Solicitors' undertaking – construction of undertaking - whether breach of undertaking – duty to discharge incumbrance – duty to complete

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Judgment: approved by the Court for handing down | *Delivered:* **31-10-03**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

GREGORY MATTHEW ARCHER MULLIN, WALTER PAUL SMITH, REV DUANE DENNIS RUSSELL AS TRUSTEES OF THE DROMORE INDEPENDENT METHODIST CHURCH

Plaintiffs

and

MILLS SELIG

Defendants

_____

GIRVAN J

JUDGMENT

[1] By an originating summons issued on 16 June 2003 the plaintiffs who are the trustees of Dromore Independent Methodist Church ("the purchasers") seek enforcement of an undertaking given by the defendant to repay all charges and to furnish executed release of charges in respect of certain lands at Drumbroneth Road, Dromore, County Down ("the relevant lands") held under folio 27672 Down which the plaintiffs agreed in April 2003 to purchase from Arthur Boyd, the trustee in bankruptcy of Thomas Maynard Biggerstaff for the sum of £17,250. The agreed date for completion of the contract was 30 April 2002. The contract incorporated the Law Society General Conditions of Sale.

[2] It appears that the purchasers initially approached the trustee in bankruptcy to inquire whether he would be interested in selling the relevant lands which are located adjacent to their church. A valuer was appointed by the purchasers and McQuoids, estate agents were instructed on behalf of the

trustee in bankruptcy. Mr Gibson of that firm provided an opinion that the relevant land was worth £17,250.

[3] The land certificate showed evidence of two all monies charges encumbering the land. The first charge was in favour of the Presbyterian Mutual Society Limited ("the Presbyterian Mutual") registered on 1 July 1997. The second charge was in favour of the Northern Bank and was registered on 18 November 1997.

[4] John J Kearns a partner in Mills Selig acted as the vendor's solicitor in relation to the transaction. Mr James McFarland a partner in McFarland Graham & McCombe was the solicitor acting on behalf of the purchasers. He prepared a draft deed of transfer in the Land Registry approved form and dispatched it to the vendor's solicitors on 24 April 2002. Paragraph (g) of the draft referred to the charges in favour of the Presbyterian Mutual and the Northern Bank.

[5] Under cover of a letter dated 10 May 2002 a cheque for the balance purchase price was furnished to the defendant, a deposit having been previously paid. The letter was expressed in the following terms:

> "Please find enclosed cheque for £15,525 being the balance purchase money. This cheque is sent to you on your undertakings as follows:
>
> 1. To authorise the Vendor to deliver vacant possession of the property.
> 2. To furnish by return the executed assurance in favour of the Purchaser together with any further relevant original Title Deeds in your possession or (if they are not currently in your possession) to use your best endeavours to furnish them within 10 working days of the date of this letter.
> 3. To repay all mortgages/charges affecting the property of which the Vendor's Solicitors is (sic) aware or ought reasonably to be aware at completion and to furnish the vacated mortgage deed executed release of charge as soon as possible after receipt from the lending institution duly registered (in the case of title subject to registration in the Registry of Deeds) or with the appropriate Land Registry fee (in the case of titles subject to registration at the Land Registry).

4. To use your best endeavours to furnish last receipt for ground rent or provide an appropriate indemnity from the Vendor.
5. As the Vendor's Solicitor to complete generally in accordance with contract insofar as it is within your control to do so.
6. Any outstanding conditions in the Contract will not merge with the present Deed.

If you are not prepared to enter into these undertakings then the cheque should be returned to us uncashed. On presentation of the cheque you will be deemed to have entered into the said personal undertakings."

Shortly after receipt of the letter the defendant encashed the cheque.

[6] After receipt of the letter of 10 May 2002 the vendor's solicitor entered into correspondence with the solicitors for the Northern Bank with a view to obtaining a discharge of what the vendor's solicitor thought was the only encumbrance affecting the property. From some reason which it is difficult to understand he failed to appreciate that the Presbyterian Mutual had a first charge on the property. On 4 July he wrote to Mr McFarland stating that he had been advised that the first charge holder was the Presbyterian Church and monies were required to pay to them. Mr McFarland in reply required immediate compliance with the terms of the undertaking. By a further letter of 4 July Mills Selig indicated that they could not comply with the undertaking and would endeavour to return the cheque to which Mr McFarland replied that the cheque had been encashed and that Mills Selig had to comply with the undertaking. On 10 September Mr McFarland asked for a clarification of the position. On 2 October 2002 the Northern Bank returned money paid to Mills Selig to discharge the bank charge. Thereafter in the weeks that ensued Mills Selig tried to arrange matters between the vendor and the encumbrancers so as to be able to discharge the encumbrances. It became clear that the Presbyterian Mutual was claiming that the land was worth considerably more than the amount for which the vendor had agreed to sell the property. It did not agree with the McQuoid valuation. By letter of 5 December Mills Selig claimed that they had fulfilled their undertaking and they offered to return the monies to Mr McFarland but he declined to take them.

[7] The current position is that the Presbyterian Mutual has recently obtained an order for possession of the lands, the order for possession being stayed for four weeks. The debt owed to the Presbyterian Mutual is in excess of £85,000 and it will not release its charge unless the debt is paid off in full. If the debt is not paid in full the Presbyterian Mutual is fully entitled to and will

proceed to effect a sale of the property. On sale in the open market the true market value of the land would doubtless be revealed.

