

**THE HIGH COURT****2004 19480 P****BETWEEN****ANTHONY CASEY AND TERESA CASEY****PLAINTIFFS****AND****CIARAN DOWDALL AND DÓNAL SPRING****DEFENDANTS****JUDGMENT of Mr. Justice Charleton delivered on the 20th day of May, 2010**

1. Anthony and Teresa Casey seek specific performance of their agreement with Ciaran Dowdall and Dónal Spring, dated 7th December 1998, to convey to them the site on which their house is now built near Delgany, County Wicklow. In this transaction Mr. Dowdall and Mr. Spring acted as vendors of sites, people later building houses on one acre sites in that location, including that of the Caseys, and Mr. Spring also acted as a solicitor. The plaintiffs are ordinary working people without any specific knowledge of the pitfalls of law or of the ups and downs of house development.

2. At the core of this dispute is that the development road leading to the house of the Caseys, and past it to that of their neighbour, and further on to an adjoining development of four houses by a Mr. O'Neill, runs over part of the Casey site without their permission. Their site is somewhat enlarged through a portion of the neighbouring site having been incorrectly fenced off by their neighbour, a Mr. Shortt, thus giving them an extra sliver of ground. Whereas in September, 1998 the Caseys contracted to purchase about an acre, with the readjustments that have taken place, they are now in de facto possession of slightly over an acre. It is the situation as regards a right of way over their land that this judgment seeks to address.

3. As will be appreciated, specific performance is an equitable remedy. This jurisdiction is exercised by the Court not in accordance with specific legal rules, but with the guidance of legal rules according to the equity of the situation. In lieu of specific performance, damages may be awarded. If a plaintiff comes to court, having made it impossible for a defendant to fulfil a bargain to convey land, such poor behaviour may bar an equitable remedy.

4. While this is a conveyancing issue, an entitlement to an estate in land by virtue of contract also gives rise to rights and liabilities under the agreement. The Caseys also claim a breach of that agreement by the defendants. Hence, they claim damages. In addition, the agreement to purchase land entered into between the parties went hand in hand with a further agreement between the same parties to construct the road that is the main cause of contention between them. The Caseys say that the road was markedly more expensive to construct than the agreement contemplated. They say the defendants must pay the balance due in consequence of this excess. The defendants say that as the Caseys built the road, any issue as to a right of way or a cutting off of a portion of the land on which their house is now situated is due entirely to their own fault: otherwise put, that they were and are the authors of their misfortune.

**Background**

5. Anthony Casey is a school teacher. Together with his wife, some time in 1998, he became aware of sites for building dormer bungalows becoming available in Delgany, County Wicklow. These were to be one acre sites in accordance with some stipulation in the relevant development plan. Anthony Casey has a brother Tom who is an engineer. Because he worked for the national road authority, he was seen by the defendants Mr. Spring and Mr. Dowdall as having many years of experience of building roads, albeit ones that are much more substantial than the development road in question here. Tom and Anthony Casey looked at the site in question here and agreed to buy it. The defendants decided that as part of the price, the estate road would be constructed by the Caseys, thereby saving them some money. So the cost of the road was built into the contract price. At this stage the owners, or soon to be registered owners, were willing to sell, and the Caseys were willing to buy a one acre site as marked out in the contract map in red pen.

6. The contract was dated 7th September 1998. The special conditions indicated that it was subject to planning permission and also indicated that the property was to be situated within the boundaries of the Folio to be opened in respect of the property arising from Folio 4980 (revised), County Wicklow. The defendants had yet to secure full title. I am satisfied that a land survey marked out the relevant site some time in the autumn of 1998. The marking, however, I am satisfied from the evidence of Gerry Kestell, a land surveyor, was subject to error. The site was marked out with stakes in the ground. These were, from the indications given in evidence, considerably under a meter high. They were not very broad, nor were they very strong. These stakes could be easily knocked over by animal intrusion, pushed over by the wind, grown over by vegetation and they would rot in the ground, especially over a period of a year and a half to two years, and be lost in the undergrowth. That was not satisfactory. I would regard it as a principle that the vendor in a land contract should specifically indicate in clear terms to the purchaser what is being sold. That can be done, in addition to marking out the site on the ground in a clear and accurate way, by reference to a map. It is the feature of this case that the longer the controversy between the parties has gone on, maps in greater detail have been produced concluding in the entirely understandably and adequate specimens produced by Mr. Kastell. He, however, unfortunately only first became involved in February 2003 in measuring the land accurately. Then in 2010 he produced maps for the benefit of this case. If the defendants had engaged his services at an earlier stage, none of what later happened would have occurred.

