Neutral Citation: [2013] IEHC 494

THE HIGH COURT

Record Number: 2010 No. 3135P

Between:

Rosbeg Partners

Plaintiff

And

LK Shields (A Firm)

Defendant

Judgment of Mr Justice Michael Peart delivered on the 8th day of November 2013:

1. When you engage a solicitor to act in the purchase of property, you are entitled to expect that after the purchase monies are paid to the vendor your solicitor will ensure not only that you own what you paid for, but also that your ownership will be properly registered in the Registry of Deeds or Land Registry, or indeed both, as the case may be. That is what the solicitor undertakes to do on foot of the retainer.

2. If your solicitor fails, in breach of the duty of care owed to you, and/or in breach of his contract with you, to properly register your title after the purchase monies have been paid over, there can be consequences for you, which may not become apparent for many years.

3. While the solicitor will, or at least should, be aware that he has not registered your title following the completion of the transaction with the vendor, you will not become aware of it until you are so informed, perhaps by your solicitor. Alternatively, you may hear of the problem through a third party, such as your Bank which will have been expecting to receive your title deeds as part of its security for any loan advanced, and may ask you to get onto your solicitor to find out why the deeds have not arrived. This may reveal the fact that the title has not yet been registered.

4. It must be a very rare case where you discover from a party who has offered to buy the property from you some 13 years later that the records in the Land Registry show that you do not appear to own all of what he thought you had bought. That is what has happened in the present case.

5. The plaintiff claims that because its title to Unit 520 Western Industrial Estate, Naas Road, Dublin 12 ("the property") was not properly registered by the defendant firm after it bought it in 1994 it lost out on a sale of that property to Mr Pino Harris for €10 million in 2007 at the height of a property bubble, because it was unable to satisfy the purchaser at a critical point of time that he had a good marketable title to all the property in sale, and therefore the precise acreage of the property in sale. The present value of the property is in the order of €1 million.

6. After an offer was made in writing, but before any contract for sale was prepared (and I leave aside for the moment the question as to whether or not the offer had been accepted by the plaintiff), the purchaser, who had indicated in writing a willingness to purchase the property for €10 million, told the plaintiff via its estate agent that it did not appear to own a portion of the property in question, and that when it had sorted the matter out it should revert if it so wished.

7. By the time the title was fully and properly registered, the property market had weakened significantly, and in addition that purchaser was no longer interested at that price, and eventually not interested at all. The property has not been sold since.

8. The plaintiff claims that the loss of that sale, less the current value of the property, is the measure of his loss, in addition to a sum for interest to date on bank borrowings which it would not have had to pay if the sale had completed, since it would have paid off a substantial portion of those borrowings from the proceeds of sale in compliance with a commitment given to its bank.

9. The defendant firm accepts that the title had not been properly registered by this time, but says that there is no evidence that the plaintiff ever accepted the offer of €10 million which was made, and therefore that the reason this sale did not proceed was not because the title to the property was not properly registered.

10. In addition, or alternatively perhaps, the defendant claims that the fact that a portion of the property had not been registered as it should have been, ought not to have prevented a contract for sale being prepared and executed, if indeed the plaintiff had accepted the offer, since there was never any doubt that the plaintiff owned the entire property in sale, and the difficulty which came to light could easily have been dealt with by the inclusion of appropriate Special Conditions in the Contract for Sale.

11. They also plead that the plaintiff has failed to mitigate its losses because, at a time when the property market had already begun its sharp decline by early 2008, it turned down a verbal offer of €8 million made by the same Mr Harris in mid-February 2008, and a later verbal offer by him of €6 million in August 2008 because it was holding out for more. In such circumstances the defendants say that the plaintiff ought not to be found liable for €9 million, being the difference between that offer and its present value of about €1 million, even if the Court is satisfied that this offer had been accepted.

The title problem in more detail:

12. In February 1994 the plaintiff company agreed to purchase Unit 520 Western Industrial Estate, Naas Road, Dublin 12 for a sum of IR£765,000 from Packaging Resource Limited. The defendant firm was retained for the transaction. The purchase was completed on the 6th May 1994 when the balance of the purchase monies was paid over to the vendor.

13. The property comprised 5 Lots made up of 5 separate titles. Lot 1 was a registered title (Folio 90991F, Co. Dublin). Lots 2 and 4 were unregistered title (i.e. Registry of Deeds), Lot 3 comprised both registered title (i.e. part of Folio 23011F, Co. Dublin) as well as unregistered title. Lot 5 was a possessory title. It is the title to Lot 3 which has caused the problem in this case.

