

BETWEEN:**WELLS & O'CARROLL SOLICITORS****PLAINTIFF****-AND-****KEVIN DEMPSEY****DEFENDANT****EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 19th day of October, 2017.****Introduction**

1. This is a case involving Mr. Dempsey, a building developer, and his agreement on the 20th April, 2004, with Irish Nationwide Building Society ("INBS") to borrow €400,000 to purchase 30 acres in Knockatain, Coothill, Co. Cavan. His former solicitors' firm, Wells & O'Carroll are suing him in connection with his failure to pay stamp duty which resulted in its failure to comply with a solicitor's undertaking.

2. The key issue in this case is that due to Mr. Dempsey's failure to pay stamp duty, his solicitor was in breach of his undertaking to INBS to provide it with a first legal mortgage over the 30 acres. As a result, the solicitor ended up having to pay the stamp duty, a considerable sum of money - €69,030 (including interest and penalties). However, the solicitor when he was presenting the Deed of Mortgage to the Land Registry amended the Deed which had been signed by Mr. Dempsey some years previously without the consent to the signatories to the Deed. He did so to take account of the fact that a new folio number had issued for the charged land which was different from the folio number when the Deed was originally signed. This case therefore has to consider whether the Deed of Mortgage is valid notwithstanding this amendment and whether Mr. Dempsey is entitled, because of what he calls the '*chicanery*' of his former solicitor, to refuse to assist that solicitor in complying with his undertaking by refusing to execute documentation and/or Land Registry forms.

Factual background

3. Under the terms of the loan offer dated 20th April, 2004 (the "Loan Offer") which was signed by Mr. Dempsey, he agreed to provide INBS with a first charge over the 30 acres in Knockatain (which are Folios 3546 and 3547 in the Land Registry) as well as two sites in Killannev, Carrickmacross, Co. Monaghan (which, at that time, were both comprised in the one folio, Folio 18542).

4. It is relevant that some four years after the Loan Offer was executed, in 2008, one of the sites in Killannev was carved out of Folio 18542 and a new folio was created, Folio 17314. Thus while in 2004 the two sites in Killannev were contained in Folio 18542, from 2008 onwards the two sites were contained in Folio 18542 and Folio 17314.

5. Mr. Patrick Callanan, who was a partner in Wells & O'Carroll at that time, was Mr. Dempsey's solicitor for this transaction. As is standard in these situations, an undertaking was provided by Mr. Callanan to INBS, whereby he undertook to register Mr. Dempsey's title to the lands and to ensure that INBS had a first legal mortgage over the lands.

6. Evidence was provided during the hearing by Mr. Callanan, which evidence was not disputed by Mr. Dempsey, that he had explained to Mr. Dempsey the meaning of the Solicitor's Undertaking and the Client's Authority and Retainer from the client to the solicitor authorising the solicitor to enter the undertaking, which was attached to the undertaking. This documentation is dated 22nd April, 2004. As this documentation also contained a family home declaration, it was signed by Mr. Dempsey's wife. The front page of the Client's Authority and Retainer states:

"I/We hereby irrevocably authorise and direct your to give an Undertaking in the form and containing the information set out overleaf to Irish Nationwide Building Society and in consideration of your giving the foregoing Undertaking, I/We hereby undertake that I/We will not discharge your retainer as my/our solicitor in connection with the foregoing transaction unless and until I/We Procure from the Society your effective release from the obligations imposed by such Undertaking and I/we hereby indemnify you and all your partners and your and their executors, administrators and assigns against any loss arising from my/our act or default."

7. It is clear from this wording that the ultimate responsibility for complying with the undertaking remains with the client, which is understandable since the undertaking is being given by the solicitor solely for the benefit of his client.

8. As a result of an oversight it appears that the front page of the Client's Authority and Retainer was not signed by Mr. Dempsey. However, the second page of the document, entitled a 'Certificate if the Property is Not a Family Home' was signed by Mr. Dempsey (and Mrs. Dempsey) on the 22nd April, 2004, and this document states, *inter alia*, that:

I/We hereby certify that the Property the subject matter of the foregoing Solicitor's Undertaking is not a Family Home with the Meaning of the Family Home Protection Act, 1976 as mended."

