

THE HIGH COURT

[2013 No. 9536 P.]

BETWEEN

MARGARET FLYNN

PLAINTIFF

AND

NIALL PATRICK KING PRACTISING

AS J. F. WILLIAMS AND COMPANY

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of December, 2017

1. The plaintiff is a horse trainer. The defendant is a solicitor practising as J. F. Williams & Company, Main Street, Dungarvan, Co. Waterford who was retained by the plaintiff to act as her solicitor in a number of property transactions. He is alleged to have failed to exercise reasonable care, skill and diligence when advising the plaintiff at various stages of these transactions as a result of which she alleges she suffered loss and damage and claims damages for negligence, breach of duty and breach of contract.

The Transactions

2. On the 15th March, 2008 the plaintiff agreed to purchase 60.93 acres of agricultural land (the Knox lands) described in Folios 6421 and 9122 Co. Waterford for the sum of €1,411,546.00. A deposit of €141,154.60 was paid by the plaintiff. A closing date was originally proposed for 25th February, 2008 but this was struck out of the contract for sale and the closing date was "to be agreed".

3. This purchase was to be financed by a loan from ACC Bank of €1,569,000.00 to be secured on the defendant's undertaking to pay the net proceeds of sale of other lands held by the plaintiff at Stradballymore, Stradbally, Co. Waterford (the Stradbally lands) described in Folio 4283 Co. Waterford and part of Folio 4320 Co. Waterford which at the time had been sold to a Mr. Denis Lehane (otherwise O'Liathain) for the sum of €3,000,000.00 pursuant to a contract for sale made 9th October, 2006. The failure of Mr. Lehane to complete this sale had serious financial consequences for the plaintiff. She was ultimately left to complete the purchase of the Knox lands using the borrowed money and was exposed to the liability to ACC Bank for the loan which she could not discharge without the proceeds of sale of the Stradbally lands.

4. The special conditions of the sale of the Stradbally lands provided that they were sold without benefit of planning permission and that the closing date for completion of the sale was 27th January, 2007 or "on such earlier date as maybe agreed between the parties (Condition 7)."

5. By facility letter dated 18th February, 2008 ACC Bank agreed to advance €1,569,000.00 "for a term of two years from the date of the first drawdown" for the purpose of financing the purchase of the Knox lands. The facility was repayable on demand. Paragraph 8 of the letter provides that the loan amount would be secured as a first legal mortgage or charge on the Stradbally lands and the Knox lands then being purchased and the defendant's irrevocable undertaking based on the plaintiff's irrevocable instructions to repay the loan to the Bank from the net proceeds of the sale of the Stradbally lands. The facility letter was signed by the plaintiff. The letter nominates the defendants as her solicitors. The money was drawn down and the purchase of the Knox lands was completed on the 3rd April 2008.

6. ACC Bank initiated proceedings against the plaintiff for the sum outstanding on the loan and obtained judgment on the 16th May, 2012 in the Commercial Court for the sum of €1,900,000.00 pursuant to a settlement made between the parties. Interest was to be applied from the date of judgment. Receivers were appointed to take charge of the Stradbally lands and the plaintiff following further High Court proceedings agreed *inter alia* to vacate that property on 5th July, 2012.

The Plaintiff's Claim

7. The standard of care required of a solicitor who undertakes a transaction entrusted to him by a client is to exercise "the ordinary level and degree of skill and competence generally exercised by reasonably careful colleagues in his profession" (per Griffin J. in *Roché v. Peilow* [1985] I.R. 232 at p. 258).

8. The plaintiff claims that the defendant was negligent and in breach of duty in that he:-

(a) failed to advise the plaintiff properly or at all as to the risks of the purchaser's inability to complete the purchase of the Stradbally lands;

(b) failed to make any or adequate inquiries about the purchaser's ability to complete the purchase of those lands when he knew or ought to have known that there were difficulties about financing the purchase and obtaining planning permission;

(c) failed to advise the plaintiff as to the consequences of a default in the completion of the purchase of the Stradbally lands prior to the plaintiff entering into a loan agreement with ACC Bank and a contract for the purchase of the Knox lands;

(d) failed to advise the plaintiff adequately or at all in respect of the precise terms of the credit facility granted to her by ACC Bank and the financial implications of her failure to repay that loan;

(e) failed to warn the plaintiff of the risks involved in entering a loan agreement with ACC Bank and the contract for purchase of the Knox lands prior to the completion of the purchase of the Stradbally lands and permitting the plaintiff to enter into those agreements;

(f) failed to comply with the Law Society's recommendations dealing with bridging finance, which state that a solicitor ought never to allow a borrower to take a bridging facility unless absolutely certain that he or she would be in a position to obtain the loan cheque in the reasonably foreseeable future and repay the bridging loan;

(g) failed to give advice in the clearest possible terms in respect of the risks of entering a contract for the purchase of the Knox lands and drawing down a loan facility provided by ACC prior to the completion of the sale of the Stradbally lands.

The Sale of the Stradbally Lands

9. The defendant was retained in the sale of the Stradbally lands on or about 29th March, 2006. A contract for sale was not received promptly by him from Mr. Lehan despite numerous requests for same. Mr. King wrote to Mr. Creedon of Philpot Creedon & Co., the purchaser's solicitors, requesting the contracts for sale executed by the purchaser together with the deposit no later than noon on Friday 6th October, 2006. This letter was written on the plaintiff's instructions.

10. The contract for sale was executed by the purchaser on 9th October, 2006. The deposit was reduced from €300,000.00 to €150,000.00. The plaintiff was satisfied to continue with the transaction notwithstanding the delay by Mr. Lehan in executing the contract.

11. The completion of the sale was further delayed into 2007. On 19th January, 2007 the purchaser's solicitors wrote that it had been "agreed between the parties to postpone completion of this sale for an agreed period of two further months". Mr. King was asked to note this. The agreement had been reached between the plaintiff and the purchaser without recourse to Mr. King for advice.

12. However, the matter was further delayed. By letter dated 3rd October, 2007 the purchaser's solicitors wrote again to Mr. King indicating that as a result of discussions between the plaintiff and the purchaser a further agreement had been reached. These terms were set out as follows:-

- "1. A portion of the contract deposit is to be released forthwith to your client, namely €50,000.00.
2. In return for a delayed completion of the Contract your client is to be paid an additional €150,000.00 on completion.
3. A contract has been executed by our client in relation to the sale of lands which *inter alia* includes the lands, the subject matter of the contract executed between our respective clients. This contract *inter alia* provides that the purchaser has eighteen months to obtain a final grant of planning permission from the 16th of August, 2007. The time is to be extended should there be an appeal to An Bord Pleanála. Once the final grant of planning permission has been obtained the sale is to be completed in 28 days."

13. The reference to the contract executed by the purchaser placing an obligation on the purchaser to obtain a final grant of planning permission related to a sale to a third party development company, Blackwater Homes Ltd.

14. Having received this letter Mr. King wrote to the plaintiff seeking her instructions on the matter on 5th October. On 8th October following her attendance with Mr. King in the afternoon, he sent an email/letter to the purchaser's solicitors expressing the plaintiff's agreement to extend the closing date to the 27th January, 2008 subject to the following:-

- "1. That the deposit of €150,000.00 be immediately released to our client.
2. That your client pays an additional sum of €150,000.00 to our client on the 27th January, 2008."

It provided also that the plaintiff's legal position on foot of the contract dated 9th October, 2006 would not be otherwise prejudiced. Mr. King furnished a copy of this letter to the plaintiff on the same date.

15. On 15th October, 2007 the purchaser's solicitors having taken their client's instructions replied as follows:-

- "1. €100,000.00 can be released to your client but no more.
2. An additional sum of €150,000.00 will be paid on completion.
3. The closing date to be extended to tie with the closing date provided for in the selling on contract which is particularised in our letter to you dated 3rd October, 2007. The difficulty which has arisen is that the land values have changed since the contract was executed and this is creating a serious problem in terms of completing this transaction and that is why our client is making the request. If your client is agreeable to meeting the request, our client is confident that the price will be maintained and the contract for selling on will be completed. He is therefore asking for your client's forbearance and agreement to wait for completion pending the completion of the selling on contract."

16. On receipt of this letter Mr. King furnished it to the plaintiff and on her instructions sent a reply to the purchaser's solicitors of the same date. This expressed his client's agreement to extending the closing date but only on the following terms:

- "1. That the full amount of the deposit in the sum of €150,000.00 be released to our client immediately.
2. That your client pays a sum of €12,500.00 per month to our client in addition to the balance of the purchase monies as and from the 27th January, 2006 up to the closing. This would mean that a sum of €112,500.00 would be paid by your client to our client immediately i.e. €12,500.00 X 9 months.
3. The closing date will be extended to the 26th August, 2009 or such earlier date that the purchaser wishes to close the sale."

The court is satisfied that the plaintiff and her solicitors in the course of subsequent negotiations with Mr. Lehan about extending the closing date were clearly on notice that there were "serious problems" concerning the completion of the transaction. Mr. Lehan sought to procure flexibility from the plaintiff by an extension of the closing date. Ms. Flynn following direct negotiations with him was satisfied to do so for the considerable additional sums agreed. The court is satisfied that she took a commercial decision to do so and was clear in what she wished to obtain in return. She had clearly considered and taken into account the "serious problems" identified by Mr. Lehan's solicitors in doing so.

17. In a letter to the plaintiff on 19th October, following a telephone conversation Mr. King enclosed a copy of this draft letter and

noted that under the terms of the contract for sale interest was chargeable at the rate of 11% per annum as and from the closing date 27th January, 2007. He noted that the interest accruing was €904.11 per day. He requested the plaintiff's instructions upon which he clearly acted.

