Neutral Citation No: [2018] NIQB 81	*Ref:* COL10764
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 26/10/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (COMMERCIAL)

_____

2017 No. 109393

BETWEEN:

JAMES ANDREW HICKLAND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET JEAN FARREN (DECEASED)

Plaintiff;

-and-

CORMAC McKEONE, FORMERLY PRACTISING AS McKEONE AND COMPANY, SOLICITORS

Defendant.

_____

COLTON J

Background

[1] The plaintiff is the executor of the estate of the late Margaret Jean Farren ("Ms Farren") and obtained a grant of probate in respect of her estate on 15 August 2013.

[2] He brings this claim as personal representative of the estate. He alleges that the defendant was guilty of negligence and/or breach of contract in respect of services provided and advices given to Ms Farren concerning the purchase by her of a ground floor apartment known as 110 Butler's Wharf, Derry ("the property"). The property was one of two apartments in a newly developed single block.

[3] The basic facts are not in issue.

[4] Ms Farren contacted the defendant by telephone some time prior to 25 February 2008. A note from the file relating to the purchase states:

> *"Buying site 110 Butler's Wharf at £162,000 – cash buying – current address is 18 Larkhill BT48 8AT – **fees** £550 plus VAT and outlay SDLT £1620, Reg £300 – send out fees quote and request deeds from Kelly and Corr."*

[5] In reply to this original contact the defendant through Louise McGinley ("Ms McGinley"), a solicitor employed by the firm, wrote to Ms Farren on 25 February 2008. The letter was headed:

> *"Re: Purchase of site 110 Butler's Wharf, Enagh*
>
> *Thank you for your instructions to act in the purchase of the above property."*

Since February 2008 Ms McGinley has married and goes by her married name Ms McShane but for the purposes of this judgment I propose to refer to her throughout as Ms McGinley.

[6] The letter advises Ms Farren to obtain her own structural survey "*as a survey carried out by your lender is for valuation purposes only and is only a very superficial survey to see if the property is adequate security for the loan.*" It continued:

> *"Once you are satisfied with the results of your survey, you should obtain your mortgage offer as soon as possible and advise the lender of our name and address as they will be sending us mortgage documentation which will require your signature."*

[7] The plaintiff points out that this section of the letter was inappropriate and irrelevant given that the note on the file had indicated that the purchase was to be in cash and without any requirement for a mortgage. The letter should have indicated that the purchase of the property was not subject to mortgage. At the hearing when Ms McGinley gave evidence she explained that this letter had been prepared by her secretary and was in a standard form. She accepted that it appeared when the letter was drafted that the reference to "*cash buying*" was not picked up.

[8] In any event the letter concluded as follows:

> *"Finally we attach our quotation of fees together with Forms 2 and 5. These are sent to you in the form required by the Law Society of Northern Ireland and we ask that you consider the attached carefully."*

[9] The quotation was dated 26 February 2008 and informed Ms Farren that she would be required to pay to the defendant £2,616.25 (being £550 plus VAT by way of

professional fees, with the remainder of the sum being made up SDLT and outlay). The quotation was signed by Ms Farren on 27 February 2008.

[10] On 29 February 2008 Ms McGinley wrote to Kelly and Corr, the solicitors for the vendor, to request the contract of sale and title documents. These documents were provided under cover of letter dated 3 March 2008, the receipt of which prompted Ms McGinley to reply in a letter dated 4 March 2008 as follows:

> "*We had understood that the transaction was to proceed by way of lease to our client as this is an apartment and accordingly would be obliged to receive draft lease from you.*"

[11] This is a reference to the fact that the property's title is what is known as a "*flying freehold*", rather than the usual leasehold that is the predominant ownership model for apartments, given the need for mutually enforceable covenants. The effect of the property being conveyed by way of freehold in this purchase is that the mutual covenants in the deeds between the owners of the apartments relating to obligations to clean, maintain and repair party walls, the roof, external walls, floors and foundations would, in effect, be unenforceable.

[12] Ms McGinley was alive to this difficulty, as is apparent from an attendance note she prepared after a meeting with Ms Farren on 27 March 2008.

