

Neutral Citation No: [2017] NICH 28

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: McB10440

Delivered: 09/11/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF A SOLICITOR

BETWEEN:

CLAIRE THOMAS

Plaintiff;

-and-

**CONOR AGNEW PRACTISING AS CONOR AGNEW AND COMPANY
SOLICITOR**

Defendant.

McBRIDE J

Application

[1] By originating summons dated 28 March 2017 the plaintiff seeks an order that the defendant, a solicitor of the Court of Judicature, practising as Conor Agnew and Company, be ordered to pay compensation, or such further or other order or committal, as the court shall deem meet, for breach of an undertaking given by him in his capacity as a solicitor.

[2] The plaintiff was represented by Keith Gibson of counsel and the defendant was represented by Michael Lavery of counsel. I am grateful to both counsel for their well-researched and marshalled skeleton arguments and oral submissions.

Evidence

[3] The application was grounded on an affidavit sworn by the plaintiff on 21 March 2017. The other evidence consisted of the affidavit of the defendant sworn 12 June 2017 and the plaintiff's rejoinder thereto.

Background

[4] The plaintiff was married to Cleland McCann (“the husband”) on 10 March 2000. On 3 January 2007 property situate and known as 20 Stonebridge Avenue, Stonebridge Village, Green Road, Conlig and contained within Folio DN138242 County Down, (“the premises”) was transferred into the joint names of the plaintiff and her husband. On the same date a charge in favour of the Ulster Bank was registered as a burden on the premises, (“the Ulster Bank mortgage”).

[5] The plaintiff and her husband separated and on 29 November 2013 a decree nisi of dissolution of marriage was granted. The plaintiff instructed E&L Kennedy, solicitors to act on her behalf in respect of the ancillary relief proceedings and the husband instructed the defendant. The solicitors entered into negotiations and on 29 November 2013 the defendant, on behalf of his client set out two alternative proposals in settlement of the ancillary relief proceedings. Both of the proposals were stated to be “entirely subject to the consent of the mortgage company”.

[6] By letter dated 4 December 2013 the plaintiff’s solicitors wrote to the defendant as follows:

“...We write to confirm that our client would be willing to accept your client’s second proposal in that he will accept 100% ownership of the matrimonial home ... and 100% of the liability of the mortgage and will make all endeavours to obtain the consent of the lending institution to consent to the transfer and release of 50% of our client’s ownership and reliability in full and final settlement...”

[7] On 9 December 2013 the defendant wrote to the Ulster Bank indicating that the premises were to be transferred into the husband’s sole name, “subject of course to your consent and release”.

[8] On 6 January 2014 the defendant wrote to the plaintiff’s solicitors enclosing “a draft transfer and release settlement document” with a request that the plaintiff’s solicitors have this document executed by the plaintiff and then returned for execution by the Ulster Bank and thereafter for registration.

[9] On 3 February 2014 the plaintiff’s solicitors returned the signed deed of transfer:

“On your undertaking that you will:

- (1) Arrange the deed for execution by Ulster Bank and Mr McCann

- (2) Register the deed and forward land registry acknowledgment to us.
- (3) Confirm the transfer has been registered and forward proof of same."

[10] By letter dated 4 February 2014 the defendant queried why the plaintiff was seeking such undertakings and advised that the original transfer had been sent to Ulster Bank for sealing and upon its return it would be registered in the Land Registry.

[11] By reply dated 5 February 2014 the Plaintiff's solicitors stated the undertakings were required to protect the plaintiff's right to pursue ancillary relief proceedings, in the event that the husband failed to register the transfer. The letter then confirmed that upon receipt of the undertakings sought on 3 February 2014 and the relevant Land Registry acknowledgement, the plaintiff's solicitors would apply for a decree absolute of divorce.

[12] On 20 February 2014 the defendant wrote to the plaintiff's solicitors enclosing:

"Certified copy transfer/matrimonial agreement sealed by the lending institution:

- Land Registry confirmation receipt."

