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*(subject to editorial corrections)**

2009 No: 01958

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL)**

Between:

HEATHER BAIRD

Plaintiff/Respondent;

-and-

**STEPHEN W R HASTINGS
PRACTISING AS HASTINGS & COMPANY, SOLICITORS**

Defendant/Appellant.

Before: Girvan LJ, Coghlin LJ and Horner J

GIRVAN LJ (Delivering judgment of the court)

Introduction

[1] This is an appeal by the appellant Stephen W R Hastings practising as Hastings & Co, Solicitors ("the Solicitor") against judgments of Weatherup J delivered on 7 August 2013 and 29 May 2014. In these proceedings the respondent, Mrs Baird ("Mrs Baird") claimed damages against the solicitor for negligence and breach of contract in relation to his conduct of conveyancing transactions in 2007 on behalf of Mrs Baird and her late husband, Mr Baird, who died on 5 September 2008. In the first judgment Weatherup J found a breach of the professional duty of care owed by the solicitor to Mrs Baird and her late husband in that he had not provided advice in a timely manner about the potential consequences of the Bairds failing to sell their property. In his second judgment he found in favour of Mrs Baird on the issue of causation and determined the level of damages recoverable by Mrs Baird. Neither the Solicitor nor Mrs Baird challenged the judge's quantification, if damages

fell to be awarded. In this appeal the Solicitor challenges two main aspects of the learned judge's findings:

(a) firstly, he challenges the finding that he was guilty of a breach of his duty of care, it being argued on his behalf that Mr and Mrs Baird knew of the risks of proceeding as they did because such risk was self-evident; and

(b) secondly, he challenges the trial judge's finding on the issue of causation, namely that the breach of duty occasioned the loss suffered by the Bairds as quantified. It is the Solicitor's case that there was no evidence that the Bairds would not have proceeded as they did even if they had been provided with the advice on the risks involved in the transaction as found by the trial judge.

[2] Mr Good QC appeared with Mr McMahon on behalf of the solicitor. Mr McNulty QC and Mr Coyle appeared for the respondent. We are grateful to counsel for their helpful and detailed written and oral submissions.

Factual Background

[3] The Bairds owned and lived in a dwelling house at 103 Charlotte Street, Ballymoney ("the Ballymoney property") which was subject to a mortgage with Nationwide Building Society having a redemption figure in 2007 of £155,000. Around 2006 they considered making alterations to the property for their disabled son but they became aware that the property, which had a large garden, had development potential. They decided to sell the Ballymoney property and to buy a bungalow for their disabled son and a replacement dwelling house for themselves.

[4] According to Mrs Baird's evidence estate agents were instructed in January 2007 in respect of the sale of the Ballymoney property which was offered on the market in April/May 2007 for an asking price of offers over £1m. It appears that there was an initial bid of £1.05m on the property which was either not recommended to or accepted by the Bairds. The Bairds were led to believe by the estate agent that the sale of the Ballymoney property would be done and dusted by July 2007. The Bairds began to look for a house for their son. They identified a suitable property at 3 Belvedere Avenue, Castlerock ("the Castlerock property") on which they were prepared to put an offer of £385,000 which was well above the original asking price. They sought funding for the purchase from the Nationwide but this was not successful. They then contacted the Ulster Bank ("the Bank").

[5] On 7 May 2007 the Bairds met with the Solicitor in his office to discuss the Ballymoney and Castlerock transactions. On 11 May 2007 the Bairds attended at the Bank. They sought mortgaging finance of £385,000 to enable them to purchase the Castlerock property. The Bank was not prepared to advance that amount secured by a mortgage but on 15 May 2007 the Bank offered a bridging financial arrangement which amounted to an offer of £540,000 to cover the purchase price of £385,000 for the Castlerock property together with the redemption figure of £155,000 which the

bank proposed to discharge in order to obtain a first charge on the Ballymoney property. Mrs Baird understood from Mr McGuinness, acting on behalf of the Bank, that this was a bridging loan to tide them over until the sale of the Ballymoney property. The Bairds understood that the interest would be added to the principal debt ("rolled over") and that interest would not have to be paid on a periodic basis. It should be noted that Mr Baird's income was such that he would not have been in a position to actually pay monthly interest on the principal sum. The Baird's accepted the offer.

