

THE HIGH COURT

[2012 No. 11215 P]

BETWEEN

TOM O'DRISCOLL AND SEAMUS DUNNE

PLAINTIFFS

AND

LARRY MCDONALD, DEIRDRE MCDONALD AND BARNEY MCDONALD

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 13th day of July, 2017

1. This claim concerns a number of property transactions entered into between the parties in 2006 and 2007. The plaintiffs, Mr. O'Driscoll and Mr. Dunne, were property developers and Mr. Dunne in addition had an electrical wholesale business in Kilkenny. The first and third defendants are farmers and the second defendant is the wife of the first defendant (Mr. McDonald). The defendants owned a house and agricultural lands at Ballyroan, County Laois. Part of these lands were rezoned for development purposes. By contract for sale dated 21st October, 2005, the plaintiffs agreed to acquire fifteen acres of land from the defendants for €1.3 million. Mr. McDonald was retaining three sites on the lands and as part of the deal, it was agreed that the plaintiffs would build three houses on these sites.

2. Rather than develop the lands themselves, the plaintiffs entered into negotiations to sell them on to a building development company called Rolan Homes Ltd (Rolan). The plaintiffs successfully concluded an agreement with Rolan in May 2006 and sold the lands for €3 million. The obligation to construct the three houses for Mr. McDonald remained.

3. A few weeks after entering into the contract with Rolan on 12th May, 2006, the plaintiffs entered into two further contracts with the defendants, both dated 2nd June, 2006. The first contract was an agreement to purchase the defendant's dwelling house for €500,000 and the second, to purchase 26 acres of land adjoining the dwelling house for €2 million. Of this 26 acres, approximately 8.8 acres were zoned for development and again, the plaintiffs entered into negotiations with Rolan to sell on the 8.8 acres.

4. This appears to have culminated in a verbal agreement with Rolan who were to purchase the eight acres for €3 million. This would have netted the plaintiffs a profit of €500,000 with them also retaining the house and a little over 17 acres of agricultural land. Throughout these various negotiations and agreements, the plaintiffs were represented by Messrs. Fitzpatrick solicitors of Clonmel and the defendants by Messrs. White and Breen in Portlaoise.

5. On the 7th November, 2006, the solicitors for Rolan, Messrs. O'Donnell Sweeney, sent a "Heads of Terms of Agreement" document to Mr. Fitzpatrick indicating the broad terms of the verbal arrangement that had been made. It referred to the fact that the 8.8 acres would be purchased by Rolan for €3 million. Shortly before that document was prepared, on 25th October, 2006, Mr. Fitzpatrick wrote to Mr. O'Driscoll in relation to both the closing of the sale with the McDonalds and the subsequent sale on to Rolan.

6. Mr. Fitzpatrick noted that he had received a 23 page fax from O'Donnell Sweeney indicating their client's agreement to proceed by way of sub sale but also that they had raised extensive queries. The sub sale arrangement would have been advantageous from a stamp duty point of view. For whatever reason, the sub sale did not take place and two days after the heads of agreement had been prepared, the plaintiffs closed the sale with the defendants on the 9th November, 2006.

7. The two sale agreements provided that the McDonalds should be permitted to remain in possession of the house and grounds for a period of six months on foot of two caretaker's agreements signed by them. The first and second defendants entered into a caretaker's agreement in relation to the dwelling house and the first and third defendants in relation to the lands. Both caretakers agreements contained the following covenants on behalf of the defendants:

"1. To keep the property in a good order, repair and condition as the same is at the date hereof (preserving the same from trespass and injury)....;

6. To indemnify the purchasers against all claims, demands, losses, damages, costs, fees and expenses whatsoever sustained by the purchasers as a result of us failing to observe and perform the covenants and obligations contained in this agreement."

8. The caretaker's agreement in respect of the dwelling house provided that the defendant should deliver up possession prior to the 9th May, 2007, unless otherwise agreed. The caretaker's agreement in respect of the land provided that the defendants would deliver up possession when required to do so at any time subject to the purchasers giving two month's notice in writing.

9. A letter from Mr. Fitzpatrick of the 22nd November, 2006, to Mr. Dunne indicates that the contract for sale was sent to Rolan's solicitors on the 20th November, 2006. This contract was never signed. Indeed it is notable from the extensive booklets of correspondence submitted to the court by the plaintiffs that from the date of closing of the sale being the 9th November, 2006, there is no further correspondence of any kind relating directly or indirectly to the proposed contract with Rolan. It is not once mentioned thereafter.

