Neutral Citation No [2012] NICh 7 | *Ref:* **DEE8169**

Judgment: approved by the Court for handing down | *Delivered:* **09/03/12**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
(BANKRUPTCY)

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BETWEEN:

SHEILA McATEER
AS EXECUTRIX OF JAMES KEVIN McATEER, DECEASED

Applicant;

-and-

WALTER LISMORE
AS TRUSTEE OF THE INSOLVENT ESTATE OF
JAMES KEVIN McATEER, DECEASED

Respondent.

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DEENY J

[1] This is an application brought by the applicant who is the widow and executrix of the estate of James Kevin McAteer, deceased. She brings the application against Mr Walter Lismore, who is a licensed insolvency practitioner and has since 4 April 1995 been trustee in bankruptcy to the estate of James Kevin McAteer. He died on 6 May 1993 leaving, as well as the applicant, three adult children.

[2] There has been prolonged litigation and dispute between the parties. This judgment relates to a hearing before the court which commenced on 15 and 16 March 2010. It was then adjourned at the request of both parties to explore resolution of the matter, which seemed sensible in the light of the evidence which had then been heard by the court. Despite optimism expressed to the court at several reviews the matter did not in fact resolve. The hearing was resumed before me on 13, 14, 15 and 17 December 2010. The parties wished to put in written submissions. Unhappily they were not submitted by respondent's counsel within the time directed by the court with a consequent delay by applicant's counsel and as a result thereof this judgment has had to be written at the next available opportunities. These

submissions when received were helpful. Mr Timothy Ferris QC led Mr John Coyle for the applicant and Mr Stephen Shaw Q.C. led Mr Mark McEwen for the respondent. The applicant contends that the sale by the respondent in 2005 of the former dwelling house of the deceased with attached lands at Folio 16606 and Folio 24432 County Down were at an under value and in breach of the duty on the respondent. (Some earlier criticisms of Mr Lismore were not pursued by the applicant). The applicant, if successful on that basis, would then go on to contend that the trustee should be removed and should not be entitled to any remuneration out of the estate of the deceased in regard to his discharge of his functions as trustee. However, those two latter matters are not the subject of this judgment which must deal with the first issue of the sale of the property at an alleged under value.

The law

[3] The function of a trustee in bankruptcy is "to get in, realise and distribute the bankrupt's estate" pursuant to Article 278(2) of the Insolvency Order (NI) 1989. Muir Hunter on Personal Insolvency (2010 Edition) at paragraph 3 – 931.2 says as follows:-

> "The trustee has a discretion in carrying out the functions of getting in, realising and distributing the bankrupt's estate and in the management of the bankrupt's estate. Accordingly, he can use his discretion as to when and how he should exercise those functions. However, this discretion notwithstanding, it is no doubt the case that a trustee owes a duty in respect of the bankrupt's estate to take reasonable steps to obtain a proper price for its assets. In Re Charnley Davies Limited (No 2) [1990] BCLC 760, Millett J, held, in the context of proceedings against an administrator in which it was alleged that he had unfairly prejudiced creditors of the company and had failed to take reasonable care to obtain a proper price for the company's business, that the obligation to take reasonable steps prior to obtaining a proper price for assets is an obligation which the law imposes on anyone with power, whether contractual or statutory, to sell property which does not belong to him (at b.775 (e)). Furthermore this is not an absolute duty to obtain the best price that the circumstances permit, and only to take reasonable care to do so; and that means the best price that circumstances as he reasonable perceives them to be permit. An administrator or other person in a similar position is not to be made liable because his

> perception is wrong, or unless it is unreasonable (at page 775 (h))."

[4] That view of the law, which I adopt, appears consistent to me with the statutory provision relating to the liability of a trustee at Article 277(1)(b) of the Insolvency Order:-

> "Where on an application under this Article the High Court is satisfied –
>
> (a) . . .
>
> (b) that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary duty or other duty by a trustee of the estate in carrying out his functions,
>
> > the Court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the Court thinks just) or, as the case may require to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the Court thinks just."
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> (Authorial emphasis)

[5] Hoffman J in Re D'jan of London Limited [1993] BCC 646 accepted that the equivalent English Section 212(2) "covers breaches of any duty including the duty of care" and applied it in a straightforward case of negligence. See also Millar and Bailie on Personal Insolvency, 4th Edition, para 13.129. Millett J in Re Charnley Davies Limited (No 2) op. cit. at 775 cited with agreement the following dictum of Lord Denning MR in Standard Chartered Bank v. Walker [1982] 3 All England 938 at 942 G-J dealing with the analogous position of a company.

