Neutral Citation: [2015] IEHC 274

THE HIGH COURT

COMMERCIAL

[2012 No. 12108 P]

BETWEEN

PATRICK O'CONNOR

PLAINTIFF

AND

BANK OF SCOTLAND (IRELAND) LIMITED AND BANK OF SCOTLAND PLC MICHAEL COTTER AND LUKE CHARLETON TRADING AS ERNST AND YOUNG MICHAEL COTTER TRADING AS ERNST AND YOUNG ERNST AND YOUNG JAMES RIORDAN AND DARREN O'KEEFFE TRADING AS JAMES RIORDAN AND PARTNERS JAMES RIORDAN AND DARREN O'KEEFFE TRADING AS M. J. HORGAN AND SONS

DEFENDANTS

[2012/4449 S]

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF

AND

PATRICK O' CONNOR

DEFENDANT

JUDGMENT of MR. JUSTICE CREGAN delivered the 20 day of February, 2015

INTRODUCTION

1. In the first set of proceedings, (Record no. 2012/ 12108 P) the plaintiff, an experienced property developer, is suing the first and second defendants (Bank of Scotland (Ireland) Limited and Bank of Scotland plc) "BOSI" or, "The Bank" respectively for breach of contract, undue influence, fraudulent or negligent misrepresentation, deceit and/ or negligence, arising out of various commercial property loans made between the Bank and plaintiff. As a result of the plaintiff's default on these loans, the Bank appointed receivers. The plaintiff has also sued the third and fourth defendants (The "receiver defendants") alleging negligence, breach of fiduciary duty and conflict of interest.

2. In addition the plaintiff pleads that the fifth and sixth defendants (the "solicitor defendants") were negligent and/or in breach of duty to him and/or acted in a conflict of interest in respect of the plaintiff and that as a result of their negligence, breach of duty and conflict of interest, he suffered loss and damage.

3. In the second set of proceedings (Record no. 2012/ 4449 S) the Bank (Bank of Scotland plc) is seeking judgment against Mr O' Connor for its debt. However, despite the complexity of the pleadings, the plaintiff and the defendants all agreed, at the end of the trial, that there were seven major issues which needed to be considered by the Court. Taking them in chronological order, these are:

> (1) The issue of whether the common areas of "Lindville" were intended to be included in the security granted by the plaintiff to the Bank in 2002;
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> (2) The issue of whether, if a mistake was made in 2002, the defendant solicitors were negligent and/or in breach of duty in failing to notice that the common areas had been included in the plaintiff's security granted to the Bank in 2002 when they were reviewing the security for the plaintiff for the 2007 loan in 2007;
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> (3) The issue of whether the Bank made a representation to the plaintiff on or about 12th March, 2010 that the Bank would fund the plaintiff's developments through to completion;
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> (4) The issue of whether the amalgamation of the 2007 and 2008 loans by means of the 2010 loan was unlawful and was procured by the Bank by deceit or fraud or undue influence or was in any other respect unlawful;
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> (5) The issue of whether the Bank represented to the plaintiff that he could spend €100,000 to complete one of the houses in Ashley to show- house standard and that the Bank would provide funds for same;
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> (6) The allegations against the receivers that the receivers had a conflict of interest, that the receivers had failed to

carry out their duties properly and that the receivers had failed to preserve the assets.

(7) The issue of whether the defendant solicitors failed to properly advise the plaintiff in respect of the 2007, 2008 or 2010 loan offers;

4. I propose in this judgment to set out the detailed narrative of events and what transpired between the plaintiff and all the various parties. I will deal, throughout the course of that narrative, with all of the above issues as they arise chronologically.

THE CONDUCT OF THE TRIAL

5. This case was conducted in the Commercial Court. Mr. O'Connor was a lay litigant and every opportunity was afforded him to present his case in a fair manner. The court had regard to the inequality of arms between the parties and sought to balance that where possible and appropriate. Thus, even though the plaintiff had filed a witness statement of some 130 pages, it was still difficult to understand the full nature of the plaintiff's case. Mr. O'Connor therefore was permitted to start at the beginning and tell his whole story through to its conclusion, a process which took four days. He was then cross examined for approximately two days. Thus he had a full opportunity to present his case to the court.

6. The second manner in which Mr. O'Connor was facilitated by the court was that he sought at the opening of the trial to adduce into evidence a report of his son, Cathal O'Connor, as an independent architectural expert. This was objected to, quite rightly, by the defendants on the grounds that the plaintiff's son could not possibly be an independent expert. Once this was explained to the plaintiff he properly withdrew his son as an independent expert. However some days into the trial Mr. O'Connor then made an application to the court to be allowed to introduce evidence of another independent architectural expert (Mr. Glen Barry). The defendants objected to this course of action. However the plaintiff submitted that he would be prejudiced if he could not put forward independent architectural evidence. In the light of this submission I permitted Mr. O'Connor to call Mr. Glen Barry as an independent architectural expert and his evidence was heard by the court.

7. The third way in which Mr. O'Connor was permitted a latitude, which perhaps might not have been permitted to all litigants in the Commercial Court, was that at the very conclusion of his evidence (indeed in the very last sentence of his very last witness) a reference was made to an alleged further breach by the receivers of their duties by allowing planning permission to lapse on the Five Firs development. Mr. O'Connor sought the leave of the court to amend his pleadings. This was initially resisted by the defendants but overnight, having considered the position, the defendants consented to the amendment of the pleadings. In those circumstances the court permitted the plaintiff to plead this as a further particular of negligence against the receivers and permitted the defendants to amend their defence.

8. In my view therefore the plaintiff was afforded every opportunity to make his case.

SUMMARY OF THE PLAINTIFF'S FINANCIAL DEALINGS WITH BANK OF SCOTLAND

9. It appears that the plaintiff at various times had no less than six facility letters with BOSI over an eight year period. A summary of the loan amounts and repayment of those loan amounts is set out below:

1. The 2002 loan agreement (loan account 101) – the original amount granted in this loan was a sum of €820,000. This was fully repaid on or before 21st April, 2005 by the plaintiff.

2. The 2003 loan agreement (loan 102) – this loan was for the sum of €750,000. This loan was repaid in full on or before 21st April, 2005 by the plaintiff.

3. The 2004 loan facility (loan facility 103) – this loan was for the amount of €900,000. This was repaid on or before 20th April, 2007 but it was repaid by the 2007 loan from BOSI.

4. The 2007 loan facility (loan facility 104) – this loan facility was for the amount of €4.34m. This was repaid/refinanced by the 2010 loan from BOSI.

5. The 2008 loan (the 107 loan facility). – this loan facility was in the amount of €1.88m. (However only €588,000 approximately was drawn down). This loan was repaid/refinanced by the 2010 loan.

6. The 2010 loan facility (the 108 loan facility) – this loan facility was in the sum of €5.4m. This loan facility has not been repaid and is outstanding. It is on foot of this loan facility that the Bank appointed the receivers.

BACKGROUND

Dissolution of plaintiff's partnership with Barry O'Donovan – The transfer of Lindville to the Plaintiff

10. From 1996 until 2000 Mr. O'Connor was in a partnership agreement with Barry O'Donovan. During this time the partnership decided to purchase and develop a number of houses in a site known as "Lindville". However in May 2000 Mr. O'Donovan sought to extricate himself from his partnership with Mr. O'Connor. According to Mr. O'Connor, as a result of that, and numerous other matters, Mr. O'Connor's companies went into liquidation in November 2000. It appears, that as a result of all these events, there were serious differences between the plaintiff and Mr. O'Donovan and as a result the plaintiff and Mr. O'Donovan agreed to dissolve their partnership.

11. At that time Mr. O'Connor's solicitor was Mr. Joseph Cuthbert. However during the course of the partnership dissolution negotiations, Mr. Cuthbert was of the view that he had a conflict of interest and that he could no longer act for Mr. O'Connor. Mr. Cuthbert asked Mr. O'Connor to obtain another legal adviser. Mr. O'Connor discussed the matter with Michael Cotter of Ernst and Young who recommended James Riordan (a solicitor defendant in these proceedings). Mr. O'Connor contacted James Riordan and he agreed to act for the plaintiff. Mr. Riordan sought to progress negotiations with Mr. O'Donovan from where Mr. Cuthbert had left them.

12. Subsequently in February 2002 a dissolution agreement was signed between Mr. O'Connor and Mr. Barry O'Donovan in the early hours of the morning in Mr. O'Donovan's solicitor's office.

13. As part of this dissolution agreement, Mr. O'Donovan agreed to transfer the development at Lindville, (the common areas and all the remaining sites) to Mr. O'Connor. In return Mr. O'Connor agreed to pay certain sums of money to Mr. O'Donovan. It was further agreed, under the dissolution agreement, that Mr. O'Donovan had a charge over the remaining sites at Lindville until he was paid his

money. However all of the sites had to be sold within twelve months (i.e. by February 2003). Thus, in Mr. O'Connor's words, when the dissolution agreement was signed, Mr. O'Connor owned everything that was unsold in the development.

14. Mr. O'Connor's evidence was that immediately after the partnership dissolution agreement had been concluded - and given that he knew that he only had twelve months to pay off Mr. O'Donovan - he sought to source finance from another lending institution in order to pay off Mr. O'Donovan. In addition he had to raise finance to pay off Ulster Bank because Ulster Bank still had a mortgage over the lands and common areas at Lindville.

Approaches to BOSI
15. The plaintiff spoke to Michael Cotter of Ernst and Young and Michael Cotter approached Roy Barry of Bank of Scotland (Ireland) about providing such finance.

16. The plaintiff gave evidence that he met Michael Cotter and Roy Barry of Bank of Scotland at the Lindville site. The parties discussed the plaintiff's financial needs and an application was made to the Bank for finance. However in or about 30th July 2002 Bank of Scotland declined the proposal and Roy Barry telephoned the plaintiff to tell him that. The plaintiff subsequently spoke to Mr. James Riordan and it was agreed that a further application would be made to Bank of Scotland (Ireland). The plaintiff's evidence is that it was Michael Cotter who was dealing with Roy Barry of BOSI on his behalf, but that James Riordan was also active in seeking finance for him at that time.

17. On 16th September 2002 James Riordan rang the plaintiff to say that he had been speaking to Roy Barry and that he was hopeful of obtaining the finance.

18. Indeed on 25th September, 2002 BOSI, decided, after all, to make finance available to the plaintiff and it issued a loan facility letter.

19. Given the complexity of the plaintiff's affairs I will now set out the details of this loan facility.

Loan facility letter of 25th September, 2002
20. Bank of Scotland (Ireland) issued a loan facility letter to the plaintiff on 25th September, 2002. This was signed by Roy Barry and Maurice Ford on behalf of BOSI. It was signed by the plaintiff on 26th September, 2002. It was witnessed by the plaintiff's solicitor Joseph Cuthbert. It was a revolving loan facility for €820,000. The term was eighteen months. The repayment of the loan was due from the sale proceeds of the sites at Lindville Blackrock, Cork. Bank of Scotland (Ireland) was to receive €150,000 from the sale of each site.

21. The security for the loan was stated on the loan offer letter to be a first specific charge over the freehold land of the borrower consisting of eight sites at Blackrock Road, Cork (Lindville). It was also stated to be a condition of the loan that BOSI's solicitor would be satisfied with the title to land or property offered as a security. An arrangement fee of €35,000 was payable by the borrower. The loan was to be drawn down not later than 30th November, 2002. In addition (and this is important given the subsequent submission made by Mr. O'Connor) the borrower stated in his acceptance form that:

> *"I further confirm that for the purposes of the Consumer Credit Act 1995 in availing of the facility and drawing down the loan I am acting within my business, trade or profession".*

(Mr. O'Connor subsequently sought to argue that he was a "consumer" within the meaning of the Consumer Credit Act and therefore was entitled to the protections of that Act).

22. Mr. O'Connor also gave evidence that he was depending on both Michael Cotter and Roy Barry to arrange the finance for him. He said he did not approach Roy Barry or have any communication with BOSI from the date Roy Barry rang him on the 31st July 2002 stating that the loan had been refused until the loan letter issued on 25th September, 2002. His evidence was that he relied on Mr. Riordan to do so.

23. Subsequently Joseph Cuthbert (acting on behalf of the plaintiff) received mortgage documentation from Lucia Fielding in M.J. Horgan's Solicitors (who acted for BOSI) in relation to this transaction.

24. The original security set out in the loan facility letter of 25th September, 2002 was a first charge over eight sites at Lindville. However, by this time there had been an agreement to sell one of the sites. Thus on 4th October, 2002 Joseph Cuthbert wrote to M.J. Horgan to give an undertaking to furnish the sum of €150,000 to BOSI out of the proceeds of sale of No. 59 Lindville. Thus the security in the loan agreement was a first charge over seven sites plus an undertaking to repay €150,000 on the sale of No. 59.

25. The plaintiff had in fact sold two of the sites from the time of the dissolution of the partnership to the time he obtained this finance from BOSI.

26. I will pause here in the narrative because the plaintiff's first allegation against the defendants arises at this point. His essential allegation is that when he obtained the loan from BOSI in 2002, he only granted them a mortgage over the sites at Lindville but not over the common areas at Lindville. He says that this was an error caused by his own solicitors and/or BOSI. (However, I note that he has not issued any proceedings against Mr Cuthbert in this regard). I turn now to consider this first allegation.

THE PLAINTIFF'S FIRST ALLEGATION – THAT IN RESPECT OF THE 2002 LOAN THE MORTGAGE TAKEN INCLUDED THE COMMON AREAS OF LINDVILLE WHEN IT SHOULD NOT HAVE DONE SO

Introduction
27. The plaintiff's first allegation, was that in 2002, when he took out his first loan with BOSI, the security which he offered for that loan consisted only of eight sites at Lindville and did not include the common areas. The plaintiff further alleged that there was no map attached to the mortgage or, if there were, that if the map attached to the mortgage included the common areas, such a map was drawn up in error and had not been agreed with him. In the circumstances, the plaintiff alleges that BOSI had taken a mortgage or a charge over properties which did not belong to it and that as a result he suffered loss and damage.

