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Judgment: approved by the Court for handing down | ***Delivered:*** **22/08/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2012 No. 139129

BETWEEN:

EDEN (NI) LIMITED
AND
MALLAGHAN ENGINEERING LIMITED

Plaintiffs;

-and-

MILLS SELIG, A FIRM

Defendant.

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DEENY J

Introduction

[1] These proceedings were brought by the plaintiffs against their former solicitors seeking damages for breach of contract, negligence and breach of fiduciary duty on the part of the solicitors in and about the conveyance of lands in 2007. This judgment deals with the factual issues between the parties, the extent of the duty of a solicitor to disclose information to a client with regard to a previous sale of the property and the consequences, on the facts, if any breach of duty is established.

[2] The action was heard before me over five days. Mr Mark Orr QC appeared with Mr Mark McEwen for the plaintiffs. Mr Nicholas Hanna QC appeared with Mr Bernard Brady for the defendant. I am grateful to counsel for their able and succinct written and oral arguments. These have been taken into account even if not expressly referred to in this judgment. I informed the parties that the Defendant firm, and on one occasion, at least, Mr Bill McCann, had instructed me as counsel prior to 2004 but both parties requested that I hear and decide the action.

The Plaintiff's Case

[3] The two plaintiff companies are both subsidiaries of Mallaghan Holdings Limited (Holdings). That is the present corporate form of a business started by the father of Mr Ronan Mallaghan (Ronan) and Mr Niall Mallaghan, who are Directors of the second plaintiff. Ronan holds 94% of the shares in Holdings. It has been a successful business based in Dungannon. It involves the design and manufacturer of ground support equipment such as catering trucks and stairs for airports – "metal bashing" as Mr Ronan Mallaghan modestly put it. Prior to 2007 the defendant firm was instructed to assist in a corporate reconstruction of this business. The first plaintiff, Eden, was set up, the court was told, with a view to a possible development of the property around the plaintiff's factory at Dungannon, in conjunction with neighbouring lands. It had no assets. The second plaintiff was the operating company of the aircraft support business and had substantial assets.

[4] It is common case, and within the knowledge of the court, that there was an enthusiastic and, indeed, heated property market in Northern Ireland in the years leading up to and including the first half of 2007. The Mallaghans appear to have been inspired by this rising property market to seek to acquire property for resale.

[5] The Mallaghans met with a Mr Martin McWilliams who represented himself, they said, as the owner of lands at Seskinore, County Tyrone. These were some 8.4 acres in extent on either side of a road within the development limit of that hamlet. The land was some subsequently conveyed as Folio No. TY 81111, County Tyrone. They agreed to buy the same for £5,375,000.

[6] The plaintiffs' case is that they were "persuaded to purchase" these lands, at least in part, because when they put the proposal to Mr William (Bill) McCann of Mills Selig he told them it was a "good deal". In fact this proved not to be the case as I will outline and they sue his former firm for their loss and damage.

[7] The second head of claim is based on an omission. In 2007 Mr McCann, in his capacity as the conveyancing solicitor to the plaintiffs, sent them a report on title. He had been sent the title documents by letter dated 18 January 2007 from the vendors' solicitors, Messrs Tughans. These documents included the last transaction with regard to the land, namely a transfer from Hugh Francis Grugan and Charles Columba Grugan to Freughmore Developments Limited (Freughmore). This was on 15 December 2006 and was in the sum of £3,300,000. The plaintiffs contend that they would never have agreed to purchase the lands for £5,400,000 if their solicitor had told them of this recent transaction at a much lower figure. It is, in effect, common case that he did not tell them of the transaction but what is in dispute is whether that amounted to a breach of his legal duty and, if so, whether it would in fact have deterred the Mallaghans from proceeding with the purchase of the lands.

[8] I observe that the transfer of 15 December 2006 is to be found at trial bundle pages pp. 1411ff. In that the address of the Grugans is given as 41 Froughmore Road, Seskinore, Fintona. The purchaser has chosen to spell its name Freughmore Developments Limited. It was a special purpose vehicle set up to purchase and re-sell the lands by Mr Martin McWilliams and a property developer called Ciaran Murdoch.

[9] The plaintiffs seek to persuade the court, for the onus is on them, that they would not have entered into the contract with Freughmore if Mr McCann had not said that 'it was a good deal' and/or had furnished them with details of the last transaction. There is clear evidence, including from two expert valuers, that in the excited market of early 2007 the market value of the lands had reached £5.4m or above. For the plaintiffs to establish a loss, necessary to establish the tort of negligence, or to establish more than nominal damages for any breach of contract, they must show that they would not have entered into the contract at all. This was, in effect, acknowledged by senior counsel for the plaintiffs, although I deal with more fully below.

[10] In the events the first plaintiff was the purchaser. The purchase monies were provided, to the extent of 100%, by the Bank of Ireland. The first named plaintiff was unable to sell on or "flip" the property as the Mallaghans had hoped. It fell behind on payments of interest. Receivers were appointed. The bank ultimately resold the property to the original owners, the Grugans, for £455,000 in 2012.

[11] The involvement of the second plaintiff was as a guarantor of the borrowings by the first plaintiff. On foot of that guarantee it was sued by the Bank of Ireland and the proceedings were settled by payment of £1.25m. It can be seen therefore that the main loser is in fact the Bank of Ireland which is not a party to these proceedings. If the plaintiffs succeed however the first plaintiff will seek to recover the loss on the transaction which it would then owe to the bank. The second plaintiff would seek to recover the £1.25m it paid to the bank.

[12] Although pleaded the plaintiffs did not persist with a claim for breach of fiduciary duty. The claim in reality rested on the alleged negligence or breach of contract of Mr McCann. As to the latter the plaintiff points out that there was no letter limiting the role of the defendant's solicitors at the commencement of the relationship. The only relevant letter, to which I will turn in due course, of 2 February 2007, reviews the title to the lands and gives an estimate of fees. The plaintiffs claim in addition interest, costs and expenses arising out of the transaction.

Evidence of Terence Ronan Mallaghan

[13] As indicated above Mr Ronan Mallaghan had come into his father's business which was then a small business. Although he himself had left school with only three GCSEs, "at the second go" as he put it, he proved an adept businessman who

has built up a substantial firm with some 200 employees and a turnover at the present time of about £40m per annum. They sell their products all over the world.

