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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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| Delivered: | 07/08/2013 |
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

HEATHER BAIRD

Plaintiff

-v-

STEPHEN W R HASTINGS
practising as Hastings and Co, Solicitors

Defendant

WEATHERUP I

[1] The plaintiff claims against the defendant, as solicitor for the plaintiff, for damages arising from the negligence and breach of contract of the defendant in relation to the conduct of conveyancing transactions involving properties at Castlerock and Ballymoney in 2007. Mr McNulty QC and Mr Coyle appeared for the plaintiff and Mr Good QC for the defendant.

[2] The plaintiff and her late husband David Baird, who died suddenly on 5 September 2008, were clients of the defendant who acted as their solicitor in relation to the sale of 103 Charlotte Street, Ballymoney and the purchase of 3 Belvedere Avenue, Castlerock. I shall refer to the plaintiff and her late husband as Mrs and Mr Baird and together as the Bairds. The Castlerock property was purchased by the Bairds as a home for their disabled son Gareth. The Bairds consulted the defendant in May 2007 in relation to the transactions. Mrs Baird's evidence was that the Bairds considered the sale and purchase to be interdependent transactions. However, the purchase of the Castlerock property was not conditional on the sale of the

Ballymoney property. The purchase of the Castlerock property was completed. A proposed sale of the Ballymoney property did not proceed and no sale of the Ballymoney property took place. Accordingly, the Bairds retained both the Castlerock property and the Ballymoney property.

[3] The purchase price of the Castlerock property was £385,000. The Ballymoney property, the matrimonial home, was valued in excess of £1M and subject to a mortgage with the Nationwide Building Society in the sum of £155,000. The Bairds met the defendant in his office on 7 May 2007.

[4] The Bairds attended the Ulster Bank on 11 May 2007 and sought £385,000 from the bank, which was refused. However, on 15 May 2007 the bank offered £540,000, being the amount of the purchase price of £385,000 together with the amount of the mortgage of £155,000 which the bank proposed to discharge in order to obtain a first charge on the matrimonial home. The Bairds accepted this offer. The Bairds met the defendant in his office on 18 May 2007.

[5] The Bairds met the defendant again in his office on 22 May 2007. On 25 May 2007 the defendant gave undertakings to the bank that any sums received would be applied for the purpose of discharging the existing mortgage and acquiring the new property and paying any necessary costs; secondly, that the defendant would hold the documents of title of the properties in Ballymoney and Castlerock to the order of the bank; thirdly, that the defendant would pay over the net proceeds of sale of the Ballymoney property when received; fourthly, the defendant would advise of any subsequent claim by a third party upon the net proceeds of sale. Completion of the purchase was on 29 May 2007.

[6] On 6 June 2007 the Baird's estate agent confirmed an offer on the Ballymoney property of £1.275M with completion anticipated on 27 July 2007. Completion did not take place. A response could not be obtained from the proposed purchaser. By August 2007 the defendant considered that the sale had fallen through, although there was no contact from the prospective purchaser to state that the purchase was not proceeding.

[7] On 12 June 2007 the Bairds agreed to purchase a further property at Semicock Road, Ballymoney for the sum of £300,000. This property was intended to be the replacement matrimonial home. The purchase of the Semicock Road property was conditional on the sale of the Ballymoney property and did not proceed when the Ballymoney property was not sold.

[8] There was a meeting between the Bairds and the defendant in the offices of the defendant on 7 May 2007 where the proposed transactions were discussed. There was a further attendance at the defendant's office on 18 May 2007 when the Bairds signed for the purchase of the Castlerock property. The defendant's evidence was that on that occasion there had been an agreement to the purchase subject to the

Ulster Bank finance and a general discussion about the Ballymoney property. That discussion concerned what the Bairds were going to do if the transactions did not go according to plan. There was some discussion about Mr Baird's circumstances. He was a member of the police and was entitled to the Patten retirement payments. The defendant's evidence was that Mr Baird said that he had been red circled for extra service without reducing the Patten payments and so he might continue in the police. There was said to have been some discussion about the prospect of selling Castlerock if that were necessary.

[9] Mrs Baird's evidence was that these discussions did not take place at the meeting of 18 May 2007 but occurred on a later visit to the defendant's offices when matters were not going according to plan. She placed that meeting around September 2007. Her evidence was that there was no discussion about the consequences of the Ballymoney property not selling at the meeting of 18 May 2007.

