Neutral Citation Number: [2009] IEHC 374

THE HIGH COURT

2009 1277 P

Between:

Allied Irish Banks Plc.

Plaintiff

And

Charles Maguire, Noel McDonald, Richard Clinch and Tommy Gibbons carrying on practice under the style and title of Seamus Maguire & Co., solicitors.

Defendants

Judgment of Mr Justice Michael Peart delivered on the 28th day of July 2009:

The plaintiff is a bank which on the 22nd day of May 2007 sanctioned a loan to Alan Hynes and his wife, Noreen Hynes ("the borrowers") in the sum of €3,000,000 for the purchase a property in Co. Wexford which I shall refer to as 'Moongate', and issued a letter of offer to them. I shall refer to the plaintiff as "the Bank".

The borrowers accepted that offer by signing the acceptance form attached to the letter of offer, albeit that they made a small alteration to the term of the offer by striking out the word "purchase" and replacing it with the word "*refinancing*". Not a lot turns on that amendment. The explanation for the amendment appears to have been that the Vendors to the borrowers are a syndicate of persons, including Noreen Hynes (one of the borrowers), and the borrowers had agreed to buy the property from the syndicate, the consideration for which was confined to the repayment to Anglo Irish Bank ("Anglo") of the loan which that bank had made for the purchase by the syndicate. It is not quite clear what the significance to the borrowers the reclassification of the loan from "purchase" to "refinancing" was, but perhaps the fact that the loan sanctioned exceeded by about €800,000 what was required to pay off the Anglo loan has something to do with it, given that there would be a balance left over. However, as I have said, nothing significant turns on that at the end of the day. No Contract for Sale appears to have been executed in respect of this transaction. Certainly none was produced before me, or discovered between the parties.

The defendants are a firm of solicitors who had acted for the syndicate at the time of the original purchase of Moongate by them, and were the solicitors acting for the borrowers in their purchase of Moongate from the syndicate. It appears also that the syndicate itself did not instruct separate solicitors to act for it in the sale to the borrowers. The defendants were acting for both the vendor syndicate and the borrowers. In addition, AIB did not choose to appoint its own solicitor to act for it in relation to the putting in place the security for the loan to the borrowers, and agreed to accept the defendants' undertaking in the Bank's standard form, the details of which I will set out in due course. It follows that the defendant firm was looking after the interests of all parties to this transactions, except Anglo.

Prior to sanctioning this loan to the borrowers the Bank had dealt principally with Alan Hynes who is an accountant in private practice, who, in addition, had a number of property interests. He was a well respected, valued and trusted customer of the Bank over several years. It would appear that the Bank regarded him as a good customer with whom they were anxious to do business at the time that this loan was sanctioned.

The Bank had accepted a valuation of Moongate which Alan Hynes had obtained from CBRE when it assessed the loan application for this transaction. The Bank did not elect to obtain its own valuation. That valuation was in the sum of €3.9 million, taking account of a significant potential development value, although planning permission had not yet been granted for the proposed development of the property. Eugene Duggan, a Senior Area Lending Manager for, inter alia, the Wexford area, has stated in his evidence that the value of the proposed security was not the only criteria for sanctioning the loan, and that other considerations such as the repayment capacity of the borrowers were also important. The defendants have filed a defence to these proceedings in which they plead contributory negligence by the Bank in failing to appoint its own solicitor to complete this transaction on its behalf. It is worth mentioning that there is no plea of contributory negligence on the basis that they failed to carry out its own independent valuation of Moongate property before sanctioning the loan.

In order to facilitate the completion of the transaction and the drawdown of the loan facility, the defendant firm signed and gave an undertaking in the form provided by the Bank. This is the normal form of undertaking with which solicitors are well familiar, even though it was intended originally to be used only in residential transactions. Since its introduction it has been in regular use also in commercial transactions, where the bank or financial institution was content not to appoint its own solicitor to look after its interests, and were prepared to rely on the purchaser/borrower solicitor's undertaking to complete matters in a manner which protected the bank's interests as mortgagees.

I will set out the chronology of events which followed the acceptance of this loan offer by the borrowers, but should state at this point that it is undisputed that the defendants' undertaking has not been complied with by them in several respects or indeed at all, that the loan has been called in by the Bank, and that the borrowers are not now in a position to repay it. The Bank is seeking to recover from the defendant firm all sums due on the loan, being principal and interest to date, because of its failure to comply with the terms of its undertaking to put the Bank's security in place. It is accepted that the borrowers are no longer a mark for this sum, and a judgment in that regard remains unsatisfied. There is no security in place which the Bank can enforce, as a result of the defendants' failure to comply with its undertaking.

In spite of the delay in doing so to date, the defendants plead that in spite of the events which undoubtedly occurred, they can still comply with the undertaking given additional time to do so, and a method by which this can be done has been explained to the Court, which I will come to. In these circumstances, the defendants submit that they ought not to be found liable to repay the loan and interest, but should, albeit late in the day, be allowed to comply with their undertaking, so that the Bank can therefore be in the same position as far as the security and its enforcement is concerned, as if the undertaking had been properly complied with at the outset. The defendants are of the view that if they are required to repay the entire loan and interest to the Bank now, it will be

oppressive on them, and will result in the Bank achieving a better result on this defaulted loan than it would have been in had the undertaking been properly complied with, and that such a result would be unjust in all the circumstances.

The Bank on the other hand submits that the circumstances surrounding the failure by the defendants to comply with their undertaking are so egregious and deliberate that they ought to be required to repay all sums due to the bank. I will address that matter further after setting out the relevant facts and events which occurred.

I should perhaps say at this point that while, as insisted upon by the bank and in accordance with normal practice, the undertaking was signed by Richard Clinch a partner in the defendant firm, all aspects of this transaction were being dealt with by a trusted employee of the firm, Fergal Dowling, and not by either Mr Clinch or any other partner, although Mr Dowling has been described by Mr Clinch in his evidence as having been an assistant to Seamus Maguire, another partner. The partners of the firm only discovered the problem on the 22nd December 2008, whereupon they appear to have taken all appropriate steps to address the problem, including by notifying their professional indemnity insurer. Mr Dowling has not been called to give evidence, and it is accepted by the defendants that he acted improperly.

Chronology:
The syndicate had purchased the Moongate site from the previous owner, Bernadette Kirwan, sometime in 2005. The purchase was completed uneventfully and in due course the Deed of Transfer, Charge in favour of Anglo, and all associated documents were lodged in the Land Registry in December 2005. The Moongate property acquired by the syndicate principally comprises two folios, namely 13115 and 13116 of the Register of Freeholders, County Wexford, but, having heard evidence from an official in the Land Registry, it appears that there was a further area of land in the transaction and in respect of which the syndicate sought to be registered on the basis of a possessory title. It is this latter area of land which gave rise to queries from the Land Registry in relation to the evidence adduced for the claim of long possession by the Vendor, and has resulted in the registration of the ownership of the syndicate members as owners of the entire holding being not yet completed as the queries have not as yet been answered to the satisfaction of the Land Registry. The application for registration is still pending in the Land Registry.

Nevertheless, it appears that the members of the syndicate, with the exception of Noreen Hynes, were anxious to realise their investment so that they could use the proceeds elsewhere, and the borrowers agreed to purchase their interests in Moongate in consideration of the amount owing to Anglo on foot of the loan advanced for the purchase. That amount was calculated by Anglo as of 4th July 2007 to be a sum of €2,200,870.71, with daily interest accruing thereafter at the rate of €435.35 per day.

With a view to acquiring Moongate from the other members of the syndicate, the borrowers, though principally Alan Hynes, approached the plaintiff bank in November 2006 with a view to seeking the necessary finance, and discussed the proposal with the local branch manager, Mai Walsh. By January 2007 Mr Hynes had provided a valuation on Moongate, and by e-mail dated 6th February 2007, Ms. Walsh requested certain financial information to be provided ahead of a meeting with her Senior Lending Manager.

Alan Hynes met with Eugene Duggan, Senior Lending Manager for the area concerned, and Mai Walsh on the 8th February 2007. The proposal was discussed in terms that the borrowers wished to acquire the property from the other members of the syndicate at market value. The amount of the loan sought was €3,000,000, and in due course further finance would be sought for the purpose of developing the site by way of a mixed development of office and residential accommodation, the office part being intended as offices for Mr Hynes's own accountancy practice. It was proposed that for the first two years the loan would be on an interest only basis in order to allow time for planning permission to be obtained for the development. That loan was to be secured on the Moongate property by a first charge.

