THE COURT OF APPEAL
CIVIL

Neutral Citation No. [2020] IECA 354
Court of Appeal Record No. 2019/343
High Court Record No. 2017/7745P

NO REDACTION NEEDED

Haughton J.
Murray J.
Collins J.

Between:

MARY EGAN and PAUL BARRON

Plaintiffs/Respondents

- AND -

NOEL THOMAS RICHARD HEATLEY

Defendants/Appellants

JUDGMENT of Mr. Justice Murray delivered on the 14th day of December 2020

Background

1. The judgment and order of Allen J. the subject of this appeal resulted in an award of €77,435.77 to the first named plaintiff by way of damages in lieu of specific performance of a contract for the sale of land. The defendant, the vendor under the contract, contends that the trial Judge erred:

(i) In deciding that statements allegedly made by the second named plaintiff (the admitted agent of the first) before and at the time of the execution of the agreement that insurance existed covering the activity of contractors on the property from November 3 to December 15 2016, and that that insurance would be produced before completion, did not afford a basis for rescinding the contract;

(ii) In deciding that the defendant lost any entitlement he might otherwise have had to rescind the contract by purporting to forfeit the deposit;

(iii) In exercising his discretion to grant the first named plaintiff relief by way of damages in lieu of specific performance notwithstanding the misrepresentation and/or reliance on concocted documents in support of the claim;

(iv) In the manner in which damages in lieu were determined.

2. The property in question formed part of a larger parcel of land owned by the defendant at The Woodlands, Burkeen Hall in Wicklow Town on which he proposed to construct thirty-five homes. The work was to be done by Wicklow Cosy Homes Limited, a company controlled by the defendant and a business partner. He also decided to sell six sites at the development to purchasers wishing to design and construct their own homes. In 2015 the plaintiffs (then living at a property owned by them at Rose Hill Close, in Wicklow Town) were introduced to the defendant by the latter's solicitor, Fachtna Whittle. The parties verbally agreed a purchase price of €85,000 for Site Four, The Woodlands. In August 2016, with the consent of the defendant, the plaintiffs proceeded to seek planning permission for the construction of a four bedroomed house on the property. The permission issued that October. They engaged a Mr.

Ciaran Rodgers to construct the house, the arrangement being that he would procure a pre-framed timber building from a Northern Irish company, QTF Limited. At the end of October 2016 the plaintiffs sold their home at Rose Hill Close and moved into rented accommodation in the area. According to the defendant, it was not possible to immediately convey the site at Burkeen Hall to the plaintiffs due to difficulties surrounding the formation of a management company, which was required to assume control of common areas in the development. Nonetheless, the plaintiffs were anxious to proceed with the works and sought the defendant's permission to enter on to the property for that purpose.

3. That was the context in which the plaintiffs and Mr. Rodgers were permitted on to the site before a contract for the sale of the land had been executed, and in which work began on November 4. This followed a meeting on November 2 attended by the plaintiffs, the defendant and Mr. Whittle at which (it was common case) Mr. Barron said that Mr. Rodgers had insurance. The insurance to which he referred, Mr. Barron said in evidence, was with AXA in Northern Ireland and comprised a builder's policy with £5 million public liability cover. Mr. Barron (who is an architect) gave evidence at one point that he had seen evidence of Mr. Rodgers' insurance in the context of other projects in which both had been involved, later saying that Mr. Rogers told him that the policy had been renewed in October 2016. According to Mr. Barron, Mr. Heatley said at the meeting that he wanted cover of over €6.4 million, although this was not accepted by the trial Judge. Mr. Barron said that he asked Mr. Rodgers after the meeting to arrange insurance at that level, and that he said that he would see if he could do so.

4. It was Mr. Barron's evidence that this was all that was said at this meeting about Mr. Rodger's insurance. The defendant, on the other hand, said that it was agreed that Mr. Rodgers

would furnish a copy of his insurance immediately and that the defendant was to be indemnified thereunder, but this was not accepted by Mr. Barron. The defendant's version was corroborated by a note of the meeting taken by Mr. Whittle, and by Mr. Whittle's evidence to the Court. Mr. Barron, Mr. Whittle said, agreed at this meeting to drop a copy of the insurance in to him. Mr. Whittle's contemporaneous note read as follows:

> '*Insurance – Ciaran Rogers is the builder for Mary Egan. He is to furnish a copy of his insurance to us immediately and Noel Heatley is to be indemnified* [in handwriting] *copy to be dropped in to me'*.

5. Mr. Rodgers' insurance was of immense concern to the defendant who was worried that, in the event of an accident on the site, he could face claims by the workmen employed by Mr. Rodgers. Over the following five weeks the defendant's evidence was that he repeatedly asked Mr. Rodgers to produce his insurance, but he did not do so. The defendant's evidence was that in response to these requests he was '*fobbed off*'. On December 8 - by which time foundations had been laid and substructure constructed for the house - the defendant ordered Mr. Rodgers and Mr. Barron off the site. By then Mr. Rodgers had still not provided evidence of the requested insurance. That tipping point was reached when some of Mr. Rodgers' workmen were observed arriving on the site without personal protective equipment.

6. Mr. Rodgers' removal from the property on December 8 resulted in an altercation that evening between the defendant and Mr. Barron in the course of which the defendant alleged he was assaulted. A claim to that effect brought by way of counterclaim in this case was dismissed by the trial Judge. That part of his decision has not been appealed.

7. As the trial Judge put it in the course of his judgment, all of this resulted in an impasse. Mr. Rodgers had been working on the site for over four weeks and the plaintiffs by then had a substructure on land for which they had no contract. The defendant had a substructure on one of his sites. Unless a way forward could be found, the plaintiffs would not be able to build their house and the defendant would be unable to sell his site.

8. To that end, a second meeting was convened by Mr. Whittle on December 15. It was attended by him, both plaintiffs and the defendant. In advance of the meeting the plaintiffs purchased a '*self-build insurance policy'* from a broker, Sheridan-Colohan. Sheridan-Colohan had advised the defendant in relation to insurance matters, and it was the plaintiffs' evidence that they understood the insurance thus obtained would meet the defendant's requirements. However, this did not address the defendant's concern as to insurance on the site in respect of the period from November 3, when Mr. Rodgers had begun work, to the date of the inception of the policy. It was, again, common case that the defendant raised the issue of insurance at this meeting, but the parties differed sharply as to what, exactly, he had said and what the response of the plaintiffs had been.

9. The defendant alleged that at the meeting he had been insistent that Mr. Rodgers' insurance be provided, and that Mr. Barron said he would do this. Although that was the position as recorded in Mr. Whittle's memorandum of the meeting this was disputed by Mr. Barron who said that he gave no such commitment. According to Mr. Whittle, Mr. Barron said at this meeting that he would provide the insurance for this period and that this was '*no problem'*. Mr. Whittle said he was '*100% certain'* that this was what had occurred at the meeting.

10. The trial Judge concluded that the defendant was insisting on the provision of this insurance, saying the following of Mr. Barron's response (at para. 21):

> '*I am not sure that Mr. Barron unequivocally agreed to provide insurance for that period but neither did he make known* ***his doubts that he ever could****. With a view to moving matters on, Mr. Barron was content to allow Mr. Heatley, and possibly Mr. Whittle, to believe that insurance could be provided for the earlier period'*.
>
> (Emphasis added.)

11. The trial Judge prefaced these comments with a finding that at this time Mr. Barron seriously doubted whether Mr. Rodgers actually had insurance (at para. 20):

> *'Mr. Barron's self-build policy was not expensive … But, however inexpensive the self-build policy was, it made no sense that Mr. Barron would take out a policy unless, at the very least,* ***he seriously doubted that Mr. Rodgers had insurance.*** *If Mr. Rodgers did not in fact have insurance, there was no prospect of Mr. Barron obtaining retrospective cover.'*
>
> (Emphasis added.)

12. That self-build policy was collected by Mr. Barron the following day from Sheridan-Colohan. The cover provided for in that document had been extended to include an indemnity for Mr. Heatley and Wicklow Cosy Homes Limited. Although this involved no additional cost to Mr. Barron, he was displeased at the change.

13. Mr. Rodgers did not return to the site but on December 16 the contracts – with Ms. Egan as the sole named purchaser - were sent by Mr. Whittle to the plaintiffs' solicitors. On December 22, they were returned, signed by her. That contract made no reference to insurance of any kind. A cheque for the deposit of €7,377.50 (being 10% of the agreed price VAT inclusive) accompanied the contract. This was held by Mr. Whittle as stakeholder. Some amendments to the agreement as drafted by Mr. Whittle had been made on the advice of the plaintiffs' solicitor (Mr. Lavelle) and were endorsed on the signed contract returned to Mr. Whittle. The defendant was unhappy with these amendments and a meeting was arranged to address those concerns. That meeting took place at Mr. Whittle's offices on January 26 2017, and was attended by the plaintiffs, the defendant, Mr. Whittle and Mr. Lavelle.