10. The defendant's executed the caretaker's agreements and they were returned by Mr. White on the 6th December, 2006. There is no correspondence of any kind on the file for the next six months or so until a letter of the 17th May, 2007, from Mr. Fintan Dunne, the auctioneer and valuer advising the defendants, to Mr. White which indicates that Mr. Dunne was in contact with Mr. O'Driscoll in relation to the three sites. Although not expressly so stated in the letter, it would appear likely that that contact related to the fact that the plaintiff's obligation to build the three houses on the sites remained extant. The date of this letter is also notable for the fact that it is eight days after the date when the defendants were supposed to vacate the dwelling house. That does not appear to have been a concern at that stage.

11. In fact over the next number of months, all contacts between the parties seem to have been solely concerned with the issue of the completion of the three houses. It is clear that the parties entered into negotiations whereby the plaintiffs would in effect buy out their obligation to build the three houses for a cash payment to Mr. McDonald. These negotiations it would appear took place between the plaintiffs and Mr. Dunne on behalf of the defendants and culminated in mid November in an agreement by the plaintiffs to

pay Mr. McDonald the sum of €350,000 in lieu of building the houses.

12. The terms of the agreement are confirmed in an email from Mr. Dunne's email to their solicitor, Mr. Fitzpatrick but which is signed by both plaintiffs. It reads as follows:

"Dear Paul,

I am here with Tom O'Driscoll and he has instructed me that he has completed negotiations with Larry McDonald through Fintan Dunne regarding the three houses and our agreement to pay him the €250,000 as per our agreement plus a further sum to complete the three houses. The sum agreed is €350,000 in total to be paid on before the 20th February, 2008.

As part of this agreement Larry McDonald must vacate the property on or before the date of completion and give us total vacant possession. If Larry has not vacated by then he will not receive his his (*sic*) funds on that date.

Yours sincerely,

Seamus Dunne and Tom O'Driscoll."

13. It is clear from this email that up to the 20th February, 2008, at any rate, the defendants' occupation of the property was consensual and thereafter, if they did not vacate, the money would not be paid. The corollary of that would seem to be that if the money was not paid, the defendants were not obliged to vacate.

14. In fact the sum of €350,000 was never paid by the plaintiffs to Mr. McDonald as had been agreed. It would appear that Mr. McDonald was, at the time this agreement was made, building a new house and his failure to vacate appears to have been due to delays in completing the construction. This in turn appears to have been caused by cash flow difficulties being experienced by Mr. McDonald. The plaintiff's evidence, which is not disputed, is that they paid the sum of €30,000 to Mr. McDonald in March 2008 for the purpose of enabling him to complete the new house and surrender possession of the contract properties to the plaintiffs.

15. This left a balance due by the plaintiff to Mr. McDonald of €320,000. It would appear that matters rested there for a further year. No steps of any kind were taken by the plaintiffs to eject the defendants from the properties. Indeed it is notable that while Mr. Fitzpatrick continued to represent their interests up until 2010 and up to that time, Mr. Fitzpatrick engaged in correspondence with Mr. White about title related matters such as the completion of security and the execution of a wayleave agreement, there is hardly any reference to possession of the property being sought.

16. It would appear that in the course of early 2009, Mr. McDonald took the law into his own hands and employed a so called debt collection agency operated by a notorious criminal, Martin "the Viper" Foley to harass and intimidate Mr. Dunne in particular into discharging the debt. On a number of occasions between early March and late July 2009, Mr. Dunne was visited at both his home and his business premises in Kilkenny by a woman and two men employed by this agency who arrived in a van with the name of the agency emblazoned in large red letters on its side including the word "Viper".

17. Mr. Dunne's evidence was that these people called to his home on five different occasions, and on one such occasion they blocked the entrance gate to his private residence. On other occasions, the van arrived at his business premises in Kilkenny and parked outside. They entered the premises and refused to leave when asked to do so. This behaviour resulted in a complaint to the Gardaí and retired Detective Garda Luke Kelly, who was involved in the investigation, gave evidence that he interviewed Mr. McDonald about the matter and advised him to instruct these people to desist from the behaviour complained of.

18. This appears to have resulted in Mr. McDonald agreeing to withdraw their instructions but for one week only. Despite the fact that the Gardaí were initially involved in this matter following a complaint on the 18th March, 2009, it took a further four months before Mr. McDonald finally withdrew his instructions to these people. On one occasion when they called to Mr. Dunne's house, his wife was there on her own and although she initially didn't realise who these people were, Detective Kelly who spoke to her said she was visibly upset when she was made aware of their background. A criminal investigation ensued but ultimately a decision was taken by the DPP not to prosecute.