It appears from a document attached to Mr Duggan's statement of evidence in this case that the discussions which took place on 8th February 2007 included reference to another valuable property owned by the borrowers at Newrath ("Newrath"), and that it was understood that in May 2007 that property would be put on the market by the borrowers. While the disposal of that asset was not made a condition of the loan sanction, the prospect of that sale and the consequent reduction of the bank's exposure as a result, was something at least taken into account by Mr Duggan in reaching his decision to approve the loan application for Moongate and the decision to allow the loan to be an interest only basis in the first two years, and a possible interest roll-up for a maximum of five years. In this document there is a consideration in detail of the proposal, and a consideration of the CBRE valuation of €3.900,000 for Moongate. It was considered that the 77% loan to value ratio was satisfactory "bearing in mind the calibre of the individuals involved". In relation to Newrath, it is stated that the sale in May/June 2007 of this property would considerably reduce the bank's exposure, and that the equity thereby released would "*provide the Bank with further opportunities to do business with these very strong customers*". Other laudatory remarks about the qualities of the borrowers are contained in the report. This report was prepared presumably by the local branch manager, Mai Walsh, who also gave evidence to the Court. She passed it up the line to her area manager, Mr Duggan, who has placed a hand-written recommendation for approval of the proposal at the end thereof in the following terms:

> *"While we would have preferred to be considering this request against a confirmed sale of property at facility (2) [i.e. Newrath] given the proposed use of Moongate House (office development), Mr Hynes is an impressive individual who has built up a strong business and net worth and who has the capacity to deal with the extent of debt now proposed. Worthy of this strong level of support."*

By e-mail dated 23rd April 2007, Ms. Walsh informed Alan Hynes that the loan had been sanctioned, but on the basis that interest be discharged quarterly rather than rolled-up for 2 years as sought. In that e-mail, she stated also that "*if Newrath moves in the near future then we will be able to look at roll-up for the 1-2 yr period pending development as discussed*".

A letter of sanction issued on the 22nd May 2007 to the borrowers in the sum of €3,000,000 "*to assist with purchase of property and site at Moongate, Clonard, Co. Wexford*." It provided, inter alia, that repayment would be reviewed in two years' time but "*in the interim, interest charges to [be] met quarterly as they fall due".*

As far as security was concerned, the sanction provided that a legal charge over Moongate be executed by the borrowers and that the property should be vested in their joint names. Importantly it went on to provide:

> *"Security item(s) 1 [i.e. legal charge over Moongate] must be in place before drawdown…".*

The borrowers indicated their acceptance of the loan offer by signing the acceptance clause at the foot of the letter on the 28th May 2007, and before so signing they altered the letter in the way already described so as to indicate the purpose of the loan as "*to assist with refinance of property and site at Moongate …".* Nothing turns on that small amendment, and no issue was raised by the Bank at the time in relation to it. They returned the acceptance by letter dated 29th May 2007.

The Bank immediately sent a 'Loan Pack' to Fergal Dowling, the solicitor in the defendant firm who was nominated by Mr Hynes, so that the necessary documentation could be put in place to enable an early drawdown of the loan funds in order to complete the purchase of Moongate from the syndicate owners. Mr Hynes had informed Ms. Walsh that it had been hoped to be able to complete that purchase by 31st May 2007. Mr Dowling apparently did not find the usual form of undertaking within the Loan Pack which he had received and a further form of undertaking was transmitted to him by letter dated 1st June 2007.

Mr Dowling completed that form of undertaking on the 5th June 2007 and arranged with a partner in the firm, Richard Clinch, to sign it. On the 6th June 2007 he faxed a completed copy of the undertaking to Ms. Walsh and sent the original by courier. Later on the 6th June 2007, Ms. Walsh confirmed in an e-mail to Mr Dowling that the defendants' undertaking was "*now approved on our systems*" and that funds could be released. On the 7th June 2007 she enquired about the defendants' bank account details and also asked what amount was needed to be drawn down, to which Mr Dowling replied that the full €3,000,000 was required. In this regard it will be recalled that in order to complete the purchase the sum required was the amount owing to Anglo on their charge on Moongate. On the 1st June 2007, Mr Dowling appears to have written to Anglo seeking the redemption figure required to discharge that item, presumably in anticipation of an immediate drawdown of the loan from the Bank to complete the purchase within days. That figure was eventually communicated to him by letter dated 3rd July 2007, and since the letter doing so commences "Further to your query" and is addressed to Mr Dowling's secretary, I must assume that Mr Dowling had asked her to contact Anglo again for the figure needed to redeem Anglo's mortgage.

The Bank transferred the sum of €2,992,500 (being the amount sanctioned less an arrangement fee) to the defendants' client account on the 7th June 2007.

I should set out at this stage the relevant portion of the defendants' undertaking is in the following terms:

> *"In consideration of all present and future advances made or to be made by the Lenders to or at the request of the client … we hereby undertake and confirm with the Lenders as follows:*
>
> *1. That the client has or will acquire a good and marketable title to the property ……*
>
> *2. That the client has already executed the Lenders' standard form of All Sums Legal Mortgage/Charge and other documents specified at 3b below] where the client owns the property*
>
> *3. Where the facilities are to purchase the property or to redeem an existing third party mortgage or encumbrance affecting it, and where the loan cheque has been paid through us:-*
>
> > *(a) to apply all sums received by us exclusively towards the purchase of the property or the discharge of existing third party Mortgage(s) or encumbrance(s) affecting the property, as appropriate, and the payment of all necessary legal costs and outlays in connection with same and*
> >
> > *(b) to ensure prior to negotiation of the loan cheque or the proceeds thereof that the following will be executed:*
>
> - *The Lenders' standard form of All Sums Legal Mortgage/Charge by our client*
> - *The appropriate Law Society Precedent Family Law Declaration ("statutory declaration")*
> - *The Deed of Confirmation (where necessary)*
> - *The prior written Consent to Mortgage and/or Consent to Deed of Confirmation (where necessary)*
>
> *4. That we are in funds to discharge all stamp duty in relation to the property and all registration fees in relation to the property and the Legal Mortgage/Charge.*
>
> *5. As soon as practicable to register the Lenders' Legal Mortgage/Charge in the appropriate Registry to ensure that the Lenders obtain a valid first Legal Mortgage/Charge on the property and thereafter lodge the following with AIB Bank, Central Securities …….*
>
> *6. Pending compliance with paragraph 5 to hold all documents in trust for and to the order of the Lenders." (my emphasis)*

This undertaking concluded by stating that the defendants had their clients' irrevocable authority to give the undertaking.

It is at this point that all went wrong.

On the day following the receipt of these funds into his employers' (the defendants) client account, Mr Dowling obtained a draft drawn on the client account in the sum of €2,000,000, not in favour of Anglo as one might have expected would be required, but rather in favour of Messrs. Taylor & Buchalter, solicitors.

That firm was acting for the vendors of the Dalkey property (an entirely different and unrelated property to Moongate) to another company controlled by Mr Hynes which I shall refer to as "Tuskar". The funds used for the purpose of obtaining that Bank draft were those received from the plaintiff bank for the purpose of completing the Moongate purchase. The letter sending that draft to Taylor & Buchalter is dated 8th June 2007 and states that it is in respect of "the deposit due" and confirms also that his client is agreeable to pay a further sum of €200,000 "*to facilitate an extension of the closing date to the end of July 2007*". That sum was in due course also paid from the Moongate loan on the 22nd June 2007. A further bank draft in the sum of €372,821.92 was provided from the same source on the 23rd August 2007. The entire of the Moongate loan was used by Mr Dowling in relation to Dalkey, and the Anglo mortgage on Moongate was never redeemed and remains outstanding together with accrued interest, and the entire transaction lay fallow until the end of December 2008 when the partners in the defendant firm became aware of the situation which had evolved by then.

Before setting out some detail in relation to the Dalkey transaction it would be helpful to refer to the explanation which was given by Mr Dowling to his employers once the true situation was revealed to them. Mr Dowling has not been called to give evidence in this case, and nor did he prepare a witness statement for this case. But there is a memo on the file which has been provided as part of discovery by the defendants, and Mr Clinch has also spoken about it.