28. The plaintiff alleged that these common areas had a residual value because in addition to the roads and common amenity areas, they also included some excess land which in his view could be developed as further sites for further houses.

The evidence in respect of the common areas

29. The plaintiff's case in respect of his allegation that the common areas were not meant to be included in the 2002 mortgage and charge consists of the following elements:

1. In the 2002 loan offer letter, BOSI offered the plaintiff the sum of €820,000. The security at para.3 of the agreement was stated to be "first specific charge over the freehold land of the borrower consisting of eight sites at Blackrock Road, Cork". (This is the Lindville site). There is, he says, no reference to the common areas. (This 2002 loan agreement was accepted by the plaintiff on 26th September, 2002 and he nominated Joseph Cuthbert of Martin Sheehan and Company as the solicitor who would act on his behalf).

2. The plaintiff's second point is that by letter dated 3rd October, 2002 Lucia Fielding (acting for BOSI) wrote to Joseph Cuthbert (his solicitor) in relation to this matter. The letter is headed "Mortgage of eight sites Blackrock Road, Cork". This letter also enclosed the security documents including the mortgage and charge and the draft certificate of title. Again, the plaintiff says, there is no reference to common areas.

3. The plaintiff's third point is that in the "Solicitors report and certificate of title", on page one, the property is described as "sites 27, 28, 29, 30, 53 and 57 at Lindville, Blackrock Road, Cork. (i.e. again there is no reference to the common areas).

30. However, in my view, the plaintiff's argument fails for the following reasons:

(1.) In the Solicitor's Report and Certificate of Title at para.1 it is stated that

"I/we have investigated the title to the property described in Part One of the Schedule hereto (hereinafter called "the property"), the tenure of which it is stated therein.

It is clear from this sentence that the description of the property set out on page 1 of the Solicitor's Report is simply a shorthand description of the property and that the actual property (which is the subject of the solicitors report and the certificate of title) is the property described in part one of the schedule in the solicitors report and certificate of title.

(2.) The property actually described at part one of the schedule is set out as follows:

"(Conveyancing description and tenure of the property)

All that and those part of the lands of Lindville, Blackrock Road, Cork as more particularly delineated on the map or plan attached hereto and thereon outlined in red held firstly for the residue of a term of 500 years demised by indenture of lease 28th March, 1854 and subject to the yearly rent therein reserved and secondly in fee simple."

Thus the description of the lands was identified by reference to a map. (There is a question as to whether any map was in fact attached to this document - a question which I will consider later in this judgment).

(3.) The mortgage and charge which was granted by the plaintiff to BOSI was dated 29th October, 2002. It was stated to be between Patrick O'Connor and Bank of Scotland (Ireland) Ltd.

(4.) It is of some note that the schedule to the mortgage and charge described the secured property as follows:

"All that and those that form part of the lands at Lindville, Ballintemple in the parish of St. Finbarr, Barony of Cork in the County of Cork as is more particularly delineated on the map annexed hereto and thereon outlined in red situate at Lindville Ballintemple in the Parish of St. Finbarr Barony of Cork in the County of Cork."

Again the description of the property was given by reference to a map.

(5.) Mr. Cuthbert gave evidence on behalf of the plaintiff. Mr. Cuthbert was the plaintiff's solicitor at the time of the 2002 loan facility and 2002 mortgage and charge over Lindville. He was a frank and honest witness. Mr. Cuthbert's evidence was that he would never have allowed a client to sign a mortgage or charge (where that mortgage or charge referred to a map) without reviewing the map carefully with the client. His evidence was that (although he had no distinct recollection of the transaction twelve years ago) he was of the view that he would have followed his normal procedure with Mr. O'Connor in relation to the signing of the mortgage and charge in 2002. If that were the case, then clearly Mr. O'Connor would have seen the map and would have known that the mortgage and charge were created over the sites and the common areas at Lindville.

(6.) Mr. Cuthbert also gave evidence that if he did not follow his normal procedure in 2002 that was simply because Mr. O'Connor had such an intimate knowledge of the Lindville site because of his experience in purchasing the site, developing the site, financing the site and because of his involvement in agreeing the map with his partner Mr. O'Donovan some time previously. He also said that, even if he did not specifically get Mr. O'Connor to review the map before he signed the mortgage, he had no doubt whatsoever that Mr. O'Connor was intimately familiar with the map. Given that this evidence was from a witness on behalf of the plaintiff, and was the plaintiff's solicitor at the time of this transaction, I am of the view that it is clear beyond doubt that Mr. O'Connor was fully aware that the common areas were included in the mortgage in 2002

(7.) It is also important that Ulster Bank originally had a charge over all the common areas and sites at Lindville. That is agreed by all parties. The refinancing which Mr. O'Connor was seeking to obtain was refinancing from BOSI to pay off Ulster Bank, (and also to pay off other debts he owed to Bank of Ireland and Mr. O'Donovan). Therefore it makes sense that BOSI would have obtained the same security as Ulster Bank. As Ulster Bank had security over all the common areas and all the sites, it makes sense that BOSI was also obtaining security over all the common areas and all the sites (with the exclusion of a number of sites which had been sold by that time).

(8.) When questioned as to whether Mr. O'Connor intended at any time to give security to BOSI which was a lesser security than that offered to Ulster Bank, Mr. O'Connor's evidence was uncertain. In my view it was not clear that he intended to offer BOSI less security than he had granted to Ulster Bank.

(9.) Moreover, when asked whether, in effect, by granting the Bank security over the sites only, BOSI would have been landlocked by virtue of the fact that they had no access to the common areas and no rights of way, Mr. O'Connor indicated that they could have been included in an extra conveyancing document but were not. However there was no evidence of any discussion at the time of BOSI or the plaintiff discussing rights of way or other conveyancing documents.

(10.) When asked did he intend to frustrate the security he offered to BOSI his reply was an emphatic no - that he did not mean to do so.

(11.) I am not convinced that Mr. O'Connor intended to grant less security to Bank of Scotland (Ireland) than had been granted to Ulster Bank. Indeed the entire tenor of his evidence was that this was a very fraught time and he was focused on obtaining the finance to pay off his former partner and to pay off Ulster Bank. Thus there was no particular reason as to why he would have contested the transfer of the common areas.

(12.) Likewise his evidence is that he did not wish to frustrate BOSI's security. If that be so, then it follows - given that there was no additional wayleave agreement - that the parties must have intended to include all the common areas, roads and services as part of the agreement. If that were not so then BOSI's sites would have been landlocked and Mr. O'Connor would have had an advantage which was not agreed or intended between the parties.

(13.) It is also of some significance that this schedule of the property is in fact on the page immediately before the signature page. The signature page therefore follows immediately after Mr. O'Connor assigned the mortgage and charge and this signature has been witnessed by his solicitor Mr. Cuthbert. A copy of the map was produced in court and the map is then attached as a following page. The map clearly includes, within the red interlining, the common areas of Lindville.

(14.) Another reason, in my view, why the map included the common areas and was always intended by all parties to include the common areas was that Mr. O'Connor gave evidence to the court that the map drawing up these sites and these common areas was drawn up by Mr. O'Donovan's solicitor and interlined in red at the time of the partnership dissolution agreement.

(15.) This map appears to have formed the basis for the map attached to the mortgage and charge dated September 2002. There is however a difference between the two maps in that the map drawn up for the dissolution of the partnership agreement included extra sites whereas the map attached to the mortgage in charge has been interlined in red to exclude a number of sites, (which had been sold). Mr. Murphy SC for the Bank, submitted to the court - and it seems a reasonable inference - that what in fact happened was that the map drawn up for the dissolution of the partnership agreement was photocopied and then re-interlined in red marker by some person so that it would properly reflect the provisions of the mortgage with BOSI. This appears to be the case because there is a stamp on the dissolution of partnership agreement which is a taxing/revenue stamp and which is peculiar to each document. It appears that exactly the same stamp appears on the document attached to the deed of mortgage and charge in 2002. (That seems a likely explanation as to what happened but it is by no means hugely important to the matters which I have to decide).

(16.) It is surprising that Mr. O'Connor could have signed a document such as a mortgage document which on the previous page refers to a map but which Mr. O'Connor now says he has no recollection of seeing and is of the view that it was not there. I do not accept this evidence. In my view, given that the solicitors report and certificate of title refer to a map, and, given that the mortgage of 29th October, 2002 also refers to a map, it is highly likely that this map was drawn up at that time and appended to the agreement.

(17.) Moreover Mr. O'Connor has not put forward a scintilla of evidence – beyond his bare assertion - that it was not intended that the common areas would be transferred to BOSI in February 2002. He seeks to rely on his contemporaneous notes of the time which on occasion refer to the transfer of eight sites. Insofar as Mr. O'Connor put forward any evidence that he did not intend to transfer the common areas to BOSI I do not accept his evidence. I have no doubt that Mr. O'Connor knew full well at the time what he was conveying to BOSI - which was the eight sites plus all the common areas.

31. I believe that what Mr O' Connor has sought to do in this case is to exploit a certain looseness of language in certain parts of the documents (for example in the solicitors correspondence and in the solicitors certificate and report of title) - which refer to eight sites but which do not refer to the common areas - to seek to argue that therefore there was no intention to convey the common areas but only an intention to convey the sites. In my view his evidence on this is non- existent and his case is untenable.

Conclusion on the first issue

32. Having heard evidence on this issue from the plaintiff, the plaintiff's solicitor and the Bank's solicitor, I therefore find as a fact that it was at all times the plaintiff's - and the Bank's - intention to mortgage and charge the common areas to BOSI and that the plaintiff at all times actually knew that he was in fact mortgaging and charging the common areas of Lindville and the relevant sites to BOSI in September 2002. I therefore conclude that the Plaintiff's case on the first issue is unfounded.

The expert evidence of the architect/ planning experts on the common areas

33. After the trial had commenced Mr. O'Connor applied to the court for leave to submit a report from another independent architectural expert (Mr. Glen Barry). Despite objections from counsel for the defendant, in the interests of justice and because the plaintiff was a lay litigant who said he would be prejudiced without being able to provide such evidence, I permitted the plaintiff to adduce in evidence an expert report by an independent architect even though it was only produced after the trial had commenced.

34. It is not necessary to describe in detail the matters set out in the expert reports of Glen Barry or of the defendant's planning expert, Mr. John Crean. All parties agree that they could be summarised as follows: The plaintiff's case is that there were excess lands included in the common areas and that it was possible that planning permission could be obtained for a number of sites on these excess lands. Thus the common areas had a potential value to the plaintiff. The defendant's expert advice was to the effect that it was extremely unlikely that the plaintiff would ever obtain any planning permission for the extra sites at Lindville for a number of reasons as follows: Firstly, because, after protests from a number of residents in Lindville, Cork City Council had taken the common areas in charge; secondly, the plaintiff had brought a judicial review against the decision of Cork City Council to take the lands in

charge and this had been refused; thirdly the plaintiff had already made two applications for extra planning permission on these excess lands included in the common areas and had been refused;

35. It is important to note that any evidence of loss and damage which the plaintiff might suffer only arises in the event that the plaintiff can establish to the satisfaction of the court that the common areas should not have been included in the mortgage or charge in 2002. For reasons set out earlier in this judgment I have come to the conclusion that the common areas were at all times intended to be included in the mortgage and charge. In those circumstances therefore the plaintiff's contention that the lands should not have been mortgaged and charged to BOSI and that as a result he suffered loss and damage is unfounded.

36. In any event, even if the plaintiff had been able to establish that theoretical loss, it would have been impossible, based on the current evidence, for the court to assess that damage because no planning permission has been granted to the plaintiff and might never be.

THE 2003 LOAN FACILITY DOCUMENT
37. To resume the narrative of events: The second loan advanced by BOSI to the plaintiff was in October 2003. This was a loan agreement dated 8th October, 2003 from BOSI to the plaintiff for the sum of €750,000. The term was two years. The purpose of the loan was to restructure an existing loan with BOSI (facility 101) and to fund the construction of two detached residences in Lindville. The security for the loan was stated to be "an extension of Bank of Scotland (Ireland) Ltd's first specific charge over the freehold land incorporating five sites in Lindville, Blackrock, Cork. This loan offer was accepted by Mr. O'Connor on 31st October, 2003. The witness was James Riordan. The name of the solicitor acting on his behalf was stated to be Joseph Cuthbert. However Mr. O'Connor gave evidence that Mr. Cuthbert did not act for Mr. O'Connor in this transaction or advise Mr. O'Connor in respect of this transaction at all.

38. I note that the security on this is stated to be an extension of BOSI's charge over the freehold land incorporating five sites rather than seven or eight. However the agreement also stated that the Bank was to receive €150,000 from the sale of each of the two houses to be constructed.

THE 2004 FACILITY LETTER
39. On 16th June 2004, BOSI issued another loan facility letter to Mr. O'Connor. This amount was for up to €900,000. The term was 24 months. The purpose of the loan was to fund the construction of four detached residences at Lindville.

40. The security for the loan - which was stated to be to "cover the borrowers general liabilities to Bank of Scotland (Ireland) Ltd – was stated to be

> *"an extension of Bank of Scotland (Ireland) Ltd first specific charge over the freehold land and premises of the borrower consisting of one completed house and four sites at Lindville"*

This offer was signed and accepted by Patrick O'Connor on 17th June, 2004. It was witnessed by James Riordan. The solicitor stated to act on his behalf was again Mr. Cuthbert of Martin Sheehan and Company. The repayment was to take place from the proceeds of the sale of individual houses but in any event repayment in full was to be made from whatever source not later than 16th June, 2006.

