Neutral Citation no. [2003] NIQB 67 | *Ref:* **COGC4004**

Judgment: approved by the Court for handing down | *Delivered:* **30/10/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

PATRICK DANIEL PAYNE
and WILLIAM COOKE

Plaintiffs;

and

ULSTER BANK LIMITED

Defendant.

COGHLIN J

[1] The plaintiffs in this action have carried on a partnership business as farmers and market gardeners for many years and, in these proceedings, they claim damages which they allege that they have sustained as a result of the negligence, misrepresentation and breach of contract of the defendant bank who, at all material times, provided banking services to the plaintiffs. The plaintiffs were represented by Mr Horner QC and Mr Steven Elliott while Mr Orr QC and Mr Eakin appeared on behalf of the defendant. I am grateful to both sets of counsel for the economy and clarity of both their oral and written submissions.

FACTUAL BACKGROUND

[2] After attending technical college, Mr Payne completed his education at 17 and started work as a farmer. He inherited 42 acres of land at Seacoast Road, Bellarena, Limavady from his father. Mr Payne kept a suckling herd of beef cattle and conducted a market gardening business on this land. In 1962 Mr Payne entered into a partnership with Mr Cooke, who had left school at 15. Since that date the plaintiffs have farmed in partnership and have jointly acquired a further 218 acres. The partnership currently farms some 260 acres. Mr Payne is now some 67 years of age and has been actively farming for more than 50 years.

[3] The partnership market gardening business flourished and in 1986, with encouragement and financial support from LEDU, the partnership

founded Foyle Pac, a company designed to provide fruit and vegetables to the retail sector and, in particular, to supermarkets. The partnership accountant, Mr Fergus McAteer, became the company accountant for Foyle Pac. In time, the partnership became one of the largest carrot producers in Ireland with 20 employees including Ms Nelly O'Kane, the company bookkeeper. Both plaintiffs are clearly very hard working, conscientious individuals who have long been dedicated to the successful conduct of their farming activities.

[4] For many years the defendant has acted as the plaintiffs' bank in respect of both their personal and business affairs through its branch at Limavady. The defendant has provided finance to assist with the expansion of the partnership business activities, including the acquisition of additional land, and has also acted as banker in respect of the affairs of Foyle Pac. The plaintiffs provided security for the sums advanced by depositing the title deeds of the lands acquired with the bank. At all material times, the Manager of the Limavady branch of the defendant bank was Mr Sparks and the Assistant Manager was Mr Wallace. I am satisfied that Mr Payne enjoyed a positive personal relationship with Mr Sparks, whom he trusted, and I have no doubt that this relationship was a significant factor in the plaintiffs' loyalty to the defendant bank.

[5] Mr Fergus McAteer, who has been the plaintiffs' accountant since the 1970s, was responsible for the preparation of the annual accounts required in relation to corporate and personal taxation. In addition, on request he prepared cash flows and projections to assist the plaintiffs in their dealings with the bank. Mr McAteer met the plaintiffs once a year to discuss the accounts as well as their personal and corporate affairs.

[6] The partnership also employed Ms O'Kane as a bookkeeper. Despite having no formal qualifications, Ms O'Kane has worked satisfactorily and efficiently for the business for more than 25 years. From approximately 1992, because of the cost of using Mr McAteer's services, Ms O'Kane took over the responsibility of providing the projections and cash flow calculations for use by Mr Payne in the course of his dealings with the bank.

[7] In time, the plaintiffs began to encounter significant problems in managing their financial affairs. Their difficulties seem to have been exacerbated subsequent to the purchase of a further 58 acres of land in 1989. At this time the defendant bank was financing the farming activities of the plaintiffs by way of overdraft. On 3 January 1990 both partners were invited to attend a meeting at the defendant's Limavady branch at which Mr Sparks, Mr Wallace and two officials from the defendant's headquarters were also present. Also in attendance was Sean McAteer on behalf of the plaintiffs' accountants. Sean McAteer is a brother of Fergus McAteer and he is also employed by the firm of McAteer & Co. The partners accepted that their business was facing serious financial difficulties and the bank officials