[6] On 18 May 2007 the Bairds met the Solicitor in his office. At this meeting the Bairds signed the offer to purchase the Castlerock property. The purchase was not made conditional on the sale of the Ballymoney property. The Solicitor's evidence was that there was an agreement to purchase the Castlerock property subject to the Bank finance and he claimed that there was a general discussion about the Ballymoney property which concerned what the Bairds were going to do if the transactions did not go according to plan. He also alleges that there was discussion about Mr Baird's circumstances. He was a member of the PSNI who was eligible for voluntary severance payments under the Patton Scheme. The Solicitor's evidence was that Mr Baird said that he had been "red-circled" for extra service without reducing the Patton payments and so he might continue working for the police. He also said that there was some discussion about the prospect of selling the Castlerock property if that were necessary. Mrs Baird's evidence contradicted the Solicitor's evidence. She said that such discussions did not take place at the meeting on 18 May but occurred on a later visit by which stage matters were not going according to plan. She placed that meeting around September 2007. Her evidence was that at the meeting of 18 May 2007 there was no discussion about the consequences of the Ballymoney property failing to sell. This conflict of evidence is of significance in the case and we refer to it in greater detail below.

[7] On 22 May 2007 the Bairds again met the Solicitor in his office. The parties discussed the bridging finance offered by the Bank and the undertakings which the Bank would require the Solicitor to give. The Solicitor in his evidence said that he took the Bairds through the undertakings on the loan agreement and the main terms of the loan. Mrs Baird in her evidence said that the appellant did not discuss the consequences of the property not selling. The Solicitor accepted that he did not go through the provisions in the bridging agreement that dealt with default. The Bairds signed the loan agreement and authorised the Solicitor to give the undertakings.

[8] The loan was drawn down and the Solicitor gave undertakings to the Bank that any sums received would be applied for the purpose of discharging the mortgage on the Ballymoney House, acquiring the Castlerock property and paying any associated costs; that the Solicitor would hold the documents of title of both properties to the order of the Bank; that the Solicitor would pay over the net proceeds of sale of the Ballymoney property when received; and that the Solicitor would advise of any subsequent claim by a third party upon the net proceeds of sale. The purchase of the Castlerock property was duly completed on 25 May 2007.

[9] On 6 June 2007 the Bairds' estate agent confirmed an offer on the Ballymoney property of £1.275m with completion anticipated on 27 July 2007. Completion did not take place and the proposed purchaser would not provide a response. By August 2007 the Solicitor considered that the sale had fallen through although there was no contact from the prospective purchaser to state that the purchase was not proceeding.

[10] On 12 June 2007 the Bairds' agreed to purchase a property at Semicock Road, Ballymoney, for the sum of £300,000. It was intended to be the replacement matrimonial home. However, on this occasion the purchase of the Semicock Road property was made conditional on the sale of the Ballymoney property and it did not proceed when the Bairds failed to sell the Ballymoney property.

[11] The Statement of Claim was amended to add a claim that the Solicitor should have given advice to the Bairds on life assurance on the life of Mr Baird. When he died in 2008 Mrs Baird was left without funds to discharge the loan to the Ulster Bank. There had been some discussion between the Bairds and Mr McGuinness of Ulster Bank 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 prepared in response to the complaint found that life cover was discussed between Mr McGuinness and the Bairds and the Bairds were found 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 (a) if they experienced any financial difficulty they would consider the sale of the Castlerock property; (b) the contract had been signed for the Ballymoney property and so there was no ground for concern; and (c) Mr Baird had death in service and pension provisions and was due a lump sum upon his retirement which was imminent. Mrs Baird did not accept that the discussions referred to in the adjudicator's report occurred when the loan was arranged in 2007 and she placed those discussions at a later date.