[13] The full text of the attendance note provides:

> "*Explained risks re not taking a lease and that her future purchaser's (sic) market will be limited – she is aware of risk and appreciates the difference between freehold and leasehold and what I was explaining to her.*
>
> *Wants to go ahead – doesn't plan on selling as this is retirment (sic) – told her things could change but she still wants to go ahead as has looked at many apartments and this is the only one she would buy.*
>
> *Queried re who is responsible for the repairs of the roof – read docs with clinet (sic) – arguabl (sic) the owners above are responsible but told client this is not clear cut – we will try and get clarification but told her worst case scenario is that she will be caught for 50% of the costs of repairs.*
>
> *Wants to complete on 17 April 08.*"

[14] On 2 April 2008 Ms McGinley wrote to Kelly and Corr in the following terms:

> *"We refer to the above and confirm our client is prepared to accept a transfer for the above premises and would wish to complete on 17 April 2008.*
>
> *We have noted however that the transfer document does not stipulate responsibility for the roof structure or foundations of the premises relevant to the upstairs and we would ask you to clarify."*

[15] By letter dated 4 April 2008 Kelly and Corr solicitors acting for the vendor replied in the following terms:

> *"Further to your letter of 2 April in relation to the above we would draw your attention to the reciprocal easements contained in paragraph 4 of the second schedule and paragraph 5 of the third schedule together with the covenants (i), (o) and (t). You may consider that these would suffice in this case."*

[16] Although dated 4 April 2008 from an examination of the conveyancing file retained by the defendant it would appear that this may not actually have been received until 7 April 2008. The file indicates that Ms Farren lodged a cheque with the defendant on 7 April 2008 for £163,581.25. On that date there is a note from Ms McGinley to "*Janelle*", a secretary in the firm asking her to "*do a reminder to Kelly and Corr … asking them to return to su (sic) re our fax of Aril (sic) as our clinet (sic) is anxious to complte (sic) on 17 April and we are in funds to do so*".

[17] On 7 April 2008 Ms McGinley wrote to Kelly and Corr. The relevant part of the correspondence is as follows:

> *"Thank you for your letter of 4 April and we note what you say and will advise our client of the implications accordingly. …*
>
> *Finally we confirm we are in funds to complete and our client is anxious to do so on 17 April …"*

[18] The Deed of Transfer was executed on 22 April 2008. The plaintiff draws attention to the fact that the defendant wrote to Ms Farren on 13 November 2008 stating the following:

> *"In connection with the above matter we enclose herewith the title deeds to the above property as per the attached schedule in duplicate, one copy of which please sign and return to us by way of receipt."*

[19] Ms Farren signed the attached form on 17 November 2008 beneath the following declaration:

> "*I/we the undersigned do acknowledge to have received from McKeone and Co solicitors, 1 Carlisle Terrace, Londonderry, the documents and deeds which are specified in the schedule hereto and undertake to keep them safe and return on demand.*"

[20] Ms Farren made a Will on 11 April 2013 through a different firm of solicitors than the defendant. The plaintiff was appointed as an executor and Ms Farren gave detailed instructions as to the disposal of her assets amongst her siblings and relatives.

[21] In particular she directed that the property be sold and the proceeds were to be shared equally between her six brothers and sisters.

[22] Sadly Ms Farren died on 15 April 2013. The plaintiff obtained a grant of probate of 15 August 2013 and began marketing the property for sale in accordance with Ms Farren's wishes. On 28 October 2014 the property was agreed for sale with Roberta O'Neill, subject to contract, for the sum of £87,000. However, by a letter dated 8 December 2014, Ms O'Neill's solicitors stated the following to the plaintiff's solicitor:

> "*We have received confirmation from our client's Lender, copy herewith. You will note the position. As we understand it, this can be a difficulty in getting lending on any freehold apartment from any Lending Institution. The issue of building insurance is going to be a recurring problem. If you can assist in any way in remedying this we would be very much obliged if you would return to us.*"

[23] The Lender, Halifax, had identified the issue that this was a "*freehold flat*", indicating that it could lend if certain conditions were in place and advising Ms O'Neill's solicitors that "*this transaction must not be allowed to proceed until this issue is resolved*".

[24] By letter dated 7 January 2015 the plaintiff was advised by the estate agents managing the sale that Ms O'Neill was not proceeding with the purchase of the property due to the concerns she and her solicitors had as to the property's title.

