Neutral Citation No. [2006] IEHC 337

THE HIGH COURT

2006 No. 72 SP

IN THE MATTER OF DANIEL COLEMAN, A SOLICITOR
AND IN THE MATTER OF AN UNDERTAKING IN WRITING DATED 15TH SEPTEMBER, 2003

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND
DANIEL COLEMAN
PRACTISING UNDER THE STYLE OF COLEMAN & COMPANY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 6th November, 2006.

The parties

1. The plaintiff is a licensed bank and is a subsidiary of the Governor and Company of the Bank of Ireland to which the Irish residential mortgage business and Irish residential mortgage assets of Bank of Ireland were transferred in 2004 in accordance with a Transfer Scheme under the Asset Covered Securities Act, 2001 (Approval of Transfers between the Governor and Company of the Bank of Ireland and Bank of Ireland Mortgage Bank) Order, 2004 (S.I. 421 of 2004). In this judgment the expression "the Bank" will be used to refer to the Governor and Company of the Bank of Ireland before the transfer became effective and the plaintiff thereafter.

2. The defendant is a solicitor practising under the name Coleman and Company, who acted for John Lane (the Borrower) in the purchase of property in County Cork and in the mortgage thereof to the Bank as security for a loan from the Bank to the Borrower in the circumstances hereinafter outlined from 2003 to date.

The facts in outline
3. On 8th August, 2003 the Bank issued what it described as a Mortgage Loan Offer Letter (the Offer Letter) to the Borrower offering an advance of €250,500 repayable over twenty years on security of property at Banane, Meelin, Newmarket, Cork, the purchase price of which was stated to be €295,000. As I understand it, it is common case that the property in question is the property registered on folio 41096 of the Register of Freeholders County Cork (the Mortgaged Property). On 12th August, 2003 the Borrower signed the acceptance form at the end of that document. In the loan application which the Borrower had submitted to the Bank he had named the defendant as his solicitor. At the same time as the Offer Letter was dispatched the Bank sent its standard "solicitor's pack" to the defendant which contained, *inter alia*, blank standard forms of the following documents for use in the mortgage transaction:

(a) solicitor's undertaking (the Undertaking);

(b) solicitor's Certificate of Title;

(c) cheque requisition form; and

(d) deed of mortgage/charge.

4. The defendant sent the completed Undertaking which was signed by him and dated 15th September, 2003 to the Bank in September, 2003. He requisitioned the loan cheque at the same time. The loan cheque, which was dated 29th September, 2003, named "Coleman & Company" as the payee. The defendant endorsed the loan cheque in favour of Joseph M. Jordan & Co., the solicitors acting for the vendors in the sale of the Mortgaged Property. In broad terms, the defendant undertook in the Undertaking, to which I will refer in more detail later, to ensure that the Borrower acquired good marketable title to the Mortgaged Property and to ensure that the Bank obtained a first legal charge on the Mortgaged Property. The defendant accepts that he is in breach of the Undertaking in that he has not perfected the Borrower's title or the Bank's security.

5. The Borrower defaulted in meeting the instalment repayments to the Bank. In December, 2004 the Bank called in the loan. By April, 2006 there was a total sum of €258,620.83 due to the Bank by the Borrower, which included arrears of €27,794.65 representing more than eighteen missed monthly instalment payments.

6. In March, 2004 the Bank, having identified "apparent irregularities" (the nature of which have not been disclosed by the plaintiff to the court) in the mortgage transaction at issue here and other mortgage transactions, the applications for which had all been introduced to the Bank by the same mortgage broker, made a formal complaint to the Garda Bureau of Fraud Investigation. That investigation is ongoing.