EVENTS AFTER 2006 – THE PURCHASE OF ASHLEY AND THE 2007 LOAN
41. Subsequently, in 2006, James Riordan and Darren O'Keeffe (the solicitor defendants in these proceedings) attended auctions with the plaintiff in relation to various other properties. At some point in time lands at Ashley came up for sale. The plaintiff also contacted Mr. Michael Cotter to see if he could arrange funding with BOSI. In 2006 Mr. Cotter made contact with Roy Barry in relation to financing. Mr. Cotter reverted to the plaintiff and discussed the matter with him. Mr. Cotter arranged a meeting with Roy Barry and Gavin Daly of BOSI, and the plaintiff in Cork. Mr. Cotter put a proposal on the plaintiff's behalf to BOSI for the purchase of the Ashley site. Mr. Cotter had a document which he produced in respect of the financing. In that document he set out estimated construction costs for the proposed development of that land. There was an auction about to take place for the Ashley lands on or about 12th December 2006 and the plaintiff was anxious to have funding in place before he went to the auction with James Riordan. Roy Barry however stated, according to the plaintiff, that the plaintiff would get the funding and when he asked him about the funding to complete the whole project, the plaintiff's evidence was that "he said yes, the Bank would provide funding to complete the project. I took Mr. Barry at his word and he told me not to worry about not having the facility letter that the funds would be made available. I went ahead, attended the auction with Mr. Riordan and the lands were purchased for in or around €1.51m". Thus the plaintiff purchased the Ashley lands and paid a deposit of €151,000 out of his own funds.

42. Subsequently BOSI issued a loan facility letter on 5th February, 2007 in respect of the Ashley development – a document to which I will now turn.

LOAN AGREEMENT OF 5TH FEBRUARY, 2007
43. On 5th February, 2007 BOSI issued a loan facility offer letter to the plaintiff. This facility was for the sum of €4.34m. The term was for 24 months. The purpose of the loan was specifically stated to be as follows:

(a.) Purchase of site at Ashley €1,600,000.

(b.) Construction costs €1,400,000.

(c.) Interest roll up €461,000.

(d.) Refinance facility (103), €879,000

(e.) Total €4,340,000

44. The security for the loan was stated to be

1. The first specific charge over the freehold land and premises at Ashley.

2. An extension of BOSI's first charge over the plaintiff's property at Lindville consisting of three completed houses.

45. Therefore the security for this loan was stated to be three sites/three houses at Lindville. The loan was to be repaid from the sale proceeds of individual houses. This loan offer was signed by Mr. O'Connor on 20th February, 2007 and therefore an agreement came

into force on that date. The Solicitor acting on his behalf was stated to be James Riordan of M.J. Horgan and sons. In fact, Mr. Darren O'Keeffe of M. J. Horgan also acted for the plaintiff.

THE PLAINTIFF'S SECOND ALLEGATION: THAT HIS SOLICITORS (THE DEFENDANT SOLICITORS) FAILED TO CORRECT THE ERROR IN THE 2002 MORTGAGE AND FAILED TO ENSURE THAT THE COMMON AREAS IN LINDVILLE WERE NOT INCLUDED IN THE 2007 MORTGAGE.

46. I pause again here in the narrative to deal with the plaintiff's second allegation because it relates to this 2007 mortgage. This allegation is related to the first allegation. The plaintiff's allegation here, is that the defendant solicitors who were acting for him in the 2007 loan transaction (and the attendant security) should have realised that an error was made in the 2002 security, i.e. that the common areas were not intended to be part of the 2002 security. The plaintiff alleges that the defendant's solicitors failed to notice this, that they were negligent and that therefore they perpetuated the 2002 error in the 2007 loan agreement. In other words his allegation is that the security for the 2007 loan also should not have included the common areas at Lindville.

47. The plaintiff's evidence was that Mr. O'Keeffe, his solicitor, put in place an extension to the security from 2002 (i.e. an extension of the original underlying security set out in the 2002 mortgage document).

48. The plaintiff's case is that, yet again, there was no reference to the common areas in the security and that therefore the original error contained in the 2002 mortgage was perpetuated and continued by this document. In the alternative he concluded that if the common areas were not transferred in 2002 that they still failed to be transferred in 2007.

49. The plaintiff in his witness statement, stated that legal work in relation to the draw down of finance was carried out by Darren O'Keeffe, solicitor in M.J. Horgan and company. The plaintiff says Darren O'Keeffe did not advise him that the 2002 mortgage was invalid or suspect in any way.

50. However, in my view, the plaintiff's allegations in this regard are also completely unfounded. His allegations against the defendant solicitors in relation to the 2007 mortgage rest crucially on the assumption that the 2002 mortgage wrongly included the common areas of the Lindville Development. However, for the reasons set out earlier in my judgment, I have concluded that the common areas were indeed included – and properly included – in the 2002 mortgage. That being so, the defendant solicitors could not be found liable for any wrongdoing or negligence in respect of the 2007 mortgage when it was clear that all parties intended the existing security to continue and to be extended to cover additional loans. Of necessity, this included the common areas. I would therefore dismiss the plaintiff's second allegation.

LOAN AGREEMENT OF 3RD APRIL, 2008

51. The plaintiff continued with his activity of building houses. In 2008, the plaintiff purchased a site called "Five Firs" which adjoined the Ashley property. He intended to build two further houses on this site. On 3rd April, 2008, BOSI issued another loan facility letter to the plaintiff. This was signed by the plaintiff on 17th November, 2008. The amount of the loan facility was €1.88m. The term was stated to be for a period of 36 months. The purpose of the 2008 loan was stated to be as follows:

(a.) Purchase of Five Firs - €750,000.

(b.) Construction costs - €750,000.

(c.) Interest roll-up - €330,000.

(d.) Stamp duty - €50,000

(e.) Total - €1,880,000.

52. The security for the loan was stated to be

1. A first specific charge over the land and premises at Five Firs (0.4 acres).

2. An extension of BOSI's charge over the land at Ashley (0.6 acres).

3. An extension of BOSI's first charge over the freehold land and premises consisting of three completed houses at Lindville.

53. However, very importantly, this loan agreement contains a vital condition precedent which provides as follows:

"Before release of funds in respect of the construction finance the Bank to be in receipt of confirmation from the borrower's solicitors that a minimum of two houses of the four in phase one at [Ashley] have contracted sales in place".

54. The plaintiff at all times has accepted that no contracted sales in Ashley were ever put in place.

55. The date of the facility letter was 3rd April, 2008. The terms were a period of 36 months. The loan facility stated that the full amount of the loan was to be drawn down not later than 3rd April 2009 (i.e. within a period of twelve months of the offer letter). The plaintiff gave evidence that that date was agreed between the parties because, when the facility was being put in place, the plaintiff and the Bank believed that the purchase of the property would take place soon after 3rd April, 2008. But, according to the plaintiff, the sale of the property dragged out for quite a long period and the property did not sell until in or around November, 2008. The plaintiff sought to lay some emphasis on the fact that the facility letter was dated 3rd April, 2008 and that it stated that it should be signed and accepted by 3rd May, 2008 but that it was not. He sought to rely on this to show that BOSI was flexible in relation to many of the issues in relation to financing.

56. The plaintiff also argued that rather than drawing up a new facility, the Bank continued to use this offer letter of 3rd April, 2008 until it was signed by the plaintiff on 17th November, 2008. He gave evidence that the Bank, instead of issuing a new facility, chose to allow the plaintiff to proceed with this facility letter in November, 2008 despite the fact that it was out of date. The plaintiff gave evidence that Mr. Gavin Daly (who was the banker with BOSI dealing with his affairs at this time) advised the plaintiff "that all dates would go forward and that I should have no concerns about the draw-down date for the loan". Thus the plaintiff believed the draw-down date was to be extended by a period of up to a year later than when he purchased the site. Thus, given that the plaintiff purchased the site in November 2008, he believed the draw-down date would be November 2011. There is no dispute on this as subsequently Mr. Daly, for the Bank, wrote the plaintiff a letter in which he confirmed that the latest date for the draw down of funds

would in fact be 20th November, 2011 rather than 2010. Thus, the plaintiff's evidence, was that the Bank in fact gave him two years to draw down the funds. However importantly at all times the condition precedent for pre-sales remained in place.

Application by Plaintiff for funding in September 2009

57. It appears that some time in September, 2009, the plaintiff made a proposal for further funding to BOSI. However on 24th September, 2009 Gavin Daly of BOSI wrote to the plaintiff refusing the proposal. The letter stated that the requirement for two pre-sales in this development was still required in order that the entire development could be completed. However it stated that BOSI would reconsider the proposal in the light of any potential sales of property - specifically the sale of the Lindville houses which would reduce the BOSI debt. It also indicated that the existing offer to draw down on phase two subject to pre-sales was valid until the maturity date (20th November, 2011).

58. Thus, it appears to be the case, that the Bank was agreeing that the facility letter of 3rd April, 2008 (and accepted by the plaintiff on 17th November, 2008) would now have a final draw- down date not of 3rd April, 2009 (as it had been in the original facility letter) but of 20th November, 2011. This meant that the plaintiff had until November 2011 to draw down the €750,000 in construction costs set out under the loan agreement provided the condition precedent was fulfilled.

59. However, it is important to note, that on 24th September, 2009 (i.e. some ten months after this loan agreement had been entered into in November 2008) BOSI was still expressly reiterating that the requirement for two pre-sales on Ashley was required in order that the entire development could be completed. In effect therefore, BOSI was not prepared to waive its requirement of the condition precedent for the sale of the two houses before any further funds would be released for construction costs.

60. This is of considerable importance because the plaintiff's third allegation rests on the proposition that on 12th March, 2010, the defendant (through Mr. Aidan McCarthy) made an express representation to the plaintiff that it would fund the project through to completion (i.e. irrespective of completed sales).

THE PLAINTIFF'S THIRD ALLEGATION- THAT THE BANK MADE A REPRESENTATION TO HIM ON 12TH MARCH 2010 THAT IT WOULD FUND THE DEVELOPMENT TO COMPLETION

Introduction

61. Matters moved on. The financial crisis of September 2008 occurred and the plaintiff suddenly found himself in financial difficulties. Demand for his properties collapsed. There were no sales. The plaintiff and BOSI began to discuss the plaintiff's issues and financial requirements. BOSI appointed a new team to look after troubled development loans – including those of the plaintiff.

62. The plaintiff's central allegation against BOSI is that Mr. Aidan McCarthy, of BOSI, made a representation to him on or about 12th March, 2010 (when they were walking the site at Ashley) that BOSI would finance the houses and sites at Ashley to completion if the plaintiff gave BOSI additional security over two unencumbered houses which he owned at Douglas in Cork (which two houses had a combined value of approximately €500,000).

63. In order to assess this issue it is important to have regard to the context in which this alleged representation was made. In turn, this requires an assessment of the outstanding loan facilities which the plaintiff had with BOSI at that time.

64. The plaintiff had two such loans - the 2007 and 2008 loan facilities. The 2007 loan facility was for the sum of €4.34m. This loan facility included a loan of €1.6m for the purchase of Ashley (which funds had been drawn down in full by the plaintiff). It also included a sum of €1.4m for construction costs of various houses at Ashley. Likewise, the plaintiff had drawn down these funds in full. In addition the February 2007 loan also included a sum of €879,000 which had been drawn down in full by the plaintiff, to repay the 2004 loan. In addition there were interest roll up provisions within the loan. This loan was for a period of two years from 5th February, 2007 until March 2009. But it had been extended for one year (from March 2009 until March/April 2010). Thus, when the plaintiff met Aidan McCarthy this loan was shortly due to be repaid in full by the plaintiff.

65. In addition to the 2007 loan the plaintiff had also, outstanding from BOSI, the April 2008 loan. This loan was for the sum of €1.88m. This included a sum of €750,000 for the purchase of the site at Five Firs. The plaintiff had drawn down approximately €510,000 of the €750,000 to purchase the site. (This site at Five Firs consisted of lands adjacent to the Ashley site. Subsequently in fact, it became amalgamated within the Ashley site and was sometimes referred to also, confusingly as the Ashley site). The plaintiff obtained planning permission to build two houses at two sites on this land. These buildings however were never subsequently built.

66. In addition, the 2008 loan permitted a draw down of €750,000 for the construction costs of the two houses. The plaintiff had until 20th November, 2011 to draw down these funds. These funds were never in fact drawn down by the plaintiff, because a critical condition precedent in the 2008 loan was that no funds could be drawn down for construction of the houses at Five Firs until houses had been sold at Ashley.

67. Thus, the plaintiff's financial condition as at March 2010, when he met Aidan McCarthy, was extremely fragile. He had an outstanding €4.34m (February 2007) loan which had been drawn down in full and which was due to be repaid in full within a couple of weeks. Moreover because no properties had been sold at Ashley the plaintiff was now in extreme financial difficulties. Given the state of the economy there had been a collapse in the price of housing and also a collapse in demand. In addition the plaintiff faced considerable difficulties with the Ashley site because although he had spent €1.4m in construction costs (the full amount of the construction costs loan), he had in fact not finished any of the houses nor had he finished off the common areas in the development. Thus the development was unsightly and a disincentive for any purchasers. In addition, the plaintiff could not draw down any of the construction costs from the 2008 loan because that was subject to the condition precedent of pre-sales at Ashley. As there were no sales at Ashley the plaintiff was not in a position either to sell a house at Ashley to reduce the February 2007 loan or to fulfil the condition precedent in the 2008 loan which might have enabled him to draw down the construction costs under the 2008 loan.

68. In addition, the plaintiff gave evidence that in February 2010 the selling agents (Savills) were having conversations with possible purchasers. The plaintiff said that there was concern in the market place about the completion of the development. One of the purchasers sought a letter from BOSI confirming funding was in place for the completion of the other houses.

69. In response to these concerns from a possible purchaser, on 17th February, 2010 Aidan McCarthy of BOSI wrote a letter to Savills.

70. It is important to set out the full text of this letter. The letter is as follows.

To Catherine McAuliffe

Savills

17th February, 2010

Re: Ashley, Rochestown, County Cork

Dear Catherine,

As discussed Pat O'Connor has advised the Bank that you currently have a live prospect for number six Ashley which is presently under construction.

I confirm that the Bank, subject to a satisfactory contract of sale being achieved, and the Bank being satisfied with same, we would support the completion of number six to the showhouse standard including relevant landscaping, site access, tarring, lighting and footpaths would be completed for the developed area of the site.

Yours sincerely,

Aidan McCarthy

BOSI.