14. Lot 3 comprised, inter alia, part of Folio 23011F, Co. Dublin. If the defendant firm had attended to matters correctly upon completion, the transfer and conveyance in respect of the entire of Lot 3 would have been part of the documents being lodged in the Land Registry to record the change of ownership, and would have led to a new folio being opened in respect of the part of Folio 23011F being acquired by the plaintiff, leaving the balance of Folio 23011F in the ownership of the vendor. Each folio would show by reference to a marked map what was comprised in the folio, and what remained in Folio 23011F. This is a perfectly normal situation, and happens all the time. There is nothing complicated about it provided that suitable maps are lodged showing, clearly marked, the respective lands.

15. What appears to have happened is that a single composite Deed of Transfer was executed by the vendor in respect of the five Lots in sale. This deed was handed over to the defendant firm on closing on the 6th May 1994 when the purchase monies were paid over. The deed was duly stamped with the appropriate stamp duty on the 8th June 1994. Sometime between that date and 7th February 1995 the deed was lodged in the Registry of Deeds in order to effect registration in respect of the unregistered lands. That registration was completed on the 7th February 1995 according to the face of the deed itself.

16. There is a memo dated 24th October 1996 on the defendant's conveyancing file which indicates that a member of staff was requested to lodge the deed and other necessary documents in the Land Registry in order to effect the registration of the change of ownership in respect of Folio 90991F, and part of Folio 23011F. The documents were lodged in the Land Registry, presumably shortly after the date of that memo. All would have been well thereafter were it not for the fact that, as often happens, queries were raised by the Land Registry on the 6th November 1996 in relation to boundaries and the maps which accompanied the deed to the Land Registry. An additional feature is that a 1992 Deed of Transfer and Conveyance (which included part of Folio 23011F Co. Dublin) from Pension Nominees Limited to Packaging Resources Limited (which was the vendor to the plaintiff company) had not been registered by the time this purchase was completed, and the defendant firm undertook the task of registering that transaction too in the Land Registry, as part of the registration process in respect of the plaintiff's purchase.

17. Following the queries raised by the Land Registry on the 7th November 2006 the defendant firm immediately wrote to the vendor's solicitors telling them that the Land Registry had rejected the map attached to the deed, and requested them to furnish another map. It should be said that on closing the vendor's solicitor had provided the defendant firm with an undertaking to deal with any Land Registry queries. For the remainder of 1996, all of 1997, 1998, and 1999 the defendant firm endeavoured to get the vendor's solicitor to sort out the mapping problem, but to no avail. They kept in touch with AIB also, letting them know that they were trying to deal with the Land Registry queries. The final letter to the vendor's solicitors seems to be one dated 22nd March 2000 pointing out that the matter was extremely urgent and requesting that they receive the required map duly marked and coloured per their undertaking, as a matter of urgency. If there are further letters to the vendor's solicitor, I have not seen them. The defendant firm's file seems to resume only in September 2007, and I shall come to that resumption in due course.

18. On the 3rd November 1998 the firm wrote to AIB Bank Securities Unit and enclosed all the documents of title except those which were the subject of the Land Registry registration application. The letter enclosed a photocopy of the deed of transfer and conveyance, and stated that same had been registered in the Registry of Deeds, and indicated that it *"has now been lodged for registration at the Land Registry"*. The author of the letter went on to state that once registration has been completed he would forward it to the Bank.

19. However, as I have referred to, the mapping queries raised by the Land Registry were not dealt with, and the registration application therefore could not progress to completion. The vendor to the plaintiff, Packaging Resource Limited, and its solicitor, were of course unaware of any of this, and indeed would have no reason to make any inquiries about the progress of the plaintiff's registration in respect of the property purchased.

20. In 2005, Packaging Resource Limited decided to sell what it still owned of the lands in Folio 23011F to Bank of Ireland Trust Services, and did so by Deed of Transfer dated 25th October 2005, thereby effecting the transfer of the lands in Folio 23011F. Because the transfer of part of that folio to the plaintiff in 1994 had not by that time been registered and a new folio opened in respect of the part of it that the plaintiff had bought, the transfer to Bank of Ireland Trust Services achieved on paper at least the transfer not only of the retained part of the folio, but also the lands which had been bought by the plaintiff in 1994.

