Neutral Citation Number: [2009] IEHC 619

THE HIGH COURT

2006 4 P

BETWEEN/

NEVILLE PRESHO

PLAINTIFF

AND

PATRICK DOOHAN AND ÓSTAN THORAIGH COMHLACHT TEORANTA

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy on substantive issue delivered the 17th July, 2009.

1. Preliminary issue determined
On 3rd April, 2009, the court ruled in favour of the plaintiff on a preliminary issue. The pleadings and complex facts of the case are referred to in that decision. The issue was whether, in the circumstance of the plaintiff's bi-polar disorder, the defendants could rely on the Statute of Limitations and delay. Further hearings were held in relation to damages and unjust enrichment including the final hearing on 13th July, 2009.

2. Substantive claim
The plaintiff's house was damaged by fire in unexplained circumstances prior to 8.00 am on the morning of 14th January, 1993. The court also accepts that the physical structure was significantly altered between 14th January, 1993 and the visit of a County Council Engineer on 7th October, 1993, nine months later. It would appear that the remaining structure was removed off the site by the date of the opening of the second named defendant's hotel on 11th May, 1994 at which time the plaintiff's site was levelled and the septic tank destroyed or covered over. Certainly when Mr. and Mrs. Presho returned two months after the hotel had opened, on 5th July 1994, there was no trace of the house.

Mr. Presho had been sent a photo from the County Council of the damaged house on 29th April, 1994. It was unclear when the photo was taken.

It was alleged that an offer had been made by Mr. O'Neachtain, the manager of the co-operative for the purchase of the plaintiff's property in 1992 before the hotel site was brought on 10th June, 1993 for £1,000. The plaintiff submits that the only logical basis for that was that the manager was acting for the defendants. This was denied by the manager. No other evidence was adduced. In the circumstance the court is not in a position to determine whether an offer had or had not been made.

The court accepts the evidence that the property was a 19th Century stone building of a strong and durable nature and that it had before 14th January, 1993 lost part of its roof. The first named defendant's assertion that the property simply collapsed on 19th January, 1994 whether by reason of the stormy conditions on or about that date or by reason of unnamed persons removing the stones lacks credibility. The evidence that he was the only person on the island with a JCB was not controverted. There was no evidence adduced to support the assertion that the building collapsed.

Photographic evidence of the size of part of the rubble being on the seashore is consistent with the use of a JCB to clear the site. The photographic evidence of the levelled site where the plaintiff's house once stood points to the use of levelling equipment rather than storm collapse and removal by unidentified persons of the remains of the house.

The septic tank serving the hotel appears to run across the path of the plaintiff's septic tank. The court accepts the evidence of the plaintiff and of Mr. Hyde, Architect, in this regard.

Mr. John McGinty, who had acted as a building contractor or subcontractor employed by the defendants in relation to the building of the hotel. He asserted that he had been asked by Mr. Doohan to demolish the plaintiff's house and offered £1,000 to do so. This was contradicted by Mr. Doohan in his evidence. Mr. McGinty refused to demolish the house, without, as he said, having written proof of ownership. The court cannot make a finding of fact in relation thereto.

The statement of claim pleaded that Mr. Doohan, the first named defendant and the principal of the second named company, placed his workmen in the plaintiff's house from 1992 to 1993. Mr. McGinty, who was a building contractor employed by the defendants to build Óstan Thoraigh, the hotel, says that he stayed in the plaintiff's house with the approval of the caretaker, Mary Meenan. Ms. Meenan did not give evidence. I accept the evidence of Mr. Presho that she had no authority to allow the defendants' contractors to occupy the premises. The court accepts that the defendants' contractor and the defendants benefited.