> "The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but he also has a duty to the

> guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor."

I conclude that the trustee in bankruptcy is under a duty to take reasonable care to realise the best price on the sale of trust property although he has a discretion (or margin of appreciation) as to how he discharges that duty.

[6] The applicant is entitled to appear by virtue of the Administration of Insolvent Estates of Deceased Persons Order (NI) 1991 SR&O No 365, para 22 of Part II of Schedule 1 which makes applicable Articles 276 and 277 of the Insolvency (NI) Order 1989.

[7] Given some of the evidence and submissions before the court in this case it is important to note Article 277(3) which reads as follows:-

> "An application under this Article may be made by the Official Receiver, the Department, a creditor of the bankrupt or (whether or not there is, or is likely to be, a surplus for the purposes of Article 303(5) (final distribution)) the bankrupt himself."

While the figures sought by the applicant would clearly lead to a surplus for the estate a lower figure might fall below the proper debts owing to creditors here, including the respondent himself, but that is not a matter which I can properly take into account it would appear because of the words "whether or not there is or is likely to be a surplus". They appear to entitle the Plaintiff to bring an application and logically therefore obtain an adjudication from the court regardless of whether that produces a surplus. In any event if she succeeds she will hope to deny Mr Lismore his costs of the sale and these proceedings which would make more money potentially available for the estate.

[8] The respondent did not dispute the summary of the law stemming from the submissions of the applicant but added a passage from Halsbury's Laws, volume 48, Trusts (2007 reissue) at 1084 as follows:-

> "Any act by a trustee with reference to the trust property in contravention of the duties imposed on him by the trust, or in excess of those duties, and any neglect or omission in his part to fulfil those duties, and the concurrence or acquiescence by one of several trustees in a similar act, neglect or omission on the part of a co-trustee, constitutes a breach of trust. However, a trustee who is guilty of negligence or breach of contract is not necessarily guilty of breach of trust or fiduciary duty. If the breach of trust entails a loss to the trust estate, then as a general rule the trustee, and, after his decease or bankruptcy, of the trustee's estate, are liable. It is, however, necessary for the beneficiary to show a causal connection between the breach of duty and the resulting loss."

[9] In this context that means that if there was a failure to take reasonable care by the respondent, or by his agent on whose advice he was acting, the applicant must show that that failure, on the balance of probabilities, caused loss to the estate. The applicant must then satisfy the court, again on the balance of probabilities, as to the proper measure of such a loss which the court may order the trustee to make good as it thinks just pursuant to Article 277 of the Order.

Background Facts

[10] The late James Kevin McAteer and his brother, John Francis McAteer, also now deceased, traded in partnership as builders particularly in the South Down area. James Kevin McAteer, as recorded above, died in 1993 and initially his widow, the applicant, was appointed as executrix of his estate. She subsequently became bankrupt herself which is one of the reasons for the delay in the coming to court of the issue currently before me. She has been discharged from that bankruptcy.

[11] The respondent is a licensed insolvency practitioner practising in this jurisdiction for nearly 30 years. He was appointed trustee in bankruptcy to the estate of James Kevin McAteer on 4 April 1995, having previously been appointed trustee in bankruptcy to the estate of the brother, John Francis McAteer, on 1 June 1994.

[12] The conduct of the trusteeship has been marked by considerable acrimony and litigation. The deceased appears to have enjoyed a somewhat lavish style of living which included the purchase of artworks and the ownership of bloodstock. Mr Lismore has had considerable difficulty in recovering assets of this character as well as the proceeds of a number of policies which have been in contention between the parties. However, as

indicated above, the hearing before me relates to the dwelling house and lands situate at 20 Templehill Road, Ballyholland, Co. Down. Ballyholland is a small hamlet to the east of Newry. The dwelling had 4 bedrooms and 3 reception rooms although the point is made in one of the reports that it was extended from a smaller dwelling. An advertisement placed in connection with it in the year 2000 describes it as having excellent views over the surrounding countryside and mature gardens. It is set in approximately 6 acres of ground with extensive outbuildings providing stabling for 5 horses. The advertisement correctly said that part of the land was zoned for housing.