7. The contract provided for a purchase price of £118,000. All but £100 of that was laid down as a deposit on the signing of the contract by the Caseys.

8. The road agreement was of the same date. The agreement provided for Mr. and Mrs. Casey to construct "on the areas shaded blue and yellow on the map or plan annexed hereto or on such other area of the owner's lands as Wicklow County Council may direct pursuant to planning permission in that behalf applied for" a roadway with a footpath and deducting for services and storm drains. Under Clause 4, in the event of a dispute between the parties as to the specific terms of para. 2 of the road agreement, the matter

was to be referred to an expert.

9. Two observations need to be made straight away. It was no part of the contract that an arbitration clause would operate in the event of a dispute between the parties. Rather, the clause indicates that the person agreed or nominated "shall act as an expert and not an arbitrator and his decision, save in the case of manifest error, shall be final and binding between the parties". As a matter of fact, an issue was referred to Ciarán Fahy as an engineer expert and he gave a ruling in July, 2004. While he met the parties, this was in the context of agreeing the terms to be referred. As in notes in his careful summary of the matter, his meetings were to set the terms of reference and to lay down a time table. He considered "all the documentation provided" to him. He did not visit the site and he did not speak to the contending parties beyond the two preliminary meetings to which I have referred.

#### **Brief chronology**

10. To put this matter in context, I want to briefly refer to a chronology. I need to come back to some of the events mentioned here:-

- *7th September 1998, the road agreement and the contract for sale are signed.*
- *August 1999, planning permission for the road is obtained. I need to refer to this in some detail.*
- *February 2000, the Caseys applied for planning permission for their house. It was later built close to where those plans showed.*
- *July 2000, work on the road begins.*
- *November 2001, the road is substantially constructed.*
- *November 2001, in the course of constructing the road, the septic tank of a neighbour is interfered with. He threatens litigation.*
- *February 2002, Mr. Spring, as solicitor and as vendor meets with Mr. Casey and his brother Tom in the Shelbourne Hotel in Dublin. It is claimed that a map is produced at this and an additional offer is made by Mr. Spring.*
- *February 2003, Mr. Gerry Castell surveyed the site for the first time. He discovers that the road is intruding upon the Caseys' site. Shortly afterwards, it is claimed, someone in Mr. Spring's office tells the solicitors acting on behalf of the Caseys about this.*
- *March 2003, a letter is sent by Mr. Spring, as solicitor for the defendants, accusing the Caseys of trespass on their neighbour's site and of building a road over what was then the site of his proposed home. No mention is made in this letter that the road is now also on a substantial portion of the Caseys' site.*
- *October 2003, some attempts are made to reach an agreement. The Caseys are blamed by the defendants for backing out of what was, it is claimed, a concluded agreement.*
- *December 2003, the Caseys express annoyance in writing at the allegations put in their direction by the March 2003 letter.*
- *July 2004, the issue of the road is referred to an expert, Ciarán Fahy, as previously indicated. He concludes that both sides are at fault in relation to the siting of the road.*
- *November 2004, a plenary summons is issued by the Caseys.*
- *November 2005, the Caseys and Mr. Spring meet at the lovely Glenview Hotel in Wicklow. Neither side have described this meeting as pleasant. It did not result in an agreement.*