[13] The documents enclosed consisted of a copy Land Registry Form 10 and a confirmation receipt from Land Registry confirming the application had been made and had been allocated a number. The Form 10 was signed by the plaintiff and the defendant and their signatures were witnessed. The Form 10 was signed by another person followed by an address. This signature was not witnessed. The Form 10 also had on its face a date stamp for the Ulster Bank.

[14] On 26 February 2014 the plaintiff's solicitors wrote to the defendant expressing concern that a decree absolute had issued as a result of an application made by the defendant notwithstanding that he had neither provided a matrimonial agreement nor given the undertaking specified in the correspondence dated 3 and 5 February 2014. The plaintiff's solicitors indicated they would agree to the issue of a decree absolute upon receipt of undertakings to:

- (i) Complete registration of the transfer and
- (ii) forward confirmation of same."

On the same date the plaintiff's solicitor advised the court office dealing with the matrimonial proceedings of the position.

[15] On 7 March 2014 the plaintiff's solicitors attended court before the Recorder's Court for the Division of Belfast. The defendant was not in attendance. The plaintiff's solicitor's attendance note records as follows:

"... I advised that ultimately if Mr Agnew was prepared to give me an undertaking that he would complete the registration of the transfer deed and further that he would forward a copy of it to us, that I would be happy for the decree absolute to stand."

[16] On 7 March 2014 the court ordered that written undertakings were to be completed between the parties. On 10 March 2014 the defendant gave the following undertaking to the court "to furnish a copy of the land registry letter of confirmation of completion of registration to the solicitors for the petitioner when received".

[17] On 18 March 2014 the defendant gave the following undertaking to the plaintiff's solicitors:

"We the undersigned solicitors for the respondent hereby undertake to furnish a copy of the land registry letter of confirmation of completion of registration to you when received.

You will be aware that your client was formally released from her mortgage obligations on 19 February 2014 and that the procedure in respect of this matter which we have now provided a formal undertaking for was already clearly communicated to you in our letter of 6 January 2014, and we have also prior provided the above undertaking to the court."

[18] On 1 September 2014 the Ulster Bank wrote to the plaintiff's solicitors stating:

"... I can confirm that your client Claire Thomas is still a party to the mortgage and remains jointly and severally liable with Mr McCann to meet all payments due thereunder. ... The bank has not executed any documentation purporting to release Ms Thomas from her mortgage obligations. The copy Form 10 you have forwarded dated 30 January 2014 has not been executed by the bank. The bank being a limited company can only execute same by way of:

- (a) affixing its seal, or
- (b) directors of the bank signing, or
- (c) an authorised Attorney of the Bank signing under a specified Power of Attorney with appropriate attestation clause providing details of the said Power of Attorney.

We note that the Form 10 shows a signature, (which we do not recognise), and a cashier's stamp in the witness section but the bank has clearly not executed the form. In no circumstances are such documents executed in a branch."

[19] As a result of this letter the plaintiff's solicitors and the defendant engaged in further correspondence. On 2 September 2014 the defendant informed the plaintiff's solicitors that the deed of transfer was prepared and provided to the husband who attended the bank, negotiated and agreed terms. The transfer deed was then signed on behalf of the bank.

[20] On 10 September 2014 the plaintiff's solicitors complained to the defendant that he was in breach of his undertakings to the court.

[21] On 5 January 2015 the defendant was given leave to come off record for the husband in respect of the matrimonial proceedings.

[22] The premises were re-possessed on 14 June 2016 and sold on 7 November 2016. The proceeds of sale did not satisfy the debt due and owing to Ulster Bank and as of 9 December 2014 the outstanding balance due is £81,497.50.

The plaintiff's submissions

[23] The plaintiff submits that the defendant gave an undertaking to release the plaintiff from her mortgage obligations to the Ulster Bank. As such an undertaking is now incapable of performance she seeks compensation, calculated on a contractual basis, namely the amount now due and owing to the Ulster Bank on foot of the mortgage being £81,497.50. The plaintiff indicated through counsel that she did not wish to pursue any other remedy sought in the originating summons.

