

THE HIGH COURT

[2005 No. 1319 P]

BETWEEN

JOSEPH PATTON
AND
BREEGE PATTON

APPLICANT

AND
COSTELLO CONSTRUCTION LIMITED

RESPONDENT

Judgment of Mr. Justice T. C. Smyth delivered on the 29th day of November, 2007

1. The plaintiff's action, it is agreed, is against the second defendant, the company. Liability was conceded at the commencement of the hearing that the building works carried out by the company on its building adjoining that of the plaintiff's caused damage to them. The plaintiffs and, in particular, Mr. Patton carried on the business of a publican in premises known as "Jack Humphrey's". The property is situated at the intersection known as the Five Lamps, where Amiens Street, North Strand Road, Portland Row and Saville Place converge. The premises are sometimes referred to as numbers 5 and 6 North Strand. They are aged approximately 150-years-old. Mr. Patton has considerable experience as a publican and has carried on that business with a variety of success. It is not disputed that Mr. Patton had a successful business in "Jack Humphrey's".

2. When his neighbour Mr. Costello proceeded to carry out building works on numbers 1 to 4 North Strand, cordial and neighbourly relations existed. Mr. Patton's position was one of cooperation, even though when works got underway various misadventures occurred, e.g. a spill in the handling of cement and debris from containers transported by crane; also the strapping of the roof of his premises. In the course of the defendant's excavations below ground level and while building progressed, cracks appeared in the walls of the plaintiff's premises. These were sufficiently significant to cause an off duty officer from the Dublin City Council, who was on the premises for personal and social reasons, to bring the matter to the attention of the plaintiffs and to warn them of the damages and possible legal liabilities of permitting the public to have access to dangerous premises. Shortly thereafter, the plaintiffs closed off part of the premises with a stated loss of business.

3. During the defendant's works they sought, by the agreement of the plaintiffs, to shore up the basement level dividing wall. However, in doing so they appear to have encroached on the plaintiff's premises, and Mr. Patton was displeased with this, not unnaturally, and saw it as 'advantage taking'.

4. At one stage during the course of the development of the block of flats or apartments on sites 1 to 4, Mr. Costello inquired if the plaintiffs might consider development of "Jack Humphrey's". The plaintiffs made enquiries, and having paid architects the sum of 12,000, they decided not to proceed with the idea.

5. Over the period of the buildings works on the company's property between 2003 and 2005 in particular, the plaintiff's business was adversely affected by *inter alia* the construction works next door and the subsequent damage to the fabric of the plaintiff's building. Sections of the premises were closed off and a loss of custom and income resulted.

6. In or about November 2004, the plaintiffs, with the benefit of Mr. Molloy (a former official of the Dublin City Council Dangerous Building Section) a qualified civil engineer of 20 years in private practice, sought permission for mixed use development on 5/6 North Strand. This application was made under certain time constraints because of the deadline on a certain statutory benefits, failed because the "living over the shop" content did not accord with the criteria of the planning authority.

7. A number of reports were prepared recording the state of the premises of the plaintiff's at various stages, and I am much indebted to both Mr. Molloy and Mr. Tennyson, Mr. Molloy in particular, for the several and detailed reports, though Mr. Tennyson's in the singular, received from them. However, the reports indicated a constant deterioration of the premises. The reports are detailed and there are differences on the telltale records. In early 2005, Mr. Molloy met with Mr. Tennyson, the defendant's engineer. There was a marked difference between the engineers as to how the damage caused to the plaintiff's premises should be addressed. Mr. Molloy, in effect, considered the position was so grave that a full reconstruction of "Jack Humphrey's" should be undertaken, which would have amounted to money in the order of one and a half million euros, or thereabouts. Furthermore, he was so concerned that the wall movements gave rise to an increased risk of collapse of number 5, and he expressed himself in a letter to Mr. Patton thus, and I quote:

"It is my opinion that you should take immediate steps to ensure the safety of your customers, your staff and other persons in the vicinity of number 5. Consideration must be given to vacating number 5 and perhaps number 6. You must take legal advice on the consequences of such action."

8. A plenary summons issued on 11th April 2005, a statement of claim was delivered on 2nd June 2005. The entire premises were closed on or about 30th September 2006 and the defence was filed on 16th November 2006. The plaintiff said in evidence that he was awaiting the outcome of a trial which he had hoped would be expeditious. Unfortunately this did not come about, through no fault of the parties.

9. The main point of contention between the parties was whether the damages (in respect of the buildings) was to be on a reinstatement cost basis or on a cost of repair basis (i.e., diminution in value).

10. In evidence Mr. Patton, who is aged 61, expressed a preference for continuing to operate as a publican but he would not give an unequivocal answer as to his future intentions. In January 2006, the applicant Mr. Patton sought and obtained for this 150-year-old building, planning permission, and he was granted same on 14th April 2006, (planning reference P 1956) for:

"The construction of a new four storey over basement, which includes a public house, off-licence, betting office, and 11 apartments."

11. The number of conditions attaching to the planning permission are unnecessary to recite in the course of this judgment.