18. A reply was received from the purchaser's solicitors dated 30th October, 2007 who indicated their client's willingness to agree that:-

1. "€100,000.00 deposit paid to your firm on execution of the contracts can be released forthwith [to] your client.
2. Our client is agreeable to pay €150,000.00 per annum calculated from the 27th of January, 2007 to the date of completion.
3. While we note that you are prepared to extend the closing date to the 26th of August, 2009 our client's preference is to tie the closing date into the date fixed for completion as referred to in Condition 3 of our letter to you dated the 3rd of October, 2007."

The proposal at Item 3 would in effect make the completion of the sale dependent on a final grant of planning permission.

19. As a result of further consultation with the plaintiff terms were agreed and embodied in a supplemental agreement dated 23rd November, 2007 which provided that:-

- "2. ... the purchaser pays the vendor a sum of €150,000.00 ... per annum i.e. €410.96 per day for the period 27th January, 2007 to the actual closing of the sale. In the event that the purchaser does not pay to the vendor on or before the actual closing date a sum of €410.96 per day for the period 27th January, 2007 to the closing date, then the purchaser would be liable on or before closing the sale to pay to the vendor interest at the rate of 11% per annum on the full amount of the purchase monies as and from the 27th January, 2007 to the date of actual closing of the sale.
3. ... the closing date in the contract for sale dated 9th October, 2006 be extended from the 27th January, 2007 to the 26th August, 2009 or 14 days after the granting of planning permission in respect of the development of the property in sale, whichever is earlier, provided that the purchaser paid to the vendor on or before closing a sum of €410.96 per day for the period 27th January, 2007 to the date of actual closing of the sale.
4. The deposit of €150,000.00 is to be immediately released to the vendor."

All other terms of the contract were thereby confirmed. The agreement was signed by the plaintiff in the presence of Mr. King.

20. On 26th November, 2007 Mr. King wrote to the plaintiff in respect of the deposit of €150,000.00 received for the purchase of Stradbally lands. A sum of €50,000.00 was paid to Sherry Fitzgerald in discharge of their fees. A sum of €20,000.00 was lodged to the plaintiff's account on 23rd November. Solicitor's fees and other sundry matters were deducted and following the plaintiff's instructions the balance remaining of €76,507.50 was lodged to her account.

21. Mr. King gave evidence that he was in frequent contact with the plaintiff who informed him repeatedly that she was in contact with Mr. Lehane. She always assured Mr. King that everything was in order and that Mr. Lehane simply required further time to complete the sale.

22. Mr. Lehane was a property developer and it was his intention on the purchase of the Stradbally lands to enter into an agreement with Blackwater Homes Ltd. for the construction of a residential development on the lands. He sought planning permission for this development. It was refused on 13th May, 2008. An appeal was lodged with An Bord Pleanála which was rejected on the 22nd December, 2008. On numerous occasions the plaintiff was informed verbally by Mr. Lehane that he would complete the sale on the closing date. However it is clear from the subsequent events that despite repeated requests to do so in March and May 2009 Mr. Lehane did not complete the sale.

23. On the 18th May, 2009 the plaintiff informed Ms. Roisin Hickey, a solicitor employed by the defendant, who at that stage had been assigned to deal with the purchase of the Knox lands and related matters, that she was under increasing pressure from ACC Bank in respect of the discharge of the loan for the purchase of those lands, which was to be cleared by 26th August, 2009. ACC did not believe that the sale would close. There had been no indication from the purchaser's solicitor of a proposed closing date for the completion of the sale of the Stradbally lands.

24. In discussions with Ms. Hickey the bank requested that she obtain a more concrete undertaking from Mr. Creedon that the sale of the Stradbally lands would be completed. The plaintiff was repeatedly reassured by Mr. Lehane that he would complete the sale on the closing date regardless of the rejection of the planning application. On 8th June, 2009 the defendants received a letter from the purchaser's solicitors confirming that there would be a difficulty in completing the sale on the closing date.

25. Following further correspondence on 28th August, 2009 a notice to complete was served on the purchaser's solicitors. He failed to complete.

26. On 22nd October a plenary summons issued seeking specific performance of the contract for sale. A motion for judgment issued. It was initially indicated that the matter would not be contested but a full defence was entered on 1st December, 2010.

27. A motion for judgment in default of defence had been struck out by consent on 5th July, 2010 and the defendant was given a further six weeks to deliver same. The purchaser's solicitors requested that the plaintiff refrain from pursuing the matter as their client was applying for legal aid. In addition, it was indicated that there was a third party interested in the property and on the basis of that representation by Mr. Lehane to the plaintiff, she was satisfied to leave matters stand at that time. Unsurprisingly ACC Bank continued to apply pressure on the plaintiff to service or discharge the debt.

The Knox Lands

28. The plaintiff had for many years an interest in purchasing land for use in her business. The defendant wrote on the plaintiff's instructions on 28th January, 2000 to Dr. John O'Connell expressing his client's interest in purchasing lands which were part of the Woodhouse Estate of which the Knox lands were a part. The letter described the lands in which she was interested lands as "70 acres approximately ... situated between the Stradbally cove and the Gleeson farm and are on the seaside of the Dungarvan/Stradbally road".

29. Dr. O'Connell replied indicating that he was not the owner and suggesting that a Mr. Mahmoud Barbir be contacted. In further correspondence Mr. King repeated the plaintiff's interest in placing a bid on the land between "Stradbally cove and the Gleeson farm containing 70 acres approximately".

30. The defendant and his firm had acted for the plaintiff and her family on previous occasions for many years. The plaintiff accepted that between the years 2000 and 2004 she disposed of three properties and retained Mr. King for that purpose and also in respect of any other matters that arose in respect of injuries to employees or trespass issues with neighbours including an issue concerning a boundary fence with Waterford County Council.

31. In 2005 to 2006 the plaintiff was training approximately twelve horses. She employed two to three people on a seasonal and sometimes part-time basis. She was introduced to a Mr. Cunningham who inquired if she was interested in swapping her lands for a farm in Clonmel. This comprised 140 acres. This impressed upon her that her own lands might be valuable. It also rekindled her interest in securing more appropriate land for the development of her business.

32. The plaintiff stated that she became aware of Mr. Lehané through two friends. She was informed that he had purchased land behind her lands. She became friendly with him. She believed that Mr. Reynolds an auctioneer brought up the subject with her of a proposal to sell her land to Denis Lehané.

33. Mr. Reynolds also indicated that another party was interested in purchasing her land for €1 million. She was satisfied to sell the land to Mr. Lehané because he had offered €3 million which was the best price. At the time the offer was made she knew him. They moved in the same circle of friends who met a few times a week and sometimes he would be there. She believed he had paid over €1 million for the area of land behind her land. She was also aware that if these lands were to be developed Mr. Lehané would require access to them through her land. She was aware of the importance of this to him.

34. By August 2006 the plaintiff was negotiating the proposed sale directly with Mr. Lehané which led to the signing of the contract for sale on 9th October.

35. The plaintiff and Mr. Lehané shortly after the signing of the contract became part of a syndicate which attempted to acquire the entire of the Woodhouse estate on which the Knox lands were situated. It was a four person syndicate which included the plaintiff, Mr. Lehané, a Mr. Ryan and one other person. The plaintiff and the other members of the syndicate attempted to procure Bank of Ireland loan facilities to finance the purchase of the entire estate. They attended at Bank of Ireland in Waterford. Each produced a statement of affairs for the purpose of seeking finance for the purchase. In the course of this transaction Ms. Flynn had sight of a statement of affairs from Mr. Lehané indicating that he had assets in excess of €10 million. This was a further reassurance to her of his ability to complete the transaction for the purchase of her own lands. She hoped as part of the syndicate to acquire the Knox lands because at that stage the estate was being sold as a single unit. However, the exact delineation of the parcel of land from the estate that each member of syndicate might obtain was not mapped out. The transaction did not proceed because Bank of Ireland declined to finance the purchase.

36. The plaintiff accepted that she had informed Mr. King about her involvement in the syndicate. However, she indicated that she had an open mind as to which portion of the estate she wished to acquire. Ms. Flynn gave evidence that she informed Ms. Hickey that a statement of affairs had been produced and gave her a copy of it. While she had no specific recollection of discussing the entire transaction with Mr. King, she said that she had no reason not to talk to him about it.

37. Mr. King, for his part gave evidence that in 2007 he had been informed by Ms. Flynn that she was involved with a syndicate which hoped to purchase the Woodhouse estate. He did not discuss funding with her. He was not instructed in relation to the matter by the syndicate. He was informed that she was very interested in securing a portion of the lands from the estate upon which she had been training her horses and that it had been her "life's ambition", to buy part of that estate. He was not informed of the identities of all of the members of the syndicate. He was not made aware of the financial arrangements in relation to it. He said that he did not advise her specifically in relation to entering into unnecessary financial risk concerning that transaction because he was never asked to advise in respect of it and was never instructed in relation to the purchase of the entire Woodhouse estate by the syndicate. By July, 2007 the syndicate had broken up and did not proceed with the purchase. It was only after the breakup of the syndicate that Mr. King became aware that an approach had been made to Bank of Ireland. Mr. King gave evidence that Ms. Flynn was always interested in purchasing the Knox lands and had expressed this interest to him on numerous occasions between 2000 and 2007.