The relevant portion of Mr Dowling's memo to Mr Clinch dated 22nd December 2008 states:

"Unfortunately the monies earmarked for discharging Anglo Irish Bank together with the balance of the AIB loan was inadvertently utilised in respect of the purchase on another property at Dalkey. At the time I was preoccupied with dealing with the Cunningham Road site [Dalkey site] and another transaction on the client's behalf, I completely overlooked the redemption of the Anglo Irish Bank mortgage. Queries had been raised in respect of the original registration. Unfortunately I assumed that I had cleared the mortgage. I noticed this around October 2007 and immediately contacted the client, advised him that the money was inadvertently used on his behalf and required the Anglo mortgage to be discharged immediately. In November 2007 the client provided me with a cheque to cover the sums due to Anglo Irish and the stamp duty on the Deed of Transfer. I was then asked not to present the cheque as the funds had not arrived into his account. No funds ever materialised. I was promised on a weekly basis that investors were coming on board and that there would be no difficulty in clearing the Anglo Irish Bank. I was asked for more time from day to day and I understand that there was a proposed re-mortgaging of the site to clear off the client's loan but unfortunately Mr Hynes's companies went into examinership in 2008 when all developments came to a halt. ……"

I will just comment at the moment that it is simply not credible that Mr Dowling "inadvertently utilised" the AIB funds and that he "completely overlooked" the redemption of the Anglo mortgage, because he had only one week before obtaining the bank draft for €2,000,000 in favour of Taylor & Buchalter for the Dalkey site, written to Anglo seeking a redemption figure for the Anglo mortgage. It was clearly on his mind during that week, and it is simply not credible that he could have overlooked the Anglo redemption. I can be completely satisfied that the dispersal of the Moongate funds was for whatever reason a conscious and deliberate act on his part, and he continued to improperly disperse those funds to Taylor & Buchalter on the 22nd June 2007 and the 23rd August 2007, the former sum being at a time when he was clearly actively awaiting the Anglo redemption figures, and in respect of the latter sum, within a few weeks after he had received that figure.

Needless to say, Mr Dowling did not notify AIB Bank of the problem that existed in relation to the purchase of Moongate and the Bank's security. They did not become aware of these difficulties until the end of 2008, as I shall come to.

The Dalkey transaction:
It appears from discovered documents that the Dalkey site was put on the market in April 2007 by way of tender. The Tuskar Group (of which Alan Hynes is a member) submitted a tender offer on the Form of Tender provided on the 15th May 2007, and made an offer to purchase the Dalkey site for a consideration of €20,000,000, and enclosed a cheque for €2,000,000. However, when completing that tender form Tuskar altered the terms thereof by making their offer "subject to contract and cheque is not to be cashed until contract terms agreed". The form had also specified that the deposit be paid by Bank draft, and that was altered also by Tuskar to payment by cheque. These alterations were not acceptable to the Dalkey vendors, but at a meeting at the offices of Taylor & Buchalter on the 15th May 2007 this conditionality was removed by Tuskar, with the effect that the tender offer and its acceptance was unconditional. The deposit cheque was presented by those solicitors, but was returned as it had been "stopped" by Tuskar. The closing date for that purchase was stated in the tender form to be the 27th June 2007.

Once the deposit cheque was returned unpaid, the Dalkey vendors immediately instituted High Court proceedings on the 28th May 2007 seeking payment of €2,000,000 as well as specific performance of the contract dated 17th May 2007, and other associated reliefs, having written a warning letter on the 18th May 2007. Mr Dowling wrote to Taylor & Buchalter on the 23rd May 2007, and while some issues are raised in the letter it concludes by stating that Tuskar would not be in a position to complete the purchase prior to the 15th November 2007. By letter dated 24th May 2007, Messrs. Taylor & Buchalter noted the contents of the letter and informed Mr Dowling that proceedings had been instituted and asked him if he had instructions to accept service thereof.

It has become apparent that Tuskar by this time had not obtained loan approval for funds to complete this purchase. A subsequent application to AIB Bank for a facility was turned down.

On the 28th May 2007 a Notice of Motion was issued and served by the plaintiffs seeking to have the proceedings admitting the proceedings to the Commercial Court. That motion was returnable in the Commercial Court for the 11th June 2007. The Statement of Claim was faxed to Mr Dowling on the evening of the 6th June 2007, who by then had entered an appearance for the Tuskar Group, having accepted service of the proceedings.

By way of reminder I should recall that on the 5th June 2007 Mr Dowling had received the AIB undertaking for the Moongate loan cheque for completion, that he returned same on the 6th June 2007, the loan funds were received into the defendants' client account on the 7th June 2007, that is, the day following receipt by him of the Dalkey Statement of Claim, and that on the 8th June 2007 he sent the draft for €2,000,000 to Taylor & Buchalter. He clearly was aware that the application to transfer the Dalkey proceedings into the Commercial Court was imminent for the 11th June 2007.

It appears that negotiations took place between the parties on the 20th June 2007 in order to extend the closing date, and it was agreed by the Vendors that in consideration of the payment of €200,000 to be received not later than 5pm on the 25th June 2007, the closing date would be extended to 27th July 2007. That payment was made from the Moongate loan funds. By the 19th July 2007 Mr Dowling had not furnished Requisitions on Title and received a reminder in that regard from Messrs. Taylor & Buchalter. Those were furnished by letter dated 23rd July 2007. The closing did not take place on the 27th July 2007, and the Vendors served a Completion Notice dated 30th July 2007. A further extension of the closing date to the 28th September 2007 was negotiated in return for a further payment of €372,821.92, which was paid by Bank draft by Mr Dowling from the Moongate loan funds on the 23rd August 2007.

In August 2007 it would appear that Mr Hynes, through Tuskar, sought a loan facility from the plaintiff bank in order to purchase the Dalkey property. However, it seems to have been considered that the price paid was on the high side given the fall in property values at that time, and the plaintiff bank refused the loan application, noting also that Ulster Bank had done likewise.

It would appear that by the 19th September 2007 a loan approval, subject to many conditions, was obtained from Zurich Bank in the sum of €20,000,000, for the Dalkey purchase, and thereafter correspondence ensued in that regard between Mr Dowling and solicitors acting for that bank. It appears that the transaction was completed by the end of October 2007.

While the transaction for the purchase of the Dalkey property was proceeding during the summer months of 2007 as outlined above, nothing appears to have happened in relation to the completion of the Moongate purchase by Alan Hynes and Noreen Hynes from the syndicate. It was part of the loan arrangement with the Bank that interest would be paid quarterly on that loan, rather than rolled-up pending the completion of the development. To facilitate the discharge of the first quarter's interest the Bank put in place an overdraft facility in the sum of €5000 sanctioned on the 11th September 2007 to be cleared in full by 11th October 2007. It would appear that Mr Hynes had overlooked putting funds in place for this first quarter's interest before going on holidays.

It appears from e-mails passing between the plaintiff and Mr Hynes's office between July and October 2007 that no interest payment

had been received as required under the loan arrangement. However, on the 18th October 2007 a sum of €42,772.87 was paid by Mr Hynes. According to Mai Walsh's witness statement the payment narrative indicated that this sum emanated from Tuskar Property Holdings.

On the 6th February 2008, the Bank provided a further six week facility of €46,000 which was to revert to a facility of €5000 by 31st March 2008, as the account was showing an unauthorised debit situation. This facility was secured also on the intended first charge on Moongate, which presumably the Bank believed was in place and awaiting completion of registration. The bank was not aware of course that the Anglo charge had not been discharged, and that the loan funds had been diverted to the Dalkey property.

By April 2008 a further two quarters of interest had been debited and Ms. Walsh was in communication about this unauthorised situation during February and March 2008. Mr Hynes provided a cheque in the sum of €100,000 which, in accordance with his instructions, was held by her until 13th May 2008. However, that cheque was in due returned 'unpaid' on the 16th May 2008 following presentation. That led to further discussions, and ultimately on the 14th August 2008 the Bank agreed a further 30 day facility in the sum of €140,000 to allow time for Mr Hynes to complete some other refinancing arrangement through Bank of Ireland, and subsequently on the 4th September 2009 a sum of €150,000 was received to address the outstanding interest due. That brought the account into order. By the 16th September 2008 a further quarter's interest fell due for payment, and Ms. Walsh again contacted My Hynes in relation to that sum. Ms. Walsh wrote again to both borrowers notifying that a further sum was due for interest in the sum of €41,609. No further interest payments have been received.