[8] Mr Brangam QC who appeared with Mr Lowry for the purchasers argued that this was a straightforward case of a solicitor having given a clear undertaking. The solicitor having encashed the cheque became subject to the requirement to fulfil the undertakings set out in the letter and was bound by them. Those undertakings included an obligation to discharge the encumbrances. The solicitor should be bound to fulfil the promises contained in the undertakings which are enforceable summarily under the inherent jurisdiction of the court. The negligently belated discovery of the Presbyterian Mutual's encumbrance on the part of Mills Selig was not a good reason to vitiate the consensus of the contracting parties. Counsel referred to the well known judgment of Lord Denning in Geoffrey, Silver & Drake v Baines [1971] 1 All ER 473, Hamilton J's judgment in United Mining & Finance Corporation Ltd v Becker [1910] 2 KB 296 at 305 Udall v Capri Lighting Limited [1987] 3 All ER 262 and Re A Solicitor [1966] 1 WLR 1064. Counsel referred in particular to a passage in Bray v Stewart A West & Co, a firm 139 NLJ 753:

> "The fact that the purchaser's solicitor may not have made a search which would have revealed the existence of a mortgage or having made such a search revealing an entry has failed to raise the point with the vendor's solicitor is not considered sufficient to excuse the solicitor from fulfilling his undertaking to discharge `all subsisting mortgages'."

Mr Brangam argued that the factual matrix of the present case was stronger than in that case. Mr Kearns had no reasonable explanation for his persistent failure to acquaint himself with information which was essential to enable him to provide a competent professional service for his client and to enable the vendor to comply with the terms of the contract accepted by him.

[9] Professor Wylie in Irish Conveyancing Law correctly states:

> "Solicitors' personal undertakings help to oil the machinery of conveyancing. If the various institutions inevitably involved in land transactions ever lost confidence in the value of such undertakings, conveyancing would be made a much more difficult process …"

In Ulster Bank Ltd v Fisher & Fisher (Unreported) Campbell LJ at pages 5-7 of his judgment set out the guiding principles to be applied in cases such as the present and I gratefully accept his statement of the law.

[10] Mr Horner QC in resisting the application in his initial skeleton argument made a concession that there was no doubt that Mr Kearns was in breach of his undertaking but he argued that the plaintiff should not be permitted to use the procedure to obtain specific performance by the back door as this would preclude the normal defences to a specific performance action being raised. There were a number of factual matters in dispute which could not be resolved in the exercise of a summary jurisdiction one of which was what the land was really worth. A common law action or a claim for a specific performance would permit the defendant or the trustee in bankruptcy to join the valuer to those proceedings and allow the court to consider in all the circumstances what are the appropriate remedies.

[11] In his oral submission in the light of the debate that took place between the court and Mr Brangam QC, Mr Horner sought to withdraw his concession and he was entitled to do so since justice could be done as Mr Brangam had an opportunity to deal with Mr Horner's new submissions. Mr Horner contrary to his written submission argued that in fact when one construed the undertaking document the defendant had not in fact breached the undertaking. The vendor's solicitor "as the Vendor's Solicitor" to complete "generally in accordance with contract in so far as this was within the Solicitor's control to do so." There was a duty under the contract on the part of the vendor by condition 9.1 of the General Conditions to ensure that any mortgages subsisting at completion were vacated. The vendor's solicitor had undertaken to repay *at completion* all mortgages charges affecting the property of which the solicitor was or ought to have been aware. Mr Horner argued that the vendor's solicitor had discovered the substantial debt secured in favour of the Presbyterian Mutual before completion occurred and completion did not take place. The solicitor was therefore not in breach of the undertaking.

[12] The factual situation in Bray v Stewart on which Mr Brangam relied strongly differs from the factual situation in the present case. In that case the defendant gave an undertaking to discharge all subsisting charges. The contract was in fact completed at the offices of the solicitors for the first mortgagee in 1980. At completion two mortgages were redeemed and the relevant documents were handed over. Subsequently a local land charge came to light and £900 was found to be secured by that charge which bound the property in the hands of the purchaser. The court held that the solicitor was bound to fulfil the undertaking notwithstanding the passage of time and pay off the debt which encumbered the purchaser's land. The significant point of difference between that case and the present case is of course that in Bray the contract had been completed. When the court is called upon to

enforce a solicitor's undertaking under its inherent jurisdiction the court must be satisfied that the undertaking imposes a clear and unambiguous obligation on the solicitor which the solicitor has clearly breached. Here, accepting that the encashment of the cheque triggered the undertaking, the effect of the undertaking was to require the solicitor to bring about completion of the contract so far as that was within the solicitor's power acting as a solicitor. It would require clear and unambiguous wording to show that the solicitor was obligating himself to pay off encumbrances whatever the amount. Acting as solicitors the defendants could only be expected to have resort to the fund available to them as solicitor to discharge the debt secured by the encumbrances. If that fund was insufficient to discharge the debt then acting as solicitor the solicitor could do no more to bring about completion. Undertaking 3 imposed a duty to ensure that the mortgages were discharged *at completion*. In this case the contract was not completed because it was discovered that there was a subsisting charge which could not be discharged out of the available proceeds of sale. The fact that the contract has not been completed however does not deprive the plaintiffs of a remedy since they have rights against the vendor who may likewise have a remedy against the valuer in respect of the valuation of the property which had brought about the contract. The vendor may or may not have a remedy against Mills Selig in respect of the manner in which they dealt with the transaction. In any event to accede to the plaintiffs' application if we accepted the plaintiffs' argument in relation to the construction of the undertaking would or might deprive the solicitors of a remedy against third parties and leave the defendant solicitors having to meet a liability for the full debt secured in favour of Presbyterian Mutual when in fact Presbyterian Mutual may not recover out of the proper value of the land a sufficient sum to discharge that full debt. If I had been in favour of the plaintiffs' interpretation of the undertaking I consider that the justice of this case would have necessitated the matter going to plenary trial.

[13] Accordingly the plaintiffs have failed on their application and I will hear counsel in the question of costs.