THE HIGH COURT

[2010 No. 1429 P]

BETWEEN

KBC BANK IRELAND PLC.

PLAINTIFF

AND

BCM HANBY WALLACE (A FIRM)

DEFENDANT

THE HIGH COURT

[2010 No. 1430 P]

BETWEEN

KBC BANK IRELAND PLC.

PLAINTIFF

AND

BCM HANBY WALLACE (A FIRM)

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 16th day of March, 2012

1. In each of the above cases, the plaintiff (the "bank") claimed damages against the defendant, who at all material times acted as the plaintiff's solicitors, having been retained to complete certain loan transactions and perfect the security required by the bank in accordance with the terms of its retainer. The proceedings bearing Record No. [2010 No. 1429 P] concern loans made to a Mr. John Kelly (the "Kelly loans") and the proceedings bearing Record No. [2010 No. 1430 P] concern a loan made to a Mr. Thomas Byrne (the "Byrne loan") who was, at all material times, the solicitor for Mr. John Kelly, through his firm Thomas Byrne & Co. Solicitors. The parties agreed that the two actions should be heard together as there is a significant overlap in the facts and personnel involved in the transactions. For convenience the parties along with the proceedings will be therefore be referred to in the singular form throughout this judgment.

2. Pursuant to the terms of a facility letter dated the 16th day of August, 2005, the bank lent Mr. Kelly a sum of €4.9 million. That loan was topped up by a facility letter dated the 13th day of September, 2005, which amended and replaced and first facility letter by an additional €1 million.

3. On the 11th day of December, 2006, the bank issued a facility letter in respect of a further loan of €9m to Mr. Kelly.

4. In August 2007, the bank agreed to loan a sum of €9m to Mr. Byrne subject to the terms set out in a facility letter of the 8th day of August, 2007. This was a separate loan facility to that granted to Mr. Kelly in the same sum.

5. In each case, the bank retained the defendant to act on its behalf in order to investigate title and ensure the completion and perfection of the security required by the bank. This included obtaining a first fixed charge over a substantial number of properties which are set out in the facility letters in each case.

6. In essence, the plaintiff's case is that out of a total of 30 properties which were required by the bank as security in respect of the loans made to Messrs. Kelly and Byrne, the defendant obtained a first legal mortgage/charge in respect of only three properties. Instead, the defendant accepted undertakings from Thomas Byrne & Co. without reference to, or authority from, the bank, and those undertakings were not complied with. The plaintiff alleged that over a substantial period of time, the defendant misled it as to the true state of affairs and led the bank to believe that it would not release funds until the required securities were in place. As a result of these actions, the plaintiff claimed that it has suffered very substantial losses due to its inability to realise its security coupled with the substantial devaluation of the properties.

7. The defendant had delivered a full defence in each case and pleaded contributory negligence and a failure on the part of the plaintiff to mitigate its loss and damage. However, as will be described in the course of this judgment, at a late stage in the main trial of the action, the defendant made a number of significant concessions to that initial position.

8. A number of issues nevertheless arose in this case:

(i) Was the defendant firm guilty of negligence/breach of contract?

(ii) If the defendant was guilty of negligence, the basis upon which damages should be assessed.

(iii) Was the plaintiff guilty of contributory negligence?

(iv) Did the plaintiff fail to mitigate its loss?

The plaintiff argued that if it was aware that the security it required had not been put in place, it would not have entered into the transactions or lent the sums involved and that the damages should be assessed on the basis of a "no transaction" case. The defendant contended that this was not the correct basis on which to approach the issue of damages, but asserted that the plaintiff bank was aggressively pursuing Messrs. Kelly and Byrne and would have made the loans in any event. The defendant also contended that the bank failed to mitigate its loss and claimed that in those cases where the bank did have security, they failed to take prompt steps to realise the security. So far as the issue of contributory negligence is concerned, the defendant claimed that the bank was targeting both Mr. Kelly and Mr. Byrne so aggressively that they would have gone ahead with the loans, even if security had not been obtained. The defendant claimed that the plaintiff bank failed to take reasonable steps to validate the claims made by the borrowers as to their sources of income and net wealth in order to ascertain whether they had the capacity to repay the loans.

9. In its defence, the defendant admitted the terms of the retainer but claimed that it acted on the instructions of the plaintiff in accepting undertakings. This was disputed by the plaintiff.

10. Mr. Ronan Egan was the partner in the defendant firm acting in the matter and dealing with the bank, save on some few occasions when he was on leave. In the course of his evidence, he made a number of significant admissions. He accepted that the bank's instructions to the defendant were clear and that the defendant was to obtain a first fixed charge over the various properties referred to in the loan documents, as security for the loans made. He admitted that the defendant firm was in breach of its obligations towards the bank in respect of the Kelly loans and that this caused substantial loss. He agreed that he released deeds where no mortgage was registered and that thereafter a number of parties secured priority over the bank. He accepted that he should have made enquires about charges before accepting any undertaking, although he argued that this was a general practice at the time and was commonly done. He also agreed that he did not have instructions to accept an undertaking, although he argued that the bank decided to proceed on foot of recommendations made by him and was thereby waiving its rights to insist on a first charge. This was disputed by the plaintiff. On the 8th day of September, 2005, Mr. Egan wrote to the bank confirming that he would comply with the bank's instructions and he knew, when he wrote this letter, that he could not procure the security which the bank required. Under cross-examination, he accepted that if the bank knew the true position concerning the security, it would not have permitted the drawdown of the second loan which, as described, was a top up loan of €1m and was to be secured on four apartments and other properties. When the sum of €5.9m was released to Mr. Kelly, none of the undertakings given by Mr. Byrne on behalf of Mr. Kelly had been complied with. Although he told Ms. Anne Marie Coleman, an employee of the bank, that he was going to accept an undertaking, Mr. Egan admitted that an email which he sent to the bank on the 20th day of December, 2006, did not reflect this at all, but, on the contrary, suggested that the requirements of the bank were being adhered to.

