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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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MELBOURNE MORTGAGES LIMITED

First Plaintiff

And

CAVENHAM FINANCIAL SERVICES LIMITED

Second Plaintiff

-v-

TURTLE AND OTHERS PRACTISING AS CARSON AND MCDOWELL SOLICITORS

Defendants

_____

DEENY J

[1] This action raises interesting questions relating to the duties owed by a firm of solicitors to a business client. The plaintiff lenders contend that the defendants were negligent and in breach of their contract for services in failing to draw to the attention of the plaintiffs, at the beginning of their relationship, a flaw in their documentation which would render it unenforceable, or, at least, to have drawn that to their attention after the Court of Appeal in England had elucidated this error in loan agreements.

The facts

[2] The first plaintiff Melbourne Mortgages Limited is a company which lends money to people, normally by way of second mortgages secured on their homes. The second plaintiff, Cavenham Financial Services Limited is part of a group which manages the arrangement of these loans for a number of companies including the plaintiff. The principal company in the group

appears to be Sheldon and Stern Management Services Limited which is owned by members of the Sheldon and Stern families. In the course of the hearing the plaintiffs were referred to as "Shern", the name of one of the companies of the group and I so refer to them hereafter.

[3] The defendants are a well known firm of solicitors in Belfast and experienced in commercial matters. Mr John Thompson QC and Mr Robert Miller appeared for them, and Mr David Hunter QC and Mr Michael Humphreys for the plaintiffs.

[4] Mr Simon Stern is one of the Directors of Shern. They had been doing business in Northern Ireland for some years through mortgage brokers who would be approached by borrowers who wished to borrow money on the security of their homes. As indicated above this was normally by way of a second mortgage on those homes, the first mortgage being held by a bank or building society. The business expanded as house prices in Northern Ireland increased resulting in the value of property exceeding the first mortgages upon it.

[5] Mr Stern readily described the particular business of his group of companies as "sub prime second mortgage business". It was "sub prime" because a high proportion of the borrowers to whom they lent money had already encountered difficulties which rendered their credit rating poor.

[6] Between 1997 and 2000 Shern used a firm of solicitors in Belfast to whom I shall refer as M and Company. Shern became dissatisfied with the quality of service they received and decided to seek a different firm of solicitors to conduct their work. However M and Company continued to enforce any agreements about which they had instructions prior to the appointment of the present defendants.

[7] The plaintiffs obtained from the Law Society of Northern Ireland a magazine article describing what was said to be the "Top 30 Northern Ireland law firms" among which the defendants were ranked second. Mr Shern then interviewed them and two other firms of solicitors on 30 March 2000. He met Thomas Adair and Patricia Rooney of the defendants, having previously furnished them with samples of the sort of loan agreements which he wished to use and enforce in Northern Ireland. He had a good discussion with them from which it emerged that they were willing and apparently able to conduct the sort of work that was required. He was very impressed. The first limb of the plaintiff's case in this action is that the defendant's solicitors ought to have detected and reported to the plaintiffs a flaw in the enforceability of the agreements which they were instructed to execute and, if necessary, enforce. In regard to that the defendants admitted that they had been provided with sample documentation relating to regulated consumer credit agreements. However at paragraph 4 of the drafted defence, they allege that Mr Adair had

offered to review this documentation for compliance with the Consumer Credit Act and conveyancing law in Northern Ireland but that Mr Simon Stern refused to make this part of the retainer between the parties. When this was put to Mr Stern he said that he did not believe that such an offer had been made. He said that he could not have refused such an offer if it had been made as he and his associates were not lawyers.

[8] It is right to say that this meeting was followed by an exchange of a number of e-mails between the parties. In none of those did the plaintiff expressly ask the defendants to check the enforceability of their standard agreements in Northern Ireland. On the other hand there is no reference by the defendants to Mr Adair's offer to review this documentation for compliance. The exchange of e-mails does include references to the defendants excluding from their responsibility certain types of searches. Fees are agreed. Procedures are discussed.

[9] In due course the plaintiffs pressed for the conclusion of an agreement for services between them and the defendants. Such an agreement was drafted by the defendants and bore the date of 20 February 2001 by which time services were already being provided. Certain minor amendments to this were proposed by the defendants which do not appear to have been the subject of any great dispute. It was never executed as such. However Mr Adair and Mrs Rooney accepted that the terms of the relationship were to be found in the draft Agreement.