38. Shortly after the conclusion of the supplemental agreement on the 23rd November, 2007 concerning the Stradbally lands and sometime before Christmas the plaintiff states that she approached Mr. Aiden Farrell who was now acting in respect of the Woodhouse estate to inquire whether he would sell a section of the estate in which she was interested namely the Knox lands. Mr. Farrell was a beneficiary of a trust which owned the estate. Thereafter the plaintiff explored the possibility of obtaining finance for the purchase of the Knox lands with Mr. Kennedy of ACC Bank on 8th January 2008. She claims that she did not know how much land she was looking for at the time nor had she discussed the price per acre of the land to be purchased. She brought the supplemental agreement with her to the meeting. She also showed Mr Kennedy her statement of affairs and a profit and loss account for her business. Mr. Kennedy indicated some enthusiasm for the project but indicated that he would have to obtain further approval from a Mr. Rafter, his superior. Mr. Kennedy said he would telephone her. He did so and arranged for Mr. Rafter to call to her house on the 10th January.

39. The plaintiff arranged to walk the lands with Mr. Aiden Farrell, Mr. Charles O'Reilly-Hyland (another beneficiary of the trust) and Mr. Greg Rafter on the 9th January. They walked the grasslands in which she was interested. A purchase price was not discussed. Finance was not discussed. Her supplemental agreement with Mr. Lehané was not discussed.

40. On 8th January the plaintiff states that she attended at Mr. King's office immediately after her attendance with Mr. Kennedy at ACC. She informed Mr. King that she had attended ACC with a query in respect of finance for a potential purchase of the Knox lands. She inquired "could this work out".

41. Mr. King gave evidence that Ms. Flynn attended at his office early in January and mentioned to him about purchasing land. He thought that she came into the office on 10th January. He claimed that she had previously discussed with him a proposal to purchase the Knox lands. He said that on the 10th he told her that when things had been sorted out she should come back to him in respect of that purchase. He indicated that Ms. Roisin Hickey should deal with the matter if there was going to be a transaction. This referred simply to a distribution of work in the office. He was not sure whether he saw her in the office or when she entered the reception area. He recalled three matters. Firstly, she was going to buy the land. Secondly, she was still negotiating about that. Thirdly, she was getting a loan from ACC. He was at that stage unaware that the matter would proceed and that concluded his involvement in the transaction. He had no further involvement in the purchase of the Knox lands.

42. The Knox lands are described as separate from the main Woodhouse estate. They are situated on a headland on the opposite side of the road from the main estate. Mr. King's understanding was that the syndicate had discussed dividing up the estate between themselves. He indicated that Ms. Flynn was very definite about her intention to attempt to acquire the Knox lands.

43. He was satisfied that Ms. Flynn told him the acreage which she sought to acquire during the correspondence with Dr. O'Connell in 2000 and in July 2007.

Ms Flynn maintains that she did not enter into an agreement or contemplate the purchase of 60.93 acres or approximately 61 acres until January 2008 and therefore states that she could not have given Mr. King that figure before January 2008.

Attendance 20th July, 2007

44. Mr. King in evidence stated that in July 2007 he was aware that the syndicate were not proceeding with the purchase of the Woodhouse estate as a single entity. The sale of the Stradbally lands had been delayed. The closing date had been extended. The additional terms referred to above had not yet been agreed. On the 20th July Ms. Flynn attended at his office to discuss the delay in the sale of the land. She informed him that she was going ahead. In that context he advised her that she should not enter into any agreement to purchase land until such time as she obtained her money for the Stradbally lands. This was recorded in an attendance of the same date. At that meeting Ms. Flynn spoke of her intention to purchase the Knox lands notwithstanding the failure of the syndicate deal. She gave him to understand that negotiations were ongoing at that stage with Mr. Farrell. He wished to put down a warning not to enter into any agreement until such time as the other sale was completed. He gave evidence that he recorded the attendance in a notebook later that day. The entry states:-

"Ref. NK

20/7/2007

Spoke to Mgt. Flynn re purchase of Lands at Woodhouse (61 acres) – specifically asked Mgt. Flynn not to purchase Lands @ Woodhouse until completion of sale of lands to Denis Lehané.

Mgt. Flynn say she was going ahead with purchase of Woodhouse Lands irrespective as she wanted these lands all her life. I again warned her against purchase of Woodhouse Lands but she said that she knew Denis Lehané and that he would pay her for lands she was selling to him @ Stradbally."

This meeting took place in his office.

45. Mr. King stated that the plaintiff was very confident that Mr. Lehané would pay the money. It appeared to him that she did not wish to take his advice because she was fully confident that he would complete the sale and he had assured her that it would be paid. He reminded her that there had been considerable delay in returning the contracts for sale in 2006 and that she still had not been paid for the lands. Ms. Flynn denies receiving any such advice.

46. In cross-examination Ms. Flynn queried how Mr. King could have known that the proposed sale or purchase of the Knox lands involved 61 acres since that figure had not been spoken out back in 2000 or before 2008. She was adamant that she initially proposed to purchase 40 acres approximately of grassland. However, ACC Bank requested that she buy the surrounding woodland, the cliff face and an area of scrubland increasing the area to 60.93 acres. She had never understood the Knox lands to be anything other than the top half of the hill, an area of 40 acres. The other half measured 30 acres approximately. The precise area of 60.93 acres was only ascertained when maps were prepared in order to get the loan. She had never spoken to Mr. Farrell about purchasing the Knox lands until January 2008. She said that when she went to the Bank first she was seeking to buy the grassland i.e. 40 acres. She agreed that the approximate figure of 70 acres contained in the correspondence to Dr. O'Connell consisted of the 40 acres of grassland and the 30 acres down to the Gleeson farm at the other side.

47. She said that Mr. Tom Rafter from ACC Bank told her that the Bank wished her to buy the surrounding lands. This consisted of an area surrounded by woodlands on two sides, cliff face on one side and land that she did not wish to buy on the other side which was the second half of the Knox lands. However, she said a specific figure of 60.93 acres or approximately 61 acres did not come into being until she agreed to proceed on the Bank's suggestion to purchase the additional area of land. It was indicated to her that the purchase "made sense" because an entrance that was eventually put in for her came all the way down one side through the woodland. The increase in acreage at the suggestion of Mr. Rafter took place during January 2008 prior to the contract for sale dated 28th January.

48. Ms. Roisin Hickey solicitor took over the file from Mr. King on the 17th January. She wrote to Keans solicitors for the vendor on 21st January in respect of a number of pre-contract inquiries following receipt of the contract of sale dated 16th January. These included a request for confirmation in Item 13 that the vendor would provide an alternative entrance to the purchaser. The location, measurements, design and construction thereof would have to be agreed in advance with the purchaser. It would have to be constructed and completed in full compliance with relevant planning permission within twelve months of the closing date of the sale. It was requested that Special Condition No. 12 be amended in this regard.

49. It does not appear that the issue of an increased acreage was discussed with Ms. Hickey on or following 17th January. Neither Mr. Kennedy nor Mr. Rafter were called as witnesses. There is no independent documentation or other evidence to support the fact that the proposed purchase of lands increased in acreage from 40 acres to 60.93 acres between the 8th and 17th January. There is no suggestion of any discussion at all in respect of any such increased acreage in consultations with Mr. King and Ms. Hickey during this period or between the respective solicitors.

50. By the 17th January, a file had been opened in respect of the proposed purchase of the Knox lands. The defendants had received the contract for sale and documents of title. A letter of loan sanction had been received from ACC Bank in principle and a letter from Sheridan Company solicitors on behalf of ACC. Ms. Hickey was satisfied that the beneficiaries of 'Gerard Kean In Trust' who held the lands were Mr. Aiden Farrell and Mr. Charles O'Reilly-Hyland. The original contract for sale furnished was dated 16th January, 2008. It stated a purchase price of €1,277,546.00 for 60.93 acres. Thus the change from 40 to 60.93 acres, if it occurred, must have taken place between 10th and 16th January. The plaintiff relies on this fact to support the proposition that Mr. King could not have known that the land to be purchased comprised 61 acres as the plaintiff did not know this fact on 20th July, 2007.

51. Mr. King was asked a number of questions concerning the authenticity of the attendance of the 20th July, 2007. The notebook in which the attendance was found was originally a notebook of 80 pages. The attendance was found loose having been torn from the notebook but within it. A number of other pages had been taken from the front and rear of the notebook. The only attendance note

was that dated 20th July, 2007 quoted above. It also contained a reference to another short attendance on 12th July but apart from that most of the pages were blank with some other miscellaneous figures or domestic references scattered throughout. Mr. King stated that he had written the attendance in the notebook. It was a notebook in which he usually recorded attendances. The practice in his office at the time was to write a note of any attendance in a notebook. The attendance was then taken from the notebook and inserted into a file if one already existed. If a file was created within a short time after a consultation, he returned to the notebook and removed the attendance and placed it on the new file. In this instance he explained that since no transaction arose out of the attendance in respect of the Knox lands a file was not opened shortly after the 20th July. When the file was ultimately opened in January, he omitted to inform Ms. Hickey of the previous attendance and consequently nobody went back to look for the earlier attendance of July 2007. While he might go through one notebook per month, on occasions he would take the notebook going to court. There does not appear to be any consistency in using any particular notebook until it was full. His notebooks were tidied away following the death of his father in December 2012.

52. Subsequently a search was initiated for the notebook. He requested that his secretary look for notebooks and diaries and any old files relating to Ms. Flynn. Searches were carried out by members of staff. He was not involved in that. He was told where the notebook was found. It was brought to his attention by Ms. Hickey. He was not quite sure which member of his staff found it. It was seven years old when found in 2014. There was an immense number of documents in the office going back 100 years. He was surprised when the notebook was found.

53. He said that when it was found he made an error and directed that the page be removed. Ms. Hickey told him that the solicitors acting on their behalf were looking for any information at all relating to files and attendances in respect of Ms. Flynn. He had removed the page by this stage. Ms. Hickey then took the notebook and page from him and he had no more dealings with it. He read the page before she removed the notebook. He realised it was an important document.