[14] He is the Managing Director with his brother Niall concentrating on sales. I will deal with the third brother Canice in due course. There is a fourth brother who does not figure in this case. Ronan gave evidence of the earlier dealings with Mills Selig already referred to above.

[15] In 2006 he met Martin McWilliams who was doing earthworks at his factory in Dungannon. He said that he knew land for sale at Seskinore and asked if Ronan Mallaghan would be interested in buying it. A few days later Ronan went with his brother Canice to meet Mr McWilliams. At that time Canice was working at the Ulster Bank in Belfast. The two met Mr McWilliams at Seskinore on a Sunday morning in September 2006. Standing by the side of the road he described the lands to the brothers and asked £5.45m for the 8.4 acres. They verbally agreed on £5.375m.

[16] In fact Mr McWilliams did not own the land at this stage. Neither the court nor, apparently, the parties are aware of whether he had a binding legal contract with the Grugans at this time. They later conveyed the land to his company as set out above.

[17] Ronan Mallaghan said that shortly afterwards he told Mr John Kearns of Mills Selig of this agreement, who referred him to his partner Bill McCann who dealt with conveyancing. In fact they had met Mr McCann before. They took him to see another site in County Tyrone in which they were interested. This was at Lough Macrory. Mr McCann advised them not to buy that land and they did not go ahead with the purchase. Mr Mallaghan said that as opposed to that occasion Mr McCann recommended the purchase of the land at Seskinore. This happened at his offices. This was he said, at first, in September 2006 or October of that year approximately. Mr McCann told him it was a good deal.

[18] While Mr Mallaghan gave his evidence generally in a confident and articulate manner, at this point, his demeanour changed and he was somewhat flushed and tense.

[19] The witness claimed that Canice was present at this meeting in the Mills Selig office. The Mallaghans were left to look for finance after this conversation with Mr McCann. Their main bank at the time was the HSBC in Belfast. They were quite positive about the transaction but needed approval from Head Office in London. This dragged on for some months and Head Office then ultimately declined to approve the loan to the Mallaghans.

[20] Mr Mallaghan said that they also banked with Danske Bank but that they immediately said no to the proposition at their first meeting.

[21] The Mallaghans then went to the Bank of Ireland whose response was positive. His main point of contact there was Mr Wayne Hawood who was based in Portadown and Belfast but who also came to their offices.

[22] Because of the delay in completing the transaction the vendor said, and the Mallaghans accepted, that they should pay a further £25,000 bringing the sale price to £5,400,000. Mr Mallaghan's attention was drawn to a letter of 19 February 2007 from the bank to the directors of Eden NI Limited of which he was one. I observe at this point that his brother Canice, although not in the business, was added as a director of the first plaintiff because their brother Niall was often abroad on business and might not be available to sign documents. This letter, at trial bundle 1, p. 211 describes the loan of £5,500,000 "to 100% finance the acquisition of a 8.3 (sic) acre residential site at Leftern Road, Seskinore, Omagh" as a "four month bullet loan". Mr Mallaghan explained that the idea was to sell the land quickly, make a profit and use the money to build something, possibly an industrial estate, at the factory in Dungannon. The letter of offer provided for the second plaintiff being a guarantor. A pre-condition of the offer was that the lands at Seskinore would be subject to an independent valuation in the minimum amount of £6.5m i.e. a million more than Eden was paying. Mr Mallaghan said that this second meeting with Mr McCann was in the latter's office in 2007 and that Canice was also present. He thought that he may have been back in the Mills Selig office one further time to sign up for the second plaintiff's guarantees but mostly he was leaving it to Canice.

[23] Counsel drew to his attention an attendance note by Mr McCann at 1/137 dated 1 February 2007. Mr Mallaghan said that he did not keep a diary and could not remember precise dates. The John Kearney named on that note was an architect whom they retained.

[24] His attention was drawn to the memorandum of sale which he had signed (II/515). From his evidence and subsequent evidence it appears that this was sent from Mills Selig on 27 February to Mallaghan Engineering Limited. They then sent it to Mr Niall Mallaghan who was in Dubai. He signed it and faxed it back to Dungannon where Mr Ronan Mallaghan signed it on 28 February. It was then faxed back to Mills Selig who forwarded it to the vendors' solicitors. It was then accepted on 1 March and completed on that day with a subsequent land registry transfer being executed.

[25] When asked by Mr Orr whether Mr McCann made any other representation the witness said "absolutely". Ronan claimed that when he was in signing the guarantees (by the second plaintiff of the first plaintiff's loan) he asked was this a good deal and Mr McCann said it was. Mr Mallaghan claimed it was his nature to ask people as he was not an expert. "Mr McCann said it was a good deal".

[26] This memorandum of sale recites that the property was comprised in a Deed of Transfer dated 15 December 2006 between the Grugans and Freughmore

Developments Limited, the vendor to Eden. Mr Mallaghan said that he did not read that. He would have just signed the document.

[27] It was the evidence of Ronan Mallaghan that he only became aware of the previous recent sale for £3.3m in conversation with his solicitor Mr Brian Walker in 2010. Ronan Mallaghan said he was shocked. If he had known that he would never have purchased the field. There would have been no profit left for him.

[28] He said that he had never seen a valuation prepared by a Mr O'Kane of Colliers with regards to the land nor did he meet Mr O'Kane.

[29] He said that they attempted to sell the land afterwards from March on. His brother Canice instructed Messrs Lisneys. They were unable to sell the land and the bank ultimately repossessed it as recorded above.

[30] Ronan was cross-examined by Mr Nicholas Hanna QC. He said that as his father was unwell he had effectively run the business from his 20s where he had built up a good team of loyal staff. He said he was cautious and relied on advice from a small network of loyal people. That included bankers, solicitors, architects and accountant.

[31] He was not involved in the property scene in 2006 but was aware that profits were being made in land. He wanted to make money also in that way.

[32] Canice was younger than him and not long out of university at this stage. Mr Mallaghan claimed that he could not remember that Canice had been working in Dublin nor did he know that he had worked in "Jones Lang Lasalle for two years,"as a Bank of Ireland paper recorded. Mr Mallaghan denied any knowledge of that. (It transpired that Canice had worked for that firm although for a shorter period of time and only, he said, on accounts).