7. In June, 2004 the Gardaí, pursuant to a warrant, removed the defendant's file in relation to the purchase and mortgage transactions from his office. The file is still retained by the Gardaí. By letter dated 7th October, 2004 the Bank wrote to the defendant enquiring as to the precise status of the transaction and sought details of what was outstanding in order to fulfil the defendant's undertaking. The defendant was asked to complete a questionnaire which was enclosed. The defendant's response was that the Gardaí had his file and that he could not furnish the information sought, but that he would deal with all matters when the file was returned.

8. By letter dated 5th May, 2005 the Bank's solicitors, on the basis that the defendant was in breach of the Undertaking, called on the defendant for the immediate return of the sum of €250,500 which it was alleged was wrongfully released by the defendant. The defendant did not comply with the request. These proceedings, by way of Special Summons, were issued on 22nd February, 2006.

9. The plaintiff has not sought to recover the debt from the Borrower in legal proceedings. Nor has it sought to realise against the Borrower such security as is afforded by the Undertaking by proceedings for a "well-charging" order and order for sale.

The claim
10. In these proceedings the plaintiff seeks the following reliefs:

A. an order that the defendant compensate the plaintiff for loss suffered as a result of the failure of the defendant to comply with the terms of the Undertaking, whereby he undertook, inter alia, not to release €250,500 paid to him by the

Bank in his capacity as solicitor for the Borrower without first having obtained a duly executed Mortgage by the Borrower in favour of the Bank of the Mortgaged Property, the defendant having released the said monies in contravention of the Undertaking and without the authority of the plaintiff; and

B. further and other relief, including an order that the defendant repay to the plaintiff the monies misapplied by him in breach of the Undertaking;

C. interest; and

D. damages

11. The plaintiff's claim has been presented on the basis that the quantum of its loss occasioned by the defendant's breach of the Undertaking is the sum of €250,500 and interest thereon.

The Undertaking
12. The Undertaking was presented as being in the Law Society approved form (1999 edition). It was expressed to be made in consideration of the Bank agreeing to the drawdown of a loan facility in respect of the Mortgaged Property before the Bank's mortgage security had been perfected. It was subject to the payment through the defendant of the loan cheque, which is what happened. The defendant's obligations under the Undertaking were set out as four distinct steps as follows:

1. Under the heading "Good Title", to ensure, where the Borrower was acquiring the Mortgaged Property, that the Borrower would acquire good marketable title to it.

2. Under the heading "Execution of Security Documents", to ensure, that "prior to negotiating the loan cheque(s) or the proceeds thereof", the Borrower had executed a deed of charge in the Bank's standard form as produced by the Bank over the Mortgaged Property. This step also covered the procurement of confirmation by all necessary parties of the charge and compliance with the provisions of the Family Home Protection Act of 1976 (the Act of 1976). It also required the defendant to ensure that he was in funds to discharge all stamp duty and registration fees. The plaintiff has laid particular emphasis on the fact that the defendant's obligation was to ensure these requirements were in place prior to the negotiation of the loan cheque.

3. Under the heading of "Stamping, Registration & Lodgement with the [Bank]", that, as soon as practicable, the defendant would stamp and register the charge, so as to ensure that the Bank obtained a first legal charge on the Mortgaged Property and expeditiously, as soon as practicable thereafter, lodge certain documents with the Bank, including the title deeds and the original charge with a certificate of charge endorsed thereon, together with the defendant's certificate of title in the Law Society's standard form.

4. Under the heading "Documents in Trust", that, pending compliance with paragraph 3, the defendant would hold all the title documents of the Mortgaged Property in trust for the Bank.

13. There was endorsed on the Undertaking an irrevocable authority from the Borrower and a direction to give the Undertaking, an integral part of which was an undertaking by the Borrower not to discharge the defendant's retainer in connection with the transaction until the Borrower should have procured from the Bank an effective release from the obligations imposed by the Undertaking. Further, the Borrower's spouse signed a consent for the purposes of the Act of 1976 in relation to both the retainer and authority given by the Borrower to the defendant and the Undertaking given by the defendant to the Bank.

