Neutral Citation No: [2024] NICh 10	*Ref:*	**HUD12527**
	ICOS No:	**16/57129**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**30/09/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

NOEL SHORTT

Plaintiff;

and

BANK OF IRELAND (UK) PLC

Defendant;

and

SEAMUS CAMPBELL

Defendant to Counterclaim.

_____

Mr Mark Orr KC with Mr Richard Shields (instructed by Clarendon Legal) for the Plaintiff
Mr William T Gowdy KC (instructed by King & Gowdy Solicitors) for the Respondent

_____

HUDDLESTON J

Background

[1] Mr Shortt and Mr Campbell were property developers and investors who owned a number of properties ("the Properties") in Londonderry. In total there were 13 buildings comprising 65 units with two vacant properties and a site with development potential. Twelve of the buildings were located in Derry Cityside and one located in Derry Waterside. The rental value or ARV as of October 2015 amounted to £330,044pa. This was comprised, in large part, from the rents paid by tenants on housing benefit with an additional "cash top-up" paid directly to the landlord which was collected by a Mr McLaughlin as a representative of Messrs Shortt and Campbell. The Properties were charged to the defendant who had provided debt finance with which to acquire/improve the Properties.

[2] The plaintiff was adjudicated bankrupt in September 2012 and entered into an IVA in October 2012. It is argued that his liabilities to secured creditors, including the

defendant, were excluded from that IVA – a point that is now live between the parties. Nonetheless, the defendant offered, and Mr Shortt and Mr Campbell accepted, renewed facilities from the defendant Bank ("the Bank") in or about October 2013. Those facilities expired on 31 December 2013 without further agreement.

[3] The defendant issued a demand for the repayment of the facilities which was not met and, accordingly, the defendant sought to realise its securities. Initially, a fixed charge receiver was appointed but in the final instance the Bank elected to sell as mortgagee.

[4] The route to sale ultimately adopted by the Bank was to add the Properties into a larger portfolio comprising of around 705 properties throughout Northern Ireland and GB in the portfolio sale that it called "Project Lanyon."

[5] The timeline for the Project Lanyon sale was, in summary:

- 11 May 2015 - the commercial property agency company Savills was invited by the Bank to tender for the contract to sell, in one lot, and by no later than 30 November 2015 the Project Lanyon portfolio by targeting investors agreed with the defendant. Savills were appointed as the selling agents that month.

- 15 June 2015 – having accepted instructions from the defendant Savills carried out drive-by valuations using sub-contractors namely Dougans, Simon Brien and Campbell Cairns (all Belfast based estate agents).

- 24 July 2015 – the Bank appointed KPMG as fixed charge receiver although, as I have said, in the final instance elected to sell as mortgagee.

- 1 September 2015 – Savills start the first phase of Project Lanyon marketing by issuing 25 non-disclosure agreements under the terms of which parties were able to gain access to a virtual data room.

- 24 September 2015 – 11 bids were submitted.

- 21 October 2015 – five "Phase 2" bids submitted.

- Date unknown – the top two bidders are called.

- 26 October 2015 – best and final offers are called for after which Lotus Group was confirmed as the successful bidder for the portfolio with a price of circa £43m.

[6] On 9 December 2015, the Bank wrote to the plaintiff advising that it had sold the Properties and further that a sum of £2,168,867 had been attributed to them. A schedule was ultimately provided showing the breakdown of that amount across the

individual Properties. The Bank's position is that an apportionment as between the individual Properties was done by the successful bidder as part of the bid process.

[7] The plaintiff also makes the case that the Properties that had been fitted out and furnished by the plaintiff to include kitchens, bathrooms, furniture and equipment the value of which he assessed at in and around £700,000 although no evidence of that was adduced and the point not advanced at the hearing with any force.

[8] It is the plaintiff's case that:

(a) the defendant, in breach of the duties it owed to the plaintiff and Mr Campbell, sold the Properties at an under value;

(b) the defendant under accounted for the value of the Properties within the portfolio sale that constituted Project Lanyon and was in breach of its duty in attributing the wrong amount of the overall sale proceeds to the Properties;

(c) as a result, the defendant and those acting on its behalf had been guilty of wrongful conduct in relation to the sale.

[9] The plaintiff also argues that the defendant has failed to account to the plaintiff for the value of the contents of the property – although, as I say, no evidence was adduced on that point, and it was not seriously advanced at trial.

[10] In essence, the plaintiff's case in the main can be distilled to three issues:

(i) that the defendant failed to achieve the best price reasonably available for the Properties;

(ii) that the defendant did not act fairly in relation to the attribution of prices across the portfolio sold;

(iii) that the defendant did not act in good faith, and specifically there is an alleged conflict of interest on the part of Richard Milligan (to which I will revert).

The defendant's case

[11] The defendant contends that the Properties were sold as part of a competitively marketed portfolio sale and that the prices reached were those, in fact, attributed by the purchaser to the specific properties and, further, that the purchase consideration compares favourably to the various benchmarking valuations that had been obtained prior to the commencement of the process, the expert evidence provided at trial and, indeed, the actual realisation values of the Properties achieved by the successful purchaser, on resale. In short, they contend that the Properties were sold for the best price reasonably available, and that the plaintiff has no case.