[10] I will return to the terms of this Agreement in due course.

[11] The plaintiffs proceeded to send new business to the defendants. By 8 November 2000 some 38 cases had been sent and the decision had been made to give them all new Northern Ireland business. With regard to these agreements it must be noted that it was common case that a significant proportion of them, perhaps 30 percent, would subsequently require enforcement. This was not unrelated to the fact that the persons who were borrowing the money had already had a chequered credit history, by and large. That the agreements should therefore be enforceable in law is obviously crucial.

[12] The parties to this action agreed that the issue of liability between them would be tried as a preliminary issue. The court need not therefore concern itself at this time with the precise numbers of agreements with regards to which the defendants were instructed or the dates of those instructions. In cross examination Mr Stern described the nature of their business further. At the peak of that business, which had diminished to some extent, Northern Ireland made up some 40 percent of the cases. Obviously therefore English and Scottish solicitors were engaged in connection with the majority of cases. The agreements in question here had been drafted originally by English

solicitors, with the assistance of Counsel. However it emerged when the relevant advices were disclosed in the course of the hearing that Counsel had cautioned against the very flaw in the agreements which later emerged. This court is not concerned with the liability or otherwise of English solicitors relating to the performance of their duties in England and Wales. The defendants drew attention to it, no doubt, to make the point that other solicitors, more intimately involved in the original drafting of the agreements as well as their subsequent enforcement had failed to detect the flaw in question.

[13] The role of a solicitor in these matters is essential because only they can register the charge on the residential property which secures the borrowing by the owner of the house.

[14] The defect in the agreement which rendered it unenforceable was exposed by the decision of the Court of Appeal in England in *Wilson v First County Trust* (1) [2001] Q.B. 407; [2001] 2 WLR 302. Although interim judgment was delivered in that matter on 23 November 2000 it was the evidence of Mr Stern that its significance in the business of Shern was not disclosed to them until November 2001 at which point their English solicitors raised the issues. The Consumer Credit Act of 1974 was the United Kingdom statute that applied to Northern Ireland equally with England and Wales.

[15] In cross examination Mr Simon Stern said that he did not recall being or did not believe he had been offered a review of the documents by Mr Adair. He denied that he pulled him up short after such an offer saying that he would never do that to a solicitor nor ever tell a solicitor not to review legal documents which he wanted to review. He admitted that he did not subsequently get any documents saying that the solicitors had reviewed the documentation.

[16] Although initially it was put to Mr Stern that Mrs Patricia Rooney's recollection of the conversation tallied with that of Mr Adair it was subsequently acknowledged that she did not have a specific recollection of the offer by Mr Adair to Mr Stern.

[17] In his evidence Mr Thomas Adair of the defendants said the meeting of 30 March was a very informal and friendly affair of about one hour. It consisted partly of Mr Stern describing the nature of their business in Northern Ireland and the reservations they had about their existing solicitors. There was some discussion of the specimen agreements which had previously been furnished to the defendants. He said that he asked Mr Stern if he wanted the whole documentation reviewed to incorporate any suggested amendments Mr Adair might have. Mr Adair said that Mr Stern said that this was not necessary as the documents had been in use for some years.

[18] In cross examination Mr Adair doubted if he had said all the words pleaded at paragraph 4 of the Defence. He acknowledged that his offer might have referred to only one of the documents that was on the table before them. Importantly he said that his offer to review was probably with regard to conveyancing issues. Later he said that if instructed he would probably have dealt with those issues and asked possibly Mrs Rooney to check the provisions of the Consumer Credit Act. Her field was that of litigation and therefore of the enforcement of these agreements whereas Mr Adair was concerned with registration of the charges.

[19] Although the issue of this conversation figured largely at the hearing of this action it seems to me that at the end of the day it is not in fact crucial. I accept that Mr Adair was an honest witness but, as he himself acknowledged, any offer he made may well have made no reference to the Consumer Credit Act and indeed was likely to have been of an informal nature, merely in the course of the conversation. I can understand in those circumstances why Mr Stern does not recollect it. If the offer was of the clarity and significance alleged by the defendants, I would have expected some reference to it by way of e-mail or letter in the subsequent active exchanges between the parties. This was not the case. The failure of the solicitor to keep any attendance note of the conversation at the pre-contract meeting is unfortunate. The importance of doing so is well recognised. See Jackson and Powell on Professional Negligence: 5th Ed. 10. 004-006 and 10.174.