The defendant's response to the claim
14. The defendant acknowledges that he is in breach of the Undertaking. While, through his counsel, he did take issue with some of the legal propositions advanced on behalf of the plaintiff, the substance of his defence of the proceedings was that he required time to perfect the Bank's security in accordance with the Undertaking.

The Law
15. Counsel for the plaintiff referred the court to two paragraphs in the latest edition of *Cordery on Solicitors* as outlining the nature of the jurisdiction of the court to enforce solicitors' undertakings. In paragraph 964 the editors of Cordery state as follows:

"The court, by virtue of its inherent jurisdiction over its own officers, also has power of enforcement in respect of undertakings. The court has a discretion whether or not to exercise it summary jurisdiction and will only do so in clear cases. The jurisdiction of the court is compensatory in effect, although it may be said that it retains a disciplinary slant since it is only exercised where the conduct of the solicitor is inexcusable and merits reproof. To be enforceable by the court the undertaking must be a personal undertaking, given by the solicitor professionally, i.e. as a solicitor, it must be clear in its terms, the whole of the undertaking must be before the court, and the undertaking must be one which is capable of being performed ab initio."

16. As authority for the proposition set out in the first sentence in that quotation the decision of the Court of Appeal of England and Wales in *Udall v. Capri Lighting Limited* [1987] 3 All E.R. 262 is cited. *John Fox v. Bannister King & Rigbeys* [1987] 1 All E.R. 737, also a decision of the Court of Appeal, is cited as authority for the proposition set out in the second sentence.

17. The commentary in paragraph 965 is as follows:

"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."

18. The decision of the Court of Appeal in the *John Fox* case is the most recent authority cited for the foregoing propositions.

19. The above quotations are from the most recent edition of Cordery updated by Issue 32 in August, 2006.

20. The substantive claim in the *Udall* case was for the price of goods sold and delivered. Before summonses for summary judgment were heard by the court the defendant's solicitor gave an oral undertaking to the plaintiff's solicitor that he would procure the execution of charges in favour of the plaintiff by the defendant's directors over their homes or life assurance policies, in return for

which the plaintiff's solicitor agreed to adjourn the summonses. The charges were not executed. In due course judgment was entered against the defendant. However the defendant went into liquidation and the judgment could not be enforced. The plaintiff then applied for an order that the defendant's solicitor should procure the execution of charges by the directors pursuant to his undertaking. At first instance the court ordered that the undertaking be performed, without considering whether performance was possible. On appeal, the Court of Appeal held that it was wrong for the judge at first instance not to take into account the fact that it was impossible for the solicitor to perform the undertaking or to consider the possibility of making a compensatory order against him. The case was remitted for further consideration. Balcombe L.J. in his judgment (at p. 268) summarised the options open to a party who wishes to enforce a professional undertaking given by a solicitor: by an action at law, if there is a cause of action; by an application to court to exercise its inherent supervisory jurisdiction; or by an application to the Law Society, which he recorded could only take disciplinary action and had no power to order payment of compensation or to procure specific performance of an undertaking. Balcombe L.J. then went on to consider the jurisdiction of the court if the second option was availed of and he summarised what he considered to be the true position as follows.

21. First, he described the nature of the court's summary jurisdiction by reference to a passage from the speech of Lord Wright in the House of Lords in *Myers v. Elman* [1940] A.C. 282. In this case, counsel for the plaintiff relied on that passage in which Lord Wright stated (at p. 319):

> "The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally as was said by Abinger C.B. in *Stevens v. Hill* [(1842) 10 M.& W. 28]. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term 'professional misconduct' has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of the solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive, but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action."