[12] Mrs Baird understood that at some stage an indication had been given that a deposit had been paid in respect of the purchase of the Ballymoney property. She said that this was reported to her by Mr Baird after Mr Baird and his son had had discussions with the solicitor in his office in August of September 2007. The Solicitor agreed that a meeting had taken place with Mr Baird and his son but he denied that he had told Mr Baird or his son that a deposit had been paid. A deposit had never been paid. The trial judge found that the Solicitor had not stated that a deposit had been paid and that Mr Baird and his son must have understood what had been said. However, the trial judge considered that 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. The trial judge therefore considered that any discussions 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 August/September 2007.

The Solicitor's Duty of Care

[13] The trial judge considered the Solicitor's duty in the following terms. He said that the Solicitor's duties arise from the terms of a retainer. In this case no written retainer was provided. He considered 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 on the completion of the connected transactions.

[14] Two qualified solicitors, Mr White for Mrs Baird and Mr McIvor for the Solicitor, gave evidence. The difference between the two experts was that Mr White identified certain risks that ought to have been articulated to the Bairds whereas Mr McIvor considered that those risks were self-evident and it was not necessary for a solicitor to explain them to clients.

[15] Mr White's opinion was that the Solicitor was in breach of the duty of care and skill owed to the Bairds by failing to point to the risks of contracting and completing the purchase of the Castlerock property before any contract was concluded on the sale of the Ballymoney property and by failing to advise them that they would be left with two properties and a loan account of well over three times the amount of their existing obligations with an unattractively high interest rate and subject to withdrawal of the loan facility at short notice. Mr White referred to the Home Charter Scheme operated by the Law Society and pointed out that written advice should have been offered to the clients.

[16] Mr McIvor considered that there was no evidence in the papers to suggest that the purchase of the Castlerock property was dependent on the sale of the Ballymoney property. He stated that the Solicitor 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 to the Bank. He opined that there was no duty to warn the Bairds about what he described as the self-evident risks of the commercial arrangements which had been made.

[17] The trial judge set out the solicitor's duty in paragraph 23:

> "[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 page 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 business man who is moving house for a second or third time. The Bairds would have fallen somewhere in the middle of the spectrum as they were not first-time buyers nor were they experienced business people."

[18] The trial judge considered the Law Society's Code of Practice known as the Home Charter Scheme which refers to the Solicitors' Practice Regulations 1987. Regulation 8(1) requires solicitors to carry out their work and conduct their practice to the highest professional standards and to observe in relation thereto any decision or directions which may be adopted, issued or promulgated by the Council either to the solicitor personally or to the profession at large. Regulation 8A provides that where a solicitor is acting in the purchase or sale of domestic property for the purposes of Regulation 8(1) the solicitor shall comply with the Code of Practice and associated forms described as the Home Charter Scheme and contained in Schedules 1 and 2 of the Regulations. The solicitor for a purchaser is required to advise the client of the consequences of any mortgage involved and a suggested form of letter is prescribed by Form 5. Form 5 sets out that it is important to understand that the arrangement between the 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 directions are given in relation to the lenders 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. The trial judge noted that to the legal world all this might seem self-evident but to the lay world it may not and, consistent with this, the Law Society considered it appropriate to require the solicitor to provide the client with written advice to the above effect.

The judge's findings

[19] The trial judge found that while the purchase of the Castlerock property was not made conditional on the sale of the Ballymoney property it was plain that the transactions were connected. The success of the Bairds' plan required the sale of the Ballymoney property. This finding was inevitable on the evidence before the court. He found that the Solicitor did not send any forms or other equivalent documents to the Bairds, took no attendance notes of the meetings with the Bairds and made no record of any of the discussions that took place. This, he concluded, may have arisen out of a familiarity between the solicitor and the client which led to informality in

their professional meetings. There is no challenge to the judge's findings on this aspect of the case.

[20] In this appeal the trial judge's conclusions on the extent of the duty of care were very much an issue. The judge concluded that the absence of a sale of the Ballymoney house had significant consequences where there was an unconditional contract for the purchase of the Castlerock property, bridging finance to be drawn down to fund the purchase and undertakings to be given to the Bank. He concluded that advice on the consequence of a failure to sell the Ballymoney property ought to have been given at the outset in May 2007 before the Bairds were committed to the purchase. He concluded that this had not occurred at that time. The Home Charter Scheme set out the nature of the information that should be imparted to the client and the trial judge was satisfied that standard applied in the circumstances of the present case. He did conclude that there had not been a breach of duty in relation to advice on obtaining life assurance. He concluded that even if the appellant had advised on life assurance at the commencement of the exercise the Bairds would probably not have accepted that it was necessary to obtain it based on the reasons identified. There is no challenge in this appeal to the trial judge's finding in relation to life assurance.