The Diary entry for 23rd November 2007

54. On the 23rd November, 2007 which was the same day that the plaintiff signed the supplemental agreement previously referred to in respect of the Stradbally lands with Mr. Lehané, Mr. King recorded an entry in his diary. It states:-

"2.30pm 23/11/2007, informed Margaret Flynn that if Denis Lehané didn't complete purchase of Stradballymore that she would have no means of repaying ACC loan. Margaret Flynn confirmed that she understood the risk and position that she would be in if Denis Lehané did not complete. Margaret Flynn instructed us that she wished to proceed with the purchase of Knox lands and ACC loan."

55. Mr. King gave evidence that at this time Ms. Flynn had been in direct contact with Mr. Lehané concerning the supplemental contract terms. At this stage he was aware of the involvement of the syndicate trying to purchase the entirety of the Woodhouse estate which included Ms. Flynn. He understood that she would get the Knox lands once that purchase was completed. She told him in July that the syndicate proposal was not proceeding but that she was going to purchase the Knox lands anyway.

56. She was happy to accept the increased amount on offer and the release of the deposit to her in consideration for the extension of the completion date. Prior to the making of the supplemental agreement Mr. King was adamant that Ms. Flynn understood the terms and consequences of that agreement. He pointed out to Ms. Flynn that Mr. Lehané would sell or have a sub-sale of the property and she was aware of that. She seemed to be aware of all his dealings with regard to the lands which they appeared to have discussed. The closing date for the sale of the lands was now two years away. He advised that she should seek an earlier completion in 2008 but she agreed to put it out to 2009 or the date of the granting of planning permission, whichever was the earlier. She was fully aware of the position with the planning application made in respect of the lands before she came into Mr. King. Negotiations on the supplemental agreement were carried out between Ms. Flynn and Mr. Lehané in the absence of Mr. King/without Mr. King's advice.

57. Mr. King said that on numerous occasions Ms. Flynn spoke about the Knox lands. She was afraid that these lands might be sold before she had an opportunity to buy them. She informed him that she intended to buy them. He reminded her that the monies had not come through in relation to the Stradbally lands. She informed him that she was getting an ACC loan. Mr. King said that this was the first time she mentioned an ACC loan. No agreement had been entered into for the purchase of the Knox lands and he understood that she was negotiating with a Mr. Farrell, one of the beneficiaries of the trust which owned the land to purchase them. Mr. King stated that he warned her that if Mr. Lehané's purchase did not proceed she would have financial difficulties with ACC if she was getting a loan. She repeated that she was getting a loan from ACC and he did not enquire any further other than "issue her with a strong warning because no agreement had been entered into to buy the lands other than she told me that she was negotiating the purchase of it".

58. Mr. King stated that because Ms. Flynn indicated a strong intention to buy the Knox lands and was negotiating with Mr. Farrell and because she told him that she was getting an ACC loan, he felt obliged to warn her of her predicament if Mr. Lehané did not complete the sale. It was up to two years away or when planning permission was granted whichever was the earlier. Mr. King stated that Ms. Flynn informed him that she understood that planning permission had not been applied for. He said that when he warned her of the dangers she maintained that she was intent on buying the Knox lands and was going ahead with it. She had assurances from Mr. Lehané that she would get her money and she was confident that would happen. Mr. King accepted that she did not indicate a figure for the loan from ACC Bank because no purchase price had yet been agreed.

59. Mr. King also stated that an area of land was not specifically discussed on this occasion. He understood the Knox lands to be a headland separate from the main estate on the opposite side of the road and while Ms. Flynn was negotiating with the syndicate to purchase the Woodhouse estate, he presumed that they had divided it up amongst themselves. The members each had an understanding of what area they would obtain. Though other parts of the estate were mentioned Mr. King recalled that Ms. Flynn was very definite about the Knox lands.

60. Ms. Flynn denies the conversation with Mr. King in the terms set out in his diary note of the 23rd November. She points out that she had not been to ACC Bank for the purpose of obtaining a loan at that stage because the contract had not been negotiated for the purchase of the Knox lands. She states that she could not have proceeded with the purchase of Knox lands because she had no agreement to sell from the vendor and there was no basis upon which to approach ACC Bank for a loan at that stage. She said that did not happen until January 2008. She accepted that she signed the supplemental agreement on 23rd November, 2007 and it would appear that it was signed the same day in Cork by Mr. Lehané. She denied that she got any such advice or warning as set out in the note.

61. Mr. King was asked to explain why there was no handwritten attendance note or other attendance notes or typed notes in respect of Ms. Flynn's attendance on the 23rd November in respect of the sale of the Stradbally lands. All that exists is a note in the

diary in respect of his warning concerning the purchase of the Knox lands. It was suggested to Mr. King that no attendances were kept by him which explained why there was little or no documentation in the files. Indeed it was suggested that this was why there were no other attendances for meetings with Ms. Flynn for 2007. Mr. King rejected this stating that Ms. Flynn had removed the files and brought them to another solicitor in 2012. When next seen by Ms. Hickey the files were depleted by more than two thirds. It was Ms. Flynn's case that no such advice or warnings had been given and that properly kept attendances would have reflected that fact. Implicitly, she was calling into question the authenticity of the diary entry.

Depleted Files

62. The evidence on this matter is that in March 2012 Ms. Hickey prepared all of the files and handed them over to Ms. Flynn who conveyed them to her new solicitor. Ms. Hickey gave evidence that she handed over four boxes containing 22 files properly scheduled to Ms. Flynn. She claimed that she handed them over in "immaculate condition". The files were boxed and contained all relevant documents in date sequence. Subsequently, Ms. Flynn retained Mr. Thomas Loomes solicitor, to whom she was referred by Mr. Gerry Beades, to act as her solicitor in these proceedings. Ms. Hickey attended at Mr. Loomes' office by arrangement for the purpose of inspecting the defendant's files in respect of Ms. Flynn in the course of preparing for this case in November 2015. She was presented with what were said to be those files. Ms. Hickey had prepared a schedule when the files left the defendant's office. Mr. Loomes commenced to take papers out of a suitcase that bore absolutely no resemblance to what had left the defendant's office. Ms. Hickey stated that there was not a single handwritten note remaining in the files. There was no telephone attendance, no notes concerning dealings with ACC and no notes concerning her dealings with correspondence or enquiries with An Bord Pleanála. She had made extensive notes in respect of the files which went missing. The only element that was complete was the file containing original title documents that had been prepared for the closing to Denis Lehané. They were however out of sequence. The files were in a disorderly state.

63. On 13th April, 2012 Ms. Flynn attended at the defendant's office and informed Ms. Hickey that she had seen her files through a window at her new solicitor's office and that they were all over the floor. She terminated her relationship with that solicitor five weeks after it had commenced.

64. The court is satisfied that the state or content of the files produced by Mr. Loomes in the course of inspection does not in any way correspond with the files as they left the defendant's offices when they were handed over to Ms. Flynn. The court is satisfied to accept Ms. Hickey's evidence in that regard and that a substantial body of attendances and correspondence were no longer to be found in the files which were in a shambolic state when produced. Ms. Hickey's testimony in this regard is in my view, substantially supported by the evidence given by the plaintiff in relation to this aspect of the case. She had sought Ms. Hickey's assistance in retrieving the files from the newly retained solicitor.

65. The court has reached the unhappy conclusion that important material contained in the Flynn files relevant to these proceedings, including attendances and correspondence were removed from the files at some stage before they were inspected by Ms. Hickey. I am satisfied that Mr. King and Ms. Hickey made attendances and other notes which were included in the files but are now missing. I reject the implication that the note and diary entry were made up and false. I am satisfied that the note of the 20th July and the diary entry of the 23rd November were made by Mr. King at the time stated and record a summary of the advice actually given to Ms. Flynn.

The Contract of Sale of Knox Lands

66. In evidence, Ms. Flynn stated that between 8th January and 16th and 17th January, 2008, Mr. Rafter of ACC Bank called to her house. She explained that she had an interest in purchasing the Knox lands. He asked how much money she would need to borrow. She did not know at that stage because negotiations were still continuing with Mr. Farrell on behalf of the vendors. She indicated that she wished to buy the lower half of the Knox lands from the beach up to the top i.e. the grassland. A price was proposed. The vendors initially indicated that they were satisfied to sell 40 acres approximately at €20,000.00 per acre. Ms. Flynn said she informed Mr. Tom Rafter. He returned and produced a map. They drove down to the property. A draft contract was furnished on 16th January. It concerned a proposed sale of 60.93 acres.

Ms Hickey's Involvement

67. The plaintiff then called to the solicitors' office and met Ms. Hickey. She told the court that she wished to "educate" Ms. Hickey on the Knox lands. There were a number of maps which needed to be discussed. She wished to outline the portion of the land which she was purchasing and indicated from the maps where that land was.

68. The draft contract indicated a sale of 60.93 acres. Mr. Farrell asked for €28,000.00 per acre for the grassland. Mr. Rafter indicated that the bank wanted her to purchase the surrounding woodland and whatever was around it if they were to fund the transaction. She returned to Mr. Farrell seeking to purchase the woodland and he then offered that land at €7,000.00 per acre. There were 17 acres of woodland.

69. In a file note dated 24th January, 2008, concerning the purchase, Ms. Hickey wrote:-

"Re: Margaret Flynn

Waterford County Council Planning Office

Attended at Waterford County Council Planning Office to make a planning search against the lands at Woodhouse and also to confirm the position in relation to the path."

