THE HIGH COURT

[2007 5264 P.]

BETWEEN

ROBERT TIGHE

PLAINTIFF

AND

P.J. CAREY

DEFENDANT

AND

WILLIAM HEVERIN

THIRD PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of June, 2017

1. By a memorandum of agreement in writing dated the 20th July, 2006, the defendant as vendor agreed to sell to the plaintiff as purchaser the property described in the particulars as follows:

> "ALL THAT AND THOSE that piece or plot of ground situate in the town land of Bangor, parish of Kilcommon Erris, Barony of Erris and County of Mayo comprising 0.992 hectares or thereabouts metric measure which said property is outlined with a red verge line on the map thereof annexed hereto and thereon marked with the letter 'C'…",

for the price of €290,000.

2. The sale was closed on the 25th October, 2006, and the consideration paid over. Shortly thereafter it became apparent that the defendant did not own a substantial part of the lands he had purported to sell to the plaintiff.

3. In fact, a strip of land on the eastern boundary of the site which the defendant had purported to sell was owned by the Office of Public Works ("OPW"), so that the lands ultimately acquired by the plaintiff amounted in area to 0.717 hectares representing a 27.7% reduction in what had been agreed to be sold.

4. The plaintiff's claim is for damages for breach of contract.

5. The plaintiff is a building contractor who was, during the economic boom period during which these events initially transpired, interested in acquiring development lands. The defendant is a publican and restaurateur who was also engaged in property development. The lands in question were part of a larger parcel of lands purchased by the defendant in or around 1990. The defendant acquired the property on foot of a conveyance of the 19th November, 1990, made between Eileen O'Rourke of the one part and the defendant of the other part. Ms. O'Rourke in turn had acquired the property on foot of an earlier conveyance of the 18th September, 1981, made between Sheelagh Mary Geraldine Hewat of the one part and Ms. O'Rourke of the other part. These two conveyances were among the title documents contained in the documents schedule to the contract of sale. Both had maps attached to them.

6. The evidence in the case establishes that the physical features of the site include a large land drain on the eastern side of the site running broadly from north to south. Some distance to the east of this land drain is a line of bushes or shrubs parallel to it. The lands acquired by the defendant from Ms. O'Rourke are delineated by the maps attached to the 1981 and 1990 conveyances which show as their eastern boundary the line of the land drain to which I have referred. However, the map attached to the contract for sale the subject matter of these proceedings shows the eastern boundary of the site as being broadly in line with the line of bushes further to the east. Both of the maps attached to the 1981 and 1990 conveyances are of a very small scale. In that regard, the evidence of the plaintiff's consulting engineer, Mr. Beale, which I accept, is that from a perusal of the 1981 and 1990 conveyance maps, it is very difficult to say what those maps include given their small scale.

7. The planning history of the site is of some relevance to these proceedings and in that regard, I will refer to the portion of the site to the east of the land drain as the OPW lands. In 2003, the defendant made a planning application to Mayo County Council for the development of three detached houses on the larger site he had acquired from Ms. O'Rourke. The application was made on the defendant's behalf by Messrs. John Irwin and Associates, who are described as auctioneers and design consultants. The site map submitted to the planning authority on behalf of the defendant by Irwin and Associates included the OPW lands. This application was refused. A second planning application was made in 2004 again by Messrs. Irwin and Associates on behalf of the defendant also for three detached dwelling houses with a modified design and this application was granted. The site map again included the OPW lands.

8. A third planning application was made by the defendant in respect of the lands in 2005 but this time, it was made on his behalf by the third party herein ("Mr. Heverin") who is an architectural technician. This application was again for three detached dwelling houses, the design having been modified from that in the earlier applications. The site map accompanying the 2005 application prepared by Mr. Heverin also included the OPW lands. It should be noted that at the commencement of the trial, the court was informed that the defendant's claim against Mr. Heverin had been compromised.

9. In the course of giving his evidence, the defendant was asked to explain how these discrepancies in the maps arose. The defendant was clear in his evidence that he was at all times aware of where the correct boundary of his property lay and the inclusion of the OPW lands in the planning maps submitted by Messrs. Irwin and Associates was an error on their part. He was unable to explain how Mr. Heverin had apparently made precisely the same error when he submitted the 2005 planning application. It is also of note that in the latter application, Mr. Heverin showed on the site map the land drain as being filled in and when the defendant was asked why Mr. Heverin had done so when the defendant did not own it, he was unable to explain. The defendant purported further in his evidence to suggest that he was unable to read maps.