[20] The flaw in the typical loan agreement can be summarised fairly briefly. The specimen agreements used by the plaintiffs and by the defendants on their behalf included the fee to the mortgage broker, legal fees and documentation fees as part of the "amount of credit" extended to the borrower. In law they should not have done so. A term in a loan agreement, prescribed by regulations made pursuant to the Consumer Credit Act 1974, which stated the amount of credit to be provided to the borrower, should not include any part of the loan which was to be paid back to the lender in satisfaction of a fee. This can be stated fairly simply. In fairness one should say that to arrive at that point one has to consider Sections 9, 60, 61, 65 and 127(3) of the Consumer Credit Act 1974 in the light of the Consumer Credit (Total Charge for Credit) Regulations 1980 and the Consumer Credit (Agreements) Regulations 1983. Although the point therefore as elucidated by the Court of Appeal in England is a relatively simple one it is clear that it was not one that "leaps off the page", for the erroneous agreement which included fees in the amount of credit was enforced for many years by various lawyers and by the courts to whom they applied for enforcement. The question therefore under the first limb of the plaintiff's argument is whether the defendants were in breach of any duty, in tort or under contract, to examine the documentation and detect this flaw in it as part of their initial and ongoing relationship with the plaintiffs.

[21] Mr Hunter QC for the plaintiffs drew attention to a number of terms in the draft but effective services Agreement which in his view assisted him. At paragraph 2.2 of the Agreement the defendants agreed that they:

> "must provide the services;
>
> (a) with due skill and care and to the best of its knowledge and expertise;
> (b) in accordance with the service standards set out in the schedule;
> (c) in accordance with all reasonable directions given by Shern from time to time;
> (d) in compliance with all applicable laws and legal obligation".

He did not expressly rely on (d) nor could he rely on (c) as it is common case that Shern did not give any directions expressly to Carson and McDowell to check the validity of these documents in Northern Ireland, but he did rely on (a) and (b).

[22] The plaintiffs also relied on certain warranties to be found at clause 6 of the Agreement which reiterated clause 2.2 and goes on to say that the defendants providing the services "will at all times have the experience, expertise, skills, competence, capacity and other resources necessary to provide the Services and properly discharge its obligations under this Agreement". There is a schedule that sets out the detailed steps which the solicitors were agreeing to perform and the amount of fees they would charge for that. Furthermore, commencing at p18 of the document, there is a section entitled "Solicitors' Service Standards". It was pointed out that the first objective was the "securing of an advance made by Shern as a charge/mortgage on the property, having first established that the Property provides good marketable security to Shern, ensuring that all conditions of the mortgage offer have been complied with before completion of an advance and when necessary the subsequent enforcing of same." Objective (b) is the provision of a quality service. Furthermore the Standards of Service paragraph 1.1(f) is clearly relevant to the second limb of the plaintiff's argument, at least. It reads;

> "The solicitors keeping Shern advised of any new legal and other process and procedural developments in the mortgage which could affect Shern's mortgage lending subject to client confidentiality."

[23] Section 1.4 of the Standards is also relevant, although once more perhaps more so to the second limb than the first.

> "Any matter whether of a legal nature or otherwise, which could adversely affect Shern's decision to proceed or to make the advance, is to be reported as soon as possible to Shern at any stage of a transaction".

[24] I now turn to the relevant authorities to consider the relationship between the parties and the failure of Carson and McDowell to draw attention to this flaw in the light of those authorities.

[25] In *Banque Bruxelles Lambert SA v Eagle Star Insurance Company Limited* [1997] A.C. 191 the House of Lords considered appeals in 3 cases relating to professional negligence by valuers in the valuation of large commercial buildings where they were sued by lenders. In his opinion, with which the other members of the Judicial Committee agreed, Lord Hoffman began by considering what the lenders' cause of action was against the valuer. His remarks are of relevance in this action.

> "Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145. But the scope of the duty in tort is the same as in contract.
>
> A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by Caparo Industries Plc. v Dickman [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although

they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:

> 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.'

In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owned.

