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Judgment: approved by the Court for handing down | *Delivered:* **15/2/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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2013 No. 129859

BETWEEN:

CAPITAL HOME LOANS LIMITED

Plaintiff;

-and-

HEWIT AND GILPIN SOLICITORS LIMITED
(SUED AS A FIRM)

Defendant.

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HORNER J

(A) INTRODUCTION

[1] The plaintiff claims damages against Hewitt and Gilpin, solicitors ("the Solicitors") alleging that it, and one of the solicitors working for it, Heidi Doogan, were guilty of breach of fiduciary duty, negligence, breach of contract, breach of trust and breach of retainer. Mr Gibson appeared for the plaintiff and Mr Good QC with Mr MacMahon appeared for the Solicitors. The court would wish to record its gratitude for the detailed and well-reasoned arguments both oral and written, advanced by counsel on each side. I have deliberately chosen in the interests of brevity not to record all the arguments addressed to the court. Both sides can be rest assured that I have taken them into account in reaching my conclusion.

[2] The case made against the defendant at trial can be briefly summarised as follows. The defendant and its employees have been guilty of breach of the CML Handbook ("the Handbook"), breach of the terms of its retainer, breach of its fiduciary duty and/or negligent. In particular it complained that the defendant had

failed to carry out its duties in respect of transactions involving 13 Dhu Varren, 9 Ballysillan Close, 10 Ballygomartin Drive, 20 Silverstream Drive, 74 Alliance Avenue, 13 Prestwick Park and 94 Ainsworth Drive ("the Properties") between Geoff Young ("GY") who owned the Properties and Nendrum Properties Limited ("Nendrum"), a company wholly owned by GY, who sold the Properties to Nendrum as part of a tax avoidance scheme.

[3] Essentially the plaintiff was funding the purchase of the Properties by Nendrum. The transaction took place in the Autumn of 2007 just as the property market in Northern Ireland was about to go into freefall. The plaintiff says that if it had known the true nature of the transaction, a matter about which the defendant was duty bound to inform it, then it would not have considered providing any finance to Nendrum. The deal would not have proceeded and the money it has lost because of the catastrophic collapse of the property market in general and, in the buy to let market in particular, would not have occurred. That loss, the plaintiff claims amounts to £325,848.99.

(B) BACKGROUND INFORMATION

[4] GY was the owner of the Properties. He had acquired them over the years with the assistance of financial support from Halifax Plc trading as BM Solutions ("BMS"). BMS had registered mortgages on all the Properties as security for GY's indebtedness. GY let these properties, mostly to private clients. However three were let to those in receipt of housing benefit. As property prices rose in value in Northern Ireland, so did the threat of CGT liability to GY. On the advice of his accountants, GY obtained an opinion from a specialist tax QC in London. As a consequence of the advice he was given, he decided to reduce his liability to CGT by:

(a) Transferring the Properties to Nendrum of which he was 100% shareholder and sole director;

(b) Applying for finance to fund each of the purchases, the funds being used to redeem the existing mortgage with BMS, to pay the stamp duty, land tax, registration fees and other outlay arising from the transaction.

[5] GY, its servant and agent, approached Tony Nixon who traded as T Nixon Associates, to act as its mortgage broker. The application form was completed and sent to the plaintiff. This form never found its way to the Solicitors. The form included the following information:

(a) The applicant was GY.

(b) The limited company was Nendrum.

(c) The Document is described as a "buy to let" mortgage application.

(d) It was not a regulated mortgage.

(e) It stated that with purchases, Section 7 was to be excluded and with re-mortgages, Section 8 was to be excluded.

(f) GY is described as a Director.

(g) Section 1(B) was completed which was the position if the application was being made in the name of a limited company.

(h) Section 1(B) was completed on the basis that Nendrum was owned 100% by GY and that it was a proposed borrower.

(i) The section in relation to the occupation was not completed consistent with the applicant being Nendrum.

(j) Nendrum is described in Section 3 as being in the business of property development and making £27,000 per annum.

(k) Section 5 is completed giving details of GY's net worth.

(l) Section 6 relates to a purchase and is not completed.

(m) Section 7 deals with re-mortgages and states that the purpose is to raise capital to pay of (sic) stamp duty.

(n) It is signed by GY. It is not signed by GY as a Director for and on behalf of Nendrum.