[25] The property was then placed back on the market. In or about late April 2015 the plaintiff accepted an offer, subject to contract, from Nikita McCrystal to purchase the property. On 15 May 2015 the plaintiff was advised by Paul O'Keefe, estate agents that the firms of solicitors, Hasson and Co and Kelly and Corr had declined to accept instructions from Ms McCrystal due to their view that the freehold title to the

property was a problem, and that it would be impossible to complete the purchase of the property on the basis of freehold title.

[26] The plaintiff says the fact that Kelly and Corr, who had acted for the vendor in the original transfer to Ms Farren, declined to act is telling.

[27] On 26 May 2015 Paul O'Keefe, estate agents wrote to the plaintiff to advise him of the offer to purchase had been withdrawn:

> "*The purchaser for the above property has withdrawn her offer and is no longer proceeding. Nikita has asked two solicitors in the city, John Hasson and Paddy Kelly to act on her behalf and both have turned down the case due to the fact that there is an issue with the property being a freehold maisonette with an apartment above. Therefore this had got her extremely spooked and nervous about proceeding and therefore withdrew her offer. With this property being a transitional property she had to focus on the resale of the property and with this issue coming up now she is worried that this may arise when coming to sell the property on.*"

[28] The plaintiff remarketed the property and on 8 July 2015 accepted an offer, subject to contract, from Danielle Collins. Again, however complications arose. Initially Caldwell and Robinson, solicitors agreed to act for Ms Collins. On 30 July 2015 that firm indicated to Paul O'Keefe, estate agents that they would require higher fees to be paid to them due to the additional work caused by the title issue. On 3 August 2015 the plaintiff agreed to pay for the additional fees of Ms Collins that would be incurred by Caldwell and Robinson. However, the plaintiff was informed by Paul O'Keefe on 4 August 2015 that Caldwell and Robinson were in fact unwilling to act for Ms Collins because they considered that certifying the title to the property to be acquired by her exposed them to an unacceptable degree of professional risk. Later that day Ms Collins withdrew her offer to purchase the property.

[29] Having been unable to successfully complete a contract to sell the property the plaintiff then sought to remedy the issue by contacting the owner of the upstairs apartment and the original vendor with a view to rectifying the transfer deeds so as to provide that each property had leasehold titles instead of freehold with resultant mutually enforceable easements and covenants. On 19 January 2016 the vendor's solicitor confirmed that it would sign whatever documents were necessary to resolve the issue. The owner of the upstairs apartment agreed in principle to this in May 2016. On 2 September 2016 the plaintiff's solicitors were advised by the vendor's solicitors that in fact it preferred to purchase the property instead of rectifying the title. The plaintiff's solicitor on 7 September 2016 informed the vendor's solicitors as to what the plaintiff would accept in consideration for the sale but no further contact

was forthcoming from the vendor, despite a lot of chasing by the plaintiff. The plaintiff has not, therefore, been able to sell the property or rectify its title.

Summary of the arguments

[30] I am obliged to counsel in this case for their helpful written and oral submissions. Mr Alistair Fletcher appeared for the plaintiff and Mr Adrian Colmer appeared for the defendant.

[31] In short form, the plaintiff says that the defendant was in breach of its duty of care to the plaintiff in the following respects:

(a) There was a failure to properly advise Ms Farren as to the problems involved in purchasing a "*flying freehold*";

(b) There was a failure to explain to her the implications these problems would have on her;

(c) There was a failure to ensure that Ms Farren understood the limited advice she was given.

[32] Again in short form, the defendant's response is that Ms McGinley was an experienced conveyancing solicitor, who properly identified the potential difficulty with a "*flying freehold*" and fully explained this to Ms Farren. In particular the defendant says that the extent of the defendant's duties should not be expanded beyond what was required. The defendant owed no duty to the beneficiaries of Ms Farren's will which was made five years after the purchase of the property and on the advice of a different solicitor.

[33] The defendant says that within the terms of the retainer between the parties, it considered and advised upon all the matters with which the retainer was concerned; it advised as to different types of titles; it advised as to the difficulties which a freehold title would have in terms of a limited resale market; it advised that circumstances could change and it advised as to the one specific aspect of the title with which Ms Farren raised an issue that is, who would bear the costs of repairs. Ms McGinley was careful to ensure that Ms Farren understood her advice and her professional assessment was that Ms Farren fully understood her advice. The fact that the scenario which Ms McGinley foresaw in 2008 – that her freehold title to the apartment would limit the future resale market – came to pass should not result in her being found liable when the risk materialised.