How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v. Scott (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the Caparo case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the

> valuer a liability greater than he could reasonably have thought he was undertaking."

[26] In *National Home Loans Corporation Plc v Giffen Couch and Archer* (*A Firm*) [1998] 1 WLR 207 the Court of Appeal considered the duty that a solicitor owed to a lender when acting both for the lender and for the mortgagee of a property. The solicitor had failed to pass on information that was of relevance to the lender but did not go directly to the title which he was charged to investigate. The court held that a solicitor's duty to his client related to the instructions given. Delivering the judgment of the court Peter Gibson L.J. at p213 cited with approval the dictum of Oliver J, as he then was, in *Midland Bank Trust Company Limited v Hett, Stubbs and Kemp* [1979] Ch. 384-402. Oliver J considered that the extent of his (a solicitor's) duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do. He went on to quote Donaldson L.J. in *Carradine Properties Limited v DJ Freeman and Company* [1982] 186 SJ 157, in relation to the solicitor's duty of care to his client that:

> "The precise scope of that duty will depend, inter alia, upon the extent to which the client appears to need advice. An experienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case for an experienced client."

[27] Although not relied on by the defendants in this action that would appear to be applicable here. The statement was cited with approval by the Court of Appeal in *Virgin Management Limited v DeMorgan Group Plc* [Unreported] 24 January 1996. A further passage from the judgment of Peter Gibson LJ (at p214) is of interest:

> "The plaintiff, an experienced commercial lender, provided its own detailed printed instructions to the solicitors. Those instructions specified the particular matters on which the plaintiff required to be advised. This made clear, for example, that the investigation of title should go beyond ordinary conveyancing matters, but extended to matters which might affect the valuation put upon the property. To give another example they were required to advise if any information suggested that the property was not to be the principle residence of Mr and Mrs Choudhry for the sole continuing occupation of them and their family. The plaintiff provided its own form of a report on title which

> stated precisely what the solicitor was required to certify. In these circumstances, whatever the position in other cases with differing circumstances, there is limited room here for treating the scope of the duty of care as extending to require the solicitor to take action which has not been expressly required by the plaintiff in his instructions."

[28] The learned Lord Justice distinguished the decision of the Court of Appeal in *Mortgage Express v Bowerman* [1996] 2 AER 836, CA quoting the reference of the Master of the Rolls to the instructions there being in a wide form. Furthermore, he felt that the information which the solicitor failed to pass on in that case was of more direct importance and relevance than in *National Home Loans Corporation*.

[29] Chadwick J, as he then was, in *Bristol and West Building Society v Fancy and Jackson* [1997] 4 AER 582 was dealing with eight of a whole series of actions brought by the plaintiff building society against various firms of solicitors which had acted for it. At p603 he stated the following:

> "The starting point from which to consider whether or not a solicitor retained by a lender in relation to a domestic mortgage transaction has failed to carry out the duties imposed by that retainer is, of course, a proper analysis of the instructions which he has been given."

I respectfully agree.

[30] Counsel for both parties agreed that the initial meeting between Mr David Stern, Mr Adair and Mrs Rooney of Carson and McDowell and the subsequent exchanges of e-mails and letters were part of the factual matrix within which the precise terms of the retainer must be discerned. Mr Hunter QC laid stress on the draft services agreement between the parties. Mr Thompson QC for the defendant was obliged to acknowledge its role in assessing the retainer, given that both Mr Adair and Mrs Rooney had agreed that although unsigned it did in practice express the terms of the agreement between the parties. The only matters outstanding were described by Mr Adair as minor and not relevant to these proceedings.

[31] At several points in the trial reference was made by defendants' Counsel to the high rate of interest which the plaintiffs secured under these loan agreements. However it does not seem to me that this is relevant to my deliberations. The interest rates, although clearly very high, are not alleged to have been unlawful. I presume that the defendants thought that themselves

as they chose to act for the plaintiffs in the enforcement proceedings which required borrowers to pay these rates, or suffer the consequences.