expressed reservations about the ability of the enterprises to service the financial commitment. It seems clear from the memorandum prepared by the bank that the purpose of this meeting was to enable the bank to decide whether to continue its support particularly in the context of an alternative offer of support which the plaintiffs had received from the Bank of Ireland. At that time the plaintiffs borrowing amounted to £310,000. The bank officials indicated that the absolute limit of the defendant's support would be £325,000 and, if a figure in that region was required, the partners would have to give serious consideration to the sale of assets. The partners were informed that if they wished to obtain finance beyond that figure they should accept the Bank of Ireland offer. A number of conditions were imposed by the bank and the accountants undertook to provide full cash flow projections for a 12 month period commencing in April 1990. The memorandum prepared by the bank recorded that the officials remained "unconvinced as to the ability of this enterprise to service the debt." The bank was concerned about very high interest costs and the apparent dependence upon a limited number of large retail customers. On the other hand, the memorandum also recorded that the security afforded by the plaintiffs' land and livestock was safe and that the honesty of the partners was not in question although they were perhaps "a little naïve".

[8] The partnership remained under continuing pressure to meet interest payments despite substantial efforts on the part of the partners, particularly Mr Payne who mortgaged his own home and committed personal funds to the businesses. The bank raised the suggestion of amalgamating the partnership business with Foyle Pac and continued to refer to the possibility of raising capital by disposing either of land or cattle.

[9] On 19 November 1992 the bank wrote to the partners, referring to previous discussion, and suggesting that it was an opportune time to allocate at least part of their borrowing to a "fixed rate loan". The letter pointed out that, at that time, the plaintiffs were paying 10.5% interest upon their overdraft which was 1.5% above the bank's standard rate (9%). The letter noted that interest was charged quarterly and that the true rate of interest, commonly referred to as APR, was almost 12%. Enclosed with this letter was a leaflet containing details of the bank's fixed rate Farm Development Loan with quotations for a loan of £100,000 over 5 and 10 years. A leaflet dealing with Base Rate Caps was also enclosed and the letter concluded with a request for the partners to discuss these options with their accountant and then to inform the bank whether they wished to proceed.

[10] On 29 January 1993 the partners were £3,500 in excess of the maximum limit of their overdraft and this had increased to £5,000 by 15 March. Some further discussions took place between the partners and Mr Sparks and Mr Wallace and, eventually the plaintiffs signed a Farm Development Loan agreement in accordance with which the bank provided £200,000 by way of a

loan at a "Flat Interest Rate" of 7½%. The agreement recorded that the purpose of the loan was to "restructure borrowing on overdraft" and the loan extended over a 10 year period with 120 instalments by way of repayment. The agreement specified that the total interest sum was £150,000, there was an arrangement fee of £2,000 and the Equivalent Annual Percentage Rate (APR) was stated to be 13.4%. Despite struggling to manage, the plaintiffs have continued to meet their obligation to discharge the instalment payments and the loan was due to expire in May 2003. According to Mr Payne, he originally discussed obtaining a loan for £150,000 but, during the final discussions, he said that Mr Wallace suggested that the partners should seek £200,000 and when Mr Sparks raised the issue as to whether they could service such an amount it was Mr Wallace who said they could. The plaintiff maintained that both Mr Wallace and Mr Sparks recommended the loan as "a good deal".

[11] Mr Payne stated in evidence that one effect of signing the Farm Development Loan Agreement seemed to be to place their financial affairs upon a "more even keel" and their contact with the bank was reduced. In 1996 during consultations with LEDU Mr Payne said that he was informed by a LEDU official, Tony Jackson, that the Farming Development Loan was "very dear money". Despite this information, Mr Payne said that he did not take any action in relation to the loan because exceeding the £300,000 overdraft had been the partners "own fault" and in arranging for the Farm Development Loan Mr Sparks and Mr Wallace had "only been doing what their head office told them to do". In 1999 the National Farmers Union referred the partners to a firm known as Acquiring Solutions. Acquiring Solutions carried out a detailed analysis of the manner in which the plaintiffs' business were being financed and, having done so, provided them with advice. As a consequence the plaintiffs instructed solicitors and these proceedings were commenced by Writ of Summons issued on 18 April 2000.

DID THE RESPONDENT OWE THE PLAINTIFFS A DUTY OF CARE

[12] In Woods v Martins Bank [1959] 1 QB 55 Salmon J said, at page 70:

> "In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law."