[33] He was asked if that were so i.e. that he did not know that Canice had any property experience why did he take him with him to the meeting with Mr McWilliams? On the second time of asking he said that was because Canice worked in the Ulster Bank in Belfast. Niall was away. Ronan had never been in Seskinore in his life. He made no enquiries before he drove down on the Sunday morning to see the land. He was asked had he not enquired about the price of the land and he alleged that he asked Mr McCann was this a good deal. The earlier Lough McCrory lands had been available at £3.3m but for a smaller acreage. He knew that and he had had their own land valued. He had a limited knowledge of these values. He did consult Canice. There had previously been a falling out between the brothers but he now wished them to be on good terms. The witness claimed that he had sent across to Mr McCann the map and photographs that he had got from the solicitor for the vendor. As indicated those materials were only sent over by Tughans with a letter of 18 January 2007 and not in September or October 2006. When this was put to the witness he said that was not possible. This was

another wholly inadequate reply. He had definitely met Mr McCann before Christmas. HSBC were working on the deal from September for months. He, Ronan, did not go the bank looking for the money before he spoke to Mr McCann, he says.

[34] Mr Hanna pointed out that the defendants in a Notice of Particulars of 29 January 2014 sought the following particular.

> "1. State the precise date upon which the plaintiff's first instructed the defendant to act for them."

The answer given in the plaintiff's replies on 29 April 2014 was:

> "The best answer the plaintiffs can provide is early January 2007."

But Mr Mallaghan said that the first thing he did was to meet with Mills Selig. When asked why he did not check the price he was paying with a valuer at any time between September 2006 and signing the contract on 28 February 2007 he said that that never occurred to him. He believed it was a deal in which he could make a profit. He was content with his solicitor's advice that it was a good deal.

[35] I pause to indicate that the parties had sensibly agreed the admission in evidence of several trial bundles but also a bundle of documents from the Bank of Ireland which only arrived at the commencement of the trial. There were some commercially sensitive redactions to which neither side objected.

[36] Senior counsel pointed out to Ronan Mallaghan that in the pleadings in the action it was asserted on behalf of the plaintiff that the defendant had been retained in January 2007. Ronan Mallaghan said no that it was about October 2006 but went on to acknowledge that it was difficult to remember as it was nine years ago.

[37] Senior counsel pointed out that the replies of the plaintiffs of 29 April 2014 in answer to the defendant's Notice for Particulars were inconsistent with the evidence that Ronan Mallaghan was now giving as to when the purchase price had been agreed with Mr McWilliams. He replied that "It is so long ago, my story stays the same it was in September at Seskinore." This was not persuasive. Mr Hanna pointed out a further discrepancy between paragraph 7 of the Statement of Claim and the witness's evidence. The Statement of Claim alleged that Mr McCann had said the price "was a good deal" when first instructed but this case was now being changed by Mr Ronan Mallaghan to suggest that he had said it twice.

[38] Further discrepancies were put to him but Ronan Mallaghan maintained that Mr McCann in his office in late October 2006 gave him this assurance with the benefit of the maps in front of him. This is inconsistent with various parts of the

pleadings including the reply saying that this assurance was in fact given on the telephone.

[39] He was cross-examined about the second alleged assurance by Mr McCann. This, Ronan Mallaghan said, was when they were finally signing up the documents, again (sic) in the office of Mills Selig. But as outlined above that is not how the signing of the contract took place.

[40] When pressed about why he did not seek any advice from a valuer between September or October 2006 and 1 March 2007 he said it was because he believed he could make a profit as others had done.

[41] Quite remarkably, he claimed that his brother Canice had never told him that he had been employed by the estate agents Jones Lang Lasalle in Dublin, although he brought him with him to inspect the land at Seskinore. Ronan Mallaghan did not know if he was aware that the Colliers valuation met the bank's need of the property being valued at £6.4m or £6.5m. His evidence became increasingly unsatisfactory as counsel cross-examined him about the Colliers valuation and his dealings with the various banks. Counsel asked him why he would prefer the remark of a solicitor in Belfast given off the cuff to a formal opinion from a valuer. His only answer to that was that Mr McCann was the head of property for Mills Selig. He denied having seen the report of the expert witness Mr Christopher Callen. It was pointed out to him that the comparables put forward from other sales in the district justified the price at that time of £625,000 per acre which he was paying. He could not say whether his expert had queried this as he had not read his report either. But he did acknowledge that the sale at the lower price of £400,000 per acre could be explained by the Grugans selling too cheaply or by Mr McWilliams having an option from them some earlier date when lower valuations prevailed.

[42] When asked why he had produced no documentary evidence of the marketing of the property by Lisneys, as he alleged, from March 2007 he could not explain that but said he left that to his brother Canice.

[43] In concluding his cross-examination Mr Hanna put to Ronan Mallaghan that Mr McCann had never said this was a good deal or words to that effect. The witness replied with a question – "Why would I do the deal if he had not said that?" This is rarely a convincing way for a witness under oath to answer a pertinent question and nor was it here.

[44] Mr Mark Orr QC re-examined but despite his best efforts the damage that had been done was not repaired.

[45] The court also heard from Canice Mallaghan. He was a graduate in economics from the University of Ulster and had studied for but not completed his accountancy exams thereafter. He recounted his work history including a period with Jones Lang Lasalle, estate agents, in Dublin where he said he was an assistant

accountant. He moved to the Ulster Bank after his parents' home burnt down and started with them in May 2006, immediately, as an assistant manager in Belfast on the corporate and property team, which seems surprising if his experience was as limited as he says.

[46] Despite an earlier disagreement his relationship with Ronan in 2006 was improving. He went with him to Seskinore one Sunday in September or October or, he said, towards the end of 2006. A price was agreed after negotiations and a handshake. There were no documents at that stage but he did get them later. This seems to have been a scheme suggesting that some 60 to 70 units might have been built on the land. He said these papers came in before the Mills Selig meeting at which Ronan asked was it a good deal and Bill McCann said it was. I did not find his demeanour convincing at this stage. Canice said that he was at a meeting on 1 February 2007, which he said was a second meeting. He described that. Although unable to remember other details about the meeting he claimed that Ronan again asked Mr McCann was it a good deal and again he said it was. Again he seemed to me flushed and unconvincing in that assertion.

