

THE HIGH COURT

DENIS J. McCARTHY

Plaintiff

.v.

THE VOLUNTARY HEALTH INSURANCE BOARD

Defendants

Judgment of Mr. Justice Barron delivered the 24<sup>th</sup> day of July 1984.

Sometime in the month of May, 1981 the defendants whose Cork office was situate in rented premises in Cook Street decided that they would purchase more suitable premises for their purposes. The manager of the defendant Board in Cork, Mr. Michael Collins-Powell, was instructed to make enquiries as to what premises might be available. He was aware that the premises No. 38/39 South Mall were for sale. The agent's Board outside these premises indicated that the plaintiff was the agent for sale. Since he knew Mr. Bishop who was employed by the plaintiff he approached him with a view to discovering the asking price. He was told that the premises were no longer for sale but that perhaps they could be rented. He indicated that his Board did not want to rent premises but to purchase them and then asked whether or not No. 70 South Mall might be a suitable alternative.

There is some conflict on the evidence on these basic facts.

Mr. Bishop thinks that he was originally asked whether or not No. 70 South Mall was available for letting and that he, Mr. Bishop, suggested that it would be better for the Board to buy the premises and that it was at a later stage that he showed Mr. Collins-Powell Nos. 38/39 South Mall. I accept Mr. Collins-Powell's evidence that at all times he was making enquiries about premises to be purchased and that it was he who first mentioned No. 70 in this context. Once Mr. Bishop became aware that the defendants were possible purchasers for No. 70 South Mall he took steps to advise them on the possibilities of such a purchase. He approached the selling agents for the premises and obtained details, including a floor plan, of the proposed premises. At this stage Mr. Collins-Powell indicated to him that he needed information for a Board meeting of the defendants in Dublin the following day. As there was little time available Mr. Bishop wrote out for Mr. Collins-Powell on a sheet of paper basic information which the Board might require. This was a written memorandum which set out the net lettable floor area of the building and a suggested rent for that building on the basis of the premises being fully fitted out ready for letting to include carpets, light fittings and floor fittings. On this basis Mr. Bishop calculated

that a rental income would be approximately £112,000 a year which upon the basis of obtaining a 6% yield would have meant an overall expenditure on the premises of £1,866,592. Since various items of costs including agent's commission at 1½% were likely to amount to a sum of £138,400 this left a purchase price which he was advising of £1,730,000.

In confirmation of this memorandum and of his conversations with Mr. Collins-Powell Mr. Bishop wrote to Mr. Graham, Deputy General Manager of the defendants by letter dated the 25th June, 1981 which is as follows:-

"Dear Mr. Graham

Re Possible Purchase of 70 South Mall, Cork

Further to my earlier discussion with Mr. M. Collins-Powell regarding the acquisition of suitable premises I introduced the scheme of buying out the above new development when completed, then leasing off the space not required by your good selves and thus retaining the premises as a property investment for your portfolio. I submitted my opinion of the costing figures to Mr. Powell which provides for our agent's purchasing fee of 1½% and other costs that your company would incur on purchasing such as stamp duty and solicitors fees.

I now understand from Mr. Collins-Powell that your Board are now prepared to give the matter serious consideration and that you require

"full documentation and drawings. I have requested the vendor's agents to provide all relevant information and as soon as I have this to hand I will forward it to you. I have been informed by the vendor's agents that there are two other parties interested in the project. One is an institution who would provide development finance and take the property fully let at the "end of the day" and the other one, which will probably cause us more concern, is a party prepared to purchase the property vacant and on the satisfactory completion. I will hopefully know the outcome of the discussions with the latter party on Monday the 29th June but I have now stated to the vendor's agents to reserve making any final decision until we have had time to fully investigate the proposition. I have received an affirmative verbal assurance on this point but I will be obliged to disclose your company's identity on Monday to show good faith, your company's financial ability, and our willingness to transact business.

I will forward the information as soon as possible."