71. Again this shows the Bank's position as being entirely consistent i.e. that any funds would only be made available subject to the condition precedent being fulfilled (i.e. proof of contracted sales before any further monies are released). That letter was sent to Ms McAuliffe of Savills on 3rd March, 2010 (although dated 17th February 2010). The plaintiff sought to characterise this letter as saying that the Bank would support the completion of number six to show-house standard but that is not the full text of the letter. The letter confirms that the Bank would support the completion of number six to show-house standard but only subject to a satisfactory contracted sale being achieved. The plaintiff appeared to read in the letter only what he wanted to read.

72. The significance of this letter is that it shows that Mr. McCarthy, on 17th February – 3rd March, 2010, was still consistently maintaining the BOSI line (which was in the loan agreement of 2008, the refusal of finance in September 2009 and now in his letter of 17th February, 2010) that BOSI would only provide the financing to complete number six subject to a satisfactory contracted sale being achieved. This language, to all intents and purposes, mirrors the language in the 2008 loan agreement (which was that BOSI would only provide construction finance in the event that two contracted sales had been achieved). (Indeed, if anything, BOSI may have been relaxing its requirements in this letter by saying that if they achieved one contracted sale they would forward the financing for the construction of that property). However it is clear that BOSI was not offering to provide financing for the completion of the site in any way which would lead the plaintiff to believe that BOSI was waiving its condition precedent about completed sales.

The plaintiff's evidence – the events of 12th March 2010

73. The plaintiff's evidence was that at the beginning of February 2010 Gavin Daly of BOSI telephoned the plaintiff and asked him to meet with Aidan McCarthy whom he advised would be taking over the plaintiff's account in BOSI. Mr. Daly informed the plaintiff that Mr. Aidan McCarthy had access to funds that Mr. Daly's department did not have. On 8th February, 2010 the plaintiff attended at a meeting with Gavin Daly and Aidan McCarthy of BOSI. Those present at the meeting were the plaintiff, his son Cathal O'Connor, Gavin Daly and Aidan McCarthy. According to the plaintiff, Aidan McCarthy gave a commitment that number four Ashley would be completed if number three Ashley "sells". (Number three Ashley was the showhouse). Mr. McCarthy also noted that one of the properties at Lindville, number 53 had been put on the market and he remarked that that strategy was good and that the plaintiff should work away trying to sell number 53.

74. The plaintiff's case fundamentally turns on what happened on 12th March, 2010. The plaintiff's evidence is that nine days after this letter (of 17th February/ 3rd March 2010) was sent by Aidan McCarthy to Savills, Aidan McCarthy telephoned the plaintiff at 1.30 in the afternoon and asked would the plaintiff be free for a meeting that afternoon on site in Ashley. The plaintiff and Mr. McCarthy met at 3.30 in the afternoon in Ashley. The parties went into the show-house, had a look around the showhouse and, according to the plaintiff, various compliments were paid about the showhouse.

75. The core of the plaintiff's evidence in this regard should be set out in full. The plaintiff's evidence (given at day two, page 127) of the transcript stated as follows:

> *"So we walked out from number three and we walked up the site and we were about number two when Aidan McCarthy said to me he said Pat he said you have two houses that are unencumbered over in Douglas and he said if you're prepared to put those two houses into the pot, the Bank will support the completion of the estate and on that basis that I was understanding that to mean that the Bank were going to give me finance if I gave them additional security of two houses unencumbered which I believe at that particular time were valued at €285,000 each or thereabouts depending on the market, and I agreed on that basis that I was in return having an agreement with the Bank to provide full funding to completion of the estate.*
>
> *So Mr. McCarthy then said that he would have to get the Bank's quantity surveyor - a Mr. Eoin Stack - to value all of the remaining works to be completed on site and do a report and to that end I called over my son Cathal who was with me …"*

This is the height of the plaintiff's evidence in respect of his case against the Bank that Aidan McCarthy made a representation to him upon which he relied. The nature of that representation, according to the plaintiff, was that if the plaintiff gave the additional security of two houses to BOSI, then the Bank in return would provide full funding to completion of the estate.

The Evidence of Aidan McCarthy

76. Aidan McCarthy gave evidence on behalf of BOSI. His evidence was that he initially joined ICC Bank (which subsequently became BOSI) in September 2001 and that he had thirteen years experience in commercial loan management. He stated that in January 2010 the plaintiff's loan accounts were transferred to the Business Support Unit, a team which managed BOSI's distressed loan portfolio, and that he managed the BSU team at the BOSI branch in Cork. Mary Noonan was a member of the same team and reported to Mr. McCarthy. Mr. McCarthy provided a witness statement in this case and affirmed this witness statement as his direct evidence.

77. Importantly, Mr. McCarthy gave evidence that the 2007 loan agreement had been fully drawn down since 20th September 2009, that the direct debits in respect of interest had been rejected and had not been discharged and that therefore the account was

overdrawn in the sum of €62,815.48. Thus, according to Mr. McCarthy, Mr. O'Connor was in default on this loan and for this reason his loans were transferred to the Business Support Unit.

78. Mr. McCarthy gave evidence that he met with the plaintiff the first time at the Ashley development in February 2010. He says he attended with Mr. Gavin Daly and on behalf of BOSI, and Mr. O'Connor was there accompanied by his son Cathal O'Connor. He said that from this inspection it was clear that the development was only partially complete. The showhouse, at the back of the development, had unfinished access and the common areas were unsightly and unfinished.

79. His evidence was, that by 12th March 2010, no sales had materialised and he therefore sought another meeting with Mr. O'Connor to discuss Mr. O'Connor's strategy for progressing sales at the Ashley development. He says that he went to this meeting and that Mr. O'Connor was there with his son Mr. Cathal O'Connor.

80. Mr. McCarthy gave evidence that during the course of this meeting Mr. O'Connor advised Mr. McCarthy that the overall site appearance was contributing to the lack of offers. Mr. O'Connor's stated intention at the time was that he wished to develop the site and therefore that he required further finance to complete one or two houses and - more importantly to complete the common areas - which, because of the state of the common areas, was putting off potential buyers. Mr. McCarthy's evidence was that he indicated to Mr. O'Connor that, (given that there was a specific precondition in the 2008 loan that the Bank would only advance further finance to the plaintiff if contracted sales were achieved), if Mr. O'Connor wished to obtain additional development finance the Bank would require additional security over the plaintiff's unencumbered investment properties (which had been set out in Mr O' Connor's statement of means dated 1st November, 2009). (Indeed, Mr. McCarthy stated that he advised Mr. O'Connor that although his statement of means also referred to his principal private residence as being unencumbered and having a value of €1,150,000 that this would not be sought as security for the proposed construction finance. In addition Mr. McCarthy stated that he said to Mr. O'Connor that as Mr. O'Connor proposed continuing to devote his time and energy into upgrading the Ashley site in order to secure a sale, that BOSI would not be proposing that he should commit his rental income from investment properties which he owned to BOSI but that instead Mr. O'Connor could use these rental incomes to finance his living expenses).

81. Mr. McCarthy also gave evidence that it was now BOSI policy, before any development finance would be released that BOSI had to obtain a quantity surveyor's report on the actual amount of finance which would be required to achieve a particular construction project - whether that was the completion of common areas or the completion or building of a property. Therefore, in order for BOSI to release further finance, any further loan application by the plaintiff had to be accompanied with, and verified by, such a QS report. Mr. McCarthy's evidence was that the QS report should outline various phases of works to be done at Ashley and that it would be appropriate that the initial phase one of the works should include completing the common areas, demolishing an original bungalow on site (which required to be demolished in accordance with the planning permission) and to generally tidy up the common areas on the site to make the estate more attractive for potential purchasers.

82. Mr. McCarthy's evidence as to whether or not he had made a representation or agreement with Mr. O'Connor at the meeting of 12th March, 2010 at the Ashley site was clear and unambiguous. He stated as follows (day nine, page 173)

> *"Your honour and I hope I am as clear as I possibly can on this. [sic] I agreed nothing with Mr. O'Connor on that site. What I agreed to do was make a proposal to the Bank. I outlined that proposal to Mr. O'Connor and that proposal was part of the meeting that we had and the strategy discussed."*

83. Mr. McCarthy stated categorically that under no circumstances would he have made any representation to Mr. O'Connor that BOSI would have provided finance to Mr. O'Connor to complete the development at Ashley without any precondition. He said he was an experienced banker and would never make any representation of that nature. Moreover he said that he didn't have the power to make such a representation because any such loan could only be approved by the credit committee of BOSI and only after all the relevant documentation had been obtained. Thus his evidence was that this discussion with Mr. O'Connor was simply a discussion in general terms about how BOSI and Mr. O'Connor might move forward together in order to ensure the best outcome for Mr. O'Connor - and BOSI - by permitting further finance to complete the common areas, to encourage potential purchasers which in turn might lead to a sale of one property in the estate - which would generate profits - which in turn could be used to reduce the loan exposure to BOSI and/or to complete another house which in turn could be sold.

84. Subsequently Mr. McCarthy says that Mr. Eoin Stack, a quantity surveyor, was retained by the Bank to complete a comprehensive report clearly outlining the necessary monies which were required to complete each part of the Ashley site (including common areas and the completion of the various houses).

85. Subsequently, Mr. Eoin Stack gave evidence. His witness statement was accepted in full and he was not cross examined. Mr. Stack's report suggested that the work should be carried out in three phases:

> 1. Phase one – works required to finish units one, two and four externally and to complete the common areas including roads, paths, etc. to facilitate the proposed sale of the completed showhouse (number three) on the site.
>
> 2. Phase two – works required to complete units one, two and four internally but with only unit two having the fit out complete to showhouse standard and the works required to construct and finish units five and six externally.
>
> 3. Phase three – works to complete the internal fit out of units one and four to showhouse standard and to complete units five and six internally to showhouse standard.

86. (Subsequently the plaintiff obtained, in May 2010 another facility loan from the Bank. As part of this loan, development finance in the sum of €225,000 was approved by the Bank and released by the Bank. The plaintiff drew down these funds and used these funds to complete the common areas and to complete phase one of the works as set out in Eoin Stack's report).

87. Mr. McCarthy indicated that the 12th March 2010 meeting which he had with Mr. O'Connor was cordial and constructive in nature and that he complimented Mr. O'Connor on the design of the development and the finish achieved in the showhouse. He said that he was also confident that the location of the site was very good and that he believed that sales would occur. He did say however, that he expressed reservations over whether Mr. O'Connor could obtain a sale price of €700,000 to €800,000 for the showhouse - given the condition of the common areas and the undeveloped nature of the adjoining house.

88. Mr. McCarthy also stated in his witness statement that Mr. Stack completed his report on 24th March, 2010 i.e. before the May 2010 loan was offered and approved and that his report concluded that the costs for doing works for phase one would be €223,000.

89. Mr. McCarthy also stated that on receipt of Mr. Stack's report he asked Ms Noonan to prepare a credit application in respect of the plaintiff's loans and that this application sought approval to amalgamate the 2007 and 2008 loan, to provide development finance of €225,000 and interest roll up of €80,000.

Conclusions on the third allegation
90. It may well be that the plaintiff left that meeting of 12th March 2010 in the full knowledge - as he believed - that he had full funding to complete the Ashley and Five Firs development in total. However, there was absolutely no foundation for the plaintiff's belief or knowledge in that regard. Indeed it is absolutely fanciful for the plaintiff to suggest otherwise. The plaintiff is an experienced property developer. He had been negotiating loan facilities and loan agreements with BOSI for over eight years at this period in time. He had at this stage, no less than five facility agreements concluded with BOSI. He was developing properties in three separate sites – Lindville, Ashley and Five Firs. He was an experienced negotiator who was at all times legally advised as to the full effect of loan agreements and contractual obligations. Throughout his evidence, he seemed quite clear about various legal obligations. Indeed, when the contractual obligations were in his favour, he seemed particularly attuned to legal niceties. It was only when legal obligations were sought to be construed against him that he sought to contend that they had no application or that they could be explained away on the basis of some other vague representations made by some bank official on some unknown date. It is quite clear from the evidence that there was no such representation made by Aidan McCarthy that BOSI would finance the development through to completion. It is also quite clear from the evidence that there was absolutely no agreement between BOSI and Mr. O'Connor that BOSI would complete the developments through to completion. The only agreement which BOSI maintained at all times both before and after 12th March, 2010 was that BOSI was prepared to honour its loan facility agreement provided that the condition precedents were met (i.e. that there would be a minimum of two contracted sales in Ashley before construction finance for the two houses in Five Firs was advanced).

91. Moreover the plaintiff elsewhere in his evidence sought to argue that by virtue of the fact that BOSI had sought to rely on Mr. Stack's QS report that that showed an indication that BOSI was prepared to agree to finance the development to completion. It shows nothing of the sort. The only reason Mr. Stack was retained was because BOSI was of the view that perhaps the full €750,000 did not need to be drawn down to construct both houses because there had been a drop in construction costs for the construction of houses between 2008 and 2010 given the conditions in the market.

92. The only witnesses to the alleged representation made on 12th March 2010 by Mr. McCarthy, on behalf of BOSI, were Mr. O'Connor and Mr. McCarthy. Having heard the evidence of both witnesses in great detail on this point, I am quite satisfied that Mr McCarthy made no representation of any kind to Mr. O'Connor that if he granted extra security, BOSI would fund the development through to completion and I make a finding of fact in that regard. Mr. O'Connor either misheard or misunderstood what was said by Mr. McCarthy.

THE FACILITY LETTER OF MAY 2010
93. It appears that between 12th March, 2010 (when the above meeting took place) and May 2010 (when the 2010 loan offer was issued to Mr. O'Connor), there was no further communication from BOSI to Mr. O'Connor - even though BOSI internally had a number of discussions and generated a number of internal memoranda about the matter. BOSI eventually issued an offer letter to Mr. O' Connor on 24th May, 2010.

94. This was a facility letter in the sum of €5.4m. The term of the loan was six months. Importantly, the purpose of the loan was stated to be as follows:

(a.) To refinance facility 104/ 107 - €5,100,000.