[47] He said that he had only learnt of the price that Freughmore had paid for the land i.e. £3.3m in 2006 some years later. If he had known of it the decision would have been for Ronan but his advice would have been to re-negotiate.

[48] He knew Mr O'Kane of Colliers through the Ulster Bank and had instructed him on occasions. He, Canice, had negotiated the fee with him but he does not remember who suggested him. Mr O'Kane was on the Ulster Bank Panel. He would have discussed the valuation with him. His attention was drawn to the Bank of Ireland file which came to light at the commencement of the trial and on being shown it he accepted that a copy of the valuation had been sent to him at his home address in Donaghmore, County Tyrone. He would therefore have been aware of the valuation before his brothers signed the contract. He gave evidence about trying to sell the property after they had bought it but said there was no offer.

[49] He was crossed-examined by Mr Hanna. It is not necessary to go over the cross-examination in detail. He said, and I accept, that he was not competent to advise on the right price for land in County Tyrone in 2006. He had not seen the pleadings and could not comment on discrepancies between it and his recollection. He admitted that the then practice of the banks was to get a valuation on the property only after they had credit approval to lend on it.

[50] He was questioned about the Colliers valuation and seeing it before 28 February. He said at one point that he had not seen it before that date which as counsel pointed out was inconsistent with his earlier answer to Mr Orr.

[51] He was asked about his own view of the valuation at the time of the transaction. He said he did not remember his own exact opinion but he did not say no to the transaction. He had the opinion that there was money to be made. The

plan was to get in and out i.e. by a resale. It was pointed out that the bankers had been told that he had two years' relevant experience in Dublin, but he said that was incorrect. However, that information must have come from him or Ronan. Further discrepancies were put to him by counsel which he was unable to explain. His answers about the post transaction dealings as evidenced by the Bank of Ireland file were unsatisfactory and unclear.

[52] Again he was re-examined by counsel but the damage earlier done was not repaired. In answer to a question from the court he maintained that the first meeting with Mr McCann was not in 2007 but in October or early November 2006.

[53] Mr Francis Paul Cassidy FRICS ACIArb was then called on behalf of the plaintiffs. He is a director of Osborne King. He had prepared a report dated 10 November 2015. A key passage in his report is to be found at paragraph 5.1 in bundle A(II) page 26. I quote it in full.

> "It is very difficult to make a cogent argument to say that the valuations are incorrect. There were a lot of land transactions in Fermanagh and Tyrone during the period 2005-2007 and any analysis of these transactions gives a range of prices per acre. Therefore, it is difficult to say for example that a land price of £650,000 per acre is wrong."

It will be recalled that that was the price that the Mallaghans paid.

[54] In cross-examination he acknowledged that the price that they paid was an open market value and not in a forced sale context. He was cross-examined on his attitude to the comparables identified by Mr Callan. In his opinion they were prices at which it would not have been prudent or professional to purchase at that time but he did not dispute their factual correctness as a picture of the market.. He would have preferred a residual valuation His evidence completed the plaintiff's case.

The defendant's case

[55] Robert William McCann was called. He is now retired but until June 2015 was a solicitor of the Supreme Court in Northern Ireland practising as a partner of Mills Selig. His work had varied to some degree over the years but in the period in question he was very largely a property lawyer. He said the market at that time was an extraordinary one with developers and speculators dominating it. He acknowledged that his written records of the dealings with the plaintiffs was limited. He might have heard about this transaction in November or December 2006 but his first written note was the attendance note of 1 February.

[56] He said that he had gone down on a previous occasion to look at a site which the Mallaghans were interested in. On going there he could see that there were

serious road issues caused by a bridge on a bad corner. It was a rough site. There was a right of way issue. There may have been environmental issues. He acknowledged that he did discourage the Mallaghans from purchasing it.

[57] He did not believe he had any meeting or received any documents with regard to this transaction before they were sent by Mr Mills of Tughans for the vendors on or shortly after 18 January 2007. For reasons he explained it was not possible to meet until 1 February, consistent with his note.

[58] This note to be found at I/137 is short, it must be acknowledged, but contains important information. Mr McCann notes the presence of Canice Mallaghan. There is no reference to Ronan but it is possible that he was there also, although Canice thought not at one point when he gave his evidence on Thursday 19 May to the court.

[59] There is a reference to John Kearney, an architect, who was to look after the planning. There was a reference: "HSBC to finance" which was the intention at that time. There then appears "10-12½ K ". Mr McCann said this meant that he was indicating that his firm's fees would be £10,000 to £12,5000. This is something that he would say at a first meeting. He would not have left it to a second meeting.

[60] In support of that he pointed to I/146 on the second page of his letter of 2 February 2007 to Ronan Mallaghan. The paragraph before that reads as follows:

> "Fees – I have indicated to Canice that the conveyancing fees will lie in the range of £10,000 to £12,500 plus VAT and outlays with a further £2,500 (approximately) for the mortgage work in connection with the proposed HSBC loan."

[61] The witness said that he wrote on the same day to Mr Kearney and to Mr John Mills of Tughans. He was asked whether he had said that the transaction was a "good deal". He said that was something he would never do. It was an incredibly dangerous area. As Mr Cassidy had said there was an inflated market at the time. He was not versed in the valuations and nor did he venture into them. Valuations were neither shown to him nor discussed with him. It will be necessary to return in due course to what is not noted on the attendance note or stated in the file i.e. the previous transaction regarding this property. For now, in examination-in-chief, Mr McCann said he had noticed that the purchase price at the last transaction (in December 2006) was £3.3m. He did not remember telling either Mallaghan of that price and accepts that it was not in his letter. He thought the difference was unexceptionable. He did not know the background. There might have been an option from some time ago. The market was red hot. "Flipping" was going on all over the place.

[62] He went on to describe his dealings with the vendor's solicitors in the subsequent week with the increase in price for the property agreed between the parties. He described the completion of the transaction immediately before and on 1 March which was in part done by phone call and in part by exchange of contracts. The lender had changed in the interval.

[63] Mr McCann was cross-examined by Mr Mark Orr QC. He accepted that he had no formal retainer from the plaintiffs and nor had he agreed a written contract with them. When asked had he limited the scope of his duty to them he said that he did not do so, so far as he could recollect. It was a very busy time but it was his only Mallaghan deal. He did not agree that this deal was at the "high risk end" – all property development involves a risk.