[6] On any view this is a contradictory application form containing as it does inconsistent information. For example, there can be no question of stamp duty arising on a re-mortgage. It is a document that at the very least a reasonably competent, careful lender would have made inquiries as to what exactly was involved, **if it had any doubt at all as to what was happening**. The plaintiff did say that some borrowers had difficulty distinguishing between themselves in a personal capacity and the companies which they owned and controlled. However there were enough clues in the application of who owned the properties and the nature of the transaction for a competent underwriter to understand that GY was transferring the Properties to Nendrum and hence, for example, stamp duty had to be paid.

[7] On 17 September 2007 the plaintiff wrote to the Solicitors requesting that they act on their behalf in the preparation and completion of a first legal charge. The plaintiff did so because the Solicitors were acting for Nendrum. It specifically reminded the Solicitors that the instructions were governed by the Handbook "and

our part 2 instructions which are available on the CML website". The plaintiff enclosed various documents. It noted:

> "If the borrower shown in the mortgage offer is a limited company, please refer to our CML Handbook, Part II requirements under Section 6.5.1."

[8] The offer of 17 September 2007 was to Nendrum. It set out in respect of each property inter alia, the following:

(a) An application had been made to re-mortgage the property.

(b) It was an interest only mortgage for 16 years.

(c) The proposed loan was substantially less than the value of the property.

(d) The joint and several personal guarantees of GY had to be executed in favour of the company in respect of the sums lent.

It is common case that the loan to value ("LTV"), that is the value of the Properties when compared to the proposed amount being lent to the plaintiff, was favourable in respect of each loan being less than 50% of the value of the Properties. Normally this would indicate that there was a low risk in lending the money because the security could be realised, if necessary and this would be more than adequate to cover the full amount of the secured debt plus interest.

[9] The Properties were purchased by Nendrum. The mortgages were registered in accordance with the retainer at the Land Registry in December 2007. However the balance of the purchase price was not paid in the form of cash, as would normally be the position. This consideration was provided in the form of issued share capital in Nendrum. This did not go through the Solicitors accounts. Mr Bloomfield, the expert witness for the plaintiff, says that this was highly unusual and irregular. Mr Molloy, expert witness for the defendant, says that there is nothing unusual about such a transaction and that it does occur regularly.

[10] It is also clear from the evidence that was led that in addition to part of the purchase price being paid in shares in Nendrum, the full amount of the consideration was not paid. Instead part of the loan from the plaintiff was used to discharge stamp duty due by Nendrum, and other outlay. The total outlay amounted to some 5% of the total consideration.

[11] The plaintiff is not a sub-prime lender. The court has no reason to doubt the plaintiff's claim that it was a responsible lender in the buy to let market. It did accept that part of the loan was used to pay off the cost of stamp duty which could not be a feature of a re-mortgage. Further advice given by the Solicitors about the

ground rent, namely that the plaintiff should seek a signed indemnity to cover up to six years of arrears of ground rent is similarly inconsistent with a re-mortgage.

[12] On 18 December 2013 the plaintiff's solicitor sent a letter of claim which contained a number of allegations:

(a) Instructions given by the plaintiff were for a re-mortgage of the Properties but they were in fact all sales from GY to Nendrum.

(b) The full purchase funds did not pass through the Solicitor's client accounts.

It demanded to see the ledger cards on or before 24 December 2013. A further letter of 29 December 2013 had stated that the plaintiff professed to be unaware that the transactions were purchases rather than re-mortgages. It pressed for proof that "full purchase monies have passed via the defendant's offices at client's account". On 2 January 2014 the Solicitors replied indicating that the consideration was set out in the transfer deeds and included the issue of shares in Nendrum. The plaintiff's Solicitors responded saying inter alia that it would not have provided finance if it had understood the true nature of the transaction. It demanded repayment of £445,199 plus interest, less payments received.

[13] King and Gowdy on behalf of the Solicitors replied on 7 February 2014 denying there had been a breach of trust and making it clear that there was no basis for a claim against the Solicitors. The plaintiff responded by issuing proceedings on 18 February 2014.

(C) THE EVIDENCE

[14] The plaintiff called Ms MacLeod as its main witness to provide the factual background to its claim. Her experience was gained originally as a mortgage interviewer, then as an assistant manager and finally as a deputy manager with the Cheltenham and Gloucester Building Society. She then worked as a mortgage consultant before commencing work as a Mortgage and Compliance Manager. She had since become a borrowing and recovery specialist with the plaintiff. In 2014 she became its litigation specialist. She gave evidence, which included the following facts:

(i) The plaintiff is not a sub-prime lender.