(b.) Development finance - €225,000.

(c.) Interest roll up - €80,000.

(d.) Total- €5,405,000.

95. The security for the loan was to be

1. A charge over house number 16 Amberly Heights.

2. A fixed charge over number 42 Alton Grove, Douglas.

3. An extension of Bank of Scotland's charge over Ashley and Five Firs.

4. An extension of BOSI's charge over the three completed houses at Lindville.

96. The full amount of the loan was to be drawn down not later than ninety days from the acceptance date or such later date as might be agreed in writing by BOSI. This loan agreement was accepted by the plaintiff on 9th June, 2010 after he had received legal advice. It was witnessed by Darren O'Keeffe, the plaintiff's solicitor.

THE PLAINTIFF'S FOURTH ALLEGATION – THAT THE BANK UNLAWFULLY AMALGAMATED THE 2007 AND 2008 LOAN INTO THE 2010 LOAN

Introduction
97. This allegation by the plaintiff against BOSI is that BOSI unlawfully amalgamated the February 2007 loan (loan 104) and the April 2008 loan (loan 107) into the May 2010 loan agreement (loan 108). Indeed his allegations against BOSI in this regard are that BOSI fraudulently and deceitfully misrepresented the nature of this loan agreement to him and that it failed to properly inform him that the loans were being amalgamated.

98. BOSI, in return, contend that the plaintiff was at all times informed that the May 2010 facility meant that the 2007 and 2008 loan were being amalgamated, that new finance was also being advanced and that new security was being taken. BOSI submit that the plaintiff was fully on notice at all times of this matter firstly from the letter of offer, secondly because the plaintiff was specifically informed of the amalgamation by Mr. McCarthy of BOSI as he handed him the loan offer letter in May 2010 and thirdly because the plaintiff obtained independent legal advice as to the nature and effect of the May 2010 loan offer. In the circumstances, BOSI say there was no question of any deception or misrepresentation or fraudulent misrepresentation whatsoever.

99. The plaintiff's evidence in relation to this 2010 loan is that he received a telephone call to go into the office of BOSI to pick up this facility letter dated 24th May, 2010. He says that he went in and was met by Aidan McCarthy and Mary Noonan and that all three of them went into a meeting room, that Mr. McCarthy gave him an envelope and that he stated to the plaintiff that he could look at the details when he took it home but that he, Mr. McCarthy, just wanted to point out that they were amalgamating the 104 and 107 facilities (i.e. the 2007 and 2008 loans) "for ease of accounting purposes" "because it was easier to have one account instead of two". The plaintiff said nothing else was said about it. The plaintiff said "I went away, I considered it. I saw that the facility letter was not in compliance with my meeting on site of 12th March, 2010, whereby Mr. McCarthy had outlined the basis for funding to completion, re. reference to the quantity surveyors costing of Eoin Stack and I was considering my position. I went in to meet my solicitor, sorry I spoke to James Riordan."

100. Thus, the plaintiff's evidence was that the facility letter was not in accordance with what he considered to be the agreement made on 12th March, 2010 with Aidan McCarthy because the development finance in the loan agreement was limited to €225,000 and also because it was due to be repaid in six months i.e. in December 2010 and not in November 2011 as his 2008 loan advised.

The financial context of the 2010 loan

101. As far as Mr. McCarthy, for BOSI was concerned, the commercial imperative for refinancing the 2007 and 2008 loans was obvious and urgent. The 2007 loan was impaired and in arrears; it was also due to be repaid and due to expire. Therefore this loan had to be refinanced as a matter of urgency. In addition, the April 2008 loan was impaired but not in arrears.

102. Mr. O'Connor put to Mr. McCarthy in cross-examination why any man "in his right mind" would give up the April 2008 loan because it permitted construction finance of €750,000 until November 2011 and it was impossible to obtain finance from any other Bank at that time. Mr. McCarthy's reply was clear. The plaintiff had simply run out of money and run out of options. The February 2007 loan had been drawn down in full; the funds available under the April 2008 loan could not be drawn down until the plaintiff had obtained pre- sales. He could not obtain pre- sales because of the unfinished condition of the estate. He desperately needed finance to complete the common areas in Ashley which might then, with a fair wind, permit him to sell the showhouse. If he sold the showhouse he then might be able to sell another house. If he achieved these two pre- sales then he might obtain further construction costs to finish out the other two houses.

103. In my view, Mr. McCarthy's evidence is credible and shows clearly the commercial imperatives which compelled the plaintiff at that time to refinance his February 2007 and April 2008 loan into the May 2010 facility. This refinancing in May 2010 had a clear commercial logic for BOSI but it also had a clear commercial logic for the plaintiff – despite the plaintiff trying to portray it differently, now that receivers have been appointed.

104. As Mr. McCarthy explained, the attraction of the May 2010 facility was (i) that it provided the plaintiff with development finance of €225,000 to complete the common areas in Ashley; (ii) it refinanced the February 2007 loan which had expired and which was in default and would have been called in; (iii) both loans were impaired and needed to be refinanced. Because the loans were impaired, because the February 2007 loan was in default and was about to be called in, and because BOSI was advancing further finance of €225,000, BOSI sought additional security of the two unencumbered properties of the plaintiff which had a value of €500,000.

105. Mr. O'Connor sought to make great play about the fact that the April 2008 loan agreement was the only agreement which contained a requirement for pre- sales. Mr. McCarthy accepted entirely that the May 2010 loan agreement had no contractual condition about pre-sales. However, the reason for that was it was not a condition of the May 2010 loan agreement that any further finance would flow after the €225,000 and therefore there was no requirement for a condition of pre-sales. Indeed this very matter was highlighted to the plaintiff by his solicitor.

106. Mr. O'Connor's case is that the April 2008 loan facility was taken away from him by way of the May/June 2010 facility agreement and that in the April 2008 loan he had a facility available to him to draw down €750,000 for the costs of construction until November 2011. However what Mr. O'Connor conveniently ignores at each and every occasion was that he could not draw down this construction finance at his own discretion. It was subject to a condition precedent which required a contractual presale of one of the houses at Ashley. He never fulfilled this condition precedent. Even up to the date of the receivership there were no pre- sales at Ashley. Thus he never could have drawn down these funds, even if the May 2010 loan agreement had not been put in place.

107. Mr. O'Connor asked Mr. McCarthy why the April 2008 loan facility was "taken away from him by way of the May 2010 facility letter". Mr. McCarthy's response to this question clearly illustrates BOSI's position. The position is, that as of May 2010, the February 2007 loan was for nearly €4.5m. As at May 2010 that loan agreement was in default and was impaired. In addition, the 2008 loan was for an additional €600,000 and therefore the borrowers overall exposure to BOSI at the time of the refinancing was approximately €5.1m. The majority of Mr. O'Connor's debt was in default at the time of the refinancing. Thus, the main concern for BOSI was that the 2007 loan had now expired, was now in default and had to be repaid. So BOSI was seeking primarily to ensure that this debt was refinanced. BOSI could have called in the February 2007 loan in May 2010. So, in response to the question as to why "anyone would have given up the 2008 loan", BOSI's answer is that they could have called in the 2007 loan (and as a result also called in the April 2008 loan because both loans were cross collateralised to each other).

108. Indeed the offer of May 2010 of loan facilities from BOSI was an offer to Mr. O'Connor to amalgamate the February 2007 loan and the April 2008 loan, to refinance the 2007 and 2008 loan, to put the plaintiff in a position where he was no longer in default on the February 2007 loan, to provide additional facilities of €225,000 to complete the common areas in Ashley and to take additional security and related matters. It was therefore a refinancing of Mr. O'Connor's loan facilities with BOSI. It was clear and explicit and Mr. O'Connor had full knowledge of what was being offered and indeed what he accepted. Thus his argument that he was tricked or that he was deceived or that there was a misrepresentation as to the effect of the May 2010 loan agreement is simply wrong. Moreover his assertion that BOSI deceived him or that they engaged in fraud is also simply wrong.

109. The evidence is clear that even before Mr. O'Connor signed the May 2010 loan agreement he was specifically told by Mr. McCarthy that both the 2007 and 2008 loans were being amalgamated into the May 2010 loan; Moreover he was specifically advised on this very point by his solicitor before he signed the agreement. Therefore there is no question but that Mr. O'Connor was fully aware before he signed the May 2010 loan that the February 2007 and April 2008 loan were being amalgamated into the May 2010 loan and that he agreed to this amalgamation, and I make a finding of fact on this point.

Plaintiff's legal advice on May 2010 loan

110. However of even greater significance was the fact that Mr. O'Connor had some time to consider and assess the facility letter and that he took legal advice on it. Mr. O'Connor met his solicitor Darren O'Keeffe on 8th June 2010 and he took a contemporaneous note of that meeting. As part of this contemporaneous note he has written:

"six months – what is Bank's policy after six months

How do we finance completion of house number 1, 2, 4.

90 day draw down – can we get that changed to six months?"

111. Darren O'Keeffe, the plaintiff's solicitor, gave evidence on this very point. Darren O'Keeffe also kept a contemporaneous note of his meeting with Mr. O'Connor on the 8th June, 2010. The meeting took place from 3 pm to 4.45 pm.

112. Some of the various matters set out in his note are as follows:

"5pm – Talked with Pat about the loan offer of 24/5/2010

Number of issues – term six months – what happens after that? No guarantee that BOSI wants to continue funding the final units

- how do you pay for the finishing of the units part built? If get a signed contract no monies will be handed over until completion?

Pat advised could be up to €80,000 needed. Decision is to ask BOSI because Eoin [Stack] and Aidan McCarthy went on site a number of weeks ago and talked about three phases. Get one sold this year. Finish the first four and then deal with five and six.

Draw down completion date – ninety days. Pat advised not enough! I advised this would require a new credit application.

- The new items of security – what is Pat getting for them? Getting some funds to get the site. Hopefully to a stage where people think it is finished. Pat advised this was more in his interest than BOSI's.

Pat asked what is worst case scenario? I advised judgment against you, get judgment mortgage over the other two properties and receiver

Appointed to complete the build and sell off. Pat feels that it is a disaster as he will build and complete better product so in everyone's interest keep him on.

If need to keep good will then the issues are the existing loan offer for "Five Firs" where you currently have finance for the construction of units five and six. "Now off the table."

Pat to talk with Aidan to see if more comfortable before signing anything." (Emphasis added).

113. What is of importance in the above contemporaneous note, is that it is noted that the existing loan offer (i.e. the April 2008 loan offer) is "now off the table". It is clear therefore that the plaintiff was absolutely aware from his meeting with his solicitor that the April 2008 loan was "off the table". It is not only clear that he was aware of it and that his solicitor was aware of it but that his solicitor advised him on this very point. Despite this, Mr. O'Connor sought to portray himself in court as a man who was oblivious of the fact that the April 2008 loan was no longer in existence, or that it was amalgamated into the May 2010 loan agreement, that he had been deceived into giving up this April 2008 loan, and that BOSI fraudulently misrepresented the position to him. It is clear that the plaintiff is wholly misguided in relation to this issue and that he was fully aware of it.

114. I therefore find as a fact based on the evidence of the plaintiff, Mr. O'Keeffe and Aidan McCarthy, that the plaintiff was fully aware as at 8th June, 2010 before he entered into the May/June 2010 loan agreement that the April 2008 loan was being withdrawn and being reissued/amalgamated in the May/June 2010 loan agreement and that he entered the loan agreement in 2010 on that basis.

115. The plaintiff had a telephone conversation with Aidan McCarthy on the 8th June, 2010. The plaintiff kept a contemporaneous note of this telephone conversation. It reads as follows:

"8-6/2010 Aidan McCarthy rang 6.15 pm

Number one signs – will get money – Bank will approve completion loan

20 – 30% will be paid by purchaser on signing

BOSI keep selling the showhouse

Once signed contract – Bank will provide funds to complete each house

Contracts with funds that can be accessed when house completed

Aidan says ninety day draw down date is wrong and that the last date for draw down is last day of six months in the property department where I am.

Aidan says – you sell and we will provide money."

116. The plaintiff then wrote a letter to Aidan McCarthy dated the 10th June 2010 which reads as follows:

Dear Mr. McCarthy

Re: Facility for development at Ashley at Rochestown Road, Cork.

I refer to your letter of the 24th alt and our subsequent telephone conversations.

I am happy with your assurances that the last date for draw down is six months rather than ninety days which would have made it impossible for me to complete the required works and have drawn down the requisite funds within that shorter time frame.

I am also happy with your assurances regarding access to additional funding to complete house numbers one, two and four conditional unsigned contracts in each case with funds that can be accessed when each house is completed.

I also confirm that I am happy with your assurances that in the event that house numbers five and six are sold, that funding will be made available to construct and complete each of these houses, conditional on unsigned contracts in each case with funds that can be accessed when each house is completed.

I now enclose facility letter duly signed.

Yours sincerely,

Patrick O'Connor.

117. The plaintiff sought to contend that his letter of 10th June formed part of his acceptance of the loan offer letter dated 24th May, 2010. However, Mr. McCarthy on behalf of BOSI did not accept that it formed a composite part of the loan offer obligations. In my view it is clear that there was no agreement on the part of the Bank that the plaintiff's letter dated 10th June, 2010 was incorporated by agreement into the loan agreement of 24th May/9th June 2010.

118. In addition, Mr. O'Keeffe took a contemporaneous note of a telephone conversation which he had with Mr. O'Connor on 9th June, 2010. This note states as follows:

"Pat in to sign. Has nothing in writing in terms of Banking him with further funds to complete. Pat happier that if gets funds to finish one Bank will consider giving funds to complete next one etc. Appreciates no guarantees but better to get one finished, get someone in and then in much better position to sell next one, deal with BOSI for more funding etc. Knows giving security now for small money but keeps it going – not getting anything in writing because needs a price for sale of first one to set a floor." (Emphasis added)

119. Again it is clear from this note, that Mr. O'Connor knew full well that he was giving extra security for "small money". But of course Mr. O'Connor was giving extra security to BOSI in order to ensure that the February 2007 loan which was in arrears and in default would not be called in. It would instead be refinanced. Thus the extra security which the plaintiff gave in terms of his houses was not only for the development finance to complete the common areas of €225,000 but also as extra security to refinance February 2007 loan which was in default.