19. During the same period, a letter was written by Mr. Dunne to Mr. McDonald dated the 8th May, 2009, purporting to demand rent from him for a three year period from the 21st August, 2006, to the 21st August, 2009, amounting to €76,500. There was of course never any basis for such a claim and it was subsequently withdrawn. Perhaps it was written by Mr. Dunne out of frustration with the situation in which he found himself and in response to the harassment and intimidation he was suffering at Mr. McDonald's behest. The letter was replied to by Mr. McDonald's solicitor, Mr. White, on the 12th May, 2009. In this letter, Mr. White said:

"Mr. O'Driscoll agreed on behalf of himself and your client to extend the period in which our client was permitted to remain on in occupation of the dwelling house at Ballyroan to facilitate our client constructing a new house at Crubbin, Ballyroan, which has since been completed and which our client and his family have been residing in for approximately a year at this stage. There is no question of any rental being due by our client to your client in that matter and as our client occupied both the house and lands in accordance with an agreement reached between the parties."

20. The letter went on to complain of the plaintiff's failure to discharge the debt then due of €320,000 to Mr. McDonald.

21. Mr. Fitzpatrick replied to this letter on the 19th May, 2009, saying:

"In relation to the caretaker's agreements, we understand that the period allowed for occupation of the property by our client and his family was for six months and has long since expired and that occupation continued notwithstanding same."

22. Matters rested there and no steps appear to have been taken thereafter by the plaintiffs to recover possession of the dwelling house, despite the fact that they had been clearly told by Mr. McDonald's solicitor that he had vacated the house a year earlier, albeit that he had not formally handed over possession. However, it seems there was nothing preventing the plaintiffs from taking possession of the property had they wished to do so and when I asked Mr. O'Driscoll in the course of his evidence about this, he said that understandably, they would have been uninclined to intervene directly while Mr. McDonald's debt recovery agency was engaged. However, that engagement ceased shortly thereafter and still no steps were taken by the plaintiffs to recover possession.

23. The funding for the acquisition of the properties in issue had been provided to the plaintiffs by Ulster Bank Ireland Ltd and because of the events that occurred and the collapse in the property market in 2008, the plaintiffs failed to honour their obligations

under the terms of the borrowing with the result that on the 25th May, 2010, Ulster Bank appointed a receiver over the properties. It would appear that the receiver secured possession of both the dwelling house and the lands some months later and they were ultimately sold.

24. However, before this occurred, Mr. McDonald commenced proceedings in 2009 in this court claiming the then outstanding sum of €320,000. Those proceedings were defended by Mr. O'Driscoll and Mr. Dunne who represented themselves. They filed a defence and counterclaim and it would appear, in those documents they made complaint of many of the same matters that are the subject matter of these proceedings. The 2009 proceedings came on for hearing before the President of the High Court on the 17th July, 2012. At the conclusion of the hearing, the President delivered an *ex tempore* judgment which is recorded in the transcript furnished to me. He gave judgment to Mr. and Mrs. McDonald for the amount claimed.

25. He seems to have considered that the counterclaim was not properly formulated and the court was not in a position to deal with it but indicated that it could be separately pursued by the plaintiffs if they wished to do so. The President did note however that the treatment to which Mr. Dunne had been subjected by the debt recovery agency employed by Mr. McDonald was despicable and reprehensible. The judgment of the President was not appealed.

26. After the within proceedings commenced, the defendants brought a motion to have them dismissed as an abuse of process on a variety of grounds including that they were *res judicata* as a result of the 2009 proceedings and/or were an abuse of process under the rule in *Henderson v. Henderson* (1843) 3 Hare 100. This application came on for hearing before Barton J. who delivered a written judgment on the 11th February, 2015, dismissing the motion.

Discussion

27. This claim is one for damages brought by the plaintiffs arising out of the circumstances I have outlined. The plaintiffs jointly claim damages against the defendants for breach of the caretaker's agreements and in particular of the clauses to which I have already referred. They say that the defendants failed to vacate the properties in breach of those agreements and furthermore that they failed to maintain the dwelling house so that it was uninhabitable.

28. In that regard, evidence was given by Mr. Dunne that he attended at the dwelling house with the receiver's agents in May 2010, when he noted that the property appeared to be in very poor condition and was overgrown. He did not however gain access to the dwelling house itself. In fact the plaintiffs complained that despite having paid very large sums of money to the defendants in 2006, they never got possession of the properties before they were repossessed by the receiver.