[13] In effect the property in question consisted of 3 parts. The first part consisted of the dwelling house with very limited ground around it and a driveway coming up from the adopted public road. A dwelling of some kind had been made in the stable block and it and about 4 surrounding fields had been leased by the applicant, Mrs McAteer, to Beech Finch Limited. While the Trustee in Bankruptcy has never accepted the validity of that lease nor did he between the years 2000 and 2009 bring a challenge to it into court. The matter was to be listed for hearing in 2010 but the parties agreed that that should be adjourned until after these proceedings. The effect of that for my purposes is that this land was not immediately available to any purchaser but there was a rent of £4,000 per annum from it and there would be a reversion in or about 2018 to the owner of the main dwelling house. The lessee had a purported option to purchase but only at market value to be fixed by an arbitrator if not agreed. The second part therefore of the property can be seen to have been the value of a multiple of the rent with the prospect of a reversion in the relatively distant future. In the alternative any purchaser could sue and seek to set aside the lease. It cannot be disputed that that is not a prospect that would be attractive to many purchasers.

[14] The third part of the property, known as Lot 2 in many of the papers, was about 1.4 acres of land just across the driveway that led to the dwelling house. While it was suitable for keeping horses or other agricultural use it was also zoned for housing in the relevant Department of the Environment Plan: the Newry Area Plan 1984-1999 still in force at the date in question. Subsequently indeed, after the sale, on 9 November 2005 a planning permission was expressly granted on foot of Application No. P/2004/3310/F. This permitted the erection of 18 dwellings with access to be provided by the demolition of two dwelling houses.
They are on the far side of this Lot 2 from the driveway up to the house. While there was confusion at times about this at the hearing I find that the land was at all times zoned for housing. Indeed a draft Plan published after the events in dispute confirmed that zoning.
Mr Ferris pointed out in opening that Lot 2 was half owned by the estate of John Francis McAteer. Counsel, in their closing submissions, do not advert to this point. I shall hear them in due course in this regard.

[15] There was a very lively debate about the value of this piece of ground as I shall have to go into in a moment. Such plots of land in the period 2004/2005 could fetch large sums of money, even before the peak of the housing boom in Northern Ireland but this plot of land suffered from the absence of any access likely to be acceptable to the Road Service and Planning Service. The lane which led up to it and the dwelling house were outside the development limit of Ballyholland and the lane was in any event otherwise unsuitable. The contemplation therefore was that existing houses on the eastern side of the plot would have to be purchased and demolished to achieve the necessary access. Furthermore sight lines might require or were likely to require slivers of ground from adjoining householders as well, said the defendant. See Condition 7 of the permission ultimately granted and the related Drawing PO9. This was the property to be sold.

[16] I have reviewed the evidenced given before me and the submissions of counsel and have taken both into account even if not everything is referred to in the course of the rest of this judgment.

[17] It seems to me necessary to pose a number of questions and address them seriatim.

(a) How did the respondent go about discharging his duty of reasonable care in selling the property?
(b) Was he, vicariously or otherwise, in breach of the duty to take reasonable care?
(c) If the answer to (b) is yes was the property sold at an under value?
(d) If the answers to questions (b) and (c) are both yes did the breach of duty cause or contribute to the sale at an under value?
(e) What compensation would it be just to award pursuant to Article 277(1)(b) of the Insolvency Order if the answers to questions (b), (c) and (d) are all yes?

Question (a)

[18] Mr Lismore became the trustee of the estate on 4 April 1995. As indicated above the estate was not without its complexity. Clearly a significant item was always the property at Templehill Road, Newry. While Mr Lismore obtained an order for possession from Master Glass on 20 May 1996 enforcement was only achieved by December 1999 (trial bundle B, page 242). A series of valuations were made earlier in the 1990s. However, I remind myself that the second Provisional IRA ceasefire, for example, was not until July 1997 and I really think that these valuations from the mid 1990s are of no assistance to me and of historical interest only.

[19] The respondent pointed out that as late as 1999 the applicant was valuing the property at £150,000, which the respondent did not accept but she was of course a buyer or a supporter of possible other buyers in and about that time seeking to obtain it as cheaply as possible.