120. It is common case that there were no contracted sales at Ashley before the loan facility of 2010. Indeed, it is common case that there were no contracted sales at Ashley before 20th November, 2011. (i.e. the date of the expiry of the draw down). That being so, and given that the condition precedent had not been fulfilled, it clearly follows that BOSI was under no contractual obligation to advance the money under the terms of the April 2008 loan offer to the plaintiff. Thus even taking the plaintiff's case at its height, it is abundantly clear, that even if the April 2008 loan facility letter had continued in being until 20th November, 2011 there would have been no contractual obligation on BOSI to advance the €750,000 construction costs for Five Firs.

121. This is important because the plaintiff's case is that the 2010 facility (which refinanced the 2007 and 2008 facility) put a new timeline in place which made it more difficult for him. However, even if he is correct in that submission, (and in my view he is not), even if the 2008 loan facility had continued in being, the plaintiff was unable to satisfy the conditions precedent. There were no contracted sales before November 2011 and therefore the plaintiff himself was unable to comply with the terms of the facility letter of April 2008 from BOSI. Indeed I am absolutely at a loss to understand why the plaintiff believes he has any case in this regard.

122. I would therefore conclude that on this issue also, the plaintiff's case is completely unfounded.

EVENTS AFTER JUNE 2010

123. Mr. McCarthy gave evidence that when he received the signed 2010 loan agreement from Mr. O'Connor, the February 2007 loan and April 2008 loan accounts were repaid. In addition, BOSI released the following payments to Mr. O'Connor in relation to agreed site development works:

1. The sum of €49,000 approximately (on 20th July, 2010 on foot of a certificate from Mr. Stack dated 7th July, 2010).

2. The sum of €41,000 approximately (on 21st September, 2010).

3. The sum of €50,000 approximately (on 22nd October, 2010).

4. The sum of €41,000 approximately (on 17th November, 2010 again all on foot of certificates from Mr. Stack).

5. The sum of €36,000 approximately (on 30th November, 2010). Thus the total amount advanced by BOSI in respect of site development works was €219,000 approximately.

124. Mr. McCarthy also gave evidence that by December, 2010 in the continued absence of progress on sales he sought a meeting with the plaintiff, together with the sales agents of Savills.

125. Much evidence was given on what subsequently happened at the development on Ashley and what progress was made on sales. Much of this evidence is irrelevant to the issues which I have to consider in this matter. It appears that there were certain parties who were interested in purchasing houses at Ashley. However prices could not be agreed between the purchasers and Mr. O'Connor. In addition Mr. O'Connor sought further finance from BOSI to complete various houses but BOSI refused to provide any further finance until Mr. O'Connor had sold a house or two houses at Ashley. In any event (and although this is not really relevant to any of the issues that I have to consider) it appears that if Mr. O'Connor had successfully completed any sales at Ashley, then BOSI might have supported him for a little longer in order to finalise the construction of that house. However, Mr. O'Connor failed to obtain any sales at Ashley and eventually BOSI appointed a receiver under the May/June 2010 facility.

EVENTS AFTER DECEMBER 2010

The evidence of the estate agents.

126. Two estate agents gave evidence on behalf of the defendants. One was Catherine McCauliffe, a director of Savills, Cork. Although Savills were estate agents acting on behalf of the plaintiff, Ms McCauliffe was called on behalf of the defendants. Her evidence was that Savills were engaged by the plaintiff to act on his behalf in the sale of properties at Ashley in January 2009. In

March 2009 the properties were uploaded onto the Savills website and related websites but the properties were not for sale at that time. The prices at that time were €1.2m to €1.3m. The showhouse was still under construction. The first showhouse opening was on 26th September, 2009. Although certain viewings took place between July 2009 and January 2010 no parties were interested in buying for a variety of reasons - one of which was that the price was too high. On 4th February, 2010 Savills wrote to the plaintiff to advise him that the prices should be reduced to €1.1m with the intention of attracting offers in the region of €850,000 to €900,000.

127. Between February and June 2010 further viewings took place but there was a nervousness in the market place and a reluctance to be the first buyer in a new development. On 24th June, 2010 the price was reduced to €975,000 but viewings still dropped. On 4th September, 2010 an interested party made an offer of €690,000 but this was not accepted by Mr. O'Connor.

128. On 12th November, 2010 Savills wrote to BOSI suggesting that the price be reduced to €795,000. In April 2011 Savills received an offer of €655,000 on a particular property but this was not converted into a contract. In April 2011 the plaintiff informed Savills that BOSI wished to introduce a second additional agent to market its development (Sherry Fitzgerald). In May 2011 an offer was made by a buyer to purchase a house for the sum of €600,000. However the buyer subsequently reduced its price to €510,000 and the sale fell through and no contract was signed.

129. In October 2011 houses number two and four were released on the market for approximately €570,000 but no sales were obtained.

130. Around March 2012 both Sheila O'Flynn of Sherry Fitzgerald and Catherine McCauliffe emailed Mr. O'Connor separately to set out their frustration at not being able to contact him or communicate with him about how to progress sales.

131. In October 2012 Savills received confirmation that receivers had been appointed and that the properties were withdrawn from the market.

132. Ms. Sheila O'Flynn of Sherry Fitzgerald also gave evidence. In particular she gave evidence that Sherry Fitzgerald also had difficulty in obtaining instructions from Mr. O'Connor in relation to certain offers which were made on various properties in or about February/March 2012 and she indicated that this lack of instruction had a detrimental effect on Sherry Fitzgerald's ability to properly market the properties.

133. Not much turns on the evidence of the estate agents save that it shows that there was a significant collapse in the price of the properties and that Mr. O'Connor was unable to obtain any contracted sales of the properties at Ashley at any price which he deemed to be acceptable, no matter what condition the properties were in.

134. Ms. Noonan of Certus gave evidence that on 25th February, 2011 and 24th March, 2011, Bank of Scotland plc (BOS) issued two standard arrears letters advising Mr. O'Connor that the loan of May/June 2010 was in arrears. Mr. O'Connor replied to the BOS letter of 25th February, 2011 by letter dated 9th March, 2011 advising that he was trying to realise monies by way of sales.

135. Ms. Noonan gave evidence that on or about 17th January, 2012, BOS were advised by Ms. McAuliffe of Savills that Lindville had been taken off the market on the instruction of Mr. O'Connor. The Bank had not been notified of this decision and therefore this announcement came as a shock to BOS. BOS asked why this had been done. Ms. McAuliffe advised that the property had been on the market for a considerable period of time and there had been no sales. Ms. Noonan's evidence was that BOS asked was this because the price was too high, to which Ms. McAuliffe advised that it was. Ms. Noonan stated that "at this point we became doubtful of Mr. O'Connor's intention to sell the properties".

136. Ms. Noonan also gave evidence that on 30th January, 2012, Ms. Noonan and Mr. Niall Murray of BOS/Certus met with Mr. O'Connor at Certus' office. This meeting was called by Mr. O'Connor to discuss a proposal which he wished to put to the Bank. Ms. Noonan and Ms. Murray received a letter from Mr. O'Connor dated 31st January, 2012 which enclosed a proposal offering BOS a sum in full and final settlement of outstanding debts.

137. Ms. Noonan gave evidence that the Bank rejected the offer because the Banks estimate of its security was estimated to be worth between €2.2m and €2.9m.

138. BOS wrote to Mr. O'Connor on 28th February, 2012 informing Mr. O'Connor that BOS had declined his offer. Subsequently on 14th June, 2012 Mr. O'Connor sent a further proposal to BOS in which he offered the Bank a further sum plus 53 Lindville in full and final settlement.

139. On 21st September, 2012 the Bank appointed Michael Cotter and Luke Charleton as joint receivers over the assets of Mr. O'Connor.

THE FIFTH ALLEGATION OF MR. O'CONNOR - THAT THE BANK PROMISED TO ADVANCE THE SUM OF €100,000 TO COMPLETE A SHOWHOUSE.

140. One of Mr. O'Connor's allegations is that he requested finance from BOSI to complete a showhouse to a particular standard. Mr. O'Connor's case is that Savills had advised him that in order to assist in the promotion of sales at Ashley that the showhouse should be completed to a high standard. In order to do this Mr. O'Connor needed further funds. He says that he approached Gavin Daly of BOSI for a further €100,000 to complete the showhouse.

141. Mr. O'Connor's evidence was that Mr. Gavin Daly promised him €100,000 and that on foot of that promise Mr. O'Connor spent the sum of €100,000 of his own money in completing the showhouse to a high standard.

142. Mr. O'Connor's evidence is based on a contemporaneous note of his which says as follows:

> *"24/2/09. 12.45pm. Gavin Daly of BOSI rang go ahead with showhouse, 100k, BOSI will treat it as part of Ashley 104".*

143. However Mr. Daly in his evidence has a different version of events. He stated as follows in his witness statement at paragraph 25:

> *"In respect of the showhouse funding, Mr. O'Connor sought approval to use €100,000 of funds towards the completion of a showhouse. Given that these funds were intended for the completion of construction works, the Bank's opinion was that use of these funds for showhouse renovations constituted an amendment from the purpose of the original offer letter. I recall seeking credit approval to allow funds be diverted towards the completion of a showhouse which was*

refused by the Bank. I have no recollection of apologising to Mr. O'Connor for delays in the process."

144. Mr. Gavin Daly in his witness statement at para. 35 also states as follows:

> *"I can categorically confirm that I never advised either Mr. O'Connor or Corbel Developments Limited to proceed with the fit out of the showhouse. I consider this comment to be entirely untrue. I did not recall advising Mr. O'Connor that a proposal could not be made due to issues with the Bank. If the Bank had no appetite to provide additional funding to Mr. O'Connor for Ashley, this message was conveyed to Mr. O'Connor professionally and in a factual manner. I do not recall instructing Mr. O'Connor to advise Mr. Cathal O'Connor to proceed with the fit out of the showhouse."*

145. Mr. Daly's evidence was that he did seek credit approval for the €100,000 but he was told by the Bank it was going to be declined. He also gave evidence that he remembered asking whether the funds in the February 2007 loan could be diverted towards completing a showhouse and this was also declined.

146. Having considered and assessed the evidence on this matter I am of the view that no representation was made by Mr. Daly to the plaintiff that BOSI would definitely advance a sum of €100,000 to the plaintiff to complete the showhouse. It may well be that Mr. Daly indicated to Mr. O'Connor that he would seek BOSI approval for this request. It may also be that Mr. O'Connor heard what he wanted to hear and took that as BOSI approval of his request. However, in the event, BOSI approval was not forthcoming and the €100,000 was not advanced for the expenditure of the showhouse. If Mr. O'Connor spent €100,000 on completing the showhouse, he did so based on a misunderstanding and not based on any representation made by BOSI or based on any agreement with BOSI.

147. Therefore, in my view, this allegation of Mr. O'Connor is unfounded and must be rejected.

THE PLAINTIFF'S SIXTH SERIES OF ALLEGATIONS

THE ALLEGATIONS AGAINST THE RECEIVERS

The first allegation – conflict of interest

148. The plaintiff's first allegation against the receivers (and in particular against Michael Cotter) is that Mr. Cotter should not have acted as receiver in this transaction because he had a conflict of interest. This allegation is based on the view of the plaintiff (and the evidence given by the plaintiff) that Mr. Cotter had previously acted for Mr. O'Connor in assisting him to obtain finance from BOSI in previous years. The plaintiff's case is that Mr. Cotter acted for him in or about 2010 in assisting him to obtain finance from BOSI. In addition the plaintiff gave evidence that Michael Cotter also assisted the plaintiff in late 2006/early 2007 in obtaining the 5th February, 2007 loan from BOSI.

The evidence of Mr. O'Connor

149. Mr. O'Connor gave evidence that the reason he was not billed for the 2006/2007 work was because Mr. Cotter said there was so much paperwork involved in opening an account that it was not worthwhile opening an account for the plaintiff. Mr. Cotter's evidence however, which I accept, is that the amount of work involved in opening an account was not significant; secondly, it had never been his intention to charge the plaintiff for simply making a few phone calls to introduce people to one another; thirdly, he felt he was doing the plaintiff a favour because of his association and relationship with the plaintiff's brother-in-law who had been a colleague of his since 1980; fourthly, the plaintiff was not set up as a client on the Ernst and Young system, that he was not a client of the firm and therefore there was no time charged to his account and no bills issued.

The evidence of Michael Cotter

150. Mr. Cotter was, in my view, a reliable and trustworthy witness. His evidence (in his witness statement) was that he first came into contact with the plaintiff in late 1985. The plaintiff was a financial accountant to a company called Noel Parks Building Company which went into liquidation around that time. Subsequent to 1985, the plaintiff was involved in five companies which were audited by Ernst and Young but Mr. Cotter had no involvement in these matters. It appears that these companies all went into liquidation in or around 2000-2001.

151. Mr. Cotter's evidence was that he was aware, in around 2000/2002 that the plaintiff had gone through a difficult time because a number of his companies had gone into liquidation and because he was in dispute with his partner Barry O'Donovan in relation to lands at Lindville. Mr. O'Connor had informed Mr. Cotter that his solicitor (Mr. Cuthbert) had a conflict of interest and could not act in his dispute with Mr. O'Donovan and the plaintiff asked Mr. Cotter to recommend alternative solicitors. Mr. Cotter gave him the names of three different legal firms including Mr. Riordan.

152. Mr. Cotter's evidence was that in July 2002, he was approached by Mr. O'Connor to assist in the preparation of a funding proposal for BOSI. A two page document was prepared for BOSI by Mr. Cotter from information provided directly by the plaintiff. No advice was provided by Mr. Cotter in this matter. Mr. Cotter then set up an introductory meeting with Roy Barry of BOSI and the plaintiff but had no further contact with the plaintiff in relation to this application.