In my view the circumstances of this case disclosed a number of factors that require to be considered in relation to this issue;

(1) on behalf of the defendant, Mr Orr QC submitted that the bank had never held itself out as a general financial adviser to the plaintiffs nor had it been consulted in relation to any other loan agreement or in relation to the

incorporation of the Foyle Pac company. The plaintiffs employed an accountant and had entered into a number of loan/finance agreements themselves, particularly in relation to equipment, without any advice or assistance from the bank. On the other hand, I have no doubt that the plaintiffs, and Patrick Payne in particular, developed a strong personal relationship over the years with Mr Sparks who had been manager of the defendant's Limavady branch since 1975. Mr Payne said that he placed a lot of trust in Mr Sparks that he was helpful when discussing business and that he accepted his advice in business affairs. Mr Sparks himself did not give evidence but Mr Wallace confirmed that Mr Payne had trusted Mr Sparks' judgment and had taken his advice "on board". Mr Payne met Mr Sparks and Mr Wallace regularly at the annual review of the partnership affairs and, in my view, the degree of trust and respect which Mr Payne had for the advice of the bank officials is reflected in the degree of loyalty which the partnership showed to the bank over time. In particular, when Mr Payne learned from LEDU that the Farm Development Loan was "very dear money" he did not raise any concerns with the bank since he considered that in encouraging the partners into taking the loan Mr Sparks and Mr Wallace had only been doing what they had been directed to do by head office, he trusted them and "didn't want to rock the boat".

(2) The agreement to take up the Farm Development Loan came after the partnership finances had been under considerable pressure for a substantial period of time which had caused considerable concern and anxiety both to the partners and the bank. The Farm Development Loan was introduced by the bank as a product which could significantly reduce these concerns and provide a stable core to the finances of the partnership. I am satisfied on the balance of probabilities that either Mr Wallace or Mr Sparks or, quite possibly, both officials represented the loan to be a "good deal" to Mr Payne knowing that the partners would receive this opinion from officials whom they trusted and who had an intimate knowledge of the partnership's financial affairs. I am further satisfied on the balance of probabilities that the suggestion that the original loan figure approved by Mr Payne should be increased to £150,000 to one of £200,000 came from the bank officials. The fact that Mr Sparks apparently queried whether the partners could service a £200,000.00 loan indicated that the bank had concerns about the size of the proposed advance.

(3) The Farm Development Loan represented a significant change in the financial arrangements between the plaintiffs and the bank.

(4) The Code of Practice "Good Banking" published in December 1991 and adopted by the defendant set out the standard of good banking practice to be observed by banks when dealing with personal customers in the United Kingdom. The Code was effective from 16 March 1992. The governing principles of the Code are set out at paragraph 1.4 and include:

> "*(b)* That banks … will act fairly and reasonably in all their dealings with their customers;
>
> *(c)* That banks … will help customers to understand how their accounts operate and will seek to give them a good understanding of banking services."

Paragraph 4.4 of the same Code provided as follows:

> "4.4 Banks … will tell customers the interest rates applicable to their accounts, the basis on which interest is calculated and when it will be charged to their accounts. … Banks … will explain also the basis on which they may vary interest rates."

In taking the foregoing into account, I have come to the conclusion that, in the circumstances of this particular case, the defendant bank did owe a duty of care to the plaintiffs in relation to the Farm Development Loan.

WAS THERE A BREACH OF THE DEFENDANT'S DUTY OF CARE?

[13] A number of factual matters are relevant in order to determine this issue:

(a) On 19 November 1992 the bank wrote a letter to the partners which included the following passage:

> "As discussed now would be an opportune time to place at least part of your borrowing on fixed rate loan. At present interest on your overdraft facility is accruing at 1½% above Ulster Banks standard rate which is currently 9%. Bearing in mind interest is charged quarterly the true rate of interest (commonly referred to as an APR) is also 12%."

(b) Included with the letter on 19 November 1992 was a loan quotation from the defendant bank illustrating a loan of £100,000 over 5 and 10 year terms. In respect of the former term the rate of interest was specified at 6% and the APR 11.8% while, in relation to the latter term, the interest rate was specified at 7.5% and the APR 13.4%.

(c) At some stage prior to execution of the loan document by the partners the bank provided the partners with literature explaining Farm Development Loans which contained the following passage in relation to interest rates:

> "The interest rate is usually similar to that for overdrafts but is fixed for the whole repayment term when the loan is taken out. The main advantage is that it removes the uncertainty caused by fluctuations in interest rates and assists forward planning."