The law

[12] The duties of a mortgagee exercising its powers of sale are well-established and are almost "textbook" for any law student. In short, when the money it is owed is due, a mortgagee can act in its own interests in deciding whether and, if so, when, to exercise its power of sale. Once it decides to sell, however, it must then take reasonable steps to achieve the best price reasonably available on the market at the time of sale or the true market value. The equally famous textbook case of *Cuckmere Brick Company Ltd v Mutual Finance Ltd* [1971] Chancery 949 makes that proposition clear and was adopted (inter alia) in *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ at 1409. Both cases were cited and considered.

[13] The mortgagee must also exercise its power of sale in good faith and for a proper purpose, ie in order to obtain repayment of its secured debt – *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295.

[14] These propositions were adopted in the local decisions of O'*Kane v Rooney* [2013] NIQB 114 and *Jennings v Quinn* [2019] NICA 39 – albeit in the context of receivership.

[15] The application of these principles to a portfolio sale was further considered by the English High Court in *McDonagh v Bank of Scotland* [2018] EWHC 3262 at [136]-[153].

[16] It should further be noted that generally the remedy for a breach of the mortgagee's duties is not damages per se but an order that the mortgagee account to those who are interested in the equity of redemption that the proper price was received – see *Downsview Nominees* and *Silvern Properties* (supra). Thus, on the present facts, to the extent that the plaintiff is successful would serve to reduce the shortfall to the defendant – unless and until that shortfall is exhausted. It is only after that shortfall has been exhausted that damages would accrue to the plaintiff.

[17] In the context of the present case the defence to the counterclaim is that the defendant is precluded by the IVA from recovering any unsecured shortfall. The Bank's position is that it would owe nothing unless and until the debt owed by the plaintiff to the Bank is exhausted.

[18] It follows from what I have said that to assess whether or not there has been a breach of duty there must be close analysis of the facts as these cases by their nature tend to be very fact specific.

Witnesses

[19] The witnesses who appeared on behalf of the Bank were, firstly, Mr Christopher Callan, who appeared as an expert witness on the question of the valuation of the Properties. The court was satisfied that he had significant market knowledge within the area not just in valuation, but also of portfolio sales such as Project Lanyon.

[20] The Bank also called Mr Ben Turtle of Savills NI Ltd (Savills) who led the portfolio sale. Mr Turtle's report on the advice given to the Bank formed part of his evidence. In the present case, Mr Ruairi Mussen, formerly of the Bank, was also called as a witness of fact as to the marketing process which constituted Project Lanyon. Mr Ian Leonard, formerly of KPMG, was also called. He had been appointed as one of the joint receivers of the Properties and was called to prove the level of rents recovered during the receivership.

[21] The court also received an affidavit from Mr Connor O'Leary, an employee, of the Governor and the Company of the Bank of Ireland to establish the exact role of Richard (Dick) Milligan, as a non-executive Director of the Bank of Ireland Mortgage Bank (as opposed to a Director of the defendant) and to deal with the conflict issue raised by the plaintiff.

[22] The only witness called by the plaintiff was Mr Dara Fury, a financial advisor and estate agent, who was based in Buncrana, Co Donegal. Mr Fury is a member of the Institute of Professional Auctioneers and Valuers and confirmed his experience in marketing and selling residential, agricultural and some commercial properties, primarily in Donegal. He did not have experience of portfolio sales or, indeed, in acting for or against institutional investors or property funds. His evidence was that he had conducted a number of shortform valuations, but that this was his first "blue book reliant" valuation. Based on this, the defendant argued that little weight should be given to his evidence. In Mr Fury's expert opinion, the true market value of the Properties at the point of sale was £4m (as opposed to the £2.1m that was realised). He based this on a number of comparables which he set out in his valuation report. He also commented adversely in relation to some of the Bank's earlier valuations:

(a) In respect of an O'Connor Kennedy Turtle (OKT) valuation report of 2013, Mr Fury's criticism of it was that it was carried out only a number of months after the bottom of the market;

(b) Mr Fury commented that OKT seemed not to have been aware that the housing benefit payments excluded rates which were paid, in addition, directly to the relevant rates office, (decreasing the expenses) and further that OKT did not properly take into account the cash top-ups paid (thus increasing the income) by individual tenants over and above housing benefit; and

(c) Mr Fury highlighted that in 2013 the Bank had refinanced the plaintiff's portfolio of Properties on an assumed then current value of circa £3.3m based

on the OKT valuation and that, notably, this was the same year that the plaintiff entered into an IVA.

[23] In relation to Savills' "drive by" valuations, Mr Fury highlighted that these were expressly provided on a non-reliant basis and further that the valuations conducted by/on behalf of Savills between June and October 2015, resulted in five different opinions on the value of the plaintiff's Properties ranging from £1.4m, £1.58m, £2.25m, £2.23m to £2.37m.

[24] In respect of a valuation provided by Dougan Residential and Commercial, Mr Fury noted that Mr Dougan had received instructions from the Bank and KPMG to carry out a red book valuation in which he concluded a final value of £1.865m (in 23 October 2015) but that in an email of 21 October 2015 to Ruairi Mussen which arose through disclosure, he had suggested that the final valuation for the Campbell & Shortt Properties should be £2m. Mr Furey questioned the alleged "interference" with the assessed value.