153. In October 2003 Mr. Cotter was again contacted by the plaintiff to assist in the preparation of a further funding proposal in relation to the development of five sites at Lindville.

154. Between 2004 and May 2006 Mr. Cotter had no contact with the plaintiff.

155. In May 2006 Mr. Cotter was again approached by the plaintiff and he facilitated the plaintiff in the preparation of a two page document on 31st May, 2006 in relation to obtaining finance for the purchase of a site at Cleve Hill. However this purchase never went ahead.

156. The plaintiff gave evidence that in 2002/2003 he paid Ernst and Young fees amounting to €9,665. The plaintiff did not give any evidence that he ever paid Ernst and Young any fees after 2003. Mr. Cotter gave evidence that he had no knowledge of this alleged payment and he did not believe that the plaintiff was a client of Ernst and Young. However he also said that Ernst and Young no longer had records dating back to 2002/2003. Mr. Cotter's recollection was that the plaintiff was not a client of Ernst and Young and that he was assisting Mr. O'Connor as a favour and because of his long standing relationship with his brother-in-law who was a colleague of his in Ernst and Young.

157. In late 2006 the plaintiff again approached Mr. Cotter in respect of the project at Ashley which he proposed to purchase for a sum of €1.6m. Again Mr. Cotter's evidence was that he assisted the plaintiff by preparing a two page document from information supplied by the plaintiff. Mr. Cotter then spoke with Roy Barry of BOSI (at the plaintiff's request) in relation to this funding proposal

but this discussion was general and was not in the nature of a presentation of a proposal for funding. Mr. Cotter gave evidence that the plaintiff conducted his own negotiations with BOSI.

158. One of the many minor matters which arose in the course of this trial was that the plaintiff alleged that Mr. Cotter promised him that BOSI would grant him a non-recourse loan. The plaintiff's evidence was that he was not aware of what a non-recourse loan was at the time. Mr. Cotter's evidence - which I believe - is that he may well have advised the plaintiff to seek a non- recourse loan but that he always advised all his clients to seek a non-recourse loan. However Mr. Cotter's evidence was that BOSI never offered to Mr. Cotter a non- recourse loan for the plaintiff and indeed never offered the plaintiff a non-recourse loan. This was clearly an irrelevant and minor matter in the trial. Despite this however the plaintiff sought on a number of occasions to argue that BOSI had offered a non- recourse loan to him through Mr. Cotter. In the circumstances and based on Mr. Cotters evidence, I find, as a fact, that no non-recourse loan was offered by BOSI to Mr. Cotter for the plaintiff or to the plaintiff himself. In my view, the plaintiff was exaggerating these matters for his own ends.

159. Mr. Cotter gave evidence that he was not consulted by the plaintiff about the letters of loan offers which emerged in February 2007 or April 2008 or May 2010 and that he had no further contact with him other than bumping into him in the street or at social gatherings until after his appointment as joint receiver in September 2012.

160. The central allegation of the plaintiff against Mr. Cotter was that Mr. Cotter had a conflict of interest in acting against him in the receivership. Mr. Cotter's evidence on this was emphatic and it can be summarised as follows:

> 1. Firstly Mr. Cotter and Ernst and Young would have done a "conflicts" check internally in the office to ascertain whether they might be acting against an existing client. His evidence was that such an internal check was carried out and no conflict was identified which precluded his acceptance of the appointment.
>
> 2. Secondly, he says he is a member of the Chartered Accountants of Ireland and under his code of ethics he would have to consider whether or not any appointment would be in breach of his code of ethics. In this regard he had to consider whether his prior relationship with the plaintiff was significant to the conduct of this engagement. His evidence was that in considering that matter there were a number of factors which he had to take into account: firstly, the nature of the relationship; secondly, if any fee was paid and what was the size of the fee; thirdly, what was the most recent involvement with the plaintiff. His view was that if he had done any work for the plaintiff in the three years prior to accepting the appointment that might create an issue. (However he accepted that there were situations outside the normal three year period which would mean that one still could not accept an appointment). However he said that the last material professional relationship which Ernst and Young had with the plaintiff was when they audited his accounts which were signed off in February 2000.
>
> 3. Thirdly, Mr. Cotter was of the view that the last assistance he had given to Mr. O'Connor was in January 2007 (i.e. five and a half years prior to the acceptance of his appointment as receiver in September 2012). Moreover, in his view, by "no stretch of the imagination" could the assistance he rendered to the plaintiff five years earlier in helping him to seek finance in 2007 be regarded as a material professional relationship.

161. The plaintiff's case, in part, appeared to be that, because the plaintiff had made allegations of misrepresentation against the Bank, Michael Cotter should have been aware of these allegations and as a result of these allegations that he should not have acted against the plaintiff as receiver. Moreover, as Mr. Cotter quite rightly said, there are many occasions where receivers are dealing with borrowers who are in dispute with the Bank.

162. In my view, having considered the evidence of Mr. Cotter and the plaintiff, I am of the view that there was no conflict of interest in this situation for the following reasons:

> 1. Mr. Cotter had not acted for the plaintiff for a period of at least five and a half years prior to his appointment as receiver.
>
> 2. The assistance which Mr. Cotter offered the plaintiff in their last involvement in or about late 2006 appears to have been an attempt to assist the plaintiff to obtain funding from BOSI. However, this appears to have been more of an "introduction" type situation where Mr. Cotter sought to assist the plaintiff with Mr. Barry of BOSI rather than the giving of advice and Mr. Cotter gave evidence that it was not his practice to charge fees for "introducing" people.
>
> 3. The plaintiff apparently conducted all his own negotiations with BOSI in respect of the 2007 loan.
>
> 4. The receivership under which Mr. Cotter was appointed arose out of the May 2010 loan agreement and not the February 2007 loan agreement. Thus, even taking the plaintiff's case at its height, Mr. Cotter was not appointed as receiver under the same loan agreement that he may have assisted the plaintiff on.
>
> 5. The plaintiff offered no evidence at all of any payment made by the plaintiff to Ernst and Young in 2006 or 2007 for Mr. Cotter's assistance. Indeed taking the plaintiff's evidence at its height, the plaintiff last paid Ernst and Young fees in 2002/2003 i.e. a period of almost ten years before Ernst and Young were appointed as receivers by BOSI in 2012.

163. For all of the above reasons, I am of the view that the plaintiff's allegation that Mr. Cotter should not have taken the appointment as receiver because of a conflict of interest is utterly without merit and I reject this allegation as being completely unfounded.

The second allegation – the allegation that the receivers failed to properly maintain the assets in the receivership
164. The second allegation made by the plaintiff against the receivers is that they failed to look after the assets in the receivership. The substance of this allegation is that the receivers failed to look after the houses and sites at Ashley and Five Firs. The plaintiff gave evidence that there was anti- social behaviour at some of the empty houses, that some vandals apparently had broken some windows in some of the houses, and that the windows of some of the houses had to be boarded up by the receivers.

165. The plaintiff also gave evidence that the hoardings at a particular part of the site had been allowed to fall into disrepair and/or be damaged and that this in turn meant that various items including scaffolding etc which had been left behind the hoardings had been damaged. Mr. Murphy SC on behalf of the defendant receivers objected, that any of the material which was left on site behind the hoardings such as scaffolding etc. belonged to Corbel Developments Limited and that Corbel Developments Limited was not a plaintiff in these proceedings. Thus the plaintiff lacked locus standi to make this argument. In my view this objection is well founded

and indeed Mr. O'Connor accepted this point. Mr. O'Connor is, as he informed the court, a director of Corbel Developments Limited a company owned by his son, Cathal O'Connor. In any event, any complaints in relation to damage to Corbel Developments Limited equipment is not properly part of this case and on that basis it is not necessary for me to consider this matter any further.

166. The receivers took over the properties on 21st September, 2012. Mr. Cotter's evidence was that, in his view, he and the other receiver properly protected all the properties from September 2012. His evidence was that there had been two minor acts of vandalism in respect of the Ashley development. The first was reported in May 2014 where some teenagers got into one of the unoccupied properties. The receivers then engaged a builder within a week to put that matter right. In addition, the receivers engaged a security firm to do daily visits to the site. Subsequently when there were no further incidents the receivers reduced the involvement of the security firm.

167. The second incident was when a tenant in Ashley contacted the receivers to say that some windows had been broken on the estate. Again Mr. Cotter's evidence was that the receivers acted to ensure the windows were fixed; they then decided to board up the windows and the doors on the downstairs of the units. In addition the receiver's ensured that a security person called on a weekly basis and the receiver's agent also called into the estate. Mr. Cotter's evidence was that the houses which were boarded up had not yet been completed and that once the houses were completed internally and externally and were ready for sale then clearly the boarding would be taken down. However the houses could not be sold for the time being because the plaintiff had registered a lis pendens against the property and the houses could not be rented out because they were not completely finished inside.

168. Moreover Mr. Cotter's evidence was that in August 2014 the receivers did a full clean-up of the site, and did whatever was required to keep the estate looking in a reasonable condition. Mr. Cotter gave evidence that on 4th October, 2012 the receivers did repairs to the gates; on 25th April, 2013 the receivers did certain repairs to the fencing; on 6th June, 2013 the receivers cut grass and tidied up the development; on 6th January, 2014 the receivers repaired fencing damaged during a storm.

169. The estate has four houses plus two sites. None of the six properties have been sold. Of the six, one is a showhouse and contains a tenant; the other three houses are only completed to builders finish and therefore have to be completed internally and the other two properties are just sites. Thus, only one of the properties has a tenant. Mr. Cotter's evidence was that the receivers were trying to keep the estate in as best a condition as they could.

170. I would therefore conclude that there is no real evidence that the receivers have failed in their duty to maintain the assets properly. There is certainly evidence that one or two difficulties arose in relation to the site with anti- social behaviour and some minor acts of vandalism. However it appears that the receivers have acted reasonably in order to ensure that such acts of damage were repaired and to ensure that no such acts could be repeated. In my view therefore the plaintiff's allegations in this regard fail completely and are unfounded.

The third allegation – that the receivers allowed the planning permission on Five Firs/Ashley to lapse

171. The third allegation made by the plaintiff against the receivers was that the receivers have allowed the planning permission on two sites (i.e. the two sites at Five Firs which is now part of the Ashley development) to lapse. It is noteworthy how this allegation came about. It was not pleaded in the plaintiff's pleadings; it was nowhere to be found in the plaintiff's lengthy witness statement; It was not mentioned by the plaintiff once in six days of evidence. Indeed this issue was raised in the very last sentence of the evidence of the plaintiff's very last witness (Mr. Cathal O'Connor – his son).

172. This gave rise to a lengthy debate between the parties about whether the matter was pleaded and about whether the plaintiff had any right or entitlement to amend his pleadings. The plaintiff insisted on wishing to plead the matter and argued that it had not been pleaded because it had only come to his attention after the pleadings had closed and after the witness statements had been delivered. There was however no explanation as to why particulars had not been furnished to the other side before the trial commenced even though the plaintiff stated that he was aware of this issue one month before the trial commenced. In any event, the defendant – quite generously in my view – consented to the plaintiff's amendment of his pleadings to include this extra particular of loss and damage against the receivers. The defendants in turn put in an amended defence on this point.

173. The defendant called a witness Ms. Patricia Stokes from Lisneys to deal with this allegation. Her evidence was that Lisneys estate agents had reviewed the development for the receivers in or about October 2012 and had prepared a report for the receivers. They identified two specific problems with the development. These were, firstly, that the garden at number four was very small and needed extra space; secondly, that the development as a whole had very little parking facilities. Their recommendation therefore was that one of the plots be given over to providing an increased garden for house number four and also to increasing parking for the development as a whole. They also recommended that the second site should be developed in a smaller way with a smaller "lodge" style house. The receivers accepted this report and acted on its recommendations. They therefore allowed the planning on these two sites to lapse because they wished to follow these recommendations and to apply subsequently for a smaller house on site. Lisney's expert advice, which the receivers accepted, was that if these alterations were done to the development it would increase the value of each of the remaining houses in the development as a whole and therefore maximise the return which the receivers could expect from the sale of the assets.

174. Mr. Cotter also gave evidence that he had received the advice and report from Lisneys in 2012 and that he was impressed by Lisney's proposal because, in his view, it sought to maximise the value of the site. Thus, in his view, by adopting the strategy outlined by Lisneys he and the receivers were enhancing the value of the site.

175. Having considered the evidence from Lisneys and from Mr. Cotter on this issue, I am of the view that the receivers followed expert advice as to the best way in which to maximise the value of the estate as a whole. Given that there were six houses on the site originally and given that none of the houses have so far been sold, this is clearly a troubled estate which requires proper estate management. It may well be that Mr. O'Connor as a property developer sought to obtain the maximum number of houses which he could on any given development. However the receivers in this case sought and obtained expert advice on how best to deal with the completion and selling of the estate - as a prudent receiver should do. Having received this advice from a number of different experts the receivers then followed the advice of Lisneys as to how to maximise the value of the estate. The fact that this included allowing the planning permission on two of the sites to lapse and to reconfigure the estate in respect of these two sites is understandable. In my view the receivers were not in default of any of their professional obligations in so acting.

176. In the circumstances I conclude that the plaintiff's allegation that the receivers were in breach of their professional duty as receivers in allowing the planning to lapse on Ashley is unfounded.

THE CLAIMS AGAINST THE SOLICITORS

177. The plaintiff has made numerous claims against the solicitor defendants. These claims include claims in negligence, breach of

contract and conflicts of interest.

178. Mr. Michael Carrigan gave expert opinion evidence on behalf of the defendant solicitors. Mr. Carrigan is a consultant in the firm of Eugene F. Collins Solicitors in Dublin. He qualified as a solicitor in 1969 and joined Eugene F. Collins in 1972. He became a partner in 1975 and remained a partner until the end of 2012. He has specialised in conveyancing and has wide experience in all areas of both commercial and residential property. He has also been engaged as an expert witness in many cases in Ireland.

179. In his expert report, Mr. Carrigan outlined the general duties of a solicitor towards his client, the taking of instructions and giving of advice generally and the recent practice of solicitors acting for borrowers and their lending institutions.

