

## THE HIGH COURT

[2013 No. 3985 P]

BETWEEN

BARBARA HILL

PLAINTIFF

AND

PAMELA WALL FORMERLY PRACTISING UNDER THE STYLE AND TITLE OF PAMELA WALL SOLICITORS

DAVID WHELAN TRADING AS DAVID WHELAN CIVIL ENGINEER

SHANE O'CONNELL TRADING AS OCCE

DAVID MCINERNEY AND JASON GRIFFIN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 30th June, 2016.

## Part 1

## Overview

1. Ms Hill, a litigant-in-person, has both cause for grievance regarding, and the sympathy of the court for, the position in which she now finds herself. And still the court must find that, as a matter of law, Ms Hill has not been the victim of deceit (fraud) on the part of Mr McInerney and/or Mr Griffin, the sole remaining defendants in these proceedings.

## Part 2

## The Facts in Outline

2. In 2006, Ms Hill decided to purchase an apartment in Ennistymon. The apartment was one of three in a house that was renovated by two small-time property developers, Mr McInerney and Mr Griffin, then working under the name of MG Developments. The auctioneer's brochure for the development described the apartment of which Ms Hill is now the owner as follows:

*"2nd Floor Apartment*

*One bed top floor apartment with open plan kitchen/dining/living area. Bedroom with joint en suite/main bathroom. Stairs to attic room/storage room with second en suite."*

3. Ms Wall, a former defendant to the within-titled proceedings, was the solicitor engaged by Ms Hill to do the conveyancing of the apartment. As part of the conveyancing process, two civil engineers gave respectively an opinion and certificate concerning compliance of the apartment with certain aspects of the planning and building code. The court visits the conveyancing process in more detail below. But before doing so, it is helpful to proceed a little further with the chronology of relevant events. So, after buying the apartment, Ms Hill rented it out to a private tenant from April, 2007, to March, 2010. After that tenant left, Ms Hill decided to rent out the apartment to a local authority tenant. Before she could do so, the property had to be vetted by the fire authority. And now a problem arose. The fire authority found that the apartment had been constructed in breach of Fire Safety Certificate FA2005/088 (the fire safety certificate applicable to Ms Hill's apartment) and has directed that the stairs to the converted attic space be sealed off, thereby removing any possibility of its being used as a habitable room.

4. Ms Hill claims that the effect of this last-mentioned direction is to make her apartment unsaleable; certainly it seems likely to have reduced its re-sale value. She further maintains that Mr McInerney and Mr Griffin knew that the apartment was an unauthorised development built in breach, *inter alia*, of the Fire Safety Certificate but that they guilefully orchestrated a series of events which saw her buy a 'dud' apartment that does not equate to what Messrs McInerney and Griffin, through their estate agent, represented to Ms Hill that she was buying. And in doing all of this, Ms Hill maintains, Mr McInerney and Mr Griffin have each committed the tort of deceit (fraud). Certain other wrongdoings were alleged in the indorsement of claim, which was drafted when the proceedings sat against all of the named defendants, but, just as the defendants had been whittled down to Mr McInerney and Mr Griffin by the time these proceedings came to trial, so too the sole allegation (repeatedly) alleged against them by Ms Hill was that of deceit (fraud).

## Part 3

## Elements of Deceit (Fraud)

5. It is as well to recite at this point the various elements of the tort of deceit (fraud), as identified by Shanley J. in *Forshall and Fine Arts Collections Ltd. v. Walsh* (Unreported, High Court, Shanley J., 18th June, 1997), at 64, viz:

*"(i) the making of a representation as to a past or existing fact by the defendant;*

*(ii) that the representation was made knowingly, or without belief in its truth or recklessly, careless whether it be true or false;*

*(iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff;*

*(iv) that the plaintiff did act on foot of the representation; and*

*(v) suffered damages as a result".*

6. Some supplementary observations might be made:

- (1) the necessary representation of fact is usually by spoken or written word, though a gesture or deed may suffice.
- (2) silence and inaction will not usually suffice, but there are exceptions, e.g., where there is a duty not to be silent (e.g., where a duty of *uberrimae fidei* arises).
- (3) a promise may be actionable in deceit (fraud), e.g., where a promise contains an undertaking with which there is a present intent not to comply when the promise is made.
- (4) a distinction is typically drawn between representations of fact and those of opinion; no liability attaches to the latter.
- (5) a representation of law can be a representation of fact, e.g., a man who tells an intended husband or wife that he is free to marry when he is in fact already married, so luring the deceived other into a sham marriage.
- (6) honest mistake and careless statements do not suffice for liability in deceit (fraud); a plaintiff must prove that the defendant (a) knew that what he was representing was false or (b) was reckless as to whether it was true or not. (Liability for negligent misstatement may, of course, present even where liability for deceit (fraud) does not).
- (7) in making a false representation, the defendant must intend (a) the plaintiff to act on same, or (b) some or all of a class of persons to whom the representation is made to so act.
- (8) the false representation need not be made directly by defendant to plaintiff.
- (9) reliance by the plaintiff is essential.
- (10) the plaintiff must prove damage, be it pecuniary, personal injury or injury to property.
- (11) the applicable measure of damages is actual damage flowing from the fraudulent inducement, together with consequential damages representing what was reasonably and necessarily expended as a result of acting on the inducement, i.e. direct consequences, not reasonable foreseeability is the test.
- (12) rescission of a contract induced by a fraudulent misrepresentation may be an alternative to awarding damages.

