THE HIGH COURT

[2016 No. 339 Sp.]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND

THOMAS MURRAN PRACTISING UNDER THE STYLE AND TITLE OF PETER O'CONNOR & SON SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 11th day of December, 2018

1. By this application the plaintiff invokes the inherent jurisdiction of the court to summarily enforce a solicitor's undertaking. The application was made nine and a half years after the undertaking was given; upwards of eight years after a complaint was made to the Law Society that the undertaking had not been complied with; and upwards of five years after the defendant had sent to the plaintiff, duly executed, a document in a form prepared by the plaintiff's solicitor and which the plaintiff's solicitor had asked to be executed. The special summons was issued without warning, and the application gave rise to an exchange of affidavits over a period of upwards of two years

2. By special summons issued on 15th August, 2016 the plaintiff claims an order directing the defendant to comply with a written undertaking dated 7th February, 2007 or, failing compliance, or in the event that compliance might be impossible, compensation.

3. The application is grounded on a short affidavit of Michael Leonard, head of asset recovery with the plaintiff, who deposed that he has access to the plaintiff's books and records.

4. Mr. Leonard exhibited a copy letter of 7th February, 2007 by which, he says, the defendant firm undertook to register a first legal charge in favour of the plaintiff over, he says, the entire of the property in Folio KY63920F, County Kerry, more commonly known as 6.5 acres at Moanmore, Tralee, County Kerry, as security for the borrowings of Maurice Prendiville.

5. The letter of undertaking is addressed to National Irish Bank Ltd. The grounding affidavit does not disclose how the plaintiff comes to be seeking to enforce it.

6. On its face, the undertaking was given in relation to two properties: 6.5 acres at Moanmore, Tralee Road, County Kerry, and 60 acres at Glenlareman, Castleisland, County Kerry. The letter of undertaking does not refer to any folio. As will become apparent, the lands comprised in Folio KY63920F extend to 8.552 acres. The plaintiff was never to have had a charge over the entire of those lands but only 6.5 acres. Mr. Leonard does not deal at all in his grounding affidavit with the 60 acres at Castleisland.

7. Mr. Leonard deposed that, in breach of the undertaking, what he calls the "*subject property*" was registered in the joint names of Mr. Prendiville and his solicitor, Ms. Marie Dennehy, and that the first legal charge was only registered over the interest of Mr. Prendiville. He exhibited a copy of the folio. The folio shows Mr. Prendiville and Ms. Dennehy registered as full owners on 27th April, 2010 and, on the same date, a charge for present and future advances in favour of Danske Bank A/S. The folio does not show that the chargor was Mr. Prendiville only.

8. Mr. Leonard deposed that by facility letters dated 12th January, 2007 and 11th July, 2007 the plaintiff offered to advance to Mr. Prendiville a total of €2.3 million for, he says, a variety of purposes but principally to fund the purchase of the property the subject of these proceedings. The facility letters show that National Irish Bank Ltd agreed to make available to Mr. Prendiville three facilities: Loan A in the sum of €1.4 million; Loan B in the sum of €800,000; and an overdraft facility of €100,000. The purpose of Loan A was to assist in the purchase of 8.5 acres of land at Moanmore for €2.7 million. The purpose of Loan B was to refinance various debts, and the purpose of the overdraft was to assist with the building of roads and services at the Moanmore site. In his second supplemental affidavit sworn nearly two years later on 12th July, 2018 Mr. Leonard mentioned, more or less in passing, that only Loan A was drawn down. If, strictly speaking, he did not in his grounding affidavit say that the other loans were drawn down, he certainly gave that impression. So the borrowing was not for a variety of purposes but only to fund the purchase of the site.

9. In the same second supplemental affidavit it became clear that the plaintiff was not, after all, claiming that it ought to have had a charge over all of the lands in Folio KY63920F but only 6.5 acres.

10. The facility letter of 12 January, 2007 shows that Mr. Prendiville then proposed to buy an 8.5 acre site for €2.7 million but immediately to resell two acres at the front of the site for €1.3 million. He wished to borrow the money to fill the gap of €1.4 million and was to pay the stamp duty from his own resources. Even now it is not apparent when the loan was drawn down.

11. Mr. Leonard in his grounding affidavit said that Mr. Prendiville "*failed or neglected to discharge his indebtedness*". He did not say what the indebtedness was, or is, or what efforts were made by the plaintiff to recover it, but he exhibited an order of Fi.Fa. dated 13th June, 2013 to make €1,747,250.03 and interest from 12th April, 2013. That order does not appear to have been sent for execution. The Fi.Fa. does not, as Mr. Leonard suggests, "*confirm the Borrower's indebtedness to the Plaintiff*" otherwise, perhaps, than on 13th June, 2013, which was fully four years before the date of the affidavit. As will become apparent, this is not pedantry.

12. Mr. Leonard in his grounding affidavit deposed to a belief, on unspecified advice, that owing to the defendant's breach of undertaking the plaintiff "*is not in a position to freely enforce its security and mortgage*". He did not say what the difficulty is or what, if any, efforts were made to enforce the security. He said nothing at all about the 60 acre site.

