Neutral citation no. 2[2005] IEHC 127

THE HIGH COURT

[Record No. 2001 18180P]

BETWEEN

PATRICK McDONAGH

PLAINTIFF

AND

KENNETH DENTON AND ANN DENTON

DEFENDANTS

Judgment of O'Sullivan J. delivered the 15th day of April, 2005

Introduction

1. By deed dated 28th August, 1981, the plaintiff purchased from the late Margaret L. Stewart a plot of ground (hereinafter "the disputed plot") situated behind the back gardens of Nos. 57-61 Cowper Road and those of Nos. 1-6 Fortfield Gardens in Rathmines, County Dublin. The disputed plot was accessed by a laneway from Fortfield Gardens and surrounded by a circulation laneway for the use of approximately ten garages giving onto these laneways.

2. The late Margaret L. Stewart died on 21st July, 1984 and her cousin James Stewart was appointed her personal representative.

3. By deed of 5th September, 1986, James Stewart conveyed to the defendants a property which I shall refer to as Fortfield House (which lies at the corner of Cowper Road and Fortfield Gardens).

4. Fortfield House was conveyed by assignment of a leasehold interest comprised in an indenture of lease dated 24th March, 1934. This lease comprised not only the dwelling house known as Fortfield House but a number of ground rents from properties adjoining it, and, the disputed plot.

5. The deed of 28th August, 1981 to the plaintiff carved the disputed plot out of the take comprised in the 1934 lease.

6. The deed of assignment to the defendants was registered at 10.10 a.m. on the 10th October, 1986 in the Registry of Deeds.

7. The plaintiff's deed was registered on 23rd October, 1987 in the Registry of Deeds.

8. In January, 2001 notices were sent by the Derelict Sites Section of Dublin Corporation to both the plaintiff and the defendants. The notices stated that there had been complaints about the disputed site saying that it was neglected, derelict, and in an unsightly condition and required the recipients to remove all rubbish, cut back and remove all overgrowth, fence and secure the site against illegal access and dumping and inform the Section of their future proposals for the site.

9. The notice to the plaintiff was addressed to his then previous home in Greystones, County Wicklow and he did not receive it until several months later.

10. Shortly after receipt of their notice, at the beginning of February, 2001, the defendants carried out substantial works at the disputed site which included removing trees, shrubs and soil, surrounding the site with a fence, and securing it with a padlocked gate.

11. The plaintiffs commenced these proceedings by plenary summons dated 12th December, 2001 seeking injunctions against the defendants, damages for trespass, and a declaration that the defendants are estopped by their conduct from asserting that the disputed plot is included in their deed.

Issues

12. *Prima facie* in the above circumstances by s. 5 of the Registration of Deeds Act, 1707, the plaintiff's deed "…shall be deemed and adjudged as fraudulent and void…" as against the defendants' prior registered deed.

13. The plaintiff submits, however, that s. 5 of the 1707 Act should not avail the defendants in the present case for a number of reasons, as follows:-

1. The defendants' deed did not contain the disputed plot because it had already been conveyed to the plaintiff;

2. The defendants did not agree to buy the disputed plot;

3. The court should treat the status quo ante as being the situation immediately before the defendants moved in to secure the disputed plot in February, 2001 and on that basis conclude that the defendants would never have been granted an injunction prohibiting the plaintiff's access to the plot if only by reason of laches;

4. The first named defendant is estopped by his conduct from asserting his prior registered deed against the plaintiff's.

Was the disputed plot included in the conveyance to the defendants?

14. Mr. Dwyer S.C. for the plaintiff submits that prior registration of a subsequent deed can do no more than secure priority: specifically, it cannot enlarge the interest conveyed by the deed so as, in this case, to include in it the disputed plot which had already been conveyed to the plaintiff.

15. There is no question but that the late Margaret L. Stewart intended to and did convey the disputed plot to the plaintiff. That being so, her personal representative simply did not have an interest in the disputed plot to convey to the defendants. Whatever was registered by the defendants it did not include an interest in the disputed plot for this reason.

16. Mr. O'Donnell S.C., counsel for the defendants, submits that this argument would defeat the entire purpose of the Act of 1707.

17. It is clear on the evidence that the disputed plot was the subject of an unambiguous agreement between the late Margaret L. Stewart and the defendants. It is equally clear that the disputed plot was conveyed in the plaintiff's deed of August, 1981 (there is a

collateral issue in relation to the transfer of the laneway access into it which is irrelevant to this point).

18. So far as the conveyance to the defendants is concerned, and subject to the next point which deals with the issue of whether the defendants actually agreed and intended to purchase the disputed plot and whether the late Mr. White of Adams Auctioneers actually agreed and intended to sell it to him, it is equally clear, in my view, that the conveyance to the defendants included the disputed plot.

19. That being the case, it seems to me that the plaintiff's deed is indeed captured by s. 5 of the Act of 1707 and must, as against the deed of the defendants, so far as this point goes, be deemed and adjudged as fraudulent and void.

Did the defendants agree to buy the disputed plot?

20. This submission is made against the background of evidence which shows a probability that the brochure advertising Fortfield House for sale by auction in 1986 referred to an area of land too small to include the area of the disputed plot and did not, it seems, make any reference to a plot separate from the immediate curtilage of Fortfield House itself; and the evidence in the case of the plaintiff's wife and her neighbour Catriona Warfield that they attended at a pre-auction viewing where they were given a brochure but where the auctioneer's representative made no mention of a small plot separate from the house curtilage.

21. Furthermore, requisitions on title and answers thereto, it is submitted, were consistent only with an intention to deal with the house and curtilage as excluding a separate plot. Replies indicating that there was no separate land were accepted on behalf of the defendants' solicitor, Mr. D'Arcy of Finbar J. Crowley and Co. solicitors. Moreover a search against the land on behalf of the purchasing defendants failed to reveal the fact that the plaintiff had applied for and been refused planning permission to build a house on the disputed plot shortly after they acquired it in 1981. This, it is submitted, shows that the mind of the defendants' agent was addressed only to Fortfield House and the immediate surrounds, and no separate search was made against the disputed plot. A further point made in this context is that when the plaintiff purchased the disputed plot in 1981 it became apparent to his lawyers, albeit subsequently, that the deed to the plaintiff did not include the access laneway which was held under a separate lease of 1932. This matter was cleared up and a separate conveyance provided. It is submitted that had the defendants truly intended to purchase the disputed plot their lawyers would, in turn, have discovered this defect and had it rectified. They did not do so because, the plaintiff argues, no one concerned with the later transaction was in fact intending to deal with the disputed plot.

22. In response, the first named defendant has given evidence that he did not attend the auction or indeed know about it at the time at all. He first sighted Fortfield House when he was passing it and noticed a sign advertising it for sale. He went immediately to the late Ben White of Adams Auctioneers and was shown over the house, the relatively small garden and was taken around via Fortfield Gardens and the laneway into the disputed plot. He said the late Mr. White was interested in architecture and discussed architectural aspects of the property with him and, in particular, how the site was squared off, and how it included the disputed plot and also a number of garages on the eastern side. Mr. White made no reference to a prior sale of the disputed plot. Mr. Denton said that the same day he went to Mr. White's office and paid a deposit. Some six weeks later he attended at the office of his solicitor, Mr. D'Arcy, who explained to him about the leasehold interest that he was buying by reference to the original map attached to the 1934 lease. This map did not show a dividing line between Fortfield House and the disputed plot, indicated only building lines (which were different to the actual boundaries of the houses actually built), and showed the area including the area of the disputed plot as a yellow square all contained within a red line bounding the take under that lease. The balance of the take was coloured green.