70. It is clear that Ms. Hickey strove to protect Ms. Flynn's interest in the purchase of the Knox lands. Thus in the face of a rather abrasive approach adopted by the vendor's solicitors she insisted that her appropriate requisitions were answered in a proper manner. Ms. Hickey was reluctant to deal further with the vendor because of the use of profanities and a failure by their solicitors to comply with normal contract procedures when dealing with her. When this occurred the plaintiff took steps to ensure that the transaction was revived, the sale having been called off by the vendor's solicitor on the 29th January, 2008. On 12th February, 2008 Pinmore Ltd. completed a sale of the entire Woodhouse Estate (of which the Knox lands are part) to Defigo Holdings 1 Ltd. the secretary and directors of which were Mr. Aidan Farrell and Charles O'Reilly Hyland. The "Gerald Keane In Trust" entity was no longer involved. On 19th February a contract for sale issued for an increased purchase price of €1,411,546.00 to Ms. Flynn for the 60.93 acres. The contract for sale was signed on 15th March, 2008 and the sale was completed on 3rd April, 2008.

71. Ms. Flynn agreed that she did not sign the contract until Ms. Hickey acting as her solicitor was satisfied that she should do so. Ms. Hickey carried out searches and made inquiries in relation to a pathway in respect of a right of way and the planning status of the lands. Ms. Hickey was informed by the planning authority that the lands were classified as foreshore and a cliff face and that no

planning permission had ever been granted in respect of the lands nor was it likely that it ever would. Ms. Hickey noted that Ms. Flynn stated she wanted the land for gallops and that they were perfect for this purpose and the issue of planning and development was of no consequence.

72. In a further entry in a diary of 24th January, Ms. Hickey wrote:-

"MGT signing ACC L/O. Went through everything. Confirmed in order. Told MGT that if Denis Lehane did not come through ACC would be in a position to sell all charged lands. MGT stated that this would not happen and that Denis would complete. Worst case scenario, someone else would buy. Went through planning also. Not a prob for MGT."

73. Ms. Flynn accepted that this was a true and accurate recording of what took place between her and Ms. Hickey on 24th January, 2008. She said that she already knew that if money from the sale of land to Mr. Lehane did not come through then ACC would be in a position to sell all charged land. Ms. Flynn confirmed that when they were going through the loan and security terms this was explained to her. She still believed that Mr. Lehane would complete the sale. She was satisfied that even if he did not some other purchaser would be interested because "all the zoned land around the village was getting bought up so there was no reason to believe it would not sell". She said that while she wished to purchase the Knox lands, she was not of the view and she did not indicate that she wanted to purchase the Knox lands at "the risk of losing everything".

74. I am satisfied that Ms. Flynn fully understood the nature of the risk that attached to the signing of the ACC loan agreement. She was fully aware that she had no other funds to execute the purchase of the Knox lands or to discharge the loan unless she received the proceeds of the sale of the Stradbally lands. I am not satisfied that she has established that she did not receive this advice from Mr. King. She accepts that she received clear advice about this risk from Ms. Hickey. Her evidence indicates that she at all times knew the risk that she was running but was happy to do so because she had full confidence in Denis Lehane's probity and capacity to complete the sale. Unfortunately, that confidence was misplaced but I am not satisfied that Ms. Flynn has established on the balance of probabilities that this was because of Mr. King's or Ms. Hickey's failure to advise her fully or adequately about that risk.

Expert Evidence

75. Expert opinion evidence was given on behalf of the parties in respect of the standard and duty of care of a solicitor having the carriage of the sale of the Stradbally lands and the purchase of the Knox lands on behalf of the plaintiff.

76. Ms. Bainton solicitor with Liston and Company solicitors is an experienced conveyancing solicitor and a member of the Conveyance Committee of the Law Society of Ireland since 2007. She served as chairman of that committee for a period of two years. She was retained to examine the files in respect of the sale of the Stradbally lands and the purchase of the Knox lands. Ms. Bainton considered the files furnished to her to be "fairly bare" and in particular, concerning why the date of the sale of the Stradbally lands was extended. She could not see any good reason for the extension of the completion date from November 2007 to August 2009. It was an extraordinarily long extension given that the contract had been signed in October 2007. It was extended to facilitate the obtaining of planning permission in respect of the Stradbally lands in the context of a sub-sale entered into between Mr. Lehane and Blackwater Homes Ltd. for the construction of a residential development on the lands.

77. Ms. Bainton was of the view that it would normally cause serious concern to a vendor's solicitors if a purchaser had entered a contract to sell on to a third party subject to planning permission which had not been obtained. It raised a question as to the ability of the purchaser to complete the purchase of the lands in the absence of planning permission and the successful completion of the selling on of the lands. However, Ms. Bainton accepted that at the time of the supplemental agreement to extend the closing date there was no proposal to buy the Knox lands. If the purchaser did not complete, the vendor normally had the right to forfeit the deposit and sue for damages for breach of contract. She accepted that notwithstanding the unusual extension period, the form and content of the agreement could not be regarded as unusual. The question of any serious risk for the plaintiff had not yet emerged.

78. Ms. Bainton was also satisfied that a serious risk emerged in February 2008 upon the signing of the contract by the plaintiff for the purchase of the Knox lands and her completion of a loan agreement with ACC to finance it which was dependent for repayment upon the sale of the Stradbally lands. Ms. Bainton was satisfied that at that stage "red flags" had been raised in respect of Mr. Lehane's ability to complete the purchase of the Stradbally lands in the earlier correspondence. This should have been discussed with Ms. Flynn as she had no other means to discharge the loan with ACC unless the sale of the Stradbally lands was completed by Mr. Lehane.

Bridging Finance – The Loan from ACC

79. Ms. Bainton noted that the loan facility from ACC was clearly a type of bridging finance. The undertaking that was given to ACC by the defendants was clearly conditional in that the money received as sale proceeds in respect of the Stradbally lands would be used to discharge the loan. The court was referred to *The Law Society of Ireland Conveyance Manual* Vol. 1 (3rd Ed. 2005) which incorporated a section dealing with bridging finance which stated:-

"Never allow a borrower to take up a bridging loan or a bridging facility unless absolutely certain (emphasis supplied) that he or she will be in a position to obtain the loan cheque in the reasonable foreseeable future and repay the bridging loan to the lending institution. It is important for the borrower's solicitor to check that the borrower is in a position to comply with all of the requirements of the lending institution before the bridging facility is drawn down or that he/she will be in a position to comply with such requirements in the immediate future".

Ms. Bainton focused upon the words "absolutely certain". She stated that the clause was strongly worded because the client as the borrower must be able to comply with the conditions of the loan. In this case Ms. Flynn could only repay if she received the monies from the sale. Having regard to the "red flags" raised about Mr. Lehane's ability to close the sale which emerged at the time of the extension of the completion date it was her view that the defendant could not have been "absolutely certain" that Ms. Flynn would have been able to repay the loan from the proceeds of sale. Her solicitor had an obligation to bring the conditions of the loan to the attention of Ms. Flynn and ensure that she was satisfied that she was able to comply with them. The normal term of a bridging loan would have been quite short which was reflected in the importance of the client being in a position to comply with the requirements of the loan "in the immediate future".

80. When first asked to examine the files there were no attendances or diary entries giving advice on the risks of financial exposure created by the loan obtained from ACC. On the evidence available to her at that stage Ms. Bainton was satisfied that the standard of care required of a solicitor had not been met in respect of a number of issues.

81. Firstly, there was a failure by the defendants to make any enquiry from the solicitors acting for Mr. Lehane as to how he would finance the purchase of the Stradbally lands or to inform Ms. Flynn that she should find out how he was going to finance it at the

time when Ms. Flynn was signing the contract for the purchase of the Knox lands and finalising a loan agreement with ACC for the purchase of those lands in February/March 2008. This inquiry was important because this information would have informed Ms. Flynn's decision in respect of the reality concerning Mr. Lehané's ability to close the sale prior to her committing herself to the terms of the ACC loan. It was at that time clear from the file that Mr. Lehané had sold on the lands to Blackwater Homes Ltd. and there was some concern about land values falling. The sale to Blackwater Homes Ltd. was contingent on the obtaining of planning permission for that land. The potential serious difficulties for Mr. Lehané completing the purchase of the Stradbally lands were made known by his own solicitors on 15th October, 2007.

82. Secondly, Ms. Bainton believed that the defendants should have inquired of Mr. Lehané's solicitors whether planning permission had been obtained or was progressing and whether they were confident he would be able to close the sale in August 2009. She was satisfied that an enquiry as to how he intended to finance the transaction if the sub-purchaser did not get planning permission was legitimate since the contract with Ms. Flynn was not subject to planning permission although she accepted that Mr. Lehané's solicitors were not obliged to give this information. The defendants had not made any enquiry from Mr. Lehané's solicitors as to how he was going to fund the purchase if planning permission was not forthcoming and the sub-purchaser failed to complete.

83. It was important that the defendants express in vigorous terms to their client that there were real concerns about Mr. Lehané's completion of the sale especially since the closing date had been put back on two occasions. The advice would not necessarily have to be given in writing but should have been recorded in writing and if given orally, should have been followed by a letter confirming the advice given as a matter of prudence. However, Ms. Bainton acknowledged that many things are better said to a client face to face when they can appreciate fully what is being said particularly when advice is given in strong terms and the client may have strong views on the relevant issues.

84. Ms. Bainton was also asked to comment upon the later production during the discovery process of Mr. King's attendance note of 20th July, the diary entry of 23rd November, 2007 and Ms. Hickey's entry of 24th January, 2008.

85. Ms. Bainton stated that an up-to-date enquiry at the time of the drawing down of the loan from ACC should have been made of Mr. Lehané's ability to close the sale in view of the conditions of the loan facility from ACC or at least she should have been advised to make those enquiries since she was dealing directly with him. It is clear that significant pressure was placed on the plaintiff to proceed with the purchase of the Knox lands by Keans solicitors. Ms. Flynn should have been firmly advised that if she did not repay the Bank it would have recourse to her property. She should also have been informed that his then solicitors did not have a lot of confidence in Mr. Lehané's ability to complete the sale and it should have been squarely put to her whether she was happy to enter into a financial commitment with ACC in the knowledge that Mr. Lehané had postponed completion twice and had sub-sold the land. It would be important to ensure that she understood fully that the sub-sale was subject to planning permission and the consequences that might flow from a failure to obtain it.