[21] On the issue of causation the judge stated at paragraph [7] of the second judgment:

> "[7] The defendant failed to provide the necessary advice on the financial consequences of a failure to sell the Ballymoney property. Had such advice been given the plaintiff would probably not have proceeded with an unconditional purchase contract and in those circumstances the finance would probably not have been drawn down. The defendant's duty to advise on the risks was considered with the financial consequences of the actions to be taken. The assessment of the plaintiff's losses must be based on the limited scope of the duty, the reasonably foreseeable consequences of a breach of that duty and sufficient cause or connection between each item of loss and the subject matter of the duty."

The parties' submissions

[22] Mr Good QC on behalf of the Solicitor contended that the trial judge erred in finding that the appellant had been in breach of his duty of care because he failed to consider whether the Bairds knew of the risk of entering into an unconditional contract to purchase the Castlerock property. He submitted that the risk was blindingly obvious or self-evident. It is submitted that the Bairds were well aware of the risks. They knew that they would own both properties, that they would require bridging finance, that the loan and interest had to be repaid and that their ability to

do so depended on the sale of the Ballymoney property. The Bairds were prepared to take the risk because they were intent on purchasing the Castlerock property and did not foresee the collapse of the property market that would ultimately deprive them of the sale of the Ballymoney property. It was contended on behalf of the Solicitor that the judge failed to deal with the issue of causation in that he set out the correct test but failed to conduct any analysis of the facts. It was submitted that it is for the plaintiff to prove that if proper advice had been given she would have acted differently and there was no evidence that the Bairds would not have entered into the contract had they been advised of the risks of failure to sell the Ballymoney property.

[23] Mr McNulty QC on behalf of Mrs Baird argued that the evidence did not disclose any negotiation with the Bank on the terms of the bridging loan rather the bank offered it without negotiation. The evidence showed that Mrs Baird had limited knowledge or understanding of bridging finance and other rudimentary elements of the transactions. She was unaware of the threefold increase in debt liability, the increased burden of supporting two houses, the additional burden of an interest rate in excess of the nationwide liability and the loss of security that the discharge of the mortgage would produce rendering her vulnerable to the withdrawal of the facility by the bank at any time and the benefit of the statutory security. Further, the Solicitor's evidence to the effect that he had advised the Bairds on risks attaching to the unconditional contract which they were about to enter into suggested that he did not rely on the Bairds knowing that which is now asserted to be being blindingly obvious and self-evident. To meet the professional standards stipulated by the Law Society required compliance with the Home Charter requirements. The trial judge's conclusion that these lay clients may not have known the risks which had not been plainly and clearly explained to them was not surprising. The Bairds were not persons of commercial sophistication. They had modest ordinary domestic experience of property acquisition. It was for the trial judge to decide what the probabilities were having assessed the testimony and demeanour of the parties and the judge's conclusion on the issue of causation could not be challenged since it was a finding of fact.

[24] It was the plaintiff's case in paragraph 6 of the Statement of Claim that the Solicitor should not have permitted completion of the purchase of the Castlerock property or alternatively if he had allowed completion of the purchase of the Castlerock property he should have clearly and unequivocally warned Mr and Mrs Baird that the purchase of that property should be on a conditional basis and therefore the ability to finance the same was entirely dependent on the successful completion of the sale of the Ballymoney property. It is not for a solicitor to "permit" a client to enter into transaction or forbid a client from entering into one. His duty is to take instructions; to act in accordance with those instructions on behalf of his client; and to take reasonable care to advise and inform the client in relation to any material considerations which the client should take into account when deciding to undertake or proceed with a transaction. He can proffer his personal opinion if he is asked but in giving it he will be careful to stress that the decision must be that of

the client and before giving his opinion the prudent solicitor would be wise to advise the client to take expert advice from another expert if the question raised raises issue of matters of expertise on which the solicitor is not an expert.