(ii) The plaintiff wanted to know where the funds for the deposit had come from so as to ensure that a customer had a personal interest in the property.

(iii) To her knowledge, although she had no experience with the plaintiff, underwriters were concerned when agreeing to underwrite a loan with

the Properties' value, its loan to value ratio, whether the rental income in respect of buy to lets was sufficient to discharge the interest which was accruing due, and the credit worthiness of the borrower.

(iv) The guarantee by GY was made a condition so that he had an interest in ensuring that future payments in respect of interest were met.

(v) The plaintiff had no idea that part of the consideration was to be shares in Nendrum. These would not have been acceptable to the plaintiff if it had known. The payment of £6,538.58 for legal fees was unacceptable as this counted as a cash back.

(vi) The plaintiff's lending book was closed in 2008.

(vii) The Solicitors did not see the application form.

[15] Ms MacLeod did not accept that what was occurring here was that GY was effectively re-mortgaging his property through a limited company, Nendrum. Nor did she agree that Nendrum received a £54,000 cash back. Although GY gave a guarantee, and on the face of it he had assets, and in particular an unencumbered house, no attempt was made to recover the plaintiff's losses from GY by enforcing the guarantee because of the cost of pursuing such a claim and the difficulty of recovery in the event of the claim being successful. As she frankly admitted a commercial decision was taken not to pursue him. This was in line with the general policy, which somewhat surprised the court, not to pursue such debtors in Northern Ireland. It seems that the plaintiff thought it would be less burdensome and more rewarding to sue the Solicitors who had acted on its behalf.

[16] During the course of her cross-examination the knowledge and attitude of the underwriter(s) who wrote this business was raised. Did the underwriters know that it was a sale to Nendrum and not a re-mortgage? Was the underwriter(s) prepared to overlook part-payment in shares because the undisputed value of the Properties far exceeded the money being lent? It would have been a simple matter to call the underwriter(s) who dealt with this transaction to bring definition and finality to these matters so the court could make a fair assessment of what the plaintiff actually knew. No such witness was called. This can only have been a deliberate decision by the plaintiff and/or its legal advisors.

[17] Ms MacLeod gave her evidence in a straightforward manner. She did her best to assist the court but was unable to deal with some aspects of what knowledge the plaintiff had of the transaction because she had had no personal involvement.

[18] Mrs Heidi Doogan told the court that she had joined the Solicitors in 2006 and had specialised in conveyancing and probate. She had acted for GY in purchasing Properties from 2007. She had been told by GY's financial consultant, Tony Nixon, that GY was going to transfer the seven buy to let Properties he owned to Nendrum

because he wanted to reduce his CTG liabilities. It was her retainer to put all the Properties into the name of Nendrum. This was in accordance with the tax advice obtained by GY's accountants, Falconer Stewart from Tax Counsel in London.

[19] Her instructions from the plaintiff were to act for it in preparing and completing a first legal charge. Those instructions were governed by the Handbook. She was given a spreadsheet of the properties belonging to GY dated 8 October 2007 and a questionnaire completed by GY in respect of the Properties to be mortgaged. There is an attendance note of 18 October 2007 relating to the purchase of ten properties from GY by Nendrum. On 8 November 2007 she wrote to Nendrum thanking it for instructing her to act in this purchase. She noted that the stamp duty would amount to over £50,000 and that requisition fees and searches would be almost £3,500 and that these fees would be discharged from a new loan from CHL which would be sufficient to pay off the old loans and meet the costs and also cover the costs of the Solicitors.

[20] On 8 November 2007 she wrote to GY about his sale of the properties at market value. She noted:

> "I understand that you will receive shares in Nendrum Properties Limited as payment for the Properties and that Nendrum's borrowing from CHL will finance the repayment of the existing mortgages on these Properties as well as stamp duty and other costs."

[21] She said that:

(a) There was an identity of interest between GY and Nendrum;

(b) Her approach would have been different if there had been an owner who was independent of GY.

However she acted on the basis that GY was selling to a limited liability company of which he was a Director and of which he was the sole beneficial owner.

[22] She thought nothing of the transaction which she considered akin to a re-mortgage. Alarm bells did not ring because shares were part of the consideration. She did accept that the Handbook stated that a sale should be treated differently to a re-mortgage. GY's name did not appear on letters to the plaintiff because it was an acquisition file and it was Nendrum who was acquiring the properties.