## Part 4

### The Conveyancing Process in More Detail

#### 1. Fire Safety.

##### A. Objections and Requisitions on Title.

7. On 15th December, 2006, the solicitor for Messrs Griffin and McInerney completed a document entitled 'Objections and Requisitions on Title'. This is a document that was initially drafted under the auspices of the Law Society in which all manner of queries are raised by solicitors engaged in conveyancing concerning (a) a vendor's title to property and (b) various related matters, all in a bid to ensure that a purchaser (such as Ms Hill) gets what she believes herself to be buying when an intended transfer of property occurs. In a typical transaction, the Objections and Requisitions are completed by the vendor's solicitor and then sent back to the purchaser's solicitor who reads the answers carefully, consults any documents that may be referred to therein, identifies her or his client of any difficulties presenting, and raises any further queries arising. Questions 28.1, 2, 3 and 5.a are among the questions relevant to the case now arising. These questions, and the answers provided by the solicitor for Messrs McInerney and Griffin back in 2006 are quoted below:

REQUISITIONS ON TITLE	REPLIES
...27. LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT 1963 ("the Planning Act")  1. Has there been in relation to the property any development (including change of use or exempted development) within the meaning of the Planning Act on or after the 1st October 1964. [In fact, the Planning Act had been replaced by this time but there is no suggestion that the questions were answered other than by reference to the correct legislation].	1. Yes.
2. In respect of all such developments furnish now (where applicable)...	
e. Certificate/Opinion from an Architect/Engineer that the Permission/Approval relates to the property and that the development has been carried out in conformity with the Permission/Approval and with the Building Bye-Law Approval (if applicable) and that all conditions other than financial conditions have been complied with....	(e) Certified Copy of Opinion of David Whelan.

*B. Opinion of David Whelan.*

8. Mr Whelan's Opinion of 27th January, 2006, as referred to in the above-quoted Replies, states that he has "*examined the plans/specification and confirm that the design of the Buildings is in substantial compliance with Building Regulations made pursuant to the Building Control Act, 1990*". However, he expressly states that "*Compliance with Part B of the Regulations is certified separately*", i.e. not by him. Part B was concerned with fire safety.

*C. Mr O'Connell's Certificate*

9. Mr O'Connell's Certificate of 4th May, 2006, as referred to in the above-quoted Replies, is headed "*CERTIFICATE OF COMPLIANCE, With Fire Regulations*" and, so far as relevant to the within proceedings, states as follows:

*"I inspected the Relevant Works [the apartment development] on the 3rd May 2006 AND in my opinion the construction of the same complies substantially with all the said Regulations applicable thereto in so far as it has been completed and so far as can be ascertained from a visual inspection except for the following item –*

*? The attic space from apartment No 3 cannot be used as habitable space and is only permitted as storage..."*

10. What one can see from the above-quoted text is that the fire safety issue presenting as regards usage of the attic, and which Ms Hill asserts herself belatedly to have discovered in 2010, was in fact expressly identified to her agent (solicitor) as early as December 2006. And on this simple fact any claim for deceit (fraud) by Ms Hill arising from some purportedly false representation regarding fire safety compliance collapses. The solicitor for Messrs McInerney and Griffin truthfully responded to Question 15.5.a of the 'Objections and Requisitions' and the certificate of Mr O'Connell (which identifies the truth as to the attic in the clearest of terms) was furnished to Ms Wall, the solicitor and agent for Ms Hill. So the truth was told by the solicitor (agent) of Messrs McInerney and Griffin to the solicitor (agent) of Ms Hill in December, 2006, and it was told openly and clearly. There is no basis for liability in deceit (fraud) on the part of Messrs McInerney and Griffin on those facts.