11. So far as the loan of €9m to Mr. Byrne was concerned, Mr. Egan said that if he had told Mr. O'Leary, also an employee of the bank, that Mr. Byrne had breached undertakings in relation to the Kelly loans, it would have put an end to any dealings between the bank and Mr. Byrne and the loan would have been refused.

12. Before going on to consider any other evidence in the case, it seems to me that on the admissions of Mr. Egan alone, the defendant cannot avoid findings of negligence, breach of duty and breach of contract. This was finally conceded by the defendant in its closing submissions on day 28 of the trial. The plaintiff called expert evidence from Ms. Catherine Duffy, a solicitor, who is head of the banking and financial services department in A & L Goodbody, solicitors. In the course of her evidence, she made extensive criticism of the manner in which the defendant carried out its work on behalf of the plaintiff bank under the terms of its retainer. At the beginning of his evidence to the court, Mr. Egan said that he did not disagree with her criticisms, save in a few minor respects. Since the defendant accepted that it was guilty of negligence and breach of duty, I must then go on to consider other issues, namely, the basis on which damages should be assessed and whether the defendant was guilty of contributory negligence and/or failing to mitigate its loss.

13. At this point it is useful to reflect for a moment on the fact that the plaintiff had grounded its claim against the defendant on two main planks. The first was breach of contract, while the second was professional negligence. Had the defendant not accepted that it had acted negligently and in breach of duty, the court would have been faced with the prospect of making a determination on liability on what, in theory, may be considered two separate and distinct bases- contract and tort. A similar situation was faced by the court in *ACC Bank PLC v Johnston practicing under the style and title of Brian Johnston & Co. Solicitors* [2010] IEHC 236, where, in that case the plaintiff had also framed its proceedings as a "no transaction" case. At para. 7.4, Clarke J. made the following remarks:

> *"The logic of a no transaction case stems from the basic principle that damages, either in tort or in contract, are designed to put the injured party into the position in which that party would have been, had the tort not taken place or the breach of contract concerned not occurred. Where the breach of contract involves professional negligence on the part of an advisor, then there is unlikely to be, in most cases, any significant difference between the proper approach, whether same is considered from the perspective of a tort or a breach of contract, for the breach of contact concerned will simply be a failure to act or advise in a non-negligent way (with the relevant duty of care being assessed by according due weight to any relevant terms of the contract)."*

In that light, in cases of this nature, there is no distinction between the two classes of breach. As such, it falls for the court to approach the claim as if it were a case based in negligence, for, in truth, while the contract framed the instructions to the solicitors, the primary duty was nevertheless to act in a responsible and competent (as opposed to negligent) manner. In the course of this judgment, I will return to the question as to whether it is, in fact, appropriate to approach the plaintiffs claim on a "no transaction" basis.

14. A critical issue that arises in this case is the manner in which damages should be assessed. The defendant maintained that it is only liable for failing to obtain the relevant security, and in support of this proposition, it relied heavily on the decision of the House of Lords in *Banque Bruxelles S.A. v. Eagle Star* [1997] A.C. 191, frequently known by reference to one of the respondents in the appeal (South Australia Asset Management Corporation) as the *SAAMCo* decision. For the purposes of this judgment, I will use the term *"SAAMCo"* in connection with this case as that is what it was referred to most frequently in the course of the submissions.

15. Counsel for the plaintiff argued that the *SAAMCo* case is no more than a restatement of the law in this jurisdiction as so held by Finlay Geoghegan J. in *ACC Bank plc. v. Fairlee Properties Ltd and Others* [2009] IEHC 45, in which she says at paras. 81 and 82:

> *"81 ... It does not appear to me that the general principle set out by Lord Hoffmann in South Australia Asset Management Corporation v. York Montague Ltd., and as subsequently explained, differs from the principles set out by the Supreme Court in the decisions to which I refer, and by which, of course, I am bound.*

> *82. Those decisions indicate that damage suffered by an injured party will be within the scope of the duty of care of the wrongdoer where it is foreseeable by a person who owes a duty of care to another that a failure to act in accordance with that duty by act or omission may result in damage of that type and that in all the relevant circumstances it is fair and just for the court to impose liability on the wrongdoer for the damage ..."*

15. It is therefore necessary to analyse the *SAAMCo* decision in order to see how it affects the issue of damages in this case.

