

1981 No 4915
2191

THE HIGH COURT

BETWEEN:

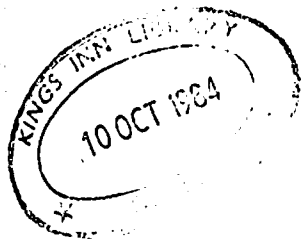
DONAL M. GAHAN

Plaintiff

and

MAURICE BOLAND AND WENDY BOLAND

Defendants



JUDGMENT of Mr. Justice Murphy delivered the 21st day of January 1983

Sometime in 1981 Mr. Maurice Boland and his wife (the defendants) purchased the dwellinghouse and lands known as Glencarrig, Bridesglen, Loughlinstown, County Dublin. These lands comprise some 3.25 acres and consist of a dwellinghouse with substantial lawns in front of it together with an L shaped plot of land - described in the evidence as a field or paddock - which is connected to the lawn area by a small neck of land. The premises are described in a map or plan put in evidence on which they are delineated by a red verge line.

In February 1981 the defendants decided to offer these premises

2192

2.

for sale. In doing so Mr. Boland took a somewhat unusual course. On the 13th February 1981 he contacted three firms of house agents, including Messrs. Lisney and Son. Mr. Boland spoke to Mr. Day of that firm and explained to him that he was considering selling the premises aforesaid and that he had instructed other house agents for that purpose: that he was anxious to sell the premises quickly if they were sold at all and that he would pay fees only to the house agents who found the purchaser. In the course of his conversation he described the premises briefly to Mr. Day. Mr. Day had not been engaged in the original purchase of the premises and had not, himself, inspected them. However, Mr. Day had another client, Mr. Donal Gahan (the plaintiff) on whose behalf he had acted in connection with the purchase of premises at Taney Road, Dundrum and he, Mr. Day, was aware that the plaintiff was anxious to acquire an alternative residence which included some land. One reason for the plaintiff's interest in acquiring premises of that nature was the security which it would provide for his children. Mr. Daly believed - rightly as the events proved - that the premises at Bridesglen would be suitable for the plaintiff's needs.

Mr. Day immediately contacted the plaintiff and explained the position to him. The plaintiff reacted favourably and sought an opportunity to inspect the property. This Mr. Day arranged with commendable expedition. Later on that day - Friday the 13th February 1981 - the plaintiff and his wife attended at Glencarrig where he was shown over the lands and premises by Mr. Boland.

It is common case that the meeting and inspection took approximately one hour. First the plaintiff and his wife spoke to Mr. Boland in the sittingroom of the main house where Mr. Boland discussed the plans which he had in relation to the premises. Then the party inspected the various rooms in the house. Next they inspected an adjoining building described as "the studio". Leaving the studio the plaintiff noticed that the foundations appeared to have been taken out and subsequently re-filled. He mentioned this matter to Mr. Boland who explained that he had intended to erect a building joining the studio to the main house but having been advised that planning permission was required for that purpose he filled in the foundations pending the application for planning permission. At the same time Mr. Boland fairly and carefully informed

4.

the plaintiff that planning permission had not been sought or obtained for the studio itself. The party then adjourned to the lawn in front of the house where the plaintiff was clearly impressed by the view and the attractions of the premises generally. The parties then walked towards the paddock and at or near the entrance to the paddock a crucial conversation took place. However, before dealing with that conversation I may pass on to say that the plaintiff and his wife walked the boundaries of the paddock. Mr. Boland did not join them on that expedition as he was not wearing suitable shoes at the time. On their return they had a further discussion with Mr. Boland when the plaintiff raised queries about two gates which led from the paddock; a pathway worn across part of the paddock leading from one of the gates and a vegetable patch which was situate on the eastern boundary of the property. Mr. Boland dealt with these queries and it is not suggested that his replies were anything but full, frank and accurate. Apart from the general background which this description of the visit and inspection provides it is material in putting in context the conversation which took place at the entrance to the paddock and the duration of that

2195

.5.

debate. It is common case that the discussion lasted something between a half minute and three minutes: certainly it was brief. This crucial conversation related either or both to the location and affect of a motorway which has been planned since 1973 to connect Dublin and Wicklow. It is common case that the plaintiff raised the matter of this roadway. Again, it is agreed by both parties that Mr. Boland said of it, "It will not be built in our life times", and, "It would be much too expensive to build the motorway through the glen" and that accordingly it would be built elsewhere. At this point I think it can be said of those two statements that they were clearly and manifestly speculative statements of future events and would be necessarily recognised as such. Accordingly, it would only be in the most unusual circumstances that those statements could form the subject matter of a misrepresentation in law.

