

THE HIGH COURT**[2012 No. 2183P]****BETWEEN****ANNA O'CONNOR****PLAINTIFF****AND****DANIEL BYRNE AND TARA BYRNE****DEFENDANTS****JUDGMENT of Mr. Justice Birmingham delivered the 29th day of October 2014**

1. This case was at hearing before me for twelve days. In form, in its essence it is an action for professional negligence, with a counterclaim for abuse/misuse of process, but over the twelve days, the case has wandered far and wide. At times it has much in common with the plot of a novel or the script of a screenplay.
2. The plaintiff is a barrister who practised as such for some 25 years. The first named defendant is a solicitor, though he does not at present hold a practising certificate, and businessman. He founded the practice of Daniel J. Byrne & Co. in May, 2006, which practiced from premises at 11/11A Ormond Court, Ormond Quay, Dublin. The first named defendant ceased active practice as a solicitor in or about the 31st January, 2008. The second named defendant is a solicitor who received her parchment in April 2006. In January 2007, the second named defendant joined the practice of Daniel J. Byrne & Co. and in March 2007, became a partner there. Since Daniel Byrne ceased practice as a solicitor, she has been the principal of the practice.
3. A very brief summary of the factual background to the case is that the plaintiff, in or about mid 2006, was anxious to become actively involved in the property market. Specifically, she engaged Daniel J. Byrne & Co. solicitors to act on her behalf in relation to two acquisitions, 4 Annesley Bridge, Fairview, Dublin and 25 New Cabra Road, Dublin. Like many others who entered the property market around that time her experience has not been a happy one. She is completely dissatisfied with the professional service that she has received. She complained to the Law Society and to the Solicitors Disciplinary Tribunal where her complaints were rejected and then brought an appeal to the High Court. While that appeal was at hearing before me, the case was settled, which involved the withdrawal of the complaints and an agreement by the plaintiff to pay a contribution towards the costs of the respondents. In March 2012, the plaintiff issued the present proceedings. As appears from the general endorsement of claim, the plaintiff's claim was for damages for breach of retainer, breach of contract, negligence, breach of duty, detainee, deceit and injurious falsehood of the defendants, their servants or agents. Elaborate as that endorsement of claim is, however, that very brief summary does not give any flavour of the breadth of dispute and it may be said the bitterness of the dispute between the parties.
4. The relationship between the plaintiff and the first named defendant which has now turned so sour had its origins in the fact that the first named defendant and the plaintiff's son, Joseph, were contemporaries as students in Blackhall Place Law School. The two students became friends and arising from this the plaintiff and the first named defendant became socially friendly. Ms. O'Connor has described the relationship as developing to the point where she was like an aunt to the first named defendant, indeed she goes so far as to say that she looked on Mr. Byrne as a son/nephew. Mr. Daniel Byrne puts a different picture of the relationship. He says that the plaintiff's son had psychological needs and that he, Mr. Byrne offered assistance with various course modules to his fellow law student and was happy to avail of nice meals cooked by his colleague's mother from time to time.
5. In or around 2006, the first named defendant had in mind to establish his own solicitors practice, and alongside this to become active in the property investment business. His plans at this stage were that he would provide what was described as a "one stop shop" for those wishing to become involved in property investment.
6. The plaintiff was aware of the first named defendant's plans and the road that he was proposing to travel. She was anxious to become active in the property market and she and her son on her behalf, pressed the first named defendant to source a suitable property for her.
7. The plaintiff, I should explain, was a former nurse and had inherited a sum of money from her late father as well as a car park in Cork which was seen as having development potential. Having been called to the Bar in 1987 she had, on her own account, built a significant practice at the Bar and had a good income from that source. She was looking ahead and anxious to invest in property in order to provide for her retirement. Mr. Byrne for his part says that he was not enthusiastic about becoming involved in an active ongoing relationship, as he was concerned that Ms. O'Connor was a litigious, needy person, who might not be an easy person to deal with. There may be an element of hindsight about that observation.
8. Be that as it may, the first named defendant did identify a property which he felt would meet the needs of Anna O'Connor. The property in question, a multi unit buy to let on the North Circular Road, had much to recommend it, and was described as being in walk in condition. The first named defendant was seeking a finder's fee of €10,000. The plaintiff says that she transferred this finder's fee to an account in Mullingar nominated by the first named defendant. The transaction did not proceed, Ms. O'Connor says because a significant planning difficulty emerged. The plaintiff says that the finder's fee which she paid on the 14th March, 2006, has never been returned to her and that this represents one significant element of the plaintiff's claim for special damages. This allegation has been the subject of detailed, indeed forensic treatment on behalf of the defendant. That exercise appeared to establish beyond doubt that the amount in question was in fact repaid on the 20th April, 2006, the repayment of this finder's fee forming part of payment made by the first named defendant to the plaintiff. Having been brought through the various bank statements in considerable detail, the plaintiff appeared to accept that this amount had indeed been repaid. Accordingly, the pleas at para. 8 of the statement of claim and also the reference to this at para. 25(g) of the statement of claim do not seem to form part of the case any longer.
9. When the property on North Circular Road fell through, it seems, though Ms. O'Connor does not have a clear recollection in this regard, that similar properties on South Circular Road and in Arbour Hill were looked at, indeed when asked about this her response

was to ask where is Arbour Hill! But the next property to be progressed to a significant extent was 4 Annesley Bridge, a residential investment property subdivided into a number of units. This property, to which the plaintiff was introduced in August 2006, is one of the two properties that are central to the current proceedings. The parties are in fundamental disagreement as to the nature of the transaction. The plaintiff for her part alleges that the arrangement was, that she was to purchase the property for €980,000 from vendors who were at arms length, that Daniel Byrne would then have it renovated on her behalf, and that Daniel Byrne would charge a professional fee in relation to the acquisition and mortgaging of the property and that in addition he would also charge and would be entitled to a project management fee of €100,000.