13. In his grounding affidavit, Mr. Leonard deposed that on 9th August, 2010 the plaintiff wrote to Ms. Dennehy, then a partner in the defendant firm, noting the defendant's non-compliance and calling on the defendant to regularise the situation, to which, he said, Ms. Dennehy replied on 20th August, 2010 acknowledging the breach of undertaking and offering to complete a deed of confirmation. That evidence is not precisely correct. The plaintiff's letter of 9th August, 2010 called for a deed of rectification and a deed of confirmation. Ms. Dennehy's letter of 20th August, 2010 did not acknowledge the breach of undertaking but it did ask for a draft deed of confirmation for completion. A draft deed was duly forwarded by the plaintiff under cover of a letter of 8th September, 2010 and was returned duly executed by Ms. Dennehy on 28th April, 2011.

14. Mr. Leonard deposed that the deed of confirmation "*merely confirmed that any beneficial interest Ms. Dennehy held in the property would be subject to the plaintiff's rights pursuant to the mortgage*" and that "*Ms. Dennehy also improperly holds a legal interest in the property as registered owner which was not the subject of the deed of confirmation and accordingly the plaintiff's security remains unenforceable giving rise to the necessity to issue the within proceedings.*"

15. Mr. Leonard concluded with an averment that despite the plaintiff's best efforts to require the defendant to comply with its undertaking voluntarily, the defendant has failed, refused and neglected to do so, causing the plaintiff to suffer loss and damage.

16. Following service of the summons there was a protracted exchange of affidavits which continued up to 8th October, 2018. This exchange of affidavits identified a number of potential difficulties with the security but it seems to me that the grounding affidavit of Mr. Leonard did not lay the ground for the allegation that the plaintiff had made its best efforts, or that the defendant had failed, refused or neglected to comply with its undertaking, or that the plaintiff had suffered loss and damage.

17. It is unquestionably the case that the site ought not to have been registered in the joint names of Mr. Prendiville and Ms. Dennehy but Ms. Dennehy had executed a deed of confirmation in a form which she had been asked to execute and, as far as the evidence of Mr. Leonard went, had not been asked to execute any transfer of her legal interest, or to confirm that she would. On the evidence advanced by the plaintiff, there was a gap of five years and four months between the date of execution of the deed of confirmation and the date of issue of the special summons for which no explanation was offered.

18. On 18th January, 2017 Ms. Dennehy, who had been but who by then was no longer a partner in the firm, and Mr. Murran, the principal in the firm, swore replying affidavits. Ms. Dennehy disclaimed any beneficial interest in the property explaining, or at least saying, that she and Mr. Prendiville, her husband, had decided on the basis of tax advice to put the property into joint names. She made the point that she had executed the deed of confirmation which she had been asked to execute and said that she had on 14th January, 2011 sent to the plaintiff an executed but undated transfer of her entire right, title and interest in the lands to Mr. Prendiville. Ms. Dennehy said that she had heard nothing further from the plaintiff after 28th April, 2011, when she had sent the executed deed of confirmation. Ms. Dennehy's evidence in this regard is uncontested. The plaintiff is now critical of the deed of confirmation which it drafted and of the form of transfer which Ms. Dennehy signed and sent but nothing was said at the time.

19. Mr. Murran swore quite a long affidavit. He observed that the undertaking had been given to National Irish Bank and that no explanation had been offered by Mr. Leonard as to the basis on which the plaintiff claimed to be entitled to the benefit of it. Whatever superficial attraction that point might have rather evaporates when it is seen that the deed of charge which was lodged for registration by Mr. Murran's office was in favour of Danske Bank A/S.

20. Mr. Murran pointed out that the security required for the loan to Mr. Prendiville, and the undertaking, had included the 60 acre site at Glenlarahan which, he said, had been put in place and realised. As to the site at Moanmore, Mr. Murran said that a deed of charge dated 20th May, 2008 had been registered on 27th April, 2010 as a first legal charge over the lands in Folio KY 63920F.

21. Mr. Murran exhibited a copy of the transfer of Ms. Dennehy's interest in the lands which was sent by her sent to the plaintiff on 14th January, 2011. He also exhibited a copy of the covering letter of 14th January, 2011 in which Ms. Dennehy had suggested that the transfer should not be registered until what was referred to as the transaction with Kerry Group, the sub-sale of the 2 acres, was "*completed*". He deposed that, by inadvertence, he had not at the time of execution of the deed of charge sent to the plaintiff his report and certificate of title but that he had done so under cover of a letter of 12th October, 2016. By that letter Mr. Murran certified that the plaintiff's security against the property was fully in place notwithstanding the fact that the property was registered in the joint names of the borrower and Ms. Dennehy, and that any judgement mortgages later registered (and between 8th September, 2011 and 21st November, 2013 seven such judgment mortgages had been registered) did not impinge on the plaintiff's right to enforce its security. As of the date of swearing his affidavit on 18th January, 2017 Mr. Murran said that he had not had a response to his letter of 12th October, 2016.