22. Balcombe L.J. then expanded on that explanation stating:

> "(2) Although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof …
>
> (3) If the misconduct of the solicitor leads to a person suffering loss, then the court has the power to order the solicitor to make good the loss occasioned by his breach …;
>
> (4) The failure to implement a solicitor's undertaking is *prima facie* to be regarded as misconduct on his part, and this is so even though he had not been guilty of dishonourable conduct; … However, exceptionally, the solicitor may be able to give an explanation for his failure to honour his undertaking which may enable the court to say that there has been no misconduct in the particular case: see [*John Fox*] case …
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> (5) Neither the fact that the undertaking was that a third party should do an act nor the fact that the solicitor may have a defence to an action at law (e.g. the Statute of Frauds), preclude the court from exercising its supervisory jurisdiction … However, these are factors which the court may take into account in deciding whether or not to exercise its discretion and, if so, in what manner.
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> (6) The summary jurisdiction involves a discretion as to the relief to be granted: … In the case of an undertaking, where there is no evidence that it is impossible to perform, the order will usually be to require the solicitor to do that which he has undertaken to do …
>
> (7) Where it is inappropriate for the court to make an order requiring the solicitor to perform his undertaking, e.g. on the grounds of impossibility, the court *may* exercise the power referred to in para. (3) above and order the solicitor to compensate a person who has suffered loss in consequence of this failure to implement his undertaking: see *John Fox* … It is stated in the text books (see *Cordery on Solicitors* (7th edition, 1981) p. 122 …) that the court will not enforce an undertaking which is incapable of being performed *ab initio*. If this statement means no more than that the court will make no order in vain, then I would not quarrel with it. If however it is intended to suggest that the court will not order compensation for breach of an undertaking which is *ab initio* incapable of performance, then it is difficult to understand the principle on which it is based and I doubt whether it is an accurate statement of the law."

23. 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 the 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.

24. The *John Fox* case, which predated and was applied in the *Udall* case, illustrates those features in a factual context. There the plaintiff firm of solicitors and the defendant firm of solicitors both acted for a Mr. Watts in relation to different business. The defendant firm held £18,000 as part of the proceeds of a sale in which they acted for Mr. Watts to his account. When Mr. Watts failed to meet the plaintiffs' professional fees the plaintiffs obtained a form of authority from Mr. Watts authorising the defendants to give an undertaking that they would retain the £18,000 in their account for payment to the plaintiffs. The defendants wrote to the plaintiffs stating that they would retain the sum of money "until you have sorted everything out". Subsequently the plaintiffs requested the defendants to release the sum to them, but on Mr. Watts' demand the defendants transferred the amount to him. Subsequently he became bankrupt. The plaintiffs applied to the court to exercise its inherent jurisdiction over solicitors and to enforce the undertaking contained in the defendants' letter. At first instance, it was held that the words in question constituted an undertaking on which the plaintiffs had been entitled to rely and that the defendants had acted in breach of that undertaking. The relief granted was an order that the defendants pay the sum of £18,000 into a deposit account to the credit of the client to remain

there until further order of the court. On appeal, the Court of Appeal upheld the finding that there was an undertaking and that it had been broken. However, the Court of Appeal held that to order the defendants to create a fund of £18,000, and place it in an account to the credit of Mr. Watts could not be right because of the intervening bankruptcy of Mr. Watts. Nor was the resolution to be found in an order that the sum of £18,000 be paid into a joint account or into court, because it would leave an issue between the plaintiffs and the defendants which would decide the entitlement to the fund to be determined. The Court of Appeal thought it appropriate to adopt a different approach, which was rationalised as follows by Nicholls L.J. (at p. 742).

> "The purpose of the undertaking was as I have sought to describe. What Mr. Fox lost by the breach of the undertaking was the opportunity to take whatever steps might have been open to him at the time to stop the £18,000 being paid to Mr. Watts and, ultimately, to have recourse to that money to meet his bill. What those debts were, and whether they would have been successful, are not matters canvassed adequately in the evidence in its present form. On the present evidence I am not satisfied that, if the undertaking had been faithfully honoured, John Fox would necessarily have obtained payment to them of £18,000. Nor, conversely, am I persuaded that they would necessarily have been left empty-handed.
>
> That being so, I consider that the appropriate order is to direct an inquiry, in these proceedings, as to what loss, if any, John Fox suffered by reason of the breach of the undertaking. If, as contended by Bannisters, John Fox suffered no loss, Bannisters will not be required to make any payment to John Fox. If, however, John Fox can prove loss to the satisfaction of the Master who will conduct the inquiry, it would only be right that Bannisters as officers of the court should now make good to John Fox the amount of that loss suffered as a result of the breach of the undertaking."