16. *SAAMCo* involved three different cases in which the defendants, as valuers, were required by the plaintiffs to value properties on the security of which they were considering advancing money to be secured by mortgage. In each of the cases, the defendants considerably overvalued the property. Following the valuations, the loans were made, which they would not have been if the plaintiffs had known the true values of the properties. The borrowers defaulted and in the meantime, the property market fell substantially which greatly increased the losses suffered by the plaintiffs. It was held by the House of Lords that the duty on the defendants had been to provide the plaintiffs with a correct valuation of the property, namely, the figure that a reasonable valuer would have considered it most likely to fetch if sold on the open market; that where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action, he was, if negligent, responsible, not for all the consequences of the course of action decided on, but only for the foreseeable consequences of the information being wrong. The House of Lords held that the measure of damages was the loss attributable to the inaccuracy of the information suffered by the plaintiff through embarking on the course of action on the assumption that the information was correct. In the cases before the House of Lords, the consequence of the valuation being wrong was that the plaintiffs had less security than they thought. It was held that the damages should be reduced to the difference between their valuation and the correct valuation. The defendant argued that the SAAMCo case and the case of *Bristol and West B.S. v. Fancy and Jackson (a firm); and other actions* [1997] 4 All E.R. 582, are authority for the proposition that the defendant is only liable (subject to contributory negligence) for failing to obtain the security it ought to have obtained and is not liable for all the consequences of the bank's decision to lend to Mr. Kelly and Mr. Byrne. In other words, it argued, the court should consider how much of these loans the bank would have recovered had it in fact obtained the security it required.

17. The starting point for any consideration of *SAAMCo* and related cases is a consideration of the scope of the defendant's duty to the plaintiff. This enquiry commences with the instructions given by the bank to the defendants in this case when it employed the defendant to act as solicitors in the transactions which are the subject matter of these proceedings.

18. By letter of the 25th day of August, 2005, the bank instructed Mr. Ronan Egan of the defendant to act on its behalf in relation to the first Kelly loan transaction. The letter enclosed a copy of the facility letter and stated, *inter alia*, that:

> *"We would be obliged if you would act for IIB Bank Ltd in this matter and ensure completion of the Bank's security and compliance with all other legal requirements as per the offer letter including, without limitation, the conditions precedent."* [IIB Bank Ltd. was the name of the plaintiff at that time.]

19. On the 14th day of September, 2005, the bank sent a letter of instruction to the defendant in similar terms concerning the second Kelly loan of €1m. On the 12th day of December, 2006, the bank sent a letter to Mr. Ronan Egan asking the defendant to take instructions in relation to the third Kelly loan of €9m. The letter stated, *inter alia*, that:

> *"We would be obliged if you would act for IIB Bank Ltd. in this matter and ensure completion and perfection of our security and compliance with all other legal requirements as per the facility letters, including, without limitation, the conditions precedence set out in the facility letter and included in the standard Terms and Conditions attached thereto. In particular, we require you to investigate title, carry out all necessary legal due diligence, obtain appropriate searches, stamp and register all security documentation…"*

The letter concluded with the following:

> *"We will require you to confirm to us in writing that all the security is in place or will be in place on closing and that all conditions precedent of a legal nature have been fully complied with."*

20. In the case of the loan of €9m made to Mr. Thomas Byrne, the instructions to the defendant from the bank were in broadly similar terms and are set out in a letter of the 14th day of August, 2007.

21. The plaintiff emphasised the fact that by the time the defendant was instructed, the bank had already made its decision to loan, but that the drawdown of funds was not to take place until the proper security was put in place by the defendant. If the defendant had acted in accordance with its instructions, none of the loans would ever have been made because the monies would not have been advanced. That being the case, the bank would not have suffered any loss. The plaintiff argued that *SAAMCo* was not a rule of general application, but is the exception to the rule, applying, as it does, to valuers advice. In this case, the plaintiff argued that Mr. Ronan Egan of the defendant firm was effectively advising the bank that it was safe to proceed and release the money. While this is an attractive argument, it seems to me to be somewhat simplistic. The appraisal of the borrowers was carried out entirely by the bank and the defendant was not relied on, to any extent, for this purpose. The defendant's responsibility was to put in place proper security for the bank in accordance with the letters of instruction issued in respect of each loan. Some of the authorities relied on by the parties on the issue of scope of duty suggest that the court should try and establish what was *"the very thing"* which the defendant was required to do under the terms of its instructions. In this case, the answer to that question is quite simple. The very thing the defendant was required to do was to put in place proper security for each of the loans before the monies were drawn down. It was not required to advise the plaintiff in relation to the loans or the credit worthiness of Mr. Kelly or Mr. Byrne. That exercise had already been carried out by the bank.

22. The plaintiff relies on *Bristol & West Building Society v. Rollo Steven & Bond* [1998] SLT 9. That case involved a firm of solicitors who had acted for a building society in connection with a loan transaction. It was a term of the instructions to the solicitors that the building society should be able to obtain vacant possession in the event of default. The loan was advanced in reliance on the solicitor's report which was erroneous since there was a sitting tenant in the house which would have the effect of reducing the sale price. Lord MacLean stated at p. 11:

> *"The critical fact which the pursuers offered to prove is that, if they had been provided with an accurate report on title and if they had been informed that there was a sitting tenant with security of tenure, they would not have made any advance to the borrower ... It must, therefore, be clearly understood and appreciated from the outset that this is not a case where a professional advisor, such as a surveyor, has provided a valuation report on property which, it is said, was seriously and negligently deficient, resulting in loss to the person relying upon its terms."*

23. Lord MacLean considered the *SAAMCo* decision and distinguished the two cases in that, in *Bristol and West Building Society*, the solicitors were not simply providing advice but were in effect advising the building society to take a certain course of action, namely, to lend a certain sum to the borrower on the security of the property. The building society argued that the solicitors were policing the transaction and counsel for the plaintiff in this case makes the same point. But it seems to me that there is a material difference between a solicitor being retained to advise a lending institution where it knows the lender will act on that advice by proceeding to make a loan, and a solicitor who is retained to put in place the security for a loan already agreed to by the financial institution.