9. Based on:

- a. the execution of the Loan Offer by Mr. Dempsey,
- b. the evidence of Mr. Callanan regarding the advice he gave Mr. Dempsey regarding the nature of the solicitor's undertaking and the authority, and
- c. this family home certificate by Mr. Dempsey which was signed by him which expressly refers to the undertaking,

it seems clear to this Court that, despite the oversight in Mr. Dempsey not signing the front page of the Client's Authority and Retainer, Mr. Dempsey gave his authority to Wells & O'Carroll to execute an undertaking on his behalf to INBS, in the terms of this Client Authority and Retainer. This authorised Mr. Callanan to grant a valid first legal mortgage over the land

at Knockatain and the two sites at Killannev unless and until Mr. Dempsey procured a release from INBS of Mr. Callanan's obligations pursuant to the solicitor's undertaking. No such release has ever been granted of the solicitor's undertaking. Accordingly, this Court concludes that Mr. Dempsey is bound by the Client's Authority and Retainer.

10. Mr. Dempsey has not disputed the fact that he borrowed the €400,000 or that he agreed to give a mortgage over the land at Knockatain and the two sites at Killannev or that he failed to pay back the loan, or indeed that he now owes some €2 million in bank borrowings (since evidence was provided of his indebtedness). Indeed, he has, in his written submissions, stated:

I agree with the plaintiff when they say I was bound to execute documents to give the society a valid legal charge."

11. However, what Mr. Dempsey did fail to do, was to provide his solicitor with the sum of €36,000 in stamp duty due on the Deed of Transfer for the 30 acres. This was because although the Deed of Transfer dated 23rd April, 2004, was executed by Mr. Dempsey for the acquisition of the 30 acres, and a Deed of Mortgage dated 23rd April, 2004, was executed by him, the fact is that despite numerous requests, Mr. Dempsey never paid his solicitor the stamp duty. This meant that the Deed of Transfer could not be registered in the Land Registry and that INBS could not therefore get a first legal mortgage as Mr. Dempsey had committed to provide under Clause 8 of the Loan Offer.

12. Mr. Dempsey's failure to pay the stamp duty left Mr. Callanan in a very unenviable position, since he could not comply with his undertaking to INBS. It appears that after many years of refusal by Mr. Dempsey to pay the stamp duty, the only option open to Mr. Callanan's firm was for it to pay the stamp duty and penalties and interest itself, in order to comply with the undertaking.

13. Accordingly, in 2010, Wells & O'Carroll, in order to comply with the undertaking paid out of its own funds the stamp duty of €36,000 plus penalties and interest of €33,030, a total of €69,030.

14. However, when the Deed of Mortgage was sent to the Land Registry for registration, it became clear that while the correct lands were charged in the Deed of Mortgage, in the sense that the lands listed in the Loan Offer were duly listed in the Deed of Mortgage, i.e. the property at Knockatain and the two sites at Killannev, the folio references for the two sites at Killannev which were contained in the Third Schedule to the Deed of Mortgage could not have been in the Third Schedule when the Deed of Mortgage was signed by Mr. Dempsey on the 23rd April, 2004.

15. This is because there was a reference in the Third Schedule of the 2004 Deed of Mortgage to a Folio which was only created in 2008, i.e. Folio 17314. For this reason, the Land Registry refused to register the Deed of Mortgage.

16. Based on the evidence of Mr. Callanan to this Court, it is clear that he inserted the updated folio reference sometime after 2008 and so after the Deed of Mortgage was signed by Mr. Dempsey. Therefore it is clear that the document signed by Mr. Dempsey did not contain the reference to Folio 17314, because it did not exist at that time and Mr. Dempsey alleges that it is not therefore a valid Deed of Mortgage. However, while Folio 17314 did not exist when Mr. Dempsey signed the Mortgage Deed, it must be remembered the lands comprised in that folio did exist and those were the lands which Mr. Dempsey agreed to charge.

