

Liability for Breach of Solicitors' Undertakings

By Stephen Chessher and Michelle Kilroy

Undertakings – the background

An undertaking is defined in the Law Society Guide to Professional Conduct of Solicitors in Ireland as:

“Any unequivocal declaration of intention addressed to someone who reasonably places reliance on it which is made by a solicitor in the course of his practice, either personally or by a member of the solicitor's staff, whereby the solicitor, or in the case of a member of his staff, his employer, becomes personally bound.”

An undertaking is binding on a solicitor as a matter of professional conduct enforceable by the Law Society. It is also enforceable by the Court by virtue of the inherent jurisdiction of the High Court over Solicitors as officers of the Court.

The use of undertakings is of course standard practice in both residential and commercial conveyancing, partly as a result of the move some years ago to a two solicitor system whereby the lender does not instruct its own solicitor but relies on undertakings given by the purchaser's solicitors as to title and execution, stamping and registration of the mortgage.

It might be thought that these basic principles would be well understood by all solicitors. Unfortunately, there has been a spate of claims against solicitors for breach of undertakings, particularly in relation to conveyancing. This spate of claims has been a significant factor in the well publicised hardening of the professional indemnity insurance “(PII)” market this year which in turn has led to two separate relaxations of the mandatory Minimum Terms for PII set by the Law Society over recent months.

In general terms, insurers are no longer required to provide cover for breach of undertakings given to lenders in respect of commercial property transactions. The effect of this is likely to be either that solicitors will need to take out additional insurance cover (over and above that required by the Minimum Terms) or, more probably, that lenders will deem it necessary to instruct their own solicitors on commercial property transactions.

Up until 2006, there had been almost no Irish case law on the subject. The only case law of interest appears to be an unreported decision of Lardner J in *I.P.L.G Limited –v- Stuart* [1992] IEHC 372. In that case, Lardner J affirmed the inherent jurisdiction of the Court in respect of solicitors' misconduct notwithstanding the supervisory regime established by the Solicitors Act 1960 which provided for hearings by a disciplinary committee of the Law Society followed by hearings by the President of the High Court.

Two recent judgments illustrate the approach taken by the Court to breach of solicitors' undertakings and may help to explain why the whole issue of undertakings has assumed such importance over the past year.

Bank of Ireland Mortgage Bank –v- Daniel Coleman (practising under the style of Coleman & Company) [2009] IESC 28

This case was an appeal by the Bank from a decision of Laffoy J. in the High Court and provides a useful review of the Court's jurisdiction in relation to undertakings.

The facts were straight forward. The defendant was a solicitor who acted for a purchaser. The purchaser obtained a mortgage offer from the Bank for an advance of €250,500. The defendant gave standard undertakings to the Bank as to title and execution of the mortgage. In September 2003, the Bank issued its loan cheque to the defendant and the defendant, in breach of his undertaking, endorsed it over to the vendor's solicitor without first having obtained a mortgage duly executed by the purchaser/borrower.

The borrower defaulted on the loan. In March 2004, the Bank reported the mortgage transaction (along with other transactions) to the Garda Bureau of Fraud Investigation over unspecified 'irregularities'. In June 2004, Gardaí seized the defendant's file under a warrant. In October 2004, the Bank wrote to the defendant enquiring as to the status of the transaction and what remained to be done to fulfil the defendant's undertaking. The defendant replied that he could not provide the information sought until his file had been returned to him by Gardaí.

The Defendant was clearly in breach of his undertaking. The Bank sought an order from the Court exercising its quasi disciplinary jurisdiction for repayment by the Defendant of the full amount of the advance of €250,500 plus interest.

In the High Court, Laffoy J found that, construed as a whole, the defendant's obligation was to furnish the Bank with proper security on the mortgaged property and that, although the defendant was in breach as at the date of the hearing, it was not impossible for the defendant to comply with his obligation in the future – which is in fact what happened. On that basis, she refused the remedy sought but she also found that, if it was in fact impossible to comply with the undertaking, the correct measure of the Bank's loss would be the value of the security that the Bank should have obtained but did not in fact obtain. That could not be measured simply by the amount of the loan.

On appeal, Geoghegan J gave the judgment of the Supreme Court. He referred to comments made by Laffoy J as to the need to maintain the integrity of the lending system as a result of which there could be cases where it would be appropriate to order the solicitor to repay the full amount of the loan. However, he accepted that would be oppressive in this case where the Bank itself had been negligent in making a loan which was based on an over valuation.