23. Evidence was given by Karl Hayes of Messrs. Gore & Grimes solicitors who was the individual partner in that firm who acted in the transaction conveying Fortfield House to the defendants. Mr. Hayes was not aware of the prior sale of the disputed plot to the plaintiff. This had been carried out by his partner, Louis Healy of the same firm who at the time dealt with Mr. O'Brien-Kenney acting for the plaintiff as purchasers.

24. Karl Hayes' evidence was unambiguous; his understanding and intention was that the conveyance to the defendants included the disputed plot. He was dealing with Mr. D'Arcy of Finbar J. Crowley solicitors acting for the defendants as purchasers and his view was that it was also Mr. D'Arcy's intention and understanding that he was purchasing an interest which included the disputed plot on behalf of the defendants. Neither of them had any inkling of a previous transaction affecting the disputed plot. A draft deed which he offered to Mr. D'Arcy included the disputed plot. He never actually saw the property himself. He attended the closing which was a "three-way closing" in that he was present for the vendor, Mr. D'Arcy was present for the purchaser, and Mr. David Anderson (as he then was) of Messrs. Gerard Scallan and O'Brien solicitors was present on behalf of Hill Samuel who were providing money to the defendants for the purchase of the property and who in fact registered the defendants' deed on 10th October of the same year.

25. Gerard D'Arcy, legal executive now retired, also gave evidence that at the time he was working with Messrs. Finbar J. Crowley solicitors, who were acting on behalf of the defendants, and that he was the individual who looked after the defendants' business. It was his understanding and intention, also, that the conveyance to the defendants included the disputed plot. He was not aware that it was a separate plot from the curtilage of Fortfield House and the reference to the map in the 1934 lease would not have alerted him to this fact. He was not aware of the deed of 1981 conveying the plot to the plaintiff. Nothing alerted him to the separate existence of the disputed plot and this explains why he was satisfied with replies to requisitions which did not alert him to a parcel of land that was separate from and independent of Fortfield House and its curtilage, and why no search was made against such an independent plot which would have revealed a prior planning application by the plaintiff. When he showed Mr. Denton the 1934 leasehold map and asked him if the house and plot shown thereon were included, Mr. Denton said they were.

26. My conclusion on this aspect of the case is that the defendants did indeed intend to purchase the disputed plot as part of Fortfield House, that this was the understanding reached between the late Mr. White of Adams Auctioneers and Mr. Denton and that this understanding was conveyed by these principals to their respective lawyers who also had a clear understanding to the same effect.

27. At the end of the plaintiff's case, Mr. O'Donnell S.C. asked me to non-suit the plaintiff. I refused and in giving my ruling indicated that the plaintiff had made out a prima facie case that the defendants had not intended to purchase the disputed plot. That *prima facie* case, was established, in my view, by reference to the apparent non-inclusion of the disputed plot in the brochure, some aspects of the replies to requisitions and the result of the searches, and the evidence of the plaintiff's wife and Catriona Warfield.

28. That was a *prima facie* case only, however, and in my opinion the evidence summarised above clearly establishes that the intentions of the defendants and the relevant lawyers was that the disputed plot was included in the sale to them.

The defendants query their title

29. Before moving on to consider the next of the four issues dealing with the status quo, I wish at this point to deal with a letter written on behalf of the defendants to Messrs. Gore & Grimes on 19th November, 1986. I turn to it specifically because it was relied

on in the submissions made at the conclusion of the plaintiff's case to suggest that the defendants must be treated as having had notice of the plaintiff's deed of 1981 at the time that they contracted to purchase the disputed plot and at the time that their deed was registered, namely on 10th August, 1986 and accordingly that they cannot rely on the prior registration of their deed.

30. The letter was written on 19th November, 1986 by Gerard D'Arcy on behalf of Finbarr J. Crowley and Co. to Messrs. Gore and Grimes. It refers to the sale of Fortfield House by James Stewart on behalf of Margaret Stewart, deceased, to Kenneth and Ann Denton and reads as follows:

> "Dear Sirs,
>
> With further reference to the above we are requested by our client to seek clarification from you with regard to the inclusion or otherwise of the plot of ground at the rear of Fortfield House.
>
> Apparently there is a small field at the rear of Fortfield House and although our clients understood that this plot was included in the sale to them, they are now not quite sure.
>
> As you are aware the Title Documents to the property are with Gerard Scallan and O'Brien and before putting our clients to the expense of taking same up on accountable receipt we would be obliged for any information you can give us."

31. The background to that letter was provided by Mr. Denton as follows. He said that shortly after he moved into Fortfield House, his next door neighbour, one Richard Evans, came round to welcome him to the area. Mr. Denton jokingly referred to the fact that he was Mr. Evans' landlord and then Mr. Evans made reference to the fact that he had heard a rumour that the plot at the rear had been sold beforehand.

32. Mr. Denton said that he immediately contacted Mr. D'Arcy because he thought that his title should be checked. Mr. D'Arcy in turn said that it was his practice within a day or two to act on these instructions and accordingly it is likely that the conversation between Richard Evans and Kenneth Denton occurred within a day or two prior to 19th November, 1986, the date of Mr. D'Arcy's letter.

33. The importance of these dates is that they exclude the possibility that Kenneth Denton became aware before the middle of November of any suspicion or question relating to his title to the disputed plot. This in turn rules out the suggestion made by the plaintiff that the Dentons were so aware and therefore must be fixed with knowledge of the plaintiff's conveyance at a time when they agreed to purchase Fortfield House or indeed at a time when their deed was registered, namely on 10th October, 1986.

34. In light of the evidence which I have summarised in the immediate foregoing, it is clear that there is no evidence to show that either of the defendants were aware of the plaintiff's prior purchase in circumstances which would have put them under an obligation to inform themselves further. Their deed was well registered before there was any suggestion made to Kenneth Denton suggesting a prior purchase of the disputed plot.

35. Mr. D'Arcy's letter of 19th November, 1986 was ultimately replied to in a letter from Karl Hayes of Messrs. Gore & Grimes, dated 14th July, 1987, and reads as follows:

> "Further to your letter of 19th November, 1986, concerning a Plot of Ground at the rear of Fortfield House, we are now in a position to confirm to you that this Plot is not included in the property purchased by your client. It was sold by Mrs. Stewart during her lifetime, in 1979, to a Mr. Patrick McDonagh."

36. At this point in my judgment I am dealing only with the suggestion made by the plaintiff that the defendants had notice of the plaintiff's prior purchase of the disputed plot. This reply and the defendants' response to it will fall to be considered at a later point when I am dealing with the issue of estoppel.