[23] She signed a Certificate of Title confirming that the plaintiff enjoyed a good marketable title in respect of all the Properties. A search carried out against GY confirmed that he was clear in respect of any bankruptcy. No criticism was made of the work carried out by Mrs Doogan in securing charges in favour of the plaintiff in

respect of all of the Properties. She does not accept that she failed in any way in the duties she owed as a solicitor to the plaintiff.

[24] She appeared to the court to give her evidence in a measured way. She did not appear to be untruthful or to make any attempt to gild the lily. The impression she gave was that she had acted as a conscientious solicitor and tried to do her best for her clients, GY, Nendrum and the plaintiff in this particular transaction.

(D) EXPERT EVIDENCE

[25] An expert witness is entitled to express his view about a matter within his expertise in respect of which the court does not possess the necessary expertise. The reasoning behind the admission of expert evidence is to ensure that the court can reach a fully informed decision. The following test set out by King CJ in the Australian case of R v Bonython [1984] 38 SASR 45. He said:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:
>
> (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
>
> The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

[26] In this case Mr Bloomfield gave evidence on behalf of the plaintiff. Mr Molloy gave evidence on behalf of the Solicitors. They gave evidence in respect of banking

practice. They are both well qualified in this area of the law. They both offered opinions on whether the plaintiff knew that this was a sale, as opposed to a re-mortgage, whether it should have known it was a sale rather than a re-mortgage, whether it knew that shares were part of the consideration of the transaction, whether it would have accepted shares or of the consideration if it had known, whether it would have accepted that there was a discount of the full consideration of 5%, and that this discount was going to be used to pay certain outlay. Necessarily both men were talking about the hypothetical because neither of them was involved at the time, neither of them had any actual knowledge and neither of them made the decision to lend money to Nendrum. What they were doing was in effect making educated guesses about how a reasonable underwriter might act given their extensive experience. But it was not necessary to have either of them speculate on these matters. Evidence was not available from the underwriter(s) to say:

(a) Whether he knew that this was a sale?

(b) If he did not know that it was a sale, whether he accepted that he should have known it was a sale?

(c) Whether he knew, or should have known that part of the purchase price was the issue of shares in Nendrum?

(d) Whether he knew or should have known that part of the loan was going to be used to pay outlay such as stamp duty and legal costs and that there would be a 5% discount approximately on the stated total purchase price?

(e) Whether the LTV was all important? As a consequence would he have relaxed the requirements that would normally have applied in accordance with the lending manual? For example by accepting shares as part of the consideration and/or by accepting a payment which amounted to only 95% of the purchase price.

[27] All this evidence was and remains available. It has not been offered to the court. Ms MacLeod could certainly not give it herself. She was challenged on the absence of evidence from an underwriter(s) who accepted this business. She was unable to offer a satisfactory explanation. But obviously a decision was taken not to call the underwriter(s) who was responsible for making this loan to Nendrum. In the absence of such a witness the court has had to rely on the unsatisfactory evidence of two expert witnesses about what might or might not have been the state of knowledge or the reaction to that knowledge by the actual underwriter(s). Unsurprisingly their speculation on these issues resulted in conclusions which for the most part were entirely favourable to their respective clients. I do not blame them. I do not criticise them. But in the search for the truth and for a just result, the assistance that experts can offer the court on this issue was marginal in the absence of direct evidence from the person(s) who actually underwrote the business.

[28] In truth the evidence of both experts was only necessary because the first hand evidence which was available was not adduced by the plaintiff. Indeed, had I been asked for a ruling as to whether any expert evidence was necessary my provisional view was likely to have been that at least the first part of question 1 posed by King CJ and referred to above, should be answered in the negative. Having heard all the evidence, I remain unconvinced of the necessity of hearing expert evidence at all in this claim. Needless to say such expert evidence has added to the length of the hearing. It will undoubtedly have increased the costs.

(E) DISCUSSION

The Liability

[29] In most cases it should not be necessary to make any distinction between the duties owed by a solicitor in contract and the duties owed by a solicitor in tort to a solicitor's client. A solicitor's general duty will be exercised with reasonable care and skill when acting for his client. "A normal retainer will confine the solicitor's duties to those matters of law which have been specifically referred and will exclude consideration of the commercial merits of any proposed transaction": see 17.36 of Dugdale and Stanton on Professional Negligence PN (3rd Edition) and 1.4 of the Handbook.