[10] Another meeting took place between the Bairds and the defendant in the offices of the defendant on 22 May 2007. This was at a time when the defendant's undertakings to the bank were being considered and the bridging finance was being discussed. The Bairds had already been to the Ulster Bank in Strabane to discuss the details of the finance. The defendant's evidence in relation to this meeting was that he took the Bairds through the undertakings and the loan agreement and the main terms of the loan. Mrs Baird's evidence was that at that meeting the defendant did not discuss the consequences of the Ballymoney property not selling. The Bairds signed the agreement and authorised the defendant to give the undertakings.

[11] The plaintiff's pleadings were amended to claim that the defendant should have given advice to the Bairds in relation to life assurance for Mr Baird in the event that he might have died and left Mrs Baird without funds to discharge the loan to the Ulster Bank. There was discussion with an Ulster Bank official, Mr Chris McGuinness, about life assurance. In August 2010 Mrs Baird made a complaint against Ulster Bank about the lack of advice on life assurance for the bridging loan. An Adjudicator's report that was prepared in response to the complaint by Mrs Baird found that life cover was discussed between Mr McGuinness and the Bairds and that the Bairds were said to have considered it to be unnecessary to provide for life cover in respect of the loan. The reasons given by the Bairds for declining life assurance were stated in the report to be that if they experienced any financial difficulty they would consider the sale of the Castlerock property; secondly, that a contract had been signed for the Ballymoney property and so there was not a concern; thirdly, that Mr Baird had death in service and pension provisions and was due a lump sum upon his retirement, which was imminent.

[12] Mrs Baird did not agree that the discussions referred to in the Adjudicator's report occurred when the loan was arranged in May 2007. She placed the discussions referred to by the Adjudicator at a later date. In relation to the suggested contract for the sale of the Ballymoney property Mrs Baird did believe at

one stage that a deposit had been paid in respect of the purchase of the Ballymoney property. Her evidence was that her husband had reported this to her after Mr Baird and their son had had discussions with the defendant in his office in August or September 2007. The defendant agreed that a meeting had taken place with Mr Baird and his son but denied that he had told Mr Baird or his son that a deposit had been paid, nor was a deposit ever paid. However, whatever was said at the meeting it occurred in August/September 2007 and Mrs Baird had no reason to believe that a contract had been signed before that date. Although Mr McGuinness left his post there were later discussions between Mr McGuinness and the Bairds. I am satisfied that any discussion with Mr McGuinness about the existence of a contract for sale of the Ballymoney property as a reason for not arranging life assurance must have occurred after the August/September meeting with the defendant.

[13] The solicitor's duties arise from the terms of the retainer. Where the solicitor does not commit the terms of the retainer to writing that solicitor will be at a disadvantage. I conclude that the implied terms of the retainer were to complete the purchase of the Castlerock property, to complete the sale of the Ballymoney property, to complete the purchase of Semicock Road, to treat the transactions as connected and to advise in relation to the financial arrangements, the undertakings and the risks relating to default in the completion of the connected transactions.

[14] Expert evidence was given by solicitors, namely Brian White on behalf of the plaintiff and Maurice McIvor on behalf of the defendant. Mr White and Mr McIvor gave evidence concurrently in what is becoming a more common method of dealing with expert evidence.

[15] While expert opinion evidence will be admissible as a matter of law on the question whether a professional defendant was negligent, in relation to a solicitor as defendant, the courts in England and Wales have limited the manner in which one solicitor may give evidence criticising or defending the conduct of another solicitor. The reasons were stated by Oliver J in Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp [1979]Ch 384 at 402B-E and approved by the Court of Appeal in England and Wales in Bown v Gould & Swayne [1996] PNLR 130 at 135 B-D. -

“Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence that really amounts to no more than an expression of opinion by a particular practitioner had he been placed hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses view of what, as a matter of law, the solicitor's duty was in the particular circumstances

of the case is, I should have thought, inadmissible, for it is the very question which it is the court's function to decide."