In November 2008, the plaintiff Bank received a letter from a firm of financial consultants acting on behalf of Mr and Mrs Hynes in which that firm sought full details of all sums due to the Bank. An internal memo of the Bank dated 2nd December 2009 indicates alarm at the unfolding situation with regard to the situation and speaks of the need to get clarity about the payment of interest due and falling due, and indicating that the situation did not look good and that it was feared that "*we will have to call the status of this borrowing sooner rather than later*".

On the 4th December 2008 Ms. Walsh wrote to the borrowers to enquire if the outstanding interest would be paid and further if an amount due on the 16th December 2008 would be paid. This letter drew attention to the serious implications of not complying with the terms of the Bank's sanctions, and warned them that if these payments were not made the Bank would be left with no alternative but to take whatever steps were necessary to recover the monies owing, but indicated also that a meeting with them had been scheduled to take place on the 12th December 2008 in order to discuss the facility.

On the 9th December 2008 the Bank received information from Brendan O'Donovan, solicitor of DFMG solicitors, acting for the borrowers, that the Anglo mortgage had not been paid off and that there were at that stage two mortgages on Moongate. A memo by Mai Walsh of the 9th December 2008 notes that this information had come to hand on the previous day in her absence. She states therein that she telephoned Mr O'Donovan to tell him that she was informing the Bank's securities department and that they would be acting under their instructions without delay. On the 23rd December 2008, Ms. Walsh wrote to the borrowers calling on them to pay a sum of €88,381.78 being overdue interest within 30 days, otherwise all banking facilities would be terminated, resulting in all sums due on their current accounts and loan account becoming due, and that the Bank would take whatever steps, including the enforcement of any security held, that were open to it.

By letter dated 15th December 2008, the Bank's solicitor wrote to the defendants to inform them that the Bank had relied upon the firm's undertaking dated 5th June 2007 when advancing the facilities to the borrowers, and since some eighteen months had passed since the funds were advanced the Bank required an immediate report as to the position relating to "the refinancing transaction and the perfection of the bank's security." No response had been received by the 7th January 2009 when a further letter was written to the defendants, and sought an urgent response. A letter from the Bank's solicitor dated 16th January 2009 refers to a telephone conversation which had taken place on the 15th January 2009, and records the fact that the Bank understood that matters had arisen which resulted in the defendants not being in a position to comply with their undertaking and that the insurers had been notified. The letter went on to state that the Bank would be holding the defendants liable for all loss and damage resulting. These proceedings then followed quickly thereafter.

Meanwhile, by letter dated 23rd January 2009, final letters of demand were written to each borrower seeking payment of sums due on three accounts, including the loan account, the latter being in the sum of €3,013,869.86.

On the 12th February 2009, Mr Hynes wrote to the Bank (Ms. Walsh) to inform her that due to a deterioration in his and his wife's personal financial circumstances they would be unable to discharge the sums due, but remained committed to their obligations and would continue to make themselves available "*to recalibrate the debt and accrued interest*".

In due course, on the 8th April 2009 the Bank obtained judgment against the borrowers in the sum of €3,104,255.48, which remains unsatisfied.

The witness statement of Richard Clinch of the defendant firm, and who gave evidence in accordance with it, indicates that shortly before the 20th December 2008, his partner Seamus Maguire had become aware of the problem about the firm's undertaking, and that on Saturday 20th December 2008 he telephoned Mr Clinch at home about it. On the following Monday 22nd December 2008 Mr Clinch spoke to Mr Dowling about the matter and was told at that time that there was a sum of about €2.3 million owing to Anglo, and that he had overlooked the redemption of that mortgage because he was pre-occupied with the Dalkey transaction, and that having assumed that the mortgage had been cleared he did not "notice the position" until October 2007, and that he had thereupon made efforts to obtain the necessary funds from Alan Hynes, but to no avail, as I have already set forth. Mr Clinch then notified his professional indemnity insurers, and took steps to try and find a way of addressing the situation, and that Counsel's opinion has advised that it is possible to yet comply with the firm's undertaking if arrangements can be reached with Anglo whereby for a sum to be agreed with Anglo, the defendants can acquire the Anglo mortgage.

At the hearing before me on Tuesday last, letters were handed in and the Court was informed by reference to them that an agreement had now been reached between the defendants and Anglo whereby in consideration of a payment by the defendants to Anglo in the sum of €1,500,000 the Anglo debt will be purchased by the defendants. A letter dated 20th July 2009 from J.A.Shaw & Co, acting for the defendants, to AIB Bank states that upon the purchase of this debt and charge from Anglo, the following steps will be taken, and which are described in the following terms:

> *"1. Procure a formal discharge of charge from Anglo Irish Bank and proceed to finalise and complete registration of first legal charge in favour of the plaintiff over lands at Moongate, Clonard, Wexford putting the plaintiff in exactly the position it would have been had the charge been registered earlier. Obviously this will require a short period of time to effect and will involve additional expenditure which could potentially be avoided by adopting one of the following more commercial*

options.

2. Procure an assignment of the existing Anglo Irish Bank charge to AIB Bank, which Anglo Irish Bank have agreed to do, and it is anticipated that the 8 original borrowers from Anglo Irish Bank would cooperate with such a proposal, such that the plaintiff would be in as good a position as it could ever have been in relation to the property.

3. Hold the existing Anglo Irish Bank charge, as mortgagee in possession, in trust and to the order of the plaintiff to do with as the plaintiff might direct which presumably would require sale of the property for the best price that can be achieved and pay over nett proceeds of sale to the plaintiff which is what it will have to do itself to realise the security in any event."

Thus far, no agreement to these proposals has been forthcoming from the plaintiff.

This rather full narrative of relevant events is the factual background against the legal submissions made to the Court need to be considered, and I will come to those.

I should add that it does not appear that any formal contract was ever entered into between the syndicate and Alan and Noreen Hynes for the purchase of Moongate in consideration of the discharge of all sums due to Anglo. Certainly none has been provided by way of discovery, and no evidence has suggested that there ever was one. However, it is a fact apparently that the members of the syndicate, other than Noreen Hynes, instituted proceedings in the High Court seeking, inter alia, specific performance of that agreement. I have no knowledge of what is contained in the pleadings in that case which can assist me in knowing the nature of that agreement, or whether it was ever committed to writing. The only evidence which I have of the fact of such an agreement, apart from the fact that Mr Hynes approached the Bank in order to discuss a facility in order to acquire the property from the syndicate members, is the fact that on Mr Dowling's file for the transaction (or at least so much of it as has been made available) is an undated Deed of Transfer containing a page attached thereto on which what purport to be the signatures of the syndicate vendors. On the file there is what purports to be a letter dated 1st June 2007 (some 6 days prior to drawdown of the funds) from Mr Dowling to Mr Hynes in which he encloses "*the signing page for the proposed transfer into yourself and Noreen's names*", and he requested Mr Hynes to arrange to have that page signed by the parties. Only the signing page was enclosed. The page apparently duly signed by all the vendors was sent back to Mr Dowling on the 1st August 2007. If all that is as it appears, it would seem clear that the vendors signed the page but without the actual body of the Transfer attached thereto. But there is another curious feature to the "Deed of Transfer" to which the signing page was later attached, which casts at least some doubt upon its integrity, and that is that on the front page of the Transfer the date appears in the following way: "*Transfer made the day of 2008*", rather than 2007. Yet another curiosity about the Transfer document is, as I drew attention to during the hearing, it actually purports to transfer "*all the property comprised in the Schedule hereto*" but contains no such schedule as would be the case had it been properly drafted. The effect of this is that if one overlooks the fact that only the signing page was handed to each vendor for signature, the document would still not have constituted a valid transfer of the Moongate property to the purchasers since the property concerned was not specified at all.

Perhaps nothing in particular hinges on this feature, but it is nonetheless something which has been referred to by the defendants in submissions and during the evidence, and it is part of the complicated and unfortunate tapestry of events in this case, because it suggests that by the time the loan proceeds were disposed of by Mr Dowling there was not even in his possession an executed Transfer from the vendor syndicate members.