10. This question of identifying the vendors and what the plaintiff was told in that regard is central to the plaintiff's case. The plaintiff's position is succinctly set out at para. 10 of the statement of claim which is in these terms:

"At no stage did the First Defendant reveal that he had himself already so contracted to buy the same property some three months earlier on the 17 May 2006 and had already incurred heavy interest accruals and that he would and transfer it to the plaintiff by way of a sub - sale."

The defendants say that what was intended was that Mr. Byrne would purchase the property and sell on with Ms. O'Connor acquiring the property as a subpurchaser.

11. The plaintiff says that structuring the transaction in this way as a sub-sale meant that the first named defendant avoided liability for income tax on the €100,000 that was coming to him as a project management fee, while she herself in contrast was exposed to additional stamp duty of €9,000. There are a number of subsidiary complaints in relation to this transaction to which I will turn presently, but at the heart of the complaint is that the plaintiff says she was unaware of the fact that she was acquiring her property from Daniel Byrne by way of sub-sale. Arguments have been advanced about the inappropriateness of Daniel Byrne, being the vendor while his solicitor's practice was acting for Ms. O'Connor the ultimate purchaser. Significant as these arguments are, they require to be put in the context of what Ms. O'Connor knew about the transaction and what she had agreed to.

12. The documentation that was generated in relation to the transaction does not leave any room for doubt, but that it must have been clear to all and sundry that Anna O'Connor was acquiring the property by way of sub-sale. In that regard there was a letter dated the 31st August, 2006, from Joe Kane, solicitor in Daniel J. Byrne who was looking after the affairs of Ms. O'Connor to her. The opening paragraph is in these terms:-

"(A) In relation to Contracts for Sale and the purchase price please find enclosed the following:

1. Copy extract Contract for Sale dated the 7 July 2006, to Daniel Byrne as original purchaser.
2. Copy contract for Sub- Sale from Daniel Byrne to yourself as sub – purchaser;

The vendors under the original contract are James McDonald and Elizabeth Gallagher and the purchaser is recited as Daniel Byrne. The original purchase price is €980,000. A booking deposit in the amount of €49,000 (5%) has been paid by Daniel Byrne. The sub - sale margin is €120,000 with a total price to you of €1,100,000.

The closing date in the original Contract for Sale was set for 28 July 2006. A completion notice was served by the vendor's solicitor on 31 July 2006, and thus we are well into the notice period. There is 12% rate representing a penal interest rate for delayed completion of contracts."

13. The Law Society Particulars and Conditions of Sale Contract document of the 8th September, 2006, described Daniel Byrne, as vendor on the cover page and recorded Daniel J. Byrne & Co. as the vendors solicitor, thereafter Daniel Byrne of Apartment 9, Block 7, Clarion Quay, IFSC, Dublin 1 is described as vendor and Anna O'Connor as purchaser.

14. Clauses 6 and 7 of the special conditions referred to the sub-sale. Clause 6 stating:-

"The Purchaser acknowledges that the sale shall be by way of sub-sale and that on closing the purchaser shall assume all obligations of Daniel Byrne (the Vendor) under the Contract for Sale between James McDonald and Elizabeth Gallagher and the Vendor and no further objection, or inquiry or requisition shall be carried out in relation to this matter.

2. The Vendor assigns all of the benefit of the Contract for Sale between James McDonald and Elizabeth Gallagher and the Vendor to the purchaser. All further correspondence shall be addressed between the solicitor for the purchaser and the solicitor for James McDonald and Elizabeth Gallagher. The Vendor accepts no further liability relating to any part of either agreement and the Purchaser shall raise no further inquiry, or requisition in relation to this."

15. The deed of confirmation and sub-sale executed by Ms. O'Connor which was witnessed in the ordinary way refers to the parties in bold, James McDonald and Elizabeth Gallagher being described as vendors, Daniel Byrne as "original purchaser" and Anna O'Connor as sub purchaser.

16. While referring to some of the special conditions it is convenient at this stage to refer to condition 11, which features in a slightly different context. It is in these terms:-

"The Purchaser agrees to pay and discharge one third of any interest in respect of the Contract for Sale between James McDonald and Elizabeth Gallagher and the Vendor subject to a limit of €5,000 in this regard."

17. I am prepared to acknowledge that clauses 6 and 7 of the contract may not have been read, but I find it very hard to accept that anyone in receipt of the letter from Joe Kane, what was in issue was a sub contract. By the same token, I cannot see how anyone signing the Law Society contract documentation or executing the deed of confirmation and sub-sale could have been unaware of what role was being played by Daniel Byrne.

18. Ms. O'Connor has been very anxious to stress that although she had been in practice as a barrister for many years that she had never practiced in the area of conveyancing and did not claim any expertise whatever in that area. I accept of course that there are many barristers whose practice does not involve conveyancing. But no particular conveyancing expertise was required to appreciate the role being played by Mr. Byrne, indeed no legal background or expertise whatever was required to do so.

19. Any doubt that one might conceivably have had that Ms. O'Connor was aware that Daniel Byrne had sold on the property to her

are eliminated by the terms of a letter written by Anna O'Connor to Tara Byrne, second named defendant of Daniel J. Byrne & Co. on the 17th December, 2008. In that letter headed "4 Annesley Bridge, Fairview, Dublin 13" Ms. O'Connor specifically refers to Mr. Byrne as the vendor. The letter contains the following sentence:

"As you are aware I paid over €1,080,000 to your fiancée Mr. Daniel Byrne, the vendor, for the property when he was the principal of Daniel J. Byrne & Co. I believe you are now the principal of that office and you are also aware that I instructed Daniel J. Byrne & Co. to act on my behalf on the conveyance from Mr. Byrne to me."