24. What makes the present case somewhat more complicated is the fact that the solicitor failed to obtain the security for the loans, but then conveyed to the bank the impression that the security had been obtained and gave assurances that the monies advanced by the bank would not be released to the borrower without the security being in place. For example, on the 8th day of September, 2005, Mr. Egan informed the plaintiff (in relation to the first Kelly loan) that:

> *"I confirm that I will not release the loan cheque until all security is in place on foot of the facility letter and all documentation in order".*

On the same date, Mr. Egan completed a report on title in relation to a property in Rathmines in which it was stated:

> *"We hereby confirm that from our investigation on Title and subject to clear results of searches on completion to the property fully described above, the borrower had/or the borrower will, on completion, acquire a good and marketable Title to the property and that your mortgage interest will be secured as a First Legal Charge."*

25. At that time, Mr. Egan knew that the required security was not in place and would not be put in place. This raises the question as to whether or not these facts take this case outside the ambit of the various authorities opened to the court.

26. In the course of his evidence, Mr. Egan accepted that the bank was entitled to rely on the assurances which he gave.

27. On any view of the evidence, the defendant's breach of duty was egregious. Not only did it fail to ensure that proper security was put in place for the loans, but it deliberately misled the plaintiff by suggesting that either security was in place or that the funds would not be released to the borrower until security was in place. Furthermore, Mr. Egan took it upon himself to recommend to the borrower that an undertaking from Mr. Byrne would be acceptable when he had no instructions to do so. This was a fundamental departure from the instructions given to the defendant. An unusual feature of this case is the scale and scope of the negligence of the defendant. It did not involve a single act of negligence, but multiple failures which the defendant repeated in the second, third and fourth loan transactions. The problem was exacerbated by the fact that each time the bank was taking a cross-collateralised security so that when the plaintiff entered into a new loan agreement it was secured on the basis of the existing security that it understood it had, as well as the new security that was being proffered.

28. In the course of his evidence, Mr. Egan confirmed that he was aware that it was a requirement of the bank that the defendant would confirm that it would withhold funds until the bank security was in place. He accepted that he confirmed to the bank that the security would be in place on completion. He also accepted that if the bank had been informed of the departure from the defendant's instructions at the time of the first Kelly loan, it would not have gone ahead with that loan.

29. With regard to the second loan to Mr. Kelly, Mr. Egan accepted that this was cross-collateralised and that the bank should have been notified that there were outstanding undertakings in respect of this security for the first loan. He accepted that if the bank had been notified of this it would not have entered into the second loan for €1 million. This transaction was predominantly handled by Ms. Colette Staunton, a senior associate of the defendant firm, and she acknowledged she did not inform the bank that she would be closing by way of undertakings and she also accepted that she did not obtain the security that the defendant had been instructed to obtain. More importantly, she gave evidence that she was specifically asked by the plaintiff, and she confirmed the instruction, not to release the loan proceeds until the security was in place.

30. After the second loan to Mr. Kelly, Mr. Egan requested the release of the title deeds for the Liberty View apartments on accountable trust receipt, and when he did so, the bank believed that its security was in place. He admitted it was a mistake for the defendant to release the title deeds on accountable trust receipt when no application for registration had been made and, that because other institutions registered charges in respect of some of these properties, they were lost to the bank as security. His correspondence conveyed to the bank the impression that registration of the charges was underway when this was not the case. The mortgages could have been registered with the Registry of Deeds but the defendant failed to do so. Ms. Staunton accepted that it was a significant failure on the part of the defendant to release four undertakings, relating to an Ulster Bank charge, as part of the documents provided by way of the accountable trust receipt.

31. The third Kelly loan involved a sum of €9 million. Mr. Egan accepted that the release of the funds on foot of undertakings was wholly at variance with instructions which his firm received from the bank. He also agreed that if checks had been performed as to the status of existing securities in relation to the first and second Kelly loans (which were cross-collateralised), these would have shown noncompliance with undertakings. He agreed that the third loan would not have proceeded to completion if the existing security status was made known to the bank. The loan involved a redemption figure in favour of the Educational Building Society which was in excess of €6.3m and this was known to Mr. Egan. He was aware that the bank understood that the figure was €5m but he did not inform them of the true position. He closed the transaction on foot of undertakings which was contrary to the bank's instructions.

32. Mr. Egan agreed that if he had adhered to his instructions from the bank in respect of the Kelly loans, the bank would never have lent funds to Mr. Byrne. He released a cheque of€9m to Mr. Byrne on trust pending searches to be made against a number of properties. The cheque was cashed during the period when it was purportedly held on trust and Mr. Egan accepted that he was unaware of this fact. He did not make enquiries with the registrations department of the defendant firm in relation to outstanding undertakings and did not have any searches made prior to the closing on any of the properties. These were all breaches of duty of the most serious kind. The defendant issued certificates of title in respect of properties securing the Byrne loan which were clearly incorrect on their face as they contained a statement that the properties were free from encumbrances, although there were prior existing charges. In February 2007, Mr. Egan was reminded by the registrations department that undertakings that he had accepted from Mr. Byrne in relation to the third Kelly loan were outstanding, but he failed to take any meaningful action and, crucially, failed to inform the bank of the position. He accepted that if he had done so, there would have been no question of the bank lending a "red cent" to Mr. Byrne. In fact, that loan of €9m was agreed in August 2007.