Limitation issue

[34] An initial issue relates to limitation. The plaintiff's cause of action at the latest accrued on 22 April 2008 when Ms Farren executed the Deed of Transfer. The writ of summons was issued on 27 October 2017, which is outside the primary limitation

period for actions of this type founded either on contract or tort under Articles 4 and 6 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order") respectively. The plaintiff therefore relies on Article 11 of the 1989 Order which provides for a three year time limit for negligence actions where facts relevant to the cause of action are not known at the date of accrual.

[35] The plaintiff relies on the three year limitation period from a starting date as defined by Article 11(4) which provides:

> *"(4) For the purposes of this Article, the starting date for reckoning the time limit under paragraph (3)(b) is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.*
>
> *(5) In paragraph (4) "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both –*
>
> *(a) Of the material facts about the damage in respect of which damages are claimed; and*
>
> *(b) Of the other facts relevant to the current action mentioned in paragraph (7).*
>
> *(6) For the purposes of paragraph (5)(a), the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.*
>
> *(7) The other facts referred to in paragraph (5)(b) are –*
>
> *(a) That the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and*
>
> *(b) The identity of the defendant; and*
>
> *(c) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.*

(8) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of paragraph (5).

(9) For the purposes of this Article a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) From facts observable or ascertainable by him; or

(b) From facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person is not to be fixed under this paragraph with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

[36] There is extensive case law on the provisions of Article 11 and like provisions in England and Wales. Applying the statute to the facts in this case it is clear that the cause of action if any, was vested in Ms Farren up to the date of her death. Given that the case that has been made on her behalf is that she was not given adequate advice as to the problems involved in purchasing the property then, subject to that case being established, she cannot have had either constructive or actual knowledge for the purposes of Article 11 of the Order.

[37] After Ms Farren's death any cause of action is vested in her estate in respect of which the plaintiff was the executor. In my view the relevant date upon which the plaintiff could be said to have actual or constructive knowledge was 8 December 2014 which is the date upon which Ms O'Neill's solicitors wrote to inform the plaintiff of the difficulties concerning obtaining a mortgage. Although the plaintiff is in fact a solicitor he indicated that he had no knowledge or expertise in conveyancing law and prior to 8 December 2014 he had no knowledge of any potential difficulty in relation to the sale of the property, particularly in the context where he had received an offer to purchase the property.

[38] I have therefore come to the conclusion that the starting date for reckoning the time limit under Article 11(3)(b) of the Order was 8 December 2014. Since the proceedings were issued within three years of that date I consider that no limitation defence arises in this case.

The merits

[39] I turn now to the merits of the plaintiff's case.

[40] The legal principles are well settled and not in dispute.

[41] The *fons et origo* of a solicitor's duties is the retainer between himself and the client. This is in essence a contractual duty but it is also clear that a solicitor acting for a client also owes a duty in tort and can be held liable in negligence as well as contract for a breach of duty.

[42] The nature of a solicitor's duties to his or her client was discussed in some detail by Oliver J in **Midland Bank Trust Company Limited v Hett Stubbs and Kemp (A Firm)** [1979] 1 Ch 384 which is quoted with approval in the current edition of **Jackson and Powell on Professional Negligence**.

[43] In that case the plaintiffs, as executors of a Mr Green, claimed damages against the defendant's solicitors for failing to register an option granted to Mr Green by his father. The case focused on the way in which the court should approach the duties owed by a solicitor to a client in a particular case and colourfully described "*the classical formulation of the claim in this sort of case as 'damages for negligence and breach of professional duty'*" as a "*mesmeric phrase*".

[44] In order to establish what the obligation is in a particular case one looks at the actual contract, if there is one, which sets out in express terms what a solicitor has agreed to do. Thus at paragraph [402] to [403] Oliver J said:

> *"There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do. (my underlining)*
>
> *Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors - or upon professional men in other spheres - duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as* ***Duchess of Argyll v Beuselinck*** *[1972] 2 Lloyd's Rep 172 ;* ***Griffiths v Evans*** *[1953] 1 W.L.R. 1424 and* ***Hall v Meyrick*** *[1957] 2 QB*

455 demonstrate that the duty is directly related to the confines of the retainer."