10 OCT 1984
 *
 DEPT. OF JUSTICE

Both the plaintiff and Mrs. Gahan swore that the plaintiff enquired from Mr. Boland whether the proposed motorway affected the property for sale and that he assured them that it did not. There are obvious difficulties in analysing closely expressions believed to have

4033
128
2196
6.

been made in the course of a brief discussion which took place many months previously. However, in so far as the words used raised the question whether the motorway "affected" the property a negative answer, particularly taken in conjunction with the comments admittedly made by Mr. Boland, would be consistent with the bona fide opinion that the proposed motorway did not and never would affect the property in the sense either that the plans would not be implemented as originally proposed or alternatively that the motorway would not be erected in the life-time of any of the parties. However, it is clear that the questions raised and the answers given did involve a request for information as to the location of the proposed motorway. Mrs. Gahan's evidence was to the effect that he pointed in the Loughlinstown direction as the site of the proposed motorway but even more significantly Mr. Boland, in his direct evidence, stated that the enquiry put to him was "is the motorway coming through the paddock" whilst he maintained - I believe honestly - in cross-examination that he had not intended to express himself in those terms but he did say, unequivocally in cross-examination, when asked whether the property was affected by the motorway that part

2197

10 OCT 1984

7.

of it was as far as he knew but that it could be checked.

Mr. Boland's evidence was to the effect that when he purchased the land himself some two years previously; Mr. Arnold Gregory, a house agent on behalf of the then vendor, had informed him in general terms that a section of the paddock would possibly be effected by the motorway; that Mr. Gregory did not show him any map; that he told him it was just a line and that he, Mr. Gregory, was not sure about its exact position. In the course of his evidence Mr. Boland indicated that as a result of his discussion with Mr. Gregory that he understood that the proposed line of the motorway affected what is in fact the eastern part of the paddock which is indicated on the map put in evidence as being separated by a discontinuous ink line. It was this information which, Mr. Boland said, he gave to the plaintiff.

In these circumstances I must conclude that the line of the projected motorway was, in fact, discussed and information sought in respect of it. On the balance of probabilities I accept that Mr. Boland did give information as to what he believed was the projected line of the motorway and that information was necessarily wrong

4055
2 130
2198
8.

as he, Mr. Boland, had been misinformed as to its true position.

I think it is also important to add, in this context, that Mr. Boland was emphatic that he attached no importance to the proposals with regard to the motorway. That he had not been worried about the plans in that regard when he purchased the premises and, for the reasons which he advanced, did not treat it as a matter of significance at the date of the sale.

After the meeting at Glencarrig on the Friday matters progressed rapidly. On the following Monday (the 16th February) the plaintiff, by arrangement, attended again at the premises this time with his architect, Mr. Harney, when a further inspection - largely directed to the main house - was undertaken. On that occasion, a Mr. Neill Brennan - Mr. Boland's architect - was likewise present and an arrangement was made under which he would, on certain terms, provide surveys which he had made of the premises.

Following upon this second visit the plaintiff contacted Mr. Day and sought an appointment with him for 2 o'clock on that Monday afternoon. As Mr. Day was anxious to arrange the attendance of Mr. Boland the meeting was put back to 4 o'clock. At that time the

plaintiff and Mr. Boland attended at the offices of Lisney and Son and after some negotiations agreement was reached under which the premises would be purchased by the plaintiff for a sum of £135,000.00.

It was apparently Mr. Boland's suggestion that a contract should be signed at that time. However, it must be said that both parties were equally anxious to finalise the transaction.

The solicitors on behalf of Mr. Boland - Messrs Gore and Grimes - were not present during the course of the negotiations but were asked to draw up a short form of contract. Apparently, they were concerned as the original documents of title were not available in their office at the time but in any event, a very short document was apparently dictated by Mr. Karl Hayes of Messrs Gore and Grimes over the telephone to Messrs Lisney and Son and subject to two amendments, one at the request of the plaintiff providing for the inclusion of certain furniture and fittings and the other at the request of Mr. Boland making it clear that no planning permission had been obtained for the studio, the document was signed by both parties and a deposit of £13,500.00 paid to Messrs Lisney and Son as stakeholders.