[25] It also seemed doubtful to Mr Furey whether Mr Dougan could have undertaken the Project Lanyon 'Red Book valuation' within the timescale of 15 days that the documentation and email exchanges suggested.

[26] Next, he highlighted that it was of concern that, notwithstanding market increases between 2013-2015, that the Savills' valuations did not show any material increase over the OKT valuation of 2013.

[27] In terms of advertising, Mr Fury expressed the view that the portfolio of the Properties was not advertised publicly. He gave evidence that he knew personally of three or four investors in the Londonderry/Donegal area who would have been interested in bidding for and could have bought the portfolio of Properties.

[28] Mr Turtle, who was called by the defendant to explain the rationale behind the portfolio sale said that his experience was that Savills, through its various offices, was able to access "active capital" that was interested and capable of investing in property of this scale. He said the information memorandum for Project Lanyon was sent to 56 such institutional investors. Mr Turtle also gave evidence that participants within the Northern Irish investment property market were well aware of the sale and could have contacted him for the information memorandum had they wished to do so.

[29] Given the nature and scale of the sale, his view was that broader publicity might have attracted bidders who would not have had the sufficient cash or equity funding to participate. He expressed the view that that type of bidder would have been more reliant on debt finance which, in short, would have meant that it would have been difficult to get the deal "over the line."

[30] There are a number of other factors relevant to the court's consideration that came out in the evidence – ones that were largely highlighted by the plaintiff – which are set out in the following sections.

Reduction prices between Phase 1 and Phase 2

[31] Attention was drawn to the fact that although Savills had invited offers in excess of £55.3m (which they subsequently reduced to £55.16m as the number of properties was reduced) that Phase 1 bids came in at figures between £27.6m to £48m, whilst Phase 2 bids came in within a range between £37.5m and £43.15m. It is common case that each of the bidders who went through to Phase 2 further reduced their bids:

- The Martin Group reduced its bid from £48m to £40m;
- LCC reduced its bid from £47m to £41m;
- DKEP/Lotus (the successful bidder) reduced its bid from £45.125m to £43.5m but with its final (and accepted bid) being £43.05m; and;
- Fitzwilliam/Alburn reduced its bid from £44m to £43.150m with its final bid therefore £100k above the successful bid.

[32] Mr Turtle's evidence by way of explanation was that between Phase 1 and Phase 2 the parties had access to further due diligence information and, more significantly, inspection facilities, to explain the reasons for the movement behind the bid levels.

Doherty Baines

[33] The plaintiff raised the question of an indicative bid put forward by Doherty Baines (an investment fund) on 6 October 2015. This was received by way of an email offer (marked subject to contract) at the level of £53m subject to a request to be permitted access to the Phase 2 bidding process. Both Mr Turtle and Mr Mussen gave evidence of their consideration of this offer. Both said that they discussed the offer but, upon further analysis, had discounted it on the basis that Doherty Baines had spent very little time on due diligence in Phase 1 and that they had put their bid in the form of a range rather than a single value. Both felt that as a bidder they had not reviewed the portfolio seriously enough to take their bid as credible. Mr Mussen gave evidence that he discussed the higher bid with Mr Service, his line manager, but that, ultimately, the Bank accepted Savills' advice not to disrupt the marketing process by adding Doherty Baines to the Phase 2 process. Mr Mussen's evidence was that the decision was not taken lightly as the Bank's overall objective was to recover as much of the indebtedness owed to it as possible.

Attribution of sale price to the Properties

[34] Part of the plaintiff's case is that the defendant/Savills incorrectly attributed (on their case under-attributed) the portfolio sale price to the individual assets that constituted the Properties. They say that final bid templates attributed pro-rata reductions to Savills' figures. Mr Turtle's evidence was that the bid structure required individual bidders to apportion prices both at Phase 2 and at the best and final offer stage.

[35] As such, the case is made by the Bank that this is not a *McDonagh v Bank of Scotland* situation, as the prices for the Properties were, in fact, those attributed – not by the Bank – but by the ultimately successful purchaser who owed no duty in that regard to the plaintiff.

Stamp duty regime

[36] Notwithstanding the best and final offer stage, the Bank agreed to a further £500,000 reduction to the successful bidder's final price. This reduction brought the DKEP/Lotus figure to £43.05m. The plaintiff makes the case that the successful bid was £100,000 less than the best and final bid from Fitzwilliam/Alburn and that fact should be sufficient to put parties on enquiry as to the propriety of the process.

[37] Evidence was given that the rationale behind the reduction was due to the Chancellor's surprise announcement on changes to SDLT during the bidding process which had a material impact on the process. The Bank's argument is that its decision to accept the DKEP/Lotus figure (as reduced) was a matter of informed judgment. At that stage it says that there was still, in the Bank's view, no certainty that Alburn/Fitzwilliam would not also seek to reduce its offer as a result of the SDLT changes and so it accepted the lower bid of £43.05m.

[38] The Bank's case, therefore, is that it decided, in the exercise of its "informed judgment" to secure the deal with Lanyon Jersey Prop Co (ie DKEP/Lotus) rather than reopen the process with the short-listed lower bidder again because of the SDLT issue. This, they say, was a matter of reasonable exercise of informed judgment on its part.