[64] When he had gone to visit their earlier possible purchase at Lough Macrory he called in at their premises in Dungannon. He was impressed at this fine business and these were obviously experienced businessmen. He did not accept that they were novices. There were a lot of people getting in the market at that time. He was cross-examined about his advice to the Mallaghans in regard to Lough McCrory. He went in detail into the reasons why he was cautious about the sale, including issues of toxic waste with which he was familiar from work he had done in the harbour estate at Belfast. He said there were a number of concerns to address. There were enough to say to Mallaghans, "be careful, consult an expert". He admitted that might constitute giving an oral 'heads up' to the client outwith the issue of title. Heads up, I take it, was being used in its currently fashionable sense of a warning or alert. He admitted he had no record of his visit to Lough McCrory, but that was because he was doing it for a new client for whom he was making an effort on a pro bono basis.

[65] He was cross-examined about the paucity of notes he had for this transaction at Seskinore. In effect he said that it was not his practice to keep many records. It transpired that there was an office record showing that lunch was ordered for the day of 1 February 2007, but no similar record for any earlier meeting with the Mallaghans.

[66] He remembered meeting Canice a number of times but could not recollect if he had ever met Ronan.

[67] With regard to valuations he would get the price from the estate agent. "I don't query the price". It was possible he had met before Christmas. He said he had never said that this was a good deal or a bad deal over the years. When asked did he say it here he said absolutely not. He could have been asked his opinion on Seskinore but he would not have said it was a good deal. That would be to put his head on the block.

[68] The opinion of Mr Cassidy that the increase in the price from £3.3m to £5.4m in three months i.e. a 67% increase from one of view was "unusual" was put to him.

He did not agree although he was not a valuer. The increase in values in Northern Ireland over that year was 32%. He did not think he made a conscious judgment not to tell the client about the earlier price but that it merely did not seem peculiar to him.

[69] Mr Hanna objected to Mr Orr putting material from the Handbook of the Council of Mortgage Lenders as this was neither a domestic transaction nor a lending transaction.

[70] Mr McCann did not feel that the fact that it was a 100% mortgage and that the second plaintiff was giving a guarantee and that these people were novices did mean that he ought to have disclosed the last transaction to them. He said that Mr Thomas Adair of Carson and McDowell, solicitors, was the gatekeeper for the Bank of Ireland and if the bank was unhappy they would not have lent the money. Mr Adair would have seen the title including the last transaction. He accepted that he was not present when the documents were signed, although he witnessed them, as they were signed in Dubai and Dungannon.

[71] Mr McCann was not re-examined by counsel. His assistant Mrs Claire Rice was called but had no specific recollection of the transaction.

[72] The defendant called Wayne Colin Horwood who was an Assistant Director of the Bank of Ireland at the time in question and is also a chartered accountant. The Mallaghans were high on his target list as potential clients in the Dungannon area in 2007. According to Mr Horwood there was a frenzy among banks competing for lending at that time. When HSBC refused credit approval he put up the proposal to his credit board. He accepted that a contemporaneous note showed this 100% loan on this property was a significant breach in credit policy. It seems that the risk was thought to be mitigated by lending the money for only four months instead of 12 months. He acknowledged the land was tertiary and not actually zoned or with planning permission. He gathered from the Mallaghans nevertheless that they were confident they could develop the land. Canice had told him that he had been with Jones Lang Lasalle. That must have been for two years as he would not have known that in any other way. He noted that he was to become a director of Eden. He noted the suggestion from Mr Murdoch, that a developer might be offering more. Mr Ciaran Murdoch had been a client of the Bank of Ireland along with many other banks. He was taken to a number of matters that appeared in his files. One of those was the valuation of the property from Colliers at £6.5m, £1m more than the purchase price. He also noted that the "promoter was confident of a £1m profit" which again must have come from the Mallaghans. He did visit the site with Ronan Mallaghan. The market did collapse later in 2007 but it was still buoyant in February. It just stalled later. The valuation of Mr O'Kane of Colliers was sent to Canice Mallaghan. He does not recall where, subsequently, he got the suggestion that there had been an offer of £5.9m.

[73] He was cross-examined by Mr Mark Orr QC. Mr Horwood acknowledged that his own file admitted that credit policy was being breached "for numerous reasons" by this transaction. That was why they were taking a guarantee from the second plaintiff. The bank was influenced by the fact that Mr Murdoch, an experienced developer, was talking of a higher bid. As stated earlier it seems that he in fact had an interest in Freughmore the company which had just bought the property for £3.3m.

[73] Mr Horwood said that there was pressure on him internally to complete this transaction from colleagues who were doing other business.

[74] The defendants called Mr Mark O'Kane, BSc, MRICS who was the chartered surveryor with Colliers who had provided the evaluation on the property. He was asked by Canice Mallaghan to do this, originally for HSBC but then to be readdressed to Bank of Ireland. He had valued for Canice a number of times. His instructions were to come in late 2006 or January 2007. He sent the valuation to Mr Horwood of Bank of Ireland on 27 February, copying it as usual to the client. He may well have done that with the earlier HSBC report. He valued the property at £6.5m.

[75] In answer to questions from the court subsequently he could not think of an increase of two thirds in the price of a site in a few months even in that market. 67% increase in two months would be exceptional in his view, but might not be when earlier transactions may have taken place. That completed the evidence.

Consideration

[76] Following the conclusion of the evidence the court received helpful submissions from Mr Hanna and Mr Orr. I have refreshed my memory of those and have absorbed them into my consideration of the facts and law.

[77] There are two planks of the plaintiffs' case. There is an issue of consequential loss if either is established which is common to them but I propose to address them separately for now. The first plank is that Mr Bill McCann told the Mallaghans that the purchase of the land at Seskinore "was a good deal" and that they acted on that to the loss of the two plaintiff companies. The second plank is that Mr McCann omitted to inform them that the property had changed hands for £3.3m on 15 December 2006 i.e. £2.1m less than they were paying on 1 March.

"A good deal"

[78] The plaintiff relies on the evidence of Ronan and Canice Mallaghan to give the factual basis for this first plank in their claim. Ronan Mallaghan while a confident witness generally was not convincing in my view when he came to this part of his evidence. There was a discernible alteration in demeanour. If I had nothing further to rely on I would not be convinced by his evidence.