37. So far as I am now concerned, however, my view is that neither of the defendants had anything approaching notice of the plaintiff's prior purchase of the disputed plot before their own deed was registered on 10th October, 1986.

The status quo ante

38. In these proceedings the plaintiff seeks an injunction requiring the defendants to leave the disputed plot and restore it to its undisturbed condition (so far as possible).

39. The defendants have been in possession of the disputed plot since February, 2001. Their action at that time was taken in response to the notice sent to them by the Derelict Sites Section of Dublin Corporation. Mr. Denton, in response to a question as to what he would have done had the notice to the plaintiff been actually received by the plaintiff at that time, said that he would have taken legal advice. I have no doubt but that so would the plaintiff. I intend to treat this aspect of the case upon the basis that they would have received competent and proper advice which, in my opinion, would have included some temporary arrangement whereby the corporation would have been satisfied pending clarification of the conflicting legal claims of the parties. In this way the court would have come to deal with the issues now before it in these proceedings.

40. I agree with the submission of the plaintiff in this matter in relation to the status quo and take the reply indicated above of Mr. Kenneth Denton to show that he too would have approached the problem raised by the corporation's notice in a manner intended to get to the bottom of the legal conundrum facing the parties rather than to exercise a "might is right" policy. In the circumstances, however, I do not think that the action taken in February, 2001 in clearing the site and making it secure can fairly be described as a policy of "might is right" without further qualification. This qualification includes the fact that the defendants were not aware at the time that such a notice had been served by the corporation on the plaintiff (the plaintiff himself was not so aware for a considerable time); they were under threat that the corporation had compulsory acquisition powers unless there was an appropriate response and they had been made aware that there were complaints about the state of the disputed plot, which Mr. Denton in evidence accepted, saying that he was not surprised by the notice as the site had become very overgrown.

Injunction?

41. I now turn to consider, briefly, the evidence from both sides in relation to what they did or did not do in regard to their claimed ownership of the disputed plot over the period since each claimed to have acquired it.

Plaintiff's evidence

42. The plaintiff himself said that initially he agreed to purchase the disputed plot subject to planning permission. He applied for

planning permission for a house and when he was refused he decided to purchase it anyway. He decided to maintain the plot bearing in mind the interests of their neighbours. Mr. Louis Healy of Messrs. Gore & Grimes solicitors who had acted for the late Margaret L. Stewart in conveying the disputed plot to the plaintiff said that part of her reason for selling it was it had become semi-derelict and she could not afford to keep it maintained. That was a description of the disputed plot in 1979; this description was the subject of strong disagreement from Mr. Thomas Cosgrove who lived at all relevant times at No. 61 Cowper Road, which is beside Fortfield House, and whilst he would have agreed that the site was overgrown, he would not have agreed at all that it was semi-derelict. On the contrary, it was a popular green area containing shrubs, trees and birds and in his view, there never was a problem about dumping. A photograph was produced in court taken from the air in 1986 which shows a considerable amount of overgrown hedging and bushes and so on surrounding the disputed plot and Mr. Denton's evidence at one point was that one could have concealed a small herd of elephants in it.

43. Mr. McDonagh said that he visited the plot on average once every two months over the period but acknowledged that there would have been longer periods in between and it emerged that the plaintiff and his wife were living in Germany between 1989 and 1991 albeit that Mr. McDonagh returned for business purposes frequently during that period. Mr. McDonagh instanced a handful of occasions when he dealt with third parties who were attempting to exercise rights over the disputed plot. In 1981, a Mr. O'Connell was growing vegetables on it and Mr. McDonagh came to an agreement that Mr. O'Connell would leave after he had harvested his crops. Subsequently, in 1998, a Mr. Kelly was using the disputed plot for building materials and once again Mr. McDonagh exercised his claims to ownership so as to have Mr. Kelly bring an end to this activity. A third incident involved Judge Connellan who was carrying out work adjoining the laneway system and Mr. McDonagh considered that this work might be intruding on his legal interests. This matter was sorted out between them by Mr. O'Brien-Kenney who at the time was Mr. McDonagh's solicitor.

44. Apart from the foregoing specific instances, Mr. McDonagh gave evidence of visiting the site regularly, responding to complaints about dumping and rubbish, and on one occasion arranging for the removal of a skip from the laneway adjoining the disputed plot. He also gave evidence that he was aware that "things got done" by the immediate neighbours and he mentioned in this context, a Mr. Hurley as being particularly "proactive".

45. Mr. McDonagh and his wife, Angeline McDonagh, gave evidence that they used one of the garages adjoining the laneway for storing household goods and, in particular, bicycles that their children had outgrown. The area was particularly known to Angeline McDonagh because her parents had lived in No. 57 Cowper Road. Her father died in 1984 and her mother had been in a nursing home for four years before she died in 1992 but the house was kept until that year as it had been divided with some people still living upstairs. One of their children continued to live in the house in Cowper Road while the plaintiff and his wife lived in Germany between 1989 and 1991. She visited the site occasionally; she had no idea how often but because they owned it they always took an interest in the site. Nobody ever said to her that there was a problem about the condition of the inside of the disputed plot but only with dumping on the laneway outside. When there was dumping there, she and her husband arranged to have it cleared away.

46. Mr. McDonagh acknowledged that during the past few years he has been retired and he has been out of Dublin more than in previous years and that his involvement with the disputed plot has become somewhat less. He did say, however, that he had put notices up at the disputed plot saying "private property – no trespassing" and "no dumping". The latter was because there was a problem about dumping which he had himself, on occasion, to sort out.

47. He also insisted that there was a fence surrounding the disputed plot at all times since he acquired it in 1981 notwithstanding that the hedges may have become somewhat overgrown.

Defendant's evidence

48. Mr. Denton said that when he inspected the disputed plot with the late Mr. White there was no sign of any fence and certainly there were no signs. He said the hedge was very overgrown. In response to this specific point, Mr. McDonagh insisted that there was a fence but acknowledged that he could not say with certainty in relation to 1986 whether or not there were signs there.

49. Mr. Denton said that he visited the plot frequently often with his children, occasionally with his wife and sometimes without her. The dumping was not an acute problem but there were empty cider cans and drinking bottles which he would clear up and dispose of. On one occasion there was a skip there and he arranged for its removal by contacting the company - named Access Waste – whose telephone number was on the side of the skip. He said that between 1986 and 1996 he did not carry out any work and he did not know the plaintiff during this period. In fact neither the plaintiff nor the first defendant knew each other until the court proceedings. Mr. Denton said that occasionally neighbours would cut branches which were obstructing the laneway especially in the north west and north east corners. They often added their own waste to waste for collection.

50. The foregoing is a summary of the evidence in relation to the physical acts of ownership done by the parties.

Laches, acquiescence and injunction

51. Mr. Dwyer S.C. submitted, on behalf of the plaintiff, that once it was accepted by the court that the *status quo ante* is the situation as it existed immediately before the defendants took over the site in February, 2001 it becomes apparent that no court would have granted the defendant an injunction permanently to remove the plaintiff from the site, if only by reason of laches.