Unlike the general promotional literature referred to in James v Barclays Bank [1995] 4 Bank L.R. this document was furnished to the partners by the defendant as part of a specific transaction.

(d) The APR quoted by the defendant bank as "almost 12%" in the letter of 19 November 1992 was incorrect and should have been "almost 11%". According to Mr Wallace the rate quoted in the letter was obtained by simply adding 1% to the current overdraft rate which was the "rule of thumb" observed by the bank at the material time.

(e) On 13 November 1992 the bank's overdraft rate dropped by 1% and a further drop of 1% occurred in January 1993 according to Mr Wallace.

[14] Mr Michael McKavanagh, who holds the post of Head of Retail Performance Management with the bank, confirmed in evidence that the bank took steps to ensure that local managers were aware and familiar with different products and associated promotional material. He also agreed that, as a concept, APR needed to be explained to customers. Unfortunately, as he conceded in cross-examination, at the time of the negotiations with Mr Payne Mr Wallace was not familiar with the bank's promotional brochure relating to Farm Development Loan nor did he appreciate that there was a difference between a flat rate and a fixed rate of interest. Further, I am quite satisfied that neither Mr Wallace nor Mr Sparks explained the concept of APR to Mr Payne and no doubt the chief factor in this omission was that neither understood APR.

[15] However, I do not consider that liability in this case depends upon whether Mr Payne was effectively instructed as to the intricacies of flat rate or fixed rate interest or APR. I am satisfied that the partners, as long-term customers of the bank and customers whom the bank appreciated were likely to rely upon the advice that they received from local bank officials, were recommended by Mr Sparks and Mr Wallace to take up a Farm Development Loan of £200,000 on the basis that it was "a good deal" as far as they were concerned. I am quite prepared to accept that, given the circumstances of the partners with a prolonged history of difficulties in reducing the overdraft

financing their farming and marketing activities, that there were aspects of the Farm Development Loan which could be legitimately represented as offering "a good deal" eg the stabilisation of the significant core element of their indebtedness with regular predictable repayments over a fixed number of years which would substantially reduce the degree of attention that they received from the bank. However, in my view, in representing that this was "good deal" Mr Sparks and Mr Wallace were also under an obligation to ensure that the partners fully understood the significance of the difference in interest rates associated with this change. Such a duty was clearly acknowledged in the bank's Code of Practice to which I have referred to above. The need for such an explanation was reinforced by Mr Wallace's knowledge that, over the years, Mr Payne had expressed concern about interest rates in general and that, in particular, he appeared to blame interest rates for the problems encountered by the partnership business during the 1980s.

[16] The Farm Development Loan agreement presented Mr Payne with two rates of interest on the face of the document neither of which was the actual rate of interest applicable to the loan and neither of which was properly understood by the bank officials. Mr Wallace accepted that Mr Payne was not informed of the 2% drop in bank overdraft rates which had taken place by the time of signing the agreement. Mr Wallace maintained that he did not do so because he (Mr Payne) "would already have been aware of it". However, this was not put to Mr Payne in cross-examination and, even if it had been true, in my view the bank should have ensured that the reduction was specifically drawn to his attention and adequately explained when he was considering whether to sign the loan agreement form. In the event, Mr McKavanagh conceded that, comparing like with like, the rate of interest payable in relation to the Farm Development Loan was 32% higher than that payable in relation to the partners' overdraft. Mr McKavanagh agreed that this was a substantial increase and that, in such circumstances, the rates could not be properly termed "similar". In the circumstances I am satisfied that the officials owed a clear duty to explain to the partners the differences in interest rates prior to signing the agreement.

[17] I am afraid that I found Mr Wallace's attempt to deal with this aspect of the case entirely unconvincing. After admitting that he was not familiar with the promotional brochure relating to the Farm Development Loan, Mr Wallace said in cross-examination that he and Mr Sparks had compared the APR for the Farm Development Loan of 13.4% with the average bank overdraft rate over the previous 15 years. Mr Wallace said that these rates were recorded on a graph in the office where the final discussions about the loan were taking place. Mr Wallace said that this graph showed the average Ulster Bank base rate over this period to have been 11% which, with the addition of the bank's margin of 3% produced an overall average of 14%. He said that as a result of such a comparison he and Mr Sparks "could have"

thought that the Farm Development Loan was cheaper. In re-examination Mr Wallace suggested that the graph on the wall had been drawn to the attention of Mr Payne. I do not accept that this was done since I have no doubt that, in the circumstances of this case, such a specific assertion would have been put to Mr Payne in the course of cross-examination. In fact Mr Payne was merely asked whether he recalled Mr Wallace "drawing graphs of interest rates" to which he replied in the negative. Furthermore, Mr Wallace himself in the course of his direct evidence had emphatically asserted that no one had ever said that the Farm Development Loan was "cheaper".