[79] In fact as can be seen from the outline above his evidence generally he was not precise as to dates, times and details. He was not even sure of the month in which certain things happened. He claimed to have signed the contract in the office of Mills Selig when that was not the case. He may never have been in that office. I find that the first meeting with Mr McCann was in February 2007 not 2006.The quality of Ronan's evidence generally was not such as to give a sound foundation for such a claim.

[80] In 2011 he had been referred to Mr Brian Walker, solicitor. This gentleman is a very experienced and careful lawyer. He wrote a letter of claim on 31 October 2011. It is a perfectly good letter of claim but it makes no assertion that the Mallaghans entered into this transaction because of some kind of encouragement, warranty or opinion from Mr McCann to the effect that it was a good deal. It seems to me most unlikely that if Ronan Mallaghan was instructing his new solicitor to make a letter of claim that he would not have told him of this important part of his case. It seems inconceivable that Mr Walker would not have raised it in his letter of claim if he had been instructed about it.

[81] I note that the writ of summons was actually only issued on 14 December 2012 which would suggest no great enthusiasm on the part of the plaintiffs. Furthermore, in breach of the rules, the statement of claim was only served on 17 October 2013. By then learned counsel, Mr McEwen, does include in the statement of claim the allegation about the good deal. But interestingly his instructions would appear to be that this was said once whereas in their evidence the two Mallaghans claimed that it was said twice.

[82] As Mr Hanna ably explored in cross-examination the divergence between the oral evidence and the pleaded case increases when one examines the carefully drafted replies served on behalf of the plaintiffs.

[83] The plaintiffs also called in aid the evidence of Mr Canice Mallaghan. Again, I thought his demeanour changed when he came to this part of his evidence which he seemed anxious to get out, no doubt aware of its importance. His evidence, although perhaps somewhat less perforated than that of his brother was far from perfect either. I do not believe him, for example, when he says he was not the source of the note on the Bank of Ireland file described by Mr Horwood saying that Canice had spent two years with Jones Lang Lasalle. I believed Mr Horwood that Canice had given the impression that he had experience in property which he now says that he did not have.

[84] Mr Bill McCann gave evidence in the case. He denied using such an expression either once or twice. I believe him. I believe he was an honest witness.

[85] It would be a most surprising thing for a solicitor, as Mr McCann put it, to put his head on the block by giving some kind of endorsement to a transaction by his

client, especially when he had in truth no means of knowing whether or not this was a good deal or not. He had not been provided with a valuer's opinion. He had not visited the site. He was not familiar with the locality.

[86] It is true that Mr McCann did visit the Lough Macrory site with Ronan Mallaghan and that he did discourage him from purchasing it. But giving cautionary advice to a client is in the nature of a solicitor. It differs significantly from endorsing a client's proposition about which knows virtually nothing. I do not believe this happened here. I find that Mr McCann did not either volunteer or answer that the Seskinore proposition was a good deal, either once or twice.

[87] In those circumstances it is neither necessary nor appropriate to go into the other interesting submissions of counsel if I had found that these words had been used by Mr McCann. Suffice it to say that there might well be merit in Mr Hanna's submission that the use of such words would not justify a claim of this sort. Mr Orr justifiably pointed out that Mr McCann had omitted to limit his retainer in any way at the commencement of the proceedings, but even allowing for that the plaintiffs here would have had a significant hurdle to overcome even if I had found otherwise than I have done on the facts.

Failure to inform of previous transaction

[88] In this connection there is no dispute as to the facts. Both Mallaghans say that they only became aware that the land that their companies were buying for £5.4m had been sold for £3.3m less than three months before. They say they learnt that from Mr Brian Walker in 2011.

[89] Mr McCann, very honestly, acknowledges that he cannot say he did mention it to them. He did not think it exceptionable. What is certainly the case is that there is no reference to it either in his brief note of the meeting of 1 February or in his letter of 2 February or in any other written note of his dealings with the Mallaghans. He did not send the transfer to the clients. I conclude therefore that they were not informed of the December 2006 transaction by their solicitor.

[90] It is necessary to consider what follows from that. Was that negligence or a breach of contract? If it was did the plaintiff company suffer loss as a result?

Relevant law

[91] The defendant relied on a passage from the judgment of Lord Jauncey of Tullichettle in Clark Boyce v Mouat [1994] 1 A.C. 428 at 437:

> "When a client in full command of his facilities and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty

> whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."

I respectfully accept the wisdom of that observation, but the issue here arises when the solicitor, in his capacity as solicitor and agent for the client, becomes possessed of relevant information. Was he in the circumstances here under a duty to convey that information, rather than advice, to the client.

[92] A leading authority on the topic is the decision of the Court of Appeal in England (Sir Thomas Bingham MR, Millett and Schiemann LJJ) in Mortgage Express Limited v Bowerman and Partners [1996] 2 All ER 836. At page 840J Sir Thomas Bingham says:

> "Mr Gilroy was a solicitor not a valuer. He had no duty to second guess the value."

This was a reference to the factual background of the case where the solicitor was acting for both lender and borrower in a mortgage transaction. He became aware that the borrower was buying from another party who was acquiring the property simultaneously with selling it but at a price 20% below what the borrower was proposing to advance. He did not disclose this fact to the lender. Subsequently the borrower defaulted and the property was sold for a little more than half of the loan advanced. The lender successfully sued the solicitor for damages for negligence and breach of contract and the solicitor appealed to the Court of Appeal.

[93] The Master of the Rolls went on at page 841G as follows:

> "That leads on to the question which, in my view, lies at the heart of this cross-appeal. What duty did the solicitors, by Mr Gilroy, owe to Mortgage Express? Before the judge it was argued for the solicitors that the duty was to do what was necessary to report to Mortgage Express on title – no more and no less. There were problems about this contention. In the first place, it did not seem to accord with the standing instructions issued by Mortgage Express to solicitors acting for it. These referred to the 'normal duties of a solicitor when acting for a mortgagee' and did not suggest that the solicitor's duty began and ended with the report on title. Secondly, as Mr Gilroy's evidence made clear, this strict and rather legalistic approach did not accord with the realities of practice. Mr Gilroy acknowledged that matters might come to

> the notice of a solicitor in his position which he would be under a professional duty to report to the lender. For example, such a solicitor was not retained to second guess the valuation in which the lender was relying, but if he received information of previous transactions so apparently inconsistent with that valuation as to give possible reasons for doubting its reliability, that might be something which he should report. Thus Mr Gilroy accepted that for questions of fact and degree would affect the solicitor's duty."