[45] In **Minkin v Landsberg** [2015] EWCA Civ 1152 Jackson LJ reviewed **Hett** and subsequent authorities including **Credit Lyonnais SA v Russell Jones and Walker (A Firm)** [2002] EWHC 1310 (Ch); in which he quoted with approval the judgment of Laddie J at paragraph [28] as follows:

> *"A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. This is the normal case although **White v Jones** [1995] 2 AC 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."*

[46] Having quoted this passage Jackson LJ stands back from the authorities and summarises the relevant principles in the following way:

> *"(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.*
>
> *(ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*
>
> *(iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.*
>
> *(iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford.*

An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.

(v) *The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."*

[47] Insofar as there has been a written retainer in this case it is as per letter of 25 February 2008 in which the defendant agreed "*to act in the purchase of the above property*".

[48] Happily no issue of construction arises in relation to a written retainer in this case. Applying the principles to which I have referred the test is whether in the circumstances of this case, recognising the duties owed by a solicitor to his client are high, the defendant has acted in accordance with what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession in acting for Ms Farren in the purchase of the property.

[49] Before I consider the application of the legal principles I should point out that the facts of the case as set out above are apparent from the written records and documentation which exists in relation to the sale of the property to Ms Farren and the subsequent attempts by the plaintiff as executor to dispose of the property. In the course of the hearing I also heard oral evidence from the plaintiff and from Ms McGinley. Before referring to any of the detail of their evidence I should say that I formed the view that both witnesses were honest and forthright in their evidence.

[50] Mr Hickland was not in a position to give evidence on what took place between Ms Farren and Ms McGinley at the time of the purchase. He gave important evidence about Ms Farren and about what took place after he tried to discharge his obligations as executor. A common theme of the evidence from both witnesses was that Ms Farren was a delightful and impressive person. Mr Hickland is a nephew of Ms Farren. His mother was her sister. He was born and bred in England and works as a solicitor in a firm in London involved in shipping/aviation and commercial litigation. He admitted that he had no experience in conveyancing. He clearly had a very close relationship with Ms Farren and was understandably emotional when recounting some of her history. From that history it emerged that Ms Farren was originally born in County Donegal and had very limited formal education. She emigrated to England where she eventually qualified as a nurse in which profession she worked for approximately 40 years mostly in England before deciding to retire and return to Ireland in 2008, aged 62. To that end she sold her house in London where she had lived since 1985. This was the only property she ever owned. She was not married and had no children. Most of her brothers and

sisters lived in Ireland and she was very supportive of the family and generous to both her siblings and many nephews and nieces.

[51] Mr Hickland indicated, and I accept, that Ms Farren was someone who was risk averse and not likely to take risks with her money. She had built up her savings from "*scratch*". Although she was a generous person she was careful with money and knew what financial hardship was. All her savings had been placed in easy access accounts with modest returns.

[52] Having sold her property in London it was her intention to use the funds she had raised to purchase a house in Ireland to be close to her many relatives and to spend her retirement there.

[53] Mr Hickland confirmed what is clear from the written documentation that having discussed issues with all the beneficiaries named in Ms Farren's Will he took steps to sell the property, but for the reasons already set out this has proved to be impossible.

Extent of the duty

[54] A starting point for the consideration of liability in this case is to ascertain what was the extent of the duty of the defendant in the circumstances of this case? Put simply, the duty was as per the original letter to Ms Farren namely to act for her in the purchase of the property. The defendant's duty therefore was to attend to the legal aspects of the purchase of the property and in the course of doing so to advise her on any issues that might arise which were "*reasonably incidental*" to the work being carried out. As per Jackson LJ what is "*reasonably incidental*" will depend on all the circumstances of the case.

[55] What is clear is that the defendant did <u>not</u> owe any duty to any potential future beneficiaries of Ms Farren. To do so would be contrary to the well-established principle in relation to duties owed to third parties. There is nothing in the circumstances of this case which would bring it within the exception to the rule as outlined in the case of **White v Jones** [1995] 2 AC.