20. I draw attention to the fact that the total purchase price referred to, is now €1,080,000 as distinct from €1,100,000 referred to by Mr. Joe Kane, solicitor in his letter. Ms. O'Connor felt that the reference to €1,100,000 did not reflect what had been agreed between the parties and, understandably sought rectification. It is an example of Ms. O'Connor looking out for her own interests and very properly so. I must conclude that it was clear to all concerned that the transaction proceeded by way of sub-sale from Mr. Byrne to Ms. O'Connor and insofar as Ms. O'Connor's evidence is to the contrary I am not in a position to accept it. Ms. O'Connor says that if this was structured as a sub-sale that this meant that she was disadvantaged in terms of stamp duty, while Mr. Byrne was advantaged in income tax terms. Mr. Byrne is firm in asserting that in fact there was no income tax advantage for him, given the ways that his affairs were dealt with by the Revenue Commissioners where he was regarded as a property trader which meant that he was liable for income tax rather than capital gains tax. Mr. Byrne also points out that if he had charged a project management fee that this would involve VAT at a rate higher than stamp duty was charged. In truth though, it seems to me that these arguments about the tax implications are really immaterial. Ms. O'Connor agreed to enter into the transaction, which she did and I conclude that she entered into the contract knowingly and it is this rather than what the tax implications for individuals are that is crucial.

21. Matters did not proceed entirely smoothly thereafter. It was Ms. O'Connor's practice to spend part of the summer in her holiday home in the south of France. She was in France at a time when she was required to complete certain documentation. Her solicitors Daniel J. Byrne & Co. decided to forward documentation to her by courier for completion. Ms. O'Connor presents a dramatic picture of a courier turning up at her holiday home in full cycling gear. In any event she signed the documentation, and then repackaged the documents and handed them to the cyclist. The documents never arrived in Ireland, giving rise to problems and delays. Ms. O'Connor and Daniel Byrne looked to the original vendors to execute a new deed, but they decided not to cooperate. This was a source of considerable distress and frustration in particular to the plaintiff, who had borrowed from Bank of Scotland in relation to the property. In these circumstances she instructed the second named defendant, Tara Byrne, solicitor to issue proceedings against the vendors. Interestingly, she sought details of the name and address of the vendor's solicitor involved, so that she could write to the Law Society in order to complain about the failure to cooperate.

22. Then, on the 2nd November, 2007, Ms. O'Connor wrote to Ms. Byrne, that letter included the following paragraph:-

"I am hereby formally instructing you to issue proceedings against the vendors for Specific Performance within seven days from the date hereof to rectify this matter and to ensure that I have a proper title to my property. Please ensure also that the proceedings include a claim for the costs of the Court action against the vendors and also include a claim for the stress and inconvenience this is causing me."

23. Two specialist conveyancing counsel nominated by Ms. O'Connor had been consulted by Daniel J. Byrne & Co. one Dublin based and one Cork based. In a letter of advice, the Cork barrister commented:-

"Insofar as specific performance is concerned, it would appear to me that Daniel Byrne is the appropriate plaintiff. Anna O'Connor can also be joined even though she was not a party to the main contract, but she is entitled to the covenant for further assurance. The only point in joining her were if she were suffering consequential loss as a result of the default."

24. Intensive negotiations with the solicitors for the vendors followed. Eventually in January 2009, the vendors executed a new deed. However, before then an issue arose in relation to the initial insistence by the vendors that they should be furnished with an indemnity lest any exposure in respect of additional stamp duty arise.

25. How this issue of indemnity was dealt with has contributed in a significant way to the deterioration of relations between the parties and in particular it is one of the factors that caused Ms. O'Connor to form the view that Daniel J. Byrne & Co. did not have her best interests at heart. This was in a situation where it was envisaged at first that an indemnity would be forthcoming from both Anna O'Connor and Daniel Byrne. However, Daniel Byrne was not willing to provide one, this in the context of deteriorating relations and rising tensions. All of this is very unfortunate, because Ms. Byrne was quite assiduous in pursuing the Revenue Commissioners in order to obtain a confirmation from them that no stamp duty penalty would arise and indeed confirmation that no penalty would arise did come by way of a letter dated the 29th October, 2008. Thus the controversy in relation to the recasting of the indemnity excluding Mr. Byrne was entirely moot. In that sense it is not surprising, that Ms. O'Connor has said that at the time she did not really mind, but that it did cause her to wonder who Tara Byrne was acting for.

26. The real break in relations between the parties can be dated from the time when Ms. Byrne presented a bill for legal services. In that regard how this issue about the efforts to have the deed re-executed is dealt with in the pleadings is both interesting and a little curious. At para. 12 of the statement of claim the following appears:

". . . The original vendors refused [to re-execute a deed] and the First Defendant obtained the advices of Counsel, the costs of which he charged not to himself but to the Plaintiff. The First Defendant as Plaintiff, but through his own firm (now including the Second Defendant) initiated specific performance proceedings against the vendors in the Circuit Court, but added the Plaintiff, his client, as a Co-plaintiff – even though she had no contract with the original vendors. The Defendants thereafter wrongfully charged the full professional fee for the entire proceedings to the Plaintiff alone."

27. Anyone reading the plea would be surprised to learn that Ms. O'Connor gave specific instructions in writing that proceedings be issued and instructed that she was to be joined to the proceedings and thereafter managed the proceedings to the extent of nominating the junior counsel who made an application for substituted services.

28. An issue has also arisen in relation to the arrangements made in relation to para. 11 of the special conditions which I have quoted above. The background to this was that a Mr. Pat O'Hara, who has been described as the best friend of the first named defendant was the original intended final purchaser, but he was unable to proceed with the transaction, apparently because of difficulty in obtaining finance. Mr. Byrne said that in a situation where Pat O'Hara wanted out of the contract and where Ms. O'Connor was coming to the transaction at a time when interest was running, that agreement was reached whereby the interest due would be split three ways between Pat O'Hara, Anna O'Connor and himself.