[16] *Flenley and Leech on Solicitors Negligence and Liability* 3rd edition, at page 80 states that it is now settled that leave to adduce expert evidence will not be given in solicitors' negligence cases unless that evidence goes to a professional practice and the existence or scope of that practice is genuinely relevant to an issue in the action. *Jackson and Powell on Professional Liability* 7th edition, at page 222 refers to solicitors' negligence cases as an instance where supportive expert evidence is not necessary for a finding of negligence. The rationale is stated to be that that the courts themselves possess the necessary professional expertise to decide the question. In Bown v Gould and Swayne Millett LJ commented that if a judge needed assistance with regard to conveyancing practice the proper way was to cite the relevant textbooks. The footnote records that in May v Woolcombe Beer and Watts [1999] PNLR 283 expert evidence was admitted in relation to conveyancing matters where there was no answer provided by textbooks.

[17] In the House of Lords in Moy v Pettman Smith [2005] UKHL 7 Lord Hope and Baroness Hale expressed notes of caution in connection with a claim against a barrister in dealing with the compromise of a medical negligence action. Lord Hope stated -

"Where a claim is brought for professional negligence the court will usually expect to be provided with some evidence to enable it to assess whether the relevant standard of care has been departed from. No such evidence was adduced in this case. Judges, recalling how things were when they were in practice, no doubt feel confident that they can do this for themselves without evidence. But judges need to be careful lest the decision in the case depends on the standard they would set for themselves. If this were to happen, it would vary from judge to judge and become arbitrary."

[18] I apprehend that there has been more flexibility about expert evidence in Northern Ireland than in England and Wales, both under the Rules (where there is no obligation to apply to the Judge for directions in relation to an expert report) and in practice (where expert reports appear to be more readily admitted at a late stage, subject to the capacity to respond by the opposing party) and in relation to the use of solicitors' expert reports in solicitors' negligence actions. Of course, the expert opinion must not be permitted to supplant the judgment of the Court. The expert should give an objective view of the professional standard and not adopt a subjective approach by outlining what they would have done. However, the necessary expertise cannot be assumed to be reposed in the Court. There may be instances where the circumstances giving rise to the claim for negligence are aligned to the professional experience of the Judge. There will be cases where that is not so.

It may be many years since a Judge was in practice. There may be no experience of the particular field in issue. Textbooks may be incomplete in respect of details required to determine the relevant standard of care and whether there has been a departure. In solicitors' negligence actions I recognise the constraints referred to in the English authorities and the assistance that may be obtained from solicitors' expert evidence. I received the expert evidence of Mr White and Mr McIvor.

[19] Mr White posed two questions on the basis of the plaintiff's pleaded case against the defendant. Was the defendant in breach of the duty of care and skill owed as a solicitor for the Bairds if he failed to give adequate or any advice on the risks, first of all, of entering into a contract for and completing the purchase of the Castlerock property before an unconditional contract for the sale the Ballymoney property existed and secondly, of agreeing and drawing down a bridging loan for the purchase of the property and redemption of the mortgage before an unconditional contract for the sale of the Ballymoney property. On the added issue concerning life assurance Mr White referred to the risks of entering into contracts with mortgage facilities, the inexperienced clients and the general duty of explanation to the clients.

[20] Mr White stated his opinion that the defendant was in breach of the duty of care and skill owed by him to the plaintiff in failing to point to the risks of contracting and completing the purchase before any contract had been concluded on the sale of the Ballymoney property. In respect of the bridging finance Mr White referred to the Home Charter Scheme operated by the Law Society and the suggested written advice to be offered to clients. He stated his opinion that the defendant was in breach of the duty of care and skill owed by him to the plaintiff in not pointing out that, upon any failure in completing the sale, the Bairds would be left with the two properties and the loan account of well over three times the amount of their existing obligations with an unattractive interest rate and subject to withdrawal of the facility at short notice. He identified a number of respects in which the defendant's conduct was less than reasonably competent. First of all, the practical and financial consequences of the collapse of the sale, secondly the risks of entering into the unconditional contract, thirdly the effect of the undertakings given by the defendant, and fourthly failing to make the Bairds aware of the continuing obligations that arose if there were no sale. All these matters are variations on the theme of advice on the risks arising as a consequence of no sale.

[21] Mr McIvor for the defendant made the criticism that the defendant failed to record details of meetings with the clients and advices provided at meetings. He referred to there being no evidence in the papers to suggest that the purchase of the Castlerock property was dependent on the sale of Ballymoney property. It is the case that the purchase was not made conditional on the sale. However, it is plain that the transactions were connected. Further it is self-evident that ultimately the success of the Baird's scheme required the sale of the Ballymoney property. Mr McIvor stated that the defendant was required to provide advice to the Bairds in

relation to the terms of the bank agreement and to obtain their authority to give the undertakings. I am satisfied that the defendant complied with those obligations by his advice on the terms of the bank agreement and the undertakings.