Legal submissions:
There is no real dispute between Martin Hayden SC for the plaintiff Bank and Paul Gardiner SC for the defendant firm as to the provenance and nature of the Court's supervisory and discretionary jurisdiction to enforce compliance by a solicitor with his/her undertaking where compliance is not impossible to achieve, and/or to order, where appropriate to do so, that any losses occasioned by such failure be paid to the party to whom the undertaking was given. The defendants' written legal submissions make the point that the plaintiff has not in these proceedings invoked this supervisory and compensatory jurisdiction, but as far as I am concerned the oral legal submissions have proceeded on the basis of that jurisdiction being the appropriate jurisdiction applicable to this case, and indeed, virtually the only case referred by either side has been the Coleman case referred to in the next paragraph. I intend to deal with the case on that basis.

This unique jurisdiction is comprehensively described in the judgment of Geoghegan J. in the Supreme Court in *Bank of Ireland Mortgage Bank v. Coleman, unreported, Supreme Court, 5th May 2009*, and in the judgment of Laffoy J. in the High Court in the same case. The issue between Mr Hayden and Mr Gardiner is whether and in what manner this Court should exercise its discretion on the particular facts and in the particular circumstances of this case, which, while very similar in some respects to the facts and circumstances in Coleman, are in other respects significantly and importantly different.

In Coleman, the plaintiff Bank had sanctioned a loan to the defendant solicitor's client. In order to complete the purchase in question, the solicitor provided the usual form of undertaking to the bank to enable it to provide the proceeds of the loan, in much the same terms as the undertaking at issue in the present case. The bank sent the loan cheque to the solicitor who, in turn, endorsed it over to the purchaser's solicitor. That occurred in September 2003, and in June 2004, and before the bank's security had been put in place by the solicitor in accordance with his undertaking, his file was removed from his office by An Garda Siochána as they were conducting a criminal investigation into the client's affairs as a result of a complaint made to them by the bank in question. In due course, the client defaulted on the loan, and the bank called it in. In October 2004, the bank asked the solicitor to provide details of what was outstanding to be done in relation to the perfection of the security, and the solicitor responded by saying that his file had been removed and that he would complete matters when it was returned to him. The bank called upon the solicitor to repay to them the full amount of the loan of €250,000, which it alleged had been released wrongly by the solicitor. The solicitor did not comply with this request, and proceedings were issued against him by way of Special Summons in which the Bank. The Bank had not sought to recover the money from the borrower, and nor did it seek in the proceedings to realise the security as against the borrower. Instead it sought an order that the defendant solicitor compensate the bank for the loss suffered as a result of the failure of the solicitor to comply with the terms of his undertaking by, inter alia, not having, as per the undertaking, obtained a duly executed mortgage by the borrower in favour of the Bank before he released the loan funds to the purchaser's solicitor. The quantum of that loss was said to be the full amount of the loan advanced. The defendant pleaded by way of defence to the claim that in the circumstances he required more time to complete the security, but accepted that he was in breach thereof. In the High Court, Laffoy J. was prepared to infer from the evidence which she heard that in fact the Bank had over-lent on the security being provided and that the value of the security was in fact in the order of €140,000, and not €250,000, and she was of the view that if the Court was to order repayment by the solicitor of the full amount of the loan, it would result in a situation whereby the Bank would receive an amount far greater than it would have been able to obtain on a sale of the security, had the security been properly put in place by the solicitor. She was satisfied that the proper measure of the plaintiff's loss as a result of the defendant's breach of his undertaking "*is the value of the*

security which it should have obtained, but will not obtain". She was also satisfied that it was not by that time impossible to complete the security, albeit in late compliance with the undertaking, and she dismissed the plaintiff's claim.

In the Supreme Court, Geoghegan J. to a large extent agreed with the reasoning of Laffoy J. but concluded that even where compliance with the undertaking in question was not impossible, the Bank may nevertheless have sustained a loss, and was of the view that the High Court could have and should have gone on to assess the amount of that loss, if any, in addition to permitting late compliance with the undertaking, and the matter was remitted to the High Court for that purpose.

Mr Hayden for the plaintiff bank has urged the Court not to adopt such an approach in the present case, given the egregious and deliberate nature of Mr Dowling's behaviour in the matter. He has emphasised the deliberate and conscious nature of that behaviour, and the fact that the funds in question were consciously diverted to another transaction – one in fact for which this particular plaintiff bank had declined to approve a loan.

He has referred to the fact also that the plaintiff bank was not informed about the problem until the end of 2008, some eighteen months after the funds were diverted elsewhere.

He submits that the Court should not accept the apparent explanation given by Mr Dowling to Mr Clinch in December 2008 that he "overlooked" the fact that the Anglo loan had not been discharged due to his pre-occupation at the time with the Dalkey transaction, and he points to the fact that Mr Dowling has not been called to give evidence by the defendants. In such circumstances, this court is urged to be sceptical at the very least about the bona fides of such an explanation, and that it should consider the actions of Mr Dowling to be deliberate and conscious.

In that regard he points to the fact that at the very moment when Mr Dowling was providing the undertaking to the plaintiff and drawing down the loan, he was fully aware that the Dalkey vendors had issued a motion to have their specific performance proceedings accepted into the Commercial Court returnable in four days thereafter, the 11th June 2007, and suggests that it is perfectly clear that he did what he did in order to advantage his client's position ahead of that application. It cannot, it is submitted, be a case of simply having "overlooked" the need to discharge the Anglo mortgage.

Mr Hayden also submits that, given the fact that queries raised by the Land Registry in relation to the registration of the syndicate members as owners of the Moongate property have, some four years later, still not been resolved, it is by no means clear that the undertaking to complete the bank's security can yet be complied with.

In all the circumstances, and in particular where the money was never used for the purpose for which the loan was approved, and where this was deliberate and conscious, Mr Hayden has submitted that the Court should order that the entire of the amount due for principal and interest should be paid, rather than permit the defendants to address the matter as contemplated by the agreement reached with Anglo, so that they achieve resolution by payment to Anglo of €1,500,000 and where the plaintiff bank may well be left with a loss of something in the order of €2,500,000, given the value of the Moongate property, even if it can be sold, and in circumstances where it did nothing except rely upon the honesty, integrity and undertaking of a solicitor.

Mr Gardiner for the defendants urges what I will call the 'benign' approach which was apparent in Coleman, albeit one which imposes a great financial burden upon the defendants. He accepts, as does everybody in this case, as they must, that there has been a serious and deliberate breach of the undertaking by the manner in which Mr Dowling has behaved in this matter. Mr Clinch in his evidence did not for one moment seek to condone the conduct of Mr Dowling.

I am satisfied that as soon as the defendants discovered the awful truth of what had happened, they acted promptly, professionally and honourably in the only way they could. They notified their insurers, and thereafter matters were to an extent out of their hands as far as resolving matters is concerned. In that regard I should just say that when asked by Mr Hayden about the fact that they had seen fit not to call Mr Dowling to give evidence so that the Court might have the fullest explanation of what occurred, Mr Clinch, and in my view this is reasonable and understandable, stated that he had not been responsible for advising proofs in the case. Clearly the defendants' insurers are in the driving seat as far as that aspect of the proceedings is concerned.

In urging the Court to adopt a Coleman-like approach by directing compliance with the undertaking, or otherwise permitting time to enable matters to be resolved in accordance with the spirit and terms of the agreement which has been reached with Anglo, as evidenced by the letter referred to dated 20th July 2009 from J.A. Shaw & Co to the plaintiff's solicitor, and either assessing the loss to the plaintiff now by reference to the latest valuation of Moongate of €620,000, or putting the case back until such time as it is actually sold in order to determine the loss actually occasioned by the breach of the undertaking, Mr Gardiner makes a number of submissions.

He points to the plea of contributory negligence made against the plaintiff bank on the basis that they could and ought to have appointed their own solicitor to act for them and protect their interests, particularly in what is submitted to be a complex and far from straightforward transaction, and its value. He also draws attention to the fact that the plaintiff bank accepted at face value the valuation of CBRE for the purpose of sanctioning this loan, and that there has been evidence from Mr Larry Kelly of Thorntons, Chartered Surveyors which indicates in his view that the CBRE valuation of €3,900,000 made in 2007 "*is based on assumptions which do not appear to be backed up by a town planning report and which did not have a planning permission in place at time of valuation. This valuation would have been subject to planning permission being obtained as outlined in the report".*

He goes on to state that "*it would have been reasonable to assume that some development would be allowed on the site and it may not have been clear that Moongate House could not be demolished*".

