

## THE HIGH COURT

2007 5018 P

## COMMERCIAL

## BETWEEN

GEORGE GOLDEN

PLAINTIFF

AND

DESMOND MAUGHAN AND DECLAN FLYNN

DEFENDANTS

**Judgment of Mr. Justice Brian McGovern delivered on the 2nd day of July 2008**

1. In these proceedings, the plaintiff claims that the first named defendant has no estate, interest, right or title, in or over the lands comprised in Folio 26887F of the Register of Freeholders, County Roscommon, or the lands comprised in Folio 17976 of the Register of Freeholders, County Roscommon (hereinafter referred to as "the lands"). The plaintiff also claims against the first named defendant ancillary relief including an order directing him to take all necessary steps to cancel the registration of a caution against the lands.

2. At the conclusion of the opening of the plaintiff's case, I made an order striking the second named defendant out of the proceedings. This was in response to an application from counsel for Mr. Flynn, who argued that no complaint is made against him in the pleadings and no complaint could be found against him in the opening of the case. Counsel for the plaintiff conceded that no case had been made against the second named defendant. The issue of the second named defendant's costs was adjourned until the final determination of the action.

3. The plaintiff, Mr. George Golden, is a successful businessman who resides in Westport, County Mayo. In June, 2004, the second named defendant, Mr. Declan Flynn, invited the plaintiff to join with him in the purchase of 11.4 acres of land in County Roscommon, which lands are comprised in Folios 17976 and 26887 F of the Register of Freeholders, County Roscommon. The lands are on the edge of Roscommon Town and have development potential.

4. For some years prior to 2004, the second named defendant had been a partner with the first named defendant, Mr. Desmond Maughan, in the buying and selling of land. They had known each other for approximately twenty years, having been in agricultural college together. Details were given to the court of a number of different land deals concluded by what was called the "Flynn-Maughan Partnership". The evidence established that Mr. Flynn and Mr. Maughan were close personal friends and they travelled around the country together.

5. Mr. Golden gave evidence to the court that he knew the defendants from about 1997. They would meet at race meetings or football matches. Some time in 2004, Mr. Flynn told the plaintiff that lands would be coming up for sale in Roscommon and that they would be a good investment. The plaintiff kept in touch with Mr. Flynn about the matter. On the morning of the auction, he walked the lands with Mr. Flynn. He was going on to a meeting in Dublin, but made it clear to Mr. Flynn that he would be interested in becoming involved in the purchase of the lands. The plaintiff was aware that Mr. Flynn was going to bid for the lands and he was happy to let him do so as he felt he would not bid more than they were worth. When he had walked the lands earlier in the day and told Mr. Flynn that he could go ahead and bid, he did so on the basis that he was prepared to get involved in the deal on a 50/50 basis and that he would finance it on a 50/50 basis. Mr. Flynn attended the auction which was held on 23rd June, 2004, and was the successful bidder at a sum of €1,550,000. A second and adjoining parcel of land was sold to a Mr. Sean Doyle.

6. In what appears to have been a rather unusual development, Mr. Flynn did not have the deposit to pay for the lands but he told the auctioneer he would arrange for it to be forwarded by his solicitor and it seems that this arrangement was accepted.

7. The lands were bought by Declan Flynn "in trust". When the plaintiff was making his return journey from Dublin, he got a call from Mr. Flynn informing him that he had got the land. The plaintiff and Mr. Flynn made arrangements that they would meet at the plaintiff's house on the following day.

8. On 24th June, 2004, Mr. Flynn called to the plaintiff's house with the first named defendant, Desmond Maughan. The issue of a finder's fee was discussed. Mr. Flynn was looking for a sum of money to cover the work he would be doing in seeking planning permission for a development and for related matters. The plaintiff was otherwise preoccupied with his own business and was happy that Mr. Flynn would deal with matters relating to the development of the Roscommon site. Although a figure of €100,000 appears to have been mentioned by Mr. Flynn, nothing seems to have been agreed.