#### **The facts**

11. Apart from the planning permission application for the Caseys' house, all of the relevant planning permission applications were under the sole control of the defendants, Mr. Spring and Mr. Dowdall. Most importantly, the planning permission application for the road was their work. In accordance with the relevant regulations, they submitted an application to Wicklow planning authority accompanied by detailed maps and a contour study. It is on foot of the defendants' application for planning permission that the road layout was put on the ground. I return, in this regard, to the road agreement. The Caseys were not, as a matter of law, entitled to lay down a road except in accordance with the direction of Wicklow County Council pursuant to planning permission. Another point arises here. Annexed to the road agreement was a map shaded in yellow and blue in order to show the track on the ground of the road. The level of accuracy in this map is extremely poor. It is very badly drawn, it is unclear and it is approximate. In relation to an item as important as this map, which sets out a roadway that had the potential to intrude on three sites, and which was supposed to link at a particular point to the O'Neill development in the adjoining field, there was a requirement for accuracy. Very little real skill, in that regard, is evident in the map. An attempt, however, at accuracy as they must have seen it was made by the defendants in their application for planning permission for the roadway. Even here, however, there were problems. The first revision of the map contained levels above sea level which would have indicated that, in places, this short road would have towered on stilts up to three metres above the adjoining land. For this reason, when the Caseys saw it, and having taken advice from Tom Casey, they put in an appeal against the grant of planning permission for the road to An Bord Pleanála. The defendants were alarmed by this and immediately contacted the Caseys. Following a meeting, whereby the defendants produced a revision of the map with more appropriate contour markings, the Caseys agreed to withdraw their appeal.

12. It was on the map in respect of which planning permission was granted, lodged by the defendants, that the Caseys built the road. Expert evidence has been produced from Gerry Castell showing minor variations in the layout of the road as between its siting, in fact, and as it would appear on the planning permission map. These differences are truly minimal and therefore of no import. The maps for the planning process prepared on behalf of Mr. Spring and Mr. Dowdall intruded the road on to the site chosen by Mr. Spring and cut off .5 of an acre of the Caseys' site. Since the road had to be built by the Caseys in accordance with the planning permission, no issue arose but that they should site the road in accordance with it; but that is not all that happened.

13. During the building of the road, Tom Casey kept getting readings as between the boundaries and the place where the road was to be sited which were up to 4 metres off. On coming on site for the first time in order to supervise the building of the road, and after his concern as to correct levels, he found that a new straight stone wall had been built on the site. Constant errors emerged in measurement when he tried to lay out the road. This concern caused Cormac O'Brien, the engineers for the defendants, to be telephoned. Work stopped. Since this work was taking place within the builders' holidays, the result was that a week of work was lost because the builders went elsewhere to other jobs, and they are not to be blamed for this. Work having stopped on the Monday, two days later on the Wednesday, the go ahead was given on behalf of the defendants on the basis of the alignment marked out for the road. It was supposed to be correct according to them. In this regard, an email dated Wednesday 19th July at 12:14:26 is relevant. Addressed to an email address @eircom.net, it says:-

*"I am writing to confirm that, further to our site discussions on 19-07-00 and my review of the setting out – proposals discussed with yourself and Tom, I am satisfied for you to proceed with the construction of the road."*

14. Mr. Fahy, the expert appointed under the road contract to rule on disputes, in dealing with this issue in July, 2004 did not have the benefit of the oral evidence which I have heard from Tom Casey, Anthony Casey and Teresa Casey. I am satisfied to accept their evidence as correct over any other evidence on this issue. That evidence would be acceptable on its own but it is also supported by the email which I have quoted. It is clear that Mr. Fahy went about his job conscientiously and carefully. The much larger body of oral evidence available to the Court leaves requires me to disagree with his view. In that regard, if necessary, I am holding that the condition whereby his ruling becomes non binding, as set out in para. 4 of the road agreement, is operative. The entire fault in relation to the siting of the road arose from the documents lodged for the purpose of planning permission for the road and the later guidance from the defendants' agent. The responsibility in that regard is unmistakably with Mr. Spring and Mr. Dowdall.