The defendant's submissions

[24] The defendant submits that the undertaking given was to furnish a copy of the land registry letter of confirmation of completion of registration when received

and he denies that he gave an undertaking to release the plaintiff from her mortgage obligations to the Ulster Bank.

[25] He further submits that, even if the undertaking was to secure the plaintiff's release from her mortgage obligations, which he denies, the plaintiff has not sustained any loss as a result of breach of this undertaking as any loss which may arise is due either to her actions or the actions of other third parties. In the event she can establish loss arising from the defendant's breach of his undertaking, the proceedings are premature as the quantum of loss cannot be calculated until Ulster Bank prove the debt against her and her remedies to recover this debt from other third parties are exhausted.

Relevant legal principles

[26] The court has inherent supervisory jurisdiction over the conduct of its solicitors. This is most commonly invoked to enforce solicitors' undertakings. Thus a recipient of an undertaking can apply to the Court to enforce the undertaking in exercise of its supervisory jurisdiction.

[27] In *Udall v Capri Lighting Limited* [1988] QB 907, CA, Balcombe LJ at 916H to 918B set out the following principles on the exercise of this jurisdiction:

“(1) The nature of the summary jurisdiction is explained in the following passage from the speech of Lord Wright in *Myers v. Elman* [1940] AC 282,319:...

(2) Although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof ...

(3) If the misconduct of the solicitor leads to a person suffering loss, then the court has power to order the solicitor to make good the loss occasioned by his breach of duty ...

(4) Failure to implement a solicitor's undertaking is prima facie to be regarded as misconduct on his part, and this is so even though he has not been guilty of dishonourable conduct ... However, exceptionally, the solicitor may be able to give an explanation for his failure to honour his undertaking which may enable the court to say that there has been no misconduct in the particular case ...

(5) Neither the fact that the undertaking was that a third party should do an act, nor the fact that the solicitor may have a defence to an action at law (e.g. the Statute of Frauds), precludes the court from exercising its supervisory jurisdiction ... However, these are factors which the court may take into account in deciding whether or not to exercise its discretion and, if so, in what manner.

(6) The summary jurisdiction involves a discretion as to the relief to be granted ... In the case of an undertaking, where there is no evidence that it is impossible to perform, the order will usually be to require the solicitor to do that which he had undertaken to do ...

(7) Where it is inappropriate for the court to make an order requiring the solicitor to perform his undertaking, e.g. on the grounds of impossibility, the court *may* exercise the power referred to in paragraph (3) above and order the solicitor to compensate a person who has suffered loss in consequence of his failure to implement his undertaking ..."

[28] In *Reddy v Lachlan* [2000] *Lloyds Rep* PN 858 the Court considered which rules of construction applied to the interpretation of undertakings. In *Reddy* a solicitor stated in a letter to the plaintiff that he acted on behalf of the company and its principal shareholder and "on completion of the sale of the business ... I am to remit £26,000 to you". Although the solicitor was never provided with the funds to make this payment the Court of Appeal held that the reasonable recipient would regard this as an unqualified promise to pay the money. In the course of the judgment Simon LJ held that the critical question to be asked when construing an undertaking is "how would the solicitor's letter reasonably have been understood by the recipient in the circumstances in which he received it" (paragraph [15]). Further, at paragraph [20] of the judgment Simon LJ approved the dictum of Lord Hoffmann in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 *WLR* 896 at 912 where he summarised the principles by which contractual documents are nowadays construed as follows:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

[29] In *Reddy v Lachlan* [2000] *Lloyds Rep.* PN 858 CA, the Court further held that an ambiguous undertaking given by a solicitor will normally be interpreted in favour of the recipient.