It was alleged that Mr. Doohan took sheeting off the roof and hindered repairs. One of Mr. McGinty's workmen gave specific evidence that the sheet came off in what he described as "a hurricane". The court accepts that there was no evidence that Mr. Doohan removed the sheeting. It was pleaded that Mr. Doohan stopped/hindered repairs. The court is not satisfied that this was so. The evidence given was that he assisted with repairs but that the replacement sheet was broken while being replaced by Mr. Doohan's JCB in weather conditions described as blowing "around like a parachute". The court accepts that Mr. Doohan helped weigh the roof down with sandbags and ropes in difficult conditions and did not hinder the attempted repair.

It was alleged that the fire was malicious and was allegedly caused by an electrical fault. Mr. McGinty had stored some combustibles in the house. Mr. McGinty believed but gave no reason for his belief that the fire was malicious other than that the fuses had been removed before the fire. The court, on the balance of probability, accepts that the fire was malicious and was exacerbated by the presence of combustibles.

No evidence was offered for the allegation that two persons acting as agents for the defendants had set the fire. The allegation was withdrawn against Mr. O'Neachtain in open court. Nobody gave evidence that the fire was started by the defendant or his agents. Mr. Doohan gave evidence to the contrary and said that he was not on the island at the time. I accept the evidence of the defendants.

It was suggested in the statement of claim that the gardaí did not investigate the fire and destruction of the house. The evidence given by Superintendent Eugene McGovern was that once Mr. McGinty complained on 15th January, 1993, the Garda investigation was delayed by bad weather and was then inconclusive. When Mr. Presho complained over a year later in July 1994 a further investigation took place. No evidence was forthcoming to the Gardaí which would warrant a prosecution. The absence of statements from the many inhabitants regarding what should have been obvious to all, is significant. The delay in investigation is not adequately explained by adverse weather.

It was alleged that the building was subsequently demolished by degrees by the defendants. No evidence was given that anyone demolished the building. In particular there was no evidence that it was done by the defendants. The workmen gave evidence that they never saw the first named defendant taking any steps to demolish the house. It is common case that some years later in 2001, Mr. Doohan had accidentally reversed his JCB into the plaintiff's then roofless house when he cleared the roadway of rubble between the hotel and the plaintiff's house on behalf of the local authority.

It was accepted that the first named defendant proceeded through the normal legal channels with Donegal County Council to clear the rocks, stones and debris from Presho's house to make the road passable.

Mr. Doohan wrote to Mr. Presho in reply to the latter's request to remove two white stones from his house site which were there without his permission as follows:

> "Dear Neville,
>
> Further to our conversation in the clubhouse last night I regret that I didn't come across the copy fax from Donegal County Council, but I can confirm that I cleared the road from rock, stones, and debris to make the road passable as instructed by Donegal County Council.
>
> Yours sincerely,
>
> Pat Doohan, 18/8/01."

3. The purported agreement of 4th October 2001

There was no evidence to support the allegation that Mr. Doohan drew up the purported agreement between Mr. Presho and himself on 4th October, 2001. The evidence points to the contrary in that Mr. Presho had asked Angela Duggan of Comharchuman Thorai, the island co-operative to prepare the document.

The agreement of 4th October, 2001, read as follows:

> "We, the undersigned Neville Presho and P. Doohan do hereby this day 2001
>
> enter into a binding agreement, where I P. Doohan will secure the land rights
>
> to the area shown shaded, for Neville Presho and will assign to him the land, rights and ownership
>
> of that area. In pursuance, I Neville Presho will simultaneously assign the land rights and ownership
>
> of the land known as folio 13745F in O.S. 6 Donegal to Patrick Joseph Doohan of Óstán Thoraigh.
>
> This is a straight swap transaction and does not involve any fanancial (*sic*) remuneration to either party.
>
> Agreed at Tory on 4/10/2001. signed Neville Presho
>
> signed P. Doohan.
>
> witnessed Angela Duggan, runai, Comharchuman Thorai."

This was accompanied by a sketch signed by the three, the two parties and witnessed by Angela Duggan which showed a hatched round undetermined area beside the Community Centre.