25. It is necessary now to consider the extent, if any, to which the Superior Courts in this jurisdiction have similar inherent jurisdiction to enforce solicitors' undertakings, and, if so, the nature of the jurisdiction and how it is invoked. The first two issues were considered by this Court (Lardner 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). In that case, on the completion of a sale of property by the second defendant to the first plaintiff, the first defendant, the solicitor acting for the second defendant as vendor in the transaction, gave an undertaking to the second plaintiffs, the solicitors acting for the first plaintiff as purchasers in the transaction, in which he undertook "to hold the full purchase money on trust for your firm pending receipt by you of a certified copy folio showing An Post as the registered absolute owner of the property in sale and failing production of the said folio on or before 31st December, 1990 to refund all monies paid by you on behalf of the purchaser without interest, costs or compensation in accordance with Special Condition 4 of the contract for sale in this case". The defendants argued that the undertaking was not enforceable against the first defendant because it invoked and depended upon the jurisdiction to discipline solicitors as officers of the court and that, while the jurisdiction existed in Ireland prior to 1920, it no longer existed and that a solicitor's undertaking was only enforceable on the same terms as any contractual obligation. The argument advanced by the defendants was that provisions of the Solicitors (Amendment) Act, 1960 (the Act of 1960), which replaced Part III of the Solicitors Act, 1954 which had reorganised disciplinary procedures in relation to solicitors but had been held to be unconstitutional, did not provide that solicitors are officers of the court.

26. Having considered ss. 7 and 8 of the Act of 1960, Lardner J. stated as follows:

> "It is nowhere provided that where the conduct of a solicitor is alleged to constitute a civil or criminal wrong, a breach of contract or of trust, the ordinary legal procedures or remedies are not available to be pursued by a complainant. This is so although 'misconduct' which may be the subject of a report of the Disciplinary Committee is given a broad meaning (see section 3) and may include for example a felony or misdemeanour. I am led to the conclusion that the disciplinary code and procedure by inquiry before the Disciplinary Committee was instituted to provide a new procedure by which the Law Society might exercise internal discipline in the profession subject to the control of the court and as provision additional to existing civil and criminal jurisdiction and procedures available to complainants. Nowhere does the 1960 Act expressly provide that the inherent jurisdiction of the court to discipline its officers shall terminate or be replaced by the new provision nor do I find any necessary implication that this was intended. The submission that because the 1954 and the 1960 Solicitors Acts contain no provision that solicitors shall be officers of the court, the pre-1920 jurisdiction of the court in regard to enforcement of undertakings has no basis and no longer exists is in my view unfounded. By sections 1 and 3(3) of the 1960 Act it is required to be construed together with the 1954 Act referred to as the Principal Act. Only Part III of the 1954 Act concerning the Disciplinary Committee was declared unconstitutional. The remainder of it enjoys a presumption of constitutionality including section 84(1) which provides that
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> > 'A reference in any enactment to a solicitor … shall be construed as a reference to a solicitor within the meaning of this Act.'
>
> One such reference appears in section 78 of the Judicature (Ireland) Act, 1877 which provides that solicitors to whom the section applies shall be deemed to be officers of the Court of Judicature and preserves the jurisdiction of the court over solicitors exercised by courts of law and equity prior to the passing of this Act. Section 78 is unrepealed and was carried over in 1922 and in 1937 as part of the law in force in this country. In my judgment the jurisdiction which the plaintiffs have invoked continues to exist."