52. This submission was not elaborated to any extent nor was it responded to by Mr. O'Donnell S.C. in any great detail.

53. I will therefore consider the submission on the basis of first principles and in the light of the findings reached in the immediately preceding portion of this judgment.

54. Whilst it may be remarkable, the evidence is that neither the plaintiff nor the defendants knew each other or of each other until they appeared in court. Mr. Denton accepted that he did no work at the site in the ten years from 1986 to 1996; Mr. McDonagh did some work but it is clear that the site was permitted to continue in such an overgrown state that it attracted the attentions of the Derelict Sites Section of Dublin Corporation. Clearly any amount of work done at the site was minimal. My impression is that perhaps more work was done on the laneway immediately surrounding the site than inside it although some work of the latter description by way of clearing dumped rubbish seems also to have occurred. Mr. McDonagh gave evidence that persons contacted him through his solicitor although he does not know how they were aware of his relationship with the site. He arranged to have notices put up but they did not disclose his identity or any contact information.

55. In these circumstances it is possible, no matter how surprising, that the parties did not in fact come to know each other or of each others existence until they met in court. Accordingly I propose to deal with the submission that no court would have granted the defendants a permanent injunction removing the plaintiff from the site given the situation and history as it existed in, say, January, 2001 upon the basis that the parties did not know each other or of each others existence.

56. In those circumstances it seems to me quite unlikely that a court would have refused the defendants an injunction merely on the grounds of laches, let alone acquiescence. If laches is a defence to an application for a permanent injunction at all in Irish Law (and there is doubt about this: see discussion in "Equity and the Law of Trusts in the Republic of Ireland" by Mr. Justice Ronan Keane (as he then was) at paras. 3.11 and 15.09), it seems that it will apply only if it can be shown that the applicant (in this case the defendants) for the injunction knew of the circumstances giving rise to his claim for an injunction against the respondent (in this case the plaintiff) for a considerable period before applying for relief, such that it would be inequitable to grant it.

57. The evidence would have shown that by letter of 14th July, 1987 Mr. Karl Hayes of Messrs. Gore & Grimes had confirmed that the disputed plot had been purchased by a Mr. Patrick McDonagh. This would not have established, however, that the defendants knew of Mr. Patrick McDonagh's activities in relation to the site any more than Mr. Patrick McDonagh knew of the defendants', albeit the latter were limited effectively to arranging the removal of a skip and frequent visits. The evidence would also have shown that the defendants' deed was registered prior to the registration of the plaintiff's deed.

58. In these circumstances I very much doubt that a court would have been satisfied to determine the issue conclusively between the parties on the basis of the defendants' alleged laches, let alone acquiescence. The court would also have learned of the correspondence between the solicitors acting for the parties in 1996 and in my view would have moved to consider that aspect of the case rather than simply dismiss the defendants' prior registered claim out of hand, so to speak, on the grounds of the defendants' laches. In the circumstances I too am not prepared to deal with this case on such a narrow basis and I intend, accordingly, to proceed to consider the correspondence which passed between the solicitors acting for the parties both in the years 1986/7 and in 1996 in the context of the submissions concerning estoppel by representation.

Estoppel by representation

59. I now turn to deal with issues arising out of correspondence, in the first instance, between the defendants' solicitor and the solicitor for the vendor to him and, in the second instance, between the plaintiff's solicitors and the defendants' solicitors.

60. The first piece of correspondence comprises Mr. D'Arcy's letter to Messrs. Gore & Grimes of 19th November, 1986 and the reply from Karl Hayes of the latter firm dated 14th July, 1987, already quoted above.

61. The first named defendant did not become aware of any suggestion that a third party had bought the disputed plot until his conversation with his neighbour, Richard Evans, which conversation occurred a few days at most before Gerard D'Arcy's letter of 19th November, 1986.

62. I turn now to consider this correspondence in the broader context of the plaintiff's submission that the first named defendant is estopped by his conduct from relying on his prior registered deed as against the plaintiffs.

63. The first named defendant's evidence was that the disputed plot was very important to him and that his price of £76,000 was calculated by reference not only to Fortfield House itself but also the disputed plot. There was no ambiguity about his agreement with the late Mr. White of Adams Auctioneers to the effect that the disputed plot was included and he only became aware of the possibility of a prior purchase and the need to have his title checked out days before Mr. D'Arcy's letter of 19th November, 1986.

64. Mr. D'Arcy in evidence said that he did not specifically remember his instructions from the defendants which gave rise to his letter of 19th November, 1986 but accepted that he would not have written it in the way he had (where he refers to seeking clarification and his clients' understanding that the plot had been included in the sale to them but that they were now not quite sure) if those instructions had expressed a high degree of concern or anxiety on the part of Mr. Denton. He said that he first became aware that the disputed plot was separate from Fortfield House and its curtilage at the time he wrote this letter in November, 1986. He also said that if Mr. Denton had been very concerned at the time he probably would have remembered it. He said that Mr. Denton did not get onto him again after the letter until it was eventually replied to on 14th July, 1987 and indeed this tallies with Mr. Denton's own evidence to like effect.

65. Mr. D'Arcy said that when he received the reply of 14th July, 1987, to the effect that the disputed plot was not included in Mr. Denton's purchase because it was sold by Mrs. Stewart during her lifetime in 1979 to a Mr. Patrick McDonagh, he simply forwarded a copy of that letter to Mr. Denton without taking any further step. He did not furnish advices to Mr. Denton and he did not hear from Mr. Denton subsequently. Sometime later he left Messrs. Finbar J. Crowley & Co. and had no further dealings with Mr. Denton.

66. Mr. Denton was asked why he did not respond in anyway to the letter indicating that he did not have title to the disputed plot and he said that he was under pressure from his business which was troublesome at the time and he had a lot of things happening which were much more pressing. He had young children to take to and from school and he was concerned with their sporting activities. He said he did not take it from this letter that Mr. McDonagh owned the plot. He was confused; he owned it and how could Mr. McDonagh own it. His troublesome business required a huge amount of attention at the time.

67. In fact, shortly after this, Mr. Denton gave up his business which was a printing business, in favour of dealing in property. In this latter context he attended lectures given by the institute of auctioneers and in particular he recalls lectures by Mr. Paul Goode which would have included some appreciation of the effect of the Registration of Deeds Act, 1707. Mr. Denton thinks that he would have become aware, initially, of this Act in 1996 or 1997.

68. In 1986, ten years earlier, he would not have had an appreciation of the effect of registering his deed and in fact did not become aware that the deed had been registered in October, 1986 until much later. Nor was Mr. D'Arcy made aware of it: the deed was registered by the solicitors acting for the company, Messrs. Hill Samuel, who advanced money to the defendants to buy Fortfield House.

69. This absence of factual and legal awareness on the part of the defendants may, indeed, explain the relatively casual instructions lying behind Mr. D'Arcy's letter of 19th November, 1986. Even granted that the acquisition of the disputed plot was very important to Mr. Denton, he was, at the time, dealing with what his neighbour Richard Evans described as a rumour that it had been sold before he bought it and this was confusing to Mr. Denton and he required an explanation. He had legal professionals acting for him and this might well explain the relatively casual instructions and the relatively casual attitude to the long delay before a reply was given.