22. Mr. Murran drew attention to the fact that in November, 2009 the plaintiff had made a complaint to the Law Society alleging a breach of undertaking, and on 11th August, 2011 (following receipt by the plaintiff of the deed of confirmation) had written to the Law Society stating that it was considering its options and would revert if it required further assistance. The plaintiff, said Mr. Murran, had done nothing about the complaint thereafter until 13th September, 2016 when it sought to revive it. That appears to be so.

23. Mr. Murran went on to complain that the plaintiff had not, in the grounding affidavit, disclosed that on 11th October, 2013 receivers had been appointed over both properties. He said that to the best of his knowledge, the 60 acre site had been sold and that, as far as he knew, the receiver had not been stood down over the property the subject of the proceedings. Mr. Murran does not appear to have been alive to the fact that the registration of ownership and charge extended to the 2 acres which had been sub-sold. The appointment of the receivers, he argued, could only have been made in exercise of the plaintiff's powers conferred by the deed of charge. Mr. Murran suggested that the fact that the property was registered in the joint names of Mr. Prendiville and Ms. Dennehy did not prevent the plaintiff from realising the security.

24. Mr. Murran protested that his firm had fully engaged with the plaintiff's correspondence up to 28th April, 2011 and that no letter before action had been sent before the special summons was issued on 15th August, 2016. Mr. Murran suggested that if the plaintiff had corresponded with his firm, any issues in relation to the security could have been resolved.

25. Finally, Mr. Murran observed that while the grounding affidavit had suggested that the plaintiff had suffered loss and damage, there was no indication whatsoever as to what this might have been or what, if any, efforts might have been made to mitigate it.

26. On 22nd March, 2017 a supplemental affidavit of Mr. Leonard was filed. Mr. Leonard explained the devolution of the loan and security from National Irish Bank Ltd to Danske Bank A/S by virtue of a scheme approved by the Minister for Finance under the Central Bank Act, 1971.

27. As to the deed of transfer of Ms. Dennehy's legal interest in the lands, he said "*I do not accept or understand why the said deed of transfer was not registered in the Land Registry heretofore which it would seem could have resolved the dispute in the current proceedings.*" [Emphasis added.] In fact, Ms. Dennehy's execution of the deed of transfer had not been witnessed and the transfer had not been executed by Mr. Prendiville but the fact is that the plaintiff had that instrument since January 2011; had not suggested that there was anything wrong with it; and had not attempted to register it.

28. As to the appointment of the receivers, Mr. Leonard confirmed that the 60 acres had been sold, although he did not say when, or for how much. He did say that the land had been sold by the plaintiff as mortgagee in possession and the unquantified sale proceeds received. He said that the receiver remained in place over the property in KY 63920F on a "*passive basis*" as neither the plaintiff nor

the receiver were capable of selling it. Mr. Leonard did not say that any effort had been made to sell the property or that any potential purchaser had raised any issue with the title, or with the plaintiff's or the receiver's entitlement to sell it.

29. Mr. Leonard protested that the property ought to have been registered in Mr. Prendiville's sole name and that the registration in joint names had been a breach of the undertaking. He referred to correspondence in 2000 and 2011 to which he had not previously referred. This correspondence disclosed that from no later than 7th October, 2010 the plaintiff was aware that the form of mortgage executed by Mr. Prendiville and which was dated 20th May, 2008 was a form which referred to the provisions of the Land and Conveyancing Law Reform Act, 2009, from which the irresistible inference was, and is, that it could not have been executed on the date it bore.

30. In the same correspondence in 2010 the plaintiff was seeking information from the defendant in relation to the sale of two acres of the 8.5 acre site to Kerry Holdings (Ireland) Ltd, which was the sub-sale contemplated by the facility letters.

31. I pause here to contemplate the state of the evidence at this point. The property had been registered in the joint names of Mr. Prendiville and Ms. Dennehy, which it ought not to have been. The plaintiff had a deed of confirmation, in a form which it had requested, by which Ms. Dennehy disclaimed any interest in the property and a form of transfer from Ms. Dennehy to Mr. Prendiville in respect of which the plaintiff's only complaint was that it had not been registered. Mr. Murran's assertion in correspondence and in his certificate of title that the security was properly in place and fully enforceable was unchallenged.

32. As to the liabilities of the plaintiff's customer for which the security was to have been put in place, the only evidence is the general assertion of indebtedness supported, to the extent that it is supported, by the Fi.Fa. which, it will be recalled, was dated 13th June 2013 and showed a liability of €1,747,250.02 on foot of a High Court judgment of 12th April, 2013. In his replying affidavit Mr. Murran had deposed to his belief that receivers had been appointed over both properties and that the 60 acres had been sold and this was more or less confirmed. Critically, however, the receivers were appointed on 11th October, 2013, which is after the date of the Fi.Fa. Mr. Leonard avers that the 60 acres was sold by the plaintiff as mortgagee in possession rather than by the receivers. He does not say when that was done but it must have been some time after 11th October, 2013. So, the evidence is that some time later than 11th October, 2013 the plaintiff has realised its security over the 60 acres and has received the proceeds of sale: which eliminates the Fi.Fa. as any indicator of what the outstanding liabilities might be.

