition to the points argued on behalf of Mr. Kelly, to which reference has already been made, I should touch on some additional factors referred to on behalf of Mr. Byrne. In the context of an assertion by Mr. Kelly that he had a credit balance with Mr. Byrne at most times of the order of €1m to €2m, attention is drawn to a number of statements of affairs produced at material times by Mr. Kelly for his banks on the occasion of seeking loans. It is pointed out that none of those statements of affairs make any reference to the fact that there was said to be a significant sum standing to Mr. Kelly's credit in Mr. Byrne's client account.

6.12 The principal factor relied on, on behalf of Mr. Byrne, was, however, based on an analysis of Mr. Kelly's evidence to the court. On the transcript for the 18th March, 2009, at pp. 33/34, Mr. Kelly was asked how he intended to provide the funds to close the Oilgate transaction. In that context, Mr. Kelly drew attention to the fact that he had available to him in addition a separate facility from Anglo Irish Bank for €1.85m. On that basis it was said that there were enough funds to meet all requirements at that time. The balance required to close Oilgate was, of course, €2.85m. In addition, stamp duty would have been required before that transaction could have been fully completed. Furthermore, attention was drawn on behalf of Mr. Byrne to the other requirements specified in the January, 2007 email including the requirement to provide €2m for the completion of a site in Dublin 8. It would appear that this was a transaction in which Mr. Byrne was not the solicitor acting for Mr. Kelly. On the basis of €9m coming from IIB and €1.85m coming from Anglo Irish Bank, it is argued on behalf of Mr. Byrne that not all of the monies referred to in the email could have been paid. It seems to me that this is correct unless one accepts Mr. Kelly's account that he would have started the period in question with a positive balance.

6.13 I have given consideration to all of the points made on both sides. I have also taken a view as to the credibility of Mr. Kelly and Mr. Byrne from having seen them give their evidence and be cross examined strenuously on that evidence. I do not accept that Mr. Byrne has told the truth about everything. His account of the documents purporting to bear Mr. Kelly's signature cannot be accepted. I am not sure, however, that the rejection of his case in relation to the partnership issue weighs very heavily. In the end of the day, on oath, Mr. Byrne did not push that matter very far. On the balance of probabilities I think it is likely that Mr. Kelly made, from time to time, various vague assurances to Mr. Byrne to the effect that he might benefit from the successful conclusion of Mr. Kelly's property ventures. My reason for rejecting Mr. Byrne's case on the partnership issue was that I was not satisfied that any such assurances went close to providing a basis for establishing the clear legal relations necessary to determine that a partnership existed.

6.14 In addition, I do not fully accept Mr. Byrne's account insofar as he sought to distance himself from any personal benefit from any of the transactions. I am satisfied that Mr. Byrne's activities were engaged in at least partly for his own ends and to provide himself with funding. However, I have, on the balance of probabilities, come to the view that Mr. Byrne's overall account of the relationship between himself and Mr. Kelly is broadly correct. I am satisfied on the facts that Mr. Kelly operated, during the years in question, on the basis of funding his own lifestyle by securing cash from whatever sources might be available. I am satisfied that Mr. Kelly was well aware that Mr. Byrne, on his behalf, was playing the system in the manner which I have earlier described so as to generate short term cash and to meet obligations only when pressure came on. While Mr. Kelly might not have been aware of each and every step taken by Mr. Byrne, I am satisfied that Mr. Kelly was, in general terms, aware of what Mr. Byrne was doing and agreed with, if not encouraged, Mr. Byrne's unlawful practises.

6.15 In those circumstances I am satisfied, on the balance of probabilities, that Mr. Kelly did direct Mr. Byrne not to repay the EBS loan. I am satisfied that it became clear to Mr. Kelly in the immediate aftermath of the January email that there was not enough funds available to meet all of the requirements specified in that email. The closure of the Oilgate transaction was pressing as a completion notice had been served and proceedings threatened if not actually commenced. It seems likely that the requirement to fund the Dublin 8 property was also pressing as was Mr. Kelly's need for "€250k down to Spain". The email invites a discussion. I am satisfied that that discussion took place and that it became clear that not all of the requirements could be met. It is manifestly clear that the

EBS requirement was, from the point of view of the consequences in the short term of non-payment, the least pressing. I am satisfied that Mr. Kelly was prepared to allow the EBS payment to be delayed on the understanding that some attempt would be made to pay it if and when pressure came on from BCM Hanby Wallace to Mr. Byrne to produce evidence of the release of the relevant security. I am satisfied that such a practice was in accordance with the *modus operandi* that had been adopted by Mr. Byrne and Mr. Kelly over the years. The least pressing payment would be delayed until irresistible pressure came on. Such money as was available would be directed not to where the legal obligation in respect of the relevant monies required it to be sent, but rather where the most pressing commercial obligation demanded.

6.16 In all the circumstances it seems to me that, on the balance of probabilities, Mr. Kelly was content to postpone payment of the EBS loan until such time as more funds became available. As the year progressed other transactions came and went but no pressure came on to repay the EBS loan. The further transactions entered into throughout the rest of the year are not themselves sufficiently clear cut one way or the other to provide any great assistance as to whether Mr. Kelly might have believed that the EBS monies had, in fact, been repaid. I do not, however, find Mr. Kelly's account as to not noticing the fact that monthly payments of a significant sum were going out to meet the EBS loan for nine months after he believed it to have been repaid, to be credible.

6.17 Having come to those conclusions of fact, it seems to me to follow that Mr. Kelly is not entitled to an order requiring the repayment of any monies attributable to the undertaking given in respect of the James's Street transaction.

7. Conclusions

7.1 In summary, I am satisfied, for the reasons already set out, that there was no partnership involving Mr. Kelly and Mr. Byrne. For those reasons Mr. Kelly is entitled to the declaration sought as to the ownership of Oilgate.

7.2 However, for the reasons also set out I am satisfied that Mr. Kelly directed Mr. Byrne to breach his undertaking to BCM Hanby Wallace in respect of the repayment of the EBS mortgage loan. While that direction in no way exonerates Mr. Byrne's disreputable behaviour in not meeting his obligation as a solicitor to comply with his undertaking, it does, as and between Mr. Byrne and Mr. Kelly, entitle Mr. Byrne to resist an order that he compensate Mr. Kelly for the monies in question. I, therefore, refuse relief under that heading.

7.3 In summary, therefore, Mr. Kelly is entitled to the declaration to which I have referred but no other relief.