29. However, he has a clear and specific recollection that Ms. O'Connor was insistent that the exposure to interest on her part should be capped at €5,000. I am disposed to accept the account given by the first named defendant in that regard. Indeed Ms. O'Connor, while not recalling the details of the conversation does accept there was some discussion about a three way split. So it does not appear the idea of a split was anathema to her. The alternative theory that the provision was included without any justification and with wilful or reckless disregard for the plaintiff's interest really makes little sense. If that was happening, one would expect to see a responsibility for one third of the interest bill imposed, if not indeed an even more onerous imposition. But instead, we find the plaintiff's exposure is capped to €5,000 apparently in accordance with her wishes. That is not to say that some different arrangement, perhaps more advantageous to Ms. O'Connor might have been devised in different circumstances.

30. A further indication that Ms. O'Connor was careful to look out for her own interests and keen to avoid spending money unnecessarily is to be found in her decision to seek to have legal fees incurred in relation to professional services in respect of the car park in Cork, the Glenvera Car Park, to which I have made reference, rolled up with the Annesley Bridge fee liability, a proposal which Mr. Daniel Byrne accepted.

31. There were internal communication difficulties in relation to Glenvera Park on the defendant's side, as a result of which at one stage Anna O'Connor was being charged professional fees, but this was eventually resolved. However, at this stage my interest lies in the fact that it shows Ms. O'Connor was well able to look out for her own interests.

32. The plaintiff has issues about the way in which the renovations of 4 Annesley Bridge were carried out and in particular there were difficulties with regard to the involvement of a builder Mark Owen, to whom she was introduced by the first named defendant and I will return to this aspect, but before doing that I wish to deal with the position in relation to the acquisition of 25 New Cabra Road.

33. 25 New Cabra Road is the second in time of the two properties that are at the heart of this case. According to the plaintiff, in early 2007, she thinks on the 2nd May 2007, she received a call from the first named defendant to say that a property, a pre 1963 multi unit investment property had now become available by reason of an earlier would be purchaser failing a medical. According to Ms. O'Connor he told her that it was an excellent property, even better than the earlier one. Ms. O'Connor said that she asked if Mr. Byrne was happy with the valuations on the property and that he said he was and that she asked whether it was a property that he would sell to his mother and he said that yes he would. In these circumstances she decided to purchase the property without, according to herself ever having seen sight of the inside of it. She says that when, after signing the contract, she visited the premises that she was shocked by the condition.

34. Again, this property involved a deed of conveyance and sub-sale. The parties Mark Stynes, Daniel Byrne and Anna O'Connor are referred to in bold, Mark Stynes being referred to as the owner, Daniel Byrne as the original purchaser and Anna O'Connor as the sub purchaser.

35. The plaintiff's obligation in total was to pay the sum of €1,050,000 of which €950,000 was to be paid to the original vendor and €100,000 to Mr. Daniel Byrne. The plaintiff's case as pleaded at paras. 18 and 19 of the statement of claim was as follows:-

"18. The First Defendant proposed:

- (i) the plaintiff buy the property for €950,000;
- (ii) plus €100,000 as his project management fee;
- (iii) his law firm would do and charge for the conveyancing;
- (iv) the builder's renovation costs would be kept to €90,000.

19. Neither Defendant revealed to the Plaintiff that the First Defendant was the true vendor of the property, until the contract was proffered by the Second Defendant at short notice to the Plaintiff for binding signature."

Paragraph 19 of the statement of claim continues:

Nor did either Defendant reveal (as both knew only too well) that the plaintiff's effective price of €1.05million (again sparing the First Defendant 42% or 20% income tax liability on €100,000 but instead dumping an extra marginal €9,000 stamp duty on his client) was very wide of the market value assessed a few days earlier by the PTSB."

36. The question which Ms. O'Connor says she posed, when she received the phone call from Mr. Byrne as to whether he would sell this property to his mother, would suggest that she felt that she was dealing with the seller. Again, all the documentation leaves no doubt that what was involved was a sale and sub-sale. A letter from Tara Anne Byrne to Ms. O'Connor of the 16th May, 2007, opens as follows:-

"Purchase and mortgage of 25 New Cabra Road.

Dear Anna,

I wish to confirm that I have received Contract for Sale documentation from the vendor's solicitors in relation to the proposed sub- purchase of the above mentioned property. Please now find enclosed the following:

- (1) Copy extract of the Contract for Sale between Mark Stynes of the one part and Daniel Byrne of the other part.
- (2) Copy extract Contract for Sale in relation to the sub-sale from Daniel Byrne to yourself.

I would summarise the following in relation to contract documentation:

Commercial Terms

a. The purchase price is recited as €950,000 in the initial Contract for Sale to Daniel Byrne. The purchase price is recited as €1,050,000.00 in the sub-sale contract. The total price payable is therefore €1,050,000.00. A booking deposit of €10,000.00 has been paid by Daniel Byrne. A balance deposit of €37,500.00 has also been paid. There is 10% rate representing a penal interest rate for delayed completion of contracts."

37. In this case the contract from Daniel Byrne to Anna O'Connor could not be clearer in identifying who was vendor and who was purchaser, just as the conveyance and sub-sale was in identifying the vendor original purchaser and sub purchaser.

38. At the signing, a particular concern of Ms. O'Connor was to identify what the provisions were in relation to interest. It appears that the interest provisions for Annesley Bridge had rankled. Her attention was brought to the relevant clause and she proceeded to delete the provision by drawing a line or two lines, through the relevant clause which was condition 9 of the special conditions, even whether one line or two lines were drawn, is an issue in controversy. This in circumstances where a contract signed by Hazel Dooley of the firm of Daniel J. Byrne & Co. in trust for Daniel Byrne and also by Anna O'Connor has emerged which refers to the contract property as 12 Hendrick Street, Smithfield. There, special condition 9, is deleted by the drawing of two lines which is initialled "AO'C" and witnessed by Tara Byrne. Whereas on the document which refers as it ought to the contract between Mark Stynes and Daniel O'Connor, para. 9 is deleted by only a single line which is initialled "AO'C" and witnessed.