[94] The Master of the Rolls went on to quote from the Guide to the Professional Conduct of Solicitors to the effect that a solicitor must not withhold information relevant to a transaction from any client.

[95] The Master of the Rolls went on to say that "if, in the course of investigating title, the solicitor discovers facts which a reasonably competent solicitor would consider might have a material bearing on the valuation of the lender's security or some other ingredient of the lending decision, then it is his duty to point this out." He also said the following at page 842E:

> "But in the course of doing the work he is instructed to do the solicitor comes into possession of information which is not confidential and which is clearly of potential significance to the client, I think that the client would reasonably expect the solicitor to pass it on and feel understandably aggrieved if he did not."

[96] Millett LJ in concurring with the Master of Rolls, as Schiemann LJ also did, said at page p. 845F:

> "The question which the judge had to ask herself was whether a solicitor of ordinary competence would have regarded the information in question as information which might cause the plaintiffs to doubt the correctness of the valuation which they had obtained."

[97] The Lord Justice discussed the facts of the case and concluded at page 846:

> "In my judgment, her conclusion [i.e. Arden J] that a solicitor of ordinary competence would have passed the information to the lender and that Mr Gilroy's failure to do so was negligent cannot be faulted."

[98] The case law is summarised at Jackson and Powell on Professional Liability, 7th Edition, paragraphs 11-220 to 229. Counsel referred to a number of the cases cited therein. I was also referred to my own judgment in Melbourne Mortgages Limited v Carson and McDowell, A Firm [2004] NIQB 82 and to the judgment of Weatherup J in Baird v Hastings [2014] NIQB 77.

[99] A solicitor in this capacity is acting as an agent of his principal, his client. Bowstead and Reynolds on Agency, 20th Edition paragraph 6-021 has the following:

> "An agent is, in general, under a duty to keep his principal informed about matters which are of his concern. Thus, a solicitor must inform his client of any overtures of settlement and a broker must inform his principal of any contracts made on his behalf. … A ship's agent must likewise inform his principal of any facts which the principal ought to know in order to make full disclosure to underwriters."

[100] The authority of the decision in Bowerman does not seem to me confined to cases of lending. A solicitor who comes into possession of information which is relevant to the transaction in which he is acting and which is of at least potential significance to the client is obliged, generally, to convey that information to his own client. There could be cases where a solicitor has agreed his instructions in such a way with the client as to the limit his role so as to obviate any such duty. But that is not this case. There was no letter of instructions or formal agreement between the plaintiff companies and Mills Selig before the latter firm began to act. In the absence of any such limitation on their role I consider the solicitors bound by a general duty to pass information of potential significance to the client. I consider that the most recent sale at a price three fifths of the price being paid by the client was of potential significance and they should have been informed of it. It was not necessary for Mr McCann to give advice, unless asked to so and agreeing to do so, but the passing of information was part of his general duty as an agent and a solicitor.

[101] It may have been enough for him simply to have sent to all the documents forwarded by Tughans to the client. That would not, I think, be a customary step taken by a solicitor but at least it would have furnished the information to the client. Here they were not made aware of the transaction in that way.

[102] In law that constitutes a breach of the contract between solicitor and client, in this case where the instructions were not otherwise restricted. It only constitutes the tort of negligence i.e. based on a breach of the duty to take reasonable care if damage resulted from what I find to be a breach of duty.

[103] It is therefore essential to go on to consider what would have happened in the hypothetical situation of Mr McCann either sending them a copy of the previous transaction or pointing out the terms of it to them. The hypothesis is not of him then

advising the Mallaghans as to what to do because it was essentially a valuation point which, subject to any willing assumption of responsibility by him, was outwith his duty to the client.

Consequences of failure to disclose price of property when sold in December 2015

[104] I begin this aspect of this matter by pointing out that the contract which was sent to the Mallaghans to sign did give some indication of the prior contract but it did not inform them of the significantly lower price. The initial position of the defendant was that even if I find that that was unlawful, as I have done "any loss suffered by the plaintiffs must be confined to the difference in the purchase price and the actual market value of the lands at the time of the first named plaintiff's purchase". They relied on the decision of the House of Lords in South Australia Asset Management Limited v York Montague Limited. [1997] A.C. 191. In that case the measure of damages against a negligent valuer was found to be the difference between the negligent valuation and the correct valuation at the time of the transaction, as a general course.

[105] The defendants submitted on that basis the plaintiffs had suffered no loss. Colliers CRE through Mr O'Kane had valued the property at this time for both HSBC and the Bank of Ireland at £1m more than the purchase price. Furthermore Mr Gerard Callan in his report, which was placed in evidence without him being called, was able to point to ten transactions of relevance at a similar price per acreage as the plaintiff here was paying for this land at Seskinore. Thirdly, even the plaintiffs' witness, although he says that at this time he was sceptical of the prices that were being fetched, could not say that £650,000 an acre was not the market valuation at the time.

[106] I therefore conclude that if the matter was simply a matter of a loss arising from the difference between the price paid and the open market valuation at the time of purchase there would be no loss.

[107] However, this is not a valuer's case. It is a case against a solicitor. That makes a difference. I observe, for completeness that what is clear is that the position regarding damages for breach of duty in tort is going to be the same as for breach of duty in contract in this context.

[108] In County Personnel (Employment Agency) Limited v Alan Pulver and Company [1987] 1 WLR 916 Bingham LJ and Sir Nicholas Browne-Wilkinson V.C., with whom Stephen Brown LJ agreed, made it clear that that approach, albeit almost invariable against surveyors "should not be mechanistically applied in circumstances where it may appear inappropriate". The basic principle is as stated by Lord Blackburn in Livingstone v Rawyards Coal Company [1880] 5 Appeal Cases 25 at 39 which Bingham LJ said:

> "Had been repeated on countless occasions since: the measure of damages is 'that sum of money which will put the party who have been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'."