[18] In representing it as a "good deal" and in failing to explain properly and effectively to the partners the difference between the rates of interest payable in relation to the Farm Development Loan and the partnership overdraft upon a like for like basis in my opinion, in the circumstances of this case, the bank was in breach of its duty of care.

IS THE DEFENDANT ABLE TO RELY UPON THE ASSUMPTION THAT THE PLAINTIFFS WOULD RECEIVE INDEPENDENT ADVICE FROM THEIR ACCOUNTANT?

[19] In my view this is a case to which the principles set out by the House of Lords in Hedley Byrne v Heller [1964] AC 465 apply. In Caparo Industries v Dickman [1990] 2 AC 605 Lord Oliver said, at page 638:

> "What can be deduced from the Hedley Byrne case, therefore, is that the necessary relationship between the maker of a statement or giver of advice (`the adviser') and the recipient who acts in reliance upon it (`the advisee') may typically be held to exist where –
>
> (1) The advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially to the adviser at the time when the advice is given;
>
> (2) The adviser knows either actually or inferentially that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;
>
> (3) It is known either actually or inferentially that the advice so communicated is likely to be

> acted upon by the advisee for that purpose without independent inquiry; and
>
> (4) It is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive but merely that the actual decision in the case does not warrant broader propositions."

The applicability of the Hedley Byrne principles has been recently confirmed by the Court of Appeal in McCullagh v Lane Fox & Partners Limited [1996] PNLR 205 in which Hobhouse LJ, after reviewing the authorities, said at page 225:

> "It is thus clear from the more recent authorities that Hedley Byrne is still the governing authority in cases such as the present. The elements of reasonable foreseeability and reliance are fundamental, as is the element of assumption of responsibility."

[20] The defendant relied upon the decisions in Hedley Byrne, Caparo and McCullagh v Lane Fox & Partners as establishing the proposition that it did not owe the plaintiffs a duty of care because, at the time that any relevant representation was made, the bank would have been reasonably entitled to take the view that its statements would be independently checked by the plaintiffs' firm of accountants, Messrs McAteer & Co.

[21] I accept the evidence of Mr Payne and Mr McAteer that the primary function of McAteer & Co was to prepare the accounts and financial projections to be used by the plaintiffs in the course of their annual meeting with Mr Sparks and Mr Wallace. In addition, the accountants would attend specific meetings and advise the plaintiffs in relation to specific topics when required to do so. Sean McAteer attended the important meeting between the partners, Mr Sparks, Mr Wallace and Mr Tate and Mr Bailie from the bank's head office on 3 January 1990. This meeting was called to discuss the serious financial difficulties which had arisen in relation to the business of the partnership and whether the bank's support should continue in the context of the letter of offer received by the partners from the Bank of Ireland. The memorandum of this meeting prepared by the bank's officers recorded that they were "impressed with Mr McAteer's openness" regarding the projections and that they believed that he could be relied upon to produce "as far as is humanly possible, realistic projections." Indeed, it appears that it was the bank who requested a representative from McAteer & Co to attend the meeting on 3 January 1990. Mr Payne accepted that McAteer & Co were always available in the background and that the bank encouraged the

partners to consult with their accountants. The bank documentation shows that Mr Sean McAteer attended a number of other meetings between the partners and the bank officials. McAteer & Co set up the Foyle Pac company of which Mr Fergus McAteer was company secretary. In 1992 when the bank suggested that the partners should amalgamate Foyle Pac with their other farming business it was McAteer & Co who advised against such a course of action having regard to the existence of LEDU funding for Foyle Pac and adverse tax implications.

[22] However, it is also clear that the partners considered that paying for the services of McAteer & Co was proving expensive and from 1992 onwards in the course of complying with the bank's demand for cost saving measures the partners arranged for the projections to be prepared by their bookkeeper Nellie O'Kane. The Advance Report signed by Mr Wallace on 13 May 1992 indicates that the bank was aware of this change.