39. Ms. O'Connor is disposed to put quite a sinister interpretation on this discrepancy. She says the document, which she says was definitely signed by her, the one with the two lines and its erroneous reference to Hendrick Street, means that she cannot have been brought through the contract. I am not in agreement with Ms. O'Connor. The clauses immediately above and below the para. 9 deleted with two lines, contain references to Kevin and Carol Smith, the Hendrick Street vendors. It seems to me far more likely that the parties went through a contract, which referred correctly to Mark Stynes and 25 New Cabra Road and that a deletion was made in this contract in accordance with Ms. O'Connor's wishes. Then having gone through one contract, the parties set about signing a duplicate contract, including deleting the clause desired, but inadvertently signed a contract which, probably because of cutting and pasting, contained erroneous references to Hendrick Street.

40. Ms. O'Connor says that a major disagreement developed with Daniel Byrne after signing the contract and indeed she provides a very dramatic picture of Mr. Byrne slapping the glass table in the office. She says that this happened when she asked when do things get started and that Daniel Byrne indicated that Mark Owen might not be available for some time. Anna O'Connor says that she was shocked at the reference to Mark Owen as she was determined that Mr. Owen would have no involvement with 25 New Cabra Road, as her experience with him on 4 Annesley Bridge Road, had not, from her perspective, been a happy one and she had wanted the work to be done by Justin Byrne, brother of Tara Byrne and thought that this was agreed by all.

41. Mr. Byrne does not accept that this dispute occurred in the manner described. Indeed, he says he was not at the contract signing, and that was why the contract was not signed by him personally, but was signed in trust on his behalf by Hazel Dooley, solicitor. It may be that Ms. O'Connor has confused the contract signing with the execution of later documents, but it does seem that she was reluctant to involve Mark Owen. I will return to the position of Mark Owen in due course and how he is relevant to this case.

42. The plaintiff has a number of subsidiary criticisms of the performance of the defendants as solicitors in relation to this sale and indeed the other property in relation to planning issues, including the continuity of use since 1963 and so on and also the fact that the contract in this instance provided for a clawback if she was to sell on by way of sub-sale. However, the major issue is in relation to the price paid by Ms. O'Connor. The plaintiff's case is that she overpaid for the premises and that her solicitors allowed her pay over the odds. A letter from the solicitors for the plaintiff of the 13th January, 2014, had indicated that a similar argument was being made in respect of Annesley Bridge. It was suggested that the true value of this property as of August 2006, was €600,000. However, I think it is fair to say that it is really in relation to New Cabra Road that the overpayment argument has been developed. The plaintiff's case is that her solicitors allowed her and indeed caused her to pay over the odds. As Daniel Byrne was the vendor of the property and as Daniel J. Byrne & Co. were her solicitors, and as her affairs were being looked after by Ms. Tara Byrne who apart from being a partner in Daniel J. Byrne & Co. was also the fiancé of Daniel Byrne, this brings the arguments in relation to conflict of interest into particularly sharp focus.

43. To put those arguments in context, it is necessary to say something about the prior history of the property. In or about 2007, the plaintiff came across the premises at 25 New Cabra Road. At one stage a lady by the name of Rita Darbey, an existing client of the office who was in the process of building up a property portfolio was going to purchase the property. She had engaged the services of Clare Dooley, a mortgage broker to assist her in obtaining finance and Ms. Dooley was pursuing a mortgage approval with Permanent TSB. At this stage within Daniel J. Byrne & Co. Hazel Dooley, solicitor was looking after Rita Darbey, while Tara Byrne was looking after the interests of Daniel Byrne.

44. On the 13th February, 2007, Daniel Byrne signed a contract to purchase New Cabra Road for €950,000. At this stage it would have been believed that Ms. Rita Darbey was available as an anxious and willing sub purchaser. Initially all seemed to be going well from a conveyancing and loan approval point of view and the expectations on the 27th March, 2007, was that Permanent TSB would be issuing two loan offers that day or the following day at the latest, one for €993,000 secured on Rita Darby's existing portfolio and one for €870,000 secured against 25 New Cabra Road.

45. However, matters did not continue to run smoothly. On Wednesday the 25th April, 2007, Ruth Campion, legal secretary in Daniel J. Byrne & Co. was emailing Clare Dooley to say that the Completions Department in Permanent TSB were indicating that they had still not received the valuation in relation to 25 New Cabra Road, that her office was coming under pressure to complete the closing and asking Clare Dooley to see to this as soon as possible. A day later Ruth Campion was telling Hazel Dooley that she had spoken to an official of the Permanent TSB Commercial Department who had found the valuation while actually on the phone to her and that the cheque would be issued that day and that Daniel J. Byrne & Co. would have the cheque through the DX document exchange in the morning. That optimism proved misplaced. On the 30th April, 2007, Clare Dooley sent Daniel Byrne an email. Because of the significance that the plaintiff places on this email and a further letter of the 1st May, 2007, I will quote it in full:-

"Daniel,

After numerous contacts with PTSB on Friday in relation to the purchase of 25 Cabra Rd, D.7, I have been notified this morning that the finance for this purchase has now been Declined, based on the following reasons:

1. The valuation that was carried out has not been accepted by PTSB and the Valuer has already been contacted in relation to this. Although the valuer only valued this property to reflect the Purchase Price, the lender has advised that they feel this valuation is above market average for this property/location.
2. PTSB have also confirmed, that relating to the above value and their knowledge that the client would have to top up as soon as works were completed to be able to finance this deal, they are no longer happy to agree to such a top up for a Min of one year.