33. In a supplemental replying affidavit sworn on 2nd May, 2017 Mr. Murran largely repeated his earlier position. All that was required to regularise the plaintiff's security, he said, was to register the deed of transfer which, he said (at least seven times) was in the possession of the plaintiff since January, 2011.

34. In a supplemental affidavit sworn on 2nd May, 2017 Ms. Dennehy restated her position and confirmed that she would execute whatever documents or deeds might be needed to remedy any actual or perceived difficulty with the security.

35. In fact, the position was a good deal more complicated than either party then appreciated.

36. On 3rd August, 2017 Mr. Murran applied to the Property Registration Authority to have the deed of transfer from Ms. Dennehy to Mr. Prendiville registered. What was lodged must have been a copy or counterpart because the original was in the possession of the plaintiff. Before that document was lodged for registration it was dated for 14th January, 2011. That application was rejected on 4th September, 2017 on the ground that the deed had not been executed by Mr. Prendiville and so fell foul of s. 30 of the Land and Conveyancing Law Reform Act, 2009 which invalidates any contract or conveyance of land held in a joint tenancy, unless there is the prior consent in writing of the other joint tenant. Mr. Murran set about addressing that issue by seeking to have the deed of transfer executed by Mr. Prendiville.

37. By September, 2017 Mr. Murran and Mr. Prendiville had fallen out. Mr. Prendiville claimed to be entitled to a sum of money which Mr. Murran was holding but over which Mr. Murran claimed a lien. Incidentally the money held by Mr. Murran appears to have been derived from the sub-sale of the two acres at Moanmore to Kerry Group plc. Mr. Prendiville had instructed a firm of solicitors in Cork to act for him in connection with that dispute.

38. On 25th September, 2017 Mr. Murran sent the deed of transfer to Mr. Prendiville's Cork solicitors with a request that he would execute it. Not altogether unsurprisingly, Mr. Prendiville did not do so.

39. Undaunted by the rejection by the Property Registration Authority on 4th September, 2017 of his application to register the transfer, and notwithstanding that it had still not been executed by Mr. Prendiville, Mr. Murran re-lodged the deed of transfer for registration on 17th November, 2017. At the time of swearing of Mr. Murran's supplemental affidavit on 22nd June, 2018 and at the date of hearing of this application on 7th November, 2018 that dealing was said to be pending and marked *"For further attention".* It seems to me that any hope that the Property Registration Authority will take any different view of the pending application than it did of the earlier application which it rejected is forlorn.

40. This application was listed for hearing on 17th November, 2017 but was adjourned to allow for without prejudice engagement and negotiation and a settlement meeting was held on 6th December, 2017.

41. On 8th December, 2017 the defendant lodged an application with the Property Registration Authority to cancel the judgment mortgages on the folio, apparently by reference to the (unregistered) deed of confirmation. That application was doomed and it was withdrawn on 13th December, 2017. The defendant prepared a revised draft application and sent it to the plaintiff's solicitors for comment but got no reply.

42. Whatever engagement there had been between the parties was brought to an end on 12th February, 2018 when the plaintiff's solicitors gave notice of their intention to apply for a new hearing date for the special summons.

43. On 23rd February, 2018 Mr. Prendiville issued Circuit Court proceedings against Mr. Murran in relation to the disputed monies and Mr. Murran promptly delivered a defence and counterclaim. This appears to have brought Mr. Murran, rather belatedly, to the realisation that he could not expect Mr. Prendiville to cooperate in solving his, Mr. Murran's, problem with the plaintiff.

44. The undertaking which was given to the plaintiff on 7th February, 2007 was given in the usual terms, using the usual forms, which included a form of authority and retainer to be signed by the client. This form of authority and retainer was not signed by Mr. Prendiville but Mr. Murran's position is that Mr. Prendiville was and is nevertheless bound to execute whatever deeds and documents might be required to allow compliance with the undertaking.

45. On 28th May, 2018 Mr. Murran instituted plenary proceedings against Ms. Dennehy and Mr. Prendiville for an order compelling them to execute any and all documents required to allow for the perfection of the security over the 6.5 acres. This was served personally on Ms. Dennehy on 29th May, 2018. In June, 2018 a number of attempts were made to serve the summons personally on Mr. Prendiville at his home, where he lives with Ms. Dennehy. Ms. Dennehy refused to accept service on Mr. Prendiville's behalf. Mr. Prendiville's Cork solicitors were asked to accept service and ultimately did: but not until 15th October, 2018. While Mr. Murran wants the court to order Mr. Prendiville to complete any and all documents required to perfect the security, I am unconvinced that anyone has worked out what precisely it is needs to be signed.

46. The position in relation to the sale of the two acres to Kerry Group plc did not become clear until a second supplemental affidavit of Michael Leonard was filed on 17th July, 2018.