The meeting of January 26 2017

14. While the meeting of January 26 was arranged to deal with a number of issues, the question of Mr. Rodgers' insurance was one of the first questions raised by the defendant and is the most significant question for the purposes of this appeal. Thus, it was common case that at the meeting the defendant again raised the issue of insurance for the period from November 3 to December 15. It was the evidence of both plaintiffs that Mr. Barron said nothing at the meeting in response. According to Mr. Barron in his evidence, while the defendant '*raised the issue of insurance… from the 3 November to the 15 December',* the request '*got lost in the rest of the meeting'.* Elsewhere in his evidence he adopted the position that he did not understand why the defendant was raising the issue of insurance and was not aware of his concerns regarding the possibility of claims against him by the workers hired by Mr. Rodgers. He said that while the defendant did bring up the original insurance on the site for that period, he did not know why, and was not sure if, the defendant was looking for confirmation that Mr.

Rodgers had insurance for the first five weeks. It was Mr. Barron's evidence that he did not '*utter a single word during the course of the meeting'*. The evidence of Ms. Egan was to the same effect.

15. It was the defendant's evidence that the issue of insurance was the most important thing to him at this meeting. He said that he '*demanded insurance if this was going ahead'*. His evidence was that the response was that '*they'* had insurance, and that the insurance '*was available'*. When it was put to him that there was nothing in the contract as signed to this effect, he said:

> '*It didn't say it in the contract but we verbally agreed it and as far as I was concerned it was part of the whole deal. I was to get insurance on the Monday and the contract was to be closed on the Tuesday.'*

16. When asked why he signed the contract if there was something yet to be dealt with, his response was '*[b]ecause I believed I would have the insurance on the Monday'*. The Monday, it should be said, was the projected closing date, January 26 being a Thursday. He said, in response to questions from the Court, '*it was part of the agreement'*. Later in his evidence he put it as follows:

> *'...there was a condition – there was a condition that the insurance and promise that we'd have the insurance before the transfer document was executed and whatever. They were to be done on the Tuesday, and we were to have, without a shadow of a doubt, the insurance on the Monday'*.

17. The defendant's evidence was corroborated in some respects by the contemporaneous records of both solicitors. Mr. Whittle's file note recorded the following:

> '*Noel had made it a condition precedent to the contract that insurance would be provided showing that Paul's contractor had insurance from the day he entered onto the site. Evidence had been produced that a policy was extracted through Sheridan Colohan from the 15th December 2016 indemnifying Wicklow Cosy Homes Limited and Noel Heatley, however, Noel required evidence of insurance prior to this date from the date the Contractor had gone onto the site in or about the 3rd November, 2016. Paul agreed that this insurance could be produced and it was agreed at the meeting that all insurance policies required would be provided to David Lavelle and he, in turn, could forward same to our offices'*.

18. Mr. Whittle confirmed the correctness of the contents of this note in evidence. When pressed as why this condition precedent did not appear in the contract, his response was '*[b]ecause as far as I was concerned, it wasn't an issue. It was coming.'* The evidence of Mr. Barron was that insofar as this part of Mr. Whittle's memorandum of the meeting of January 26 was concerned, he had '*got it wrong'*.

19. The note prepared by the plaintiffs' own solicitor, Mr. Lavelle, noted as the first item on his record of the meeting '*Insurance. Copy of'*. The fifth item was '*Copy of Kieran's insurance'*.

20. The findings of the trial Judge in respect of this aspect of the meeting began with the following (at para. 29):

> *'I find that if Mr. Barron did not unambiguously say so,* ***he conveyed the impression that evidence could be produced that Mr. Rodgers was insured.*** *At such a remove from the time at which Mr. Rodgers had first been asked to produce insurance, any hope that he might appears to me to have been rather forlorn, but Mr. Barron's judgment was clouded by the fact that he had paid Mr. Rodgers far more than the value of the work on site and, indeed, had paid Mr. Rodgers in December, after he had been put off the site.'*
>
> (Emphasis added.)

21. He subsequently returned to this issue similarly concluding that at the meeting on 26 January Mr. Barron '*placated'* the defendant and '*probably repeated, as he had previously said, that Mr. Rodgers had insurance, or at least that Mr. Rodgers said he had and would produce it'* (at para. 44). That, he said, '*got Mr. Heatley to the table'*.

22. The trial judge was clearly of the view that it made little sense for the defendant to refuse to sell the site if no insurance for the period between November 3 and December 15 was produced. He noted (id.):

> '*If Mr. Rogers had insurance, there was no sensible reason why that could not have been produced long before the meeting. If he did not there was nothing that anyone could have done about it. Any problem, if any, in relation to the period prior to 15th December was not going to be solved by refusing to sell the site'*.

23. However, Allen J. stressed, the parties then proceeded to negotiate the contract with a revised price being agreed and a special condition being introduced to address insurance and indemnities for claims by the adjoining site owners. From there, he said this (at para. 46):

'*It was not a condition of the contract that Ms. Egan would provide evidence of insurance in respect of the period from 3rd November, 2016 to 15th December, 2016. If Mr. Heatley had wanted to make it a condition, it would have been a simple matter to have written that into the new special condition. If it was a condition precedent, Mr. Heatley could have refused to sign the contract until he saw the insurance policy. He did not do that. Instead, the deposit cheque was presented and soon after Mr. Heatley relied on the contract to purportedly forfeit the deposit'*.

24. He repeated '*if Mr. Heatley's case was that the contract he and Ms. Egan signed was not binding, what he needed to do was to return the deposit'* (at para. 47). He continued (at para. 48):

'*If I am wrong in my analysis of the circumstances in which the contract came to be executed by the vendor and the purchaser, the legal effect of any representation or misrepresentation which induced Mr. Heatley to make the contract was that it was voidable, and Mr. Heatley by purporting to rescind and forfeit the deposit elected to treat it as valid'*.

25. What is clear is that the parties did agree upon the terms of the contract at the meeting. The purchase price was re-negotiated to the sum of €90,800, inclusive of VAT. They also resolved to include a new special condition in the contract dealing with a separate insurance issue arising from the defendant's concern that the purchasers of the plots adjoining the subject site might bring claims arising from the carrying out of the works by the plaintiffs on their property, together with new special conditions dealing with the erection of boundaries and

access to the site. The contract was dated and signed by all of the parties, the completion date being January 30.

The aftermath of the meeting of January 26

26. The day after the meeting Mr. Whittle presented the deposit cheque for payment and send closing documents to Mr. Lavelle. The balance of the purchase price (€15,000) was transferred to Mr. Whittle on January 28.

27. On January 31, Mr. Lavelle sent a letter to the defendant's solicitors referencing the property at Burkeen Hall and enclosing what he described as '*insurance particulars'*. These comprised the cover note from Sheridan-Colohan confirming the self-build insurance from 15 December 2016 and indemnities for the defendant and his company. There was no provision in the contract requiring the sending of this information to the defendant: the only suggestion made by any party that insurance particulars were to be sent to the defendant's solicitors came from the defendant and, on his account, those particulars were to include the cover for Mr. Rodgers on site from November 3 to December 15. Mr. Barron said in evidence that this documentation was provided because it was agreed between the parties at the meeting on January 26 that the policy had to be changed to make specific reference to the Burkeen Hall address.

28. This letter and the accompanying documents were sent on to the defendant by Mr. Whittle on the afternoon of February 1. He responded by e-mail that evening. His mail – to Mr. Whittle directly – was as follows:

'I am surprised to get a copy of one insurance policy when we met last week a condition on going ahead with this transaction was that copies of the original which they had used from the start together with an updated copy of the Sheridan Colohan policy dated from 15/12/16 were to be provided to me by Monday last. The contract was signed on that basis and it seems like another promise broken and ***at this stage we tear up the agreement as conditions were not met.*** *Send me your account for what you have done as I do appreciate its not your fault and I don't blame you for this mess and I don't want you to be at a loss, its just dealing with unworthy people.'*

(Emphasis added.)

29. Mr. Whittle sent that mail to Mr. Lavelle the following day, February 2 asking that he '*address the issue raised and revert to us as a matter of urgency'*. Mr. Barron said in evidence that when he saw this mail from the defendant he contacted Mr. Rodgers asking for the original insurance he had when he went on site. He said that he was furnished in response with three policies of insurance. The following day Mr. Lavelle's office sent to Mr. Whittle these three policies (comprising a professional indemnity policy, a contractors' plant policy and an all risks policy) on which QTF Limited (the company manufacturing the timber frame) and an associated entity, QTF Services Limited were named as the insured. The insured period in respect of each policy included the period from November 3 to December 15 2016. These were furnished in response to the defendant's e-mail of the previous day, but neither made reference to nor took issue with its contents.

30. The defendant's evidence was that when he received these policies he made a number of phone calls to ascertain whether they in fact covered Mr. Rodgers. Allen J. said (at para. 36):

'*To my eye, it was as plain as day that these policies did not cover the work that Mr. Rodgers had done on the site but if it was not clear to Mr. Heatley without making a series of phone calls, I suppose that it might not have been absolutely clear to Mr. Barron.'*

31. At some point in early February (most likely Friday February 3), the defendant telephoned Mr. Barron telling him that (as Mr. Barron described it in evidence) he was not signing or not completing the contract (or as the defendant put it in evidence, '*it was all off*') and that Mr. Barron should take anything he wanted off the site.