[56] As Ms McGinley asserted in her evidence, consistent with what was said by the plaintiff, Ms Farren was an unmarried, independent lady who was seeking to purchase a retirement home. Ms Farren did not make a Will until 5 years later. The interests of any beneficiaries under that Will were not within the contemplation of the parties at the time of the purchase. The duty was one owed to Ms Farren. The plaintiff in this case stands in her shoes as executor of her estate and the matter has to be considered in the context of the duty owed to her.

[57] In considering the performance of the defendant's duty there can be no doubt that there was an obligation to advise Ms Farren of the implications that arose from

the fact that the property was being conveyed by way of freehold rather than a lease. This was not only incidental but central to the legal purchase of the property.

[58] Obviously the defendant was alive to this issue. When Ms McGinley received the title documents she immediately wrote to the vendor's solicitors setting out her expectation that the transaction would proceed by way of lease.

[59] In her evidence Ms McGinley informed the court that she discussed this problem with another solicitor who had been involved in the purchase of the apartment above the property. As a courtesy that solicitor had sent an opinion she had obtained from counsel dealing with the problem of a "*flying freehold*". The opinion explained the difficulty and recommended that efforts should be made to prepare an appropriate lease to ensure appropriate provisions for the maintenance of the structure below and above that apartment. Therefore Ms McGinley was clearly sighted of the problem. As a response she arranged to meet Ms Farren. I have already referred to the attendance note that was prepared after that meeting. In her evidence Ms McGinley indicated, and I accept, that she remembered the meeting with Ms Farren "*very clearly*". She recalls meeting Ms Farren in her office and that she had a mobility issue and was using a walking aid. Clearly Ms Farren made an impression on her. She described her as "*a lovely lady who was intelligent, informed and very calm*."

[60] It was her evidence that she explained the difficulty that arose. She explained the difference between freehold and leasehold. In practical terms she explained that this could create difficulties in relation to the maintenance and repair of the outer structural areas. She explained the difference by describing freehold as being "*for forever"* as compared to a leasehold which would be for "*a term of years*". Her evidence was, and the note confirms, that Ms Farren was "*very determined*" to purchase the property. She had looked at other properties and this was the one she wanted to buy. She was warned that there could be issues if she wanted to sell the property. This was described in the note as "*future purchaser's market will be limited*". It was in response to this that Ms Farren indicated that she wanted to retire and that she did not plan on selling the home. Ms McGinley did indicate according to the note that "*things could change*" but despite this Ms Farren was adamant she wanted to proceed.

[61] It was her professional assessment that Ms Farren fully understood the risk. Before closing the meeting she asked her again did she understand. She felt that in fact Ms Farren felt she was being patronised by the question and simply replied "*yes dear*".

[62] She accepted that Ms Farren did raise an issue about responsibility for maintenance or repair of the roof. According to the note Ms McGinley indicates that she read the documents with the client but indicated that the position was not clear and that she would seek to get some clarification on the point.

[63] Mr Fletcher was critical of Ms McGinley in relation to this meeting. He submitted that to refer to the market being "*limited*" was a gross understatement and that in fact the property, as has been proven, is unmarketable. He refers to a publication from the Council of Mortgage Lenders which records that when asked the question "*do you lend on freehold flats*" only two of 45 lenders gave an unequivocal "*yes*" – the Royal Bank of Scotland and its subsidiary Ulster Bank Ltd, provided the loan to value ratio was 90% or better. However, it should be noted that this publication was dated 29 October 2015 and therefore was not contemporaneous with the purchase. He argues that the evidence of Mr Hickland demonstrates this amply. Ms McGinley countered by pointing out that the purchaser of the upper apartment had obtained a mortgage and that despite the warning Ms Farren was also prepared to purchase the lower apartment. Thus there clearly was a market at that time. Mr Fletcher further argued that it was incumbent on Ms McGinley to advise Ms Farren of specific issues that might arise in the future, such as the effect this might have on any potential beneficiaries after she died or, for example, the requirement to sell the property should she need care in a nursing home in her old age.