47. The lands in Folio 63920F, County Kerry, are described by reference to a plan on the registry map. It is not immediately evident from the folio, but it is from the registry map, that the lands in Folio 63920F comprise 8.552 acres. In the deed of appointment of the receiver, following the description in the deed of charge, the property was described as comprising 8.552 acres, being more particularly described and delineated on the map attached to a deed of mortgage dated 20th May, 2008 and thereon outlined in green, being the property comprised in Folio 63920F, County Kerry. In his affidavit filed on 17th July, 2018 Mr. Leonard referred to correspondence from solicitors for the receiver to Kerry Group plc in 2017. Incidentally, Mr. Leonard referred to the receiver as having been "*subsequently discharged*" from his duties without saying when the receiver had been so discharged.

48. It will be recalled that the receivers were appointed on 11th October, 2013. On 26th May, 2017, well after these proceedings had been commenced, Beauchamps solicitors, on behalf of the receiver, wrote to the Kerry Group plc. They said that they had been advised by the receiver that Kerry Group plc had constructed a building on the site and that it was unclear what the legal basis of that had been. There appears to have been no response and further letters were written on 22nd June, 2017 and 15th August, 2017 threatening that failing a satisfactory response, the receiver would take the necessary steps to protect and enforce the security.

49. Kerry Group plc eventually reverted in March 2018 providing a copy of a stamped deed of transfer dated 20th March, 2007 between John Mitchell of the first part, Maurice Prendiville of the second part, and Kerry Creameries Ltd of the third part. This recited that Mr. Mitchell had lately agreed for the sale to Mr. Prendiville of part of the lands in Folio 42190F, County Kerry, for €2.7 million and that Mr. Prendiville had agreed with Kerry Creameries Ltd for the sale of 2.14 acres for €1.3 million. In consideration of the sum of €1.3 million, then paid, Mr. Mitchell transferred the 2.14 acres to Kerry Creameries Ltd. That transfer was plainly the sub sale contemplated by the facility letters in 2007 but for some reason it was never registered and the later transfer from Mr. Mitchell to Mr. Prendiville and Ms. Dennehy was of the entire 8.552 acres the subject of the original agreement between Mr. Mitchell and Mr. Prendiville.

50. It is quite clear that Folio KY42190F will need to be rectified. There is no evidence that anyone has done anything about this or even thought about how this is to be achieved.

51. By its undertaking dated 7th February, 2007 the defendant undertook in the first instance that the loan monies would be applied to ensure that the borrower had good marketable title. It was unquestionably a breach of the undertaking that the property was put in the joint names of Mr. Prendiville and Ms. Dennehy.

52. The defendant further undertook that it would ensure that the borrower had executed a deed of mortgage or charge over the property prior to negotiating the loan cheque. It is quite clear that this did not happen. The deed of charge dated 20th May, 2008 was plainly executed much later, certainly after the operative date of the Land and Conveyancing Law Reform Act, 2009 and probably shortly before it was lodged for registration in 2010.

53. In his second supplemental affidavit sworn on 12th July, 2018 Mr. Leonard identifies three problems which he says are separate and distinct.

54. First, he says that Mr. Prendiville and Ms. Dennehy are joint registered owners "*so that Danske only has a security over a half interest in the 6.5 acre*s". I do not accept that this is correct. It takes no account of the fact that the land was bought with money drawn down from the plaintiff on the borrower's promise and on the defendant's undertaking to put in place a first legal charge. It takes no account of the deed of confirmation, or the transfer, or of Ms. Dennehy's repeated declaration that she will execute any further deed or document that might be required. Counsel for the plaintiff acknowledged in the course of argument that the drawdown of the loan on the undertaking to provide a legal charge created an equitable charge over the entire 6.5 acres.

55. Secondly, Mr. Leonard says that Mr. Prendiville and Ms. Dennehy are incorrectly registered as joint owners over the entire folio when only Mr. Prendiville should be registered as the sole owner of 6.5 acres. There are two propositions here and they are both correct. The infirmity with the transfer first became apparent to the parties in September, 2017 when the application to register it was rejected. As I have said, no one appears to have directed their mind as to what is necessary to regularise in Kerry's title. The defendant has instituted proceedings against Ms. Dennehy and Mr. Prendiville with the aim of having Mr. Prendiville registered as the sole owner of the 6.5 acres.

56. Thirdly, Mr. Leonard says that the mortgage dated 20th May, 2008 is a post 1st December, 2009 mortgage deed which was clearly executed after 1st December, 2009 and improperly backdated. This, he says "*raises a question as to its enforceability as a matter of first principle*". Clearly the backdating of the mortgage was irregular but I am not satisfied that it was thereby rendered unenforceable. This suggestion appears to have been first made in the last affidavit filed on behalf of the plaintiff.

57. The application now before the court is in form an application for an order directing the defendant to comply with its undertaking but it seems to me that in substance it is an application for compensation. The plaintiff's position in argument was that the problem or problems with the security were perhaps not impossible to resolve but that it was improbable that they could be. It was suggested that the court might make an order directing compliance within a short period but the plaintiff did not really engage with the issues as to what might be done or ought to be done to regularise the security or how long this might take.

58. It is clear that the undertaking is incapable of being complied with in its terms and that the best that can be hoped for is that the security might be patched up. The defendant hopes that this can be achieved by an order in the plenary action which has been instituted against Mr. Prendiville and Ms. Dennehy, the prosecution of which is expected to take at least a year.