10. The defendant also said in evidence that when he gave instructions to Mr. Murphy, the auctioneer from Remax, to act on his behalf in relation to the sale of the site, he made it clear to Mr. Murphy that the boundary was the drain. The defendant in evidence

struck me as an astute businessman very well versed in matters such as property development. He referred to his successful licenced premises and restaurant business and the fact that he had bought and sold a number of houses on a speculative basis over the years as well as developing the site in question.

11. I therefore have great difficulty in accepting his evidence that he is unable to read maps and I am perfectly satisfied that the reason that successive engineers acting on the defendant's behalf included the OPW lands both in the planning applications and on the contract map was because the defendant believed he owned them. That belief in turn appears to me likely to have stemmed from the fact that the physical boundary of the site was accepted by the defendant, as by the plaintiff in turn, as being represented by the row of bushes on the OPW lands and not by the land drain.

12. I therefore reject the defendant's evidence that when he gave instructions to Mr. Murphy to act on his behalf, he expressly told him that the drain represented the boundary of the site.

13. Mr. Murphy contacted the plaintiff in late 2005 to introduce him to the site and obviously Mr. Murphy knew the plaintiff to be a potentially interested party in development lands. The plaintiff met with Mr. Murphy on the site in or around November 2005, and walked the lands. The plaintiff's evidence was that the auctioneer had a map with him which he gave to the plaintiff which I accept. I further accept the plaintiff's evidence that as a result both of discussions with Mr. Murphy and obtaining the map, he was given the clear impression that the boundary of the site was the line of bushes on the eastern side.

14. Thereafter negotiations on the price ensued and a verbal agreement was reached by the plaintiff to purchase the site for €290,000 subject to obtaining planning permission for further dwelling houses. As noted above, the defendant had already obtained planning permission for three houses on the larger site. Two of these houses had been already constructed by the defendant on part of the larger site that was not being included in the sale to the plaintiff, the smaller site including the third house for which planning permission had been obtained but was not yet constructed. It was the plaintiff's intention to submit a new planning application for an additional three houses on the site he was acquiring so that he would ultimately construct and sell four houses on the site.

15. It was agreed between the parties that while the contract would contain a special condition making the sale subject to the plaintiff obtaining planning permission for the construction of four houses on the site, the plaintiff would make the planning application in advance of executing the contract. This is in fact what transpired and the plaintiff made a planning application submitted by Mr. Granaghan of MG Design and Build, Ballina to the planning authority on the 22nd March, 2006. A decision to grant planning permission for the three additional houses on the site was given on the 21st June, 2006. The map accompanying the planning application submitted by MG Design and Build included the OPW lands which the plaintiff at that stage believed he was acquiring.

16. On the 25th October, 2006, the sale was closed and the purchase money paid over. Thereafter the plaintiff commenced construction works on the site and it would appear that sometime in early 2007 as a result of a conversation with a neighbour, the plaintiff became aware that part of the site he thought he had acquired was in fact owned by the OPW.

17. The discovery of the discrepancy in the area of the site resulted in the plaintiff having to make a revised planning application in 2007. The plaintiff's 2006 planning application had shown two of the four new house sites on the eastern part of the lands with the houses themselves being constructed on or very close to the land drain and their back gardens extending as far as the line of bushes. Thus the rear gardens of these two houses took in the OPW lands and the site layout had to be revised substantially to pull the houses back from the line of the drain leaving them with much reduced back gardens. The revision of the contract map also resulted in the loss of a further small parcel of land in the south eastern corner of the site which presumably would ultimately have become part of another garden although not shown as such on the planning drawings.

Relevant Contract Terms

18. The contract for sale is in the standard Law Society of Ireland format which includes Special and General Conditions. I have already referred to the fact that the documents schedule in the contract referred to the 1981 and 1990 conveyances and it is common case that these and the attached maps were made available to the plaintiff prior to the execution of the contract.

19. Clause 2 of the Special Conditions provides in relation to the General Conditions that:

> "The said General Conditions shall:-
>
> > (a) Apply to the sale insofar as the same are not hereby altered or varied, and these Special Conditions shall prevail in case of any conflict between them and the General Conditions…"

20. Special Condition 3 provides as follows:

> "The purchasers warrant that they have inspected the property and are aware of the nature and condition of same and the boundaries thereto. No objection or requisition will be raised by the purchasers in relation to these matters."