This is an extremely Serious issue for All Involved, I have never experienced a Lender refusing to accept a valuation which

states the purchase Price of the Property. There appears to be an undercurrent query here that I am not privy to, therefore, this is completely out of my control.

I will call Rita now to advise same.

Kind regards,

Clare"

46. There was a further email from Ms. Dooley, this time addressed to Tara Byrne. That email was in these terms:-

"Tara,

With reference to our telephone conversation today, I can confirm the following:

1. PTSB have rejected the valuations and are stipulating that only one valuer will be accepted in this case. They have themselves independently checked the comparisons in this area and are not 100% satisfied with the value already stated, therefore, they will only accept a valuation from One of the their panel of valuers.

2. In addition to the above, even if the appointed valuer was to produce a valuation report confirming the purchase price, PTSB have advised that the client cannot top up on the property for a min of 12 months, which would be standard practice under their criteria.

I am **Strongly advising All parties involved**, that the "Full Finance" is Not available for this client and that due to the cutback of the original loan amount and the refusal of a top up for the period of time advised, that the Client is Fully Exposed in relation to the builder and legal fees (as previously advised in my email below).

In addition to the above, the Client does not have sufficient funds to pay the monthly mortgage borrowing while the works are being carried out and tenants are secured and does not have the fall back of the top -up once works are completed.

This deal cannot be secured with any other lender, as the client only qualifies under a Buy to let basis, therefore, I am now instructing PTSB, that I am cancelling the application due to insufficient finance being offered to secure the total deal.

I am also Strongly Recommending that Rita obtain independent Legal Advice relating to this issue and a copy of all Correspondence will be kept on Rita's file should an investigation be carried out.

This situation is not ideal for anyone, including myself after weeks of work, but I am not willing to involve myself either Professionally or Personally to assist a client in closing a deal while being fully aware that the full funding is not available to the client.

Should you wish to seek further clarification re the above, please revert in writing.

Kind regards,

Clare"

47. I am not all convinced that Ms. O'Connor paid over the odds by the standards of mid 2007. She attaches particular significance to the fact that she has learned that the house price index maintained by Sherry Fitzgerald recorded the first fall in Dublin house prices during the last quarter of 2006. However, attaching significance to that report at this time remove involves a major degree of hindsight. A general election took place in May, 2007, and at that stage, all the major parties were united in their sense of optimism for what the future had in store for the Irish economy. All the talk was as of the levels of future growth and the prospects for a "soft landing".

48. Paragraph 19 of the plaintiff's statement of claim pleads that the effective price paid by the plaintiff of €1.05 million was very wide of the market value assessed a few days earlier by Permanent TSB. Despite the potential importance of this plea, no direct evidence was adduced of what value if any, was assessed by Permanent TSB. From the opening of the plaintiff's case, it emerged that her case is that the true value of the property as of May, 2007, was €675,000, this on the basis of calculations linked to multiples of rental income. However, the main reference to this figure during this hearing came from Ms. Clare Dooley who indicated that this was a figure that she had heard, from Douglas Newman Good. However, just as no witness from Permanent TSB as to their view of value was called, neither was the valuer called from Douglas Newman Good.

49. It is the case that a valuer, Eugene Davy was called and he indicated that in his view €675,000 was the appropriate price as of August 2007. However, when cross-examined he appeared to accept that purchasers could be found who would be willing to pay more than €1.05million for such property, given the state of the market at the time and a strong belief that capital appreciation awaited. It seems to me that the best evidence that there was no overpayment is to be found in the history of the property itself. Mr Daniel Byrne who was a very active figure in the property market was happy to pay €950,000. Even if the view was taken by Ms. O'Connor, as I am sure it would be, that Mr. Byrne would not have been too worried about driving a hard bargain and getting the property at the best possible price because he had would be sub - purchasers available to him, there remains the fact that the property was sold in April 2004 for €754,000. If the property could achieve €754,000 in April 2004, I cannot see how it can be seriously suggested that the August 2007 market price was only €675,000 when the whole country knows that property prices were roaring ahead between 2004 and 2007. I am of the view that this was not a question of Ms. O'Connor paying over the odds by the standards of the time, but rather that she simply decided to get involved in the property market at just the wrong time.

50. While I do not believe that Ms. O'Connor paid over the odds at the time, the controversy does highlight the difficulty and let it be said the undesirability of the way the relationship between Daniel Byrne and Anna O'Connor and indeed Daniel Byrne and his other clients was structured. Ordinarily a solicitor will not be over concerned with the price being paid or obtained by his client, value being a matter for the client and the value of that property will in some circumstances involve a significant element of subjectivity. In a situation where the solicitor for the plaintiff is the vendor, the vendor will naturally have an interest in obtaining the best possible price. Ordinarily, a vendor will not, subject to well established exceptions, be expected to introduce information that undermines the

property that is for sale. However, the potential for difficulty when the solicitor for the purchaser is himself the vendor or linked to the vendor is obvious. The difficulty for Ms. O'Connor is that she freely chose to instruct the solicitor's practice of her vendor to act as her solicitor. Ms. O'Connor makes the point that while she is an experienced barrister, her practice in recent years was heavily focused on clinical negligence and that she had absolutely no specialised knowledge of conveyancing. I have already accepted that that was the case and indeed that she was far from alone at the Bar in that regard. However, as an experienced lawyer, she must have been acutely aware of the importance of independent legal advice and yet chose to instruct Daniel J. Byrne & Co. The clear sense one has is that Ms. O'Connor in mid 2007, was an eager, indeed aggressive investor focused on building her portfolio and was anxious to align herself with Daniel Byrne, a significant figure on the property scene.