[23] In the letter of 19 November 1992, following the meeting between the partners, Ms O'Kane, Mr Wallace and Mr Sparks on 12 November 1992, the bank specifically advised the partners to discuss the options with their accountant. It appears that the partners and Ms O'Kane met Mr Fergus McAteer on 19 November 1992 for the purpose of discussing the letter from the bank and the quotation. Mr McAteer confirmed in evidence that he would not have been opposed in principle to a fixed rate loan which would have provided the partners with a predictable and structured element to their financial indebtedness. He agreed that, at the material time, that nobody really knew whether interest rates were likely to go up or down and that, essentially, future interest rates had to be regarded as "a judgment call". It seems that during this meeting Mr Fergus McAteer did ring Mr Wallace and received some information about bank interest rates at that time. While there may have been one further meeting between the partners and Mr McAteer prior to the signing of the agreement, I am satisfied that he was not consulted about the ultimate terms of the loan nor did he see or become aware of the actual document until he wrote to the bank for relevant information when preparing the accounts to be completed for the year ending 31 March 1994. In the course of giving his evidence Mr Fergus McAteer maintained that, had he been given an opportunity to see the document, he would have advised the plaintiffs not to execute the loan having regard to the fact that the rate of interest payable upon their overdraft at that time was significantly lower than the rate to be charged in relation to the Farm Development Loan.

[24] The appropriate test appears to be whether, in the circumstances, the respondent bank was reasonably entitled to take the view that its representations and statements would be the subject of independent advice and opinion. While no specific date was established in evidence, the meeting between the partners, Ms O'Kane, Mr Sparks and Mr Wallace at which the Farming Development Loan was referred to by the bank's representatives as a

"good deal" but without the partners being given any detailed information as to comparative rates of interest probably took place between 12 March and 29 March 1993. I infer this from the fact that the handwritten memorandum produced by Mr Sparks bearing notes dated 12 and 15 March 1993 refers to "Danny" wishing to proceed with £150,000 loan whereas, on 29 March 2003, the Advances Report referred to the partners wishing to restructure a "solid core of £250,000 on FDL."

[25] In my view, whatever may have been the correct date for this meeting, it is fairly clear that the farming development loan documentation was not signed at that time. It was either handed to the partners and Ms O'Kane at the meeting or subsequently sent by post. Ms O'Kane was quite satisfied that the document was not signed at this meeting although she could not remember precisely where the signing took place. She thought that it might have occurred in her office at Foyle Pac on the basis that the usual practice was for the partners to bring business mail which they had received to that address. Ms O'Kane accepted that Mr Wallace and Mr Sparks had encouraged the partners to talk to their accountants but that they had not done so apart from discussing the original quotation and associated documents with Mr McAteer in November 1992.

[26] Mr Wallace and Mr Sparks did not request the plaintiffs to bring Mr McAteer to the relevant meeting nor do they seem to have specifically told them to take the Farming Development Loan documents to Mr McAteer for his advice. As I have already noted, the bank would have been aware that, relatively recently, the partners had instructed Ms O'Kane to produce their business estimates and projections rather than the accountant but it would also have known that the plaintiffs had consulted Mr McAteer recently in relation to issues of substance. The plaintiffs had taken the advice of Fergus McAteer when resisting the bank's pressure to amalgamate the businesses. In this context, I note that the Advances Report of 22 September 1992 recording that the plaintiffs' accountants had advised against amalgamation post-dated the earlier report of 8 May 1992 in which it was noted that the partners were reluctant to engage their auditors to produce cash flow forecasts.

[27] Mr Sparks and Mr Wallace knew that the original quotation for the Farm Development Loan had been referred by the plaintiffs to Mr McAteer and they also knew that, subsequent to the plaintiffs discussion with Mr McAteer, the plaintiffs had indicated that they wished to proceed with a loan for £150,000. However, during the vital meeting, Mr Wallace and Mr Sparks persuaded the plaintiffs to increase the amount of the loan by a third. In addition, they recommended this increased loan as a "good deal" without ensuring that the plaintiffs were aware of the intermediate decrease in base interest rates. In such circumstances, I do not consider that it was reasonable for the defendants to simply assume that the plaintiffs would go back to Mr McAteer for advice before executing the Farming Development

Loan. Indeed, in my view, in the particular circumstances of this case, the defendants should have specifically advised and encouraged the plaintiffs to seek a further opinion from Mr McAteer at the conclusion of this meeting. I am fortified in this view by the fact that there was clearly some doubt between Mr Sparks and Mr Wallace themselves as to whether the partners could service a Farm Development Loan of £200,000.00. I conclude that the plaintiffs have established that the defendants were in breach of their duty of care.