17. After the Land Registry brought the error to the attention of Wells & O'Connell, that firm requested Mr. Dempsey to execute a fresh mortgage deed in the same terms as the old mortgage deed save with a new date and the correct folio reference for the charged lands. If Mr. Dempsey had done so, then the Land Registry refusal to register the mortgage would have been resolved and Mr. Callanan would have been able to comply with his undertaking to provide INBS with a first legal mortgage.

18. However, Mr. Dempsey has steadfastly refused to do so, despite acknowledging that he was obliged "*to execute documents to give the society a valid legal charge.*" As a result, Mr. Callanan, or more accurately his former firm, Wells & O'Connell since he is no longer working there, cannot comply with the undertaking. As a justification for his continued refusal, Mr. Dempsey has relied on what he terms the '*chicanery*' of Mr. Callanan in inserting the new Folio number after the Deed was signed.

19. However Mr. Dempsey's actions are much closer to chicanery than those of Mr. Callanan. This is because it is Mr. Dempsey, who by his failure to pay a legally owed debt, the stamp duty, has placed his solicitor in an invidious position where he was not able to comply with his undertaking and his firm had to personally pay Mr. Dempsey's stamp duty debt in order to comply with the undertaking.

20. Perhaps Mr. Dempsey is hoping that it will never be possible to register the mortgage and that despite being €2 million in debt, he could somehow have a mortgage-free title to his land at the expense of INBS and his solicitor. There would be something deeply inequitable if Mr. Dempsey could benefit from his own wrongdoing, namely his breach of his legal obligation to INBS to provide it with a first legal mortgage and the breach of his legal obligation to pay stamp duty, at the considerable expense of third parties who were assisting him in his business, INBS in providing funds and his solicitor who was providing legal advice.

21. However, it seems clear to this Court that the law will not permit this inequity to occur. This is because, in reliance on the authority of *Anglo Irish Bank v. Collins* [2011] IEHC 385, it is clear that, while the amendment made by Mr. Callanan to the Deed of Mortgage is regrettable, it is not an amendment to the Deed which '*tells a lie*' about the Deed, which is the test applied by Dunne J. in that case.

22. Rather, the amendments made by Mr. Callanan were designed to ensure that the Deed '*told the truth*' about the Deed. This is because the intention of Mr. Dempsey was to charge land at Knockatain and the two sites at Killannev and the change made by Mr. Callanan, although ill advised, achieves this aim.

23. In reliance on *Anglo Irish Bank v. Collins* therefore, this Court holds that, notwithstanding the amendment made to the Deed, it is a valid and effective legal mortgage of the folios referred to in the Third Schedule, since there was no alteration in the contractual obligations which were entered into by Mr. Dempsey in favour of INBS, arising from this amendment.

24. This Court has held that Mr. Dempsey is bound by the Client's Authority and Retainer and for this reason it will make order for the specific performance of that agreement.

25. Uncontroverted evidence was also provided that Mr. Dempsey refused and/or failed to execute a new mortgage with correct folio numbers despite being requested to do so and despite his legal obligation to INBS to provide it with a first legal mortgage over the lands. Thirteen years have passed since the original mortgage. Evidence was provided that during that time there have been changes in the Land Registry rules as well as evidence of the acquisition of the mortgage first by NAMA and then by Promontoria (Arrow)

Limited. For these reasons, in order to supplement the order of specific performance, this Court will order, pursuant to s 31 of the Trustee Act 1893, that Ms. Ashleigh Ward, a solicitor with Gleeson McGrath Baldwin (solicitors for Wells & O'Carroll and indemnified by their insurance company) be appointed as trustee on behalf of Mr. Dempsey to execute documents, which might be necessary to procure the registration of Promontoria (Arrow) Limited as the owner of the first ranking mortgage over the 30 acres at Knockattain and the two sites at Killannev.

26. For all of these reasons, the form of orders and certain ancillary orders sought by counsel for the plaintiff has been provided to the Registrar with certain amendments approved by this Court.