[25] In paragraph 7 of the Statement of Claim it was pleaded that the Solicitor had a duty to warn and advise the plaintiff of the consequences of an unconditional contract which should not have been executed by the Bairds until there was at least an enforceable contract in relation to the Ballymoney property and more properly the certitude of a sale completing. In paragraph 8 it was alleged that Mrs Baird had not been advised that she was bound to pay bridging loan interest at an unfavourable rate at the time when the Bank was given undertakings in respect of the property. The interest rate payable to the Ulster Bank was considerably higher than a rate of interest on the mortgage to Nationwide. The particulars of negligence are set out in paragraph 11 of the Statement of Claim. These include a failure to warn the plaintiff of the risks of entering into an unconditional contract for the purchase of the Castlerock property; a failure to warn the plaintiff of the effect of the undertakings given to the Bank; a failure to make the purchase of the Castlerock property conditional on the sale of the Ballymoney property; a failure to make the plaintiff aware of her obligation to continue to discharge the bridging loan with the Ulster Bank even if the sale of the Ballymoney property did not proceed; a failure to give competent legal advice; allowing completion of the Castlerock property to proceed prior to the sale of the Ballymoney property; and a failure to provide any or adequate loan advice on the terms of the bridging loan.

[26] An important question of fact arose for determination in the course of the trial. The transcript shows that the Solicitor stated:

> "I also recall that I had a general discussion with (the Bairds) about, because at that stage on 18 May their own property at Charlotte Street, Ballymoney had not been agreed for sale. Clearly Mr Anderson was indicating a completion on 18 May. Mr and Mrs Baird were extremely keen to complete this property as a matter of urgency and as a consequence of that they would end up with having two houses and I had, I clearly remember a conversation with both of them whereby simply to say you will end up with two houses is I suppose in normal language obvious but I tried to go a stage further by saying the consequences of having two houses are what are you going to do if things do not go in the manner that you anticipate they will. I knew David was in the RUC. We discussed that he would be entitled to his Patton payment which would obviously create a relatively substantial capital sum. David indicated to me that he was red-circled, which was a term that I was unaware of until that conversation, and we had a general discussion about

> the concept of being red-circled which appears to be that you are in a job or in a position of special needs, special requirements and as such you are entitled to gain extra years of service without diminishing your Patton payment. In other words working on longer to continue to pay the liability and we certainly did, I suggested to him and also in any event you could always sell Castlerock and those conversations about working on, getting a Patton payment, selling Castlerock were all discussed at the time of the contract to ensure that they were absolutely clear that the consequences of this transaction was that they had two houses and I believed they understood, they were clear and I was happy that they understood the consequences of what they were doing."

He also went on to say:

> "I wanted to be absolutely sure that they were aware of the consequences of this step that they were doing which is committing to buy a second house without the first house either agreed or in any way started down the sales process."

He further said:

> "If you end up with two houses you may have to sell the one that you have just purchased, you have to work on, that you may have to use your Patton. I did not believe that they did not understand what was being said to them."

It was the evidence of Mrs Baird that no such advice was given before the Baird's bound themselves by a contract to buy the Castlerock property. Her evidence was that those discussions did not take place at the meeting on 18 May 2007 but occurred at a later stage when matters were not going according to plan. She placed the meeting around September 2007. Her evidence was that there was no discussion about the consequences of the Ballymoney premises not selling at the meeting on 18 May. In relation to the meeting of 22 May Mrs Baird's evidence was that the solicitor did not discuss the consequences of the Ballymoney property not selling. It was at that meeting at which the Bairds committed themselves to signing the contract.

[27] The trial judge at paragraph 34 of his judgment decided that he preferred the evidence of Mrs Baird. He was justifiably critical of the Solicitor failing to comply with the Home Charter requirements. The fact that the Solicitor failed to record in an attendance note advice given and matters discussed and failed to give written

advice would not of itself establish that the Solicitor had not given the advice or discussed the matter which he subsequently alleged took place. The absence of a note and the absence of compliance with the Home Charter mean that the Solicitor's evidence is not supported by any contemporaneous document. The absence of a note or correspondence tends to show that the Solicitor approached his professional duties in a slipshod manner. The trial judge in his judgment made an adverse finding against the Solicitor. That was not simply because of the absence of a note. The trial judge had the benefit of seeing and hearing the witnesses. There was evidence and material before the trial judge entitling him to prefer the evidence of Mrs Baird on this central issue.