15. Up to February 2003, apart from a triangle of land about the size of a large table, no one knew that there was a problem with the road intruding on Mr. Spring's site or on the Caseys' site. A serious issue had arisen, however, in relation to the costs of the road. The road agreement provides, at Clause 7 thereof:-

*"In the event that planning permission for the construction of the services shall be refused on appeal or issue on conditions unacceptable to the owners, Mr. and Mrs. Casey shall upon payment to the owners of the sum of £42,000 have the right to call upon the owners to execute a deed of easements over the area shaded yellow and blue on the map attached hereto... [and] shall not be obliged to comply with the provisions of Clause 2 hereof [whereby they were to build the road] and the owners shall not be obliged to construct services."*

16. I have looked carefully at all of the evidence in relation to cost overruns. I am satisfied that the road cost markedly more than £42,000 to construct. I am also satisfied that a contract needs to be construed reasonably. Were it the case, for instance, that Wicklow County Council had demanded a very much wider road than was contemplated by the parties, or one that was designed for more than ordinary durability, this would not have been envisaged by the parties to the road contract. Instead, the sum contemplated by the parties to be spent on the road was in and around, with reasonable variation, the sum set out in para. 7. That is because that sum is reasonably to be construed as the replacement cost of the vendors building the road should the Caseys default in constructing it. I would regard that reasonable variation under the contract as perhaps extending upwards by 25%. Anything more than this would be unreasonable.

17. Much evidence has been given as to the nature of the road constructed. I am satisfied that the road was different, to an unacceptable degree, to that contemplated by the road agreement. Some evidence has been given by Anthony Casey as to the cost to him. He has, in my view, put that cost too high, at €122,000. In addition to that, however, he produced evidence which I regard as cogent and acceptable from Ray Cowan, a quantity surveyor. This was impressive evidence. While this pricing was done retrospectively, he feels that the price of the road as constructed, as to lamp standards, constructing manholes, storm drains, footpath and surfacing would have been around €95,000 plus 13.5% V.A.T. At the present day it would be 58.2% dearer. This retrospective price for the year 2000 is convincing. Doing the best that I can with the figures, it seems to me to be likely that the roadway cost the Caseys a sum of money in or around £75,000. A sum of money was saved in relation to V.A.T., as it seems that some of the workmen either included V.A.T. in the price or did not produce a V.A.T. invoice. None of these figures are exact. Doing the best I can with the relevant figures, as I must at this juncture in time, it seems to me that there is due in respect of excess for the construction of the road a figure which must be at least the sum of €25,000.

18. Given the chronology that I have set out above, it is apparent that in 2001 and 2002, a serious dispute had arisen as to the cost of the road. In addition, litigation was possible from other sources. In respect of road building adventures, which included the smashing of a septic tank of a notable person, the Caseys were at risk of being sued. Mr. Spring, in order to quiet these anxieties, dealt with the neighbour who had the septic tank problem in an honourable manner. In addition, in order to discuss the excess costs on the road, he arranged a meeting with the plaintiff Mr. Casey and his brother Tom in the Shelbourne Hotel in Dublin.

19. An issue arises in relation to this meeting. To my mind it is easily resolved. Mr. Spring says that at the meeting, in February 2002, the Caseys told him that they wished for the parties to settle their differences. I am wary of trespassing on areas which are subject to without prejudice negotiations. Here, I have to in the light of what follows. Whatever was offered by either side, the issues to be discussed were the completion of the roadway, which had not yet been surfaced, the additional sum in respect of roadway works and the responsibility for it, and the transfer of the site and the laying of a water main.

20. In relation to this meeting, what is in serious dispute is that it is claimed by Anthony Casey that, at some stage during this meeting, Mr. Spring produced a map. It is probable that Mr. Spring did bring a map to the meeting. This map, not only outlined in red the site that was to go to Mr. and Mrs. Casey, but also included a spur of land which would have connected the eastern side of their site along a laneway out on the existing public road to Delgany town. A serious controversy in evidence arose between Mr. Spring and Mr. Casey as to this. Having reviewed that evidence carefully, I am satisfied of the following. Firstly, this spur of land was valuable to Mr. Casey. I believe that he saw it on the map and was under the impression that Mr. Spring was offering it to him in addition to the ground for his own site. That impression, however, was not reasonable. Mr. Spring never intended to offer him this additional spur of land. Indeed, in his negotiations with one of the original landowners, a Mr. O'Connor, this spur of land had already been promised by Mr. Spring to him, when it was conveyed to Mr. Spring, so that Mr. O'Connor would enlarge the right of way over the northern portion of the land on which the development roadway was to be situated. While I am satisfied that Mr. Spring produced a map, I am also satisfied that Mr. Spring did not produce that map except to have in his possession a handy reference-point as to what the parties would talk about. It is probable that the spur of land was outlined in red, with no division shown from the site of the Caseys to the additional spur of land, but there was no warrant in terms of anything that Mr. Spring said for Mr. Anthony Casey to jump to the conclusion that he was being gifted an additional piece of land. On that basis, I could not hold that his offer was made. Furthermore, the Court notes that the parties did not discuss this spur of land in any overt way. I therefore prefer Mr. Spring's evidence on this issue.