86. Ms. Bainton was not satisfied that the defendants had, as they had pleaded, gone to "great lengths to warn the plaintiff about the dangers of the transaction and the risks and potential losses that would result if the purchaser failed to complete the sale". In that context she stated that while the attendance note of 20th July, 2007 contains strong advice advising Ms. Flynn not to proceed with the purchase of the Knox lands until Mr. Lehané had closed the sale of the Stradbally lands, it was advisable to follow-up that advice in writing. However, she acknowledged that the important thing was that the advice was given and that a follow-up letter was not an absolute requirement.

87. Ms. Bainton noted that the diary entry of the 23rd November was made on the same date as the supplemental agreement signed with Mr. Lehané. It is a handwritten record of advice given to Ms. Flynn which was "absolutely correct". However, Ms. Bainton stated that the note was dated November 2007 and the account loan was drawn down in March 2008. It was important therefore to repeat this advice at the time the loan was being drawn down from the account to remind Ms. Flynn of the advice previously given in November.

88. In respect of Ms. Hickey's diary entry of 24th January, 2008 which stated that Ms. Flynn was advised that if Mr. Lehané did not complete the purchase, ACC would be in a position to sell all charged lands, Ms. Bainton accepted that this was also factual and correct advice. However, she considered that since it was given at a critical time, strong advice should again have been offered about the fact that Mr. Lehané had already postponed the sale twice and had sub-sold the land to a third party which was subject to planning permission. Ms. Flynn should have been informed that neither she nor her solicitors knew how Mr. Lehané was going to finance the purchase of the Stradbally lands in the event of planning permission not materialising and if Blackwater Homes did not complete the sub-sale. In effect, Ms. Bainton was saying that the advice given (as recorded) was not strong enough and therefore inadequate in the circumstances. Thus she was not satisfied that the defendants had gone to the "great lengths" claimed in the defence of advising Ms. Flynn about the risks applicable to the purchase of the Knox lands and the drawing down of the loan facility. The client should have been "strongly" advised in relation to these matters particularly if she had strong views in respect of her desire that the purchase of the Knox lands should be completed.

89. Mr. Barry Lysaght has forty years' experience as a conveyancing solicitor in private practice. He is a former lecturer at the Law Society in continuing education on land registry practice. He is the co-author of the Law Society's publication on conveyancing in the land registry. He gave evidence on behalf of the defendants.

90. He agreed that the notebook entry of the 20th July, 2007 recorded sound advice given to Ms. Flynn not to proceed with the purchase of the Knox lands until the sale of Stradbally was completed. The diary entry of 23rd November gave the correct advice identifying the risk if the purchaser of Stradbally did not complete the sale. It was important that the advice be given but it was for the client to determine the commercial risk and whether she wished to act contrary to that advice. This advice was given on the same date as the supplemental agreement was signed. Ms. Hickey's diary entry of the 24th January, 2008 indicated again that advice was given of the risk involved in proceeding with the loan and the purchase of the Knox lands. Mr. Lysaght noted that the entry went further and stated that the worst case scenario according to Ms. Flynn was that somebody else would purchase the Stradbally lands. This reflected a positive view by vendors concerning land transactions in or about 2007 and 2008. However, Mr. Lysaght was satisfied that the risk appeared to have been weighed and a commercial decision taken by Ms. Flynn at that stage. The other matter of concern raised by the solicitor related to planning in respect of the Knox lands which was "not a problem for MGT". He took it that advice had been received and the commercial decision had been taken by the client to proceed.

91. Mr. Lysaght also had regard to a note of the 18th February, 2008 in which Ms. Hickey noted that Ms. Flynn did not want to lose the property and was confident that she would get back extra money she was obliged to pay for its purchase in the future. She confirmed that she wished to proceed "regardless". He interpreted this note as further evidence of a commercial decision made by the plaintiff. Since Mr. Lehané was going to pay a premium for late completion, if Ms. Flynn were to pay extra money for the purchase of the Knox lands, she would thereby recover some of that loss. She was quite confident that the transaction would proceed. He was

satisfied overall that the advice reflected in these diaries and notes was correct advice and was advice which her solicitors had a duty to provide to Ms. Flynn.

92. Mr. Lysaght also considered whether the defendants ought to have made enquiries from Denis Lehané's solicitors about his financial ability to close the purchase of the Stradbally lands. He stated that in his forty years experience it had never been appropriate or the practice to make an enquiry into a purchaser's financial capacity to complete a sale after a contract had been signed. This could be done before a contract was signed and in recent years it had become a more common practice for auctioneers to look for proof of funds when a property was sold free of condition concerning a loan or the sale of another property. However, in 2006 to 2008 people who committed to purchase property were presumed to be in a position to complete. It was likely that any enquiry of that kind to a purchaser's solicitor after a contract had been signed would get 'short shrift'. This information was only likely to be forthcoming in circumstances such as those which arose in 2010 when Mr. Lehané's solicitors revealed that he was a candidate for NAMA and that his financial position rendered him unable to complete the purchase. Normally such an enquiry will not be entertained and the purchaser's solicitors will simply point to the terms of the contract.

93. Mr. Lysaght stated that the plaintiff was negotiating for the purchase of the Knox lands from July 2007 but did not secure a contract until the following January 2008. He stated that if a person unconditionally agrees to purchase property and has carried out negotiations through an auctioneer prior to signing a contract and paid a substantial deposit, it is to be presumed that he/she is determined to complete because of the financial commitment made. In this case Mr. Lehané had not only provided the plaintiff with a statement of affairs indicating that he had assets of some €10 million but had permitted the payment over of the deposit and had agreed to pay a substantial premium on the price in consideration for which the plaintiff was willing to delay the completion. He stated that it is not considered to be the established practice nor was it usual to test the capacity of a purchaser to perform his contract between the date of signing of the contract and the date of completion. It was not practice to make enquiries of a purchaser's personal capacity to complete following the signing of the contract simply because the vendor considers the purchase of another property using the funds likely to arise from the sale of his own property. Even if an enquiry is made in those circumstances the same principle applies in that a purchaser of the first property will not discuss his client's capacity to complete.

94. Mr. Lysaght noted that in previous times in the 1960s, 70s and 80s a solicitor gave a personal undertaking in relation to the repayment of a bridging loan to a bank from the proceeds of the loan cheque. It is in that context that the Law Society recommended that the solicitor should make absolutely certain that the client was in a position to repay the bridging loan i.e. that he had obtained loan approval and that all conditions for same would be completed to the building society's satisfaction. The personal undertaking given by the solicitor in those circumstances occurred at a time when financial institutions could be relied upon. There was a difference between the notional bridging finance arranged for the plaintiff in this case and the old bridging finance arrangement. In this instance there was a recognised risk based on the contingency of the purchaser performing the principal contract. This was not a solicitor's undertaking that the purchaser would complete, it was an undertaking that when the purchaser completes the proceeds of sale would be paid to ACC. The defendants' obligation only arose once that contingency was completed. Completion is not and could not be guaranteed by the solicitors. This process clearly involved a higher level of risk undertaken by the plaintiff in relying upon the proceeds of sale from the Stradbally lands to purchase the Knox lands than that which applied to a bridging loan undertaking by a solicitor in respect of funds, the availability of which was virtually guaranteed by the time the undertaking was given.

95. Mr. Lysaght accepted that the bridging finance advice given in the Law Society's handbook was relevant to the transaction in respect of the Knox lands. He was satisfied that rather than having a loan cheque to discharge her obligations in respect of the purchase of the Knox lands, she would have the proceeds of sale of the Stradbally lands. In the interim she would have a bridging loan to pay for the second property. Mr. Lysaght stated that in Ms. Flynn's case where there is a bridging loan contingent on the completion of a sale and in addition, the subsequent sale of another property, there is an element of commercial risk:-

"The client must be advised of the risk that the purchaser may not complete that subsequent sale. The client must be advised of that but if you were to predicate every bridging undertaking on the absolute certainty that the transaction would complete you may have forced the situation where the lending bank may go to the wall or alternatively a purchaser who is unconditionally approved may die or whatever circumstances and be unable to complete. There are inevitable contingencies in every case. In this case the contingency was that Mr. Lehané performing his contract and if the plaintiff was advised of that and undertook that risk that was the commercial decision."

96. It was essential that she be advised before entering into the Knox land purchase and the ACC loan of the possibility of Mr. Lehané defaulting on his contract. This obligation crystallised in February/March 2008. The purchase of the Knox lands was contemplated by the plaintiff from the previous July from which stage Mr. King states that he was advising her about the risks involved. In addition, Ms. Hickey notes her advices to Ms. Flynn on this matter on 24th January, 2008.

97. Mr. Lysaght agreed that it would be prudent to give or confirm advice in writing or to obtain a signed acknowledgement that such advice had been given but that the client wished to proceed notwithstanding the advice given. However it was not essential and indeed some clients might become extremely annoyed if they were furnished with a letter in respect of advice which they had already rejected. He agreed with Ms. Bainton that the important fact was that the advice was given: it did not have to be in writing. Documentation would normally follow as a matter of prudence for the record. Apart from that it would also provide evidence that the advice had been given if that were required. However, once verbal advice is given and the relevant risks are communicated by a solicitor to a client with whom he has a long track record and whom he knows well, the solicitor's duty is discharged fully. He was satisfied that the risks attaching to the purchase of the Knox lands and the drawing down of the ACC loan were outlined to the plaintiff as indicated in the four notes relied upon. He was satisfied that the solicitors had acted appropriately.