29. Secondly, Mr. Dunne separately in the within proceedings makes a claim for damages arising out of the harassment and intimidation he suffered consequent upon the activities of the debt collection service to which I have already referred.

30. Throughout the course of the hearing, I asked Mr. O'Driscoll and Mr. Dunne to indicate what the quantum of their claim was for the breach of contract of which they complain in these proceedings. In response, they submitted that because of the breach of contract, they had lost the benefit of the contract with Rolan which resulted in a loss to them of €3 million together with the value of the dwelling house and agricultural lands they would have retained in addition.

31. In particular, no evidence of any description was led by the plaintiffs in relation to the cost of repairs of the premises. Although as I have said Mr. Dunne gave evidence to the effect that from an external viewpoint, the premises were in poor condition, no evidence was given as to what the cost of putting the premises into the condition in which it stood at the time the agreement was entered into as per clause 1 thereof.

32. Aside from Mr. Dunne's personal claim, the plaintiffs have confined their claim for damages to one involving the loss of the Rolan contract.

33. In that regard, a review of the documents to which I have already referred shows clearly that there was a putative agreement with Rolan which seems to have been concluded very shortly prior to the closing of the sale with the defendants on the 9th November, 2006. Mr. Fitzpatrick sent a draft contract to Rolan's solicitors on the 20th November, 2006. However, after that date, there is not a single scrap of correspondence which touches in any way upon the Rolan contract. That is surprising to say the least. Mr. O'Driscoll in evidence suggested that Rolan pulled out of the deal because the plaintiffs couldn't get possession of the property from Mr. McDonald. That does not appear to me to be consistent with what the documents show. As I have said, those documents are completely silent with regard to any involvement of Rolan post November 2006, despite the fact that the caretaker's agreement, which gave the McDonalds a right to occupy the property for at least six months, was only entered into during that month.

34. When I asked Mr. O'Driscoll about this, he told me that he continued to have verbal discussions and contacts with Rolan throughout this period. His evidence was that Rolan in fact only finally pulled out of the arrangement in October 2007, and this was directly consequent upon the fact that Mr. McDonald had failed to vacate in May 2007, as he had agreed.

35. I have great difficulty in accepting that evidence because it appears to me to be directly contradictory to all of the surrounding circumstances. In the first instance, if the Rolan deal was still available in May 2007, at the end of the six months of the caretaker's agreement in relation to the dwelling house, it is quite extraordinary that there is not even a single letter from the plaintiffs or their solicitors demanding possession as a matter of extreme urgency.

36. One would have expected that if the Rolan deal was still available in May 2007 but was now being jeopardised by the defendant's failure to vacate, there would have been correspondence of the most urgent kind followed by immediate legal action to obtain possession of the premises as a matter of extreme urgency. It may even have been appropriate to apply for a mandatory injunction given the clear urgency of the situation if the plaintiff's evidence is correct and the fact that they were now on risk of losing €3 million because of the alleged failure to vacate the dwelling house.

37. Moreover, the caretaker's agreement in relation to the lands which included the 8.8 acres being sold to Rolan required two months notice in writing to be served upon the defendants before they were obliged to surrender possession. There is no evidence before the court that such notice was ever served.

38. Furthermore, if as Mr. O'Driscoll alleges Rolan had finally pulled out of the deal in October 2007, it is, to say the least, quite extraordinary that barely a month later, in November 2007, the plaintiffs agreed to pay the defendants a sum of €350,000 to buy out their obligation to build the three houses contained in the original contract. If Rolan had pulled out of the deal as suggested in October, one would have expected the plaintiffs to be taking legal steps to recover the huge losses they had now suffered as a result of the defendant's breach of contract.

39. Not only did they not do this but were actively involved in further negotiations with the defendants at that time to pay them additional monies. They admit, and the court has found, that they did enter into such an agreement and failed to comply with it. Further, the email correspondence to which I have already referred demonstrates clearly that the McDonalds were permitted to remain in occupation until at least February 2008 on a consensual basis and arguably after that date if the €350,000 was not paid.

40. I am satisfied therefore that all the evidence in this case points to the fact that the defendants remained in occupation of the property on an agreed basis after the expiry of the initial six month period. I accept that the agreement entered into in November 2006, was concluded with a view to the defendants vacating in February 2008, on the basis of further monies being paid over to them. However, those monies were never paid and have still not been paid.