[20] The applicant criticises the respondent for not instructing an agent from Newry or its locality experienced in the sale of residential property. I say two things about this. I find, having heard the evidence of Mr Lismore and Mr Kenneth Crothers, that they did make reasonable efforts to secure such an agent but, it would appear, perhaps because of the ill feeling generated by the McAteer family, no agent was agreeable to act. They did get some limited advice initially from Messrs Hanna Hillen & Company, estate agents in the district. It is relevant to note that they recognised the "hope value" of Lot 2 at that time and wrote that it "can only be accurately determined by marketing the land".

[21] I find it was proper, in those circumstances, for Mr Lismore to retain Mr Crothers to conduct the sale and that it was proper for Mr Crothers to accept those instructions. That requires such an express statement because Mr Crothers is very well known as an agent dealing with substantial and commercial matters and giving expert advice on the more technical aspects of land values rather than the sale of residential property. Indeed he acts as an arbitrator himself. This transaction was not therefore part of his typical workload. Nevertheless having accepted those instructions in the circumstances he had a duty to take reasonable care in so doing. He was not, if I may so by way of analogy, in the position of a consultant physician called on to open someone's abdomen in a surgical theatre. The work of a residential estate agent, without disrespect, does not require such specialised skills. This is borne out by the fact that no professional qualification such as that of Membership of the Royal Institute of Chartered Surveyors is required to permit one to so practice. On 5 June 1996 Mr Crothers wrote to Mr Lismore pointing out that they were not residential estate agents and recommending the well known firm of Eric Cairns as joint agents but Mr Lismore said that they declined to so act.

[22] It seems to me that this is uncontroversial and it is uncontroversial that Mr Crothers went about the matter in the right way initially in 2000. On the evidence, which the respondent says the applicant did not seem to appreciate before, he did cause the property to be advertised in the Belfast Telegraph and in a local newspaper (although there was a suggestion from Mr Boyce that it was the less appropriate of the two local newspapers). He did have a 'For Sale' sign erected. There was not a lot of interest as a result of that which the respondent points to as showing the limitations of advertisement. The evidence seems to be that the 'For Sale' sign was removed. It may have been replaced once but not, I find, repeatedly. Nor was any injunction sought against the McAteer family who were suspected of removing the 'For Sale'

sign, without any evidence to support that. They were continuing to be hostile to any alienation of what Mrs McAteer continued to regard as her home – although by then she had complied with the order of the court to vacate it. However, interest began again after a considerable gap, in 2004. The first offer from Lisneys was for £40,000 for part of the lands but in March of 2004 Mr Declan Rodgers, solicitor, wrote to John McKee & So who were acting for the respondent. Following this Mr Crothers wrote to Mr Lismore on 16 March 2004 to this effect:-

> "Dear Walter
>
> 20 Templehill Road, Newry
>
> I have had some contact in recent days from a solicitor, Declan Rodgers, acting on behalf of a client named McKinley (sic). He has indicated an offer to purchase at £250,000.
>
> I have advised Mr Rodgers that this offer is unacceptable and falls very far short of expectations.
>
> He has undertaken to seek and obtain further instructions from his client and revert to me . . ."

[23] I observe that the reference to the offer being unacceptable is consistent with a view expressed by Mr Crothers in the year 2000 that a valuation of £400,000 be put on the property while accepting that that was optimistic.

[24] However it is clear that Mr Lismore took a more pessimistic view of the valuation because on 23 March Mr Crothers was writing to John McKee & Son saying that their mutual client (Mr Lismore) had agreed to sell to H P McKinlay Esq for £240,000:- "Sold unconditionally, with the purchaser to be fully apprised of all issues affecting the property."

[25] In the event R P Crawford, solicitors for the McAteers, then took various steps in effect to discourage Mr McKinlay from going ahead with the sale. Respondent's counsel said some of the evidence was on the basis that other members of the McAteer family were asserting a title by way of adverse possession to Lot 2. In fact no such proceedings seem to have ever been issued. What R P Crawford were doing was applying to register an inhibition based on such a possible claim but as John McKee & Son objected that was never registered. It is a matter of comment that the issue was left to be adjourned. I think it would have been better for the vendor's solicitor to clear their title if in fact this possible inhibition was a disincentive, by having the Registrar rule against it or force the McAteers to set out properly any alleged claim they might have. If this really was a disincentive then it seems to me that a

reasonably careful vendor would have taken that step. Given that the respondent had an experienced solicitor I conclude that I must infer that they were acting on instructions in not testing this matter or that it was not in fact as significant a factor as the respondent would now like to say. The effect however of the intervention from R P Crawford was to deter Mr McKinlay from proceeding with the sale as John McKee & Son reported to Mr Lismore on 3 July 2004. However about the same time a further possible purchaser came forward through Messrs Campbell & Grant, and Messrs C & H Jefferson on 5 July also offered £250,000 from a client of theirs. Mr Crothers then recommended acceptance of the offer from C & H Jefferson.