9. The plaintiff informed the court that he was aware from what Mr. Flynn told him that the first named defendant did not want to be involved in this deal, but as Mr. Flynn had brought Mr. Maughan to his house, the plaintiff asked him whether he was in or out of the deal and the first named defendant informed the plaintiff that he had nothing to do with it, that he did not want to be involved with it, and it was between the plaintiff and Mr. Flynn on a 50/50 basis. The plaintiff stated that he had said to the first named defendant that he did not mind going in on the deal on a 50/50 basis, or if three people wanted to be involved, he would go in on the basis of one-third for each of the parties. The plaintiff gave evidence that on the morning of the auction when he walked the lands and spoke with Mr. Flynn, he understood he would be buying the lands with Mr. Flynn if they were successful at the auction. However, when Mr. Maughan arrived at his house on the following day with Mr. Flynn, he took the trouble to ask the first named defendant whether he had any interest in it because he knew that the first named defendant and Mr. Flynn had worked together on other ventures and were always travelling around together. He wanted to be clear in his own mind what the position was.

10. On the Friday of the week following the auction, another meeting took place. This meeting was at the plaintiff's office. As on the previous occasion, Mr. Maughan accompanied Mr. Flynn. The plaintiff wanted to be completely sure about the first named defendant's position and he asked him again if he was in or out of the deal and Mr. Maughan made it clear to the plaintiff that he had no interest in the deal whatsoever and that it was a matter for the plaintiff and Mr. Flynn.

11. Mr. Flynn gave evidence that at the time of the Roscommon deal, he was aware that the first named defendant had some personal problems and was at a low ebb emotionally and that he was concerned about him. He said that the first named defendant did not want to be involved in any property dealing for the foreseeable future. He described walking the lands with the plaintiff on the morning of the auction. He then went back to Ballina and collected the first named defendant to see if he was interested in going to the auction. He said he wanted to bring him to the auction to keep him occupied because of his general condition at the time. There was not much discussion about the auction while they were in the car, but he said that the first named defendant knew why Mr. Flynn was going to the auction. He did not discuss tactics, or the price, or the plaintiff's involvement. When he signed the contract

for sale "in trust", he was doing so on his own behalf and on behalf of the plaintiff. He intended taking a loan from the Flynn-Maughan partnership in order to pay the deposit. After the auction, he walked the lands with the first named defendant and phoned the plaintiff to tell him of the deal. He also phoned Mr. Paddy McEnroe, the solicitor of the Flynn-Maughan partnership, to tell him about the deal. Mr. Flynn gave evidence that while driving back from the auction, the first named defendant told him to make sure that he got someone else for the other half of the field. On 24th June, 2004, he went to the bank to see Mr. Holmes and get the deposit. Prior to that meeting, he met with the first named defendant and they discussed the payment of the deposit for the property. He said that he would be getting a loan from the partnership funds or that there would be collateral on the partnership properties.

12. Mr. Flynn said that Mr. Holmes, the Bank Manager, was told that the Roscommon lands were not for the partnership and that the first named defendant was present when these words were said. Mr. Holmes' evidence was somewhat different. He gave evidence that he got a request from the first and second named defendants to provide funding of €155,000 to pay the deposit on the lands which they purchased at auction. They said they had purchased the lands for €1,550,000. He said that the defendants also mentioned to him that they had another interested party, namely, the plaintiff. Mr. Holmes was clearly under the impression that the first named defendant and Mr. Flynn were involved in the deal and that the plaintiff might also become involved. In addition to the €155,000 deposit, there was another sum of €30,000, which was described as a "balancing amount" that had to be paid.

13. Mr. Flynn described the meeting that took place at the plaintiff's home outside Westport on or about 25th June, 2004. He confirmed the evidence of the plaintiff that he asked the first named defendant was he involved and the first named defendant said "no" that it was 50/50 between Mr. Flynn and the plaintiff. He said that he would have had no difficulty if the first named defendant had said he wanted to participate in the deal.

14. Mr. Flynn also confirmed the plaintiff's evidence concerning the meeting at the plaintiff's office near Westport on the Friday of the following week. He confirmed that the first named defendant again stated that the deal concerning the Roscommon lands was between the plaintiff and Mr. Flynn.

15. The first named defendant says that approximately one month before the auction, he was aware that the Roscommon lands were coming up for sale as he had been told about it by Mr. Flynn. He said that on one occasion, about two or three weeks before the auction, he went up to Roscommon and looked at the lands. He described going to the auction with Mr. Flynn and that Mr. Flynn made his bid at the auction as he always did in matters involving the Flynn-Maughan partnership. He was not aware that Mr. Flynn had signed the contract for sale "in trust". Mr. Flynn introduced him to the auctioneer as his partner and said that they would be involved in this land together. He said that after the auction, he rang Mr. Pat Holmes in the bank to tell him that they had purchased the land but there was no deposit paid and he told him that they had better call in the following day. He described how he went back that evening with Mr. Flynn who told him that he shown the lands to the plaintiff in the morning. On the following day, they went to Mr. Holmes, the Bank Manager, and they discussed the purchase of the lands. They met a day later at the bank to sign up for the drawdown of the facility for the deposit. He said there was absolutely no doubt in anyone's mind that the money was for the deposit and that they would be coming back for the balance.