32. On February 20, the plaintiffs' solicitors wrote to the defendant's advising of three options as set out by their client. These were (a) completion of the sale with a reduction of the purchase price to the €85,000 originally agreed, compensation to their client in the amount of €1,000 arising from additional construction work said to be necessitated by the site contours being changed, deletion of a provision in the contract dealing with the management company and an undertaking to complete the contract in a timely manner, (b) the plaintiffs withdrawing from the purchase and the defendant paying them €125,000 compensation or (c) both parties proceeding to litigation. Although this was followed by a meeting between the parties and their legal representatives on March 27 this did not result in a resolution of the issues between the parties.

33. On April 20 a completion notice pursuant to Condition 40 of the Contract was served by new solicitors instructed by the plaintiffs. The defendant had similarly instructed new solicitors and following contact from them the plaintiffs' solicitors wrote on June 6 itemising their financial losses, which they said amounted to a total of €167,505.50. On 17 July they sent

vouching documentation in respect of these. This included a letter dated 23 June 2017 which purported to be from AXA relating to Mr. Rodgers' insurance and an invoice from the second named plaintiff to the first for '*professional services'*.

34. The parties' solicitors exchanged further correspondence before the proceedings issued. On August 17, the defendants' solicitors wrote demanding the withdrawal of the completion notice. The letter recorded that a '*fundamental condition of the agreement'* had been breached by the first named plaintiff and referenced the failure to provide evidence of adequate insurance cover from November 3. This was recorded as a breach of the contract and the letter stated that the defendant had no option but to deem it a repudiation of the agreement. The defendant's solicitors said:

> '*In the circumstances of such repudiation we are directed to call upon you to return all documents of Title currently in your possession and our client elects to exercise his rights under General Condition 41, to forfeit the deposit paid by your client to date and to exercise as appropriate his entitlement to resell the property.*'

35. The letter proceeded to reserve the right to claim damages. It was replied to on 18 August 2017, the plaintiffs' solicitors stating that the defendant had been provided with a copy of '*the insurance policy'* on 2 February and making it clear that proceedings would be instituted. That duly occurred on August 24.

The findings of the Court in respect of the alleged misrepresentation

36. In his oral submissions to this Court Mr. Keane SC for the defendant described the central issue in the appeal as revolving around the effect of a misrepresentation made on January 26. He described it as a precondition to his client entering into the contract the subject of the proceedings. In the course of his submissions to this Court he stressed that this was not an innocent misrepresentation. He described it as '*at the very best, a reckless representation',* relying in this regard – in particular – on the number of occasions the issue had been raised and on the fact that Mr. Rodgers and Mr. Barron were put off the site because of the failure to produce that insurance. In his written submissions it is asserted that the trial Judge concluded that Mr. Barron was reckless as to the truth or accuracy of his representation.

37. The misrepresentation thus alleged by the defendant was presented as relevant to the action in three different ways. First, it was said to afford a basis on which the defendant was entitled to rescind the contract. Second, it was contended that if it did not operate to enable rescission, it was a ground on which the court could and should have exercised its discretion not to grant specific performance (and therefore damages *in lieu*). Third, it underpinned an asserted cause of action in damages.

38. As to the first of these, the trial Judge described the language used in the pleadings and in argument as '*rather loose'.* In the defence it was pleaded that the contract was not enforceable '*owing to the misrepresentation of the fact of insurance when none existed, entitling the Defendant to rescind the contract in its entirety'* and that the completion notice was without effect '*in circumstances of the Plaintiff's misrepresentation'.* While the counterclaim pleaded that the initial entry on to the site was agreed to by the defendant '*in consideration of him being provided with an indemnity in respect of any claim that might arise',* it was not pleaded that the representation alleged to have been made on January 26 comprised

part of the contract agreed on that date. Instead, the alleged misrepresentation was relied upon as '*inducing the Defendant to enter into the contract'* and it was from there claimed that the nature of the misrepresentation was such that the defendant was entitled to seek rescission.

39. Nonetheless, the alleged misrepresentation was treated by the trial Judge as involving both a claim that the statement alleged by the defendant to have been made by Mr. Barron gave rise to a condition precedent to the contract, and a claim that the contract could be rescinded on the grounds of misrepresentation. In terms of characterisation, the case was further complicated by the fact that the defendant was alleging two different, albeit closely related, representations – that Mr. Rodgers was in fact insured for the period in question (a representation of fact) and that the plaintiffs would in advance of completion, provide the defendant with that insurance (a statement of future intention, albeit dependant on an assurance of fact). Neither the pleadings nor submissions made to the High Court made it entirely clear whether it was being claimed that the representation was being made fraudulently or innocently, and the closing argument before the High Court seemingly addressing itself to the proposition that the representation had been made without '*due care'*.

40. I have already quoted the trial Judge's findings relevant to the alleged misrepresentation and the context in which it was said to arise. It is helpful to gather them together:

(i) The trial Judge said that his assessment of what was likely said at the meeting on January 26 was informed by what had been said at the meetings on 2 November and 15 December (at para. 44). As to the meeting of 2 November, the Judge noted it as common case that Mr. Barron said that Mr. Rodgers had insurance and that he was allowed on to the site on foot of that representation (at para. 7). As to the

meeting of 15 December he said he was not sure whether Mr. Barron had unequivocally agreed to provide insurance, that he never made known his doubts that he ever could do so and that he was content to allow the defendant believe that insurance could be provided for the earlier period (at para. 21);

(ii) Allen J. also expressly found that Mr. Barron had '*doubts'* as to whether he could provide insurance for the period in question. He would not, he found, have purchased the self-build policy if he did not '*seriously doubt'* that Mr. Rodgers had the insurance (at para. 20).

(iii) In reference to the impression the Court thus found had been communicated by Mr. Barron to the defendant that there was insurance, he said that any hope that there was such insurance was forlorn but that Mr. Barron's judgment was '*clouded'* by the fact he had paid Mr. Rodgers far more than the value of the work done (at para. 29).

(iv) At the meeting on 26 January the Court similarly found that Mr. Barron conveyed the impression that evidence could be produced that Mr. Rodgers was insured. He did not find that Mr. Barron unambiguously said this, but nor did he find that he did not say it ('*if Mr. Barron did not unambiguously say so, he conveyed the impression ...'*) (at para. 29). This, Allen J. said, brought the defendant '*to the table'*.

(v) Similarly (at para. 44), the trial Judge held that Mr. Barron '*probably repeated'* his previous statements that Mr. Rodgers had insurance or at least that Mr. Rodgers had said that he had insurance and would produce it.

(vi) Noting that nothing previously agreed had been reduced to writing (at para. 45), the trial Judge found that it was <u>not</u> a condition of the contract that the first named plaintiff would produce evidence of insurance (had it been the case, the judgment states, that the defendant wanted to make it a special condition it would have been a simple matter for him to have written that in to the new contract) and he further found that this was <u>not</u> a condition precedent (had this been the case, the judgment also suggests, the defendant would have refused to sign the contract until it was produced) (at para. 46).

(vii) Allen J. said that if he was wrong in his analysis of the circumstances in which the contract came to be executed, the legal effect of any alleged misrepresentation was to make the contract voidable (at para. 48).

(viii) The actions of the defendant in purporting to rescind the contract and forfeit the deposit amounted to an election to treat it as valid (at para. 48). His action in purporting to forfeit the deposit was also viewed by the Judge as relevant to whether the alleged representation was a condition precedent (at para. 46) and to the correctness of the argument that the contract was not binding (at para. 47).

41. These conclusions are underpinned by four important findings of fact relevant to the meeting of January 26. These also bear repetition:

(i) That on December 15 Mr. Barron had led the defendant to believe that Mr. Rodgers had insurance and that it could be produced;

(ii) That on January 26 Mr. Barron probably repeated his earlier statements that Mr. Rodgers had insurance or he said that Mr. Rodgers had said that he had insurance, and that Mr. Barron led the defendant to believe that evidence of that insurance could be produced;

(iii) That the effect of his saying this and giving this impression was to bring the defendant to the table;

(iv) That he had led the defendant to so believe at a point when he himself had serious doubts as to whether such insurance existed.

The requisite elements of a claim for rescission for misrepresentation

42. Some elements of the law governing rescission of a contract procured by misrepresentation are clear and were common case as between the parties. There must be a representation of fact made both with the object of inducing the representee to enter into the contract and having that effect (*Gahan v. Boland,* Unreported, High Court, Murphy J., 21 January 1983 at p. 14, Unreported, Supreme Court, 20 January 1984 at para. 6). In deciding whether these requirements are made out in an individual case, the Court is concerned with determining what a reasonable person would have understood from the words used in the context in which they were used. This will depend on the nature and content of the statement

and the circumstances in which it was made (*Raiffeisen Zentralbank Osterreich AG v. Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at para. 82).

43. Where the legal position became controversial in this case, however, was as to the role of '*materiality'* in the applicable test. This was relevant because – unusually - the alleged representation had at most a tenuous relationship with the terms and performance of the contract itself. The legal framework relevant to resolving whether that feature of the case was fatal to the claim of misrepresentation is muddled by distinctions between law and equity, between executed and unexecuted contracts, between contracts in which the representation was fraudulent and those in which it was made innocently and between materiality as a free-standing requirement of rescission as objectively measured by its relationship with the contract on the one hand, and its expression as an aspect of inducement to enter into it on the other. On these questions there are a variety of conflicting judicial dicta and textbook pronouncements.