70. What is more difficult to understand, however, is the complete failure of Mr. Denton to react to the unambiguous reply from Messrs. Gore & Grimes in their letter of 14th July, 1987. He says he was under pressure at work and busy with his family. It seems to be the case that his printing business was causing problems and he was becoming interested in property in South Africa, where he had visited first in 1992 and subsequently in 1998 when he bought a house there. Also he has become interested in investment property since around that time.

71. Despite taking all these considerations into account, I have to say I find it quite difficult to understand why a person, to whom the acquisition of the disputed plot was very important and who had received an unambiguous assertion from the solicitors who sold it to him that the sale did not include the plot because it had been sold in 1979 (later corrected to 1981) to a Mr. Patrick McDonagh, did not lift the phone to his legal advisors and start asking questions. The initial rumour communicated to him by his neighbour was sufficient in his mind to make an inquiry about his title. One can understand that he may not at that stage have experienced any great degree of anxiety. What I do not understand, however, is why this relatively relaxed attitude, if such it was, was not completely upended on receipt of the letter of 14th July, 1987 from Messrs. Gore and Grimes. If a rumour from the mouth of a neighbour merited investigation in November, 1986, a categorical confirmation from the vendor's solicitors in July, 1987 merited a much more concerned reaction rather than simply no response at all.

72. Whilst I accept that Mr. Denton may have been under considerable pressure from his business and as a parent, which may well have included financial pressure, I simply cannot understand how he can have been too busy and too preoccupied to raise the issue as a matter of priority with his legal advisors.

73. I note also, in this context, however, that none of this information would at the time have been communicated to the plaintiff or his lawyers, so that there is no question that the defendants by their silence, inactivity or apparent acceptance (if that is what it was) in July of 1987 amounted to a representation to the plaintiff for the purposes of the doctrine of estoppel. The plaintiff at the time simply knew nothing about all of this correspondence.

The later correspondence

74. It was different ten years later when Mr. Brian O'Brien-Kenney wrote a letter on behalf of the plaintiff to Mr. Douglas Heather of Lennon Heather & Co., solicitors then acting for the defendants. This letter confirmed an earlier telephone conversation. The correspondence which followed is important and therefore I will quote it. The letter of 3rd October, 1996 after giving the references reads as follows:

> "I refer to your telephone conversation this morning and would be grateful if you could let me have, as soon as possible please, a Certified Copy of the Deed of Assignment dated 5th September, 1986, James Stewart (as legal personal representative of Margaret Louise Stewart) to Kenneth Denton and Ann Denton; in particular please make sure that the map attached to the deed is fully completed, including colouring.
>
> He then confirms that he will discharge scrivenery fees."

75. On the same date Douglas Heather wrote to the first defendant seeking instructions as follows:

> "Brian Kenny, solicitor for Pat McDonagh contacted me in connection with (Fortfield House). He wants to obtain a copy of the Assignment whereby yourself and Ann purchased Fortfield House from the Stewarts in 1986. Apparently, his client Pat McDonagh purchased a plot of ground from the Stewarts prior to 1986 and, as the Deed was lost for some years, it was not registered until 1987. He is anxious to clarify that the lands sold to you by the Stewarts did not include the lands which his client had purchased back in 1980/81. If you are agreeable to me dealing with his query, I will need to get the original title documents to Fortfield House. I think initially it is best if you contact me and let me know what your views are in relation to this matter. I am sure that you are fully aware of Mr. McDonagh and I do not know whether you wish to assist him or not."

76. This letter was produced in court and Mr. Denton referred to a manuscript note on his copy which reads as follows:

> "7.10.96 Spoke to Sandra Kerns – asked if title could be checked."

77. Mr. Denton said that this reflected his response which was to have his own title checked. Just over a week later Mr. Brian O'Brien-Kenney wrote direct to Mr. Louis Healy of Messrs. Gore & Grimes on the same subject matter. His letter said:

> "I refer to our telephone conversation last Wednesday morning and note that you will kindly let me have a Certificate from your Firm to the effect that the premises comprised in the Deed of Assignment dated 5th September, 1986 between James Stewart, as legal personal representative of Margaret Louise Stewart deceased, and Kenneth Denton and Ann Denton did not include any portion of the property comprised in the Deed of Assignment dated 28th August, 1981, Margaret L. Stewart to Patrick McDonagh.
>
> I note that you will also let me have copies of the letter from Finbar Crowley, solicitor, and your reply dated 14th July, 1987 in relation to the said matter. If you could forward me the foregoing as soon as possible I would be much obliged."

78. On 17th October, 1996 Mr. Louis Healy replied to Mr. O'Brien-Kenney's letter of 11th October as follows:

> "With reference to the above matter, we hereby confirm that the property comprised in the Deed of Assignment dated the 5th day of September, 1986, between James Stewart as legal personal representative of Margaret Louise Stewart deceased and Kenneth Denton and Ann Denton did not include any portion of the property comprised in the Deed of Assignment dated 28th August, 1981, between Margaret Louise Stewart and Patrick McDonagh.
>
> As requested, we enclose herewith, for your attention, copy letter from Messrs. Crowley Miller & Co., solicitors, raising the initial query, dated 19th November, 1986, and our reply thereto dated 14th July, 1987. You will note in our reply, that we erroneously referred to the Deed of Assignment to Mr. McDonagh as being effected in 1979."

79. With that letter, presumably, were enclosed the letter from Gerard D'Arcy of Finbar J. Crowley & Co. to Gore & Grimes of 19th November, 1986 and a copy of the reply from Karl Hayes of Gore & Grimes dated 14th July, 1987.

80. Following this Brian O'Brien-Kenney wrote to Douglas Heather again on 21st October, 1996 saying that he no longer needed the Deed of 5th September, 1986;

> "…as I have now received from Gore & Grimes, solicitors, an appropriate Certificate which confirms the information which I had been seeking viz. that no part of the property which my client had previously purchased from Ms. Stewart, during her lifetime, was included in the sale by her legal personal representative to your client."

81. Finally there was a last letter from Brian O'Brien-Kenney to Douglas Heather dated 11th November, 1996 repeating his first request

from 3rd October, 1996 with emphasis on the map fully and correctly coloured in and confirming a discharge of the scrivenery fee.

82. I now turn to consider what was said in evidence by Mr. Heather and by Mr. O'Brien-Kenney and their respective clients about this correspondence.