[22] However, Mr McIvor rejected any duty on the defendant to warn the Bairds about what he described as the self-evident risks of the commercial arrangements made by the Bairds. This is the essence of the differences between the two experts because on the one hand Mr White refers to the risks that ought to have been articulated to the Bairds and Mr McIvor refers to the risks as self-evident and as being commercial matters that it was not necessary for a solicitor to explain to clients.

[23] The duty of the defendant was to perform what he was retained to do as a reasonably competent practitioner would have done having regard to the standards normally adopted by the profession. Flenley and Leech at paragraph 443 states in relation to the solicitor acting for the purchaser that in general the solicitor has no duty to inform the client if the purchase of the property which he or she is to make will be unwise or commercially imprudent. Undoubtedly that is the case. The commercial wisdom of the transaction is not the province of the solicitor. Further, the advice which would be required by a first time buyer with no legal experience whatsoever may differ from that required by a client who is an experienced businessman who is moving house for a second or third time. The Bairds would have fallen somewhere in the middle of that spectrum as they were not first time buyers nor were they experienced business people.

[24] Flenley and Leech refers to the English Law Society's Conveyancing Handbook and the Law Society Conveyancing Protocol applicable to residential conveyancing. The handbook contains a checklist of questions for solicitors acting for a buyer and sets out the matters on which the Law Society expect practitioners to advise buyers and that includes insurance. A footnote refers to Knight v Temperville Woodbridge (18 March 1999 unreported). I was not able to find a copy of the decision. It is stated that where the Defendant solicitors were found in breach of duty in failing to confirm that life assurance was in place before exchange of contracts. It is stated to be an open question whether the court will accept a failure to comply with the handbook as evidence of negligence or compliance as discharge of the duty of care and that this may well depend on the circumstances of the case.

[25] The equivalent Law Society publication in Northern Ireland is the Home Charter Scheme. The Home Charter is based on the Solicitors' Practice (Amendment) Regulations 2000 by which the Council of the Law Society of Northern Ireland made the Regulations for the purposes of Article 26 of the Solicitors' (Northern Ireland) Order 1976 to amend the principal regulations, the Solicitors Practice Regulations 1987. The schedule to the 2000 Amendment Regulations contained a Code of Practice and associated forms.

[26] Regulation 8A of the 1987 Regulations states that where a solicitor is acting in the sale or purchase of domestic property the solicitor shall comply with the Code of Practice and associated forms. The Code of Practice and the associated forms are known as the Home Charter Scheme. Regulation 8C provides that where there is a failure to comply with regulation 8A it shall be an adequate defence to establish that the failure arose from the written instructions of the client.

[27] The introduction to the Home Charter Scheme states that the pack contains material designed to be of assistance in securing compliance with the scheme standards as formally prescribed from 1 January 2001 by the Solicitors' Practice (Amendment) Regulations 2000. The text of the Code of Practice provides that a solicitor acting for a vendor or purchaser shall write to the client setting out terms of business and enclosing the information in Form 2. Further the solicitor for a purchaser shall advise the client of the consequences of any mortgage involved, a suggested form of letter being Form 5.

[28] Form 2B contains information to be sent to clients and sets out the work involved in selling and buying houses. Under the heading 'Mortgages' it is stated in capitals -

"In every case where you receive an offer of loan from a lender you should study it carefully and speak to your solicitor to ensure that you understand it. If the loan is not repaid the lender has the right to take the property from you and sell it. This right may only be exercised in certain circumstances and if you at any time in future have difficulty repaying the lender you should immediately consult your solicitor."

The text then explains a repayment mortgage and an endowment mortgage and states that there are other types of savings plans available and advises the clients to talk to their solicitor so that they know precisely all the consequences of each choice of mortgage.

[29] Form 5 contains the suggested form of letter to clients and sets out that it is important to understand that the arrangement between client and lender is a business transaction which imposes legal duties on the client, the most important being that the client is required to make regular monthly payments of the amount and at the time specified by the bank or the building society and that if the payments are not made the clients are at risk of losing their home. Particular direction is given in relation to the lender's letter of offer in that the client should study what it says about the insurance of the structure of the property; should remember to take out separate insurance to cover the contents of the house; should consider that it may also be wise to take out some kind of life insurance so that in the event of death the

mortgage would be paid off and that this is something the solicitor would be happy to discuss with the client.