21. The plaintiff was aware by late 1998 that the deeds had not yet been received by AIB because it wrote to the defendant firm asking them to get the deeds to AIB. Presumably AIB had been asking the plaintiff company about the deeds and the delay. I notice that on the 23rd September 1998 the firm wrote to the plaintiff company stating that they had received the plaintiff's faxed letter of that date. They regretted the delay in dealing with the matter. The author confirmed that he was arranging for the title deeds to be sent over to AIB by registered post. By the 6th October 1998 the deeds had not been sent, and the plaintiff wrote again by faxed letter stating that the bank had not received same. Thereafter the defendant firm wrote the letter dated 3rd November 1998 to which I have already referred at paragraph 18 above.

22. The fact that this mapping problem existed, that registration had not been completed, and that the deeds had not yet reached AIB had no practical consequences for the plaintiff at that time as it had vacant possession of the entire property. Nevertheless it was anxious to get all loose ends sorted out in so far as they were aware of them.

23. The plaintiff carried on its various businesses in the intervening years, with the assistance of bank borrowings with which it was also able to expand by the acquisition of other businesses. It enjoyed a good relationship with its bankers, AIB. In 2005 the plaintiff received a loan sanction from AIB for an additional €5.9 million for acquisitions. Among the repayment conditions in this approval was one that there would be a capital reduction of €8 million from the sale of Unit 520 by January 2007. With that in mind architects were engaged to give advice to the plaintiff so that the development potential of the property could be maximized in the price to be obtained for it in due course.

24. The property adjoins another property which a short time previously had been bought for a good price by Mr Pino Harris, who is a well-known and respected businessman, and who was active in the property market around this time. He was known to be buying up land in this area, and he was an obvious target for the sale of the plaintiff's premises. He also has the reputation for being a man who likes matters to proceed quickly and efficiently once he has made an offer. The plaintiff company had considered two options in relation to the development potential. They could decide to obtain planning permission and develop the site themselves, or they could sell it to Mr Harris so that he could maximize the potential of the site himself since he already owned a significant amount of adjoining and adjacent land. They decided on the latter course.

25. The plaintiff's agent, Ben Pearson, and Mr Harris's agent, William Harvey were in touch with each other. Both men are experienced negotiators and knew each other. In fact, it appears from the evidence of Bob Stewart, the owner of the plaintiff company, that when he bought the property in 1994, Mr Pearson had acted for him then, and Mr Harvey had acted for the vendor, Packaging

Resource Limited. So each knew the property well and for a long time. There had been very substantial sales of similar properties in the immediate area of the plaintiff's premises over the previous year or so.

26. In early 2006 a verbal offer of €6.5 million was received by Mr Pearson from Mr Harvey acting on behalf of Pino Harris. That offer was not accepted, because the plaintiff knew that property values in the area were increasing all the time. Mr Stewart felt that he would eventually get the right price for the property, and was prepared to wait. A valuation from Douglas Newman Good in 2006 indicated a market value of €10,000,000. In fact Mr Stewart himself believed the property might fetch as much as €15,000,000 at that time.

27. As I have said, the plaintiff's bank was expecting the property to be sold by January 2007 so that there could be a reduction of €8,000,000 in the company's borrowings. Moving into 2007 Mr Pearson was encouraged to redouble his efforts to achieve a purchaser. Mr Stewart has said that he told Mr Pearson that he would like to get €12 million, but to remember that *"our back-stop figure is €10,000,000"*. (T.2, Q.67)

28. Around the 15th September 2007 Mr Pearson telephoned Mr Stewart with the news that Mr Harvey had phoned to say that Mr Harris would offer to pay €10 million for the property. He was told also that he would allow the plaintiff remain in the premises on a short-term rental agreement while it sought alternative premises from which to run its business. No rent had been discussed or agreed at that stage though.

29. The offer was put in writing in the form of an email dated Friday 21st September 2007 from John Burns (who is Mr Harris's right-hand man, so to speak) to Ben Pearson. That email stated:

> *"I wish to confirm Mr Harris' offer to purchase the above property for €10m (Ten million euro), subject to contract and subject to confirmation of a total site area of 2.56 acres. We would envisage completing and closing the contract quickly, subject to satisfactory completion of the legal work. In the event of the Vendor wishing to remain in occupation Mr Harris is willing to enter into a short term letting agreement to rent the premises back to the vendor (term to be discussed and agreed) at a quarterly rent equal to the 3 month deposit rate available from Anglo Irish bank on the €10m offer price for the property (currently 4.8%) plus rates and service charges (if applicable).*
>
> *This offer remains open for five working days and lapses if not accepted by 5pm. Friday 28 September 2007.*
>
> *If you need any clarification please let me know." [emphasis added]*