21. General Condition 33 provides as follows:

> "Differences – Errors.
>
> > 33(a) In this condition 'error' includes any omission, non-disclosure, discrepancy, difference, inaccuracy, misstatement or misrepresentation made in the memorandum, the particulars or conditions of the Non Title Information Sheet or during the course of any representation, or response to negotiations leading to the sale, or whether in respect of measurements, quantities, descriptions or otherwise.
> >
> > (b) The purchaser shall be entitled to be compensated by the vendor for any loss suffered by the purchaser in his bargain relative to the sale as the result of an error made by or on behalf of the vendor provided however that no compensation shall be payable for a loss of trifling materiality unless attributable to recklessness or fraud on the part of the vendor nor in respect of any matter which the purchaser shall be deemed to have had notice under condition 16(a) [*which I am satisfied does not apply*] nor in relation to any error in the location or similar plan furnished for identification only…
> >
> > (c) Nothing in this memorandum, the particulars or the conditions shall:
> >
> > > (i) entitle the vendor to require the purchaser to accept property which differs substantially from the

property agreed to be sold whether in quantity, quality, tenure or otherwise, if the purchaser would be prejudiced materially by any such difference…"

Discussion

22. I am satisfied that the error which occurred in this case resulted in the property differing substantially from the property agreed to be sold. I am also satisfied that the loss of over a quarter of the area of the site could not be described as "of trifling materiality".

23. The defendant contends that General Condition 33 is overridden by Special Condition 3 to the effect that in the circumstances of this case, General Condition 33 does not apply. I cannot accept that submission. While the plaintiff warrants by Special Condition 3 that he has inspected the property and is aware of the boundaries, as I have already indicated I accept the plaintiff's evidence of what occurred at the inspection and nothing that arose during that inspection could have put him on notice that the property he was acquiring was different from that illustrated on the contract map. The warranty in Special Condition 3 clearly relates to a physical inspection of the property itself, referring as it does, *inter alia*, to the "nature and condition" of the property. Special Condition 3 is therefore not relevant to any examination of maps contained in earlier documents of title.

24. As previously indicated, I accept the evidence of Mr. Beale that the maps attached to the 1981 and 1990 conveyances were of such a small scale as to make it difficult, if not impossible, to determine with accuracy the boundaries of the property and it is notable that the defendant and his successive experts were apparently unable to determine those boundaries accurately at any time during his fifteen year tenure in the property. Reliance is placed by the defendant on correspondence dated the 31st March, 2006, from the defendant's solicitors to the plaintiff's solicitors stating, *inter alia:*

> "5. As you are aware identity is a matter for the purchaser and we do not feel that our client has an obligation to provide a declaration of identity and considering that your client probably has his own engineer it is easy for him to retain his services to ensure that the map already provided accurately identifies the boundaries to the property. However, we are taking our client's instructions in relation to this matter and will revert to you in due course…"

25. This letter is headed "Subject to Contract/Contract Denied". I cannot accept the proposition that this letter somehow modifies or qualifies the clear terms of the contract subsequently entered into by the parties which speak for themselves. Furthermore reliance was placed by the defendant on correspondence and attendances rather bizarrely discovered without a claim of privilege by the plaintiff's solicitor in relation to advices she gave to the plaintiff.

26. Quite apart altogether from the fact that these documents should almost certainly have been discovered subject to a claim of privilege and thus not have been accessible to the defendant, I cannot see how any advice that may or may not have been given to the plaintiff by his own solicitor can impinge upon the clear contractual obligations of the defendant.

27. It seems to me that the fact of the matter is that the defendant contracted to sell a particular site for a particular price to the plaintiff, and the plaintiff having paid that price instead of getting what he was contractually entitled to obtained title to a substantially smaller site.

28. In his submissions, the defendant appears to rely on the doctrine of common mistake and a number of authorities which suggest that a contract for sale may be rectified in the presence of such mistake. This submission is to my mind misconceived. There was no common mistake here. On the contrary, the mistake was unilateral on the part of the defendant. The mistake was that he thought he owned something which he did not. The plaintiff was not in any sense mistaken as to what he was buying and that was reflected accurately in the contract. The doctrine of mutual mistake does not therefore arise but in any event, the submission is somewhat surprising in circumstances where the defence and counterclaim of the defendant, as it is described, in fact contains no counterclaim for relief.

Damages

29. In his statement of claim, the plaintiff set out particulars of special damage under five different headings. The first, and largest, was the loss of profit on the houses due to diminution of the site areas. This was stated to be €68,000. The cost of an additional planning application was also claimed although unascertained. The other three items comprised the overpayment of stamp duty, engineering expenses and additional groundworks expenses bringing the claim to over €91,000 without the planning expenses. The defendant sought and was provided with particulars of these claims.

30. In support of the diminution in value claim, a report from property consultants Fox & Gallagher was provided which is a little difficult to follow but appears to suggest that the loss could be estimated on two different bases, first the reduction in the value of the individual houses as a result of the loss of garden size and secondly, on the alternative basis of a pro-rata reduction in the purchase price by reference to the reduced area.