Defendants' solicitor's evidence
83. Douglas Heather said he wrote to Kenneth Denton (I have already quoted this letter) and they had a conversation and in which he told Kenneth Denton that he had looked at the request and at his lease and asked him was the plot part of the demised area. He said that Mr. Denton said it was and that he advised that in those circumstances Mr. Denton had bought all of the lease. When asked for his advice, he said that he thought Mr. O'Brien-Kenney's approach was peculiar where he had not been given a copy of the deed under which Mr. McDonagh claimed title nor had he been given a copy of the Certificate from Messrs. Gore & Grimes. He advised Mr. Denton that from the documents in front of him Mr. Denton owned the plot of ground and he had no evidence that anyone else had title. He said he did not do a search in the Registry of Deeds and that it would not have benefited him because there are no maps in the Registry of Deeds. He had no recollection of being told by Mr. Denton of the letter from Messrs. Gore & Grimes of July, 1987. He did not think if he had, his advice would have changed, because he had a deed in front of him. If a portion of Mr. McDonagh's deed had been assigned and registered ahead of Mr. Denton's, he said that would mean the 1981 deed took precedence and that Mr. Denton would have an issue with the vendor of the land to him. He confirmed that his advice was given in ignorance of the existence of the letter of July, 1987. At the conclusion of his evidence he said to me that he assured Mr. Denton that he had purchased the property. He had no countermanding evidence, no document of a legal import, for example, a title document, to suggest otherwise and he thought that Mr. O'Brien-Kenney was "flying a kite" to use a term in his letter. It also transpired that he was not familiar with the letter of 14th July, 1987 from Messrs. Gore & Grimes and when he read it and considered it he indicated that it would be inappropriate for him to try and recount how he would have advised his client nine years before in light of the letter.

Plaintiff's solicitor's evidence
84. Mr. O'Brien-Kenney gave evidence in relation to this correspondence.

85. In the first place he pointed out that his letter asserted specifically that the site was not included in the sale to Mr. and Mrs. Denton and said he had put that information in the letter for a very good and specific reason, namely, that if Mr. Heather had any idea or suggestion that that was untrue that he must inevitably come back to him straight away with an objection. He described his letter as an invitation to a competent and experienced solicitor to indicate to him if he had any idea that he was making an incorrect statement in his letter. He said that, as an experienced conveyancing solicitor himself, if he received such a letter, he would be aghast if he thought that his client was the owner of the property in question; he would immediately send a copy to his client and ask him what they were going to do about it.

86. Later, however, he acknowledged that his letter was merely a request for a certified copy of a deed and not a request for anything else. He said that if there was no reply to his letter (asserting his client's title) that this non-response would be persuasive evidence for a purchaser's solicitor in regard to Mr. McDonagh's title. He accepted that a solicitor taking his clients instructions in these circumstances would be perfectly within his rights to ignore the letter and not to respond if his client had received advice that he held title to the property.

87. He was then asked why he again sought the deed from Messrs. Lennon Heather on 11th November, 1996 and said that he already had a copy of the memorial of that deed and that, notwithstanding his earlier letter saying he did not need the deed he felt it would be beneficial to have a copy of the deed because a purchaser's solicitor might well prefer to have a copy of the actual deed rather than merely a copy of the memorial of the deed. The purchaser's solicitor would have the letter (described by Mr. O'Brien-Kenney as a Certificate) from Messrs. Gore & Grimes saying the property was not included in the take plus the correspondence of 1986 and 1987 which he was advised was of tremendous relevance and he said that that, combined with the documents and letter to Messrs. Lennon and Heather, was, he was advised, very persuasive for a purchaser's solicitor.

88. When he was asked why, having cancelled his first request following the letter from Messrs. Gore & Grimes he reiterated it, he said:

> "Because I felt that if a copy was forthcoming, it would be beneficial in terms of providing it to a prospective purchaser's solicitor, in addition to the copy memorial of that deed, but when I got no further reply to that letter either, I said to myself, well, I have to work with what I have got."

89. Later he said:

> "It was not necessary to follow it through because the memorial of the Deed of Assignment to Mr. and Mrs. Denton contained, if you like, the critical words. I was only looking for a copy of the deed as a supplementary piece of evidence, but it was not crucial, and the solicitor acting for the prospective purchaser indicated to me that he was not concerned about the absence of a copy of the deed. That he was satisfied that a copy of the memorial of the deed of assignment to Mr. and Mrs. Denton was in itself perfectly adequate evidence."

90. He also, later, said that sending his letter to Douglas Heather, explaining that Messrs. Gore & Grimes had told him that the plot was not included in the sale to Mr. and Mrs. Denton, was in itself a very risky move because it was clearly inviting Mr. and Mrs. Denton to contradict immediately, "…which is what I would do if I were in their shoes." He acknowledged, however, that they were perfectly entitled to do what they did which was to ignore the assertion made in his letter. He further acknowledged that they never admitted to him through their solicitors or otherwise that Mr. McDonagh had title to this property. He also accepted that he never communicated to Mr. Denton or his solicitor the claim of title which Mr. McDonagh had over the property until November of 1996.

Plaintiff's evidence
91. The plaintiff said that in the latter half of the 1990's it became clear that people were interested in purchasing the disputed plot and he got his solicitors to check out the title and only then became aware that another title had been registered ahead of his. He himself gave no thought to the registration of his deed and he did not communicate with his solicitor regarding his title until 1996 nor did he do so with Messrs. Gore & Grimes and never with Messrs. Lennon Heather until 1996. He did not instruct his solicitors to communicate with the defendants or their solicitors prior to that time. He acknowledged that Messrs. Gore & Grimes communicated his claim to title to the defendants' solicitors in July of 1987.

92. He was not asked about how did he give any account of the advices he may or may not have received from Brian O'Brien-Kenney in relation to the correspondence between his solicitor and Mr. Heather in November, 1996.

Defendant's evidence
93. In relation to this correspondence, Mr. Denton said that he had previously instructed his solicitors to take up his title deeds when Messrs. Hill Samuel had decided to cease doing business in this country and a replacement loan was procured from the Bank of Scotland. When Mr. Heather wrote to him, he spoke to Sandra Kearns. He thought the disputed plot was part of his property but he felt the title should be checked. Mr. Heather confirmed that it was part of his property and that he had no need to be concerned and this reassured him. He did not want to engage in the expense of proving his title and his instructions were not to respond further to Mr. O'Brien-Kenney's request. He accepted that Douglas Heather's letter to him of 3rd October, 1996 called to mind the previous letter of July, 1987 from Messrs. Gore & Grimes when he was told he had not purchased the disputed plot. He felt anxiety when he got the letter and that he needed clarification and so he asked Sandra Kearns to have his title checked. The result was that Douglas Heather assured him that the plot formed part of his ownership. He did not know whether he told Mr. Heather of the July, 1987 letter. He had kept a copy of it. On getting Douglas Heather's advice, he saw no need to incur further fees. It was put to him that Mr. McDonagh was entitled to assume that he was not challenging his title when Mr. O'Brien-Kenney's assertion of it to his solicitor evoked no response. He said he was a layman not a legal professional and that he had bought the plot and house and understood clearly that he owned the plot despite the letter from Messrs. Gore & Grimes in July, 1987. He was satisfied on the advice of Douglas Heather that he owned the plot and that there was no need to respond to Mr. O'Brien-Kenney's correspondence.

94. He said he had kept the letter of 14th July, 1987 from Messrs. Gore & Grimes but was not sure whether he had told Douglas Heather about it at the time of Mr. O'Brien-Kenney's letter of November, 1996. Douglas Heather, had no recollection of hearing about that earlier letter and accepted that his advices were given without knowledge of it. The probability, in my opinion, is that Mr. Denton did not disclose the earlier letter of which he had kept a copy to Mr. Heather because the latter would surely have recalled and probably retained that copy had this happened. Mr. Denton simply was not sure on this point, which I find difficult to understand, given that he had kept a copy of the earlier letter and said at an earlier point in his evidence that he had an open relationship with his solicitor. My view of the evidence is that, for whatever reason, Mr. Denton did not furnish a copy of the earlier letter to Mr. Heather in 1996 or tell him about it. Accordingly the advices given to him by Mr. Heather were given in light of the most recent correspondence of 1996 only and without the benefit of the information contained in the earlier correspondence.