[64] I confess I do have some concerns about the advice that was given at this meeting. I am concerned that the focus of the advice to Ms Farren related to the difference between freehold and leasehold. The real issue relates to the fact that the covenants and easements in this conveyance were unenforceable. This should have been the focus of the concern. I am further concerned that the risk of being unable to sell was indeed understated. The "market", at that time was a cash buyer and another buyer who had obtained a mortgage notwithstanding legal advice. That scenario was unlikely to be repeated. Other issues that might have been discussed included difficulties if the owner of the apartment above the property became impecunious in terms of dealing with maintenance or repairs, insurance issues for the building and how any common parts in the block were to be managed. It is arguable that Ms Farren should have been expressly advised against proceeding. Consideration might also have been given to asking her to sign a note confirming her understanding of the difficulties and recording the solicitor's advice. However, on balance and with some reservation I am not prepared to find that there has been negligence in respect of how Ms McGinley conducted this meeting. It may well be that a different solicitor would have taken a different course, advising against proceeding and raising the issues outlined above. The fact that some solicitors may have given this advice does not mean that Ms McGinley has not met the test of what a reasonably competent practitioner would do having regard to the standards normally adopted by the profession. She had identified the difficulty and explained it to the client in terms she felt the client understood. She specifically identified the risk of a potential difficulty in selling the property in the future. Ms McGinley's evidence, supported by the contemporaneous note of the meeting, shows that –

(a) Ms McGinley explained the risk involved in not having title by way of a lease.

(b) Ms McGinley explained that Ms Farren's future purchaser's market would be limited.

(c) Ms Farren was aware of the risk.

(d) Ms Farren understood the difference between freehold and leasehold and what Ms McGinley was explaining to her.

(e) Ms Farren wanted to go ahead with the transaction.

(f) Ms McGinley noted that Ms Farren said she did not plan to sell and that this was her retirement home.

(g) Ms McGinley advised that notwithstanding Ms Farren's views about her future plans things could change.

(h) Ms McGinley noted that Ms Farren wanted to proceed.

(i) Ms McGinley noted that Ms Farren said that she had looked at many apartments and this was the only one she wanted to buy.

(j) Ms McGinley confirmed that she wanted to complete the transaction.

[65] However, this was not the end of the matter. Ms Farren had raised a query about bearing the costs of roof repairs. This indicates she had a concern. That concern is directly related to the difficulty that arose in this case. Ms McGinley had indicated that she would seek clarification on this issue. She did this by way of correspondence with the vendor's solicitors who simply referred her back to the clauses in the lease.

[66] As has already been explained these clauses were of no benefit to Ms Farren. The response clearly failed to deal with the issue raised by Ms McGinley. This could not amount to a "*clarification*". Nor would a competent solicitor in my view consider "*these would suffice in this case*".

[67] A consideration of the reciprocal easements would only reinforce the problem with this title and the need to ensure that the purchaser fully understood the implications of buying the property in these circumstances.

[68] As Ms McGinley said in her evidence a freehold title in these circumstances was "*not acceptable in any shape or form*".

[69] In my view there was an obligation on the defendant to return to Ms Farren after the meeting of 27 March 2008 particularly with regard to the issue of the repair of the roof and the inadequate clarification provided by the vendor's solicitors.

[70] Mr Fletcher argues that there was an obligation to return to her in writing in any event. He refers to the mandatory provisions of Regulation 8A Part II(i) of the Law Society of Northern Ireland's Solicitors' Practice Regulations 1987 which requires solicitors to "*investigate the title with due professional skill*".

[71] In particular Regulation 8(A) Part II(d) states that –

> *"When acting for a purchaser in a transaction to which Regulation 8(A) applies a solicitor shall …*
>
> > *[t] report to the client from time to time as may be required and, in particular, report to the client;*
> >
> > > *(i) when title is received to provide the client with details of premises, easements, owner's covenants etc and to enclose copy map of premises;"*

[72] This obligation is reinforced by the Home Charter Scheme published by the Law Society of Northern Ireland which requires compliance with the aforementioned Regulations and repeats them in the same form.

[73] Mr Colmer submits that this obligation only arises "*when required*". It seems to me "*when required"* relates to the obligation to report "*from time to time*". The mandatory obligation under the Regulations clearly envisages a report to the client when the title is received and the clear inference is that this "*in particular*" should be in writing, given that the obligation also requires the solicitor to enclose a copy map of premises.

[74] In evidence Ms McGinley said that she was not aware of the details of the Regulations but that she did follow the Home Charter Scheme requirements. She said it was not the general practice of solicitors in Derry at that time to routinely provide written reports on title. She was a very experienced conveyancer at the time and I accept her evidence on this point. I bear in mind that this conveyance took place at the time of the "property boom", albeit it was about to come to an end. It may well be that the huge volume of conveyancing work being undertaken by solicitors at that time contributed to this approach.