30. Mr Stewart decided to consider the matter over that weekend, and arranged to meet with Mr Pearson on the following Monday 24th September 2007 along with Mr McConvey, his financial controller and fellow director. That meeting took place. The offer was discussed, and a decision was taken that the offer should be accepted, even though Mr Pearson had prepared a draft letter in advance of the meeting, which suggests that he at least felt that they should go back to Mr Harris to seek a bit more. However, Mr Stewart's evidence, which I accept, is that his decision at that meeting was that the offer should be accepted. Mr Pearson was given the task of communicating that decision to Mr Harvey, as well as finding out what solicitor was acting for Mr Harris. Mr McConvey was tasked with getting a map of the property from the defendant firm which had acted in the purchase of the property back in 1994, in order to satisfy Mr Harris as to the acreage being 2.56 acres, and to move matters forward in relation to getting contracts out.

31. Mr Pearson has given evidence that he clearly recalls that Mr Stewart said at the meeting that he wanted to proceed on foot of the offer of €10 million. Mr McConvey recalled that being said at the meeting also. Mr Pearson remembers also saying that it was critical that they get the title documents, or a map, over to Mr Burns as soon as possible, because the precise area of the site had to be confirmed as a condition of the offer. He has stated that he telephoned Mr Harvey and confirmed that he had instructions from Mr Stewart to accept the offer of €10million, and went on to say that they would need to discuss in more detail the period for a lease back of the property for a period to allow the plaintiff find alternative premises from which to operate its business, and the rent to be paid. He remembers also confirming that a map was being sought from their solicitors. He remembered also feeling that the deadline for acceptance of the offer by the following Friday was too tight in circumstances where the map had to be obtained so that the purchaser could be satisfied as to the precise acreage, and sought an extension. That extension was granted to the 5th October, and this was communicated to Mr Pearson by Mr Burns.

32. There has been some debate during the course of this case as to whether the offer was accepted. This is because on the one hand Mr Pearson has said that he told Mr Harvey on the telephone that the offer was being accepted, and yet on the other hand he asked for an extension of the deadline for acceptance. This dichotomy is more apparent than real in my view. It is explained most easily by saying that the offer contained a deadline for acceptance by the vendor, but was also subject to the vendor satisfying the purchaser that the area was 2.56 acres. In other words, while the vendor through Mr Pearson indicated to Mr Harvey that the vendor wished to accept the offer, the deal would not be sealed until the vendor satisfied the purchaser as to the precise acreage. The extension of the deadline was in reality not for the acceptance of the offer, but rather to satisfy the acreage requirement. That is the common-sense meaning to be given to what was happening.

33. The extension of the deadline seemed to Mr Pearson to provide sufficient time to get the necessary map to the purchaser as there was no doubt in the plaintiff's side that the area in sale was 2.56 acres and that the map would show this. On the 5th October Mr Pearson forwarded the map which he received from either Mr Stewart or Mr McConvey to Mr Burns.

34. Immediately after the meeting on the 24th September, Mr McConvey got in touch with AIB Bankcentre to find out where the title deeds were so that he could get a copy of the map. He spoke to the plaintiff's relationship manager at AIB, John Reynolds, with whom he had previously had contact in relation to the loan facility. He remembers telling Mr Reynolds that the company had accepted the offer of €10,000,000 for the property. He was glad to be able to do that because the bank had been given an assurance that as part of its loan arrangements with AIB it would be reducing its overall indebtedness by €8 million through the sale of this property by the end of January 2007. I accept Mr McConvey's evidence as to his recollection of saying this to Mr Reynolds. It makes complete sense, and it corroborates Mr Pearson's evidence and that of Mr Stewart that at the meeting on the 24th September 2007 a decision was taken to accept the offer for the premises, and that what remained to be done was satisfy the purchaser as to the acreage, and to finalise the details about the lease-back so that a contract could be prepared and executed by the parties. I accept also the evidence that this figure was stated to the defendant firm during a telephone call, I accept also that this was the figure mentioned to Tony Hanahoe, solicitor, when the plaintiff approached him to act in the sale. All of these pieces of evidence serve to corroborate the fact that the plaintiff had decided to accept this offer, and was taking steps to be in a position to proceed with the transaction.