[30] When acting for a lender the primary task of the solicitor is to ensure that the lender obtains a good enforceable title to the property which will secure the lending: see 17.42 of Dugdale and Stanton on Professional Negligence.

[31] In Mortgage Express Limited v Bowerman and Partners (Firm) [1996] 2 All ER 836 Millet LJ at 845-5 said:

> "A solicitor who acts for both a purchaser and a mortgage lender faces potential conflict to duty. A solicitor acts for more than one party to a transaction there is a duty of confidentiality to each client, but the existence of this duty does not affect his duty to act in the best interests of the other client. All information supplied by a client to his solicitors is confidential and may be disclosed only with the consent, express or implied, of his client. There is therefore, an obvious potentiality for conflict between the solicitor's duty of confidentiality to the buyer and his duty to act in the best interests of the mortgage lender."

He went on to say, agreeing with Bingham MR, at 245E-G:

> "The question which the judge has to ask himself was whether a solicitor of ordinary competence could have regarded the information in question as information which might cause the (lender) to doubt the correctness of the valuation which they had obtained."

[32] Accordingly the test is whether a solicitor of ordinary competence would have considered the information he had obtained as being such that it would cause the lender to have second thoughts. Did the information, which was withheld, it is asserted, have a material bearing on the decision to lend?

[33] It is also important to remember that the solicitor is not a guarantor. In this case it was GY who guaranteed the transaction. As Laddie J said in Credit Lyonnais SA [2002] EWCH 1310 (Ch):

> "A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer …. He is under no obligation to spend time and effort on issues outside the retainer. However, if in the course of doing that for which he is retained, if he becomes aware of risk or a potential risk to a client, it is his duty to inform the client …. If a dentist is asked to treat a patient's tooth and on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. If in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk to the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him."

As Rougier J said in Gray v Buss Murton [1999] PNLR 882:

> "It is a solicitor's business to ascertain the client's business accurately bearing in mind the possibility that the client, through ignorance of the correct terminology, may not have corrected expressed it."

[34] It is against this legal background that it is necessary also to consider the terms of the retainer which include the original letter of instruction and the Handbook.

[35] The letter of instruction of September 2007 made it clear that the terms of the retainer were governed by the Handbook and specifically drew the solicitor's

attention to 6.5.1 of the Handbook in respect of the retainer to prepare and complete a first legal charge. The Handbook itself was discussed in considerable detail during the course of the hearing. The following are the material terms which were drawn to the attention of the court:

(i) 5.1.1 states:

> "Please report to us (see part 2) if the owner or registered proprietor has been registered for less than six months or the person selling to the borrower is not the owner or registered proprietor unless the seller is."

(ii) 5.1.2 provides:

> "If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrow (such as where the borrower has given …… information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of the conflict of interests, you must cease to act for us and return our instructions stating that you consider a conflict of interest has arisen."

(iii) 5.9 states:

> "You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrow is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see part 2) failing on which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest."

(iv) 5.12.3 states:

> "If you are aware that the title to the property is subject to a deed of gift or a transaction in an apparent undervalue completed within five years of the proposed mortgage then you must be satisfied that we acquire our interests in good faith and will

being protected under the provisions of Article 312 to 315 and 367 to 369 of the Insolvency (Northern Ireland) Order 1989 or the Insolvency (No.2) 1994. If you are unable to give an unqualified certificate of title, you must arrange indemnity insurance (see paragraph 9)."

(v) 6.3 provides that the purchase price for the property:

"Must be the same as set out in our instructions. If it is not, you must tell us (unless we say differently in Part II) if the contract provides for:

6.3.1.1 A cashback to the buyer; or

6.3.1.2 Part of the price has been satisfied by a non-cash incentive to the buyer. This may lead to the mortgage of her being withdrawn or amended."

(vi) Finally 6.3.2 provides:

"You must report to us (see part 2) if you will not have control over the payment of all of the purchase money (for example if it proposed that the borrow pays money to the seller direct) other than the deposit held by an estate agent or a reservation fee of not more than £500 paid to a builder or a developer."

[36] In the light of the requirements of the Handbook there are a number of matters that the plaintiff would reasonably expect the solicitor to have passed on and "feel understandably aggrieved if (she) did not". These are, given the correspondence between the Solicitors and the plaintiff, and the plaintiff's instructions:

(a) This was a sale by GY to Nendrum, a company owned and controlled by GY absolutely. It was not a re-mortgage. It was a sale and a mortgage. The Solicitors regardless of their view of the transaction and the state of their client's knowledge, should have spelt out in clear terms that this was a sale and mortgage.