[30] Buxton LJ in *Citadel Management Inc v Thompson* [1999] 1 FLR 21 affirmed that it is appropriate to look at the background circumstances in construing an undertaking. Similarly in *Bhanabhai v Inland Revenue Commissioner* [2007] NZ CA 368 Young P said:

“An undertaking should ... be read sensibly and in light of the commercial context in which it is given.”

[31] Therefore when construing the letter of 18 March 2014 the court must ask and determine the question, “how would the letter of 18 March 2014 reasonably have been understood by the plaintiff’s solicitors having regard to all the background knowledge available to the defendant and the plaintiff’s solicitors?”

[32] In the event the Court is satisfied an undertaking has been given and breached, the court may grant relief. In the exercise of its discretion the court may, *inter alia*, discharge a solicitor from performance of the undertaking, award compensation or refuse to enforce the undertaking at all, for example on the ground of delay.

[33] The principles upon which compensation is awarded were set out by Mummery LJ in *Taylor v Ribby Hall Leisure Limited* [1998] 1 WLR 400, CA at 408G to 409B as follows:

“The supervisory power over solicitors ... is essentially a summary disciplinary one exercised by the court over its own officers to ensure their observance of an honourable standard of conduct and to punish derelictions of duty. The court has the necessary powers of enforcement which extend, ... to the payment of compensation for loss suffered in consequence of misconduct of a solicitor in failing to implement an undertaking given to the court. The award of compensation is not, however, dependent on an enforceable civil law right on the part of the person who has suffered loss ... Compensation is only available under this jurisdiction where the conduct of the solicitor is inexcusable and such as to merit reproof ... The discretionary nature of the jurisdiction should be emphasised. The discretion extends both to procedure and substantive relief. It is

flexible and unfettered by any absolute rules and is to be exercised according to the facts of the particular case.”

[34] Generally an award of compensation is assessed on the contractual basis, that is, the recipient is placed in the position she would have been if the solicitors had performed the undertaking.

Consideration

[35] Both parties agreed that the central issue in dispute related to the construction to be placed upon the words used in the letter dated 18 March 2014 and specifically whether the defendant gave an undertaking to release the plaintiff from her Ulster Bank mortgage obligations.

[36] Mr Gibson on behalf of the plaintiff submitted that the plaintiff reasonably understood the defendant gave an undertaking to release her from her obligations under the Ulster Bank mortgage. This construction, he submitted was in line with the words used in the 18 March 2014 letter and in particular the second paragraph. Secondly such a construction accorded with the background circumstances and in particular the correspondence. Thirdly, subsequent correspondence dated 8 October 2014 and 17 October 2014 confirmed that the undertaking given was to release the plaintiff from her Ulster Bank mortgage obligations.

[37] In contrast, Mr Lavery, on behalf of the defendant submitted that the natural meaning of the words used in the 18 March 2014 letter were unambiguous and could only be interpreted to mean that the defendant would provide relevant paperwork when received. He denied paragraph two of the letter changed the meaning of the undertaking given in paragraph one. He further submitted that the defendant’s interpretation was in line with the background correspondence which demonstrated that the plaintiff’s solicitors never asked for and were therefore never given an undertaking to release the plaintiff from her Ulster Bank mortgage obligations. Thirdly, he submitted that the subsequent correspondence did not support the plaintiff’s interpretation of the undertaking.

[38] As set out in paragraph [31] above, this court must ask and determine the question, “how would the letter of 18 March 2014 reasonably have been understood by the plaintiff’s solicitors having regard to all the background knowledge available to the defendant and the plaintiff’s solicitors?”

[39] I find that the following background context is relevant to understanding how the plaintiff’s solicitors would reasonably have understood the letter of 18 March 2014. First, the correspondence entered into between the plaintiff’s solicitors and the defendant in November and December 2013 demonstrates that the Plaintiff’s solicitors were aware the husband’s proposals to settle ancillary relief matters was

offered and accepted on the basis that he would make all endeavours to secure the consent of the Ulster Bank to the release of the plaintiff from her obligations under the mortgage.