33. What is the effect of these breaches of duty on the part of the defendant? It seems to me that they go far beyond mere omission with regard to the obtaining of security for the bank in respect of the loans. In reality, the breach of duty goes so far as to

amount to a deception on the part of the defendant because it was aware that the required security was not in place but led the bank to believe that it was. The defendant accepts that although the bank had agreed to make the loans, the funds would not actually have been released if the true position had been made known to the plaintiff. If the funds had not been released, the bank would have suffered no loss. The loss arose, not so much from the failure to obtain the necessary security, but rather, from the bank being deceived into permitting the release of the funds on express assurances from the defendant firm which were untrue and which it knew to be untrue. This is quite apart from any other radical departures from the instructions given to the defendant which have been referred to above. In the circumstances, I hold that the damages should be approached on a "no transaction" basis and that the bank is entitled to recover all of the loss it has suffered as a result of entering into the Kelly and Byrne loans.

34. In the course of the trial, a significant amount of evidence was given on the issue of contributory negligence. While a number of issues arose in this context, the following emerged as the principal ones:

> (i) The true position concerning two UK properties claimed to be owned by Mr. Kelly which comprised a substantial percentage of his net worth;
>
> (ii) A statement of affairs furnished in respect of Mr. Kelly and practice accounts for Mr. Byrne;
>
> (iii) The failure on the part of the bank to carry out a proper search of the loans made to Mr. Kelly by IIB Home Loans, a lending institution, which was connected to the plaintiff bank and which the defendant argued would have shown that Mr. Byrne, while acting as solicitor for Mr. Kelly, had a number of unfulfilled undertakings;
>
> (iv) The fashion consultancy claim by Mr. Byrne in respect of a number of French fashion houses; and
>
> (v) There was also an issue canvassed before the court as to whether or not the bank could have taken more timely steps to dispose of those properties where they did have security.

UK Properties

35. Mr. Noel O'Leary, a former associate director of KBC Bank Ireland plc. who gave evidence on behalf of the bank, said that the primary focus of the bank in the context of loans was the related security. In July 2005, he was a senior manager with Business Banking. He accepted that the two UK properties owned by Mr. Kelly represented €20m of his net worth, but said that there was an additional €20m of net worth outside those properties. A statement of affairs from Mr. Kelly furnished in August 2005 showed that those two UK properties formed part of his assets but they were missing from the statement of affairs furnished in 2006. Mr. O'Leary did not make enquiries about this because he said Mr. Kelly still had an additional €20m of equity. He did not accept the criticism that the bank should have made further enquiries about this matter because it materially affected Mr. Kelly's net worth.

36. Mr. Barry Kealy, Head of Collections within the plaintiff bank, said that in the statement of affairs of Mr. Kelly attached to a credit assessment of the 27th day of July, 2005, the two UK properties, namely, Hunton House and Mareton Lane, appeared. He agreed that Mr. Kelly's statement of assets in June 2006 did not contain these properties, but that in December 2006 they appeared back in his net worth statement. He said that this was not something that appeared obvious to him as a matter giving rise to concern. Mr. Michael Quinn, who had thirty years experience in banking and at a senior level in more recent times, accepted that there were discrepancies between the statements of affairs furnished on behalf of Mr. Kelly, and in particular, the one of the 19th day of July, 2006, from which the UK properties were missing. He agreed that, given their importance, this would set alarm bells ringing. He also agreed that no statement of affairs was ever received from Mr. Kelly's UK accountants. But he did not believe this was a matter of serious concern as these properties were no more than a degree of comfort for the first and second loans. He accepted that by the time the third loan was made to Mr. Kelly, the information was of greater significance. Evidence was given by Mr. Marcus John Trench who had a banking career in retail and commercial banking over a period of forty years. His experience involved responsibility for the management of a specialist property unit and he was also involved in internal audit in the HSBC Group. He says that in the first statement of affairs for Mr. Kelly, two things stood out like a beacon and they were the two UK properties. He said that the bank should have sent someone to look at the properties and found out something about the terms of the leases attaching to them.

Statements of Affairs

37. In the case of Mr. Kelly, two properties (9 and 22, Liberty View), in respect of which security was in place, were disposed of by Sini Holdings Ltd., a company connected with Mr. Kelly. In October 2005, Mr. Kelly was seeking finance from the bank to purchase properties which he had already told the bank he owned, in his statement of affairs of July 2005. Mr. Conor O'Malley, a banking expert, stated in evidence that the bank was not required to undertake a detailed forensic examination of the statement of affairs and that the defendant's complaints involved looking at the matter with the benefit of hindsight. Mr. Edmund Cahill, a forensic accountant, criticised the Kelly statements of affairs because it was merely a statement of property and not of net worth. He would have expected information on the solvency of the individual. In his view, net worth must include all assets and liabilities. He was concerned about the fact there a swing of €2,914,556 between July 2005 and July 2006, and stated that the bank should have made further enquiries. He also noted that apartments 9 and 22, Liberty View were sold by Sini Holdings Ltd. in January 2006 and February 2006 respectively, yet were thereafter still being offered as security. He expressed surprise that the bank did not look at disposals and see whether they had been paid out of those disposals. The same point was made by Mr. Trench in his evidence.