[26] On 14 September 2004 Simpson Property came forward with an offer to Mr Crothers in the sum of £260,000. In their letter (trial bundle B page 301) they say that their offer is cash subject to contract and title and go on:-

> "My client assures me that he is aware of all the problems associated with the land and is prepared to deal with these in his own time; funds are available for purchase and a quick completion can be arranged."

[27] There was considerable activity about this time e.g. an actual signed contract forwarded by C & H Jefferson on 13 October 2004 on behalf of Colette Neill offering £250,000. Messrs Campbell & Grant, already mentioned, were in the field on behalf of Mr Tony Hughes (the ultimate purchaser). On 11 November 2004 having previously offered more he wrote to this effect:-

> "We have received a fax from Crawford & Company, solicitors, on behalf of Fergal McAteer, Lorraine McAteer and Sheila McAteer. Our client is greatly concerned about the threats of proceedings and further legal action being taken by the McAteer family including potential proceedings regarding annulment of bankruptcies for Sheila McAteer and her late husband.
>
> Obviously there is therefore considerable risk to our client in the proposed purchase and as such he is only prepared to offer a sum of £200,000 for the lands in question. Our client instructs us that he is however in a position to make this payment within 2 days should this be agreed. Perhaps you would take your client's instructions and refer to me by return."

[28] I pause here to consider the position at this time. The applicant led evidence from the University of Ulster Northern Ireland Quarterly House Price Index for the first quarter of 2005. It shows that the value of property had risen significantly in Northern Ireland from the mid 1990s on. Whereas in 2001 their index seems to be at about 316, to judge by the graph provided, by the first quarter of 2005 it had reached 467.91. Between the beginning of 2004 and that date it had risen from 400. While it had not reached the level of excitability to be found in 2006 leading up to the peak of the market in the middle six months or so of 2007 there was clear evidence to anybody in the profession and indeed lay people also that there was a rising housing market. Mr Hanson, a very experienced insolvency practitioner who reported for the applicant here, said that as an insolvency practitioner he would always want to advertise and he commented adversely that there appeared to be no evidence of re-advertising or even consideration of re-advertising in the autumn of 2004. One can understand that while the bids were coming in quickly it might have been thought not necessary to do so but once the transaction seemed to stall the applicants say that the respondent should indeed have re-advertised it or if these threats of legal proceedings were in truth holding up a proper sale they should have taken legal steps to clear the title. The respondent did neither. Nor was there at this time any similar step taken i.e. the property was not on a website and nor, does it appear, were details of it circulated to the very many property developers who Mr Crothers must have been aware of. I accept the evidence that this was going to be a somewhat speculative purchase by anyone but I cannot but express surprise that none of this was done. The internet was not as prevalent a marketing tool then as perhaps it has become now in 2012. See for example Melbourne Mortgages Limited v. Turtle & Others [2004] NIQB 82 paras 37 to 57. It was, perhaps, a source of information then more than a marketing tool, but Mr Quentin Boyce said he would have used it as part of aggressive marketing of the property.

[29] In the events that happened no further advertisement of the property or other step took place in the winter of '04/'05. The respondent dug in his heels regarding the price and on or about 15 March 2005 he sold to Anthony Hughes Lots 1 and 2 in the sum of £260,000. Mr Hughes agreed to fully indemnify him and the estates of the two bankrupts against all "damages, action, proceedings, costs, claims, demands, expenses whatsoever arising out of Writ 1999/3695, the alleged lease dated 1 December 1993 made between Sheila Bernadette McAteer of the one part and Beechfinch Limited of the other part and/or any further or other proceedings issued against the vendor relating to the lands hereby transferred". It is this transaction of which the applicant complains.