35. This Court is not concerned with whether in strict legal terms there was a completed acceptance of the Harris offer for the property. The Court is concerned with whether, as a matter of probability, a decision was taken by the plaintiff company on the 24th

September 2007 to accept the Harris offer and to take such steps as were necessary towards having a contract prepared and executed, and the sale completed. I am completely satisfied that such a decision was taken. Mr McConvey's contact with Mr Reynolds is entirely consistent with such a decision having been taken, as are the other pieces of evidence I have just referred to, and I have no reason to doubt the veracity of the evidence of both Mr Stewart and Mr McConvey.

36. The Court is not so concerned with whether and in what way this decision was communicated to the Harris side. In fact, Mr Pearson's evidence is that he is adamant that he told Mr Harvey that the offer was being accepted. I appreciate that the fact that the date "for acceptance" was extended opens up room for potential confusion as to whether there was actual offer and acceptance in a strict legal sense, but I have already made a comment in relation to what I see as the reality of that situation.

37. It is clearly the case that even though the plaintiff company had informed the Harris side of its intention to accept the offer and sell the premises to Mr Harris for the sum offered, there were things to be done before that could happen. There is nothing unusual about that situation. Some details still had to be settled and tied down, such as the acreage and the lease-back agreement. But there was nothing unusual or in any way troublesome or difficult about what had yet to be done before a contract would be exchanged and the sale completed in the normal way.

38. The lack of any such difficulty makes it an overwhelming probability that were it not for the fact that the plaintiff's property had not been properly registered by this critical time in the immediate aftermath of the offer being made, and in particular that the plaintiff's ownership of part of Folio 23011F, County Dublin was not apparent from an inspection of the records in the Land Registry, and because the Harris side had become aware of this, this sale to Mr Harris would have been completed rapidly. In my view this case must be considered as "a completed transaction" case as explained by Mr Justice Clarke in his judgment in *Kelleher & another v O'Connor* [2010] IEHC 313.

39. Just prior to these events Mr Harris, who was assembling a substantial bank of property in this immediate area, had purchased a large property adjoining the plaintiff's property, as I have previously mentioned. It makes complete sense that he would also purchase the plaintiff's property if he could do so at a price he considered acceptable. I am satisfied that he wanted to buy this property 'at the right price', which from his viewpoint was the price he offered, and which the plaintiff was content to accept.

40. It is clear from the evidence that Mr Harris is a man of considerable resources and was in a position to complete the purchase quickly, and indeed would have done so quickly. That is his style, and it is what happened in relation to his purchase of the adjoining property a short time previously. He is a man who likes to get a deal tied down and completed quickly and without any complications or delays. It is clear from his evidence that if he senses at the start that there are going to be complications to a proposed deal, he will take a step backwards, as he did in this case.

41. It is understandable therefore that when it became clear that some time would be needed to sort out the registration of the plaintiff's title to part of Folio 23011F, County Dublin, the Harris side told the plaintiff's side to revert to them when the matter had been sorted out. No contract existed at that point. It has been suggested that Mr Harris, being an experienced and able businessman, may even have taken advantage of the plaintiff's embarrassment, and considered it to be to his advantage to tell the plaintiff to revert when the title was sorted out, rather than entering into a conditional contract in order to secure the purchase knowing as he did that the property market had commenced a decline in the second half of 2007. That may be so, but it is not really relevant to this case. It was a legitimate tactic, if tactic it was. But whether it was or was not, the fact is that the plaintiff was frustrated in his wish to follow through on its decision to sell to Mr Harris at the price offered.

42. I have little doubt that if Mr Gardiner, solicitor acting for Mr Harris, and Mr Hanahoe who seems to have been the plaintiff's preferred solicitor for this transaction at the time had sat down together at that time, they could have agreed the terms of a contract containing various special conditions which would have dealt with any issues yet to be agreed and resolved on the vendor's side, including satisfying the purchaser as to the acreage. There is nothing unusual about such a course of action. None of the outstanding matters were particularly complex or difficult to resolve. However, that was not the way things were done. Instead, the plaintiff's side set about sorting out the problem with which they had just been confronted as quickly as they could. It does seem to have taken longer to resolve the title issue than would normally be expected, or hoped for in an ideal world. But that does not in my view alter the fact that the plaintiff had decided to accept the offer, and that if all had been well in relation to the title, this transaction would have proceeded quickly to completion. The plaintiff cannot be criticized for not having explored with Mr Harris the possibility that he might enter into a conditional contract. In fact, from the evidence which I have heard from Mr Harris and other witnesses such as Mr Gardiner, I doubt very much if Mr Harris would have agreed to do so.