A reply was received from Mr. Graham dated the 26th June, 1981 which is as follows:-

"Dear Mr. Bishop,

Thank you for your letter of 25th June.

I confirm our interest in this matter and that we will be glad to have full details and drawings as soon as possible for consideration by your Board."

A telephone call followed this letter in which Mr. Graham authorised Mr. Bishop to disclose the defendants' name as being his clients.

Mr. Bishop then had a meeting with the sale agents for the property at which he discovered for the first time that the property developers had themselves entered into a verbal agreement for sale unknown to their own estate agents. He reported the result of this meeting by letter to Mr. Graham dated the 2nd July, 1981 which is as follows:-

"Dear Mr. Graham,

Thank you for your letter dated 26th June, 1981.

I recently telephoned your office but you were away on holiday and I spoke to your Secretary.

This is to confirm that the vendors agreed verbally with an institution last Friday, the 26th June, to dispose of the property.

I understand this was done without the agent's knowledge. I also understand that the price is £1.76 million on a guaranteed rental

"of £120,000 per annum with an additional sharing arrangement between the institution and the developers on the capitalised value of the rental achieved above £120,000. This is fairly normal practice in these cases and the developer does not receive the money until the property is fully let and ready to hand over.

Our transaction was much more straightforward and I am extremely annoyed and disappointed at the unbusinesslike way the matter was conducted.

I enclose for your records a copy of the site plan. It was my idea to recommend the purchase of the entire site edged in red and blue as only the site edged in red was subject to the present purchase. This would have given you more flexibility and further growth investment at the rear and also access from Morgan Street.

If for any reason the present purchase is not concluded I will contact you again but I would imagine that this is very doubtful.

However, I will continue to keep an open mind on the subject and should something else arise I will contact you.

I am going on holiday this Saturday and I have spoken to your local manager to inform him of the position.

Yours sincerely."

There is some evidence that Mr. Bishop indicated to Mr. Collins-Powell that one or two other premises might be available in the City of Cork. However, this involved no more than a walk along the street and can be disregarded. Mr. Bishop did however ask the estate agents at a later stage whether or not they would quote a letting price for the premises. He was informed that no price was being quoted and again he found this somewhat strange in the context of that type of development. In November 1981 Mr. Bishop found that the defendants had purchased the premises. He felt aggrieved at not being consulted and requested a meeting with Mr. Graham. However, Mr. Graham was away but he did meet Mr. Ryan the then Assistant General Manager and Mr. Flynn the Financial Controller. Nothing was achieved by this meeting and on the 25th November, 1981, Mr. Bishop wrote to Mr. Graham seeking confirmation that his fees ~~1 1/2~~ of the purchase price would be payable by the Board on completion of the purchase. Mr. Graham replied on the 4th December, 1981. The material part of this letter contained the following paragraphs:

"I am absolutely astonished at the request contained in your second paragraph. As far as our Board is concerned, the full details and drawings relating to this development were not submitted, as requested in our letter of the 26th June, and you informed us by telephone on

"the 30th June, that the possible purchase had fallen through. This was confirmed in your letter of 2nd July.

In the circumstances, you may take it that it is not our intention to make any payment whatsoever, to you, in respect of this matter."

The circumstances in which the defendants bought these premises at 70 South Mall, are somewhat unusual. The purchaser referred to earlier in the correspondence was apparently Allied Irish Investment Bank who had entered into an agreement with the developers to purchase the development at an agreed multiple of the rent at which the premises should ultimately be let. The Bank purchased on behalf of one of their discretionary investment clients; they had not then selected which one. Coincidentally, the defendants were one such client and in August or September obviously having learnt that the Bank was involved asked the Bank to allocate the purchase to them. The Bank agreed but instead of completing the purchase on the arranged formula as to price purchased at a negotiated price of £2.2 million.