38. In July 2005, Mr. Kelly included the properties 11, 17, 19 and 21 Greenhills Road in his statement of affairs, showing a value of €4.5million. But the bank had a credit application in October 2005 showing the same properties to be worth €8 million. The defendant maintained that this discrepancy should have caused the bank to raise queries about the July 2005 statement of affairs. In October 2005, Mr. Kelly made an application to buy the properties on Greenhills Road, yet in the statement of affairs furnished in July 2005, he is shown as the owner of these premises. The defendant maintained that the bank should have checked this information. This point was conceded by Mr. Conor O'Malley in his evidence. The third Kelly loan in December 2006 was supported by a statement of affairs which showed that properties 9 and 22, Liberty View were offered as security. But they were shown in a statement of affairs in June 2006 as having been sold. The bank did not receive any funds out of those sales. Mr. Cahill said that in his view, it was incomprehensible that the bank would not look at the disposals to see whether they had received funds. Mr. Trench also made this point and stated that the bank should have made further enquiries about the net personal wealth of Mr. Kelly.

Thomas Byrne Practice Accounts

39. Mr. Kelly introduced Mr. Byrne to the bank as a new customer. It was clear from the documentation presented to the bank in support of credit applications made by Mr. Byrne that he owned a substantial amount of property and had amassed a net worth of approximately €32m. The bank did not ask for bank statements prior to 2007. A statement of affairs was submitted by Mr. Byrne to the plaintiff which showed he had spent €21m on property within a period of no more than two and a half years without the necessity

of a mortgage lender. Although a witness for the plaintiff conceded this was suspicious, the matter was not investigated further.

40. Mr. Byrne claimed to have an income in 2006 of approximately €12 million. Bearing in mind that he was the proprietor of a small solicitors practice in Walkinstown, this should have raised suspicions on the part of the bank. Mr. Rory Emerson of the bank directed personnel to investigate Mr. Byrne's alleged income. On the 25th day of July, 2007, he sent an email to colleagues which stated:

> *"I would support this on the basis that the earnings multiple is twelve. While this is just below our minimum target level of 12.5, there is a very strong case for banking this client with €12m of personal income in 2006. We probably need to check this out as it sounds very high!"*

41. The €12m was made up of €4m in 2006 from his solicitors practice, other income of €4m and a €4m annual fee for providing consultancy services to French fashion houses. The latter claim was unsupported by any documents and, on the face of it, was highly questionable. The plaintiff did not investigate that claim but maintained that it did not need to do so as it did not rely on that figure in assessing the annual income of Mr. Byrne. This does not seem to me to be a plausible explanation. Unsurprisingly, the French fashion Consultancy claim was entirely bogus. But if the plaintiff had taken steps to investigate that, it would quickly have discovered that the claim was bogus and this should have informed the plaintiff's view on Mr. Byrne, generally, and the degree of weight it could give to information he was providing.

42. The second set of accounts dated the 7th day of August, 2007, furnished on behalf of Mr. Byrne, showed that there was a huge deficiency in the client account. This was not picked up by the bank and was a serious matter. The bank did not raise any detailed queries on the accounts on the basis that it did not place a great deal of reliance on the practice as the source of repayment of the loan. In May 2005, the practice account was overdrawn to the extent of approximately €245,000. The accounts showed increasing provision for bad debts and suggested that Mr. Byrne was writing off 20% of everything he invoiced. There was an introduction of capital of €3.37m and Mr. Byrne drew €3.8m which was nearly three times his net profits. One witness (Mr. Fennelly) pointed out that one could not bring in sales proceeds of properties unless Mr. Byrne was proposing a false account. The same witness said 22 that according to the accounts furnished, Mr. Byrne's solicitors practice had not generated any cash in 2006. There was a disparity between the debtors ledger and the client account. In short, it is alleged that the accounts furnished by Mr. Byrne ought to have given the bank cause for concern.

43. Two of the properties that Mr. Byrne was offering as security, Bayview and 19, Ballsbridge Terrace, were properties that had appeared in the 2006 statement of affairs in support of Mr. Kelly's application. Yet, in July 2007, the properties were being offered by Mr. Byrne as security for a loan he was seeking. This discrepancy was also not picked up by the bank.

44. On the issue of contributory negligence, the defendant placed great emphasis on the failure of the plaintiff bank to check with its related lending institution, IIB Homeloans, as to the credit worthiness and reliability of Mr. Byrne. The evidence established that the bank would have had access to IIB Homeloans' records, and it seems reasonable to conclude that if they had checked the records of IIB Homeloans concerning Mr. Thomas Byrne, they would have established that there were a significant number of undischarged undertakings. The defendant argued that if the bank had done so, it would never have advanced the monies to Mr. Byrne.