43. The defendants contend that the manner in which the plaintiff company proceeded after the 24th September indicates that in fact it had not made a decision to accept the Harris offer and was holding out for more money. I do not accept that. If it was truly holding out for more, the Bank would not have been told by Mr McConvey that the property had been sold for €10 million, and I would have to reject the evidence of Mr Stewart, Mr McConvey and Mr Pearson. I do not reject that evidence. The fact that Mr Harvey, Mr Burns and Mr Harris say that the offer was never accepted is in my view not the real issue.

44. I am satisfied to decide this case not by whether or not a contract had been finally concluded following an offer and a full and unconditional acceptance, but on the basis that the plaintiff had made a firm decision to accept the offer, and that because the defendant firm had failed to properly register the plaintiff's title to the property which it had bought in 1994, it lost the opportunity to follow through on that decision and sell the property to Mr Harris after it had made that decision. The failure to properly and completely register the plaintiff's title was negligent. It fell below the standard of care to be expected of a reasonably competent solicitor. I have heard a good deal of expert evidence as to the standard of care owed, and what ought to have been done in discharge of that duty of care. It is clear that there was a breach of the defendant's duty of care owed to the plaintiff to ensure that its title was properly registered within a reasonable time after the purchase had been completed, not to mention that it failed to advise the plaintiff company of the mapping difficulty which it had encountered after the documents had been lodged in the Land Registry and rejected with queries. I have no doubt that it was this breach of the duty of care which caused the loss of the sale to Mr Harris.

Refusal of later offers - mitigation of loss/contributory negligence:

45. There is clear evidence given by Mr Stewart that even though the title had not been sorted out by January 2008, he nevertheless wanted to keep in touch with the Harris side about a possible future sale to Mr Harris. In January 2008 Mr Pearson was in contact with Mr Harvey. Even though it was made clear that Mr Harris was no longer interested at €10 million, Mr Harvey said that he would take instructions and revert. In due course in mid-February 2008, Mr Harvey reverted indicating a verbal offer to purchase for €8 million. The plaintiff's response was to say that they would like that offer put in writing. Mr Harvey responded to Mr Pearson on the 14th February 2008 confirming that Mr Harris was still interested in purchasing as he had asked Mr Harvey if there had been any response to his verbal offer. However, Mr Harvey went on to say:

> *"In my opinion, I feel that it would be better if he were not asked to confirm his offer at this stage as I know that he will take this as a suggestion that your client does not trust him, and from experience I know the way he will react!"*

46. Mr Stewart has stated in his evidence that he was "nonplussed" by this response which he described as "risible". He was nonplussed that Mr Harris would not put his offer in writing and would be upset to be asked. Nevertheless he knew that Mr Harris was 'the only act in town' so to speak, and wanted to try and deal with him. A little time passed, and by letter dated 4th March 2008 Mr Pearson wrote to Mr Harvey and, referring to the offer of €8 million, stated that he had taken instructions on it but that the plaintiff was not prepared to accept the reduced offer of €8 million. He went on to say, however, that the plaintiff was prepared to negotiate on his original offer of €10 million. No response whatever was received to that letter.

47. In another effort to try and revive things, Mr Pearson was instructed to suggest a sale price of €9 million to Mr Harvey. An email to that effect was sent to Mr Harvey on the 11th April 2008. Again, there was no response to that overture. But one must appreciate the fact that from Mr Harris's viewpoint there was no hurry to agree a price in a rapidly declining property market. The evidence is that by then the market for this type of property had collapsed, and funding from Banks was extremely difficult to obtain, if not impossible. Nevertheless, Mr Harris, being a person not requiring bank finance, was still interested but not at €10 million. In a rapidly falling market, it is not surprising that the purchaser, and in particular one such as Mr Harris who had no need for bank borrowings to finance a purchase, would feel in a dominant position in any negotiations for the purchase of the property. Conversely, the plaintiff was in a very weak position, yet still anxious to sell, given its commitment to AIB to reduce its borrowings by €8 million.

48. Mr Stewart's evidence has been that he accepted that the value had dropped by April 2008, but not as far as €8 million. He was concerned that if he indicated a willingness to accept an offer of €8 million which had not been put in writing, this would beget further negotiation downwards on the part of Mr Harris. Mr Stewart also knew that the title problems had still not been fully resolved. But he was anxious to try and keep matters alive between him and Mr Harris.