44. Before turning to these it is to be noted that while the trial Judge decided that the defendant had not made out a claim for rescission based on misrepresentation (at para. 48), the findings of fact he did reach were consistent with some elements of a claim for rescission based on misrepresentation being established. In particular, it followed from the findings I summarised above that he found that Mr. Barron had led the defendant to believe that the insurance existed and could be produced, and he had done so while himself entertaining '*serious doubts'* as to whether either was true. That was a representation, and it was one of fact. It was also, at least insofar as the evidence went, untrue. However, these elements of the defendant's claim are not sufficient to make out a case for rescission. It is also necessary to establish that the representation was intended to, and did, induce the defendant to enter into the agreement (*Forshall v. Walsh,* Unreported, High Court, Shanley J., 18 June 1997 at p. 64).

And, according to the plaintiffs, it was a further pre-requisite to rescission that the representation bore some relationship to the terms or performance of the contract itself. The existence of any such requirement was disputed by the defendant.

Materiality, misrepresentation and rescission

45. That debate was provoked by paragraph 44 of the judgment of Allen J. There he made the point that as far as anyone knew on January 26 2017, there had been no accident on the site and there was no claim against Mr. Rodgers. If Mr. Rodgers had insurance, he observed, there was no sensible reason why it could not have been produced before the meeting. If he did not, there was nothing that anyone could do about it. Any problem – if there was any – prior to December 15 was not going to be solved by refusing to sell the site.

46. The parties appear to have interpreted these comments – I think incorrectly – as going to materiality in the sense of applying (and finding wanting) a requirement that the representation bear a relationship to the agreement it is alleged to induce. Supporting that thesis, Mr. Ralston SC for the plaintiffs submitted that in order for a misrepresentation alleged to have induced the entering into of a contract to afford a basis for rescinding the contract, the representation had to have (as it was variously put) *'an effect on'* the terms of the contract, '*have related to the terms of the contract in some way', 'have some bearing on the contract',* and must '*be material to the contract and the performance of the contract'.* Counsel for the defendant, on the other hand, urged the Court to find Allen J. in error. He emphasised first that what was critical was the freedom of alienation of the defendant, and second that the alleged misrepresentation did have a bearing on the contract in that the defendant was disposing of a site adjacent to other property he continued to own and on which he would be working.

47. In order to address that argument, it is necessary to begin with a determination of the precise type of misrepresentation in issue. In this regard, the statement by the Judge that Mr. Barron entertained serious doubts as to whether Mr. Rodgers had insurance is of note. However, the case was not pleaded as one of fraudulent misrepresentation and at no point did the trial Judge make an express finding that the plaintiffs had in terms acted dishonestly, with the Judge at one point describing Mr. Barron's judgment as '*clouded'* by the fact he had paid Mr. Rodgers more than the value of the work on the site (at para. 29). No detailed submission was made as to why this Court, on appeal, should now re-characterise the misrepresentation by reference to any particular level of intent or indeed as to the exact legal consequences on the facts of this case of its so doing. It follows that in the absence of a clear pleaded case of fraud and an unequivocal finding to that effect, this Court must proceed on the basis that the misrepresentation in issue was not made fraudulently. That being so, the role of materiality in a claim for rescission presents a controversial issue on which there is some conflict in the authorities.

48. While there is some Irish authority suggesting that an innocent misrepresentation will give rise to rescission only if it gives rise to a total failure of consideration (*Carbin v. Somerville* [1933] IR 276 at p. 288, Farrell '*Irish Law of Specific Performance'* at para. 9.22), and while there is considerable authority suggesting this is wrong - at least in relation to an executory contract ((see Clarke '*Contract Law in Ireland'* (8th Ed. 2016) at para. 11-27; McDermott and McDermott '*Contract Law'* (2nd Ed. 2017) at para. 14.111 fn. 289), this is not a requirement where the representation is made dishonestly (*Kennedy v. Panama Mail Co.* (1867) LR 2 QB 580 at p. 587).

49. Similarly, while there is both authority suggesting that in the case of innocent misrepresentation the law imposes a distinct requirement of objective materiality (*Gahan v. Boland* at pp. 13 to 14, Treitel '*The Law of Contract'* 11th Ed. 2003 at p. 336 to 337), and authority that such materiality is relevant only to the burden of proving inducement (*Museprime Properties Ltd. v. Adhill Properties* [1990] 2 EGLR 196, Goff and Jones '*The Law of Restitution'* (6th Ed. 2002) at para. 9-022, Cartwright '*Misrepresentation, Mistake and Non-Disclosure'* (4th Ed. 2017) at para. 4-33, Spencer Bower Turner and Hadley '*Actionable Misrepresentation'* (5th Ed. 2015) at para. 6.21), there can be no doubt but that where the representation is found to be fraudulent it is not necessary to establish that the representation would have been viewed by a reasonable person as material (see *Kennedy v. Panama Mail Co.* at p. 587 as approved in *Lecky v. Walter* [1914] 1 IR 378 at p. 386 to 387 and *Carbin v. Somerville* at p. 288).

Inducement and intention to induce

50. It would not be desirable to resolve these issues without the benefit of an analysis by the parties of these authorities. In this case having regard to the manner in which the trial Judge approached the issue on the factsit is not necessary to decide whether and if so when, materiality is an independent precondition to rescission on the basis of innocent misrepresentation. Either way, the relationship between the representation and the contract and the extent to which it might be objectively viewed as material is indisputably relevant when it comes to determining whether there has been inducement. The representee must establish that the representation was intended to, and did, induce the representor to enter into the agreement. This may be a more rigorous requirement where the misrepresentation is innocent, but materiality is relevant in establishing inducement for the simple reason that '*materiality is*

evidence of inducement because what is material tends to induce' (*Hayward v. Zurich Insurance Co. plc.* [2016] UKSC 48, [2016] 3 WLR 637 at para. 29 per Lord Clarke). This is just common-sense. The closer a representation is to the subject matter of the agreement, the more readily it can be assumed that it induced it. Thus, if the subject matter of the representation is objectively material to the contract so that a reasonable person would have relied on it, the onus shifts from the representee to the representor to negate the inference that there was both inducement and an intention to induce (*Matthias v. Yetts* (1882) 46 LT 497, at p. 502). It is put concisely by Goff and Jones; '*[i]f, however, the misrepresentation would not have induced a reasonable person to contract, the onus will be on the representee to show that the misrepresentation induced him to act has he did'* (*'The Law of Restitution'* at para. 9-022). If the subject matter is remote from the terms of the contract or its performance, it becomes more difficult for the representee to simply point to the representation and rely upon its terms to establish inducement.

51. As I read paragraph 44 of the judgment of Allen J., it was to this common-sense proposition that his comments that refusing to sign the contract was not going to solve the insurance issue (rather than to any legal requirement of a connection between the insurance and the contract) were correctly directed. The concept of materiality is not referred to at all by him. There, and in the following two paragraphs of his judgment, he was addressing the issue of reliance and explaining why an intention on the part of Mr. Barron to induce, and the fact of inducement, had not been established as a matter of fact. Had it been the case that the issue of concern to the defendant – the fact that Mr. Rodgers may not have been insured for the period between November 3 and December 15 thereby exposing the defendant to claims for damages – would have been ameliorated by not entering into the contract, the onus would be easier to meet. It followed that viewed objectively, as Allen J. was emphasising, it made little sense to

refuse to execute the agreement if the assurance was not forthcoming. If not entering into the agreement would have in some sense improved the defendant's position, the Court would have more readily accepted that the representation induced the defendant to enter into the contract.

52. Bearing in mind that a party may by his conduct show that he is not relying on a representation in entering into an agreement (*Redgrave v. Hurd* (1881) 20 Ch. D 1, at p. 21) it is important to stress that the defendant did not simply sign the agreement after the representation was made to him. Instead, he proceeded to renegotiate the price, and to require (and to reduce to writing) a new special condition dealing with the insurance and indemnity insofar as it affected neighbouring properties. Because, having regard to all of these circumstances, the defendant had *not* insisted on the inclusion of an express term that Mr. Rodgers had insurance for the relevant period and that it would be produced before closing, it was open to the trial Judge on the basis of his assessment of the evidence to conclude in these circumstances that he was not relying on the representation in entering into the contract or, if he was, that the plaintiffs were entitled to assume that he was not.

53. Of course, many cases in which rescission of written contracts is sought based on oral misrepresentation can be met with the response that the representation was made to get the representee '*to the table'* and in all such cases it can be said that had the parties intended that subject matter of the representation be legally binding they could have included a term in their contract to that effect. It is a question of fact in each individual case whether or not protestations of that kind are well grounded. In this case, however, what would in other circumstances be a glib response, has compelling force on the facts

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54. Here, it would not have been incorrect of the trial Judge to conclude that it made little sense for the defendant to say that he was relying upon an assurance that he would be given Mr. Rodgers' insurance (the existence of which he also must have seriously doubted) in entering into a contract in circumstances in which he proceeded following the making of the representation to insist on express terms dealing with *other* aspects of the insurance arrangements in the same contract while leaving the issue of the contractor's historic insurance to be regulated by an oral promise. That all of this occurred in a context in which he was allegedly relying upon the word of a person whose trustworthiness he had considerable cause to question (if his evidence on other issues were to be believed) renders the proposition all the more remarkable.