51. On the other side of the coin, the Daniel Byrne business model with its emphasis on sub - sales, meant that Mr. Byrne was placing himself, as a matter of routine, in a situation where he would find himself simultaneously selling property and acting for the purchaser of the property. The point has been made that purchasers did not have to avail of the services of Daniel J. Byrne & Co. and indeed that there were purchasers who did not do so. I do not doubt that is so, but the business model was an undesirable one, institutionalising potential conflicts of interest. That said, I am convinced that Ms. O'Connor, given her particular background and experience must have been fully aware of the significance of independent legal advice and must have been aware of the fact that Daniel Byrne had a dual role and was content with the situation. Not every client may have been as fully aware of the situation in which they were placing themselves.

52. Apart from the allegation, that Mr. Byrne made secret profits by not disclosing that he had purchased both properties, an allegation that I have rejected as being in the teeth of the evidence, the other key allegation made by the plaintiff was that the first named defendant was required to provide a project management service in respect of both properties and indeed provided such services in relation to Annesley Bridge. In that regard the plaintiff produced in evidence, a document in the nature of a curriculum vitae or a business history, apparently obtained from Clare Dooley, in order to establish that Mr. Byrne had acted as project manager. However, the document although introduced by the plaintiff, in fact offers support for the first named defendant's narrative. The document refers to an adjustment of strategy in November 2005, to merely supply a client with an undervalued property and that this had resulted in an exponential growth in practice income due to the amount of time freed up from micro managing every aspect of each project.

53. I have referred in some detail to the very many references in the documentation to the fact of a sub purchase, but what is wholly lacking is any reference anywhere to project management. The concept is not a very precise one, and it seems to me that if there had ever been an agreement, that such a service would be provided in return for a very substantial professional fee, that details of what was and was not included would have been spelled out in considerable detail. Ms. O'Connor has spoken highly of Mr. Joe Kane, solicitor, who looked after her interest in relation to Annesley Bridge and it would seem inconceivable that a careful and conscientious solicitor, (Ms. O'Connor's description), would not have ensured that there was a common understanding of what was going to happen and what was excluded. Ms. O'Connor also accepts that whatever about Annesley Bridge, that Mr. Byrne had no active involvement with the New Cabra Road remedial work. In contrast, she herself was up and down to that house every day, while the work was being carried out. If Mr. Byrne was supposed to be project manager, and was contractually committed to fulfilling this role and had been paid for this role and was not carrying it out at all, it is inconceivable that there would not have been vigorous protest from Ms. O'Connor and that these would not have been carefully recorded by her. There have been a number of other issues in this case which deserve mention.

54. In a case with many unusual features, not the least the way in which the dispute has spawned several other sets of proceedings, including *Rita Darby v. Clare Dooley and Daniel Byrne v. Brian Fox and Others*, one of the oddest of all involves the role played by Mark Owen. Mr. Owen whose name at birth was Paul O'Halloran, was born in England where he worked for a period in the construction sector before moving to Ireland. He served a substantial prison sentence for a serious assault and following his release encountered Mr. Daniel Byrne. According to Mr. Byrne, Mr. Owen told him that he was down on his luck and asked for a break. Mr. Byrne decided that he would give him a chance and used him to carry out work on one of his own properties at Charlotte Street. Apparently, Mr. Owen carried out the work in an exemplary fashion, Mr. Byrne described Mr. Owen as over performing. This opened the way for Mr. Owen to work on a large number of properties to which he was introduced by Mr. Byrne, some of these were Mr. Byrne's own properties, in some cases he was managing the project and in some cases Mr. Byrne's involvement was simply to introduce and recommend Mr. Owen to the property owner. In circumstances which have not been made clear, the relationship between Mr. Owen and Mr. Byrne deteriorated to a very considerable extent. Mr. Byrne speculates that the deterioration was because he wanted to start putting building work in the way of his brother in law, work which would have once gone to Mr. Owen. Whether or not that is the cause, there is no doubt that Mr. Owen made a complaint to the Law Society which was dismissed and also sought to interest journalists in stories about Mr. Byrne.

55. So far as Ms. O'Connor is concerned, there is no dispute but that she was introduced to Mr. Owen by Mr. Byrne. She says that she was very unhappy with his role in relation to Annesley. In particular she says that she was made very uncomfortable to the extent that she was unable to sleep because of the fact that Mr. Owen was very anxious that payments to her should be made in cash, which required Ms. O'Connor to acquire significant sums of cash and then hand them over, sometimes in dubious circumstances.

56. Ms. O'Connor says that she agreed to purchase New Cabra Road, that she stated that she was agreeing only on the very clear understanding that Mr. Owen would have no role whatever in relation to the renovation. Ms. O'Connor says that she was very anxious that the work would be carried out by Justin Byrne, brother of Tara Byrne, whose work she had had an opportunity to observe. Justin Byrne, I should explain had an involvement in the construction area as indeed had another brother of Tara's, Peter. Even this area of identifying an alternative builder to Mr. Owen which one might have expected to be non-controversial, has in fact proved to be quite controversial. This is because the defendants say that the work carried out by Mr. Justin Byrne, which Ms. O'Connor said she viewed and was greatly impressed by was not undertaken until a point later in time. Therefore according to them, it was Tara's brother Peter who was in the frame for the contract. In any event Peter Byrne was not prepared to become involved as he felt that Anna O'Connor would be a very difficult person to work with. In these circumstances, reluctant or not, Ms. O'Connor did decide to go with Mr. Owen.

57. The immediate controversy relates to the fact that Ms. O'Connor and her son Jack, arranged to meet with Mr. Owen in the Spawell Licensed Premises in Tallaght. According to Mr. Owen, Ms. O'Connor asked him to testify, agreed to pay him €1,000 at that stage and a further €2,000 if the case was successful and that she asked him to say that Mr. Byrne had project managed the two houses that he had worked on and that he, Mr. Owen had never met Ms. O'Connor. Ms. O'Connor absolutely denies asking Mr. Owen to give false evidence, pointing out that her case has always involved her being in regular contact with Mr. Owen and that there would be nothing to be gained by having Mr. Owen say that he never knew Anna O'Connor, even if she was prepared to pay for false testimony, which of course she was not. Mr. Owen says that he is a street smart individual, who does not make mistakes about what is being said to him. So concerned was he about what had been said to him that he went out and bought two Dictaphones so that he could record future phone conversations, which he did. In addition he took the step of informing a client/employer about what had occurred. That gentleman who is an acquaintance of Mr. Byrne put Mr. Owen in touch with a very prominent solicitor practicing in the

area of criminal law so that he could obtain advice.