[40] Second, as appears from the correspondence dated 3 and 5 February 2014 the plaintiff's solicitors only sought undertakings in respect of (a) the execution of the transfer Deed by Ulster Bank and the husband and (b) proof of registration of the transfer in Land Registry. No undertakings were sought requiring the defendant to secure the release of the plaintiff from her obligations under the Ulster Bank mortgage.

[41] Third, by letter dated 20 February 2014 the defendant stated he had enclosed "certified copy transfer/matrimonial agreement sealed by the lending institution". The document enclosed was Land Registry Form 10 which bore the witnessed signatures of the plaintiff and defendant together with a signature by a third person followed by an address of an Ulster Bank branch and an Ulster Bank cashier's date stamp. After Form 10 was sent to the plaintiff's solicitors, the plaintiff's solicitors never asked raised any concerns about its validity and never asked the defendant to provide any undertaking to release the plaintiff from her Ulster Bank mortgage obligations. This is clear from the terms of the correspondence dated 26 February 2014 and the contents of the solicitor's attendance note at Court on 7 March 2014 when she noted that she advised the Court the undertakings sought from the defendant related to completion of the registration of the Transfer Deed and providing proof of such registration. There is no reference in this attendance note to the plaintiff's solicitors seeking any undertaking to release the plaintiff from her mortgage obligations to the Ulster Bank. In all the circumstances, I am satisfied that the actions of the plaintiff's solicitors, after they received Form 10 demonstrates that they believed the document was a validly executed document which secured the plaintiff's release from her Ulster bank mortgage obligations. In such circumstances I find that they never sought nor expected to receive an undertaking from the defendant to secure the plaintiff's release from her Ulster Bank mortgage liabilities.

[42] In a context where the plaintiff's solicitors never asked for an undertaking to release the plaintiff from her Ulster Bank mortgage obligations, I would expect very clear words to be used before finding a reasonable recipient would understand that such an undertaking was given.

[43] I do not find that the letter of undertaking dated 18 March 2014 gives such an undertaking in clear words. Rather, I find, paragraph one states in clear and unambiguous terms that the undertaking is to furnish certain paperwork when received. The plaintiff seeks to rely upon the second paragraph of the letter of undertaking dated 18 March 2014 to establish that the undertaking given was to release the plaintiff from her Ulster Bank mortgage obligations. I am however satisfied that paragraph two of the letter should not be interpreted in this way. The first part of the sentence in paragraph two, which states "you will be aware that your

client was formally released from her mortgage obligations on 19 February 2014” is an assertion of the facts as understood by all the parties, namely that the plaintiff had been released from her Ulster Bank mortgage obligations. The second part of the sentence which states “that the procedure in respect of this matter which we have now provided a form of undertaking for ...” means that the undertaking given in paragraph 1 relates to the procedure to enable the plaintiff to be released from the mortgage rather than an undertaking to substantively release the plaintiff from her mortgage obligations.

[44] In view of the background context I find that a reasonable solicitor in the plaintiff’s solicitor’s position would not have understood the letter of 18 March 2014 to mean that the defendant was now undertaking to formally release the plaintiff from her Ulster bank mortgage obligations.

[45] The plaintiff sought to rely on correspondence sent subsequently to the undertaking, namely correspondence dated 8 October 2014 and 17 October 2014 as evidence which supported her construction of the undertaking. The letter dated 8 October 2014 was sent by the defendant to the plaintiff’s solicitors and stated:

“... The undertaking has not been breached as it is being complied with. We enclose herewith extract from our client’s e-mail for your information ...”