The respective positions of the parties' solicitors
95. This has significance for a number of reasons. Mr. Heather in evidence said that he thought that Mr. O'Brien-Kenney was "flying a kite" in his November, 1996 correspondence. That reaction is not difficult to understand when one remembers that the correspondence came to him out of the blue – that is, not in any particular context. Specifically it was not in the context of a discussion about a plot at the rear of Fortfield House – it merely sought a copy of the relevant deed of assignment with particular attention to be paid to the map. The next thing Mr. Heather knew was that the request was cancelled because of a "Certificate" from Messrs. Gore & Grimes confirming the information being sought, namely, that no part of the property which Mr. O'Brien-Kenney's clients had previously purchased was included in the sale to Mr. Heather's clients. This letter did not enclose the "Certificate" or a deed or make any specific reference to a title or the location or characteristics of the particular portion of the property which was causing concern to Mr. O'Brien-Kenney. Again, no context. The last thing that Mr. Heather would have known was the repeated request, despite prior cancellation, for a copy of the deed with particular attention to the map, but no further details were given so that, yet again, the request remained without any specific context other than that the respective clients of these two solicitors had purchased property from the same vendor. Side by side with this information Mr. Heather had before him the clear documents of title which were unambiguous and his client's instructions (which excluded reference to the correspondence a decade earlier) not to engage in unnecessary expense.

96. This picture would have looked very different, I think, if Mr. Heather had, at the time, been given a copy of the 1986/87 correspondence by his client. This would have revealed, first, that the piece of ground in question was a plot at the rear of Fortfield House, second, that in November, 1986 his client was "now not quite sure" whether he had bought it despite originally thinking that he had, third, that the solicitors for the vendor unambiguously asserted in July, 1987 that his client had not bought this plot because it had been sold to a Mr. Patrick McDonagh (the same purchaser referred to in the November, 1996 correspondence), and fourth, that this sale had occurred in 1979 (an error for 1981).

97. As a result of this information, Mr. Heather would have been aware that, from Mr. McDonagh's point of view, he had owned the plot for more than a decade and a half and that, so far from his solicitor's letter of November, 1996 being an exercise in kite flying, his claim was actually backed by the solicitors for the vendors and their attitude had been communicated to his (Mr. Heather's) client in July, 1987.

98. In this context the significance of the request for the map would have come into sharp focus together with the fact that he knew, as he said in evidence, that the memorial registered in the registry of deeds did not include a map.

99. Here, now, was a formal solicitor to solicitor request, the response to which might well have implications no matter what that response was, and indeed in my view, no matter how peculiar was the approach of Mr. O'Brien-Kenney. All this, of course, is hypothetical because Mr. Denton did not furnish Mr. Heather with the earlier correspondence.

100. Mr. O'Brien-Kenney's approach to Mr. Heather was, it is true, tentative rather than assertive. He merely requested a copy of the relevant deed with a properly coloured in map. He did not reveal the specific context in which this request was being made, and, in particular, did not indicate specifically the importance of a properly coloured map. When cancelling his initial request, whilst he gave as his reason the receipt of a Certificate from Messrs. Gore & Grimes, he did not specifically refer to a map attached to the Certificate or give any further explanation beyond saying that it confirmed that no part of the property purchased by his client had been sold to Mr. Heather's client.

101. The foregoing considerations must be tempered, at the least, by the fact that Mr. O'Brien-Kenney had received from Mr. Healy of Messrs. Gore & Grimes, by letter of 17th October, 1996, a copy of the 1986/1987 correspondence – correspondence which he was entitled to assume was also available to Mr. Heather because it comprised a query and response raised by Mr. Denton's then solicitors. It should also be remembered, of course, that Mr. O'Brien-Kenney must have been aware that the deed to the Dentons had been registered whereas the deed to his own client had not.

102. I have read and re-read my own notes and the professional transcript of the relevant portion of Mr. O'Brien-Kenney's evidence and I am satisfied that he relied on the fact that there was no response to his letter asserting the plaintiff's title indicating a disagreement with that view. There are internal tensions, not to say contradictions, in the evidence of Mr. O'Brien-Kenney – particularly in relation to whether Mr. Heather was or was not entitled to respond to the assertion of the plaintiff's title – but one thing is clear and it is that Mr. O'Brien-Kenney relied on the absence of a challenge to his assertion of the plaintiff's title in his letter of November, 1996 as part of his argument to convince the purchaser's solicitor of his client's title to the property. Another portion of this argument, which he regarded as "of tremendous relevance", was the correspondence of 1986 and 1987 between Finbar J.

Crowley and Co. and Messrs. Gore & Grimes solicitors.

103. Under cross-examination Mr. O'Brien-Kenney accepted that a solicitor receiving such a letter was perfectly within his rights not to reply to it but it is clear, notwithstanding, that, so far as he was concerned, the absence of a reply was significant.

104. Subsequently the plaintiff entered negotiations with one Mr. Cormac MacCartaigh and ultimately in September, 1999, agreed to sell the disputed plot to him. Mr. MacCartaigh has taken specific performance proceedings against the plaintiff which are fully defended but which I am told are in abeyance pending the outcome of this case.

Conclusion on representation

105. In my view, the fact that Mr. Heather did not reply to Mr. O'Brien-Kenney's assertion of the plaintiff's title in his letter of 21st October, 1996 amounted, in the circumstances, to a representation on behalf of the defendants that there was no disagreement with that assertion.

106. I have come to this conclusion because I think that letter must be seen in the context created by the correspondence of a decade beforehand between Messrs. Crowley and Gore & Grimes solicitors. The fact that Mr. Heather was not aware of such a context arose because his client did not furnish him with that earlier correspondence; if he had my view is that it would have been incumbent on Mr. Heather to have challenged Mr. O'Brien-Kenney's assertion of the plaintiff's title at that point in time.

107. It is obvious that, had such a challenge been made, the plaintiff would not have agreed to sell the disputed plot to Mr. MacCartaigh before the issue had been clarified. In my view, the plaintiff relied on the defendants' representation indicating that he was not challenging the plaintiff's title as an important element in establishing his own title to sell to Mr. MacCartaigh.

108. I have also had to consider whether it was necessary that Mr. Denton, either by himself or through his solicitor, should have become consciously aware that the plaintiff was proposing, in reliance on the representation made, to sell the disputed plot to Mr. MacCartaigh or anyone else. There is no evidence that the defendant or his solicitor were made so aware.

109. It seems, to me, common sense that where one solicitor formally raises with another the question of his client's title and subsequently asserts his client's title to that other solicitor, both must be aware that this is not simply an academic exercise but that it is being engaged in for the purpose of relying on that title for whatever reason.