59. Failing compliance with the undertaking, or in the event that the defendant might be incapable of complying with it, the plaintiff asks the court for an order directing the payment of compensation.

60. As I have observed earlier, there was no evidence in the grounding affidavit of any attempt to realise the security over the 6.5 acres or what price it might have realised. In his second supplemental affidavit filed on 17th July 2018 Mr. Leonard exhibited a valuation by CBRE of the 6.5 acres on the basis of vacant possession as of 20th May, 2008 (said to be the date on which the lands were charged to the plaintiff) and as at 5th July, 2017.

61. The plaintiff does not, either in the affidavits or argument, attempt to quantify or explain the basis of its claim for compensation or to identify the date at which any compensation might be assessed.

62. The fundamental premise of the compensation claim, I suppose, is that the plaintiff did not have the security it should have had when it should have had it but the assessment of the plaintiff's loss entails much more than simply looking at the value of land as of the date on which the agreed security ought to have been put in place.

63. In *Allied Irish Banks plc v. Maguire* [2016] 3 I.R. 85 Clarke J. (as he then was) considered the proper approach of the court to an award of damages for breach of a solicitor's undertaking. In that case there had not been any significant debate at the hearing in relation to that issue. In this case there was none. Citing *McGregor on Damages* (19th Ed., Sweet & Maxwell, London, 2014) Clarke J. said that the value of the damages at the time of the wrongdoing should, at a minimum, be the starting point. Clarke J. noted that the authorities distinguished between cases of irreversible conversion of goods and cases where the claimant seeks and obtains the return of the goods and said that a like distinction could be drawn between a case (such as this) where the breach of undertaking might be remedied and a case (such as Maguire) where the actions of the solicitor rendered it impossible to comply with the undertaking in question.

64. Without expressing any definitive view at this stage, it does appear to me that any attempt to assess the loss sustained by the plaintiff by reason of the defendant's failure to put in place the agreed security must inexorably lead to a consideration of what the agreed security would have realised if the plaintiff could have realised it when it ought to have been able to realise it, and would have realised it. If the starting point is to measure the loss at the date of the wrongdoing, it is necessary to look not only at what the plaintiff should have had but also at what, if anything, it did have.

65. In this case the plaintiff ought to have had an enforceable first legal charge. In fact (as counsel for the plaintiff conceded) it had, and has, an equitable charge over the 6.5 acres. That equitable charge was short of what the plaintiff should have had and would have been more difficult, and perhaps more expensive, to enforce. Certainly an action for a well charging order and an order for sale would have taken a great deal longer than an action for possession, if that had been necessary. In this case there is no suggestion that the receiver had, or would have had, any difficulty in taking possession. If that is so, there might have been no impediment to the plaintiff going into possession of the lands as mortgagee, so that the relevant date might have been the date of default, whenever that was, or a date shortly thereafter on which the plaintiff might have found a buyer for the land.

66. The undertaking in this case was to ensure that the deed of charge was executed before the loan cheque was negotiated and thereafter to have the charge registered as soon as practicable. So the starting date, at least, is the date on which the loan cheque was negotiated without the charge having been executed.

67. There is no evidence of the date of drawdown. The first (and, as it eventually transpired the only relevant) facility letter was dated 12 January, 2007. The letter of undertaking was dated 7th February, 2007. The deed of transfer to Kerry Creameries Ltd was dated 20th March, 2007 and it was stamped nine days later. It seems to be to be highly unlikely that the sub-sale to Kerry was completed upwards of a year before the sale to Mr. Prendiville.

68. To my mind, whatever the date of the wrongdoing may have been, it is highly unlikely to have been 20th May, 2008. CBRE were asked to value the property as of that date and Mr. Leonard suggests that that was "*the date the lands were charged to the plaintiff*". If this is to be understood as a reference to the date upon which the deed was executed, the evidence is quite clear that that date was not 20th May, 2008 but rather some time in 2010. Moreover, the execution of the deed of charge was, or would have been, only the first step. It would have been necessary thereafter to have the charge registered before the security would have been enforceable. The copy folio shows that when the charge was eventually lodged for registration in 2010 it did not take terribly long for it to be registered but there is no evidence as to what time might reasonably have been allowed for registration of the charge in 2007 or 2008, when it ought to have been executed.

69. Whatever the date may be upon which the charge ought to have been registered, it seems to me that that cannot be the relevant date upon which the loss to the plaintiff is to be measured. If, in principle, it is the starting point it seems to me that, on the facts of this case, any assessment of damages would necessarily end up at the date upon which the plaintiff might otherwise have realised its security.

70. In this case there is no evidence as to the date of default unless, inferentially, from the fact that Fi.Fa. shows a 2010 record number for the action in which judgment against Mr. Prendiville was obtained. The only evidence of any attempt to enforce the security was the appointment of the receivers on 11th October, 2013 following which there was a very long delay before, in May, 2017 the receiver's solicitors set out to establish how the Kerry building came to have been built on the land.