55. It is in that light that Allen J.'s suggestion that had the defendant wished to impose an obligation *vis a vis* Mr. Rodgers' insurance, he ought to have done so within the contract, falls to be understood. The fact that the defendant did not so insist, the trial Judge thus held on the facts, meant he was not relying upon the insurance as if it were a special condition – or at the very least the plaintiffs were entitled to so conclude. Once the process moved in that direction, the plaintiffs were justified in operating on the basis that their legal obligations with respect to the transaction (and, insofar as it was provided for in the agreement, insurance requirements imposed upon them) were in the contract, and to be found there alone. I can see no basis on which this Court could or should interfere with those conclusions of fact.

Affirmation

56. Because of my conclusions on the first question, it is not necessary to address at any length the alternative basis for the trial Judge's conclusion in respect of the argument as to

rescission, namely that by forfeiting the deposit the defendant also forfeited the right to avoid the contract. However, in deference to the arguments of counsel, it seems to me that the Judge was correct in concluding that the assertion that the defendant intended to forfeit the deposit would have represented an approbation of the contract, and he was also correct in determining that this would not have been redeemed by subsequent correspondence. The purported forfeit of the deposit is capable of being an affirmation of the contract and an affirmation once made is final – '*an election once made is made for ever and cannot be revoked even if the party wishes'* (*Sargent v. ASL Developments Ltd.* (1974) 131 CLR 634 at p.656).

57. However, the converse of this principle is also true – once a party has avoided a contract he can never thereafter affirm it. In such circumstances, the contract will have terminated and cannot be subsequently revived. The fact is that the defendant in the clearest of terms stated his position both in his mail of February 2 and his subsequent conversation with Mr. Barron, and the effect of each communication was that the contract was over. Had there been a misrepresentation which enabled the defendant to avoid the contract, I would conclude that by these communications he did so. If that were correct, his subsequent actions in purporting to forfeit the deposit were irrelevant.

Damages in lieu: relevant principles

58. The trial Judge awarded damages *in lieu* of specific performance rather than damages for breach of contract at common law. This followed the position clearly advocated by the plaintiffs, who neither pleaded common law damages nor sought to agitate them at trial. That position was repeated in the course of oral argument before this Court, where it was contended that the manner of calculation of damages *in lieu* was more advantageous to the plaintiffs.

59. This apparent advantage, however, came with a condition. In *McGrath v. Stewart* [2016] IESC 52, [2016] 2 IR 704, the Supreme Court decided that the award of damages *in lieu* was subject to the same discretionary bars as an order for specific performance. A court may in its discretion decide that specific performance, while available to a plaintiff, should not be ordered. This could occur because, for example, there were intervening third party rights, because it was no longer possible to return the parties to the position they would have been in before the contract or because specific performance would be unduly oppressive in particular circumstances to a defendant. In that situation, although it *could* make an order for specific performance, the Court may order damages instead pursuant to the facility to that end introduced by s. 2 of the Chancery (Amendment) Act 1858 and continued in the current law. The same principles would apply where, irrespective of how the Court might have exercised its discretion, the plaintiff elects for damages *in lieu* instead of specific performance.

60. However, where the reason the court exercises its discretion against specific performance arises from the conduct of the plaintiff, *McGrath v. Stewart* decides that damages *in lieu* may not be available. There, the plaintiff sued to enforce a contract for the sale of a number of properties. He waited for years after the date of execution of the contract to issue a notice to complete. In his proceedings he sought an order for specific performance and damages *in lieu* (but not damages for breach of contract). Laffoy J. concluded that if the Court would have refused specific performance because of the plaintiff's delay (and she decided that it would) it should not award damages *in lieu*. Before the High Court, the parties accepted that the decision in *McGrath v. Stewart* makes it clear that if the Court concludes in this case that it would have refused specific performance because of some aspect of the plaintiffs' conduct, it could similarly refuse damages *in lieu*. The issue between the parties reduced itself to whether the

conduct of which the defendant complained was such that damages ought to have been refused. As I will explain, a subtly different position was adopted by the first named plaintiff in this Court.

61. In support of his claim that the High Court should have refused to award danages *in lieu* because of the conduct of the plaintiffs the defendant relied upon the findings of the Court in relation to the misrepresentations made by Mr. Barron concerning insurance, upon a letter from AXA which purported to evidence insurance of some kind for Mr. Rodgers and upon certain of the documentation relied upon to vouch the plaintiffs claim for damages.

62. The factual basis for the first of these is outlined above: the Court found that Mr. Barron misled the defendant in relation to the insurance on two occasions, acting on each occasion when he had serious doubts as to whether what Mr. Rodgers' was being induced to believe was true. The documents require further attention.

The documents relied upon by the plaintiffs

63. The first issue on the documents arose from a sheet discovered by the plaintiffs, and indeed forwarded by their solicitors to the defendant's solicitors under cover of a letter dated 17 July 2017. It was thus presented on a '*without prejudice basis in support of its financial losses to date'.* It was described in the covering letter as '*Insurance Cover Note – AXA (RE CFR Construction*'). The sheet had a heading '*Redefining/standards AXA',* was dated 23 June 2017 and was addressed to Ciaran Rodgers. It presented itself as responding to a request for a cover letter outlining the insurance cover for '*CF Rodgers Construction Ltd'.* It recorded that Mr. Rodgers had been a customer of AXA insurance for 20 plus years holding both public

liability and employers' liability insurance. The document was signed by a Mary Carson, for whom a telephone number was given. It stated that a new policy was activated on 3 October 2016 at 12.32 hrs but proceeded to record :

> '*This policy could not be activated on this particular site due to the increased requirement over £6.5 million and the inclusion of another company*.'

64. The trial judge (at para. 82) described this document as '*risible on its face',* and '*fantastic'* and noted (at para. 77) that it carried no address or contact details, that the logo at the top of the page was obviously copied and pasted, and that it did not properly name Mr. Rodgers' company (which in some of the other documents was described as '*CFR Construction Ltd'*). Allen J. said that the Court could safely infer that whoever Ms. Carson was, when the defendant dialled the number given for her on the document (as he gave evidence he did) the person who answered was not anyone in AXA. Noting that the document was a fake certificate purporting to confirm that Mr. Rodgers had no insurance, Allen J. observed '*you couldn't make it up'*.

65. It is impossible to resist the temptation to observe that this is precisely what someone, somewhere, for some reason had done. The document was, as I have said, discovered by the plaintiffs, it being described in the affidavit of discovery as '*letter dated 23rd June 2017 from AXA advising non extension of cover in respect of higher requirement of £6.5 Million and inclusion of another company'*. It strikes me that the person producing the document may well have intended it to suggest that Mr. Rodgers would have been able to obtain insurance were it not for the requirement alleged to have been imposed by the defendant on November 30, that the level of indemnity be fixed at £6.4 million with an indemnity for Wicklow Cosy Homes

Limited (a requirement the trial Judge found had never in fact been imposed). It was never suggested that either of the plaintiffs had themselves fabricated the document and, as importantly, they never actually deployed the document at trial or in their pleadings. However, the document was an obvious forgery, the description accorded to it in the affidavit of discovery was false (it was not '*from AXA'*) and I would add that it would have been most surprising had neither the plaintiffs nor their legal advisors thought at some point to dial the telephone number on the letter to confirm its contents with the author. They ought to have done so, not least of all having regard to the peculiar get up of the sheet of paper. If they had, they must have known that the person who purported to author it had not in fact done so. If they knew that it was incumbent upon them to immediately advise the defendant of that fact and to amend the description of the document in the plaintiffs' affidavit of discovery accordingly.

66. The other documents were found by the trial Judge to present more troubling issues. These came in the form of various documents relied upon by the plaintiffs in connection with their claim for losses. Mr. Barron in the course of his evidence in chief referred to each of these documents as he went through the losses he said they evidenced, and each formed the basis for, and was attached to, a schedule of special damages delivered at the direction of the Court in advance of the trial. They were presented in respect of almost €70,000 of the total claimed sum of €138,000. That sum had developed from €125,000 claimed in the plaintiffs' solicitor's letter of 20 February 2017, to €167,505.50 in their solicitors' letter of 6 June 2017 before (as the trial Judge put it) it '*settled down'* at €138,115.85, this being the basis on which the case opened.

67. The documents in question were as follows:

(i) The plaintiffs claimed fees for Mr. Barron's architectural practice vouched by an invoice dated 6 October 2016 addressed to the first named plaintiff at the Rose Hill address (which they sold that month). It carried a VAT number but no charge to VAT, it was admitted by Mr. Barron that this was made up '*long after the event'* and that in fact the first named plaintiff had no liability to the second named plaintiff in respect of it (which, obviously, was never paid by her). This sum was referred to in Replies to Particulars delivered by the plaintiffs in March 2018.

(ii) €54,685 was claimed on the basis of a letter dated 27 June 2017 to '*Ciaran'* from '*Q t f Ltd.'* and acknowledging payment of £35,000 and asking for payment of an additional balance of £12,500. Allen J. said that the letter was '*quite obviously home-made'* and it was based on the assumption that QTF were asking for the balance due on a timber frame which had never been delivered or erected. Allen J. noted that the logo and get up were '*quite different'* from a quotation from QTF produced in the course of the case. If anyone was liable on foot of this document, it was Mr. Rodgers. Mr. Barron accepted in cross examination that this document was obviously fake.