21. I am satisfied that by this point, an issue as to the additional costs of the Caseys' solicitor was coming into focus. The issue about road costs had not been advanced at all. No agreement was reached in the Shelbourne Hotel and the absence of agreement was not in any way supplemented by the tacit acceptance of facts on the ground to which the parties later agreed.

22. In February 2003, the first proper survey was done by the vendors of the land. This was done expertly by Gerry Castell. This showed, for the first time, the alarming situation as regards the road intruding on the site of the Caseys. At this point, in my judgment, the vendors, and in particular Mr. Spring, as the lawyer involved, should have taken responsibility for the mis-siting of the road. Instead, as is often the case in the human affairs, an error was made. On 3rd March 2003 a letter was written by Daniel Spring and Co. acting on behalf of the defendants, and for which Mr. Spring, in a forthright manner accepts responsibility. This letter reads:-

*"We refer to previous correspondence in relation to the above.*

*We refer to the agreement under which your client was to construct a roadway at our client's property. It now transpires that your client has constructed the roadway incorrectly, causing the roadway to be constructed on part of the land owned by Donal Spring and is now registered of Folio 21738F, County Wicklow thereby bringing about a situation whereby the lands comprised in Folio 21738F, County Wicklow form less than the one acre required by Wicklow County Council for planning purposes to comply with zoning requirements. The incorrect construction of the roadway in addition has caused considerable damage and delay to adjoining land owners and will involve a substantial remapping exercise. Our client holds you solely responsible for such loss and damage. In addition we are instructed that your client has constructed offence purporting to enclose the lands to the subject matter of a transfer between our respective clients. Our clients' surveyors advise that your clients have trespassed substantial on to lands agreed to be sold by our client to Mr. Shortt. We enclose herewith copy map where the lands contracted to be sold by our client to Mr. Shortt are outlined in red and whereon the fence constructed by your client is shown. Kindly arrange for your client to immediately take down the fence on the lands outlined in red and reconstruct same along the point A to B shown on the attached map.*

*Once again in this regard our clients have sustained loss and damage for which they hold your clients solely responsible".*

23. The letter, in effect, accused the Caseys of being entirely responsible for the wrong siting of the road. As a matter of fact, this was incorrect, as I have held. Secondly, the letter accused the Caseys of deliberate trespass. In evidence it emerged that the person who in fact put up the fence in the place where it is now situated was Mr. Shortt. Mr. Spring did not seek, in evidence, to contradict this assertion. The letter had consequences to the case which continued, in terms of aggravating Mr. and Mrs. Casey, all the way down to the present day. I simply regard this letter as a mistake, and as it turns out, it was pivotal to the continuance of the dispute between the parties.

24. I refer again to the rule whereby without prejudice communications, even if not marked as such should not be had regard to in evidence by the Court. A communication, in this regard, can be without prejudice, even if not so marked, if its purpose is to settle issues being litigated between the parties, or which may go to litigation. The body of letters subsequent to the letter of the 3rd March 2003, and, in particular dated 15th October, 17th October, 24th October and 1st December 2003 fit within that category. It is also correct to say that nothing was agreed in that exchange of letters. Many matters were left outstanding and it is fair to comment that until everything was agreed nothing was agreed. As a matter of fact, I hold that nothing was agreed. In the letter of the Caseys' solicitor dated 1st December 2003 it is asserted that they were at all times seeking their costs, and continued to seek their costs. It is also requested that the allegations against the Caseys contained in the letter of 3rd March should be withdrawn. It suffices to say that Mr. Spring, in evidence before this Court dealt with these allegations in a direct manner. As to the allegation of trespass, by taking some of Mr. Shortt's site, he accepted the evidence of Mr. and Mrs. Casey. As regards the siting of the road he has taken a view as to who is to blame with which the Court differs; I have no doubt, however, that he will study the judgment of the Court. Whatever disagreement Mr. Spring has with the Caseys it is clearly a legal disagreement based on a genuine error and it is not one of mischief, whereby any of the parties to this case have sought to aggravate or annoy the other party. Any notion of aggravated damages in this context was always far-fetched, and was, while pleaded, not advanced in argument before the Court.