71. There is no indication in Mr. Leonard's affidavit as to how 5th July, 2017 might be relevant to the assessment of the loss.

72. The valuation report is a desktop valuation dated 16th March, 2018 based on a letter of instruction of the same date. It refers to an inspection of the property by a consultant CBRE valuer on 25th June, 2017 but does not disclose the purpose of that inspection, or who asked for it. I suppose that it might be pure coincidence that the visual inspection coincided with the correspondence from Beauchamps, solicitors for the receiver, to Kerry. The report describes the land as a greenfield 6.5 acre site in a cul de sac which is zoned for light industrial use but in agricultural use. The site is valued as of 20th May, 2008 at €1.3 million (which is what Mr. Prendiville paid for it) and as of 5th July, 2017 at €130,000.

73. On the authority of *Allied Irish Banks plc v. Maguire* [2016] 3 I.R. 85, the normal order in a case where an undertaking has been breached is an order requiring the solicitor to do that which he had undertaken to do. In a case where such an order is not appropriate, for example in the case of impossibility, the court has power to order the solicitor to make good the loss.

74. In *ACC Loan Management v. Barry* [2015] 3 I.R. 473 the Court of Appeal emphasised that the jurisdiction of the court to direct compliance with a solicitor's undertaking should only be exercised in the plainest of cases where the case for judicial intervention is manifest and obvious. The court also emphasised the discretionary nature of the jurisdiction.

75. It is well established that in the exercise of its discretion the court will attach significant weight to any delay on the part of the

plaintiff in invoking it. In this case there was a very long delay between 28th April, 2011 when the plaintiff was sent the deed of confirmation and 15th August, 2016 when the special summons issued. There has been no attempt to explain this delay.

76. As the case progressed it became apparent that there were a number of problems with the title but the initial focus (such as it was) was on the fact that the deed of transfer of the legal interest from Ms. Dennehy to Mr. Prendiville had not been registered. It seems to me that that problem might have been dealt with by the plaintiff calling on the defendant to have the transfer registered or by the plaintiff lodging it for registration. It is true that when Mr. Murran eventually lodged the transfer for registration the dealing was rejected and that any earlier application would almost certainly have been rejected for the same reason but if the need for Mr. Prendiville's consent had been identified before the dispute arose between him and Mr. Murran, it may very well have been forthcoming.

77. If it was initially thought that the enforcement of the equitable charge might have been complicated by the fact that Ms. Dennehy was a joint registered owner, any such concern would have been disposed of by the execution by her of the deed of confirmation. While the enforcement of an equitable charge is certainly slower and more cumbersome than the enforcement of a legal charge, it seems to me that the plaintiff had ample time to do so in the five years in which it did nothing.

78. In *ACC Loan Management v. Bar*ry the first of three reasons given by the Court of Appeal for upholding the decision of the High Court was that no letter before action had been sent to the solicitor calling upon him to honour the undertaking. The court held that except in urgent or special cases, no proceedings of this kind should be issued without giving the solicitor an opportunity to address the question. In this case there was no letter before action and the plaintiff has not offered any explanation as to why such a letter was not written.

79. *Taylor v. Ribby Hall Leisure* [1998] 1 W.L.R. 400 was a case in which the plaintiff sought an order for committal of a solicitor as well as compensation for allegedly aiding and abetting his client in breaching an injunction and for acting in breach of an undertaking. The Court of Appeal in England emphasised that proceedings invoking the supervisory jurisdiction of the court over solicitors should, in the absence of good reason, be initiated within a reasonable time of the plaintiff acquiring knowledge of the breach of a court order or undertaking.

80. *Bank of Ireland Mortgage Bank v. Coleman* [2009] 3 I.R. 699 was a case, like this, where the purchaser's solicitor had released the loan cheque to the vendor without perfecting the borrower's security and title. The plaintiff bank, by the summary procedure invoked in this case, sought to recover from the solicitor the amount of the advance. The High Court (Laffoy J.) found the plaintiff's claim to be misconceived and refused it. By the time the case reached the Supreme Court there had been, as the court found, a dramatic change in the factual situation in that the title was in order and the bank's security was properly in place. In those circumstances the Supreme Court was persuaded to allow the appeal to the extent of remitting the case to the High Court for an assessment of the losses (if any) as the bank might have suffered by reason of the delay in providing the security.

81. As I understand the judgment of the Supreme Court in *Coleman*, it took the view that the High Court ought not to have confined itself to deciding whether the plaintiff had made out its case to be entitled to the relief claimed (which the Supreme Court agreed would not have been appropriate) but ought to have considered what appropriate order it might make to ensure that the undertaking was enforced, taking into account the need to uphold the integrity of the lending system which was totally reliant on solicitors' undertakings in the Law Society approved format. The Supreme Court in *Coleman* did not say that Laffoy J. should have made an order directing the solicitor to perform his undertaking and the dramatic change in circumstances had the effect that it was no longer necessary to consider whether that was appropriate.