49. By July 2008 Mr Stewart was most anxious that the property be sold because AIB was getting anxious and requiring progress to be made. He instructed Mr Pearson to write again to Mr Harvey to tell him that the title was resolved and to indicate that the plaintiff was in a position to treat should Mr Harris still have an interest. It is clear that a letter such as this was being carefully drafted, so as not to give any impression of desperation on the part of the vendor, since Mr Harris was clearly the only possible purchaser. That is understandable. Mr Pearson wrote in these terms on the 11th July 2008. Again, there was no response, until another verbal offer was indicated to Mr Pearson by Mr Harvey in August 2008, but this time it was a verbal offer only, and in the sum of €6 million. As I have said, it was known that the market was falling very rapidly by this time.

50. Mr Pearson was instructed in due course to reject this offer and to state that this was because the plaintiff did not believe that it reflected the true value, notwithstanding the fall in the property market. Mr Pearson wrote a letter in those terms on the 26th August 2008.

51. That letter did evoke a response from Mr Harvey who wrote by letter dated 28th August 2008. He pointed out the drop in property values, but indicated that Mr Harris was still interested, and that his client was one of the very few individuals who could conclude a purchase quickly. Mr Harvey ended his letter by asking what was the minimum price that the plaintiff would accept for the property.

52. That letter was responded to by Mr Pearson by letter dated 23rd September 2008. It would appear that some considerable thought was given to how to respond to Mr Harvey's request, since the final letter sent seems to have gone through at least two prior drafts. Again, that is very understandable given the delicacy of the negotiations, and the position of weakness that the plaintiff company felt it was in. Following a number of preliminary paragraphs, the final paragraph indicated that the plaintiff would be prepared to sell at a price of €8.5 million subject to vacant possession and an agreed closing date.

53. Mr Harvey responded by email dated 22nd October 2008, apologising for not getting back to him earlier. He pointed out that Mr Harris had been unwell for the previous month and had returned to work only in the last few days. The meat of the response was as follows:

> *"I have spoken to him on the matter and unfortunately his position on the price he is willing to pay for the property has not changed since our last conversation. He is of the opinion that there is little prospect of any development taking place in the area for some considerable time, possibly years, and this coupled with the general downturn in business has seriously dulled his appetite for new acquisitions, despite their merit.*
>
> *I am disappointed that we cannot do business on this occasion but I thank you for all your attention, courtesy and effort in the matter."*

54. This letter was taken, correctly in my view, as a confirmation that Mr Harris was no longer interested in purchasing at all, and not simply that he was not interested in paying any more than his last offer of €6 million. That letter ended the efforts of the plaintiff to sell the property to Mr Harris, and there was little point at that point, being late 2008, in trying to sell the property at all.

55. By the date of commencement of these proceedings, the value of the property had slumped to €2.5 million, and by the date of hearing before me the value according to the plaintiff's valuer is €1 million, and according to the defendant's valuer is €1.5 million. So there is little between the two estimates of value for the purpose of this case, but I propose accepting the higher of the two valuations put forward.

56. I do not consider that the plaintiff should be regarded as having been guilty of contributory negligence or failing to mitigate his losses by not having accepted either of the later offers of €8 million and €6 million. The sequence of events in 2008 do not demonstrate any culpability on the part of the plaintiff in this regard. In my view it was reasonable for the plaintiff in January/February 2008 not to simply accept the next offer made. One must not yield to the temptation to view these events with the benefit of hindsight. From today's perspective, of course, it seems foolhardy not to have taken the offer of €8 million, or indeed that of €6 million made later on, rather than accept either one of them and be relieved to get them. But Mr Stewart is not a foolhardy man. He is an experienced and careful businessman, or at least that is the impression that I have gained of him from his appearance in this case. He has been a successful businessman for a great many years.

57. Mr Stewart was not in my view acting irresponsibly or even negligently when he tried to negotiate further with Mr Harris rather than simply take the offers being made, notwithstanding that the market was in severe difficulty at that time. He did not simply adopt a petulant stance and refuse to try and treat at a lower figure. In my view, he considered carefully how to respond to the unfolding events, conscious of the weakness of his negotiating position. He indicated a willingness to sell at €8.5 million. It was reasonable for

him to try and negotiate for the best price, especially where he knew that the 'only game in town' was a person who all accept was at the time a 'special purchaser' given his recent purchase of the adjoining property and his financial strength. The fact that by October 2008 the market had collapsed completely, resulting in Mr Harris's appetite for investment drying up altogether cannot be laid at the plaintiff's door. I reject the defendants' claims for reduction on this account.