16. The first named defendant claims that the plaintiff knew that the lands had been bought by Declan Flynn and George Maughan. He denied that he ever said to the plaintiff that he was not in on the deal, either at the plaintiff's home or at the subsequent meeting at his office.

17. The issues in this case can essentially be resolved by determining whether or not the first named defendant, Mr. Desmond Maughan, was a party to the agreement to purchase the Roscommon lands. On the one hand, the plaintiff and Mr. Flynn have given evidence in the clearest terms that he was not a party to the agreement. On the other hand, the first named defendant asserts most positively that he was. In order to resolve this dispute, it is necessary to look at some of the other evidence which was available. Some of this was oral testimony and some is to be found in documents.

18. I am satisfied that the Flynn-Maughan partnership entered into numerous property transactions over the years and that Mr. Flynn was the dominant person in negotiating the deals and putting them into effect. I refrain from expressing any view as to whether, and to what extent, Mr. Flynn drew on the assets of the partnership or relied on the assets of the first named defendant in order to pursue these transactions, as I am aware there are other proceedings between Mr. Maughan and Mr. Flynn in which these issues have to be resolved. In this case, I am solely concerned with whether or not Mr. Maughan was involved in the Roscommon land deal and whether the plaintiff is entitled to the relief he seeks against Mr. Maughan.

19. There is no doubt that Mr. Holmes, the Bank Manager, thought that Mr. Flynn had purchased the Roscommon lands on behalf of the Flynn-Maughan partnership. Mr. John Earley, the auctioneer, did not recall Mr. Maughan being at the auction on 23rd June, 2004, but he did say that approximately a year later, Mr. Flynn called to his office with Desmond Maughan when there was a possibility of a sale of the lands to a Mr. Collins and Mr. Fahy. He says that Mr. Flynn introduced the first named defendant as a man he was doing business with. It was only later that he was introduced to the plaintiff. He assumed that the first named defendant was involved in the deal because he called to his office with Mr. Flynn. Mr. Flynn never explained the position to him but introduced him as a business friend.

20. Mr. Patrick McEnroe, solicitor, handled the legal formalities surrounding the purchase of the Roscommon lands for Mr. Flynn. By 21st July, 2004, he was aware that Mr. Golden was involved on a 50/50 basis. He said the loan for the balance of the purchase monies, namely, €1,350,000, was being taken out in the names of Declan Flynn and George Golden, from Ulster Bank. He had no idea that the first named defendant was claiming an interest in the property until the caution was registered. Mr. John Earley, auctioneer, did not recall seeing the first named defendant at the auction although it is clear, from the evidence of Mr. Flynn and Mr. Maughan, that he was there. At some stage, he assumed the first named defendant had some interest in the lands because he had called to his office a few times with Mr. Flynn.

21. There are a number of documents which were produced in the course of the trial which are of some assistance in resolving the conflict of evidence. It seems clear that the funds for the deposit, namely, €155,000, were lent to Mr. Desmond Maughan and Mr. Declan Flynn. This appears from a letter of 25th June, 2004, from Ulster Bank, sanctioning a loan to them in that sum. The loan was for a term of two months. The balance of the purchase monies, €1,350,000, was advanced by Ulster Bank to Declan Flynn and George Golden. This appears from a sanction letter of 31st August, 2004. The term was for twelve months. The lands were registered in the names of Declan Flynn and George Golden as tenants in common of one undivided one half share each. An internal bank document entitled "Sanction Summary Sheet" was produced in the course of the trial. It is dated 26th July, 2004. The document contains a business profile of Mr. Maughan and Mr. Flynn. It states *inter alia*:

"In our last report on this connection, on 24/06/04, we advised that D.M. and D.F. had purchased, at auction, 11.5 acres of residentially zoned development land but without planning, opposite the County hospital in Roscommon, for €1.55 M and

we arranged a short term bridging loan of €155 K to enable holders provide for the required ten percent deposit pending receipt of sale proceeds of other properties.”

22. Further down the same document it is stated:

“The present position is that D.M. has decided not to continue with his involvement in this particular venture, as he essentially a full time farmer and he does not have sufficient time to devote to all the various projects on an ongoing basis. As a result, the purchase of the 11.5 acres will now involve only D.F. and G.G. . . .”