31. The sum of €68,000 claimed in the statement of claim was computed by the reference to the loss of the size of the gardens in all four houses, three representing a loss of €16,000 and the fourth €20,000 or €68,000 in total. The alternative basis was advanced as being 36% of the purchase price or €104,000. Although evidence was never given by the author of this report, it is in any event clearly erroneous in its approach. The evidence clearly established that only two of the houses had gardens that were affected by the reduction in site area which was not 36% but rather 27.7%.

32. On the morning of the trial, some ten years after the commencement of these proceedings, the plaintiff advanced for the first time an entirely new claim for damages based on a pure calculation of pro-rata loss of site value amounting to a little over €86,000 together with interest on borrowings to fund the site purchase, again on a pro-rata basis, amounting to something over €37,000 being in total just over €124,000. This latter claim for interest was abandoned by the plaintiff after objection was taken to this entirely new claim with considerable justification by the defendant. However, I allowed the matter to proceed on the basis that the amount being claimed was now slightly less than the original claim. In addition, the pro-rata element had at least been signalled as a possible alternative in the original replies to particulars.

33. The plaintiff's evidence of loss was given by Mr. Paul Goode, a chartered valuation surveyor and property consultant. Although Mr. Goode had originally been instructed some two years prior to the commencement of the trial, it would appear that the report he presented to the court was prepared a few days in advance of the hearing.

34. Unlike Messrs. Fox and Gallagher, Mr. Goode's approach to the assessment of the loss was simply to take the price of the site plus ancillary costs and divide it pro-rata based on the diminution in the site area. His calculation was based on the site cost of €290,000 and the cost of acquisition which was €24,500 amounting to €314,500 in total. Applying the area reduction of 27.7% of this figure, this equated to a loss of €87,185. To this should be added planning and ancillary costs, interest and damages.

35. Mr. Goode was challenged on this evidence and the methodology he adopted of basing value purely on area. When pressed on this he indicated that the available planning density depended on the size of the property but had to concede that the reduced size still resulted in four houses which was the original number contemplated in any event. He also agreed that the plaintiff had been unable to sell any of the houses since their construction as a result of the property crash.

36. It seems to me that the approach adopted to valuing the plaintiff's loss in this case by Mr. Goode cannot be the correct one.

37. The evidence in this case establishes clearly that the consequence of the defendant's breach of contract is that the plaintiff has ended up with two houses of the same size and quality albeit with somewhat smaller gardens than they ought to have had. It seems to me therefore that the true measure of the plaintiff's loss in this case is the reduction in the value of the two houses in question as a result them having smaller gardens. That appears to have been the approach originally adopted by the plaintiff but not pursued at trial for whatever reason.

38. I must also take into account the fact that a third portion of ground, being roughly a triangle in the south-eastern corner of the site has been lost to the plaintiff which would most likely have become part of a third house, albeit with a somewhat lesser impact than on the other two houses.

39. The defendant has sought to argue that the plaintiff has in reality suffered no loss. Because of the collapse in the property market, the plaintiff has completed only one house which is now rented and substantially completed a second. Works have commenced on a third house but have not progressed beyond the construction of a raft foundation. The defendant therefore argues that there is in reality no loss accruing to the plaintiff.

40. I cannot accept that proposition. Furthermore it is not supported by any evidence since the defendant called none on this issue. As the defendant himself submits, damages for breach of contract fall to be assessed as of the date of the breach. In this case, the breach occurred at the closing of the sale when the defendant failed to convey to the plaintiff the property he had contracted to convey. It seems to me therefore that damages fall to be assessed as of October 2006, a date well in advance of the property collapse relied upon by the defendant.

41. Evidence was given by Mr. Mulchrone, a solicitor in Lyons Gilvarry and Company who represented the plaintiff, that the total cost of the transaction from the plaintiff's point of view to include stamp duty, fees and outlays amounted to €29,608.08. In the context of this figure, it seems to me that Mr. Goode's approach is probably valid so applying the percentage of 27.7 to that figure gives a loss of €8,201. It should be noted that the plaintiff also incurred the cost of the additional planning application in 2007, although that has not been quantified.

42. In terms of sites number 1 and 2, it appears to me that on a rough calculation, each of these sites has lost something in the region of a quarter of an acre of garden, a not insignificant amount. In the case of the triangular portion of lands, the area is probably a little less. In attempting to assess the value of these lost portions of garden based on all the evidence, I must also have regard to the fact that there would have been an expense associated with culverting the drain either so that it could be built over or form part of a landscaped garden.

43. Doing the best I can in all the circumstances, I propose to assess the plaintiff's loss in the sum of €10,000 for each of the sites 1 and 2 and €5,000 for the third plot.

44. This amounts to a total loss of €25,000 to which the sum of €8,201 should be added giving a final total of €33,201. There will be judgment for that amount accordingly.