12. Basically the plaintiff's case was that the gable wall of his premises needs to be completely taken down and rebuilt, as per Mr. Molloy's report. That cannot be done without bringing in heavy machinery required to excavate four to five metres through foundation

level to enable construction of a new foundation. Access for such machinery will require such dismantling of the premises as to render economic repair and rebuilding of the wall, while retaining the remainder of the premises, impossible. Thus proper reinstatement, according to Mr. Molloy, will require effective demolition of the entire premises and rebuilding of same from scratch, i.e. demolition and clearance of the entire site, followed by the construction of new foundations and the rebuilding of the entire premises.

13. It is inconceivable that in the light of extant planning permission, with the variety of possibilities it affords, that it would not be taken into account and as a matter of probability followed rather than the restoration as is before the litigation began.

14. The plaintiff's reinstatement claim thus requires nothing less than a complete demolition and removal of "Jack Humphrey's" and the rebuilding of same. The Molloy Specification of Works and the Carroll Costing is for a complete demolition and replacement of the old premises with a brand new building, albeit designed exactly according to the old building with nothing added, and this would cost 1.8 million.

15. The Supreme Court in *Munnelly v. Calcon Ltd.*, [1978] I.R. at page 387, is the leading case which this Court must follow. In the course of his judgment at page 399, Henchy J. stated as follows:

"In my view, the particular measure of damages allowed should be objectively chosen by the Court as being that which is best calculated in all the circumstances of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as a pecuniary award can do so."

16. Further in the judgment, Henchy J. citing a passage from the judgment of May J. in *Taylor v. Hepworths*, (recorded in McGregor on Damages) stated:

"The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property."

17. In this regard I refer particularly to what I have already stated in the judgment about the failure to obtain an unequivocal answer from the plaintiff in this regard. Henchy J. further referring to the judgment of May, referred to that passage which is recorded at page 400 of the Irish Reports:

"The various decided cases on each side of the line to which my attention has been drawn, and to some of which I have referred to in this judgment, show in my opinion merely the application in them of two basic principles of law to the facts of those various cases.

These two basic principles are, first, that whenever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But secondly, the damages to be awarded are to be reasonable."

18. Henchy J. in considering the matter further, went on to state as follows:

"I accept those two principles as being basic to, although not necessarily exhaustive of the concept of *restitutio in integrum* on which the law of damages rests in cases such as this. It is in the application of those principles that difficulty may arise, for a court, in endeavouring to award a sum which will be both compensatory and reasonable, will be called on to give consideration with emphasis varying from case to case, to matters such as the nature of the property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act, and the pecuniary, economic or other relevant implication or consequences of reinstatement damages as compared with diminished value damages."

19. In my judgment, notwithstanding the considerable reports I have had from the engineers and also from the valuers, it seems to me that the following matters, by way of damages, are indisputable: Loss of profits, €127,000.

20. Insofar as the planning permissions are concerned, it seems reasonable and just that the plaintiffs should have the costs of the planning applications for which he looked for permission, in the first instance at the invitation of the plaintiff and thereafter, and in the two occasions to which I have referred in this judgment. These in total amount, on my calculations, to €67,000.

21. On the question of the reinstatement of the premises, the value of the premises has been put variously by Mr. Young and by the defendant's valuers at figures with a differential of approximately a half million euro between them. The various comparisons I found of interest, but notwithstanding its smaller size, the premises that seems most in point is that of the Strand House, which is immediately across the road from "Jack Humphrey's", and I note the evidence given in that regard. It seems to me that in the context of the overall position that the plaintiff now finds himself in, where repair is necessary, it becomes a decision as to whether it is repair damages or restoration in its full sense, according to Mr. Molloy.

22. In my judgment there is no warrant to follow the total restoration provided for by Mr. Molloy. On the other hand, I consider Mr. Tennyson's figure to be low. He estimated originally the cost at 45,000 plus 1,000 fees and 2,000 at supervision, being 48,000. On the other hand, there has been a dispute subsequent to Mr. Tennyson's evidence as to whether the moment in the premises is thermal or whether it, in fact, is grave than that, as suggested by Mr. Molloy. Thus the buttressing of his original calculations for the complete demolition and restoration. In my judgment, a further sum should be allowed to Mr. Tennyson's requirements on repair of another 45,000, that is making in all a figure of €93,000.

23. Even if the premises are repaired in accordance with Mr. Tennyson's requirements and the additional figure that I considered would be appropriate to add thereto, there remains the fact that the plaintiff is out of the premises, and while he has another way of livelihood in the meantime, it was one not chosen voluntarily but largely by forced circumstances. And it seems to me that there would be a time during which the repairs would be required to be carried out, and this could be extensive given the fact of the confined nature of the site, the fact that there are already struts on the premises, and it seems to me that a reasonable figure ought to be allowed and I allow a figure of €125,000 in that regard, making in all a figure of €412,000.

24. A question of interest was canvassed during the course of the hearing, but I was not satisfied in the evidence that this was solely and exclusively related to the events at "Jack Humphrey's". Other premises had been sold at a loss in City West and that and

other, possibly, integrated matters which were not broken down for me in the bank's calculations, lead me to believe that no allowance should be made in that regard. Accordingly, the figure to be allowed to the plaintiff is €412,000.