180. Mr. Carrigan notes that it has been common conveyancing practice for 30 years or more - and it was the practice in the years 2007, 2008 and 2010, (when the commercial loans under consideration in this case were granted), - for Banks and building societies to require the solicitor acting for the borrower to complete and register the security documentation involved, instead of appointing the Bank's own solicitors. This practice, which developed generally, allowed the borrower to draw down the loan on receipt from the borrower's solicitors of a written undertaking to the Bank that the borrower's solicitors would

(a) Ensure that the borrower had good marketable title

(b) Hold the title deeds to the property being secured to the order of the lending institution

(c) Arrange for the mortgage and related security documentation to be completed by the borrower before the funds were made available to the borrower

(d) Arrange for the mortgage to be stamped and registered in the appropriate registry

(e) Forward to the lending institution the title deeds to the property when completed together with an appropriate certificate of title.

181. However in larger commercial loans, the lending institutions often decide- as they did in this case- to appoint their own solicitor who would then either carry out a full investigation of title or rely on a certificate of title furnished to them by the borrower's solicitors.

Conflicts of interest
182. The plaintiff has made allegations against the defendant solicitors that they were involved in a conflict of interest situation in that they represented the Bank and also represented the plaintiff. This allegation has to be considered in respect of each of the three transactions – the 2007 loan, the 2008 loan, and the 2010 loan.

183. It is a clear principle of law - as Mr. Carrigan states in his report - that "*a solicitor has a paramount duty to his client and should not place himself in a position where that duty comes into conflict either with his own interests or those of another client*".

184. He also refers to the Law Society Guide to Good Professional Conduct of Solicitors in Ireland which deals with conflicts of interest.

185. He notes that para. 3.2 deals with conflicts of interest between two clients and states

> *"If a conflict of interest arises between two clients in a matter in which the firm is acting, the firm must cease to act for either client in that matter. In exceptional circumstances one of the clients may consent to the other client remaining".*

However, it also states that the circumstances of each case must be examined and the matter decided on a case by case basis.

186. Paragraph 3.3 of the Law Society Guide deals with property transactions and it states, as a general principle, that a solicitor (or two or more solicitors acting in partnership) should not act for both vendor and purchaser in a transfer of property, subject to certain conditions and exceptions.

187. Mr. Carrigan notes that para. 3.3 (dealing with solicitors acting for vendors and purchasers) states that, provided there is no conflict "actual or perceived between the vendor and purchaser before or during a transaction relating to the transfer of property, exceptions to that general principle may arise in four particular cases as follows:

(a) The vendor and the purchaser are associated companies

(b) The vendor and the purchaser are related by blood, adoption or marriage

(c) The vendor and the purchaser are established clients of the solicitor and are both clearly advised at the outset by the solicitor of the desirability of separate independent representation but each agrees that the solicitor should continue to act for both and

(d) Two associated firms or two offices of the same firm in different locations are acting for the vendor and the purchaser provided that

(1) The respective firms or offices are in different locations

(2) Neither party has been referred to the firm or office acting for him from an associated firm or office of the same firm

(3) The transaction is dealt with or advised by a different solicitor in full time attendance at each firm or office"

188. Mr. Carrigan notes however that the "*issue of solicitors acting for both the borrower and his lending institution is not specifically addressed in the 2002 Law Society Guide*." He states "*however I believe that similar considerations apply to those which apply to a vendor and purchaser and, as in the case of a vendor and purchaser, I would expect the solicitor whose firm is instructed to act for*

both the borrower and the lender to advise both parties very clearly of the differing interests of the parties, the potential for conflict and how an actual conflict would be dealt with".

189. Mr. Carrigan's report also dealt with the new rules relating to conflicts of interest which came into operation in 2012 – *the Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012 (S.I. 375 of 2012).* Under these regulations, solicitors are prohibited from acting for both a borrower and a lender. Moreover Mr. Carrigan notes that "the current edition of the Law Society's "*A guide to good professional conduct of solicitors in Ireland"* (published in October 2013) addresses in much more detail than did the 2002 guide, the question of conflicts of interest and how solicitors should act when they arise. These provisions were not of course in existence at the time of the 2007 transaction, the 2008 transaction or the 2010 transaction.

190. Mr. Carrigan however noted that firstly Mr. O'Connor always knew that the solicitor defendants acted for the Bank and secondly Mr. O'Connor never raised any issue (either with Mr. O'Riordan or Mr. O'Keeffe from 2002 until these proceedings issued in 2012) about the solicitor defendants acting for both Mr. O'Connor and the Bank.

191. However, even taking the plaintiff's case at its height, and even assuming that before the 2012 regulations came into existence, that the solicitor defendants should not have acted for both borrower and lender there is no evidence at all to suggest that the plaintiff suffered any loss or damage as a result of this. The plaintiff was represented by two solicitors – James Riordan and Darren O'Keeffe who were formerly solicitors with M.J. Horgan and Sons and then solicitors with James Riordan and Partners. Insofar as the Bank was also represented by James Riordan and Partners or M.J. Horgan and Sons, the Bank had separate solicitors acting on their behalf at all times. Moreover the security documentation which was put in place by the solicitor defendants on Mr. O'Connor's behalf in relation to the 2007 transaction, the 2008 transaction and the 2010 transaction all reflected correctly what was set out in the 2007 loan offer, the 2008 loan offer and the 2010 loan offer.

192. As Mr. Carrigan in his expert opinion concludes:

> *"Accordingly, notwithstanding the fact that the solicitor defendants acted for both Mr. O'Connor and the Bank I do not see in the particular circumstances of the case, that the solicitor defendants in the manner in which they represented Mr. O'Connor in relation to the 2007 transaction the 2008 transaction or the 2010 transaction subjugated Mr. O'Connor's rights to those of the Bank or failed to protect his interests in any way".*

193. Having heard all the evidence in this case (including the expert evidence of Mr. Carrigan) and having considered all the plaintiff's submissions in this regard, I too would conclude that, on the particular circumstances of this case, there is no evidence that the solicitor defendants failed to protect Mr. O'Connor's interests in any way in respect of the three relevant transactions – the 2007 loan, the 2008 loan and the 2010 loan.

194. Moreover, as Mr. Carrigan notes in his report, a solicitor is entitled to have regard to the knowledge and expertise of his client in a given field and, in giving advice to Mr. O'Connor, the solicitor defendants were entitled to take account of the knowledge and experience which they knew Mr. O'Connor to have in the area of commercial property loans and property developments.

Allegations of negligence
195. The plaintiff also made various allegations of negligence and conflicts of interest against Mr. James Riordan and Darren O'Keeffe (the solicitor defendants). Mr. Michael Carrigan also addressed these issues.

196. The issues which Mr. Carrigan addressed in his evidence and report were

(i) The transactions the subject of the 2007 letter of loan offer

(ii) The transactions the subject of the 2008 letter of loan offer

(iii) The transactions the subject of the 2010 letter of loan offer.

(I) The 2007 transaction.
197. The first allegation which the plaintiff makes in this regard is that the security of the 2007 loan was an extension of the plaintiff's existing security granted to BOSI. The plaintiff alleges that given that the 2002 Lindville charge should not have covered the common areas, the solicitors acting for him in relation to the 2007 loan should have properly reviewed the mortgage and charge documentation in relation to the 2002 transaction and should have noticed that it was not intended that a charge be taken over the common areas at Lindville. However, for reasons which I have set out earlier in my judgment, I am of the view that the plaintiff's allegations in this regard are completely unfounded.

198. In addition Mr. Carrigan gave evidence that where a loan, offered by a lending institution, involved the extension of an existing charge, it would not be normal for either the borrower's solicitor or the lending institution's solicitor to review the terms of an existing charge unless they were specifically requested to do so, either by the borrower or the lending institution or unless the particular facts of the case called for such a review. Thus, in his expert opinion, the defendant solicitors were not required to review the extent of the 2002 mortgage on behalf of the plaintiff or to otherwise advise the plaintiff in relation to the 2002 Lindville charge whether at the time of the 2007 transaction, the 2008 transaction or the 2010 transaction. In addition, and looking at the transaction as a whole, Mr. Carrigan was of the view that the defendant solicitors had discharged their duty of care to the plaintiff.

(II) The 2008 transaction
199. The 2008 letter of loan offer is dated 3rd April, 2008. It was accepted by the plaintiff. Mr. O'Keeffe acted for the plaintiff whilst Mr. McLoughlin acted for BOSI.

200. Mr. Carrigan's expert opinion was that, on the basis that the security documentation presented to the plaintiff for execution by Mr. O'Keeffe, was in line with the terms of the letter of loan offer, and that the security given by him did not extend to other assets not specified in the 2008 letter of loan offer, that the solicitor defendants had discharged their duty of care to the plaintiff and did not fail to protect his interests.

(III) The 2010 transaction
201. The 2010 loan offer is dated 24th May, 2010. Mr. O'Connor signed and accepted it on 9th June, 2010. Mr. O'Keeffe acted for the

plaintiff whilst Mr. McLoughlin for the same firm acted for the Bank.

202. Mr. Carrigan reviewed the relevant documentation in relation to the 2010 transaction.

203. As Mr. Carrigan notes, the 8th June, 2010 attendance of Mr. O'Keeffe would suggest that the terms of the 2010 letter of loan offer were discussed by Mr. O'Keeffe with the plaintiff in considerable detail and that Mr. O'Keeffe raised with the plaintiff certain specific concerns which he had in relation to the facility and the overall benefit to the plaintiff of this facility. Moreover he was again of the view that the solicitors had discharged their duty of care to the plaintiff.

Conclusion
204. I am of the view therefore, having regard to the evidence of the plaintiff, the defendant's solicitors and the expert opinion of Mr. Carrigan, that all these allegations against the defendant solicitors fail in their entirety.

THE BANK'S CLAIM AGAINST PATRICK O' CONNOR
205. Bank of Scotland plc is also claiming judgment against Mr. O'Connor in the sum of €7,683,599.96 representing the sum that was drawn down on 22nd July, 2010 together with interest.

206. Counsel for the Bank submits that there are four independent grounds of proof in relation to the debt. These are:

a. The absence of a denial by Mr. O' Connor

b. The admissions of Mr. O' Connor in the course of his cross examination

c. The certificate of Mr. Hamilton relying on general condition 25.2

d. The statements of accounts as established by Mr. Hamilton's witness statement and oral evidence as to the manner in which they were produced and prepared.

207. The loan agreement was signed by Mr. O'Connor. The draw downs were expressly admitted by Mr. O'Connor in his evidence as was the fact that no repayments had been made on the loans.

208. An officer of the Bank, Mr. Gavin Hamilton, provided a certificate to the court of the figure of €7,683,599.96 as being the sum that was due on the account from 21st October, 2014. As counsel for the Bank submitted, that certificate is therefore binding on the parties - absent manifest error pursuant to the terms of general condition 25.2. No challenge was made by Mr. O' Connor to the certificate, no manifest error has been suggested and counsel for the Bank submitted it was therefore conclusive.

209. In addition the Bank submitted that it had proved its debt in accordance with the Bankers' Books Evidence Act. I am satisfied on the evidence that Mr. Gavin Hamilton, in his witness statement and in his direct oral evidence, has satisfied the various requirements for formal proof by the Bank of the debt to the Bank pursuant to the Bankers' Books Evidence Act.

210. I am satisfied that, even discounting the absence of a denial by Mr. O' Connor and/ or the admissions of Mr. O' Connor in the course of his cross examination - that the Bank has fully and properly proved its debt by virtue of all the evidence which it has led in these proceedings.

211. In the circumstances given that the Bank has proven its debt against Mr. O'Connor in the sum of €7,683,999.96, and given that the various defences to the debt which have been raised by Mr. O'Connor do not avail him at all in relation to a defence of this debt, I will give judgment to the Bank in that amount.

MR. O' CONNOR'S CASE UNDER THE CONSUMER CREDIT ACT
212. Mr. O' Connor made many and varied submissions in the course of this case. One such submission was that he claimed to be a consumer under the Consumer Credit Act.

213. Under the Consumer Credit Act s.2 a consumer is defined as meaning:

1. A natural person acting outside the person's business or

2. Any person or person of a class declared to be a consumer in an order made under subs. 9.

214. However as noted above, Mr. O'Connor in signing some of the loan documentation accepted that he was not a consumer.

215. Moreover, in any event, it is quite clear from hearing three weeks evidence in this case that Mr. O'Connor is, and was at all material times, an experienced borrower and property developer. That was his business. Indeed there was evidence that the Bank decided to allow him to retain various rents he was receiving from investment properties which he owned to pay for his living expenses as he was engaged on a full time basis in trying to complete and sell various properties on the Ashley and Five Firs developments. Thus I find as a fact, that Mr. O' Connor was engaged in the business of property development and that all of his actions in relation to any Bank loans which he took out from the defendant Bank were loans taken out in the course of his business. In those circumstances Mr. O'Connor is clearly not a consumer within the meaning of the Consumer Credit Act 1995.

216. In case authority was required, I was referred to *AIB v. Higgins and Others* [2010] IEHC 219 where Kelly J. considered whether the defendants were consumers in borrowing certain monies from AIB. Kelly J. having considered the provisions of the Act, and the provisions of the Council Directive 87/102/EEC, (as amended by Counsel Directive 90/80/EEC) and having considered the position of the European Court of Justice in *Benincasa v. Dentalkit* (Case C – 269/95) stated as follows:

> *"The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self - same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive. There is nothing in the Act suggesting that the legislature here sought to go further than the Directive, still less to confine the interpretation of the term "business" in the definition of "consumer" to a single business activity."*

217. In the present case it is clear that Mr. O' Connor was engaged in trade or professional activities and the loans were taken out by

him not in his capacity as a consumer, but in his capacity as a professional property developer. In those circumstances Mr. O' Connor is clearly not a consumer within the meaning of the Act.

Conclusions

218. I would therefore dismiss all Mr. O' Connor's claims against all defendants in the first set of proceedings and enter judgment against Mr. O' Connor in favour of the Bank in the second set of proceedings.