[30] It is important to bear in mind that she also complains that her interest in the lands and those of persons associated with it were not taken seriously by the respondent and his agent. But Mr Lismore points out that she owed

£350,000 to the estate at that time and that he successfully petitioned for her bankruptcy in pursuit of that debt.

Question (b) Was the respondent, vicariously or otherwise, in breach of the duty to take reasonable care?

[31] I have taken into account the evidence of Mr Lismore and Mr Crothers along with the other evidence in the case. I can understand how Mr Crothers in certain circumstances dealing with valuable pieces of land would never put it up for auction or advertise it at all. He would know the identity of the persons who now, or more likely in the recent past, would be interested in and capable of buying valuable pieces of property. But this was a speculation of a rather more modest kind. I bear in mind and accept his evidence that in the light of the various difficulties including the Beechfinch lease bank lending would be most unlikely (although some adventurous lending certainly occurred about this time). That would be relevant to the later issues of valuation. I cannot accept his view that marketing the property might undermine his negotiating position especially as he candidly admitted that he could not say that he had considered advertising at this time (Friday 17th December, 11.49 a.m.)

[32] The essence of the matter is as follows. The property was only advertised in 2000. There was a rising market through 2004 and into 2005. There was interest in the property from several bidders. The bidders, however, came along largely seriatim rather than bidding against one another. I find that at least by the time the process stalled in the autumn of 2004 it was the duty of a careful respondent, the trustee in bankruptcy, properly advised, and however he might exercise his discretion, to take some further steps to expose the property to a wider market. That might have been done by advertising in the Belfast Telegraph and another newspaper or newspapers circulating in the locality. Certainly nowadays it might have been done by ensuring that it was on a readily accessible website and conceivably that might have been enough in 2004 but that was not done either. No lesser step, even inadequate, was taken. Other professional persons say they would have done more. It seems to me therefore that there was a breach of the duty of care by the respondent, although Mr Lismore is at pains to make it plain that he was reliant on the advice of Mr Crothers which he received "all along". The property had not been valued, either at all or for 5 years at this time. In 2000 Mr Crothers thought it might be worth £400,000 in a poorer market. Mr Ferris pointed out that on 16 March 2004 Mr Crothers said the then offer of £250,000 "falls very far short of expectations". Mr Lismore said that he did not recall the discussion. He did not know if Mr Crothers had gone back to previous bidders. He also admitted that no sign boards were erected in the period 2002 -2004. The respondent needed to do more than was done to discharge his duty of care. The steps I outline were not onerous.

Question (c): If the answer to (b) is yes was the property sold at an undervalue?

[33] It is the evidence of two independent and professional witnesses, Mr Quinton Boyce B.Sc. and Mr Gerald Kelly M.R.I.C.S., that the sale of the property for £260,000 in 2005 fell far below the professional valuation of the property at that time. No contradictory independent evidence has been advanced on behalf of the respondent. Mr Crothers is clearly not an independent witness. Furthermore he has repeatedly said that he was not a residential agent, let alone a residential agent practising in this district as Messrs Boyce and Kelly were. He did seek to rely on the NAVs of the property in question and the comparables of Mr Kelly to argue that the valuation of £260,000 was a correct valuation. It exceeded the NAV for 2005 by £80,000. Both the respondents' independent valuers said this was not a normal way of assessing the market value of residential property. I accept that evidence which accords with the courts understanding and experience. In some cases the NAV was close to the market value of Mr Kelly's comparables, in others not. I do not wholly disregard this evidence which I will bear in mind in due course. It is inevitable that I must find in the light of the evidence before me that the land was sold at an undervalue. This is not only because of the expert evidence given but because one would be very apprehensive that that would be the very outcome where there had been a failure to advertise the property in the newspapers, on the ground or on the internet in the years leading up to the sale. The answer to question (c) therefore is yes.

Question (d). If the answers to questions (b) and (c) are yes did the breach of duty cause or contribute to the sale at an undervalue?

[34] In answering that question I must apply, in my view, the standard common law approach of assessing the matter on the balance of probabilities. I will not repeat what I have said above. In my view it is probable that if the property had been more actively marketed, particularly at the end of 2004 and leading up to the sale in 2005, it is probable that more bidders would have appeared and pushed the price up. We know other persons were interested despite the disincentives that undoubtedly existed. We know it was a rising market. I have the opinion of the plaintiffs' experts collectively and individually on value. I conclude that the breach of the duty to take reasonable care on the part of the respondent, its servants and agents did cause and contribute to the sale at undervalue.