The plaintiff's claim is for the sum of £27,500 being commission at the rate of  $1\frac{1}{4}\%$  on the purchase price of the premises. For the plaintiff to succeed in his claim he must establish a contract and then a term of that contract entitling him to remuneration in the circumstances which have arisen



The plaintiff who, at all times, acted through Mr. Bishop was instructed by Mr. Collins-Powell to act on behalf of the defendants to obtain details as to the terms upon which the premises No. 70 South Mall could be purchased. Following these instructions, he indicated to the agents for the vendor that he had a client who was interested in the premises. At this stage he had no firm instructions to take the matter any further. He did, however, at the request of Mr. Collins-Powell prepare the memorandum to which I have already referred which was, in effect, a preliminary advice. Following consideration of this document, the defendants authorised him to obtain further details of the premises and also to disclose the defendants' identify to the vendor's agent. He acted upon this latter authorisation and at that stage learned that the property was no longer available for sale through the estate agents.

The plaintiff was clearly employed as an agent to advise the defendants and to negotiate a purchase of the property. He had indicated that his fee would be 1% of the purchase price and if he had negotiated a purchase and it had been completed, then he would have earned this commission. The defendants would have been free at any time to drop their interest in the premises and if they did, then the plaintiff would not have been entitled to any remuneration. Neither of these things

happened. The defendants did not drop their interest in the premises but completed a purchase in the circumstances which I have indicated but without the assistance or intervention of the plaintiff. The question is whether the agreement between the parties contained any term whereby the plaintiff became entitled to remuneration for the work which he did carry out.

The real question is, what terms were implied in the contract? This depends upon what must have been the understanding of the parties. The defendants realised that they would have to pay commission at the agreed rate if the plaintiff concluded a deal on their behalf. Equally, the plaintiff realised that if he failed to conclude a deal he would be entitled to nothing. Both parties must have realised also that the defendants were free to approach the purchase in any way they wished and that they were free to decide not to proceed with a purchase or not to proceed with a purchase through the intervention of the plaintiff. If they decided to change their agent, then unless they so decided for good cause, as, for example, because he was not acting diligently or was otherwise endangering a successful conclusion of the contract they must have realised that in the event of the transaction being completed either by themselves or by another agent acting on their behalf that the plaintiff

would have had to be paid for what he had done while he was still employed. Unlike the ordinary case of a house agent being employed to find a purchaser, in the present case no question of his being the effective cause of the transaction could have arisen so that no possibility of his earning his commission existed once his employment was terminated before any transaction was completed.

I regard the agreement as including an implied term that if the transaction was ultimately completed by the defendants after they had terminated the services of the plaintiff other than for good cause they would pay the plaintiff remuneration in respect of the services which he had actually rendered. In the present case the defendants did not specifically terminate the instructions of the plaintiff, nevertheless, having regard to the course which events took they must be deemed to have done so. They had no good reason for doing so. They did not come to him to negotiate the purchase through any default on his part, nor for the reason suggested in their letter dated 4th December, 1981. It was because the Bank already had such advisers. The transaction which was completed was that which they had instructed him to arrange. Although the mechanics of the purchase were unusual, the transaction was, in reality, the same. Again, although there was something of a time lag between the date upon which the plaintiff was instructed and the date

upon which the defendants approached their bankers, the circumstances had not materially altered so that it could not be said that a new situation had arisen. The refusal to remunerate the plaintiff is a breach of the implied term.

The plaintiff must be remunerated for the work which he did prior to the termination of his employment. Estate agents are normally remunerated on a commission basis and it seems to me that what I must calculate is the extent of the work carried out by the plaintiff as a proportionate part of the total work which he would have carried out if he had brought his transaction to a successful conclusion. He had not really commenced any serious part of his employment though he had made preliminary enquiries from the estate agents acting for the vendors and had indicated very roughly the basis upon which the price should be calculated. I take the view that it would not be unreasonable to regard the extent of this work as being 10% of the total work which would have been involved. Accordingly, the plaintiff is entitled to be remunerated in the amount of £2,750.

*Henry Barron*  
24th July 1957