25. In consequence, the matter was not settled during the autumn and early Winter of 2003.

26. Applying the same criteria as to without prejudice negotiations to oral, as well to written exchanges of views, I come to a meeting which took place in the Glenview Hotel in April 2005. At this meeting were Mr. and Mrs. Casey, on the one hand, and Mr Spring on the other. I accept Mr. Spring's evidence that he expected Mr. McGuire, as solicitor for the Caseys, also to be in attendance. I accept the evidence of Mr. and Mrs. Casey that the meeting started in a friendly way. My view is that all of the parties, Mr. and Mrs. Casey and Mr. Spring, went into that meeting with the best of intention to see how the matters in contention might be sorted out. Various issues were put on the table, including the transfer of the site as occupied by the Caseys, the costs of the referral to the expert, the legal costs, and €80,000 claimed in respect of excess costs on the road. Quite often, in settlement negotiations, parties will ask for more than they expect, often aggravatingly more. A limited amount of emotional investment was made by each of the parties into this conveyancing transaction. From the point of view of Caseys, they were talking about their home and they were preoccupied by their view of the letter of 3rd March 2003. From the point of view of Mr. Spring, as a vendor it was a matter which had gone on for a long time, and as a solicitor, he felt that the issues and the settlement terms put before him were unreasonable. The meeting ended without agreement and in circumstances, I am satisfied, where there was no attempt made by anyone to worry any other party. Rather, the tension of the situation reflected itself in the character of the meeting, as seen subjectively by both sides, instead of the beauty of the setting. From the point of view of the Court, this matter becomes irrelevant and, as evidence, inadmissible because no agreement was reached.

## **Conclusion**

27. This entire matter arose out of the mis-siting of the site road. I have already made findings of fact, which I regard as inescapable, that the responsibility in that regard arises from the mapping and planning exercise conducted on behalf of Mr. Spring and Mr. Dowdall, the vendors, in their application for planning permission. No other conclusion is open to me. That being so, it is clear that the Caseys have lost a portion of their site in circumstances which were no fault of their own.

28. In addition, the excess cost of the road went outside what could be reasonably be contemplated by the parties to the road agreement, and the figure therein mentioned, as reasonably construed to give it effect. I find there is an excess there of €25,000.

29. The Caseys are seeking the conveyance of the original site. At this point, in equity, the Court would not make that order. Instead, the Court would indicate that it is appropriate that the Caseys should now have possession of the site as occupied by them and as carefully mapped out in the 2010 map by Mr. Gerry Castell. The parties can make the necessary arrangements.

30. Since that site is somewhat larger than the original site, by reason of subtracting the road intrusion, and adding on the sliver of land on the Shortt side of the boundary, no proper claim to damages arises therefrom.

31. A claim to reasonable damages, however, does arise by reason of the absence of fault by the Caseys as to the distortion of their site and the view taken in that regard by the defendants. The sum of €15,000 should be awarded in addition. The size of this sum reflects not only the rights of the parties, but the understandable, though incorrect, attitude of the defendants. It also takes into account the mistakes noted in this judgment

32. As of the date of issue of these proceedings the site outlined was a matter of controversy between the parties. In consequence, the rateable valuation could not come within the Circuit Court jurisdiction as none will have been assigned. It was therefore reasonable to commence the case in the High Court.

33. There will therefore be judgment in favour of the plaintiff in the sum of €40,000. I now intend to adjourn this matter for a period of two weeks so that the necessary conveyancing papers can be drawn up by the parties. These should be executed without delay. The matter will return to me to ensure that the matter has been satisfactorily concluded.