98. Mr. Lysaght was asked to comment on the changing circumstances and the strength and degree of advice given by the solicitors in respect of same particularly having regard to the letter of mid-October 2007. He was asked whether the vendor's solicitors should have been asked why it was said that land values had changed since the contract was executed, what were the nature of the serious problems which had arisen for completion of the transaction and whether Mr. Lehané was confident that the price would be paid if the completion date was postponed. Mr. Lysaght was satisfied that it was not appropriate to raise these matters in correspondence with Mr. Lehané's solicitors because in 2007 there was a very aggressive property market. The obligation on the defendants was to advise their client of the contents of the letter so that the client could make a commercial decision arising in respect thereof. The solicitors had an obligation to point out the risks of which they were aware but not necessarily to have an answer in respect of every risk. An issue about land values could be resolved by an auctioneer whom the plaintiff had retained. In any event the plaintiff was satisfied to proceed to grant the extension notwithstanding these difficulties for the consideration set out in the supplemental agreement of November 2007. While this indicated that Ms. Flynn was being "strung along" by Mr. Lehané during this process, she nevertheless made a commercial decision and was happy to proceed with the additional funds agreed in November.

99. In conclusion, Mr. Lysaght rejected the proposition that the practice from 2006 to 2008 not to make enquiries concerning the purchaser's financial capacity to complete a transaction after they had signed the contract was a defective practice and gave rise to a breach of a duty of care. Mr. Lysaght reiterated that prior to the signing of a contract an enquiry could be made through an auctioneer as to the financial capacity of a proposed purchaser but that after the signing of the contract such enquiries by a vendor's solicitor to the purchaser's solicitor would not receive a positive response nor would he expect it to. In addition he noted that at all times it was acknowledged that Ms. Flynn had ongoing contact and engagement with Mr. Lehané from which she had obtained considerable information about which she was satisfied concerning his ability and willingness to complete the sale. This heavily informed her positive responses to changes in the completion date.

Legal Principles

100. The plaintiff submits that the defendant was on notice that Denis Lehané had sub-sold the Stradbally lands to Blackwater Homes Ltd. conditional on planning permission which gave rise to the difficulties set out in the letters of October 2007. This resulted in a lengthy extension of the closing date to August 2009. Therefore it is claimed that the defendant was aware of a real and substantial risk of non-completion by Mr. Lehané of that purchase and should have advised the plaintiff to make enquiries concerning Mr. Lehané's financial capacity to complete the transaction or have made enquiries of Mr. Lehané's solicitors to that effect. I am satisfied on the evidence set out above that while there may be circumstances in which financial assurances and enquiries may be made about the proposed purchaser's financial situation prior to the signing of a contract of sale, once signed the terms of the contract bind the parties and a solicitor is under no obligation to seek or disclose any of his client's financial details to the purchaser's solicitor. Both experts were agreed on this. Ms. Bainton said it was not unusual, however, for a purchaser's solicitor on occasion to discuss such matters informally with the vendor's solicitor. The information may be voluntarily given. Mr. Lysaght indicated that there is no duty on a solicitor to make such enquiries, which would be given "short shrift" by a purchaser's solicitor. Insofar as there may be a difference in evidence or emphasis between the experts, I prefer the evidence of Mr. Lysaght. The court is also satisfied that Ms. Flynn had a significant and informed understanding of Mr. Lehané's financial affairs from her engagement with him in the syndicate of 2007 which sought a bank loan from Bank of Ireland to purchase the Woodhouse Estate. Furthermore, his financial position in 2007 enabled him to release the deposit on the Stradbally lands purchase to Ms. Flynn and guarantee additional sums in consideration of the late completion of the contract.

101. The plaintiff also submits that if the recognised practice was not to seek financial details from a purchaser's solicitor in circumstances where a sale was being delayed for such an extended period and his sub-sale of lands was proposed subject to planning permission to a third party, such a practice was not one which a reasonable solicitor ought to have adopted. The plaintiffs relied upon *ACC Bank plc. v. Johnston* [2010] 4 I.R. 605. In that case the defendant's solicitor was engaged by the plaintiff to act on its behalf in a series of four interconnected loan facilities. The first three loan facilities were to be secured by the putting in place of a first legal mortgage over lands which were to be purchased by the beneficiary of the loan facilities. The fourth loan facility issued later was to be secured by the extension of the legal mortgage over the lands to cover the monies to be advanced under that loan. The defendant closed the first three loan facilities on foot of an undertaking from the purchaser's solicitors that the monies advanced would be applied exclusively in the purchase of the lands and that a legal mortgage over the lands would be created and registered as a charge on the lands. The following year the defendant advanced the monies under the fourth loan facility without having seen direct evidence of the creation of the mortgage over the lands and accepted an undertaking from the purchaser's solicitors to stamp the title documents and have them lodged in the land registry within six weeks. The purchaser never acquired title to the lands and the first legal mortgage was never registered. He went into arrears in respect of the loan facilities and a judgment mortgage was registered against his property by the plaintiff. It was claimed that the defendant's solicitor acted negligently in advancing the first three loan facilities on the basis of the undertaking from the purchaser's solicitor and also in advancing further funds under the fourth loan facility when he ought to have been aware that the first legal mortgage was not in place over the lands.

102. It should be noted that the judgment of Clarke J. deals specifically with the general obligations of solicitors in relation to closing transactions for the sale of land. The learned judge having considered the principles applied by the Supreme Court in *Roche v. Peilow* stated:-

"96. While the duty of care of a professional person is often described by reference to the standards that would normally be applied by a professional of equivalent experience, it is clear from *Roche v. Peilow* ... that the mere fact that a practice is universal does not, of itself, immunise the professional concerned from potential liability, if it is a practice which, on reasonable consideration, the professional concerned ought to have identified as giving rise to a significant risk. In that context, it is apposite to note the reference of Walsh J. to a "stock" risk. There is risk in everything. Professionals cannot remove risk from the equation. However, professionals are normally employed to minimise risk or advise clients on relevant risks. Professionals should not expose their clients to unnecessary risk without, at a minimum, advising their clients of the risk involved and inviting their clients' instructions. The mere fact that there may be a common practice to expose clients to a particular type of risk will not necessarily provide a defence. The ordinary duty of care, therefore, extends not merely to ensuring that the relevant professional person carries out his or her duties in the way in which other suitably qualified members of the relevant profession do, but also extends to considering whether common practices may so obviously involve unnecessary risks which can be eliminated that such practices should not be engaged in. It might be said that such practices are more honoured in the breach than in the observance in the proper sense of that quote."

The court concluded that any consideration of what was involved in accepting a closing in the manner adopted by the defendants revealed that it necessarily exposed the plaintiff to a significantly greater risk. At para. 103 the learned judge noted that there was no evidence that there was any basis upon which the defendant could reasonably have been expected to have concerns about the probity of the purchaser at the time when the undertaking was taken.

103. In *Kelleher v. O'Connor* [2010] 4 I.R. 380 Clarke J. held that the defendant's solicitor was not under a duty to make enquiries as to whether a restaurant complied with health and hygiene standards as this was a matter more properly between the proprietor of the restaurant and the health authorities. However the defendant's solicitor was found negligent in not advising his client to make those enquiries. This was particularly so in circumstances where the client did not have any experience in the catering trade and a specific inquiry was made by the client on the point in issue. The facts of that case are not analogous to the facts in this case.

104. However, the plaintiff submits that the defendant was negligent in not advising her to make enquiries about Mr. Lehané's financial decision. I am not satisfied that in the circumstances of this case the plaintiff was unaware of the consequences of Mr. Lehané's ability to complete the sale. Her solicitors repeatedly advised her of the risk and exposure to which she was liable if Mr. Lehané failed to complete. She was fully aware of this. She had full confidence in Mr. Lehané's financial situation in 2007 to 2008 from her own knowledge and dealings with him. In this regard, the circumstances in which a loss was sustained by the plaintiff arise, in the court's view, from a decision which was commercial in nature to purchase the Knox lands at a time when she was fully aware of the risks of doing so when the completion of the sale of the Stradbally lands had not taken place. She was fully advised and aware that should that happen she would not be able to repay the ACC loan.

105. In *Kandola v. Mirza Solicitors LLP* [2015] EWHC 460 (Ch) the defendant firm of solicitors acted for the plaintiff in the proposed purchase of a property. The vendor did not complete and was made bankrupt. The claimant lost his deposit. The plaintiff submitted that having advised of the risk of insolvency, the solicitor who had advised him had a duty to take steps to explore the extent of that risk, by making searches that would have revealed the existence of the bankruptcy petition. The court in dismissing the claim held that the solicitor had not been under any duty to make the suggested searches prior to the exchange of contracts. The risks had been adequately explained to the plaintiff who had experience in these matters and had understood the advice given. David Cooke HHJ. stated:-

"51. It is not, in general, a solicitor's duty to check on the credit status of his client's counterparty in a transaction unless instructed to do so. There may be circumstances in which a solicitor should check specifically for the commencement of bankruptcy proceedings, since that may affect a party's ability to complete a transaction or give a good title. But that is not the same as a general duty to make checks about risk of future insolvency. Nor can such a duty arise merely because the client is incurring a risk of loss if the counterparty becomes insolvent, for that will be true in most if not all transactions. Nor in my view does such a duty arise merely because the transaction takes an unusual form which does involve a solvency risk (e.g. on release of a deposit) where the more normal form would not (deposit held as stakeholder). In such cases the duty of the solicitor is to advise of the unusual risk, but not to seek to evaluate it unless specifically instructed to do so.