**2. Compliance with Planning Permission.**

*A. Objections and Requisitions on Title.*

11. Returning to the 'Objections and Requisitions on Title', specifically the segment relating to compliance with general planning requirements, this was answered, in December, 2006, by the solicitor for Messrs McInerney and Griffin as follows:

REQUISITIONS ON TITLE	REPLIES
...27. LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT 1963 ("the Planning Act")	
1. Has there been in relation to the property any development (including change of use or exempted development) within the meaning of the Planning Act on or after the 1 <sup>st</sup> October 1964. [ <i>In fact, the Planning Act had been replaced by this time but there is no suggestion that the questions were answered other than by reference to the correct legislation</i> ].	1. Yes.
2. In respect of all such developments furnish now (where applicable)...	
e. Certificate/Opinion from an Architect/Engineer that the Permission/Approval relates to the property and that the development has been carried out in conformity with the Permission/Approval and with the Building Bye-Law Approval (if applicable) and that all conditions other than financial conditions have been complied with....	(e) Certified Copy of Opinion of David Whelan.

12. Mr Whelan's Certificate of 27th January, 2006, as referred to in the above-quoted Replies, states, *inter alia*, as follows:

*"...1. I have inspected the [relevant] building works....*

*2. The plans and other particulars on foot of which they were granted Permission/Approval mentioned in paragraph 3 have been prepared by others and examined by myself.*

*3. The Grant of Planning Permission...dated the 30th day of October 2004 relates to the relevant works....*

*6. The conditions of the Permission/Approval referred to at paragraph 3 have been substantially complied with....*

*7. No Planning Permission other than that referred to at paragraph 3 aforesaid is pertinent to the Relevant Works.*

*8. In the event that the Relevant Works and the site works pertaining thereto have not been built and/or laid out exactly in accordance with the said Permission/Approval any disparity is unlikely to affect the planning and development of the area as envisaged by the Planning Authority and expressed through such Permission/Approval."*

13. Ms Hill complains that (a) Messrs McInerney and Griffin, after they engaged Mr Griffin, handed certain planning documents to him and that Mr O'Connell gave his opinion by reference to these, rather than consulting the planning file at the local planning authority offices, and (b) that Messrs McInerney and Griffin knew themselves to have departed from the planning permission in the course of their development works and hid this fact. Ms Hill perceives in (a) and/or (b) the necessary elements of the tort of deceit (fraud).

14. Both Mr McInerney and Mr Griffin took to the witness-box during the course of the within proceedings to explain their actions. They both struck the court as truthful men, able to renovate a property but, by their own admission, dependent on Mr Whelan, Mr O'Connell and their solicitor to make sure that they (Messrs McInerney and Griffin) did right by planning law, fire safety requirements, and transferring good title to the property that Ms Hill bought. It did not seem to the court that either man was being, to borrow a colloquialism, 'too clever by half', i.e. affecting a certain lack of knowledge and pointing the finger of blame at their professional advisors. Rather, it seemed to the court that what they said was a truthful account of what they did, i.e. they renovated the property and trusted in their paid professional advisors to make sure that they did not err legally or otherwise in the renovation or sales process.

15. Returning then to Ms Hill's particular complaints, as referred to above, when it comes to (a) the court finds that Messrs McInerney and Griffin did hand certain planning documents to Mr Whelan but in a bid to assist him, no more. It was up to Mr Whelan to do his job properly after that – and there is no evidence to suggest that either Mr McInerney or Mr Griffin sought to influence Mr Whelan in how he did his job. If Mr Whelan erred in his professional responsibilities, and the court does not consider that it needs to make any finding in this regard, that is a failing of Mr Whelan. But there is no basis in the foregoing for finding any deceit (fraud) on the part of Messrs McInerney and Griffin.

16. As to (b), even if Messrs McInerney and Griffin knew themselves to have departed to some extent from the planning permission, and in placing an additional en suite facility in the attic it appears that they did depart from the planning permission, they, like Ms Hill, are not experts in planning issues and will doubtless have taken, and were entitled to take, the same comfort from items 6, 7 and 8 of Mr Whelan's opinion as Ms Hill and her solicitor, Ms Wall, doubtless did when that opinion was furnished to Ms Wall following the completion of the 'Objections and Requisitions on Title'. If Mr Whelan erred in his professional responsibilities, and again the court does not consider that it needs to make any finding in this regard, that is a failing of Mr Whelan. But there is no basis in the foregoing for finding any deceit (fraud) on the part of either of Messrs McInerney and Griffin. In truth, they sought at all times to do right by the planning permission, right by law, and right by Ms Hill. That this is so appears to the court to be evidenced by the fact that Messrs McInerney and Griffin engaged professional advisors in order to ensure, so far as possible, that everything, to borrow a colloquialism, was done 'above board', and in this one finds the very antithesis of the tort of deceit (fraud).

## **Part 5**

### **Conclusion**

17. The court ends where it began. Ms Hill has both cause for grievance regarding, and the sympathy of the court for, the position in which she now finds herself. And still the court must find that, as a matter of law, Ms Hill has not been the victim of any deceit (fraud) on the part of either Mr McInerney or Mr Griffin.