[75] I am satisfied that Ms McGinley should have provided further advices to Ms Farren after the meeting of 27 March 2018 and in particular after the reply from the vendor's solicitors dated 4 April 2018. In her evidence she said that she believed she had a further conversation but could not provide any detail about this. She accepted that there was no record whatsoever of any such contact. I am satisfied that if there was such contact there would have been a note on the file. Furthermore, in answer to interrogatories served by the plaintiff Ms McGinley confirmed "*I did not have any further meeting with her, nor did I write to her, to advise about the title issue. This*

issue had been dealt with fully and in detail at the meeting of 27 March 2008". This is consistent with the impression I formed from Ms McGinley's evidence that she considered the matter had been dealt with at the meeting of 27 March 2008. I have concluded that there was no further contact or advice given on this issue by Ms McGinley to Ms Farren.

[76] In any event I would go further and say that Ms Farren should have been written to in clear terms after the meeting of 27 March. I consider that there was an obligation to do so under the Law Society Regulations. Ms McGinley was clearly cognisant of the value of written advices and some of the obligations under the Regulations in the Home Charter Scheme. Thus Ms Farren was expressly written to advising her of the fees for the work Ms McGinley had undertaken to carry out and after completion was also given written advices about retention of the title deeds.

[77] It was obvious that Ms Farren was obtaining a defective title in the sense that the transfer deed contained easements and covenants which were in effect worthless. Given that this touched on an issue in respect of which Ms Farren was promised a clarification there was a particular obligation to ensure that this was done and in my view should have been done in writing.

[78] I am not persuaded that it is correct to say that, as Ms Farren was told, that she would only be liable for 50% of the costs of repairing the roof in event of repairs being required as Ms Farren could not oblige the owner of the apartment above her to contribute to the costs.

[79] Given the particular difficulties with this title I consider that there was an onus to ensure that Ms Farren was fully informed and fully understood those difficulties. I consider that on the facts of this case Ms Farren should have been provided with written advice setting out the difficulties clearly and providing her with the clarification she sought on 27 March.

[80] The Law Society Regulations and Home Charter Scheme to which I have referred recognise the importance of providing a written report on title advising in respect of easements and covenants. Undoubtedly Ms Farren was determined to proceed notwithstanding the problems identified and explained to her at the meeting on 27 March.

[81] However, this was the first time she had been made aware of the difficulty which is a complex legal one. She was advised about this orally in the course of a short meeting lasting from between 10 to 15 minutes to half an hour at most. She did not take any notes at the meeting. Even then she had raised an issue in respect of which she was promised clarification.

[82] Ms Farren was committing to expenditure of £162,000 on property in respect of which there was in effect a defective title.

[83] In all of these circumstances I take the view that independent of any obligations under the Law Society Regulations it was negligent not to have formally written to her after clarification was sought, confirming and setting out the many potential difficulties in clear terms, advising her of the potential problems and advising her at the very least to consider these carefully and fully before committing to the purchase.

[84] This view is confirmed and reinforced by the obligations of the Law Society Regulations and Home Charter Scheme which exist to promote good conveyancing practice by solicitors. A written report was clearly "required" in the circumstances of this case.

[85] The purpose of such written advice, apart from complying with the Regulations, is to ensure that someone such as Ms Farren fully understands the import of the advice she was given on 27 March. It would have at the very minimum responded to a request for clarification but more importantly have afforded her the opportunity to take a considered and informed decision before committing to a conveyance which was not in her interest.

[86] I do not say that the negligence was gross here. Clearly Ms McGinley did identify the main problem and explain it orally to Ms Farren. I have also been careful to avoid coming to a conclusion with the benefit of hindsight. It may well be that in reality practices have changed since 2008, not least because of the property crash that ensued. However, the problem was clearly identifiable in 2008 and the obligations contained in the Law Society Regulations and Home Charter Scheme were also in force.

[87] I therefore conclude that the plaintiff has established negligence against the defendant in respect of its conduct of the purchase of the property on behalf of Ms Farren and that the plaintiff is entitled to succeed against the defendant.