(b) Part of the consideration involved shares in Nendrum. This was a matter that should have been drawn to the attention of the plaintiff for two reasons:

(i) The Solicitors could have no idea what the shares were worth. Further shares have the ability to change in value depending on the underlying assets and this can occur without warning.

(ii) The balance of the consideration for the sale was not going through the Solicitors' account.

(c) The full consideration was not being paid as part of the money being loaned by the plaintiff was being used to pay stamp duty and other outlay. There was a 5% discrepancy, meaning the sale was at an undervalue.

(d) The legal costs of GY were being paid out of the monies advanced by the plaintiff and this could amount to a "kick back".

In respect of the nature of the transaction, I am satisfied that the plaintiff's underwriting department knew that this was a sale of Properties by GY to Nendrum, a company he owned absolutely and not a re-mortgage of the Properties by GY or Nendrum. At the very least the underwriter must have turned the Nelsonian blind eye as to what was actually happening.

[37] The Solicitors sought to make the case that those matters at (b)-(d) would have been known to the plaintiff or should have come as no surprise to the plaintiff. It is simply not possible for this court to know what knowledge the plaintiff did have of the various elements of the transaction. But that does not really matter. The Solicitors should not be guessing at the plaintiff's knowledge. Ms Doogan should have expressly drawn all these relevant matters to the plaintiff's attention unless she could be wholly satisfied that the plaintiff already had the requisite knowledge. This was not the position here. In the circumstances I am satisfied that the Solicitors did not discharge their duties under the retainer to the plaintiff.

Causation

[38] It is impossible for this court to know what the plaintiff actually knew because relevant witness(es) were not called who could deal with this issue. There is considerable force in the suggestion made by Mr Good QC on behalf of the Solicitors that "only a hopelessly incompetent Bank could have missed the true nature of the transaction". I am satisfied that the plaintiff was not hopelessly incompetent and nor were those whom it employed. As I have recorded the plaintiff should at the very least have realised that this was not a re-mortgage, but a sale to a limited company. The court's view is that in the febrile atmosphere that existed at this time with a bull property market, apparently limitless credit and boundless optimism that property prices would continue to rise ever upwards, even if the plaintiff did not know and could not have known that this was a sale by GY to Nendrum, a company he controlled, it would still have lent the money secured on those Properties. At the very least the court does not know because a deliberate decision was taken not to call

the underwriter(s) responsible but instead to rely on someone not involved in the transaction, Ms MacLeod, and an expert who could not give first hand evidence. For the most part their evidence was contradicted by Mr Molloy, an expert called on behalf of the Solicitors, placing the court in an impossible position. There were so many clues and none of these were hidden. It is scarcely surprising that Mrs Doogan fell into error and did not inform the Bank of the obvious. However the reasonably careful and competent solicitor would have put this matter beyond doubt by correcting what must have appeared as an error in her original instructions.

[39] However there was more serious failures given the terms of the retainer to inform the Bank that:

(a) Part of the consideration was shares in Nendrum.

(b) The full consideration was not being paid.

(c) The legal costs of the vendor, GY, were being paid out of the money loaned by the plaintiff.

[40] The experts chose to give their opinion as to whether this information would have precluded the Bank from proceeding. It may be the underwriter was not called because the Bank did not want to concede that it knew full well the true nature of the transaction namely that it was a sale to a company controlled by GY and not a re-mortgage. However the court as a consequence was left to guess. The plaintiff must prove its case on the balance of probabilities.

[41] At the time of this transaction as I have recorded the market felt that the inexorable rise in the value of properties would continue with, at worse, a temporary stall. No one foresaw the catastrophic slump in the property prices that was about to engulf Northern Ireland.

[42] In this lending transaction the LTV was less than 50%. On the face of it the risks at that time, arising as they did from matters which the Bank may not have known, must have appeared modest. It is clear that the Bank in this transaction was prepared to relax its standards set out in its Lending Manual in respect of:

(a) Occupancy by DHSS tenants in respect of three of the Properties: see paragraph 4.5;

(b) The ratio of rental payments to interest after the concessionary period had expired: see paragraph 5.4.