[28] It is the Solicitor's case that even if the trial judge was correct in his finding of fact on this issue the Bairds must have known that they were committing themselves to a transaction carrying a risk that they could end up with the Ballymoney property unsold and that in that eventuality they would be left with a substantial financial liability. It was, Mr Good argued, blindingly obvious that there was that risk and the Bairds willingly undertook the risk. The Solicitor in his evidence proceeded on the basis that the advice that he claimed to have given the Bairds was necessary and appropriate advice. His evidence appears to amount to a recognition by him that such advice would have been appropriate and necessary. He did not make the case that he omitted to give such advice because it would have been blindingly obvious to the Bairds.

[29] As a solicitor advising a client in such a situation he would have been aware that the bridging finance arrangements were highly unusual. Bridging finance, he recognised, normally covers a financial loan advanced to cover the period between the completion of a purchase contract on property and the later completion of a sale contract of other property. That is say it normally arises when there are two binding contracts and the bridging finance covers the relatively short period between the commitment to complete the purchase of one piece of land and the obtaining of the funds arising from the sale of another. The arrangement in this case was quite different. There was no binding contract to sell the Ballymoney property. The bridging arrangement imposed a relatively high rate of interest (as compared to interest under traditional mortgage arrangements). It was time limited to six months. There was no guarantee that it would be extended beyond six months. Even if it was extended the rate of interest could very well increase and would still remain high and might not be rolled over, thus exposing the Bairds to an obligation to pay regular interest out of an income which would have been insufficient to fund such a high principal sum. Even in a rising market the sale of any property can always present difficulties and no assurance that a sale can be effected within a particular timeframe could be given. The Solicitor was aware of the income of the Bairds. He was aware of the family circumstances, that Mrs Baird was the carer of a handicapped son and that there was a need to ensure availability of accommodation. He failed to explain the default provisions of the bridging agreement and what consequences would flow from default in accordance with the terms of the bridging arrangement. He did not explain the effect of those terms on the potential living

arrangements of the parties or their financial commitments. None of those are matters which could be said to be necessarily self-evident to a lay client who was proceeding in an obviously very optimistic frame of mind induced by his estate agent's apparent assessment of the situation. In particular, it could not be said to be self-evident to Mrs Baird, a joint owner of the property without the benefit of separate advice, who on the evidence was simply a mother and carer.

[30] Accordingly, the trial judge did not in our view err in his conclusion that the Solicitor was in breach of the duty of care in failing to provide appropriate advice in a timely manner as to the consequences of a failure to sell the Ballymoney property.

Causation

[31] The case raised two separate issues, firstly, had Mrs Baird proved liability against the Solicitor and, secondly, if so, what was the appropriate measure of damages. There were two separate aspects to the first issue. Had Mrs Baird proved that the Solicitor was negligent or in breach of duty as a solicitor in the way in which he had advised or failed to advise Mrs Baird when she entered into the contract to purchase the Castlerock property and authorised the Solicitor to give the Bank the relevant undertakings? If so, had she proved that if properly advised she would not have entered into the transaction? In this context it is important to remember that the Solicitor was advising Mr and Mrs Baird. As pointed out by Stuart Smith LJ in Allied Maples Group Ltd v Simmons and Simmons [1995] 1WLR 1602 :

> "causation depends, not upon a question of fact, but on the answer to the hypothetical question, what would the plaintiff have done if .... the advice had been given"

In relation to the causation issue the trial judge's conclusion is clear but his reasoning is not. It is not apparent why this issue was not dealt with in the first hearing on liability or dealt with in the judgment on the liability issue. Following the first hearing a remedies hearing took place and it was in the course of the judgment arising out of that hearing that the judge stated he was satisfied that causation was established but he did not go on to analyse the evidence or provide a chain of reasoning which led to his conclusion. It is not clear whether any consideration was given to the question, whether any further evidence was necessary or should be called on the issue or whether the issue of causation was to be left to be decided on the evidence adduced at the first hearing. It may be simply that there is a lacuna in the evidence because the causation issue was not fully explored at the first hearing.