Valuation evidence

[39] As I have indicated the court heard from two valuers. Both Mr Fury and Mr Callan adopted different approaches to the valuations that they had been asked to undertake. Both experts were in agreement that the correct valuation approach to the tenanted properties was an "investment approach" which involved taking (a) the gross rents received, (b) adjusting that by a percentage deduction for operational expenditure ('Opex') and then (c) multiplying the net rent by a suitable multiplier based on comparable evidence to achieve a capital value as the base.

[40] In establishing the income, Mr Callan adopted the average rents which were received during the receivership undertaken by KPMG which he said included not

only the housing benefit rents but also the actual cash receipts accounted for by Mr McLaughlin. The Bank contended that the rental figure, therefore, that Mr Callan relied upon gave a much more realistic picture of the gross return from the plaintiff's property. The Opex deduction which Mr Callan adopted was 30% which, in his evidence, he noted was consistent with that adopted by OKT in their valuations and which, in his opinion, was a normal market deduction.

[41] Mr Fury in terms of his assessment of the base income, used a maximum figure for cash top-ups even though it did not correlate with the information provided by Mr McLaughlin - information which confirmed that some of those cash top-ups were not actually collected. In terms of the Opex deduction Mr Fury adopted a figure of between 11-15% which he said he based on the indicative fees provided to him by other managing or rent collection agents. In cross-examination it appeared that those managing agents did not actually operate in Londonderry but had practices in Carndonagh and Buncrana, nor it transpired, did his Opex deduction take into account voids or the costs of cleaning and repair between incoming/outgoing tenants - although on that point he sought to argue that the turnover of tenants was low. The schedule of tenancies which he exhibited to his reports, however, did not substantiate that position nor did Mr Leonard's evidence in relation to the operation of the Properties during his period as FCR.

[42] There was debate as to what extent Mr Callan had valued on the basis of the properties which, in his view, fell within the definition of a "house in multiple occupation" ("HMOs") (as per Houses in Multiple Occupation Act (NI) 2016) – the debate focusing on the extent to which that applied in respect of the Properties. The plaintiff argues that the Properties were individual flats outwith that definition, thus attracting a higher rate.

[43] On the question of capitalisation (and following on from the issue of HMOs) Mr Fury relied on a number of Derry based comparables, eg the Star Factory and Foyleview apartment developments. It was, however, noted that the comparables used were of individual or rented apartments rather than comparables consisting of an entire building. Although, Mr Callan noted that comparables were rare, he did consider that the sale of a property at Newtownabbey that consisted of an ex-NIHE block of flats which had a capitalisation yield of 12.5% or "eight years purchase" was a good starting point. On that basis, Mr Callan, in his valuation adopted capitalisation of yields of 12.5%/eight years' purchase for three of the Properties and 10%/10 years' purchase for the balance.

[44] The two experts were similarly at odds in respect of the approaches adopted to the valuation of the uninhabited properties (of which there were two) and the development site. Mr Fury adopted an approach of calculating the valuation of the properties (once developed) and then deducting the estimated costs of completion. Mr Callan felt that this approach had "too many unknowns." Not least of those was the question of extant planning permission. Where there was hope value, Mr Callan

discounted that on the basis that it is not something he felt can properly be reported in line with a Red Book valuation.

[45] Whilst there had been a joint meeting between the experts, they failed to reach consensus. In the final instance the valuation advanced by Mr Callan for the Properties was £1,861,750 as compared to that of Mr Fury of £4m.

[46] The Bank, in its closing submissions, helpfully set out a schedule (now attached in Appendix 1) which conveniently sets out the comparative basis for the various valuations under consideration.

[47] It is also, perhaps, interesting to note that the valuation now advanced by the plaintiff is well in excess of the offers which he made (and advanced as the then current market value) whilst in negotiations with the defendant for the acquisition of the portfolio. This comparison is set out in Appendix 2.

[48] A further cross-check is possible when one looks at the resale price at which the various Properties were sold as part of the unwinding of Project Lanyon. The sale proceeds received by Lanyon Jersey Propco Ltd, as part of those resales, is set out in Appendix 3.

Conflict

[49] The final point that the plaintiff made was that the case involved a potential conflict of interest. It is argued that Mr Richard Milligan was associated (as a non-executive director) with the successful bidder whilst, at the same time, holding a position as a non-executive director of the Bank of Ireland Mortgage Bank - a wholly owned subsidiary of the Bank of Ireland. As I have indicated the Bank dealt with this through the affidavit evidence of Connor O'Leary who confirmed Mr Milligan's position was as a director of the mortgage bank but not the separate subsidiary who is the defendant in these proceedings. Mr Mussen was equally clear in his oral evidence that he did not know Mr Milligan and that he had no decision-making role in the decision to appoint the successful bidder.

Consideration

[50] The core of the plaintiff's case, it seems to me, is that he fundamentally rejects the idea that the Bank was entitled to include his Properties as part of a portfolio sale and alleges that in adopting such an approach the Bank was in breach of its duty to act in good faith and/or to discharge its duty to obtain the true market value of the Properties. That argument breaks down into two distinct issues.