[32] In this case it can be seen that the clients were experienced lenders. They already had the benefit of expert legal advice for some years in both England and Northern Ireland. It is clear they did not expressly ask for a review of the documentation. I certainly accept that Carson and McDowell did not believe that they were agreeing to review the documentation for its enforceability in Northern Ireland. To adopt the words of Lord Hoffman: "Should they reasonably have thought they were undertaking this? Could the lender reasonably expect that he was entitled to such a review of the documentation?" The absence of any express request to perform this task must be of assistance to the defendants here. The language used in the draft agreement does not, it seems to me, particularly in the context of the original meeting and the exchange of e-mails imply such an obligation on the part of the solicitors. It possibly comes closest to doing so in the wording of objective (A) at p18 but, even then, there is no express reference to the document as such, let alone its enforceability under the Consumer Credit statutory provisions.

[33] I therefore come to the conclusion that the duty which the defendants had accepted did not extend to an examination of the documents which would reasonably have been expected to disclose this flaw. In doing so I note the following passage from Jackson and Powell on Professional Negligence at 10-206;

> "A crucial feature which should be mentioned at the outset is that, unlike the vast majority of areas of a solicitor's work, the terms of a solicitor's retainer is normally governed by detailed instructions from the lender, which differ from one lender to another. While there is some room for the implication of implied duties in addition to the written duties, the scope for such implication is quite limited."

[34] I note that considerable attention was paid at the hearing to a subsequent meeting between the parties after this difficulty had arisen. An attempt was made to place importance on some hand gesture by Mr Stern which was thought to indicate some admission but I found this evidence was so ambiguous and uncertain as to be of no assistance and I disregard it.

[35] I observe that many of these agreements have been operated successfully without the need for enforcement. The flaw in the wording of the original regulated agreement has not prevented them having business efficacy. Even where enforcement has proved necessary, as it often has, many of the agreements were enforced or compromised despite the flaw. It should

be noted that it was Master Ellison of the High Court in Northern Ireland who drew the attention of the defendants to this flaw in the agreements, before they had learnt of it from England. Thereafter, of course, he declined to enforce any agreement which was not in accordance with the statutory provisions.

[36] In arriving at my conclusion I have taken into account all the surrounding circumstances including the fact that these agreements had been drafted with the assistance of solicitors in England practising in this field who had taken the advice of counsel experienced in this field. Those advices were not furnished to Messes Carson and McDowell. The agreements had been enforced in both England and Northern Ireland by a number of firms of solicitors and by several courts. In all those circumstances it seems to me to ask too much of the solicitors to voluntarily have carried out their own check and detected this flaw. The duty did not extend to that. A scrupulous solicitor might have done this and might well then have detected the defect but I do not consider it amounts either to negligence or breach of contract that the defendants herein did not do so.

Second limb

[37] The contention of the plaintiffs as to the second limb of their action is that the defendants failed after the publication of the material decision of the Court of Appeal in England in the case of *Wilson v First County Trust Limited* (The Times, December 6 2000;) (2000) 144 SJLB 288; (2001) 98(3) LSG 42; (2001) 2 WLR 302; (2001) QB 407, within a reasonable time, to appreciate that the form of loan agreement used in respect of the material lending business was unenforceable, in that it did not comply with the aforesaid statutory provisions as elucidated by the court, and in failing to so advise Shern, the defendants were negligent.

[38] Even though they had not been obliged to review the documents originally, as I have found, were the defendants nevertheless obliged, as part of their duty of care, to be aware of a decision of the courts which adversely affected the enforceability of the agreements they were being paid to enforce? Were they obliged to then draw this to the attention of clients?

[39] Provided that the judicial decision was one that a reasonably careful solicitor, practising in the field, would or ought to have been aware of, I consider the answer to those questions must clearly be in the affirmative.

[40] The plaintiff draws attention to a series of publications which it is appropriate to now set out. A report of the case of *Wilson v First County Trust Limited* was published in The Times Newspaper on 6 December 2000. Messrs Carson and McDowell do not receive The Times and nor did those individual solicitors who were questioned about this in court.

[41] The headline on that report read as follows:

> "Consumer credit agreement should not include fee."

The report succinctly summarises the judgment of Sir Andrew Morrit V.C. But the defendants did not read it.

[42] On 22 December 2000 there was a further report of the case in the "CPD: Briefing" in the Solicitors' Journal of England. This was a shorter report. The headline read: "Consumer Credit: Credit Agreement recording amount of credit as including sum paid as fee to lender: whether fee part of amount of credit: whether agreement enforceable." Although this is an English publication Messrs Carson and McDowell did take it. But unfortunately no one read it, or if they did, they failed to notice this report.