82. The approach taken by the Supreme Court in *Coleman* was spelled out in *Allied Irish Banks plc v. Maguire* [2016] 3 I.R. 85 where the Supreme Court held that the normal order in such cases should be to require the solicitor to do what he had undertaken to do but where that was not appropriate, for example on the grounds of impossibility, the court has power to order the solicitor to make good the loss occasioned by the breach. Significantly, impossibility is given only as an example of the circumstances in which an order requiring the solicitor to do what he has undertaken to do might not be appropriate. All of the authorities are agreed that the jurisdiction is discretionary. In *Maguire* Clarke J., as Laffoy J. had in her judgment in Coleman, cited with approval a passage from the speech of Lord Wright in *Myers v. Elman* [1940] A.C. 282 in which it was said that:-

> *"This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ."*

83. I understand this to be clear authority that the summary procedure may not be invoked simply as an alternative to a negligence action or an action on a certificate of title but is available only in appropriate cases. It seems to me that a proper case in which to invoke the jurisdiction will be a clear case, capable of summary adjudication, in which the court is promptly called upon to intervene, and in which the plaintiff makes its case clearly and comprehensively.

84. In *Danske Bank A/S v. O'Ceallaigh* [2011] IEHC 216 Laffoy J. emphasised the need for both the lenders, seeking to enforce undertakings, and the solicitors' indemnifiers, to be realistic in their approach to proceedings invoking the court's jurisdiction to enforce undertakings. The appeal to reality in that case was directed in particular to calls on behalf of solicitor defendants to have sent to plenary hearing cases in which the compensation could be readily quantifiable on affidavit evidence but the court also emphasised the need that all relevant facts be disclosed in the grounding affidavit. In that case Laffoy J. did not have the necessary evidence to assess the plaintiff's loss and directed the delivery of points of claim within two weeks and points of defence within two weeks thereafter, each to be supported by such affidavit or affidavits as might be necessary to support the claim or defence, and then an exchange of letters seeking voluntary discovery within a week.

85. *O'Ceallaigh* was not a simple case but the basis of the claim for compensation was that the borrowers had sold 2.7 acres of land which should have been secured to the plaintiff. In view of the supervisory nature of the jurisdiction which had been invoked, Laffoy J. saw no basis for simply adjourning the case to plenary hearing but took the view that the issues could be readily and speedily identified and dealt with on affidavit evidence.

86. This, in my view, is not such a case. If the defendant succeeds in patching up the security, the basis of the claim for compensation will be that the plaintiff was delayed in its ability to enforce its security. If the deficiencies in the security are not cured, the measure of the loss will be the difference in value between the security which the plaintiff ought to have had and the limited security which it did get. This is not a claim that can be adjudicated upon on the basis of points of claim and defence, verified by affidavit. It seems to me that to adjourn the compensation claim to plenary hearing with directions for the exchange of pleadings, particulars, letters seeking discovery and so forth would defeat the purpose of the summary jurisdiction the plaintiff has sought to

invoke. Far from saving the costs of a damages action, it would add a layer of costs for a process which has achieved little or nothing.

87. It is trite that a solicitor will be bound by his undertaking even if what he undertakes to do is not within his own power. It does not follow, however, that it will always be appropriate to make an order directing the solicitor to do something which is not within his power.

88. The plaintiff in this case asks the court to direct compliance with the undertaking. It asks that the defendant should be ordered to do something which, although perhaps not impossible, it is said to be improbable that he will be able to achieve. What needs to be done in this case is to get the folio rectified and to get Mr. Prendiville to execute the transfer of the legal interest in the 6.5 acres. Neither of these is within the immediate power of the defendant and I do not believe that it would be appropriate to order the defendant to do something that he is not immediately capable of doing, *a fortiori* something that the plaintiff contends he is highly unlikely to be able to achieve.

89. It seems to me that in the last seven years the plaintiff has shown no real interest in having the security perfected. Rather, the plaintiff's object is an award of compensation and the court is asked to make an order directing compliance only because the Supreme Court has said that that is the usual order in the first instance. It appears to me to be a box ticking exercise. For upwards of five years the plaintiff failed to take issue with the defendant's efforts, largely prompted by the plaintiff's correspondence, to patch up the security. There was no letter before action. As late as March, 2017 the plaintiff believed (albeit wrongly) that the issue might have been resolved by lodging the deed of transfer for registration but did not do so.

90. In this case it is clear that the defendant did not comply with the undertaking given to the plaintiff but the clarity ends there.

91. This application was made upwards of eight years after the plaintiff became aware that the undertaking had not been complied with. More significantly, the application was made upwards of five years after the last communication with the defendant and without notice or warning. There is no explanation for that very considerable delay.

92. The evidence offered in support of the application in the grounding affidavit of Mr. Leonard was, to say the least of it, incomplete. There is no evidence of the date of drawdown. That being so, the date of wrongdoing is not clear. There is no evidence that the plaintiff took any step to enforce the limited security it did get over the Moanmore lands, or even that it took advice as to its options. There is no evidence of what the plaintiff collected by the realisation of the charge it did get over the Castleisland lands, or when. There is no evidence as to the balance outstanding on the loan.

93. For all these reasons I have come to the conclusion that this is not a proper case in which the court should exercise its discretionary summary jurisdiction and I will refuse the application.