(a) The method of sale

[51] Taking the first of those in turn, there is, in my view, no strength in the plaintiff's argument that the Bank was not entitled to adopt a portfolio approach by which to sell the Properties. This issue was considered in *McDonagh v Bank of Scotland Plc* [2019] 4 WLR 12 at [140]:

> "140. When considering whether a mortgagee or a receiver has committed a breach of the equitable duty to take care to obtain the best price reasonably obtainable, the court must recognise that the mortgagee or receiver is involved in an exercise of informed judgment and if he goes about the exercise of his judgment in a reasonable way, he will not be held to be in breach of duty. An error of judgment, without more, is not negligence or a breach of the relevant duty in equity." [emphasis added]

That, in my view, is the starting point in this analysis.

[52] On the specific question of adopting a portfolio sale, the learned judge, Morgan J, cited the case of *Bell v Long* at para [57]:

> "Whatever the weight of the arguments for and against recommending acceptance of the portfolio bid from [the buyer] I am satisfied that [the selling agent advising the receiver] **made the decision himself based on his own assessment of the market and that the advice … represented his genuine views of the most prudent course for the receivers to take. For an allegation that this advice was negligent to succeed it is not enough to produce evidence which shows with the benefit of hindsight that an alternative strategy could or would have produced a higher return. What has to be demonstrated is that no competent valuer standing in [the selling agent advising the receiver's] shoes at the time with the information which he had could reasonably have given [that] advice**." [emphasis added]

[53] At para [144] the learned judge indeed goes on to articulate some of the potential advantages of a portfolio sale and to emphasise at para [145] that:

> "The mortgagee is entitled to prefer his own interests to those of the mortgagor."

[54] At [146] he notes the possibility of the exposure of the property to a "different type of purchaser" through a portfolio approach and that it "might lead to a better

price for the property compared with the price achievable if the property was sold separately."

[55] If one applies that guidance to the facts and evidence here, it confirms the position that the Bank took is not susceptible to challenge. Reasonable care was taken to appoint an expert to undertake the marketing and selling of an extremely large portfolio of properties. I heard from Mr Turtle, who was the representative of Savills and who had direct responsibility for the sale. A report as to his recommendations was also provided. His evidence was that guidance was provided to the Bank in the form of that report and the route selected to market was through the issuing of an information memorandum to approximately 56 interested parties, whom he felt, would be able to transact without necessarily having to raise bank or other finance. In this, one has to recall that the context of the Project Lanyon sale was against the background of what had been a distressed property market following the financial crash at a point when lending on commercial property was limited. I accept that the portfolio sale was adopted by the Bank as a way of recouping the monies which it had advanced against a large number of properties most of which at the relevant time were in negative equity. Certainly, it was the case that the Properties with which we are concerned fell into that category – by some considerable margin as the debate on shortfall confirms.

[56] All of these factors, the appointment of a suitably qualified expert, the adherence to his advice in the context of a Bank who was anxious to recoup the maximum value it could as quickly as possible, goes to the question of whether or not it was exercising informed judgment. In my view, the actions adopted by the Bank in pursuing a portfolio sale fell within the realm of the discretion that was open to the Bank both as to the method of sale adopted and, indeed, the process that it followed. One has to recall that the Bank's primary role, at that point in time, was to realise as much as it could in order pay down the accumulated debt. Mr Mussen's evidence to that effect was cogent on that point. To that extent (ie the recovery of as much as possible) the interests of mortgagee and mortgagor were aligned, but as to the methodology to be adopted the Bank as mortgagee, in my view, had the right to adopt the approach it preferred provided that it acknowledged legal duties and obligations which it owed to its borrowers. As *McDonagh* makes clear, even if there were an error of judgment (which I do not accept to be the case in this instance) such an error does not constitute negligence per se, nor, indeed, a breach of the relevant duty.

(b) Valuation issues

[57] The second issue the plaintiff has, quite rightly, raised are the issues it has in terms of the valuation and apportionment of values on the final sale.

[58] I have set out above Mr Fury's critique of the various earlier valuations and the various concerns raised by the plaintiff, but when properly considered (in context) as set out in the three appendices, in my view, fundamentally those valuations do not show that there was a particular discrepancy which would cause this court concern.

[59] What I find is telling is the comparison with the post-sale realisation by Lanyon PropCo (see Appendix 3). The plaintiff says that is of no evidential value because I have no evidence as to what happened post the transaction. That is true, but it cannot be disputed that the appendix illustrates a general trend that the price attributed by the successful purchaser across the portfolio of Properties was not, in fact, realised upon its later disposals – ie at the point when the Properties were sold individually to onward purchasers. Regardless of what the plaintiff says that is a useful comparison in testing the plaintiff's argument.

[60] Further, those realisations are, I note, also very consistent with Mr Callan's valuations as undertaken specifically for the purpose of this case.

[61] We have, therefore, a situation where the Bank before undertaking the portfolio sale had undertaken a range of valuations. Through the bidding process it ensured that bidders allocated valuations to the individual properties – thereby avoiding some of the issues that were raised in *McDonagh* and finally, a situation that, when one looks at the valuations in the rear-view mirror, the actual prices raised after the impugned transaction certainly do not disclose any particular windfall for the successful bidder. Indeed, quite the contrary. That, I find, demonstrates a degree of consistency of approach that tends to negate some of the issues raised by the plaintiff.