As a consequence of the decision not to call the relevant underwriter(s) the court is left in the dark. Mr Bloomfield and Mr Molloy disagree on almost everything. Mr Molloy did however say that the plaintiff would not have proceeded to finance the Properties "knowingly at an undervalue". The court finds the evidence of

neither expert witness satisfactory because neither Mr Bloomfield nor Mr Molloy can know what the underwriter(s) knew or thought at the relevant time. The court does not even agree with the experts on the issue of whether or not the plaintiff would have continued to fund a transaction if it had known that there was to be a 5% discount on the full purchase price. I remain unpersuaded on the evidence that the plaintiff would have acted differently if it had known that there was to be such a discount, given the LTV and the general all pervasive optimism as to the future of the property market in Northern Ireland.

[43] In Goldsmith Williams Solicitors v E. Surv Ltd [2015] EWCA Civ. 1147 the Court of Appeal in England had to consider an appeal in respect of a re-mortgage. The complaint was that the solicitor should have reported to the lender matters coming to his attention which affected those interests of the lender which he was employed to safeguard, including the value and adequacy of security offered. Sir Stanley Burnton giving the lead judgment said that the judge had fallen into error. He said at paragraph 48:

> "It was for the Surveyors to establish that his Solicitors' breach of duty was a cause of the Lender's loss. It was of course open to the solicitors to adduce such evidence as they considered appropriate on the issue of causation, but it could not be held against them that they did not do so. It was for the surveyors to secure the evidence they required, if necessary, by the issue of a witness summons against a relevant witness. It also seems to me that the judge's finding that there was no evidence of a standard practice for an approving underwriter to conduct a thorough check including cross-referring all of the information in the mortgage application form against the valuation sits ill at ease with his earlier positive findings that an underwriter had scrutinised the information provided by the Borrower and nonetheless approved the loan in question.
>
> [49] Ultimately my view is that the judge did not have the evidence before him that enabled him to answer the question I referred to at [47] above. In my judgment, the Surveyors did not prove the Lender would have reacted to the information that the Solicitors should have provided on the purchase price and date of purchase of the property, which was not materially different from information given to them by the Borrower. I would allow the appeal on this ground."

[44] I agree. The onus must always be on the plaintiff to prove its case, and that includes proving causation. In my view this required the underwriter(s) to give evidence and satisfy the court that regardless of the generous LTV, the plaintiff would not have proceeded with this particular transaction if it had had full knowledge of all the actual details of what was happening. On the present evidence the plaintiff has failed to discharge the onus of proof on the issue of causation.

(F) FURTHER ISSUES

[45] If I am wrong to conclude that the plaintiff has not proved that the solicitor's breach of duty caused or contributed to its loss, then given the submissions made by counsel on behalf of both parties and in the event of an appeal, I set out briefly my views on the evidence on the issues of contributory negligence, duty to mitigate and quantum.

Contributory Negligence

[46] Obviously, the issue of contributory negligence does not arise given my conclusion that the plaintiff has not established that the solicitor's breach of duty caused or contributed to its loss. It follows that if I am wrong in that issue, then the plaintiff must have been hopelessly incompetent not to have known that there was a sale by GY to Nendrum and that is not my assessment of the plaintiff or its employees. It should also have known that part of the money being lent by it to Nendrum was being used, inter alia, to pay part of the vendor's costs and stamp duty and that the full consideration was not being paid.

[47] I have no hesitation in concluding that:

(a) The plaintiff was at fault;

(b) The fault was causative of the damage suffered by the plaintiff; and

(c) It would be just and equitable for the damages to be reduced to take account of that fault.

[48] Each case of contributory negligence turns on its own facts. There are many authorities in which a bank has been held to be substantially to blame for its loss and where the court has concluded that it is just and equitable that there should therefore be a substantial reduction in the compensation awarded to the bank. For example in Omega Trust Company Limited & Another v Wright Son & Pepper & Another (No.2) [1998] PNLR 337 Douglas Brown J reduced damages by 70% in respect of an award to the bank because it has fallen well short of the standard to be expected of a secondary bank of reasonable competence. For the reasons which I have given, the same criticism applies to the plaintiff. If it did not know of the true nature of the transaction, then that can only be explained by complete incompetence on the part of its employees and in particular those engaged in underwriting this business. I

consider that it just and equitable that the award should be reduced by 66.7% to take account of the contributory negligence of the plaintiff in entering into the transaction which, if its own expert is correct, it should have shunned.