Claim for interest paid to the bank on €8 million borrowings not paid off:
58. The plaintiff's accountant has given evidence that if the plaintiff had reduced its borrowings with AIB by the promised €8 million by the 30th January 2008, (being a reasonable estimate of when the sale to Mr Harris would likely have been finalized, had it proceeded) the plaintiff by the date of commencement of the present hearing would have been saved interest payments in the amount of €1,502,000. There will have to be a fresh calculation to bring that figure up to date of this judgment.

Claim for difference in CGT liability:
59. Had this property been sold in 2007 the evidence is that CGT would have been chargeable at the rate of 20%, but that this rate will be now 33% as a result of an amendment upwards of the applicable rate. The plaintiff claims the difference as part of his claim for damages. There has been some disagreement as to precisely what the liability will be based on. The plaintiff's accountant says that the difference amounts to €1,677,980 on the basis of a finding that the plaintiff's loss on the lost sale is €9 million. In fact, I have concluded that the loss arising on the lost sale is €8,500,000. The defendant says that the stated figure is incorrectly calculated and should be about half a million less. I cannot resolve that conflict. But it will need recalculation in any event in view of my finding as to the amount of the loss arising. There is no evidence from the Revenue Commissioners, and the final liability will presumably have to be awaited in due course.

60. Subject to further submissions, I propose suggesting that the higher of the two figures be paid by the defendant into some form of escrow account, or placed on deposit in the joint names of the plaintiff's solicitors and defendant's solicitors pending the precise figure becoming known, or indeed brought into court, with a direction that in the event of the CGT liability being less than that held, the balance be returned to the defendants, and that in any event any interest earned on the amount held be paid to the defendants. In addition, I will accept an undertaking on behalf of the defendant firm that if for any reason the amount finally assessed for CGT by the Revenue Commissioners exceeds the amount so held, the difference will be provided by them to the plaintiff's solicitors within 21 days of such a duly vouched request being made.

61. As I have already indicated, I am satisfied that the defendant firm was negligent in not having ensured that the plaintiff's title was properly registered by the time the plaintiff was trying to dispose of the property. It owed the plaintiff company a duty of care in that regard as a result of its retainer to act in the purchase in 1994. Their duty was a continuing one. It failed to bring the problem to the purchaser's attention at any earlier stage. If it had, I have little doubt that the plaintiff company would have been sufficiently concerned to have ensured that the necessary steps were taken to have matters completed. In as much as the defendant has pleaded the Statute of Limitations in this case, though I have to say it was not pursued with any vigour, if at all, I am completely satisfied that it was not correctly relied upon in this case. The plaintiff did not know of the negligent act until it took steps in response to information provided to it by Mr Harvey on behalf of Mr Harris. The defendant firm ought to have kept the plaintiff appraised of the difficulties which were encountered in the Land Registry but did not. They cannot rely on the plaintiff's failure to act sooner.

62. I am satisfied that this duty of care was breached by the defendant firm, and that it was the failure to have registered the plaintiff's title to the property that directly led to the failure to reach a point with Mr Harris of exchanging contracts and completing the sale thereafter. Any dispute or doubt as to whether an acceptance of the offer was communicated to the purchaser's representatives is not determinative in my view. I am satisfied, as I have said, that on the 24th September 2007 the plaintiff company took a decision to accept the offer made, and instructed Mr Pearson to so communicate with Mr Harvey. As I have said, that decision is corroborated, inter alia, by the fact that Mr McConvey so informed Mr Reynolds at AIB shortly afterwards, and was relieved to be in a position to do so.

63. Being satisfied that the present value of the property should be fixed at €1,500,000, the plaintiff's loss is the difference between the lost offer and that figure, namely €8,500,000 million. To that must be added the amount to date for interest to AIB on €8 million of borrowings which would have been paid off had the sale been completed. The parties can agree what that final figure should be up to the date of judgment, so that an order to be drawn. Finally, the figure for the difference in the rate of Capital Gains Tax must be added for the purposes of the order to be made.

64. There will be judgment in favour of the plaintiff company for the total of these amounts when that total sum has been calculated up to date, and my order will contain a direction in relation to the CGT figure in line with what I have already stated above. I can hear the parties in due course as to the precise terms of any order in that regard.