By way of conclusion he expresses his opinion that in 2007 the market value of the Moongate property without the benefit of planning permission would have been "*in the region of €2,000,000",* and that by the time that the plaintiff called in this loan in January 2009 "*there would have been a significant diminution in value by that date…"*. As I have said, CBRE have stated that the value as at January 2009 was €650,000 and that it by the present date €620,000.

So, Mr Gardiner submits that the defendants should be permitted to comply with its undertaking even at this stage, since in his submission that is still possible to achieve. This would place the plaintiff bank therefore in the same position as it would have been in January 2009 when it called in the loan i.e. with a property against which its loan is secured and which it can realise in reduction or discharge of the indebtedness. He points to Mr Duggan's evidence that the value of the security was not the predominant factor which persuaded the bank to approve the loan, and that he has stated that the repayment capacity of a trusted and valued client of the bank, and the viability of the project, were important factors in addition to the availability of Moongate as security. He also had some regard at least to the prospect that the property at Newrath was going to be put on the market in May 2007, according to

what he was told by Mr Hynes, and which might have had a positive impact on the indebtedness to the bank.

Mr Gardiner also points to the fact that for the remainder of 2007 and through 2008 the plaintiff bank adopted a tolerant attitude to the question of outstanding interest payments. The fact that the quarterly interest payments were not made in accordance with the terms of the loan sanction was something which did not lead the bank to call in the loan sooner than they did. They granted additional short-term sanctions to the borrowers to assist them with regard to interest. He submits that in these circumstances the fact that the undertaking was not in place during 2007 or 2008 had no adverse effect on the plaintiff bank since it never formed any intention to enforce the security during that period. In other words, it is submitted that even though there was a breach of the undertaking, it had no effect as far as occasioning loss to the plaintiff bank is concerned, than if it had been properly in place, since the bank at no stage before the end of December 2008 intended to call in that security.

For this reason it is submitted that the defendants should be permitted to perfect the security now, and allow the bank realise the security by the sale of the Moongate property, and that the price that they will now be able to achieve is going to be the same as if there had been no breach of the undertaking, and that accordingly the defendants should not be made to pay to the bank either the entire amount of the loan, or any sum representing the difference between the 2007 valuation (whatever that may be) and the present valuation, or even the value the property might have had in October 2007, being the date upon which Mr Dowling stated to Mr Clinch that he first became conscious that the Anglo loan had not been paid off. He submits that to so order would be in effect to provide to the bank a windfall gain which they would not have got even if the undertaking had been complied with as it ought to have been.

Such a solution would have the effect of enabling the defendants to resolve the breach of undertaking at a cost to them of €1,500,000 plus presumably other attendant fees and expenses and some legal costs, if awarded against them. It is submitted in view of all these circumstances that for the defendants to be required to pay the entire amount of the loan to the bank, a sum in excess now of €3,000,000 would be an oppression of the defendants since there is a less expensive and punitive solution to the problem, such oppression being something to be avoided as seen above from the authorities.

Mr Gardiner submits that the facts and circumstances of the present case are more or less on all fours with those in the Coleman case, and he urges that a similar approach be adopted by the Court. For example, he refers to the fact that in Coleman the solicitor had not perfected the title, but that by the time the case was heard on appeal the title had been perfected. In the present case the syndicate members are suing the defendants also in respect of the failure to pay off the Anglo loan and they wish to be able, as happened in Coleman, to sort it out now that they are aware of the situation.

Mr Gardiner refers also to the fact that in Coleman, Laffoy J. did not simply find that there was a mistake or inadvertence in what happened, and that she found the mistake to be inexcusable. He makes that reference in order to draw a parallel between that inexcusable mistake and the present case which he says is equally inexcusable and that the defendants do not for one moment seek to condone what Mr Dowling did. In this way, he seeks to keep the present case within the parameters of Coleman and to urge that a similar approach be taken.

He refers also to the fact that in the Coleman proceedings the bank did not seek an order that the defendant comply with the undertaking, and again, he draws a parallel with the present case because Mr Hayden has stated to this Court that even though such a relief is claimed in the Plenary Summons and Statement of Claim delivered, the plaintiff abandons that particular relief. However, Mr Gardiner submits that notwithstanding this, the defendants ought to be permitted to do so since that is still a possibility, as it was in Coleman, and that the Court should not direct the repayment to the plaintiff of the entire amount of the loan plus accrued interest.

Conclusions:
The judgments of Laffoy J. in the High Court and that of Geoghegan J. in the Supreme Court in Coleman deal extensively with the nature and provenance of the Court's jurisdiction in matters of this kind. Having traced the nature of the jurisdiction from *Udall v. Capri Lighting Limited* [1987] 3 All ER 262, and *John Fox v. Bannister King & Rigbys* [1987] 1 All ER 737, and by reference to a commentary thereon contained in Cordery on Solicitors, she stated:

> *"Assuming a similar jurisdiction is exercisable by this Court, it seems to me that, for present purposes, the significant features of the foregoing analysis of the jurisdiction are the emphasis on the discretionary nature of the jurisdiction, that where an undertaking is not, on the evidence, incapable of performance the usual order is to direct performance, but if it is impossible to perform the undertaking, the court has a discretion to direct compensation. Compensation, in this context, means a sum of money which will make good the loss incurred by a person who has suffered loss in consequence of the solicitor's failure to fulfil his undertaking."*

The learned judge, having considered and relied upon the judgment of Lardiner J. in *I.P.L.G Limited and Houghton Fry & others, practising as William Fry, solicitors v. Donald O. Stuart and An Post*, High Court, unreported, 19th March 1992, stated that she was satisfied that the Court's jurisdiction in this country was consistent with what was stated in Cordery, para. 965, namely:

> *"The court will not enforce an undertaking which has become impossible to perform so that the solicitor cannot realistically be expected to carry it out, but in such circumstances the court may order the solicitor to compensate a person who has suffered loss in consequence of his failure to implement his undertaking. In enforcing undertakings the court is not concerned with the law of contract, its aim is to secure the honest conduct of its officers."*

On one issue, Geoghegan J. found himself at variance with the conclusion of Laffoy J. In that regard he stated:

> *"… She seemed to consider that if the transaction was still capable of completion there was no justification for awarding any compensation against the defendant. I cannot agree with this approach. It would seem to me that the judge ought to have assessed compensation. I do not want to prejudge what the headings of compensation might be but at that stage, one of them would presumably have been the real value of the security which the bank should have obtained but did not obtain."*

As it happened, by the time the appeal in that case was heard, the transaction had been fully completed and the bank's security was in place. However, given there had been a serious breach of the undertaking, which resulted in the bank not being able to act on its security until the charge was registered, Geoghegan J. felt that the bank probably suffered a loss as a result, and that the High Court should at that stage have at least gone on to assess what that loss might be, and the appeal was allowed to that limited extent, Geoghegan J. stating that such an order was an appropriate exercise of the court's discretionary jurisdiction in such a case.

Geoghegan J. went on to state:

> *"…… First of all, as will become clear when I review the case law, the order which the court makes when this special jurisdiction is invoked is discretionary but like all discretionary orders the discretion must not be exercised inappropriately. I would respectfully agree with the learned High Court judge that where, as in this case, a solicitor's undertaking is involved, it is important in considering the discretionary order to be made to have regard to the undertaking as a whole and not merely to the particular obligation within the undertaking the breach of which is complained of. But if the learned judge intended to convey that the court could never enforce an isolated obligation within the undertaking if the original purpose of the transaction could still potentially be achieved, I would respectfully disagree. The precise enforcement of a particular obligation may, in many instances, be the appropriate order. In the final paragraph of her judgment, Laffoy J. makes clear her consciousness "of the serious risk to the integrity of the lending system in relation to residential mortgages which this case has exposed." She goes on to observe that, on the evidence she had heard, most if not all the other major residential mortgage lenders adopt similar procedures. It is the system which came into place some years ago and it was designed to avoid the necessity of a third solicitor being engaged to act for the lender. Although the supervisory jurisdiction and its principles were decided long before the major lenders in this country adopted the two solicitor system, a judge being asked to enforce an undertaking given in the context of such a transaction, but in exercising his or her discretion, ought to have regard to the maintenance of the integrity of that system. There would be cases, therefore, analogous to this case where if the undertaking solicitor behaved in a similar manner, it would be appropriate for a court to order the solicitor to repay to the bank the whole of the sum advanced. However, for reasons indeed adverted to by the learned High Court judge, that would not have been appropriate in this case. The bank by its own negligence independently of any connection with the default by the solicitor provided loan facilities on an overvaluation of the property. The English authorities clearly indicate that an order made by the court under this jurisdiction should not be oppressive towards the solicitor. Therefore, I am in agreement with the learned High Court judge that it would not have been appropriate to order the defendant to repay to the bank €250,500 with or without interest."*