41. Whilst I accept that the claim now being advanced by the plaintiff for some €3 million has not been precluded by the previous judgment of the court herein, nonetheless to my mind it lacks any credibility for the reasons I have outlined. In addition, it is to say the least surprising that such a claim has been advanced at the trial of this matter without it ever having been referred to in any shape or form in the pleadings. In fact the allegedly lost contract with Rolan is not once mentioned in those pleadings. If there had been any reality in such a claim, it would of course have provided a full defence to the original proceedings that came before the court in 2012 but it was never raised, or raised effectively.

42. What remains therefore is a bare assertion that a breach of contract occurred.

43. In my view, the most likely sequence of events that occurred here is that Rolan pulled out of the deal with the plaintiffs at an early juncture not long after November 2006, for reasons unconnected with any alleged failure on the part of the defendants to vacate the properties. I believe that throughout 2006 and early 2007, the plaintiffs were more concerned about their liability to Mr McDonald to construct the three houses in question and the focus of their attention was in trying to do a deal with him to liquidate that liability by the payment of a sum of money.

44. I think it likely that once that agreement was made, the plaintiffs were not anxious to press the issue of getting vacant possession because they realised that they were unlikely to do so until they had paid what they agreed to pay. In the event, they defaulted on that obligation. Once Rolan pulled out of the deal, it seems to me that the plaintiffs were probably in a deteriorating situation with their bank and had no real pressing need or indeed desire to get possession of the property. It is notable that when the plaintiffs finally, and for the first time, in effect sought possession by writing looking for rent in May 2009, it emerged that the defendants had vacated the house a year earlier, a fact of which they were evidently unaware.

45. Indeed, the letter from the plaintiffs of May 2009, claiming arrears of rent which were never due, and admittedly never due, seems to me more likely than not a response to the involvement by Mr McDonald of the debt recovery agency. That letter even goes so far as to include a rather ironic reference in the third last paragraph to the plaintiffs handing the matter of the alleged arrears rent over to a debt collection agency for recovery themselves.

46. In the final analysis the plaintiffs have not satisfied me that if any breach of contract did occur in this case that it has resulted in any actual loss to them. As I have previously pointed out, if they had suffered a loss as a result of the failure to hand over possession in a timely manner, and had allowed the premises to fall into disrepair, the measure of that loss would be the cost of putting the premises back into the condition it was in at the time the caretakers agreements were entered into. As matters stand, there is no evidence whatsoever before the Court as to what that cost might be.

47. For these reasons therefore, I am satisfied that this claim must fail.

48. With regard to the separate claim by Mr Dunne in relation to the harassment and intimation he suffered at the hands of Mr McDonald's servant or agent, it is quite clear that this behaviour by Mr McDonald was entirely unacceptable and amounted to intimidation although perhaps not assault. The unauthorised and unlawful visits to Mr Dunne's home and business premises clearly constituted a trespass and further the watching and besetting of his premises by the individuals concerned was also unlawful.

49. It was clearly designed to intimidate and coerce Mr Dunne in relation to the outstanding debt. The fact that the people concerned parked their van in a deliberate and obvious way in the car park of his business premises where it could be seen by all his customers was intended to have a detrimental effect on his business, and bring further intimidation and pressure to bear on him. The blocking of the gate to his private residence was a further act of trespass which necessitated the involvement of the Gardaí.

50. Indeed, even after the Gardaí were involved and had interviewed Mr McDonald, he persisted in the behaviour concerned and only agreed reluctantly to withdraw the debt recovery agency for a period of one week. I am therefore of the view that Mr Dunne is entitled to damages for this unlawful and high handed conduct on the part of Mr McDonald.

51. I accept Mr Dunne's evidence that he was intimidated and felt threatened by what had happened. I note his wife was accosted in the family home and suffered emotional distress as a result but she is not a plaintiff in these proceedings and so that is not directly material. Whilst one might conceivably understand how Mr McDonald out of a sense of frustration and financial necessity felt he was within his rights to engage this debt recovery agency, after he had been interviewed and warned by the Gardaí he can no longer have been under any misapprehension but despite that he still persisted.

52. Having heard Mr Dunne's evidence, he struck me as a level headed and robust businessman who would not be unduly sensitive to intimidatory behaviour. While any normal and reasonable person would no doubt be upset and anxious about what had occurred, Mr Dunne to a certain extent at least took it in his stride notwithstanding the high-handed and outrageous nature of the behaviour complained of. His evidence was that the individuals concerned visited his home on five occasions approximately and his business on two or three times over three month period.

53. I would point out that his evidence in this regard was entirely uncontradicted as no evidence was led on behalf of the defence. Having regard to all the circumstances, I propose to assess general damages in favour of Mr Dunne in the sum of €10,000, and there will be judgment accordingly.