He reviewed the English case law and in particular, he summarised with approval seven principles set out by Balcombe LJ in the English Court of Appeal decision in *Udall –v- Capri Lighting Limited* [1987] 3 All ER 262 as follows:

1. *'The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally ...'*
2. *Although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant.*
3. *If a person has suffered loss 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 evidence of misconduct even if he has not been guilty of dishonourable conduct.*

5. *The supervisory jurisdiction is not ousted by defences that might be available to an action at law such as the Statute of Frauds but the court may take these factors 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.*
7. *Where it is inappropriate for the court to make an order requiring a solicitor to perform his undertaking e.g. on grounds of impossibility, the court has a discretion as to whether it should exercise the power to order the solicitor to pay compensation.*

On the facts, Geoghegan J found that the Bank had probably suffered loss in consequence of the breach of the defendant's undertaking, notwithstanding that the security had been properly put in place by the time of the appeal hearing. In the circumstances, the appeal was allowed to the extent of remitting the case back to the High Court to assess the Bank's losses (if any), such losses to be paid by the defendant.

Allied Irish Banks PLC –v- Charles Maguire, Noel McDonald, Richard Clinch and Tommy Gibbons carrying on practice under the style and title of Seamus Maguire & Co, Solicitors [2009] IEHC 374

Coleman was applied by the High Court in this case on which Peart J gave judgment on 28 July 2009. In *Maguire*, both parties were agreed as to the nature of the Court's jurisdiction. What was in issue was how the Court should exercise its discretion on the particular facts of the case.

In *Maguire* the defendant solicitor had acted for both parties in the purchase of a property known as 'Moongate'. The consideration for the sale was the discharge of the vendors' existing loan from Anglo Irish Bank ("AIB"). The purchasers/borrowers obtained a loan offer of €3m from AIB. The defendant provided the usual undertakings to AIB on the basis of which AIB advanced the full amount of the loan (less arrangement fee) to the defendant.

Rather than use the AIB advance to discharge the Anglo Irish loan as intended, the defendant in fact used the advance for an unrelated transaction being made by one of the purchasers. The Anglo Irish loan was never discharged, the AIB security was not put in place and the borrowers defaulted on the loan.

AIB obtained judgment against the borrowers which was unsatisfied. In these proceedings, AIB sought to recover from the defendant all sums due on the loan (principal and interest) because of its failure to comply with its undertaking.

The defendant argued that the undertaking was still capable of compliance as a result of negotiations with Anglo Irish and that it would be oppressive for them to be required to repay the entire loan and interest which would result in AIB being in a better position than it would have been had the undertaking been properly complied with. AIB would never have been able to recover the full amount of the loan. That was because there was evidence that the valuation which had been accepted by AIB when the loan offer was made was excessive so that even if the security had been put in place as it should have been, AIB would still have suffered a shortfall. Further AIB had been indulgent to the borrowers and had not called in the loan as soon as it could have done (and that against the background of a falling property market). The defendant also pleaded that AIB was contributorily negligent in not appointing its own solicitor.

AIB on the other hand argued that the defendant's actions were so egregious and deliberate that it ought to be required to pay all sums due to AIB.

Peart J, having distilled the principles set out in *Coleman* and the authorities on which it relied, drew attention to the deliberate and egregious nature of the defendant's actions, not simply in failing to comply with the undertaking, but in deliberately misapplying the proceeds of the loan. He concluded that it was necessary to mark the Court's absolute disapproval and condemnation of such actions and on that basis found for AIB and ordered the defendant to pay all sums due to AIB. The allegation of contributory negligence received short shrift.

Summary

- The Court has an inherent jurisdiction to supervise the conduct of solicitors.
- Where an undertaking is still capable of performance, the Court will ordinarily order that it be performed.
- The Court has a discretion as to how it exercises its jurisdiction. In considering compensation, it is entitled to and will assess the conduct of the solicitor in question.
- A failure by a lender to instruct its own solicitors in relation to a commercial property transaction is not necessarily to be regarded as contributory negligence. Whether the Court will take the same view in future in the light of the amendments to the PII Minimum Terms relating to undertakings given on commercial property transactions remains to be seen.

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