27. Later in his judgment Lardner J. considered the nature of a solicitor's undertaking and stated as follows:

> "A solicitor's undertaking is commonly understood as being one which can be safely relied upon. He is an officer of the court and it is long established that where a solicitor gives an undertaking the court will compel him to carry it out unless there is good reason for his not doing so. I have already referred to an example in Ireland reported in 53 I.L.T.R. at page 57 (51?). The jurisdiction is based on the court's right to require its officers to observe a high standard of conduct. It is exercised where a solicitor acting professionally for a client and in that character gives his personal undertaking whether to the client or a third party or to the court in the course of proceedings. Further requirements for its exercise are that the undertaking is clear in its terms; that the whole of the agreement to which it relates is before the court and that it is one which is not impossible for the solicitor *ab initio* to perform."

28. That passage is consistent with the commentary in the latest edition of Cordery.

Procedure

29. In the *I.P.L.G. Limited* case the issue of the enforcement of the undertaking arose in a plenary action. The earlier case referred to by Lardner J. in his judgment was In the Matter of a Solicitor [1919] 53 I.L.T.R. 51. It is not clear from the report of that case whether it was a decision made on foot of a summary procedure. The manner in which it was entitled would suggest that it was, but against that there is a reference to costs having been ordered "against vendors".

30. In this case, it was submitted on behalf of the plaintiff that it was entitled to proceed by way of special summons by virtue of O. 3(22) of the Rules of the Superior Courts, 1986 (the Rules).

31. Order 3 lists the classes of claims in respect of which proceedings by way of special summons may be adopted. Proceedings to enforce a solicitor's undertaking do not fall within the classes set out at (1) to (20) of Order 3. The Rules of the Superior Courts (No. 2) (Amendment of Order 3), 2001 (S.I. 269 of 2001), which became operative on 16th July, 2001, varied O. 3(21), which now covers, *inter alia*–

> "Any other proceeding which is required or authorised by law to be brought in a summary manner for which no other procedure is prescribed by these Rules."

32. The essence of the inherent supervisory jurisdiction is that it may be invoked in a summary manner. Where there are no existing proceedings in which an application may be brought, as here, it seems to me that an application to enforce a solicitor's undertaking may be brought by special summons under O. 3(21), as it is now in force. It is also a matter which the court may think fit to dispose of by way of special summons so as to come within O. 3(22), as suggested by counsel for the plaintiff. But that requires some qualification. While it may be appropriate to initiate a claim to enforce a solicitor's undertaking by way of special summons, the summary process cannot be operated in such a way as to perpetrate an injustice on the solicitor defendant. In the *John Fox* case, Sir. John Donaldson M.R. explained the summary character of the procedure stating as follows (at p. 743):

> "Its 'summary' character lies not in the burden or standard of proof, although it is only exercisable where there has been a serious dereliction of duty, but in the procedure whereby it is invoked. This is normally by originating summons, although it can be by simple application in an action where the conduct complained of occurred in the course of that action, and will not automatically or usually involve pleadings, discovery or oral evidence, although the court can, in appropriate circumstances, require a definition of the issues (by pleadings or otherwise), discovery and oral evidence."

Application of the law to the facts

33. I consider the plaintiff's claim for compensation by way of repayment of the sum of €250,500 together with interest as a means of enforcing the Undertaking to be misconceived for the reasons set out below.

34. In my view, the plaintiff has misconstrued the Undertaking and has misinterpreted its overall effect. In particular, the plaintiff has founded its claim for return of the amount of the loan cheque on one segment of the Undertaking without regard to its context and the Undertaking as a whole. When read as a whole, it is clear that the purpose of the Undertaking was to ensure that, notwithstanding that the loan was advanced before the Bank's security was perfected, the Bank would get a good security on the Mortgaged Property for the loan in accordance with the terms of the Offer Letter. That was the defendant's ultimate obligation. It has not been fulfilled because it is undoubtedly the case, as was averred to in the plaintiff's grounding affidavit and as the defendant acknowledges, that the Borrower still does not have any registered or marketable title to the Mortgaged Property, the Bank still does not have any registered and enforceable first legal mortgage thereover, and the original title deeds and documents, duly stamped and registered, have never been delivered up to the Bank.