58. I do not believe that Ms. O'Connor or indeed her son deliberately set out to suborn perjury. However, I do believe it was quite inappropriate for them to be discussing with a potential witness as to fact, what his testimony would be and to be offering payments to him. I find it remarkable that an experienced litigator like Ms. O'Connor could have put herself in a situation where she could even appear to be offering a witness with the sort of history that Mr. Owen had, money in exchange for testimony, with some funds being withheld until the litigation concluded. Her involvement in this instance was at best very unwise.

59. I have referred to the fact that Ms. O'Connor had a number of subsidiary criticisms of the quality of the professional services she received. The expert evidence of Mr. Michael Carrigan solicitor, which I found extremely helpful, touched on a number of these. They included the fact that special condition 11, of the New Cabra Road, contract provided that if the property was sub-sold by them, that the vendor who of course was Daniel Byrne, was entitled to half the uplift. Mr. Carrigan refers to the clause as slightly surprising and indeed as very surprising. I would echo those remarks and indeed would go further. However, while it raises concerns as to the extent to which anyone and more specifically whether the defendants were looking out for the plaintiff's interests, it is the case that unusual as the condition is, it has had no practical effect, because, of course the plaintiff never sought to dispose of the property by way of a sub-sale.

60. Very similar observations apply to some of the other criticisms that have been advanced. So for example, special condition 7 was in these terms:

"The vendor assigns all the benefits of the Contract for Sale between Mark Stynes and the vendor to the sub purchaser. All future correspondence should be addressed between the solicitor for the Vendor and the solicitor for Mark Stynes, the vendor accepts no further liability relating to any part of either agreement and the purchaser shall raise no further inquiry objection or requisition in relation to this."

Mr. Carrigan has indicated that he would have suggested an alteration in the wording, in part to avoid any possible difficulty that might arise in relation to stamp duty.

61. There were also issues arising from the fact that the property was a pre 1963 structure. A planning search is dated the 17th May, 2007, ie. the day after the sub-sale contract whereas of course searches should be pre-contract. The timing may possibly be explained by the fact that earlier searches were available, though this is just a possibility. The search result with its reference to protected structure would certainly merit a discussion between solicitor and client. Mr. Carrigan was also critical of the statutory declaration provided by Anne Coyne which refers to the fact that when her late brother purchased the premises in May 1988, it was in multiple units and still was. Her late brother she records was told that the property was in multiple units prior to the 1st October, 1964. However, there was no information as to how many units were involved.

62. I do not underestimate these criticisms, but at the end of the day, this case is not about an alleged failure to achieve excellence in conveyancing standards. None of the issues identified gave rise to any practical difficulties. Rather, the case is about an allegation that the plaintiff was misled as to the nature of the transaction that she was entering into, as a result of which secret profits were alleged to have been made by the second named respondent. However, the plaintiff has failed to make out these allegations. On the contrary, I am satisfied on the evidence that has been adduced that the plaintiff was fully aware of the nature of the transactions that she was entering into. The clear impression, I am left with is that Ms. O'Connor, and she certainly is not alone in this regard, entered the property market at exactly the wrong time, and feels, and again she is far from alone in this, that someone else must be responsible. The unusual practice model/business model that the first named defendant had established meant that it was likely that she would look in his direction. However, notwithstanding the undesirability of that model in the circumstances the plaintiff's claims fail.

63. I turn now to the counterclaim. Relatively little attention, it must be said, has focused on the counterclaim.

64. The counterclaim pleads that in April, 2008, the plaintiff met with the defendants and informed them that she was in dire financial difficulty due to contemporaneous increases in interest rates and falls in rental income. The counterclaim goes on to plead that in November 2008, the second named defendant issued invoices and then that in May 2009, the plaintiff made a complaint to the Law Society in a situation where the second named defendant was relying on a lien in relation to certain files. There is reference to a second complaint made by the plaintiff about unpaid fees due to her as a barrister and a further complaint to the Solicitors Disciplinary Tribunal. One of the side issues that surfaced during the case which I have not found it necessary to deal with, is a complaint in relation to unpaid barristers fees and what might be described as a cross complaint brought to the Barristers Professional Conduct Tribunal by the second named defendant. It is pleaded that there was a series of unmeritorious and malicious actions brought for improper purposes against the second named defendant designed to obtain cover for the financial losses the plaintiff suffered arising from her property investment as a result of the general fall in property values.

65. The counterclaim contains reference to alleged actions of Joseph, son of the plaintiff in making intimidatory nuisance phone calls and also of the role played by William Black, described as a former business associate of the first named defendant and who was involved in some form of confrontation with the second named defendant while the disciplinary appeal hearing was taking place before me.

66. While I deprecate in strong terms any contact with a witness or party which might involve intimidating them or otherwise influencing their evidence, again I do not regard these matters as requiring to be explored further at this stage.

67. While I have no doubt that the proceedings have been stressful for all concerned, and perhaps particularly for the second named defendant, that is simply the nature of litigation. It is also the case that there has been a considerable degree of overlap between the issues canvassed in the present proceedings and those that were in issue in the course of the appeal from the Disciplinary Tribunal. However, while that is so, to seems to me that the state of the proceedings falls short of establishing an abuse of process and further short still of the sort of abuse of process that might give rise to a distinct cause of action as distinct from seeing the proceedings dismissed. I will therefore make no order on the counterclaim and confine myself to dismissing the plaintiff's claim.