[28] Alternatively, I am not persuaded that either Mr Wallace or Mr Sparks had any reasonable ground for believing at the time of the vital meeting with the partners and Ms O'Kane that the rates of interest were "similar" as had been represented in the Farming Development Loan brochure and, consequently, to represent that they were at that time was a breach of Section 2(1) of the Misrepresentation Act 1967.

THE LIMITATION (NORTHERN IRELAND) ORDER 1989

[29] The relevant limitation period in this case is six years from the date upon which the cause of action accrued. The plaintiffs issued their writ of summons on 11 day of April 2000. In the course of giving evidence Mr Payne said that he learned from LEDU that the loan was "very dear money" in 1996 and that the partners were referred to Acquiring Solutions in 1999. In cross-examination Mr Payne was not challenged in relation to either of these dates. As I have already indicated, I accept Mr Payne's explanation for the partners inaction after 1996 based upon their acceptance that the size of the overdraft had been "their own fault" and they believed Mr Wallace and Mr Sparks to be acting in accordance with Head Office directives. In the circumstances, I do not consider that the plaintiffs had knowledge of the material facts within the meaning of Article 11 of the 1989 Order until 1999 and that consequently the action is not statute barred.

DAMAGES

[30] On behalf of the plaintiffs Mr Horner QC submitted the damages were recoverable upon two alternative basis:

(*1*) If the plaintiffs had not entered into the Farming Development Loan they would have maintained their overdraft facilities with the defendant bank and, as a result, would have saved some £60,083.00 in respect of interest.

(*2*) Alternatively, Mr Horner QC argued that the bank should be compelled to repay to the plaintiffs the additional profit which had accrued to it as a result of the plaintiffs agreeing to take out the Farming Development Loan, namely, a figure of £20,685.

[31] Mr Payne firmly maintained that the partners would not have agreed to take out the Farming Development Loan if they had known the full details in relation to the comparative rates of interest and they were supported in this by Mr McAteer who confirmed that he would not have advised them to do so in the circumstances. Mr Nicholl, a fellow of the Chartered Institute of Accountant, who was called on behalf of the plaintiffs agreed that, in general, the interest rate for a ten year loan would have been higher than the interest rate applicable to a normal overdraft facility and he conceded that he was unable to identify any fixed rate loans that might have been available at 9.5% at the material time. Both sides agreed that transferring a portion of the plaintiffs indebtedness to a number two account simply would have resulted in a second overdraft. Mr McKavanagh, the Head of Retail Performance at the Ulster Bank, who was called on behalf of the defendant thought that in the circumstances, it was not a realistic option to maintain the level of overdraft and keep "prodding" the plaintiffs and the discovered documentation does appear to confirm increasing anxiety on the part of the bank with regard to the overdraft facility. Indeed, at the meeting on 3 January 1990 the plaintiffs were advised by Mr Sparks and Mr Wallace that the "absolute limit" of the overdraft that the defendant bank was prepared to extend was £325,000.00 and that, if this figure were to be exceeded, the plaintiffs should accept the offer from the Bank of Ireland. The defendant bank had never granted a fixed term loan at overdraft interest rate and while it had marketed a Term Loan at 8.2% plus the overdraft margin of 3.5% it appears that such a product was not available when the plaintiffs signed the Farming Development Loan and did not reach the market until a number of year later.

[32] Despite the considerable pressure brought to bear on the plaintiffs' account by the defendant bank, on the balance of probabilities, I have reached the view that, if the Farming Development Loan had been rejected by the plaintiffs the defendant bank would have continued to extend overdraft facilities to the partnership. In forming this opinion, I have taken into account all the circumstances of the case including, in particular, the longstanding relationship between the parties, the plaintiffs undoubted loyalty to the defendant bank and the fact that interest rates began to decline in the early 1990s. I also bear in mind the fact that the plaintiffs probably could have obtained similar overdraft facilities with the Bank of Ireland subject to comparable interest rates. In these circumstances, I propose to award the plaintiffs £60,083.