[43] The Law Society (of England) Gazette was published on 18 January 2001. There was a note on the *Wilson* case which was short but effectively summarised the decision. It was under the heading "Consumer Credit". This Gazette is also taken by the defendants but not, on this occasion, read. Finally and importantly the official report of the decision was published in the Weekly Law Reports, in the weekly version, at 2001 2 WLR 302. This was on 16 February 2001. Messrs Carson and McDowell did take the Weekly Law Reports but again, no one in the office noticed this relevant and authoritive clarification of the law.

[44] Mr Hunter QC contends that the cumulative effect of these publications is such that any solicitors, holding themselves out as practitioners in the field of consumer credit, should have been aware of the decision in *Wilson* and acted upon it, by communicating to their clients this important information by 1 March 2001. That provided a fortnight even after the last and official report of the case in which to notice and report the decision. I accept the submission and consider the failure to do so amounted to a breach of the duty of care owed by the defendants to the plaintiff. The failure resulted in loss to the plaintiffs and therefore constitutes negligence, because the plaintiffs continued to make loans based on this form of Agreement although it was clear from the decision of the Court of Appeal in *Wilson* that it was unenforceable.

[45] I am encouraged in that view by the following passage in the judgment of Bingham LJ, as he then was, in *Eckersely v Binnie* [1988] CLR 1 at 79, CA.

> "[A] professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other

> ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in this field. He should have an awareness as an ordinarily competent practitioner would of the deficiencies in his knowledge and the limitations on his skills. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet. "

One notes that the Consumer Credit Act and Regulations made thereunder are provisions that apply not only in England and Wales but in Northern Ireland. Inevitably therefore the great majority of decisions relating to the operation of the Act and the Regulations will be English decisions. It seems to me therefore that a decision of the Court of Appeal in England which renders unenforceable any agreement containing a particular error is indeed a development which a ordinary practitioner in the field of consumer credit should be aware of within a reasonable time.

[46] My attention was also drawn to the case of *Credit Lyonnais SA v Russell Jones and Walker* [2003] Lloyds Rep. P.N.7; [2002] 33 EG 99. In that action Laddie J was considering the liability and negligence of a solicitor dealing with a lease for the plaintiffs. I quote a passage from his judgment at paragraph 28.

> "A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. This is the normal case, although *White v Jones* [1995] 2 AC 207 suggest that obligations may occasionally arise outside the terms of the retainer, or where there is no retainer at all. Ignoring such exceptions, the solicitor has only to expend time and effort in what he has been engaged to do and for which the client has agreed to pay him. He is under no general obligation to expend time and effort on issues outside the retainer. However, if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform

> the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern that he learns as a result of, and in the course of, carrying out his express instructions. In relation to this, I was struck by the analogy drawn by Mr Seitler. 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. So too, if, in the course of carrying out instructions within his area of competence, a lawyer notices, or ought to notice, a problem or risk for the client of which it is reasonable to assume that the client may not be aware, the lawyer must warn him."

[47] It seems to me a reasonable incremental step from that dictum to hold liable a lawyer who ought to have noticed an appellate decision which created a very significant problem for his client.

[48] Mr Thompson QC for the defendants accepted that if the defendants had been aware of the decision they would have been negligent not to have drawn it to the attention of the client but he contended that they were not liable where they had not noticed this decision. It seems to me that this view of the law could lead to a rather paradoxical situation. A diligent lawyer who had kept up to date with the reports and noticed the decision would be liable in negligence if, for reasons of pressure of work or some error on the part of a member of his staff directed so to do, he failed to communicate this to the client, while the less careful lawyer who had not troubled to keep up to date with the reports was not liable.

[49] I have read, with respectful admiration, the judgment of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Limited* [1995] 2 A.C. 145. That action involved the liability in tort of managing agents to Names at Lloyds where no contractual relationship existed between them. Lord Goff dealt with this issue at p.184 – 194 of his judgment. He is at pains to extol the decision of Oliver J in the *Midland Bank* case already referred to.