The first named defendant says that this information was supplied to the bank by Mr. Flynn and was incorrect. The loan of €155,000, with interest, was redeemed in September 2004, from the sale of Flynn-Maughan partnership land.

During the hearing, a document was produced which purported to be a list of partnership properties drawn up at a meeting between Mr. Flynn and Mr Maughan. I found this document to be of little help in determining the legal or equitable ownership of the Roscommon lands. One of the striking features of the Flynn-Maughan partnership was the chaotic manner in which transactions were carried out and the failure to keep proper records. There were very few books and documents available relating to the partnership.

### **Findings**

23. I found the plaintiff to be an honest and credible witness. He is a successful businessman and has also achieved respect in the world of sport, having been a selector for the Mayo County Football Team. He impressed me as someone who had no “axe to grind” so far as the issues in dispute in this case are concerned. I accept his evidence that it was a matter of indifference to him whether he was involved in the Roscommon lands purchase on a 50/50 basis, or whether he was involved on the basis of one-third, one-third, one-third. He is quite clear in his recollection that the first named defendant, not once, but twice, affirmed that he was not involved in the purchase of the Roscommon lands. I accept this evidence. It is supported by the evidence of Mr. Declan Flynn. Mr. Flynn also confirmed, in evidence, that if Mr. Maughan wanted to be involved in the deal he had no problem. The documentary evidence which has been produced lends support to this evidence. Leaving aside the deposit, it is quite clear that the balance of the purchase money was paid by the plaintiff and Mr. Flynn and the monies were advanced by the bank to them. They are the registered owners of the lands in question. The contents of the “business profile” appended to the Sanctions Summary Sheet of 26th July, 2004, also lend support to the fact that Desmond Maughan was not involved. I accept that this memo suggests that he may have had an involvement but that he had decided not to continue it. But it certainly flies in the face of the first named defendant’s evidence when he says that he was, at all times, involved in the deal. If the bid for the Roscommon lands was being made on behalf of the partnership, one would have expected some discussion about tactics and price to have taken place between Mr. Flynn and Mr. Maughan in the course of the car journey to the auction. But I do not reach any conclusion based on that fact since the plaintiff also seems to have left Mr. Flynn with a free hand and there is no evidence that any detailed discussion took place between them. The plaintiff merely gave evidence that he was happy that Mr. Flynn would not bid too much for the land.

24. The matter is somewhat complicated by the deposit. There is no doubt that the borrowers of the sum lent by the bank for the payment of the deposit were Desmond Maughan and Declan Flynn. The plaintiff was unaware of this. It appears from his evidence that he assumed Mr. Flynn would pay the deposit and any necessary readjustments could be made between them at a later date.

### **What is the effect of the loan for the deposit?**

25. If the loan is from the Flynn-Maughan partnership, then the issue of whether or not Mr. Flynn has to account to Mr. Maughan and/or the partnership for these borrowings is something that can be dealt with in the separate proceedings between Mr. Maughan and Mr. Flynn. I only have to decide how the borrowing of the deposit affects the issues in this case.

26. It appears from the evidence that the only way Mr. Flynn could raise the deposit was through the Flynn-Maughan partnership. Some of the witnesses who gave evidence assumed that Mr. Maughan was involved simply because he attended meetings in the presence of Mr. Flynn. This is hardly surprising as it was an unusual situation for Mr. Flynn to involve someone in such meetings who was not involved in the purchase of the Roscommon lands. But apart from the fact that the deposit monies were borrowed by Mr. Flynn and Mr. Maughan, there is no other document to link Mr. Maughan with the transaction. On the contrary, the Folio shows the plaintiff and Mr. Flynn to be the registered owners of the land and the bank documents show that they borrowed the balance of the purchase monies.

27. The first named defendant entered a caution against the lands in Folio 26887F and Folio 17976 of the Register of Freeholders, County Roscommon. The caution is in the following terms:

“No dealing by Declan Flynn, the registered owner of one undivided half share is to be registered except after notice to Desmond Maughan of Chapel Street, Crossmolina, County Mayo.”

The date of the caution is 31st May, 2006. The caution does not appear to have been entered against the interest of the plaintiff and the first named defendant stated, in evidence, that he was not challenging the plaintiff’s title or his entitlement to a one-half share in the Roscommon lands.