[32] In recent decisions of the Supreme Court (McGraddie v McGraddie) [2013] UKSC 12 and Henderson v Foxworth Investments Ltd [2014] UKSC 41) the Supreme Court has pointed out that appellate courts should exercise restraint in reversing findings of fact made at the first instance. In Henderson at paragraph 17 it stated:

> "In the absence of some other identifiable errors such as (without attempting an exhaustive account) a material error of law or the making of a critical finding of fact which has no basis on the evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that the decision cannot reasonably be explained or justified."

In this case it is difficult for this court to divine how the trial judge reached his conclusion on causation.

[33] In the context of professional negligence claims the issue of causation arises frequently in the context of cases raising questions of medical care and treatment, particular in the context of cases in which for example, a surgeon is alleged to have failed to give a patient a warning as to the risks of an operative procedure. A reasonable and important example of such a case is Montgomery v Lanarkshire Health Board [2015] UKSC 11 in which the question arose as to whether a diabetic patient was entitled to recover damages following the birth of a baby who suffered catastrophic birth injuries as a result of a natural delivery when the injuries could have been avoided if a caesarean section had been carried out. On the issue of causation both the Scottish trial judge and the appellate court held against the plaintiff. They concluded on the evidence that if the patient had been warned there was a small risk of injury with a natural birth she would not have elected for a caesarean delivery. On its analysis of the evidence, however, the Supreme Court rejected the lower court's conclusion on the issue of causation and held that causation was established. Lords Kerr and Reed giving the principal judgment of the court held that the doctor was under a duty to take reasonable care to ensure that a patient was aware of any material risks involved in any recommended treatment and of any reasonable alternative treatments. The test of materiality is whether in the circumstances of the particular case a reasonable person in the patient's position would be likely to attach significance to the risk or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it. Their Lordships pointed out that the doctor's advisory role involved dialogue the aim of which is to ensure that the patient understands the seriousness of the condition and the anticipated risks and benefits of the proposed treatment and any reasonable alternatives so that she was in a position to make an informed decision. The information given needed to be comprehensible.

[34] The doctor/patient relationship is not a full or true analogue of a solicitor/client relationship since the therapeutic duties owed by a doctor to a patient raises different questions from those arising between a solicitor and client. However, a solicitor is bound to take reasonable care to ensure that the client understands the material legal risks that arise in any transaction which the client has asked the solicitor to handle on his behalf. As in the doctor/patient relationship the test of materiality is whether a reasonable client would be likely to attach

significance to the risks arising which should be reasonably foreseeable to the competent solicitor. As in the medical context, the advisory role of the solicitor must involve proper communication and dialogue with the client.

Disposal of the appeal

[35] Bearing in mind that the advisory role of the Solicitor would have required dialogue, discussion and clear communication, in considering the question of causation the court must subject to analysis the question of how that dialogue would have been likely to develop if the Solicitor had been acting as a reasonable solicitor, what issues would have emerged, what questions the reasonable solicitor would have advised the clients that they needed to consider and what answers were likely to have been given if appropriate questions had been asked. While it might be tempting for this court to reach its own conclusions on whether causation was established in this case and while it is open to this court to draw inferences from established evidence we must recognise the importance of ensuring the integrity of the trial process at first instance before this court can properly uphold or overrule a decision in the court below. Without some further exposition of the analysis and reasoning adopted by the trial judge it is difficult for this court to reach a conclusion as to the sufficiency of the factual evidence and/or argument that provided a foundation for his inference as to causation. Against this background of a complete absence of analysis and reasoning and without being sure that the trial judge had properly considered the question whether further evidence or argument might be required on the causation issue we consider that justice requires that the issue of causation should be remitted to the trial judge to hear argument on whether any further evidence and/or submissions should or can properly be called and, depending on the outcome to those questions and in the light of anything coming to light as a result, he should give a reasoned explanation for his decision on the question of causation.

[36] We uphold the trial judge's reasoning on the first issue. We will hear counsel on the question of costs.