Also included was a draft undated statement with the plaintiffs address in Hollywood, Co. Down and telephone numbers which stated as follows:

> "It gives me great pleasure, as proprietor of Óstán Thoraigh to fully endorse Neville Presho's plans for a Tory visitor centre (illegible). His ideas and enthusiasm will ensure that Tory becomes a major tourist attraction in Ireland.
>
> The ferry, the smooth operator TM will be 150 seat, state-of-the-art high speed wave (illegible) catamaran, designed to the specifications of skipper Jimmy Sweeney to suit the sea conditions around Tory. It will out trawl and reduce the time between Magherety to Tory from the current one hour to little under 20 minutes. In addition the ride in all sea conditions will be extremely stable.
>
> I was involved in Mr. Presho's film 'Oilean' about life in Tory Island in 1976 and have enjoyed discussing ideas with him up to the present."

A further letter to the first name defendant from the plaintiff dated 20th June, 2003, from Hollywood, Co. Down read as follows:

> "Dear Patrick Doohan,

> This letter has been sent by registered mail.
>
> When I met you on Tory Island in October, 2001, we both signed a legally binding document in which you were to acquire a site (marked) on the island, in exchange for you acquiring my house site.
>
> As I had not heard from you since we signed that document on 4/10/01, I then wrote to you on 6/3/02 and again, received no response from you. You are hereby advised to expedite this matter within the next 21 days.
>
> Failure to do so will result in this issue being taken out of my hands.
>
> Best wishes,
>
> Yours sincerely,
>
> Neville Presho."

A final letter dated 4th August, 2003, enclosed €100 which Mr. Doohan had lent Mr. Presho and referred to and enclosed a letter in relation to an unrelated matter.

Mr. Presho less than two weeks before the purported agreement gave notice of an application to the planning authority was published in the "Derry People" in "Donegal News" on Friday, September 21st, 2001. It read:

> "I, Neville Presho, am applying for planning permission for the erection of a two-storey replacement dwelling at Middletown, Tory Island."

No evidence was given in relation to any development of that application.

The agreement of 4th October, 2001 was signed by both Mr. Presho and Mr. Doohan. The evidence of the circumstances of its preparation and execution is bizarre and was referred to by two eminent psychiatrists as a manifestation of the plaintiff's mental impairment. The court, in its preliminary ruling of 3rd April, 2009, also referred to the agreement in relation to the plaintiff's inability to deal with his affairs. The evidence of Mr. Doohan was that while he signed it he did not think it would be binding. Neither party were legally represented.

The court accedes to the plaintiff's request and will declare the agreement of 4th October, 2001 to be null and void.

4. Circumstantial evidence

In assessing the evidence the Court has to identify the circumstantial evidence as well as the direct evidence given.

The circumstantial evidence of motive, capacity and opportunity depends on the reasonable inferences. The court is also entitled to consider the continuance of acts and the failure to give evidence or call witnesses (see Keane: *The Modern Law of Evidence*, 7th Ed. Oxford, 2008, 11-19).

Relevant facts are those which the existence or non-existence of a fact in issue may be inferred.

As already determined there is a lack of direct evidence in relation to critical facts alleged by the plaintiff. The absence of the plaintiff from Tory Island from 1988 to 1994, the delay in the Garda investigation of the initial complaint by Mr. McGinty, absence of a visit by the local authority until October 1994 and the delay in ascertaining and notifying Mr. Presho, then in New Zealand, on 29th April 1994, all contributed to the absence of direct and forensic evidence.

More telling was the lack of cooperation with the Garda investigation and the absence of corroborative evidence from neighbours.

The defendants benefited to some extent from the demolition of Mr. Presho's house. There was no evidence of lack of motive on their part to show the relative unlikelihood of their interest.

While the court accepts the removal by Mr. Doohan's JCB of debris from the road between the house and the hotel was authorised by the local authority, the removal of the remainder of the house required mechanical means. Mr. Doohan, as the owner of the only JCB on the island had the capacity and opportunity to remove the stones identified by Mr. Presho on the foreshore.