28. The caution does not prevent any dealing in the land but merely requires that no disposition of the land take place by the registered owner without notice to the person who has entered the caution. In this case, for “registered owner” one can read Declan Flynn because the caution is directed against his interest in the lands. Rights which may be protected by caution include the right of a person who claims to have provided some or all of the purchase price of the lands. The problem about a caution being entered is that if the lands are sold for value, registration will be stayed until such time as the cautioner establishes his right by way of court proceedings. While an application can be made to cancel a caution if proceedings are not instituted within a reasonable time, it does have the power to hold up the registration of a purchaser for value and this could have a negative impact on a proposed sale. I am satisfied, therefore, that the plaintiff is affected by the caution inasmuch as his ability to effect a transfer of the lands to a purchaser for value may be compromised.

29. In his submissions to the court, the plaintiff contends that the first named defendant should be estopped from claiming that he has an interest in the lands, having regard to the representations which he made to the plaintiff at his home on the day following the auction and at his office the following week. In my view, the issue of estoppel does not arise in this case. There is no evidence that the plaintiff acted to his detriment by any representations made by the first named defendant. The plaintiff was quite clear in his evidence that he would have entered into the deal even if the first named defendant was involved because it did not matter to him whether he was entering the transaction on a 50/50 basis with Mr. Flynn or on the basis of one-third each to the plaintiff and the two defendants.

30. Whether the first named defendant stated that he was not a party to the deal is a question of fact. I am satisfied that he said he was not involved in the deal.

31. The letter of sanction for the loan for the deposit is dated 26th June, 2004, which is two days after the auction. It is also one day after he said to Mr. Golden at his home that he was not involved in the deal. While the obtaining of the loan could be seen as a repudiation of his comment to the plaintiff at his home on 24th June, 2004, it is clear, from the evidence, that the first named defendant subsequently reiterated at the plaintiff's office that he was not involved in the deal. This supports Mr. Flynn's evidence that the first named defendant was prepared to accept that the deposit would be funded out of a loan from the Flynn-Maughan partnership. If Mr. Flynn has to account to the partnership for this loan, it is a matter that can be dealt with in the proceedings between Mr. Maughan and Mr. Flynn.

32. The plaintiff argues that if borrowed money is used to purchase a property, the lender does not thereby obtain an interest in the property, see *Re. Sharpe* (a Bankrupt) [1980] 1 W.L.R. 219. At p.222, Browne-Wilkinson considered the position of a lady who had provided a substantial portion of the purchase price of a property to her nephew who was the bankrupt in the proceedings. He said:

"I will first consider whether she has established an equitable interest in the property and its proceeds of sale by virtue of having provided the bulk of the purchase money, that is to say, has she an interest under a resulting trust? I have no doubt that she has not established any such interest. It is clear that the parties never worked out in any detail what was the legal relationship between them, but no one has suggested that Mrs. Johnson advanced the money to the debtor otherwise than by way of gift or loan. In his public examination, the debtor suggested that the monies were a gift, but I find as a fact that the monies were advanced by way of loan."

33. The situation is somewhat similar to the present case inasmuch as Mr. Flynn and Mr. Maughan had not worked out in any detail what was the legal relationship between them so far as the purchase of the Roscommon lands was concerned and the raising of a loan from the partnership to fund the deposit.

34. I am satisfied that the evidence does not disclose that the monies raised from the Flynn-Maughan partnership for the deposit were intended to be a gift. The evidence suggests that it was, rather, to be a loan to Mr. Flynn from the partnership to enable him to pay the deposit. While that would not have excluded Mr. Maughan from becoming a party to the purchase of the Roscommon lands, I conclude that he did not, in fact, become a party to the transaction for the reasons I have already set out. In the circumstances, the plaintiff is entitled to a declaration that the first named defendant has no estate, interest, right or title in or over the lands comprised in Folio 26887F of the Register of Freeholders, County Roscommon, or the lands comprised of Folio 17976 of the Register of Freeholders, County Roscommon. The plaintiff is also entitled to an injunction restraining the first named defendant from claiming that he is entitled to any estate, interest, right or title in or over the lands. This does not affect the claim of Mr. Maughan in separate proceedings brought against Mr. Flynn for Mr. Flynn to account to the partnership for any monies lent to him.

35. I make an order directing the Registrar of Titles to cancel the registration of the caution on the Register.

36. I make no further order in respect of the remaining relief sought by the plaintiff in the statement of claim, as I am not satisfied the plaintiff has established, on the evidence, that he is entitled to succeed on those issues.