45. The defendants also placed reliance on the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. 395 of 1992) (as amended). Between 1st January, 1993, and 31st December, 2006 -the period during which the Kelly loans were advanced- Regulation 16 of the 1992 Regulations provided as follows:

> ***"16. Management of Credit Institutions***
>
> *(i) Every credit institution authorised by the Bank shall manage its business in accordance with sound administrative and accounting principles and shall put in place and maintain internal control and reporting arrangements and procedures to ensure that the business is so managed.*
>
> *(ii) The Bank may direct a credit institution in writing to furnish to it, within a specified period, such information in relation to the arrangements and procedures referred to in paragraph (i) as the Bank may require, and the credit institution shall comply with that direction. "*

46. With effect from the 1st day of January, 2007, Regulation 16 was enhanced by the addition of Regulation 16(3) and 16(4), so at the date of drawdown of the Byrne loan, it additionally provided as follows:

> *"(3) Subject to paragraph (iv), every credit institution shall have robust governance arrangements including -*
>
> *(a) a clear organisational structure with well defined transparent and consistent lines of responsibility,*
>
> *(b) effective processes to identify, manage, monitor and report the risks it is or might be exposed to,*
>
> *(c) adequate internal control mechanisms and*
>
> *(d) without prejudice to the generality of sub-paragraph (c), sound administrative and accounting procedures.*
>
> *(4) Every credit institution shall, for the purpose of complying with paragraph (3)-*
>
> *(a) Ensure that the arrangements, processes and mechanisms referred to in that paragraph are comprehensive and proportionate to the nature, scale and complexity of the activities of the institution, and*
>
> *(b) take into account the technical criteria set out in Annex V to Directive 2006/48/EC."*

47. The defendant argued that sub-paragraphs (3) and (4) further emphasize a responsibility of the banks to have effective processes to manage risks and that the processes should be comprehensive and proportionate to the scale and complexity of their activities. They said that this is a licensing regime with which a bank must comply and that the bank is not entitled to abrogate to any third party or to solicitors its responsibilities and duties under the Regulations. The plaintiff argued that the defendant has no *locus standi* to raise this point as it is a matter of regulation. The defendant maintained that the bank failed to comply with this Regulation, and that if the bank had done what it was required by law to do, it would not have approved the loans and facility letters would not have issued, and therefore the question of instructing the defendant would never have arisen.

48. A review of the evidence on contributory negligence leads me to conclude that the plaintiff was somewhat careless in its appraisal of the borrowers, Mr. Kelly and Mr. Byrne. While many of the criticisms were made with the benefit of hindsight and in the knowledge that Mr. Thomas Byrne has been struck off the Roll of Solicitors for dishonest conduct, there were, nevertheless, a number of facts presented to the bank which ought to have raised suspicions in their mind as to the true financial worth of the borrowers and their reliability. It is necessary to consider the effect of these lapses by the plaintiff and to determine whether they are such as to warrant a finding of contributory negligence with a concomitant reduction in damages.

49. In *ACC Bank plc. v. Johnston* [2011] IEHC 376, Clarke J. stated at para. 7.21:

> *"... it seems to me that the 'no transaction 'jurisprudence is primarily directed to ensuring that a plaintiff cannot recover a loss of bargain which that plaintiff may suffer by reason of a transaction not going ahead in circumstances where, even had the relevant defendant not been guilty of negligence, the transaction would not have gone ahead anyway. The 'no transaction' jurisprudence is designed to exclude such damages. It does require that the starting point for a consideration of the plaintiff's proper damages is, therefore, to calculate what would have happened had the transaction not gone ahead. However, it is also clear from cases such SAAMCo that not all of the losses which may arise from the transaction going ahead may be recoverable. Where the primary breach of duty found against the defendant is such as leads to the inference that the breach of duty was directly responsible for the transaction going ahead, then, as per Bristol & West, the full/asses may be recoverable. But where, as here, the fact that the transaction might not have gone ahead in the absence of negligence is only a tangential or highly indirect consequence of the negligence and where, as a result, it is possible to divide the losses on the transaction between those which are directly attributable to the negligence of the defendant and those which are, in truth, attributable to the underlying disadvantageous nature of the transaction itself, then it seems to me that the justice of the case requires the court to calculate the damages by reference to that portion of the losses which derive directly from the negligence of the defendant."*

50. In this case, the undisputed evidence is that if the defendant had acted in accordance with the bank's instructions, none of the loans would have proceeded. This was accepted by Mr. Ronan Egan. If the defendant had complied with its instructions, the first loan would not have closed because Mr. Kelly was not in a position to provide the actual security required by the bank. In those circumstances, the proximate cause of the plaintiff's loss was the defendant's negligence and breach of duty. If the decision of the plaintiff to approve the loans was, to some extent, due to its own negligence in assessing the borrowers, this was a *causa sine qua non*. In other words, the loans would not have been subsequently approved but for some lack of care on the part of the plaintiff. But the proximate cause or *causa causans* of the loss was the defendant's act in failing to comply with instructions and releasing the funds to the borrowers in circumstances where it knew or ought to have known that it were acting against its instructions and had given an explicit assurance to the plaintiff that it would not release the funds without the relevant security being put in place.

51. Every case must be decided on its own facts and it seems to me that the facts in this case are quite exceptional. They are sufficiently exceptional to dispose of the defendant's claim for contributory negligence. If there were any shortcomings on the part of the plaintiff in approving the borrowers for the loans, it cannot be said that the defendants were in any way negligent so far as the actual release of funds was concerned because they were released after the plaintiff sought confirmation from the defendant that it would not release the funds until such time as the security was in place, and they received confirmation of this from the defendant prior to the release of the funds. No bank which retains the services of a professional, such as a firm of solicitors, should have to check into those assurances before releasing the funds. The bank was entitled to rely on the assurances received by the defendant and did so. I have been referred to Jackson & Powell on *Professional Liability* 7th Ed. (Sweet & Maxwell 2012) at p. 211:

> *"In the context of a professional negligence action, a successful plea of contributory negligence by the defendant is less common than in other areas of negligence. This is because the parties often do not stand on an equal footing.... If the defendant makes a mistake, it may be difficult to say that the client was negligent not to spot it or correct its effect, unless the client is expected to be wiser than his own professional advisers."*

52. *A fortiori* a client is entitled to rely on specific assurances given by the professional firm which it has retained and which go to the heart of the instructions given by the client. In the circumstances, I hold that the defendant's claim for contributory negligence fails. A professional firm which confirms to its client that its instructions have been complied with when it knows this is not the case, and who, having been asked to do so, confirms that funds will not be released until security is furnished in accordance with the express instructions already given, cannot rely on a plea of contributory negligence unless it can be shown that the negligence of the client was at least a proximate cause of the loss. I reject the defendant's claim for contributory negligence.

Failure to Mitigate

53. I found the evidence on the issue of failure to mitigate damages inconclusive. Among the defendant's witnesses, there was a lack of agreement and some actual disagreement. The issue is to be determined, to some extent, by the manner in which damages are assessed below and the date on which the secured properties are to be valued.

Damages

54. In the course of the closing submissions, counsel for both parties agreed that the Court should decide the basis on which damages are to be awarded and the parties will return to the Court at a later date with a view to either agreeing the figures or to have the Court decide what figures apply.

55. Since the evidence establishes that the loans would not have been made if the defendant had acted in accordance with its instructions, the question of when the properties would have been sold does not arise except in the case of the small number of properties were security was obtained. In respect of the Byrne loan, the defendant obtained security over the properties at 4, Crumlin Village and 23, Coldwater Lakes. In respect of the Kelly loans, the only property secured was 167, Upper Rathmines Road. Later, Mr. Kelly offered additional security to the plaintiff by either giving a first charge over a property at Oilgate or by transferring the property to the bank (see below at para. 57) and he also gave the plaintiff €900,000.

56. As I have already held that this case should be dealt with on a "no transaction" basis, the loss to the plaintiff is the amount of the loans advanced together with the costs of funding those loans to date less any interest or capital repayments made by the borrower and/or the value of any secured property (or additional property) which the bank obtained. The plaintiff claimed the legal and receivership costs expended by it in relation to those loans, including the costs of related third party proceedings. While the plaintiff originally claimed for the amount which the bank would have made if it had lent the money elsewhere, this claim was withdrawn.

57. The parties are not in agreement as to the basis on which damages should be assessed, but each side has put forward various proposals to the court which are not all that different. The defendant agreed that if the plaintiff is entitled to recover on the basis of

the full amount of the loans, they should recover that amount less the valuation attributable to the security obtained (i.e. the Rathmines, Coldwater Lakes and Crumlin Village properties). A further deduction should be made in respect of the value of the Oilgate property and the €900,000 received from Mr. John Kelly. The plaintiff would also be entitled to the cost of funds on the subtotal. The plaintiff claimed that if the bank is entitled to the return of monies lent, it is also entitled to the cost of funds from the date of the loans, receivership costs incurred and third party legal costs in respect of related proceedings where Mr. Kelly was joined as a third party. The plaintiff also funded the stamp duty on the Oilgate property to enable Mr. Kelly to complete the purchase of same. There seems to be some uncertainty as to whether the Oilgate property was offered as security or was transferred directly to the bank and I will hear counsel on this in due course.

58. The plaintiff agreed that deductions should be made in respect of the capital repayments and interest, the value of the properties offered as security and the value of the Oilgate property net of stamp duty and the cost of funds.

59. Apart from the question of whether the plaintiff is entitled to recover all of the sums advanced (less the security and other assets obtained), the main areas of disagreement relate to whether or not the plaintiff is entitled to the third party costs, receivership costs incurred and at what time the three secured properties should be valued. A similar question will arise with regard to the Oilgate property once it is clarified whether this property was offered as security or transferred to the bank. I will allow the stamp duty paid by the plaintiff to facilitate the completion of the purchase of the Oilgate property by Mr. Kelly. It seems to me that the plaintiff is entitled to recover the third party costs. I do not propose to allow the receivership costs if they were incurred in respect of any of the three secured properties since it cannot be said that the negligence of the defendant extended to those transactions.

60. So far as the time at which the secured properties should be valued is concerned, I have decided that the appropriate time is when the value of those securities could have been realised if the plaintiff had moved to do so with reasonable expedition. In the course of its submissions, the plaintiff contended that if it had obtained security on the various properties which ought to have been secured, it could have sold them between January 2008 and June 2008. It seems reasonable in those circumstances to conclude that the three secured properties could have been sold by June 2008, and for the purpose of any deductions to be made from the damages to be awarded to the plaintiff. I hold that the value of the properties is to be calculated at that date. I will hear submissions from counsel as to the value that should be ascribed to each of the three properties secured as of June 2008. I will also hear further submissions on the position with regard to the Oilgate property. At the moment, there is some uncertainty whether a first legal charge was offered over the property or whether it has in fact been transferred to the bank. If a first legal charge has been secured on the property, I will fix the value of the property as being that applicable on a date six months after the furnishing of the security. If the property was transferred to the bank, I will fix the value as of the date of the conveyance.

61. Having agreed the methodology applicable to the calculation of damages in this case, I will hear counsel on a date to be fixed to see if the figures can be agreed and, if not, whether it is necessary to hear further evidence on those figures.