That authority is expressly referred to by Lord Hoffmann in South Australia at page 219E. There is no suggestion that it is bad law.

[109] The plaintiffs pleaded in the Statement of Claim two alternative contentions:

> "13. In fact unbeknown to the plaintiffs but to the knowledge of the defendant the transaction of the first named plaintiff proceeded at a price significantly higher than the price paid by the vendors and that the true price was lower.
>
> 14. The earlier recent purchase of the land by the vendors at the price paid by them was such as would have caused the plaintiff to question the value of the lands which the first-named plaintiff was proposing to purchase and to seek independent advice from a valuer who is informed of the earlier purchase and the price paid by the vendors."

I pause there to mention that it appears that the valuer from Colliers CRE was not aware of the earlier purchase price.

[110] Under the heading of Particulars of Breach of Fiduciary Duties counsel pleaded the following:

> "17. Had the defendant reported the earlier purchase of the lands by the vendors at the price paid by them and had the defendant not been negligent and/or in breach of its retainer and fiduciary duties, the plaintiffs would not have entered into the transactions aforesaid."

[111] The oral evidence of Ronan Mallaghan was to the effect that he would not have gone through with the transaction if he had known of the lower price paid by the vendor Freughmore so recently. His brother Canice said it would not have been his decision but he would have advised his brother to renegotiate. It can be seen that neither of them actually said that they would have taken valuation advice if they had been aware of the matter.

[112] Nevertheless, it seems right to address that issue. If, as pleaded, they had taken valuation advice it seems clear, on the balance of probabilities, that it would have been this was a price which reflected open market value in February 2007. They might by chance have come upon Mr Cassidy as their valuer who might have cautioned them against the purchase, but if they had taken valuation advice the normal duty of the valuer would have been to look at comparable valuations and advise on that basis.

[113] It was suggested that a residual valuation would have been appropriate. Even if that is correct it seems to me from the evidence that I heard that a residual valuation would not necessarily have exposed the excessive optimism of this purchase i.e. that an estate of houses could have been built out allowing one to sell houses at values then being fetched in the neighbouring county town. Whether, of course, one would have found enough buyers is a different matter but that is a judgment for the purchaser rather than for a valuer. I do therefore conclude, partly for that reason and partly because of the approach of the Mallaghans at this time, that even if they had got a further valuation on learning of the £3.3m price in December, which for reasons set out below is by no means inevitable, that valuation would have been consistent with the price they were paying.

[114] There was very limited evidence to deal with the suggestion of Canice Mallaghan that he would have advised his brother to re-negotiate. The only evidence on this was that Mr Horwood was being told that there was another buyer in the market at that time willing to pay more than Freughmore were selling to the plaintiff at. They were being told this by a leading property developer who was a client of theirs as well as of other banks. I could not be satisfied on the balance of probabilities that even if Canice had said that, that would have led to either a reduced price for the plaintiff or them pulling out of the transaction.

[115] The main thrust of the plaintiffs' case is that they would have withdrawn from the transaction if they had known of this, as said by Ronan but not by his brother. The weight of Ronan's assertion on this point as to what he would have done then, in the light of his evidence generally and what has happened since and his strong motives to so assert, is far from compelling.

[116] The defendants urged me to examine that contention closely. They do so without prejudice to their other contention that the proper measure of damages is only the difference between what was paid and the market value at the time; I do find that that difference was nil.

[117] What would the first plaintiff, in effect Ronan Mallaghan, have done if he learnt of the previous transaction of £3.3m? I consider it probable that he would, at least, have asked Mr McWilliams about it. It may well be, no evidence having been called, that Mr McWilliams could have been in the position of holding an option over the lands, granted 6 or 12 or 18 months before at the price in question. That would have been a complete answer to this potential concern. Mr McWilliams

would have pressed him, in all probability, threatening him with this other buyer allegedly waiting in the wings.

[118] It may be Mr McWilliams would have told him that even if he had not an option agreement that he had agreed the price 6 or 12 or 18 months before with the Grugans and that, being honest men, they were abiding by the price that they said they would take even though there was no legal contract.

[119] At the very least I conclude Mr McWilliams would have been entitled to point out that the price had been agreed with the Grugans at some stage before the legal transaction in December and that there was a rapidly rising market which Mr Mallaghan had wanted to get into.

[120] What I find wholly improbable is that Mr McWilliams would have spoilt his own sale by saying, in effect, to Ronan Mallaghan that he was paying too much for the land and should not be going through with the transaction.

[121] Given the likelihood that he would have heard one of those three options from Mr McWilliams Ronan might well have thought it wise to get a valuation at that stage. But one has to be careful there. As he admitted to Mr Hanna in cross-examination he had agreed to buy this property in September and was signing for it some six months later without ever having a valuer look at it on his behalf.

[122] In any event as I have set out above if he had got a valuation at that time on a comparable basis he would have been told that this was the open market value of the property or that that value was indeed more as Colliers CRE were telling the Bank of Ireland. Even if, which is improbable, he had got a residual evaluation done by a sceptical and far seeing valuer he might well have still have thought this was an acceptable price to pay. I conclude, on the balance of probabilities that if informed of this price the directors of the first plaintiff, and the second plaintiff the guarantor, might well have reflected but in the light of valuation evidence available and comparables available showing that this was the market value they would have continued with the transaction. It is easy with hindsight to say that that was foolish of them. It is true that in my judgment in Bubble Inns Limited v Beannchor [2008] NI Ch. 2, in January 2007, I cautioned that property markets could go down as well as up but I do not expect the directors of the plaintiff companies here to have read that judgment. Nor am I aware of other cautionary remarks being made at the time of that property boom. It is the case that the plaintiff chose to buy at or immediately before the peak of a market which then stalled and fell back. (See Bonner Properties Limited v McGuran Construction Limited [2008] NICh 16; [2009] NICA 49; Mooney v Keys and Others [2012] NICh 23 [32]).

[123] I therefore find that the plaintiff fails in these proceedings against the defendant firm, save to the extent that the omission to furnish information about the last sale of the property did constitute a breach of contract. I am not satisfied that the plaintiff has shown that that omission caused any loss to the plaintiff.

Nevertheless the plaintiff is entitled to nominal damages for that breach. I will receive submissions from counsel on that topic and on the issue of costs.