[62] On the current valuations and the dispute between the experts in this case, may I also say, that the evidence of Mr Callan is greatly to be preferred. He, as his curriculum vitae confirms, has considerable valuation experience in sales such as this when, Mr Fury, by comparison, has not. Mr Fury accepted that this was, in fact, the first "Blue Book" valuation which he had undertaken but, moreover, the reasons for preferring Mr Callan's approach are more ingrained when one considers his valuation methodology:

(a) In assessing the open market rental value of the Properties (OMV) Mr Callan took a more conservative approach than did Mr Fury. Some of this is allied to the actual as opposed to an assumed recoverability of the "cash top-up" payments in establishing the recurring income. Mr Callan's approach was more consistent with the practical experience of the fixed charge receiver as evidenced by Mr Sheppard in terms of the actual recoverability of the various rents whereas Mr Fury, in my view, took a rather too generous view of the gross income – glossing over issues of actual recovery which are germane to a prudent valuation.

(b) As a deduction, Mr Callan's treatment of the likely operating expenditure (Opex) was taken at 30%. Notwithstanding the debate on the HMO status of the Properties (or not) Mr Callan was able to demonstrate with admirable clarity how this was more consistent with market norms than the 11-15% adopted by Mr Fury which, by his own concession, was based on practices he had spoken to informally in Carndonagh and Buncrana whose experience, I

would have to say, would not be reflective of the Properties with which we are dealing. It also fails to reflect voids, cleaning, renewals etc and the other incidental costs of portfolio management.

(c) When contrasting the approach to capitalisation, Mr Fury's valuation unquestionably looked at, in effect, single unit sales which are inevitably higher and attract a different (often owner occupier) market, whereas, Mr Callan had tried to establish a comparable of another portfolio sale (albeit in Newtownabbey) and/or relied upon his experience of capitalisation yields (putting it at 8, 10 or 12 times yield) which he explained was more consistent with the investment market – which is the market with which we are primarily concerned.

[63] In relation to the treatment of the valuation of development sites/hope value, Mr Callan's approach, as he demonstrated in his evidence, was consistent with the Red (or Blue) Book, whereas, Mr Fury's attempt to calculate a sales value of a property (as completed) and then net off indicative costs lacked consistency and precedent (by reference to established valuation methodology) and, in my view, Mr Callan's view (and mine) opened up too many variables. Taking all of that into account, Mr Callan's valuation (at £1,861,750) and his valuation methodology was by far the more convincing when compared to Mr Fury's valuation of £4m and his approach overall.

[64] Looking then at some of the additional features complained of by the plaintiff:

(i) Publicity

[65] If one accepts that the Bank had the ability to choose a portfolio approach as the method of disposal (which I obviously do) then the question of publicity takes on a different complexion. However one looks at it, this was a portfolio sale – not the sale of a single asset. Based on the professional advice of Mr Turtle and the contacts of his firm an information memorandum was circulated to 56 individual institutional investors whom, he explained, were considered to have access to "active capital." By that stage one was speaking of a portfolio in excess of 700 properties with a (final) capital value in excess of £40m. As against that, Mr Fury said that he knew of three or four local (ie Derry based) investors who would have been interested in the Properties. That may have been so, but there was no substantive evidence before the court that (a) they were available to contract in 2015; and (b) that they were ready and willing and able to transact without reference to third party or bank finance to address the issue upon which Mr Turtle gave evidence ie the ability to transact. Finally, in this context, one is also cognisant that the valuation placed upon the Properties by the plaintiff itself was substantially below the transaction value ultimately submitted (see Appendix 2).

(ii) The attribution of purchase prices

[66] The process adopted, very sensibly in my view, did not seek an all-encompassing figure but sought an attribution for the individual properties (at Phase 2 and at the best and final stages) from each of the bidders. Although the parties dispute it, I am satisfied on the evidence that the bid proforma was crafted in such a way and took the case out of some of the concerns regarding attribution of price by a mortgagee or receiver that was recognised in *McDonagh*. As I have said, the ultimate prices (as compared to the realisation values) are set out in Appendix 3 and do not, in my view, raise a concern.

(iii) Doherty Baines

[67] The submission (at a late stage) of the Doherty Baines email offering £53m was, properly interpreted, more of a request to be permitted access to the Phase 2 round. Again, I felt that the evidence of both Mr Turtle and Mr Mussen was entirely cogent on this point. Whilst superficially attractive, on further analysis, it was established that Doherty Baines had done scant due diligence during the Phase 1 phase. Accordingly, in my view, the Bank had every right to be suspect of their ability to ultimately transact. The benefit of data rooms such as are deployed in cases such as this is that one can monitor the activity of the respective bidders. It seemed quite clear from the evidence provided by both Mr Turtle and Mr Mussen that the offer which Doherty Baines had made was based on superficial due diligence and, to that extent, when considered and rejected by them was done so, in my view, as a proper exercise of their professional judgment.