Duty to Mitigate

[49] The plaintiff has on the face of it a clear claim under the guarantee given by GY in respect of Nendrum on the information before this court. The plaintiff has been able to offer no good reason why it is not sought to enforce that guarantee, other than some general policy of the plaintiff about taking proceedings against guarantors in Northern Ireland which makes no sense.

[50] While there is no reason to suppose GY would willingly pay on foot of the guarantee given to the plaintiff, the law in respect of guarantees in Northern Ireland is clear and is the same as that in England and Wales. This is a case of a director who owns a 100% of the issued share capital of a company guaranteeing that company's indebtedness to the bank. There is no question of undue influence. On the evidence before this court, I can see no impediment to the plaintiff being able to enforce the guarantee. Indeed, no grounds have been convincingly suggested by the plaintiff which would provide any defence to GY. Furthermore GY's home address is 30 Lisnabreeney Road, Belfast which he purchased for £400,000. Its value at the date of the guarantee was £700,000. There must therefore have been a reasonable prospect of the plaintiff being able to obtain judgment on foot of the guarantee and to enforce that judgment against GY. I must stress that is, of course, a provisional view and that it is expressed in the absence of any evidence from GY.

[51] The general rule is that a client in a solicitor's negligence case is not under any obligation to bring further proceedings to mitigate its loss: see Pilkington v Wood [1993] Ch 770. However in that case Harmon J said that the plaintiff was not obliged to embark on a "complicated and difficult piece of litigation". This is not the position here.

[52] It will be noted that in Western Trust and Savings Limited v Clive Travers and Co [1997] PNLR 25 a lender sued its solicitors for negligent advice in relation to a mortgage transaction. The court determined that it should have mitigated its loss by obtaining possession and selling the property. This was an ordinary feature of enforcing a security "and would have been necessary whether or not there were defects in security, as there in fact were": see 10-319 of Jackson and Powell on Professional Negligence (5th Edition). Dickinson v James Alexander and Co [1990] 6 PN 205 is an example where a plaintiff was found to be guilty of failing to mitigate her loss when she did not institute proceedings to vary a settlement order made in divorce proceedings.

[53] On the facts of this case the plaintiff should have mitigated its loss by seeking to enforce the guarantee against GY, rather than seeking to recover its loss in their entirety from the solicitors.

Quantum

[54] In fairness to the parties who made detailed submissions on the issue of damages, and in case this matter should go to an appeal, I will comment briefly on the issue of quantum.

[55] The fundamental principle is that the successful plaintiff should be put, so far, as money can do it, and subject to the rule of remoteness, in the position it would have occupied if the solicitor had fulfilled its obligations: see Livingstone v Rawyards Coal [1880] 5 App. Cas. 25 at 29.

[56] This issue of what is recoverable in damages from a defendant who has been found liable for breach of duty is a complicated subject. In Banque Bruxelles Lambert SA v Eagle Star Insurance Co Limited (SAAMCO) [1997] AC 191 Lord Hoffman said at 214:

> "I think that one can to some extent generalise the principle upon which this response depends. It is that a person under duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the respondent responsibility for losses which would have occurred even if the information which he gave had been correct, is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> The principle thus distinguishes between a duty to **provide information** for the purposes of enabling someone to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the advisor must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is

> negligent, he will be responsible for all the foreseeable consequences of information being wrongful."

[57] There has been much ink spilled as to what Lord Hoffman meant and what the effect of SAAMCO is. I do not propose to add to the many commentaries on this issue. In this case, if the plaintiff had satisfied the court that it did not know of the true nature of the transaction taking place between GY and Nendrum because of the Solicitors' breach and that if it had known it would not have entered into the transaction, then it would not have suffered any loss. Its loss in those circumstances has arisen as a consequence of doing this particular business with Nendrum. The amount of its loss will equal the amount lent, plus interest less repayments made and the value of the properties as realised or retained. From that will need to be deducted an amount to represent the failure on the part of the plaintiff to mitigate its loss by seeking to enforce the guarantee. Finally there will need to be a reduction of 66.7% to take account of this contributory negligence.

(G) CONCLUSION

[58] On the evidence before this court:

(i) The Solicitors were in breach of their duty to the plaintiff.

(ii) The plaintiff has failed to prove that the Solicitors' breach of duty was causative of any loss it suffered as a consequence of the loan made to Nendrum and secured on the Properties.