(iii) €3,453.83 was claimed for *Quality Timber Frames Storage*. This was based upon a letter dated 1 January 2018 from '*Q t f Ltd.'* to '*Ciaran'*. It was in what Allen J. described as '*the same obviously home-made form'* as the letter of 27 June 2016 and that the same comments as applied to the latter applied to it. He noted that no claim for storage was made for any period after 2017. Similarly, it was a concocted document. The trial Judge found (at para. 69) that Mr. Barron was not in a position at the hearing to explain the claim for storage of the timber frame, noting that

neither plaintiff had ever seen the timber frame in storage. This together with the preceding item appeared to reflect at least part of a claim of €61,832 made in respect of the ordering and construction of a timber frame home identified in Replies to Particulars delivered in March 2018.

(iv) In replies to particulars delivered in March 2018 €13,736 was claimed in respect of '*glazing units'*. By the time of the trial €11,100 was claimed based upon a letter from '*SK Windows'* to Mr. Rodgers. The address given for SK Windows was the plaintiffs' former home at Rose Hill Close. The letter suggested that €7,000 of this was paid and that €4,100 remained due in respect of windows and doors received. Mr. Barron also accepted in cross examination that this document was obviously fake although he said in evidence in reference to both this and the QTF documents that it never occurred to him prior to the hearing that any of them were fake. He said '*I don't like the look of them now that they're pointed out to me'*. In the course of his judgment, the trial Judge specifically noted that Mr. Barron qualified the claim in respect of windows and doors during his evidence, saying that he and the first named plaintiff had paid Mr. Rodgers €4,000 in respect of the windows and doors.

(v) A claim was made for scaffolding in the amount of €5,867.95. This was included in replies to particulars delivered in March 2018. It was unvouched and Mr. Barron accepted in evidence that he had not paid anything in respect of scaffolding and that no-one had approached him on behalf of any scaffolding company seeking payment - although he said that he was or had been expecting a bill for this. He confirmed in cross examination that he had no dealings with anyone in respect of

scaffolding and had had no approach from anyone about scaffolding. This is unsurprising given that the building did not go beyond foundation level.

68. Allen J. was highly critical of the plaintiffs insofar as their claim for damages was concerned. Apart from the uncompromising terms in which he described the fabricated documents that had been produced to the Court, he said the following of the second named plaintiff's demeanour when addressing this evidence (at para. 76):

'*Mr. Barron gave the impression of being interested in the questions, as opposed to having been exposed in a transparent attempt to advance a claim for which there was no conceivable justification'*

69. Allen J. also decided that, having regard to the evidence he had heard as to the manner in which payments were made to Mr. Rodgers (at para. 80):

'*The contract, or at least the performance of the contract, which Mr. Barron made with Mr. Rodgers was calculated to defraud the revenue and was illegal. It was, however, quite independent of the contract between Ms. Egan and Mr. Heatley. It my view, neither the making or the performance of the building contract tainted the site purchase contract. The dealing between Mr. Barron and Mr. Rodgers was not inequitable to Mr. Heatley'*.

70. However, Allen J. concluded that he would not exercise his discretion against granting specific performance because of these documents, stating (at para. 83):

'*After careful consideration I have come to the conclusion that the fake documents do not go to my discretion to award damages in lieu of specific performance. This case comes before the court because Mr. Heatley refused to complete the sale. Mr. Heatley's refusal to complete pre-dated, and had nothing to do with, the fake documents and I find that the plaintiffs' reliance on them does not disentitle them to the relief they seek. They do, however, go to the question of costs.*'

Damages, equity and the Court's discretion: case law

71. The issues presented by the representations made to the defendant, and that arising from the documents, are different. As to the former, the defendant relies on the following comment of Jessel MR in *Re Banister* (1878) 12 Ch. D. 131 at p. 142:

'*I apprehend that the considerations which induce a Court to rescind any contract and the consideration which induce a Court of Equity to decline to enforce specific performance of a contract are by no means the same. It may well be that there is not sufficient to induce the Court to rescind the contract, but still sufficient to prevent the Court from enforcing it.*'

72. I have some difficulty with the proposition that the Court would refuse rescission of a contract in respect of a misrepresentation and at the same time find that the misrepresentation alone afforded sufficient basis for declining to enforce the contract by means of an order of specific performance. Keane (*Equity and the Law of Trusts in Ireland* 2nd Ed. 2011 at para. 3.18) quotes with approval the suggestion in one of the English texts that such cases are best categorised as instances of specific performance being refused on the grounds of hardship, at

least in cases where the representee does not actually rescind. That, of course, requires proof of more than just misrepresentation but of a hardship arising from the enforcement of the contract. Given that enforcing the contract would not have resolved the issue of insurance one way or the other, I would not be inclined to exercise the discretion against granting the equitable remedies on this basis alone. Indeed, it is significant that in each of the cases relied upon by the defendant as suggesting that specific performance could be refused where there had been a misrepresentation irrespective of whether the misrepresentation avoided the contract (*Re Terry and White's Contract* (1886) 32 Ch. D. 14, 29, *Hope v. Walter* [1900] 1 Ch. D. 257 and *Re Banister*), the misrepresentation was such that the defendant believed it was obtaining something quite different from that contracted for. That is not, clearly, the case here. The subject matter of the contract itself was not affected by the representation.

73. Here, however, the case went further. Mr. Barron was found by the trial Judge to have led the defendant to believe that Mr. Rodgers had insurance and that it could have been produced when he had serious doubts as to whether that was true. And, more relevantly insofar as the presentation of the case was concerned, he was found by the judge to have relied upon documentation which the plaintiffs ought to have known were fabrications.

74. Insofar as the '*clean hands'* principle is concerned the general legal framework is not controversial. As Keane explains (at para. 3.18), if the conduct of the plaintiff in relation to the particular matter in respect of which he is claiming relief has been inequitable or tainted in some manner to which a court applying principles of equity should have regard, he may be refused relief. The application of the principle to any particular case is, clearly, highly fact sensitive. The maxim will not apply where the irregularity alleged to give rise to its application is trivial. Nor will it operate unless there is an immediate and necessary relationship between

the conduct in question, and the equity sued for. As explained by Lord Scott in *Grobelaar v. News Group Newspapers* [2002] UKHL 40, [2002] 4 All ER 732, at para. 90:

> *'it is long established practice that an equitable remedy should not be granted to an applicant who does not come before the court with 'clean hands'. The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case*.'

75. One circumstance in which the Courts have made it clear the maxim is triggered is where a party seeking equitable relief seeks to rely in Court on evidence that is false (see *Armstrong v. Shepherd and Short Ltd.* [1959] 2 QB 384). The decision of the English Court of Appeal in *Willis v. Willis* [1986] 1 EGLR 62 makes it clear that reliance on falsified documents will bring the maxim into play. There, the appellants claimed that they had carried out works on property leased to them by the respondents and sought to resist an application for possession of the property on the basis of an estoppel. They claimed that based on a representation by the owner of that property that they could live rent free in it for as long as they wanted, they had expended monies on repair and improvement of the premises. Therefore, they said, it would be unconscionable for the respondents to insist on their right to possession. Particulars were given by them of the expenditure and this was vouched for by a letter from a person who (the letter recorded) had carried out work on the property and purporting to confirm the amounts the appellants had claimed. The letter was false – the work had not been done by the purported author of the letter and he had been paid no money. The letter was written at the insistence of

the father of one of the appellants who sought the author's assistance to provide evidence of the expenditure of money.

76. While the trial Judge did not make a finding that the appellants had themselves been responsible for the fabrication, one (but not the other) was aware that it was fabricated. It was passed by him to their solicitor for the purposes of formulating their claim at a time when the former knew it was false. The letter was not used at trial and the pleadings were amended to remove reference to its contents, the falsity having been discovered by the respondent's solicitor before-hand. Nonetheless the fact of production of the letter, the transmission of it by one of the plaintiffs to their solicitor and its use to underpin the pleaded claim was held in itself to require rejection of the defence in its entirety.

77. Parker LJ expressed the view (at p. 63) that where a party seeks the aid of the court to obtain its assistance *via* the principles of equity so as to override another's strict legal rights, it is clearly a case for the application of the maxim that he who comes to equity must do so with clean hands. He then said (at p. 63):

> *'I find it difficult to see how there could be any more serious conduct than that. When a party comes to the Court and seeks to obtain from it equitable relief, it is accepted, as I have said, that he must come with clean hands. I accept also, as was submitted on behalf of the appellants, that not every item of misconduct can possibly be sufficient to deprive a party who seeks equity from being granted the relief he seeks. Some misconduct may be trivial. But when a party acts as these parties have done – and Joanna Willis must be regarded as having been concerned in this, albeit indirectly, in as much as the document was put forward on behalf of both the appellants – it seems to be impossible for this Court*

to do [anything] *other than to take the most serious view of it and to decline to grant equitable relief even if, to which I say nothing because it does not arise on the view I take of this case, they would otherwise have been so entitled.'*

78. Sir John Donaldson M.R. said at page 63:

'The conduct of the appellants which has been disclosed in this case was such that no Court could, in my judgment, possibly grant equitable relief.'