(iv) The subsequent reduction in prices

[68] The reduction in price between Phase 1 and Phase 2 (see above at [31] and [32]) one can accept was a direct consequence of the details which came out through the Phase 1 due diligence process. The fact that each of the bidders reduced their bids is consistent with that. I do have little more reservation about the treatment of the SDLT reduction (if I may call it that). In this context the Bank reduced the successful bid by £500,000 (to £43.05m) to acknowledge the change in SDLT proposed by the Chancellor. That final bid was, therefore below the second highest bidder by a margin of £100,000. There is no evidence to suggest that Alburn/Fitzwilliam would actually have sought a renegotiation of its bid by an equivalent amount if the issue of the additional SDLT charges had been put to them (which it was not) or, indeed, at all, but, on balance, I am satisfied from the evidence that the issue was considered and that it fell within the discretion of the Bank in the exercise of its judgment rather than being the grounds for any serious claim for a breach of duty on its part. Given the size of the entire portfolio, its complexity and the relatively small proportion which comprised the Properties, any adjustment as regards this plaintiff would have been de minimis in any event.

(v) Conflict of interest

[69] Having considered the evidence set out in the affidavit of Mr O'Leary which details Mr Milligan's involvement in the Bank I am satisfied that any reasonable person, appraised of the full facts and thus aware that Mr Milligan was in no way involved either in governance terms, nor, in the actual decision-making under challenge would not consider there to have been a conflict of interest – see as an analogy guidance in *Porter v Magill* [2001] UKHL 67.

Summary conclusion on the action

[70] Taking all of those factors into account, therefore, I am satisfied that the Bank as mortgagee, took reasonable steps to achieve the best possible price readily available. As I have said, it was not bound to adopt any particular sales process. The plaintiff is clearly aggrieved that he was saddled with a portfolio sale but, in my view, that was an option which was entirely open to the Bank, and, for the reasons I have set out above, did not constitute breach of the Bank's specific duties to the plaintiff as mortgagee. The exercise of such judgment does not, as *McDonagh* makes clear, automatically mean that there has been a breach of duty and when one looks at the case in the round (as one is obliged to do in fact specific cases such as this) I am satisfied that the plaintiff has no case on the merits.

[71] As a final word on the issue of fixtures and fittings and the alleged value(s) attributed to them. As I have said, no cogent evidence of their actual value was adduced. In any event, in my view, to the extent they were fixtures they were comprised in the Properties and would have been captured by the mortgage. If they were items of furniture (as the Bank concedes) then they could have been removed but either way they do not alter the determination of this case.

The counterclaim

[72] The Bank counterclaims for the shortfall of £1,226,887.76 with interest (at £77.62 per day) which it says remains due and owing on the mortgage account.

[73] Counsel for the plaintiff admitted that the Bank had (a) made the advance and (b) that it had demanded repayment and (c) that the figures claimed were agreed. The only question, therefore, on the counterclaim is whether the shortfall claimed by the Bank was compromised by the IVA entered into on 30 October 2012 and as modified on 20 April 2016.

[74] The background to the IVA itself is that on 1 October 2012, the plaintiff proposed an IVA to his creditors. The basis of his proposal was that he would introduce £147,415.00 to pay his unsecured creditors 100 pence in the £1 and that the secured creditors would rely on their security. That IVA was approved - with modifications - on 30 October 2012. The Chairman's report included reference to a modification (Modification 1) in respect of the position on the secured debts in the following terms:

> "Any debts in respect of secured creditors shall not be compromised under the terms of the arrangements and clause 4 and 39 of the R3 terms and conditions should be amended accordingly and, for the avoidance of doubt, the secured creditors may reserve their rights to revalue their security whenever they so choose during the voluntary arrangement without the consent of the supervisor."

[75] It also included a further modification (Modification 4) requiring the plaintiff to refinance his facilities from Ulster Bank prior to 1 June 2013.

[76] On 28 October 2013, the defendant bank offered new facilities to the plaintiff which were accepted on 26 November 2013, thus, establishing a new contractual obligation on the part of the plaintiff to repay the sums advanced by a date certain, in this case, 31 December 2013 (if not subject to a prior demand). It is the Bank's case that the plaintiff's obligation to repay the Bank which was extant at the date of his IVA (and excluded from it) was voluntarily replaced by a new contractual obligation which post-dated the IVA to repay the debt, albeit at a later date.

[77] Moving forward to 23 March 2016, the plaintiff proposed a variation to his IVA in relation to Modification 4. It did not purport to have any effect on Modification 1 (supra).

[78] On 18 April 2016, the Bank's solicitors wrote to the supervisor of the IVA setting out its position that, as it had advanced new facilities to the plaintiff after the date of the IVA, it did not consider itself to be a creditor which was bound by it.

[79] The variation in relation to Modification 4 was thus approved on 20 April 2016 removing the plaintiff's obligation to refinance his liabilities to Ulster Bank and further contained a provision that "a shortfall in negative equity due to Ulster Bank Ltd on secured loans after realisation of a security will be excluded from and will not be compromised under the terms of the individual voluntary arrangement." It is the Bank of Ireland's case that the variation did not have any impact whatsoever on Modification 1, and that throughout the IVA ie both before and after the 2016 variation standard the provision of clauses 4 and 35 were amended to the effect that secured liabilities were not comprised by the IVA.