110. This approach seems to accord with principle. In the thirteenth (2000) edition of Snell's equity at p. 640 the following appears:

> "Once it is shown that O gave assurances or other encouragement to A, and A suffers detriment, it will readily be inferred that the detriment was suffered as a result of the encouragement: the burden of proof is on O to show that A's conduct was not induced by the assurances."

111. This proposition is supported by a number of authorities the primary one of which is *Greasley v. Cooke* (Court of Appeal) [1980] 1 W.L.R. 1306.

112. In that case Lord Denning M.R. said at p. 1311:

> "The first point is on the burden of proof. Mr. Weeks referred us to…*Brikom Investments Limited v. Carr* [1979] Q.B. 467, 482 – 483 where I said that, when a person makes a representation intending that another should act on it:
>
> It is no answer for the maker to say: 'You would have gone on with the transaction anyway'. That must be mere speculation. No one can be sure what he would, or would not, have done in a hypothetical state of affairs which never took place….Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced.
>
> So here. These statements to Ms. Cooke were calculated to influence her so as to put her mind at rest, so that she should not worry about being turned out. No one can say what she would have done if Kenneth and Hedley had not made those statements…"

113. A little later, dealing with detriment, he said:

> "It so happens that in many of these cases of proprietary estoppel there has been expenditure of money. But that is not a necessary element. I see that in Snell' on Equity, 27th Ed. (1973), p. 565, it is said:
>
> > "A' must have incurred expenditure or otherwise have prejudiced himself.'
>
> But I do not think that is necessary. It is sufficient if the party, to whom the assurance is given, acts on the faith of it, in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it: see *Moorgate Mercantile Company Limited v. Twitchings* [1976] 1 Q.B. 225 and *Crabb v. Arun District Council* [1976] 1 Ch. 179, 188."

Detriment

114. This aspect of the case can be dealt with under two headings, namely works on site and the contract with Mr. MacCartaigh.

115. Mr. O'Donnell has submitted that the works carried out by the plaintiff at the disputed plot were so low level as not to amount to detriment in the law of estoppel. I have summarised those works in the foregoing and it is my distinct impression that the condition of the site remained more or less the same between August, 1981 when the plaintiff acquired his title and February, 2001 when the defendants moved in to clear and secure the plot. The plaintiff did carry out individual acts of ownership and maintenance, one of them being in 1998 (that is after the representation comprised in the November, 1996 correspondence) involving a Mr. Kelly who was using the disputed plot for storing building materials. I am not aware, however, what all this cost the plaintiff; it cannot have been very substantial. On this aspect of detriment I agree with Mr. O'Donnell that such works of maintenance and expenditure of outlay on the disputed plot as followed November, 1996 (when the defendants' representation was made) were no different in character than those which preceded the representation made at that time and would not have amounted to detriment for the purposes of the doctrine of estoppel, even if it could be shown – which I do not think it has been – that they were carried out in reliance on that representation.

116. As I understood the plaintiff's case this aspect of detriment was gently cast aside, if not abandoned, following my ruling on the defendants' application for a non- suit.

117. The second aspect of detriment, namely the plaintiff's contract to sell the disputed plot to Mr. MacCartaigh, is however, unambiguously relied upon by the plaintiff. In response, Mr. O'Donnell submits that, because in his defence to Mr. MacCartaigh's specific performance proceedings the plaintiff denies the existence of the contract, he cannot assert its existence in the present case in the context of detriment. Moreover he has pleaded loss of opportunity to market and sell the disputed plot by reason of the defendants' assertion of title but there is no evidence, submits Mr. O'Donnell, that the plaintiff went to the market or attempted to sell the plot at all.

118. In my opinion, however, being involved as a defendant in specific performance proceedings is in itself a substantial detriment. I do not know what the outcome of those proceedings will be and probably the less I say about them the better. Apart from the consumption of time, the worry of litigation, the exposure to a claim for damages and the payment or exposure to payment of lawyers there is the uncertainty of outcome and the on-going delay in having the plaintiff's title to the disputed plot – such as it is – clarified as between him and Mr. MacCartaigh.

119. Neither do I accept the point that simply because the plaintiff has asserted in his defence that no agreement exists between himself and Mr. MacCartaigh that he is thereby disentitled to rely on the agreement and on those proceedings as constituting detriment in the present case. Denials and assertions in pleadings are there for a particular purpose namely to identify issues and clarify to one's opponent what is required to be proved. They are not evidence of what is asserted or denied and indicate no more than the stance being adopted by the plaintiff in defending the specific performance proceedings.

The law

120. The following extract from the judgment of Blayney J. in *Haughan v. Rutledge* [1988] I.R. 295, at p. 300 sets out the broad principles of the relevant law in a convenient form:-

> "I was referred to Snell's Equity (28th Edition 1982) at p. 559 where the four conditions which need to be satisfied for such an estoppel (i.e. proprietary estoppel) to arise are set out…
>
> These four conditions are as follows:-
>
> 1. Detriment.
>
>> 'There is no doubt that for proprietary estoppel to arise the person claiming must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment.'
>
> 2. Expectation or Belief.
>
>> 'A must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest.'
>
> 3. Encouragement.
>
>> 'A's belief must have been encouraged by 'O' or his agent or predecessor in title.'
>
> 4. No bar to the equity.
>
>> 'No equity will arise if to enforce the right the claim would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty.'

121. In my opinion, it is a correct statement of the law that if these four conditions are satisfied then an equity will arise which can be enforced against the owner of the land, and this was not disputed by counsel for the defendant."

122. I have already indicated that the plaintiff has prejudiced himself or acted to his detriment in the sense indicated in contracting to sell the disputed plot to Mr. MacCartaigh thereby exposing himself to specific performance proceedings.

123. It is also clear that the plaintiff in agreeing to sell the disputed plot to Mr. MacCartaigh acted in the belief that he already owned a clear and transferable interest in the property namely by reason of the conveyance to him in August, 1981.

124. He was, further, in my view encouraged in the foregoing belief by the silence of the defendants' solicitor when confronted with an assertion of the plaintiff's title in his solicitor's letter of November, 1996.

125. Fourthly, it has not been suggested that there is a bar to the equity and in those circumstances an equity arises in this case which can be enforced by the plaintiff against the defendants.

Satisfaction of the equity

126. Because, in my view, it would be unjust and inequitable if the defendants were able to assert their prior registered title to the disputed plot as against the plaintiff, there should be appropriate orders restraining the defendants from interfering with the plaintiff's beneficial ownership, occupation, possession and enjoyment of the disputed plot and, I think, an order directing the defendants to surrender the relevant keys to the plaintiff.

127. On the other hand, the defendants have carried out works to the disputed plot which, despite the criticism made in relation to them by the plaintiff during the trial, were to the advantage of the owner of the plot. The corporation has done nothing and is apparently satisfied with the response to its derelict site notices and the plot has been cleared and fenced and secured. Mr. Denton gave evidence that he engaged a Mr. Nally to carry out work in February, 2001 and that this cost him £7,550. He is entitled in principle to be repaid this sum.

128. I will discuss with counsel the terms of the orders that should be made.