79. It is to be noted that the appellants in that case were held to be precluded from invoking equity even though (a) there was neither evidence nor a finding that they had themselves fabricated the evidence, (b) Joanna Willis' involvement appears to have been limited to allowing deployment of the documents on her behalf and (c) the fraud having been discovered before the trial, they were not actually used in evidence – although as I have noted they were deployed in particulars.

80. These passages were referred to in *Gonthier v. Orange Scaffolding Ltd.* [2003] EWCA Civ. 873. There, the defendants similarly sought to resist an action for possession of property occupied by them on the basis of an estoppel. In that regard they further claimed that they were entitled to repayment of sums they had allegedly expended on the property to the knowledge of the plaintiff. To make that claim, they relied upon documents which, they said, evidenced that expenditure. Those documents were referenced in the witness statements tendered on behalf of the defendants in advance of the trial.

81. In respect of three items of alleged expenditure in particular, the Court found that the invoices and letters had been forged (the companies which allegedly sent them gave evidence that they had never done so) and in relation to another, the defendants had procured an invoice which recorded as having been paid to a third party a sum which was greater than that had that been paid (the payments had been made in cash in order to evade VAT). The trial Judge had found in relation to the expenditure suggested by these documents that some of it had in fact been incurred, and awarded some – albeit reduced – compensation accordingly. He rejected the contention that the clean hands principle dictated that the respondents' claim should have been refused in its entirety on the basis that at least some of the expenditure had in fact been incurred, and because he felt there was an explanation for the deployment of the concocted evidence (the respondents found it difficult to get the persons they had paid to produce invoices because they had been accepting cash payments).

82. Lindsay J. described the wrongdoing in which the respondents had been involved, as follows:

> *'There was thus abundant material for an argument from the Gonthiers that OCS's hands were far from clean. OCS, by Mr Horrigan, had asserted, right down to the hearing itself, a claim for an equity in its favour, an equity which depended on expenditure by it, but had very substantially exaggerated that expenditure. It had done so in ways which it had had to accept were not only inaccurate but misleading, which, at points, had the appearance of an intended fraud on the Customs and Excise and which, at other points, had depended on documents as to which there was evidence, not said by the Learned Recorder to have been unreliable or to be disregarded, that they had been fabricated. In a passage I shall come on to, the Learned Recorder accepted that OCS had "concocted"*

documents. In the circumstances it is hardly surprising that the Learned Recorder said that he found this aspect of the case deeply troubling.'

83. He said (at para. 36):

'*But there cannot be any principle by which the fabrication of documents produced to the Court as part of a party's case may be excused or treated as other than serious on the ground that the fabrication was done in order to portray "in broad terms" what the party believed to be the truth or what was the truth. A party unable to find any documentary support for the truth it wishes to assert can expect a very serious view to be taken of its conduct if, in order to suggest or support that truth, it fabricates documents. Still less can such conduct be excused where the documents do not portray but exaggerate the truth and where their falsity is hidden from view until the very course of the hearing.'*

84. Concluding that the circumstances in that case justified the refusal of the equitable relief claimed, Lindsay J. said (at paras. 38 and 39):

'Thirdly, Mr Recorder Thom concerned himself with the questions of whether refusing relief would be to impose a disproportionate penalty on OCS and whether reduction of its monetary claim for the expenditure it claimed to have laid out on the premises was "a sufficient punishment". With respect, those were not appropriate questions; the question, as Parker L.J. emphasised in Willis supra at page 63 e-f, was not whether an equity had been lost by reason of bad conduct but whether, by reason of bad conduct, the equity had ever arisen.

In the circumstances I would hold that the Learned Recorder misdirected himself in law on the question of "clean hands" for the reasons I have given. If (as to which I am far from sure) Mr Recorder Thom was able to regard the matter as simply one of the exercise of a discretion, I would hold that, in the light of his misdirection, this Court is free to look afresh at "clean hands". For my part I would hold, especially in the light of Willis supra, that Mr Horrigan's hands were hopelessly muddied; his conduct on OCS's part was in my judgment such as to deny equitable relief to the Respondent. I would allow the appeal on this ground alone …'

85. The effect of these decisions was summarised by Andrew Smith J. in *Fiona Trust v Privalov* [2008] EWHC 1748 (Comm):

'These authorities are examples of cases in which the court regarded attempts to mislead the courts as presenting good grounds for refusing equitable relief, and show that this is so not only where the purpose is to create a false case but where it is to bolster the truth with fabricated evidence: see Gonthier v Orange Contract Scaffolding Ltd especially at para 36. Further, as is clear from J Willis & Son v Willis, such misconduct can deprive a party of equitable relief notwithstanding the trickery was detected and therefore not pursued to the trial of the claim. However, in all these cases the misconduct was by way of deception in the course of litigation directed to securing equitable relief…'

86. Neither party to these proceedings made reference to the decisions in *Willis* or *Gonthier.* After it reserved judgment in this case, the Court afforded the parties the opportunity to make additional submissions in relation to these decisions. Both did so. Unsurprisingly, the defendant enthusiastically embraced them, stressing not merely the production of and reliance

upon '*fake'* documents, but also the fact that the plaintiffs had engaged in the payment of large amounts of cash to Mr. Rodgers, the contract with whom, or performance of same, was calculated to defraud the revenue.

87. The first named plaintiff makes three points in relation to these authorities, which she says are clearly distinguishable from the facts of this case. First, she says that she did not seek to rely on any fake documents in claiming the primary relief of specific performance of the written contract. In *Willis* and *Gonthier*, she says, the very fact of expenditure found to be falsely presented was the foundation of the equity claimed. In order to preclude a party from equitable relief, the first named plaintiff says, the conduct must have an '*immediate and necessary relation to the equity sued for'* (*Dering v. Earl of Winchelsea* (1787) 1 Cox 318, at p. 319).

88. Second, she submits that damages *in lieu* of specific performance is not an equitable remedy in itself but is instead a statutory remedy based on the Chancery (Amendment) Act 1858. She says that a claim for such damages is outside the sphere of equitable jurisdiction, noting that the equitable doctrine existed and was maintained long before the Court of Chancery had jurisdiction to award damages. This point, it should be stated, was not made by the first named plaintiff in either her written submissions or in the course of the appeal. She accepts that it is no defence to a claim fraudulently made to say that it falls outside the equitable jurisdiction but seems to contend that the whether such a claim should be permitted falls to be determined by reference to the common law principles reflected in the decision of the Supreme Court in *Shelley Morris v. Bus Atha Cliath* [2003] 1 IR 232 rather than any particular equitable principle. In this regard she draws particular attention to the fact that the fake documents did

not induce the contract nor affect the entitlement to an order for specific performance, saying that the claim should not be dismissed on the basis of the equitable principle of clean hands.

89. Third, she says that in *Gonthier* various items of evidence were adduced that substantiated the allegation that the respondent had fabricated and knew the documents to be false, inaccurate and misleading. She notes that it was not suggested that the documents had been concocted by the plaintiffs, that the documentation regarding insurance was immaterial to the contract for the sale of the land, that the issue of the building costs and outlay was similarly immaterial to that contract, that the second named plaintiff did not doubt their genuineness until cross examined and when cross-examined '*came easily'*, and that this Court should have regard to the manner in which the trial Judge exercised his discretion in relation to the matter.

Analysis

90. It is convenient to first address the second of these arguments. The contention of the first named plaintiff that damages in lieu is not an equitable, but a statutory, remedy and that accordingly equitable barriers to relief cannot be erected in defence of such a claim is in the teeth of the decision of the Supreme Court (per Laffoy J.) in *McGrath v. Stewart.* The judgment of Laffoy J. was based on a careful analysis of s.2 of the Chancery Amendment Act 1858. While the Act was repealed in 1883, the jurisdiction to award damages in lieu continued consequent upon a saver in the repealing Act. Section 2 provides:

> *'In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against*

the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the Court shall direct.'

91. Laffoy J. approached the provision (at para. 37) by first inquiring whether the High Court had jurisdiction to entertain an application for specific performance of the contract in question reasoning that, because it was a contract for the sale of land, it did. Therefore, again following the text of the provision she said, it had jurisdiction to award damages *in lieu* if '*it was appropriate for the court to think it fit that it should do so'*. She continued:

'*In a situation where the Court has determined that laches on the part of the plaintiff purchaser, as here, should operate as a bar to entitlement to an order for specific performance, it is difficult to see how the Court could think it fit to award damages in lieu of specific performance.'*

92. The plaintiffs are, of course, correct when they suggest that the issue that presents itself in this case is different from that addressed in *McGrath* because the presentation of false documents in support of a claim for damages *in lieu* is a step which, unlike the circumstances giving rise to *laches*, would have no relevance to a claim for specific performance *per se.* The claim for specific performance is dependent upon the existence and enforceability of the contract, while the documents at issue here were put in evidence solely for the purposes of quantifying the claim in damages. However, putting to one side the fact that there is a considerable body of authority that even prior to Lord Cairns' Act Courts of Equity enjoyed a

jurisdiction to award damages (see Spry *The Principles of Equitable Remedies* 9th Ed. p. 647 to 648) I think that this contention ignores the context, effect and intent of the Act.