Question (e) What compensation would it be just to award pursuant to Article 277(1)(b) of the Insolvency Order (NI) 1989 if the answers to questions (b), (c) and (d) are all yes?

[35] This question requires the court to form a view pursuant to the principle of restitutio in integro of what value would have been obtained for the property if it had been properly marketed and sold in or around mid 2005. From that one would deduct the value actually achieved at that time. The court must also consider whether any reduction should be made in that award so as to render it "just" pursuant to the statutory provision.

[36] I do not for a moment hide the fact that I have found the valuation of the property if properly marketed in 2005 a very difficult matter. The plaintiffs' experts are putting it in the bracket of £750,000 to £1m. They are doing this while acknowledging the real difficulties that existed with the site. These are summarised by counsel for the respondent particularly at paragraphs 36 to 42 of their closing submissions. I take those adverse factors very seriously into account. In particular I think the difficulty and cost of achieving an access to the site, albeit one that achieved planning permission for 18 dwellings, would have calmed the enthusiasm of even a very determined developer. Such access was likely to have required the co-operation of at least 4 and perhaps 6 owners. Two whole houses would have had to disappear and small adjustments be made for sight lines to adjoining dwellings or rather their front gardens or hedges. I also take into account the fact that clearly there was a degree of knowledge of the availability of the property given that a number of buyers did appear seriatim in 2004. I must take into account that their bids were all around £250,000 and the evidence of recent NAVs. Of course, it is clear now that Mr Lismore had settled on or about this as the minimum figure in his own mind, albeit without a full professional valuation.

[37] The court seeks to balance the factors pointing towards a higher valuation set out by the plaintiff and her witnesses against the factors pointing to the actual sale price set out on behalf of the respondent. It seems to me that I have to consider what the plaintiff has shown was the <u>probable</u> sale price if there had been more active marketing in 2004/2005. I am not going to value this as the loss of a chance nor was it suggested that I should. I recognise that Messrs Kelly and Boyce may be right in the sense that two developers going against one another may have bid the property up to the levels they have in mind. But I am not satisfied that on the balance of probabilities those levels would have been achieved even if reasonably careful marketing had taken place at the relevant period. I find in light of all the facts that Lot 1 would have fetched £300,000 and Lot 2 £100,000. With regard to Lot 1 I find the evidence of the professional valuers very persuasive of that including fixing a reasonable multiple for the £4,000 a year from the Beech Finch lease. With regard to Lot 2 I am clearly substantially discounting their valuation for the reasons advanced on behalf of the respondent but it seems to me likely that if one had attracted more people into the bidding arena that a piece of ground with difficult access but with a potential for 18

new houses would have been worth at least £100,000 to someone in 2005 on the balance of probabilities and I so conclude.

[38] £400,000 is a figure of £140,000 more than the actual sale price. The court is obliged to take into account whether it is just to award to the plaintiff that or some lesser sum of money. As the property fetched £260,000 the loss is £140,000. As I have found Lot 2 to represent 25 % of the value of the property I shall apply the same percentage to the original sale price. On that basis Lot 2 was worth £65,000. The estate of her brother in law was the co-owner of Lot 2. It has lost half of £35,000 as has James's estate i.e. £17,500. To that must be added £300,000 less £195,000 i.e. £105,000 giving a total to the plaintiff of £122,500. Should I reduce the sum of £122,500 payable to her as executrix of the estate of her late husband because her family appear to have discouraged purchasers rather than encouraged them? It seems to me that that would not be appropriate. First of all I am not satisfied on the balance of probabilities that the evidence of such disincentive can be brought home to her rather than other members of her family or possibly others. But secondly to do so would be to inflict a double penalty. The family of the deceased would have been wiser to have assisted the administrator in getting the best price possible at a time of a rising market and hoping to clear the debts of the estate. That was not the view taken. But it would be to inflict a double penalty on Mrs McAteer now to reduce her damages, as in effect they are, when the estate has already lost out in that way.

[39] I therefore conclude that the sum of money which it is just for the respondent to pay to the estate represented by the plaintiff pursuant to Article 277(1)(b) of the Insolvency Order is £122,500. I will hear counsel in regard to the estate of John McAteer and any other consequential matters including interest.