The court accepts that the demolition and removal of the house was gradual. The house did not disappear in an instant. The continuance of the process to a gravelled site infers planning and motivation. The court attaches particular importance to the photographic evidence of the uninterrupted view by the hotel of the harbour. Mr. Presho then put in evidence the superimposed outline of his house on that photograph which observed the direct view from the hotel. This was not objected to nor was he cross examined.

The court accepts the plaintiff's difficulties in getting evidence. The defendants' evidence denying the allegations was not corroborated other than in the use of the car park.

It is clear that in criminal law a combination of circumstances, no one of which could raise a reasonable conviction or more than a mere suspicion may, when taken together create a conclusion of guilt.

In *People (DPP) v. Nevin*, CCA, 14th March, 2003, the Court of Criminal Appeal approved Carroll J.'s direction to the jury as follows:

> "… to consider individually whether or not to accept each piece of circumstantial evidence, and to resolve any doubts arising therefrom in favour of the accused, given the presumption of innocence; thereafter, … to consider the 'cumulative weight' of the circumstantial evidence, any inference it engendered in the case, (and) required to exclude the possibility of coincidence or fabrication before deciding to convict the accused."

Nevin involved a criminal protection requiring proof beyond reasonable doubt of circumstantial evidence.

The burden of proof in a civil case, such as this, is lower being the balance of probabilities.

5. The doctrine of *res ipsa loquitur*
The court further considers that the doctrine of *res ipsa locquitur* – the affair speaks for itself – while not entirely dispositive has some application to the case. Henchy J. in *Hanrahan v. Merck Sharp and Dohme* [1988] I.L.R.M 629 stated the following in relation to the doctrine of *res ipsa loquitur*: (emphasis added.)

> "The ordinary rule is that a person who alleges a particular tort must, in order to succeed, **prove** (save there are admissions) all the necessary ingredients of the tort and it is not for the defendant to disprove anything. Such exceptions as has been allowed to that general rule seem to be confined to cases where a particular element of the tort lies, or is deemed to lie, **pre-eminently within the defendant's knowledge, in which case the onus of proof as to that matter passes to the defendant.** Thus, in the tort of negligence, where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant, the rule of *res ipsa loquitur* will allow the act relied on to be evidence of negligence in the absence of proof by the defendant that it occurred without want of due care on his part. The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be **palpably unfair to require a plaintiff to prove** something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof." (emphasis added.)

While McMahon and Binchy in *Irish Law of Torts*, 2nd ed. (Dublin, Butterworths, 1989), are somewhat critical of this reasoning of Henchy J., the doctrine is applicable to the circumstances where motivation, capacity and opportunity of the defendants are considered. McMahon and Binchy point out:

> "It is not the case that *res ipsa loquitur* may be invoked only where the evidence is more accessible to the defendant. Of course, proof of the elements of a case based on *res ipsa loquitur* frequently shows superior or exclusive knowledge on the part of the defendant as to how the accident occurred: of the nature of things, those in control of the instrumentality causing the injury are generally more likely to have such knowledge than their victims. But the *res ipsa loquitur* doctrine is neither reducible to, nor dependent on, this element … **The whole point of the doctrine is to permit the making of an inferential conclusion that the defendant's negligent conduct caused the plaintiff's injury from the fact that (a) the thing causing the injury was under the defendant's control and (b) accidents such as the one befalling the plaintiff do not ordinarily happen if those in control exercise due care**." (2nd ed. 1989 at 143) (emphasis added.)

The court is entitled to infer and is satisfied that it is probable that the first named defendants JCB, whether driven by that defendant or not, was the only "thing causing the injury".

6. Unjust enrichment
While not pleaded, the court considered, in addition to the circumstantial evidence, whether and if so, to what extent it was proper to consider restitution either as a *quasi* contractual or equitable remedy. The court allowed an opportunity to the plaintiff to consider an amendment. No such amendment was made, though the defendants made written submissions.

The court does not propose to address the matter.