52. In part that is because the decision whom to trust in business is a commercial decision for the client to take and not the solicitor. In part it reflects the submission ... with which I agree, that just because a solicitor (or other professional) could take a particular step does not mean that it is his duty to do so. His duty is always defined by his retainer. If he advises his client of a risk, it is a matter for the client to decide whether he wishes to take that risk, or to obtain further information or security before doing so. The solicitor is not, in general, obliged to seek out such further information unless instructed to do so.

53. The position would be different if there was an established practice of obtaining particular types of information in the course of a particular type of transaction. Conveyancing is a process extensively set about with established procedure of this sort, for instance as to the making of searches and enquiries of local authorities and environmental registers which go well beyond the establishment of title to land and bear on its value and the costs and risks of ownership. But it is accepted that there is no established procedure to make either of the suggested searches at the time of exchange of contracts."

106. In *Pickersgill v. Reilly* [2004] UKPC 14 the plaintiff sold shares in a company which was a tenant under a lease which he had personally guaranteed and took an indemnity from the purchaser company. The tenant became insolvent and the indemnity was worthless. The Privy Council held that the plaintiffs owed no duty to investigate the purchaser's financial position because it was a matter for the commercial judgment of the client as to whether he was prepared to accept the protection of the indemnity from the company. The solicitor's role in those circumstances was not to be extended from that of solicitor acting on instructions to that of a commercial advisor. I find these decisions to be of persuasive authority on the limitation to be placed on the extent of a solicitor's duty of care in these circumstances.

107. The court is satisfied that the plaintiff was not asked to carry out searches or enquiries in relation to the defendant's financial position. Furthermore, having regard to the history of the case it is clear that the plaintiff was repeatedly advised of the risks of extending the completion date in October/November 2007. Nevertheless, she was satisfied because of her understanding of Mr. Lehan's financial position and her viewing of his statement of affairs and his assurances and a consideration of the additional sums offered to extend that closing date notwithstanding the risks involved. She was then subsequently advised in contemplating and engaging in the purchase of the Knox lands of the risks of doing so and taking out a loan from ACC Bank having regard to its terms and conditions in the absence of completion of the sale of the Stradbally lands. Nevertheless she chose to act.

108. Reliance was also placed on the judgment of Barron J. in *McMullen v. Farrell* [1993] 1 I.R. 123 to the effect that a solicitor cannot abrogate a duty or skill or follow instructions blindly when consulted by a client. The solicitor has an obligation to consider not only what the client wishes him to do but also the legal implication of the facts which the client brings to his attention. A solicitor must follow up these facts to ensure that he appreciates the real problem with which he has been asked to deal and when he is clear as to the way forward he must then advise his client accordingly. Barron J. stated at p. 143:-

"In more complicated cases, the duties of the solicitor are also more complex. If his opinion corresponds with what he is asked to do, then there is no problem. When it does not, he must advise his client of his views and all reasonable approaches to the problem. The solicitor then acts on the basis of the instructions which he receives in the light of these advices. It is probably better that the solicitor's advice should be in writing, but that is a matter for him. In other words, as part of his duty to his client, a solicitor is obliged to exercise his professional skill and judgment in the interests of his client. The extent of this particular obligation is dependent on the nature of the case presented to him."

109. In *Carroll v. Carroll* [2000] 1 IRLM 210 Barron J. in dealing with the case of undue influence stated at p. 233:-

"... a solicitor or other professional person did not fulfil his obligation to his client or patient by simply doing what he was asked or instructed to do. He owed such a person a duty to exercise his professional skill and judgment and he did not fulfil that duty by blithely following instructions without stopping to consider whether to do so was appropriate. Having done so, he must then give advice as to whether or not what is required of him is proper ..."

110. The court is not satisfied that the defendant in these proceedings acted in any way contrary to the principles and propositions set out in *McMullen v. Farrell* or *Carroll v. Carroll*. Legal advice was given in the knowledge of all of the relevant circumstances at each relevant stage of this process. It was a matter for Ms. Flynn as to whether she accepted and acted upon that advice. She chose not to do so. The court is satisfied that the advices given by Mr. King and Ms. Hickey were sufficient and clear in the circumstances. The court is also satisfied that this advice was firm advice given to a client who was purposeful and firm in her intention to purchase the Knox lands.

111. The plaintiff also submits that it was important that this advice be given to her in writing. Reliance is placed upon the decision of the Court of Appeal in *Emerald Isle Assurances and Investment Ltd. and others v. Dorgan and others* [2016] IECA 12. This case concerned an application to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay. There had been substantial disagreements between the plaintiffs and their forensic accountant over the quantification of their claim over a period of four years. In the face of the motion the plaintiffs' action was compromised on the basis that the motion to be dismissed would be successful. A claim was brought for professional negligence against their former solicitors and the Court of Appeal held in the plaintiff's

favour. Ryan P. stated:-

"Mr. Duane's obligation was to address the situation and to give clear advice to his clients as to what the options were and what the risks were. He was not fixed to a position of having to continue to employ ... [the forensic accountant]. Neither did he have to achieve a situation where Mr. Peelo and the clients were in agreement. If consensus as to the damages claim between Mr. Peelo and the plaintiffs was impossible, other options were available. Mr. Duane had to advise the clients by telling them in straight terms what the situation was. He was also obliged to follow that up with the clearest letter or letters informing them of the options and the dangers. ... It is telling in this situation that Mr. Duane never actually sent a clear explicit letter outlining the danger that the case could be struck out for want of prosecution unless the situation was resolved by a decision one way or the other. Neither did he tell the plaintiffs that they could proceed on the basis of the evidence of the in-house accountant, although there would undoubtedly be risks involved in proceeding in that way ..."

112. In that case it does not appear that any warning was given to the clients of the consequences of the impending motion to dismiss the proceedings nor was any advice given that they might dispense with the services of their forensic accountant and employ a new one. The solicitor never addressed or engaged on these issues with the clients. They should have been informed of other options. In this instance, the reverse is the case. Repeated advice was given to the plaintiff throughout the transactions the subject of these proceedings. The evidence indicates that Ms. Flynn fully understood the position and the risk that she was running. I am not satisfied the decision in *Emerald Isle Assurances and Investment Ltd.* is therefore in point.

113. As already stated the court is satisfied that the advice as set out in the diary entries and notes adduced in evidence was given to the plaintiff on the occasions stated by Mr. King and Ms. Hickey. Indeed Ms. Flynn does not dispute the advice given to her by Ms. Hickey on 24th January, 2008 that if Mr. Lehané did not come through "ACC would be in a position to sell all property" nor does she dispute the advice given on the 18th February, 2008 not to proceed with the purchase because of the increase in price. I am satisfied that this advice was given by Ms. Hickey and was repeated by her before the purchase was made. Both expert solicitors were satisfied that the contents of these advices were "proper and professional". Both were also agreed that it was unnecessary to commit such advice to writing though it would have been prudent to do so. In addition, I am satisfied having regard to the close control and engagement by the plaintiff with her affairs and the independent decisions which she took notwithstanding and sometimes in the face of the legal advice received, that she was capable of and took commercial decisions in the hope and expectation that they were reasonably based having regard to the then prevailing economic climate and would work out to her advantage. These included the fact that she proceeded with the purchase of the Knox lands despite the difficulties presented by Keane solicitors originally in providing the contract and responding appropriately to her solicitor's enquiries and personal abuse from the vendors and a unilateral increase in the purchase price of the lands for no additional gain.

114. She was clearly able to engage in negotiations directly with Mr. Lehané. She was satisfied in the climate prevailing that she could find an alternative purchaser if he did not complete. She was satisfied to defer the completion date in consideration of the release to her of the deposit and the payment of an increased amount on completion. I do not accept that the plaintiff has established any want of duty of care on the part of the solicitors involved in advising her or that they ought to have presented that advice in a more forceful way to her. In particular the court is satisfied that prior to the loan agreement with ACC and the drawing down of the funds under the terms of that loan that Ms. Hickey had clearly brought to the plaintiff's attention the risks of proceeding in the absence of completion of the sale of the Stradbally lands which on the evidence I am satisfied Ms. Flynn fully understood.

115. I am also satisfied on the evidence from Ms. Bainton and Mr. Lysaght that there was no professional obligation to make an enquiry from Mr. Lehané's solicitors as to his financial capacity to complete the contract. Ms. Bainton considered that there was a professional obligation to discuss the risk with the client but if the client did not want to make any enquiry "that's up to the client". It is clear from the evidence that Ms. Flynn had satisfied herself on the statement of affairs which Mr. Lehané had produced in the course of the short lived syndicate established to purchase the estate containing the Knox lands that he had assets at the time in the amount of €10 million or more. She on several occasions expressed the view to the solicitors that she was satisfied he would complete. This confidence could only have been enhanced by his willingness to allow the drawdown of the deposit and agree to a payment of further sums on completion in consideration of the extension of the completion date. She gave no instructions to the solicitors of any concerns in this regard or that they should carry out searches of any kind in respect of his financial state.

116. While there is little difference between the expert witnesses in respect of the nature and scope of the duty of care attaching to the defendants to Ms. Flynn in respect of these transactions, the court is satisfied to accept the evidence of Mr. Lysaght insofar as there is any difference between them.

Conclusion

117. For all the reasons stated above the court is satisfied that the defendants were not in breach of their duty of care to Ms. Flynn in advising her in relation to the transactions for the sale of the Stradbally lands and the purchase of the Knox lands or the ACC bridging loan. I am also satisfied that the defendants were not in breach of their duty to Ms. Flynn by failing to make enquiries as to Mr. Lehané's ability to complete the purchase of the Stradbally lands or in any other respect. Accordingly I would dismiss the plaintiff's claim.