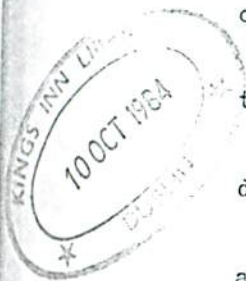
KINGE
10 OCT 1964
DUBLIN

Whilst the speed with which the transaction was accomplished was impressive and satisfied the needs of both parties there were obvious dangers in disregarding the more normal, if more tedious, procedures. Under the simple form of contract executed the defendants committed themselves to making title on the basis of an open contract and without any of the ordinary provisions in ease of them. Again the plaintiff who is an experienced solicitor foresook the elementary precautions on which I am sure he would have insisted if acting on behalf of any client. He did not obtain any written particulars as to the property for sale: He did not, so far as the evidence went, make any inquiries as to title and in particular did not make from any statutory or local authority any independent inquiries as to how the exercise of any functions of such statutory or local bodies might affect the property for sale. Mr. Rory O'Donnell - a distinguished solicitor - gave evidence on behalf of the defendants to the effect that it was the normal practice to make inquiries before executing a contract particularly in relation to planning matters. Any such inquiries would readily have shown the existence of the projected motorway and the extent to which it affected the property for sale. Furthermore, it emerged that

2201

11.

in 1977 - before the acquisition of the premises by the defendants - an application had been made for planning permission to erect two bungalows on the paddock and that application was refused on the specific grounds that the paddock was on the site of the projected motorway. It seems to me a reasonable inference that on the investigation of the title by Messrs Gore and Grimes on behalf of Mr. Boland when the premises were acquired by him that the refusal of this permission and the reason for such refusal would have come to light. If opportunity had been given for inspection of the documents by the solicitors, this matter would surely have been adverted to. However, I must again repeat that it is not suggested in this case that Mr. Boland deliberately misled the plaintiff or indeed that he was at any time conscious of the precise projected route of the motorway through his property even if that fact was ascertained by his solicitors.



Following upon the execution of the contract the plaintiff made arrangements to sell his own residence at Taney Road and arranged for plans to be drawn up for the reconstruction of Glencarrig. He and his architect discussed his plans for the reconstruction of the house

with Mr. Dooley of Dublin County Council and it did not appear that there was any significant official objection to those proposals. It was sometime between the 6th and 9th April that Mr. Harney contacted the Dublin County Council in connection with proposals which he was making to his client in relation to creating a new entrance to the premises that he became aware of the precise location of the projected motorway. Mr. Harney inspected the relevant maps and from them superimposed the outline - so far as relevant - of the motorway over the lands. This exercise is incorporated in the plan put in evidence where the motorway is shown as an area coloured yellow bisected by a discontinuous ink line. It is clear from that plan and the evidence given by Mr. Dooley that the projected motorway transverses virtually the entire of the paddock. Immediately following upon this discovery a formal letter was on the 10th April 1981 sent by Messrs Donal M. Gahan & Co. - the plaintiff's firm - to Messrs Gore and Grimes claiming rescission of the contract on the basis that it had been represented to the plaintiff that the property was not affected by the motorway when such was not the case.

In addition it was contended that Mr. Gahan had been led to

10 OCT 1984

13.

believe originally by Mr. Day that the premises comprised some 5 acres: that he was subsequently informed that it was 4.6 acres and that the survey ultimately undertaken disclosed that it was approximately 3.25 acres. However, a representation based on a misstatement of the area involved was not strongly pressed as Mr. Cahon conceded that he would have been happy to take the premises even if there had been a misstatement as to the actual area involved.

I have, therefore, concluded that the representation as to the location of the motorway was in fact made and that it was false. I repeat that I fully accept - and it is not otherwise suggested - that it was honestly and in good faith and with no intention to mislead.

Again I have no hesitation in concluding that the statement was material. This is an objective test to be applied by the Court and I am satisfied that the existence of plans - albeit plans which have been in existence for some time and unlikely to be fulfilled in the near future, if at all, - for the erection of a motorway through or even near property is a factor which would have a material influence on the mind of a hypothetical potential purchaser. Apart from the inconvenience which the erection of such a roadway would have

it is clear that the plans themselves - as the facts of the present matter show - would affect the owners for the time being as to the manner in which they might make use of the premises.

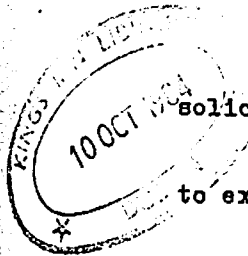
There are two further obstacles which the plaintiff must overcome to succeed in his claim. He must establish that the representation was made by the defendant with the intention of inducing the plaintiff to act thereon and secondly, that the plaintiff did in fact act or rely on the representation.