35. As I have already stated in outlining the provisions of the Undertaking, it set out the steps which had to be taken by the defendant to achieve the objective of the Undertaking and to fulfil his obligations thereunder. The segment of the Undertaking upon which the plaintiff relied in support of its entitlement to recover the amount of the loan cheque was paragraph 2 and, in particular, the requirement there that the defendant ensure that the Borrower had executed the deed of charge prior to negotiating the loan cheque. It is necessary to consider the evidence adduced on the issue of whether the defendant negotiated the loan cheque without ensuring that the Borrower had executed a deed of charge.

36. The evidence that the plaintiff has put before the court in relation to the title to the Mortgaged Property, the Borrower's interest therein, the procurement of a mortgage from the Borrower in favour of the Bank, and the course of the correspondence in the purchase transaction between the defendant as solicitor for the purchaser, the Borrower, and the vendor's solicitors is contained in an affidavit sworn by Brendan Moriarty, the plaintiff's solicitor, who inspected the defendant's file at the offices of An Garda Síochána on two occasions under Garda supervision. In his affidavit Mr. Moriarty averred that he could find no trace of any mortgage deed in favour of the Bank on the defendant's file. However, in his replying affidavit, the defendant has exhibited what is described as a "true copy" of a deed of mortgage executed by the Borrower and Mary Lane whose signatures appear to have been witnessed by the defendant. The defendant did not aver as to when that document was signed, although he did refer to the client's retainer and authority which is an integral part of the Undertaking and he averred that he believed from his subsequent conversations with the Borrower that the Borrower and his spouse would fully assist in perfection of the security required pursuant to the Undertaking. In a subsequent affidavit filed on behalf of the plaintiff it has been averred that the form of mortgage exhibited by the defendant was not the form that would have been available to the defendant at the time when he should have secured the execution by the Borrower.

37. I think it is reasonable to infer on the evidence that the defendant did not comply with para. 2 of the Undertaking, as he should have done. However, in my view, if it is possible for him to fulfil the overall purpose of the Undertaking and his ultimate obligation and furnish the Bank with good security on the Mortgaged Property in accordance with the terms of the Offer Letter, and if he does so, there will be no relief which the court can give to the plaintiff in exercise of its inherent jurisdiction. The plaintiff will have obtained what it was entitled to under the Undertaking. Therefore, given that the court's jurisdiction is discretionary, whether the defendant should be precluded from fulfilling his ultimate obligation, if fulfilment is possible, is the crucial question.

38. In effect, in seeking the relief it has sought, the plaintiff has purported to pre-empt the court from considering whether it is possible to perform the Undertaking as a whole and to procure for the plaintiff a good security on the Mortgaged Property in accordance with the terms of the Offer Letter. If it had not adopted that course, but had sought to enforce the Undertaking as a whole, it would have been open to the court to make the type of order which the authorities indicate is usually made, namely, to require the defendant to do what he has undertaken to do, where there is no evidence that performance is impossible.

39. On the evidence presented in this case, the defendant has some distance to go to be in a position to procure a good security on the Mortgaged Property in accordance with the Offer Letter. As I have stated, the Mortgaged Property is registered on folio 40196 County Cork. The vendors are still registered as owners on the folio and a charge in favour of a building society is registered as a burden on the folio. Included on the defendant's file is an undated and unstamped transfer executed by the vendors in favour of "Joseph Lane". However, the defendant has averred that the charge in favour of the building society has been discharged and that the appropriate evidence of discharge is available. Given the vendor's averment that he believes that Borrower and the Borrower's spouse will assist him in perfecting the security, and given that it is clear on the evidence that, on closing the purchase transaction by post, he furnished the loan cheque to the vendor's solicitors to be held in trust pending receipt of searches, transfer and title, all

acts and searches explained and an undertaking to discharge the building society loan from the proceeds of sale, I do not think it would be appropriate to conclude that it is impossible for the defendant to comply with the Undertaking, although he obviously cannot do so while his file is retained by the Gardaí.