He later went on to state:

> *"What these principles, when read as a whole, clearly indicate is that the special supervisory jurisdiction of the court invoked by summary proceedings is discretionary in nature. In this particular case where the bank appears to have carelessly acted on an overvaluation of the property it was, therefore, going to be at any rate left with a much lesser security than it anticipated. In those circumstances it would not be appropriate to measure the compensation that might be ordered to be paid by the solicitor as the actual amount of the loan, unless, of course, the bank had been misled as a consequence of fraudulent conduct to which the solicitor had been party. But there was no evidence before the High Court or before this court of any such complicity." (my emphasis)*

I have underlined a sentence upon which Mr Hayden for the plaintiff bank seeks to rely, as he contends that the conduct of Mr Dowling in this case, even if it has not been found to be fraudulent in a criminal sense (and, as Mr Gardiner has stated, fraud has not been pleaded) is yet of such a deliberate and egregious nature as to fall within the exception contemplated by Geoghegan J. in this passage. I shall return to that important matter.

In summary, the following principles emerge from the judgment of Laffoy J. and Geoghegan J. in Coleman, and the authorities considered therein:

> 1. The Court has an inherent jurisdiction in matters concerning the conduct of solicitors, being officers of the court, including but not confined to compliance with their undertakings.
>
> 2. It is both a punitive and compensatory jurisdiction.
>
> 3. It is discretionary and unfettered in nature requiring each case to be considered on its own facts and circumstances.
>
> 4. In its exercise, the Court is concerned to uphold the integrity of the system, and the highest standards of honourable behaviour by its officers – a standard higher than that required by law generally.
>
> 5. The order made by the Court can take whatever form best serves the interests of justice between the parties.
>
> 6. In the matter of undertakings, the Court must consider the entire undertaking in order to reach a conclusion as to its real ultimate purpose.
>
> 7. The Court may order compliance with the undertaking, though late, where there remains a reasonable possibility of so doing.
>
> 8. Even where the undertaking may still be complied with, the Court may nevertheless order the solicitor to make good any loss actually occasioned by the breach of undertaking, which may or may not be the entire of the sum which was the subject of the undertaking.
>
> 9. Where compliance is not possible to achieve by the time the Court is deciding what order to make, if any, it may order the solicitor to make good any loss actually occasioned by the breach of undertaking.
>
> 10. Carelessness or other form of negligence on the part of the person affected by the undertaking, and in relation to the matter the subject thereof, may be a factor which the Court will have regard to when determining what order may be fair and just.
>
> 11. Any order the Court may make ought not be oppressive on the solicitor. Nevertheless, gross carelessness or other conduct considered sufficiently egregious by the Court, though falling short of criminal behaviour or even professional misconduct, 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 occasioned by the breach of undertaking.

To these statements of principle which I perceive to emerge from Coleman and the other cases referred to therein, I would add one other which is linked in a way to that at 11 above. It is this. It seems to me that the special supervisory jurisdiction being exercised by the Court in these matters is not unlike an equitable jurisdiction, given the wide discretionary nature thereof, and its objective of ensuring that justice is done between the parties in a broad sense. In my view, therefore, it seems to me that it is not inappropriate

or otherwise wrong for this Court to have regard to the overall behaviour of the solicitor, somewhat akin to seeing whether a person who is claiming an equitable relief has come to court with clean hands, even where the undertaking may be still reasonably capable of being completed, and even where the loss actually occasioned and sustained by the claimant may be less than the entire sum which was the subject of the undertaking.

I say that because the Court's special jurisdiction in these matters has, as one of its important objectives, the upholding of the integrity of the system and the highest standards of professional behaviour by officers of the court. Its purpose is not simply to ensure that the person adversely affected is compensated for loss sustained as a result of the breach. There can be no half measures in that regard.

The approach of the Court will differ from case to case, as cases vary significantly both as to the nature and the degree of the failure to comply with the undertaking in question.

In cases of deliberate, conscious or reckless breach of an undertaking by a solicitor, and not one resulting from mere mistake, oversight, inadvertence or other human frailty, a situation cannot be allowed to exist whereby the Court is seen to tolerate less than honourable and professional behaviour, by permitting a solicitor who has acted thus, egregiously, and in a way that is deliberate and utterly reprehensible, to simply walk away from that with permission to comply late with his undertaking, and pay whatever sum has resulted directly from the breach, and perhaps leave the other party with a substantial loss to bear. To my mind, such an order may be appropriate where the breach has been accidental or otherwise not deliberate, or through inadvertence or other human frailty, but that an egregious, deliberate and fundamental breach must be treated differently in order to take account of and mark its distinct character, and the court's absolute disapproval and condemnation thereof.

To do otherwise would be to fall short of what is necessary under the supervisory element of the Court's inherent jurisdiction - a jurisdiction which exists to uphold honourable conduct by solicitors - and would overly emphasise the compensatory element of the jurisdiction at the expense of the supervisory element of the jurisdiction.

In the Coleman case, it is clear from the judgment that the Court was satisfied that, whatever about the questionable background to the loan, given the Garda investigation undertaken, the reason why the defendant had not complied with his undertaking was that the Gardai had seized his file and documents. Laffoy J. was satisfied that it was not impossible to still comply with the undertaking, and, as decided by Geoghegan J. in the Supreme Court, any loss actually occasioned by the failure to comply appropriately with the undertaking, should be paid by the solicitor. That loss would be influenced by the fact that the plaintiff bank had itself apparently been somewhat careless in accepting an over-valuation of the proposed security, and consequently lent more than the security could realise in the case of default. An important feature of the Coleman case is also the fact that the money received from the plaintiff bank was paid to its intended recipient and for the purpose intended by the bank, that is, the purchase of the property which was the subject of the loan application in the first place.

In such a situation it is easy to understand the attitude taken by the Court in not ordering the repayment by the defendant of the entire amount of the loan, especially where the undertaking could yet be complied with, and which occurred in due course, thereby putting the plaintiff bank in the same position as far as enforcement of security is concerned as it would have been in, had the undertaking been complied with properly at the outset, and allowing loss to be assessed also on the basis of the actual loss incurred taking into account the actual value of the security. In that regard the carelessness of the bank as to value was noted.

Those facts look entirely benign when placed beside the appalling facts of the present case, even though any breach of an undertaking by a solicitor, being an officer of the court, is a very serious matter indeed, and must not be in any way condoned. Otherwise the entire system breaks down. I cannot see how it would be appropriate to treat the breach of undertaking in this case in the same manner as in Coleman.

Mr Dowling has not been called to give evidence in this case and nor has Mr Hynes. Only they know between them what, if any, conversations took place between them in relation to the pressures mounting in relation to the deposit on the Dalkey site and the pending application on the 11th June 2007 to the Commercial Court, and the need to have the deposit on Dalkey paid urgently. Possibly Mr Hynes had no part in urging Mr Dowling to use the Moongate loan monies in order to get him out of the jam he was in having signed an unconditional contract for the purchase of Dalkey for €20,000,000. We simply do not know. I am entitled to conclude, and I do in all the circumstances, that the fact that the Moongate money was not paid to Anglo on drawdown was deliberate and not through oversight, and that the payment of the Dalkey deposit with those funds was a deliberate act by Mr Dowling made in the clear knowledge that it was a breach of the undertaking which his employer had signed. I have no doubt that Mr Dowling may well have convinced himself, or have been so convinced and persuaded by Mr Hynes, that in due course the fund would be made good by Mr Hynes when he got loan approval for the Dalkey project, and that all would be well in the end. But that can in no way excuse or minimise the deliberate and conscious action of misappropriating the Moongate loan proceeds for a purpose never intended by the plaintiff Bank. Indeed they had themselves by that time already declined to lend on the Dalkey property.