[80] The Bank also argues that the liabilities of the plaintiff to the defendant post-date his IVA and are, therefore, not subject to it and so seeks judgment on the shortfall.

Consideration

[81] Mr Mussen accepted, on behalf of the Bank, that the October 2013 refinancing was not "new money." It was, in essence, the refinancing of an existing (pre-IVA) loan. No further security was taken at that stage nor was any further money advanced, the defence says, therefore, that the liabilities thereunder were captured by the IVA. They say the Bank failed to submit a Proof of Debt form. They say that the failure on the Bank's part to submit a Proof of Debt form is significant and that insofar as the IVA, when it spoke in terms of the exclusion for "debts of secured creditors", could only as a matter of law and construction mean those who had submitted a Proof of Debt form. They rely on the definition in article 9 Insolvency (NI) Order 1989 coupled with Rule 6.094 of the Insolvency Rules (NI) 1991 which, in turn, encompasses the requirement to submit a claim in the form of a Proof of Debt as provided for in Rule 6.112. They also say section 30 of the Terms and Conditions of the IVA also requires creditors (of whatever status) to submit Proof of Debt forms. On that basis they say, therefore, that the IVA Supervisor in terms of the IVA itself any reference within the Modification to "debts in respect of secured creditors" can only encompass "both as a matter of law and a matter of construction … those parties who have submitted a Proof of Debt."

[82] In contrast, the Bank's position is that as a secured creditor the IVA did not affect its rights and that it was at the date of the IVA and subsequently a "secured creditor." In addition, it argues that by virtue of the October 2013 facility letter a new contractual relationship was established between the Bank and the borrower when that facility was accepted on 26 November 2013. Under those contractual arrangements, the plaintiff and the defendant to counterclaim agreed to repay the facilities on 31 December 2013. The Bank argue that this was a new contractual obligation which post-dated the IVA and superseded all previous contractual relationships.

[83] Turning to the IVA as varied by the April 2016 variation (the effect of which was to delete Modification 4) did not, the Bank says, impact upon Modification 1 (ie the preservation of the status of secured creditor interests) thereunder – both as originally approved and/or as subsequently varied.

[84] In my view, the analysis advanced by the Bank in the circumstances of this case is to be preferred. On any reading of the sequence of facility letters, the October 2013 one sought to refinance the plaintiff/defendant to counterclaim. It was a "new" contract notwithstanding that no additional monies were advanced, and that the existing security was relied upon. In effect, it was a confirmation by the Bank that it would give the borrowers additional time (until 31 December 2013) to repay the facilities.

[85] In terms of pure chronology, in my view, the October 2013 obligation (as assumed by the plaintiff/defendant to counterclaim) could not, therefore, have been caught by the earlier IVA. Even if I am wrong in that analysis, I am satisfied that under the terms of the original IVA (with the modifications) that "secured liabilities" were excluded. The term "secured liabilities", in my view, to give it its natural

meaning, always encompassed the monies from time to time owed by the Bank and in respect of which it had security, and I do not think it fatal to the counterclaim brought that no proof of debt was actually submitted in the original IVA. The effect is that throughout the IVA – including both before and after the 2016 variations – the provisions of the standard clauses 4 and 35 clearly were intended to and did apply to the Bank.

[86] On that basis, I give judgment to the Bank on the counterclaim and dismiss the case in the main action brought by the plaintiff.

[87] If required, I will hear the parties on the question of costs.

Appendix 1

Property	Sale Price	OKT	Savills	Dougan	Callan	Doherty (High)	Doherty (Low)
Mount Royal	£862,900	£750,000	£750,000	£650,000	£675,000	£1,750,000	£760,000
Westland Mews	£448,045	£380,000	£600,000	£450,000	£428,500	£624,000	£400,000
Eden Terrace	£375,030	£210,000	£350,000	£380,000	£338,250	£650,000	£160,000
Spencer Road	£106,203	£115,500	£100,000	£100,000	£110,000	£175,000	£120,000
Northland Road	£376,689	£325,000	£430,000	£285,000	£310,000	£525,000	£340,000
TOTAL	**£2,168,867**	**£1,780,500**	**£2,230,000**	**£1,865,000**	**£1,861,750**	**£3,724,000**	**£1,780,000**

Appendix 2

Property	Sale Price	Sekhon	Plaintiff	Furey
Mount Royal	£862,900		£500,000	£1,381,250
Westland Mews	£448,045			£828,750
Eden Terrace	£375,030			£893,850
(1 Eden Tm-ace)	*£16,594*		*£50,000*	
Spencer Road	£106,203			£221,000
Northland Road	£376,689			£687,250
(60 N/land Rd)	*£82,971*		*£60,000*	
TOTAL	**£2,168,867**	**£2,000,000**		**£4,000,000**

Appendix 3

Property	Sale Price	Resale Price	Resale Date
Mount Royal	£862,900	*£800,000*	7 July 2019
Westland Mews	£448,045	£400,000	Q4 2017
Eden Terrace	£375,030	£172,000	Q4 2016 – Q2 2019
Spencer Road	£106,203	*£100,000*	Q3 2018
Northland Road	£376,689	£405,000	Q2 2018
TOTAL	**£2,168,867**	**£1,877,000**	