40. Further, and I consider this to be the fatal flaw in the plaintiff's claim, on the evidence before the court the relief which the plaintiff seeks would not be commensurate with compensating the plaintiff for the loss it has suffered in consequence of the defendant's failure to implement his ultimate obligation under the Undertaking. As I have stated, the Offer Letter discloses that the purchase price for the Mortgaged Property was €295,000. The defendant has put before the court a valuation report from a firm of auctioneers and valuers operating in County Cork that the value of the Mortgaged Property as of 12th June, 2006 was €140,000. Having regard to the pending Garda fraud investigation, I consider it prudent to be cautious about drawing inferences from the evidence put before the court about the "apparent irregularities" which are the subject of that investigation. However, I can say that I think it reasonable to infer that, if the defendant had fulfilled his ultimate obligation under the Undertaking within a reasonable time, the plaintiff would not have obtained a security which was worth €250,500. In plain terms, as counsel for the defendant put it, if the plaintiff is entitled to the relief it claims, it would mean that it would be better off if the defendant did not comply with his ultimate obligation under the Undertaking to furnish good security than if he did, and that cannot be right. Construing the Undertaking as a whole, the defendant's ultimate obligation was to furnish the Bank with a good security on the Mortgaged Property in accordance with the terms of the Offer Letter. To date he is in breach of that obligation. However, if it is impossible to comply with that obligation, and I am not satisfied on the evidence that it is, the measure of the plaintiff's loss in consequence of the defendant's breach is the value of the security which it should have obtained, but will not obtain.

41. The plaintiff not only ignored the true import of the Undertaking but also strayed outside the narrow jurisdiction it had invoked, advancing an argument based on agency. The thrust of that argument was that the defendant was an agent of the Bank, that it acted in excess of its authority in endorsing the loan cheque in favour of the vendor's solicitors and that the measure of the Bank's loss was the value of the loan cheque. If the plaintiff is correct in characterising the defendant as its agent, and I express no opinion on that point, and it wishes to pursue a case based on agency, it must do so as it would against any agent whom it alleges is in breach of his contract of agency. If it were to do so, it might be then open to the defendant to mount the types of defence canvassed by counsel for the defendant in this case, for example, apportionment of liability in reliance on s. 34(1) of the Civil Liability Act, 1961 or the failure of the plaintiff to mitigate its loss. In my view, such pleas, even if established, are not defences where a plaintiff properly invokes the court's inherent jurisdiction against a solicitor, although they may be factors to be taken into account in the exercise of the court's discretion.

42. Finally, in reaching the conclusion I have reached that the plaintiff's approach in this matter has been misconceived, I am very conscious of the serious risk to the integrity of the lending system in relation to residential mortgages which this case has exposed. The evidence is that the plaintiff has advanced in excess of €2.2 billion on residential mortgage loans, such as the loan to the Borrower in this case, in the financial year to August, 2006 and in practically all of those cases the loan cheques were issued to the borrowers through their solicitors on foot of and in total reliance on undertakings in the Law Society approved format. The evidence is that most, if not all, of the other major residential mortgage lenders operate in the same way. I in no way condone the conduct of the defendant in this case, which I note the plaintiff has not reported to the Law Society, but which, on the evidence adduced, I consider to be inexcusable. However, I am satisfied on the authorities and on the basis of principle that the plaintiff is not entitled to the relief it seeks.

Order

43. There will be an order dismissing the plaintiff's claim.