In this context Counsel on behalf of the defendants rely on the evidence given by Mr. Boland to the effect that he advised the plaintiff not that he should himself check the information relating to the motorway - as had been suggested in the cross-examination of Mr. Gahan - but that it was a matter which could be readily checked.

A further point was taken - based partly on the evidence of Mr. O'Donnell as to the practice of solicitors in conveyancing matters and partly on the authority of certain passages from Professor Wiley's book at page 261 taken in conjunction with the decision of the Supreme Court in Somers and Weir 1979 I.R. 105. It was contended on behalf of the defendants that it is the duty of a purchaser in every case to make the appropriate inquiries - including pre-contract

inquiries - in relation to the property intended to be purchased and that if he neglects to do so he is in the same position as if he actually knew the facts which such inquiries would have disclosed. It was argued that the representation alleged to have been made by Mr. Boland was, therefore, negatived or cancelled out by the knowledge which the plaintiff was deemed to have acquired as a result of failing to make the ordinary inquiries. I cannot accept that argument.

There is, of course, a duty in contract and in tort on a solicitor acting on behalf of a client in the purchase of property to exercise all proper professional care - including undertaking or advising in relation to appropriate searches concerning the property for sale but a purchaser as such does not owe a duty to anyone - least of all the vendor - to make any particular investigation or inquiry. I do not understand the law as stated authoritatively in Somers and Weir by the Supreme Court or the very helpful comments of Professor Wiley to go further than restating the well-settled proposition that if a purchaser neglects to make the usual and appropriate investigations and inquiries he will be fixed with notice of such documents, facts and



2206

events as such investigations or inquiries would have disclosed if undertaken. Indeed, investigations in the present case would not have affected a purchaser in the present case in the sense that his knowledge, be it actual or constructive, of the proposed motorway would not alter or affect his rights as purchaser in relation to that motorway. The problems presented by the projected motorway do not arise by reason of the fact of knowledge, actual or constructive.

It seems to me that the argument deriving from the practice of solicitors in relation to conveyancing would be highly material if it was suggested that the misrepresentation was made knowingly or fraudulently. In that case it might well be argued on behalf of the defendants that such an intent was extremely unlikely as the vendor would necessarily anticipate that the routine inquiries would be made and his wrong-doing discovered. As I say I do not see that the argument can avail the defendant in the present case where it is recognised that the misrepresentation was made innocently.

As to whether Mr. Boland intended to induce the plaintiff to act on the representation I believe that this question must be answered in the affirmative. Whilst I would accept that it was not

4055
139
207

a matter to which he attached any great significance and I would accept as a probability that he indicated that the matter could be checked out I believe that all of his statements to the potential purchaser were intended - though with no sinister motive - to interest the plaintiff in the property and induce him to purchase it.

For his part the plaintiff has given evidence, which I accept, of the importance to him of the paddock. That background and the fact that he raised the query about the motorway clearly indicates that this was a relevant consideration for him and accordingly, it seems to me, proper to infer that the erroneous statement made in relation to the projected location of the motorway did have an influence on the plaintiff. Clearly, the plaintiff could not be said to have been induced by the misrepresentation if he knew it to have been untrue. On the other hand it is well settled law that there will be an inducement notwithstanding that the purchaser may have had every opportunity of discovering the truth (see Redgrave and Hurd 1881 20 Ch. D. 1). The fact that the plaintiff was advised that he could check out the relevant facts or that indeed he could or should have done so in his own interest but neglected so to do cannot

18.

prevent the misrepresentation operating as an inducement.

In these circumstances, it seems to me, the plaintiff in these proceedings is entitled to an order for the rescission of the contract dated the 16th February 1981 and is entitled to give a good receipt for the return of the deposit paid thereunder. It was agreed that the argument in relation to the payment of interest on the deposit would be postponed until a later date.

The plaintiff also claimed £4,500.00 expenses alleged to have been incurred by him consequent upon the execution of the said contract.

In the absence of a claim for negligence or fraud expenses of the nature claimed are irrecoverable as damages. The plaintiff did in the course of the proceedings before me apply to amend the Statement of Claim to plead negligence but this application was subsequently withdrawn.

Concurrently with - and indeed immediately before the institution of these proceedings - the defendants herein had instituted proceedings against the plaintiff in the High Court (Record No. 1981 No. 4874P) claiming specific performance of the contract dated the 16th February 1981. Having regard to my decision in the proceedings brought by Mr. Gahan the defendants' claim against him for specific performance must fail.

Francis D. Wolff

KINGS
10 OCT 1981

4055

140

2208