[46] The plaintiff submitted that this showed the defendant understood the undertaking was to release the plaintiff from her Ulster Bank mortgage obligations. I do not however accept this interpretation. This letter was written in a context in which the parties were seeking to resolve the difficulty which had arisen as a result of the letter written by Ulster Bank dated 1 September 2014. In this letter the defendant was simply indicating that his client was still making endeavours to secure the release of the plaintiff from the Ulster Bank mortgage. In such circumstances he was correct in stating the undertaking was not being breached as the defendant hoped the husband would secure the plaintiff’s release from the mortgage and thereafter the solicitor would be able to put the paperwork in place. I therefore do not find that this letter supports the plaintiff’s interpretation of the letter of 18 March 2014.

[47] The plaintiff further relied heavily on a letter dated 17 October 2014 sent by the defendant to the husband. It stated:

“... We will have no alternative but to make an application to the court to come off record and cease to act for you, in that application we will be making the court aware that when we provided an undertaking to have your wife released from the mortgage that we were acting on instructions from

you that the consent and release of the Ulster Bank had already been obtained following your and your father's attendance and negotiation at the bank."

[48] The plaintiff submits that this is a clear acceptance by the defendant that he gave an undertaking to release the plaintiff from her mortgage obligations.

[49] Considered in isolation this letter supports the view that the defendant gave an undertaking to secure the release of the plaintiff from her Ulster Bank mortgage obligations. This letter however must be considered in context. It was written to a lay client for the purposes of explaining to him that the defendant could no longer act as his solicitor because of a dispute over an undertaking the defendant had given. I accept that the contents of this letter differs from the interpretation the defendant seeks to place on his undertaking now but I find this arises because the defendant was not as careful in his use of language as he should have been in the letter to his client and because the defendant did not see a need to explain the intricacies of the dispute about the undertaking to his client. He simply needed to explain why he had to come off record. Understood in this context I do not find that this letter assists the court in construing the meaning of the undertaking given by the defendant in the letter of 18 March 2014.

[50] Having regard to all the background knowledge which was available to the parties at the date of the letter of 18 March 2014 I find that a reasonable person in the position of the plaintiff's solicitors would not have understood the letter of 18 March 2014 to be an undertaking by the defendant to secure the release of the plaintiff from her Ulster Bank mortgage obligations. Rather a reasonable recipient in the position of the plaintiff's solicitors would have understood the letter to mean that the defendant would forward the relevant paperwork to the plaintiff's solicitor when he received it.

[51] I further find that the construction I have placed on the letter of 18 March 2014 is corroborated by the contents of the pre-action letter and the originating summons issued by the plaintiff. In both these documents the plaintiff did not complain about breach of an undertaking to release the plaintiff from her mortgage obligations. Rather in the pre action letter dated 20 February 2017 the plaintiff's solicitors complained about failure to honour an undertaking to "furnish a copy of the Land Registry letter of confirmation of completion of registration". Further the originating summons states:

"1. On the 18 March 2014 the Defendant gave an undertaking in his capacity as solicitor...that he would provide a copy of the Land Registry letter of confirmation of completion of registration.

2. No properly executed registration had been provided and Conor Agnew has been called upon to honour the said undertaking and has failed to do so.”

I am satisfied that if the plaintiff had understood the undertaking to mean that the plaintiff was released from the mortgage that she would have made this case in her pre-action letter and the originating summons.

[52] In the events which have happened the defendant is unable to furnish the relevant paperwork. I do not however find that he is in breach of his undertaking as the provision of paperwork was made conditional upon these documents being received. In all the circumstances I find that the defendant is not in breach of his undertaking.

[53] I therefore dismiss the summons. As a result I do not have to consider the interesting issues raised relating to the question whether I should grant relief and if so the nature of the relief to be granted.

[54] This case raises important issues about undertakings and establishes again that it is most important that solicitors exercise extreme care and caution when giving undertakings.

[55] Whilst the plaintiff has not been successful in this application it does not mean that she is without a remedy. I note that she may have a defence to any claim made by the Ulster Bank, if it chooses to enforce the debt against her and she also has potential claims against her husband and possibly other third parties, to recoup any loss she may sustain.

[56] I will hear counsel in respect of costs.