[50] He discusses the decision of the House of Lords in *Hedley Byrne and Company Limited v Heller and Partners Limited* [1964] A.C. 465 [1963] 2 AER 575, H.L. He expressly refers to the fact that the principle in that action was applicable to the relationship of solicitor and client (per Lord Devlin at p.529 and implicitly by Lord Morris of Borth-y-Gest) At p.186 (G) there is a relevant passage:

> "I have already expressed the opinion that the fundamental importance of this case rests in the establishment of the principle upon which liability may arise in tortious negligence in respect of services (including advice) which are rendered for another, gratuitously or otherwise, but are negligently performed – viz., an assumption of responsibility coupled with reliance by the plaintiff which, in all the circumstances, makes it appropriate that a remedy in law should be available for such negligence. For immediate purposes, the relevance of the principle lies in the fact that, as a matter of logic, it is capable of application not only when the services are rendered gratuitously, but also when they are rendered under a contract."

[51] At p194 he concludes his consideration of this topic in this way.

> "But, for present purposes more important, in the instant case liability can, and in my opinion should be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, a plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous."

[52] I note the helpful summary of the duty of care and skill of a solicitor from the judgment of Riley J in *Tiffin Holding Limited v Millican* 49 D.L.R. (2d) 216 and approved by the Supreme Court of Canada [1967] 60 D.L.R. (2d) 469 and to be found at paragraph 10-079 of Jackson and Powell. It seems to me to reinforce the distinction which I draw between the first and second limbs of the plaintiff's case.

[53] I refer at this time to the paragraphs in the Solicitors' Service Standards of the draft Services Agreement, which the defendants accept effectively expressed the contractual terms between the parties. At paragraph 1.1(f) the defendants agreed that their duties would include "the solicitors keeping Shern advised of any new legal and other process and procedural

developments in the mortgage market which could affect Shern's mortgage lending subject to client confidentiality". Furthermore paragraph 1.4 is clearly supportive of the planitiffs case and is set out at paragraph 20 above. It seems to me therefore that the agreement between the parties, rather than precluding this duty on the solicitors, places it upon them. I therefore find the defendants liable also in contract.

[54] In this case the defendants were acting for the plaintiffs in regard to literally hundreds of loan applications so far as conveyancing was concerned. About 30 percent of these loan agreements required enforcement by the solicitors for the plaintiffs to a greater or lesser extent. The position of the defendants was therefore very different from that of a solicitor, or indeed a barrister, who was instructed once or twice to conduct one of these cases. It seems to me that they had assumed the responsibility to keep abreast of the law in Northern Ireland regarding the ongoing enforcement of these agreements. The plaintiffs did rely on them and, it appears to me were entitled to do so. Consistently with the analysis of the relationship under the first limb it does not seem to me that the plaintiffs here are pre-cluded by that contract from relying on the defendants to remain up to date with developments in the law which affected the enforcement of these agreements in Northern Ireland.

[55] I do not consider it necessary to rule on the individual responsibility of each solicitor. At least 4 solicitors from the defendants were involved in acting for Shern. Suffice it to say that some one of them should have been delegated to and should have kept up to date with significant developments in the law of consumer credit arising from changes in legislative provisions or reported judicial decisions, as this was a field in which they were actively engaged and holding themselves out to be competent. I readily accept a submission on behalf of the defendants that a reasonably competent lawyer is not and cannot be expected to be familiar with every decision in every series of reports. But that is not the plaintiffs' case.

[56] I make it clear that it may well be that in some cases reporting of a decision in rather less than 4 publications may well ground a successful claim in negligence. Whether a lawyer was in breach of the duty of care in a particular case will have to be judged on all the facts relevant to that case.

[57] I observe for completeness that no evidence was led before me in this action as to any publication on a judicial web-site. That may well be a factor in the future.

[58] A lawyer, holding himself out as competent in a particular field, has a duty to keep up to date with judicial decisions in that field. It is not for the court to prescribe the precise method of doing so, particularly as a number of the publications are of a commercial and competing nature. But it is

appropriate that he or she should keep up to date with the law in the fields in which they practice. It might be observed that this may be onerous to a single practitioner solicitor coping with a range of work. There are many such practitioners in Northern Ireland. However they have the benefit of an independent Bar to consult when in doubt on any particular point. They also have the option to choose not to practice in fields with which they are unfamiliar to avoid situations of this kind arising. In any event, that is not this case.

[59] I therefore find the defendants liable in tort and contract on the second limb of the plaintiffs case. I will hear counsel on the issue of costs.