For these reasons I am satisfied that this case is not one which should follow the course adopted in Coleman. It is distinctly and significantly different as to the nature and degree of the breach of the undertaking, and the reasons for non-compliance with it. To conclude otherwise would be to say that a breach of an undertaking, no matter how egregious and dishonourable the conduct of the solicitor, really does not matter provided that the undertaking can still be complied with.

In this case the plaintiff's funds were never used for the purpose intended and undertaken. That is so fundamental and deliberate a breach at the very outset that nothing which can be done now in ease of the defendants should be contemplated, where such a course leaves the plaintiff bank in a parlous position. In effect the plaintiff's funds were misappropriated by being misapplied in a manner to which the plaintiff would never have agreed had it been asked. The plaintiff bank was deceived in this matter, and was not informed about the matter for some eighteen months. Mr Dowling hid what he had done from the bank, thereby depriving it of the opportunity to take steps to address the breach in a timely manner. Such steps would not have been limited to proceedings such as these, or the putting in place of the intended security.

Because of the nature of my conclusions, it is strictly speaking not necessary to address the question as to whether or not it is still reasonably possible for the defendants to comply with their undertaking. But I will make some comments in that regard.

It will be recalled that the vendor syndicate had sought in 2005 to be registered in the Land Registry as registered owners of two folios, namely Folios 13115 and 13116 of the Register of Freeholders, County Wexford, and also a further strip or piece of ground, the latter being on the basis of a possessory title by the vendor to them. In relation to the latter, queries had been raised, and in the four years which had intervened these queries had not been satisfied. There is at least the possibility therefore that those queries may never be capable of being dealt with finally, and the consequence of that could be that the vendor syndicate members may never

achieve registration as owners of the strip of ground in question, and therefore Mr and Mrs Hynes could not become owners of it either, after the discharge of the Anglo loan. If that were to occur it would mean that Mr and Mrs Hynes, following the payment of sums due to Anglo, could be registered only on the two folios and not the other area of land. If that was so, the undertaking could not be complied with as intended, as the loan sanction was for the purchase of the Moongate property and that in my view must be seen as including the area not covered by the two folios, as presumably the entire Moongate property was the subject of the planning application which was refused and was the security being offered to the plaintiff bank, as the valuation submitted took account of a significant development potential. In this regard, it must be remembered also that in the undertaking given to the Bank on the 5th June 2007 the defendants undertook that the borrowers had a good and marketable title to the Moongate property. That was by no means certain at that point in time, no more than it is now. That was not something which could properly have been the subject of the undertaking, and certainly was not something which was within the capacity of the defendants to ensure and guarantee in the way that they did. That is one difficulty in the way of compliance.

Even if the queries from the Land Registry can be dealt with, notwithstanding that in four years they have not been in spite of efforts made in that regard, it may still be a substantial length of time before the matter is sorted out and registration is completed. That is another difficulty, and something that the Court would have to take into account in deciding on how to exercise its discretionary jurisdiction.

The defendants, through their insurers, have designed and negotiated a way out of their difficulties, though at a substantial cost, albeit a lesser one than the repayment of the entire amount to the plaintiff bank, and whatever remains to be paid in relation to Anglo and the Moongate syndicate members who are still exposed to the Anglo loan. That involves the acquisition of the Anglo loan by the defendants and the Anglo charge. Thereafter, it is intended that a sale of the Moongate property would take place and that the proceeds would be paid to the plaintiff Bank in reduction of the amount due to it by Alan and Noreen Hynes. Even if the entire Moongate property (including the area of land outside the two folios) can be sold by the defendants, there will be a very significant shortfall to the plaintiff bank in order of at least €2,400,000. I have no evidence from which to even speculate by how much the value of Moongate will be diminished if the said area must be excluded from the sale in the event that the Land Registry queries related to possessory title cannot be dealt with quickly. It is possible that without that area of ground included in the sale, there is no development value at all, and that a price even lower than the current CBRE estimate can be achieved. I simply do not know. But it speaks to the whole question as to whether this undertaking is still reasonably capable of being complied with.

In addition to the above, it would seem necessary to achieve the co-operation of the syndicate members from whom, so far as can be gleaned from the file that has been made available, there is still no effective deed of Transfer in favour of Alan and Noreen Hynes. That may present a difficulty. I cannot know that with certainty however. I appreciate that the mechanism agreed between the defendants and Anglo seeks to side-step that difficulty by the defendants becoming mortgagees in possession and selling Moongate in that capacity, if the plaintiff was to be agreeable to that course of action. But I am looking at that scenario from the point of view of whether or not it is possible to still comply with the undertaking.

Finally, I want to deal with the allegation of contributory negligence made by the defendants on the basis that the plaintiff relied upon the defendants to complete this transaction for them rather than appoint their own solicitor to do so. Richard Lovegrove, solicitor, of Joint and Crawford, solicitors, and who it is safe to regard as an expert in conveyancing generally, and commercial conveyancing in particular, is of the view that there was nothing about this transaction, as it was originally intended, which was other than straightforward, and such as to lead the plaintiff bank to a conclusion that it ought to instruct its own solicitors to look after the bank's interests in perfecting its security. One set of vendors were selling a property to two purchasers who were obtaining a loan for that purpose. He did not consider that there was any more to it than that, and that it was therefore straightforward. In his view, the size of the transaction (i.e.€3,000,000) was not of itself a reason why the bank should have instructed its own solicitor. In his experience, which is considerable and across a wide range of different financial institutions, in the vast majority of cases an undertaking is given by the borrower's solicitor in relation to the loan cheque and the perfection of security, as in this case, and it would be the exceptional case where the bank would engage its own solicitor. He considered it now to be unusual for that to occur.

David Larney, solicitor, and managing partner in Gleeson, McGrath Baldwin, solicitors, and again a very experienced solicitor in conveyancing, both residential and commercial, accepts that there is no uniform practice with regard to the use of undertakings across the range of financial institutions, and that the use of undertakings is common even in commercial transactions. However, where he differs from Mr Lovegrove is that he does not consider that this transaction was straightforward, and that it would have been prudent for the bank to have its own solicitor to look after it for them. He refers to the potential difficulty about Capital Gains Tax and the necessity for the vendors to have obtained a CGT Clearance certificate to avoid Mr Dowling having to withhold 15% of the purchase money for example.

I must say I am completely unconvinced that there was something about this transaction which made it incumbent upon the plaintiff bank not to entrust the loan transaction to Mr Dowling. The amount of the loan by itself was certainly not so great, in 2007, as warranted that as a matter of course. There was no particular difficulty identified either to Ms. Walsh or to Mr Duggan which should have put them on their guard. In fact Mr Hynes wanted the matter to be dealt with urgently, and there is no doubt that the use of Mr Dowling facilitated that. But there is something singularly unattractive, and untenable, about an experienced firm of solicitors, such as the defendants are, pleading in its defence effectively that the type of transaction which they freely undertook was not one which they ought to have been entrusted with, and that by being so entrusted, the plaintiff bank in some way failed in its duty of care to itself.

Certainly in the present case there is no evidence to support this plea of contributory negligence. I am not persuaded by anything I have heard that this transaction was in some way so out of the ordinary from a conveyancing viewpoint, or even value, that it was imprudent of the plaintiff not to consider engaging its own solicitor to look after the question of security. The matter has undoubtedly become more complex now for a variety of reasons, but in June 2007 this was a relatively straightforward transaction, and was considered such by all concerned.

I have during the course of the hearing expressed a deal of sympathy for the predicament in which the named defendants find themselves as a result of the actions of an employee, one of some ten years standing and whom they obviously trusted to deal with high value transactions on their behalf, and for whose negligent and other acts and omissions they carry a vicarious liability, and I do so again. There is no suggestion that any of the named defendants in any personal way contributed to the appalling vista that now faces all concerned. But ultimately, they do as partners carry responsibility for Mr Dowling's actions, and of course it was incumbent upon them to ensure as far as possible, and in their own interests and for their own protection, that there were in place internal accounting and other procedures adequate to ensure that an employed solicitor could not expose them to losses of which they were unaware.

I am of the view therefore for all the reasons which I have set forth that an appropriate exercise of the court's discretionary

jurisdiction in these matters is, having regard to the nature of the breach and the circumstances which I have outlined at length, to order that the defendants repay to the plaintiff bank all sums paid into their client account on foot of this loan sanction, together with any interest due to date of payment, and I will so order.