93. The 1858 Act was intended to address the inconvenience facing litigants who sought and were refused specific performance by the Chancery courts, and thereby found themselves having to take recourse to different courts so as to obtain damages (*Ferguson v. Wilson* (1866) LR 2 Ch App. 77 at 88). However, in conferring the jurisdiction it did, the legislature not merely invested the courts of Equity with a clear jurisdiction to award damages but, as was held in *Leeds Industrial Co-op v. Slack* [1924] AC 851, the jurisdiction so conferred was a more expansive jurisdiction than was enjoyed at common law. Damages are thus available pursuant to the 1858 Act for breach of a purely equitable right, and for certain types of prospective loss that can only be recovered in law by way of subsequent action.

94. It was because the plaintiffs here perceived an advantage to proceeding to seek only damages *in lieu* and not to seek common law damages for breach of contract law, that they adopted this course of action. At the same time – and unlike the position in law – the question of whether damages should be awarded is vested in the discretion of the Court. By interposing between the plaintiff and his damages the stipulation that such an award would be made only where the Court thought it fit to do so, the inference that the legislature replicated the discretion vested in a court of Equity, seems to me to be irresistible. The passage from the judgment of Laffoy J's in *McGrath v. Stewart* to which I have referred above makes it clear that the language of this statutory discretion afforded the basis for her decision that the defence of *laches* applied to the damages claim in that case. In short, while a Court may in its discretion refuse specific performance, yet award damages instead (see *Price v. Strange* [1978] Ch. 337, at pp. 358 to 360, 368 to 370), *McGrath v. Stewart* makes it clear that the same equitable principles as govern

the grant generally of equitable relief also apply to damages under the 1858 Act. This, I note, reflects the position adopted in Spry '*The Principles of Equitable Remedies'* (9th Ed) at p. 669:

> '*Whether the court is acting pursuant to its inherent powers or pursuant to a special statutory power the grant of equitable damages is just as much a discretionary matter as the grant of specific performance or of an injunction; and whether the relief is refused depends on the precise discretionary considerations that arise'.*

95. If that is so, it must follow that the question is not whether the plaintiffs presented false documents with a view to supporting their claim that the contract on which they sued was enforceable, but whether they relied upon such evidence in seeking relief that is subject to an equitable jurisdiction. The point is also specifically addressed in Spry (at p. 670):

> '*there sometimes arise personal considerations such as fraud, misrepresentation, a failure to make a necessary disclosure, unfairness, a failure to comply with conditions that are necessary in order that the plaintiff may be said to do equity, a lack of clean hands, or similar matters .... in cases of this nature considerations that have led to the refusal of specific enforcement may lead also to the refusal of equitable damages. What is ordinarily regarded as giving rise to a sufficiently close connexion between the inequitable behaviour in question and the relief that is sought is determined by reference to the same principles that are applied when the right to specific performance or to an injunction is in question.'*

96. It follows from the authorities I have addressed in the earlier part of this judgment that, subject to the exception for falsehoods that are trivial or inconsequential, the production before

a court exercising an equitable jurisdiction of documentary evidence which is manufactured for the purposes of obtaining relief within that jurisdiction, or of testimony which is material and knowingly false will, of itself, debar the plaintiff from obtaining the relief claimed. The decisions in *Willis* and *Gonthier*, which I am satisfied represent the law in this jurisdiction, make it clear that this is so irrespective of whether the plaintiffs themselves falsified the documents, that it is so whether or not the plaintiffs believed that they had incurred the expenses purported to be evidenced by that documentation and that it is so irrespective of the fact that some of the damages claimed by the plaintiffs could be established independently of the false material.

97. In this case, the plaintiffs deployed in correspondence the transparently forged AXA document, an invoice from the second named plaintiff to the first which in no sense reflected any actual liability, and purported vouchers from QTF which were clearly forgeries. While they may not themselves have falsified these documents (except for the invoice from the second named plaintiff to the first) they did rely upon them in circumstances where they must have known that they were false (as the trial Judge found). The former feature of the case makes it less serious than *Gonthier*, but the fact that they actually produced the documents before the Court and relied upon them as part of their evidence makes it considerably more so.

98. Allen J. (to whom none of these authorities to which I have referred above were cited) rejected the defendant's contention that the use of the false documents precluded the plaintiffs from obtaining relief because the defendant's refusal to complete pre-dated, and had nothing to do with, the fake documents. However, in my view, he erred in so concluding. Where a party seeks equitable relief by reference to materially false evidence, the question is not whether the evidence was connected with the event alleged to generate the entitlement to that

relief, but whether it was used by the party to obtain relief based on that event. The reason equity precludes an applicant in these circumstances from obtaining *any* relief derives not from whether they might otherwise have had an entitlement to it (that is why it matters not if the evidence is adduced in order to broadly reflect the facts as they believe them) but because in the course of asserting that claim they have behaved unconscionably and in a manner that is at the same time morally reprehensible and undermining of the integrity of the administration of justice.

99. If it stood alone, I would not have believed the introduction into the proceedings of the *AXA* letter operated to prevent the plaintiffs from obtaining any of the relief they claimed. While the letter was both deployed in correspondence and discovered in an affidavit that misled as to its provenance, it was not actually deployed in the course of the trial. It established nothing of relevance to the actual issues in the case and, when viewed in that context, would reasonably have been viewed as representing an isolated error of judgment. This is particularly so given that it was never suggested that the plaintiffs had themselves been responsible for its production. The vouching documentation, however, is in a different category. These were relied upon in evidence to establish claims to which the plaintiffs had no entitlement. They informed the claim to damages. Some of them such as the concocted invoice from the second named plaintiff to the first for €6,209.40 in respect of 'planning services', and the purported voucher from *SK Windows* for €11,100, were invoked to sustain claims to losses which had never been incurred. Others were patent fabrications, the transparency of which exacerbates, not ameliorates, their invocation. The most serious of these was the use of the Q t f Ltd documents, described by the trial judge as "obviously home-made", to support the claims for €54,685 for the timber frame that was never delivered, and a further €3,453.83 for its claimed storage.

100. In overall terms there was a disturbing differential between what the plaintiffs claimed, and what they could actually prove, and this must have been apparent to them long before their case opened in the High Court yet they chose to persist with their claims. This was, to borrow the words of Andrew Smith J., misconduct by way of deception in the course of litigation directed to securing equitable relief. The fact of that misconduct together with its nature and extent in and of themselves disentitle the plaintiffs from claiming equitable damages. Given the trial judge's reference to Mr. Barron being '*exposed in a transparent attempt to advance a claim for which there was no conceivable justification',* he ought to have exercised his discretion against the grant of any relief.

101. By reason of this conclusion, it is unnecessary for me to express any view as to the implication of the trial Judge's separate finding that the performance of the contract between Mr. Rodgers and the plaintiffs was calculated to defraud the revenue and was illegal. It will be recalled that he said that this feature of the arrangements was quite independent of the contract between Ms. Egan and Mr. Heatley and that accordingly neither the making or the performance of the building contract tainted the site purchase contract, and that the dealing between Mr. Barron and Mr. Rodgers was not inequitable to Mr. Heatley. It will be noted, however, that in *Willis* the fact that payments had been made to third parties in a similar context was found relevant to the exercise of the Court's discretion in granting equitable relief, a proposition which arguably does not depend on whether the underlying agreement was tainted. Nor is it necessary to consider whether the actions of the plaintiffs in relying upon this documentation would have precluded them from making a claim in common law.

102. Insofar as the defendant's claim for damages is concerned this also fails: the losses alleged by him are predicated upon his succeeding in his claim that the contract was procured by misrepresentation.

Conclusion

103. The end point of this judgment is that the plaintiffs have failed to obtain relief consequent upon their contract with the defendant, and the defendant has failed to establish that he was entitled to rescind the contract for misrepresentation or to damages for such misrepresentation. The defendant also failed in the High Court in his action for assault, but the plaintiffs were found by the trial Judge to have misled the defendant in respect of the availability of Mr. Rodgers' insurance, and they were found to have behaved improperly in the advancing of a claim grounded on fabricated documents.

104. In these unusual circumstances it is my provisional view that the costs of the High Court proceedings should be left as directed by the trial Judge. Although this Order was made by him in a context in which he awarded damages *in lieu* to the first named plaintiff, it properly reflects the fact that that plaintiff succeeded in her claim that there was a binding and enforceable contract between the parties, and that the defendant both failed to justify his failure to complete that contract, failed to obtain damages for misrepresentation and failed in his action for assault. The Court notes, in particular, that in awarding the first named plaintiff only two thirds of the costs of two days and excluding the costs of complying with discovery, the trial Judge reflected his concerns in relation to the use of concocted documentation. Insofar as the costs of the appeal are concerned, neither party was entirely successful each succeeding and each failing on one of the two issues in the case – the misrepresentation claim and the claim

for damages. In this case, it is my provisional view that no order should be made in respect of the costs of the appeal.

105. It is open to either party to dispute this provisional view. If they do so dispute it, they should communicate that fact to the Court of Appeal Office by close of business on Wednesday December 16, in which event the Court will fix a time before the end of this term for oral argument on the issue of costs. In accordance with its established practice, if a party proposes to dispute the provisional view of the Court on a costs issue they will be liable for the costs of any consequential hearing if the Order for costs ultimately made is as originally proposed.

Haughton J. and Collins J. are in agreement with his judgment and the Order I propose.