6. Damages
The court is satisfied on the basis of the above analysis of the circumstantial evidence and the doctrine of *res ipsa loquitur* that the plaintiff is entitled to the damages for trespass and interference.

The final short hearing in relation to trespass and damages in relation to the path of the second defendant's septic tank and car parking on the plaintiff's site was heard on 13th July, 2009. The court considered the plaintiff's architect and valuer's affidavit together with the affidavits of Mr. Doohan of his valuer, Manus O'Ceallaigh, the affidavit's of his solicitor, Sean O'Canainn together with seven affidavits of inhabitants of Tory Island. The latter all said in like terms that they had not seen any cars parking where the plaintiff's house was nor where the hotel's septic tank was situate. Each said that they remembered well where the plaintiff's house was and where the septic tank for the hotel is. None of these deponents gave evidence in court as to what occurred to the plaintiff's house.

The affidavit of the first named defendant denied any involvement in the matters alleged in the plaintiff's statement of claim and referred to two questions which remained to be resolved.

The first was that of the septic tank. The first named defendant said that the hotel bought the land through Sean O'Canainn, their solicitor. Mr. O'Canainn in his affidavit referred to the pleadings and opposed any amendment thereto. He referred to the purchase of the land and easement in relation to the hotel's septic tank, the evidence of which had been given in the hearing in Letterkenny. He also referred to the planning permission obtained in relation to the septic tank.

In submissions made by Seamus O'Thuthail A.S., it was urged that Mr. Presho, the plaintiff, did not have prescriptive rights to the land which was not included in his folio. He had purchased the land in 1986 and the house had been unoccupied and had been destroyed in 1993 or 1994. Accordingly, the plaintiff had no prescriptive rights to the garden area or the septic tank due to the non-user of same.

It was further submitted that if there were damages, which was denied, then it was *damnum sine iniuria*.

Manus O'Ceallaigh, a valuer, referred to the affidavits already filed by Kevin V. Hyde, architect and Dermot J. Rainey, valuer. He said that the hotel did not use Mr. Presho's site for parking; there was ample parking around the hotel and only fifteen cars altogether on the island.

In submissions counsel referred to his valuation as being zero or insignificant insofar as the supply of parking is greater than the need.

Mr. O'Dualachain S.C. on behalf of Mr. Presho stressed the occurrence of trespass over a period of sixteen years. No licence to trespass could operate in favour of the second named defendant. The interests of the plaintiff in the land had to be upheld by the court which could draw inferences from common sense.

The Court is not satisfied that the property rights of the plaintiff in relation to the septic tank used by the plaintiff can be extinguished by non-user. While there was no argument in relation to the issue of the nature of easement acquired it would appear to have been an easement of necessity even though it was not covered by the folio. While no causation has been proved in relation to the destruction and demolition of the plaintiff's house it does not seem to be equitable that the second named defendant can enjoy its advantage and rely on the non-user of easement attaching to Mr. Presho's site. Whatever the cause of the destruction and demolition of the house it would seem to the Court that the legal entitlement of the plaintiff to rebuild the house, subject to planning permission, would include the use of the septic tank even if this is on land now transferred to the second named defendant.

Damages for trespass to the plaintiff's property in relation to access to the septic tank, as shown by Mr. Hyde, the architect on behalf of the plaintiff, can result in no significant damage, once the plaintiff is in the position to use the septic tank which benefited the site on which his house once stood.

The Court is not satisfied that the plaintiff has proven that there was trespass by way of parking of cars on the site.

The court in allowing the plaintiff claim at (a) and (d) of the Statement of Claim now considers the relief claimed at (b) (the restoration and rebuilding) and (c) (the removal of the septic tank, etc.).

The court is conscious of the delays in proceeding from the date of notification of the cause of action from 1994 to 2006, the absence of evidence of the state of the house prior to the fire and to the ambivalence of the plaintiff. The equitable remedy lies not in reinstatement but in the provision of a comparable dwelling on Tory Island or the open market value of a comparable dwelling on the island.