[30] To the legal world all this may be self-evident but to the lay world it may not be and, of course, the Law Society considered it appropriate to require the solicitor to provide the client with written advice to that effect.

[31] Strictly speaking the present case did not involve a mortgage but rather short term bridging finance, although there was a charge on the Ballymoney property for the amount of the bridging finance.

[32] The defendant did not send any forms or their equivalent to the Bairds, took no attendance notes of the visits of the Bairds and made no record of any of the discussions at the meetings that took place. I find that it is common in the cases that come before the Court that the solicitor has neglected to make any attendance note and is relying on memory. The importance of maintaining a record of discussions with clients cannot be emphasised too strongly. Another feature that is common in these cases is that the absence of records is accompanied by, and presumably arises out of, a familiarity between the solicitor and client that induces informality in their professional dealings.

[33] Was the defendant duty bound to advise the Bairds on the risks inherent in the transactions? By advice on risks is meant advice on the consequences of any default in achieving what the transactions were designed to achieve. One such risk was the Ballymoney property not selling within the period of the bridging loan or at all. With an unconditional contract for the purchase and bridging finance to be drawn down to fund the purchase and the defendant being required to give the undertakings, the absence of a sale had significant consequences. Another risk which added to the prospect of adverse consequences and which must have seemed remote at the time was that of the death of Mr Baird as the income provider who serviced the bridging finance.

[34] I am satisfied that the duty of the defendant extended to the provision of advice to the Bairds about the above risks inherent in the transactions. These advices ought to have been given at the outset in May 2007 before the Bairds were committed to the purchase. The opportunity arose at the May meetings. The defendant says that he discussed the risks at the meetings, including the consequences of a failure to sell the Ballymoney property. Mrs Baird says that this did not happen until a later date. There are no notes from the defendant and nothing to verify that his memory is correct. I am satisfied that the defendant did not discuss the consequences of a failure to sell at that time. The Home Charter sets out the nature of the information that should be imparted to the client when the Regulations apply. I am satisfied that that sets a standard that applies in the circumstances of the present case. I am satisfied that the defendant was in breach of

duty in failing to provide the appropriate advice in a timely manner about the consequences of a failure to sell the Ballymoney property.

[35] In relation to the issue of life assurance I accept that the discussion between the bank and the Bairds probably came later than May 2007. Again there are no notes but Mr McGuinness stated that the Bairds had relied on there being a contract in place for the sale of the Ballymoney property as a reason for the Bairds not taking out life assurance. The Bairds' belief that a contract was ever in place was mistaken. However, there was a time when the Bairds believed that there was a contract in place, not in May 2007 when they were discussing the terms of the loan but probably in September 2007. I am satisfied that any reasons they had for rejecting life assurance in May 2007 could not have included reference to there being a contract for sale of the Ballymoney property. I conclude that the subject was not discussed at that time. One reason the Bairds did not undertake the life assurance at the later date was the belief that a signed contract for the sale of the Ballymoney property made it unnecessary to do so. Other reasons related to the prospect of funds from a resale of the Castlerock property or of death benefit or a retirement lump sum being available. Even if the defendant had advised on life assurance at the commencement of the exercise I am satisfied that the Bairds would probably not have accepted that it was necessary to obtain life assurance.

[36] As to the alleged sale of the Ballymoney property and the payment of a deposit, I am satisfied that the defendant did not report that a deposit had been paid. There was really no reason for the defendant to tell the Bairds that there was an agreement and a deposit paid when that was not the case. Mrs Baird believed, as a result of statements made by her husband and her son, that they had been told this by the defendant in his office. I am satisfied that this report must have been based on a misunderstanding by the husband and the son of what the defendant had said. In any event it does not have any bearing on the issue in the case which turns on the nature of the appropriate advice from the defendant.

[37] The result is that I am satisfied that there was a breach of duty by the defendant and that the breach of duty occasioned loss to the Bairds. I am not satisfied that life assurance cover for Mr Baird would have been undertaken in any event.

[38] There will be judgment for the plaintiff with damages to be assessed.