

Record No. 1981/14038P

THE HIGH COURT

BETWEEN:

MAURICE ANTHONY NEVILLE

PLAINTIFF

AND

SLATTERY ESTATES COMPANY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barrington delivered the 15th day of February, 1984.

In these proceedings, which were instituted on the 17th day of December 1981 the plaintiff seeks specific performance of a contract for the sale of certain premises at 70 South Main Street, Bandon in the County of Cork. The defendants in their defence and counterclaim, which was delivered on the 15th day of June 1982, deny that the plaintiff is entitled to specific performance of the said contract but seek specific performance of the contract on their own terms.

On the opening of the hearing before me on Tuesday December the

13th 1983 the defendants sought leave to file a reply to the plaintiff's defence to the defendants' counterclaim. In this the defendants claim that the plaintiff had breached and repudiated the original agreement so as to discharge the defendants therefrom or alternatively that there was no consensus ad idem as to the terms of the original agreement and that no agreement was in fact created.

The agreement giving rise to the litigation is a perfectly straightforward contract of sale dated the 26th January 1981 between the plaintiff and the defendants in the standard form of the Incorporated Law Society. The purchase price of the property was £21,500, the plaintiff paid a deposit of £5,375 and the closing date fixed was the 23rd February 1981.

The sale was subject to the interests of two overholding tenants in the property. The first of these was Dr. Eugene T. Callanan, since deceased, and the second was the Royal Liver Friendly Society. Apart from this the title presented no unusual difficulties and does not explain the problems which have given rise to the present litigation.

I am quite satisfied that all problems which arose in the course

3.

of the investigation of title could have been resolved but for an unfortunate clash of personalities which took place between the parties. To understand this it is necessary to say something about the background to the transaction.

The defendant company was formerly controlled by a Mr. W. Slattery, now deceased, and is presently controlled by his widow Mrs. Slattery. The plaintiff is a solicitor who acted for the Slatterys in relation to some of their affairs. The relationship appears to have been an unhappy one at any rate so far as the plaintiff and Mrs. Slattery were concerned and resulted in litigation between the parties. The purchase by the plaintiff from the defendants of the property the subject matter of the present litigation was intended to resolve all outstanding disputes between the parties.

Another background factor may help to explain, though not to excuse, some of the things which subsequently happened. The plaintiff occupied the premises immediately adjoining the premises which he was purchasing. He was also familiar with the title and with the sub-tenants. The Slatterys, on the other hand, lived in the Isle of

Man and had retained solicitors in Dublin who were also remote from the Bandon scene. As a result the purchaser, at times, acted as intermediary between the vendor and the vendor's sub-tenants. Moreover, the investigation of title commenced in a rather unusual way with the purchaser briefing the vendor's solicitor concerning the title and the sub-lettings. However, thereafter the investigation of title proceeded in a normal business-like way and it seemed as if the sale would be closed early in 1981.

SUB-TENANTS

The first difficulty which arose concerned the sub-tenants. Both sub-tenants were holding over on expired leases and had served notices of intention to claim relief under the Landlord and Tenant Acts. It was anticipated that both sub-tenants would, in fact, obtain new leases under the Landlord and Tenants Acts and a problem arose concerning the new rents which would be payable retrospectively from the date of the expiration of the original leases until the date of the closing of the sale. The contract of sale contained no provision dealing specifically with this point. Under these circumstances I am satisfied that the purchaser was only obliged to account, on closing, for rents actually received by him leaving the vendor

to whatever rights he might have in law to recover the new rents when ascertained. This matter, however, became academic because the plaintiff was, sensibly, prepared to give an undertaking to pay to the vendor the vendor's proportion of the new rent when ascertained and collected by him. I do not believe that he was under an obligation to give this undertaking but he was, reluctantly, prepared to give such an undertaking and he adhered to that position at the hearing before me. Under these circumstances I do not think there is any substance in the defendants' pleas that the plaintiff repudiated the contract or that the parties were not ad idem.

On the 2nd March 1981 - and before the plaintiff had given the undertakings referred to - the plaintiff wrote to the vendor's solicitors in the following terms:-

"Please return the Deed of Conveyance executed by your client when we shall let you have a cheque for the balance of the purchase money namely £16,125.00 plus arrears of rent to date of closing at £20.00 per annum in respect of the letting to Dr. Callanan and £130.00 per annum in respect of the letting to the Royal Liver Trustees Limited which are the rents currently payable in respect of the two sub-lettings."

The defendants' solicitors replied to this letter on the 16th

6.

March 1981 saying that they had "forwarded the conveyance to our clients for the purpose of having it sealed". They then went on to say that their "instructions" were to request the plaintiff to forward before closing, the documents of title relating to four properties namely (1) Field, New Road, Bandon; (2) House occupied by Mr. Cullinane 17, St. Patrick's Place, Bandon; (3) House occupied by John Slattery, North Main Street, Bandon and (4) Deeds of plot of ground near church at Bandon.

I am satisfied that these documents had nothing to do with the present sale but were introduced by the defendants as a totally extraneous and unnecessary complication.

On the 12th May 1981 the defendants' solicitors wrote to the plaintiff saying that before closing the sale they would require a letter from him in which he would undertake to pay over to the vendors the share of the Slattery Estate Company Limited of (1) the new increased rent payable by Dr. Eugene Callanan in respect of his tenement from the 8th September 1980 to the date of the actual closing of the sale and (2) the new increased rent payable by Royal Liver Trustees Limited in respect of its tenement from the 29th

September 1950 to the date of the actual closing of the sale. On the 9th July 1981 the defendants' solicitors again wrote saying that they would not close until they received this undertaking. On the 14th July 1981 the plaintiff wrote stating that Dr. Callanan was not renewing his tenancy. On the 24th July 1981 the plaintiff wrote protesting at the undertaking which was being demanded from him but adding:-

"However, in order to get the matter completed, we undertake to pay whatever rent is set by the court in respect of the Royal Liver premises up to the date of closing."

MR. AND MRS. KELLY

On the execution of the contract in January 1981 the plaintiff appears to have proceeded on the assumption that the premises he was purchasing, which as previously stated were next door to his own office and home, would shortly be his. I am satisfied also that the premises were, even then, in poor repair and that, sometime after signing the contract, the plaintiff had some salvage work done to the premises at his own expense and replaced a defective lock on the door. Much more seriously the plaintiff purported to make a letting of some

8.

rooms in the premises to a Mr. and Mrs. Kelly in February 1981 at a rent of £25.00 per week. Even assuming in Mr. Neville's favour that this "letting" was made to assist a newly married couple who were stuck for accommodation and that the Kellys' presence in the property at night was a protection to it, it was still an extraordinary thing for a solicitor to do.

But one of the most distressing aspects of the present case is that the plaintiff repeatedly lied in correspondence about the making of this letting. The plaintiff admitted under oath in these proceedings that he let in Mr. and Mrs. Kelly on the 6th February 1981 and that they had paid in all some 19 weeks rent amounting to £475.00, and that he must account for this sum on closing.

Early in April 1981 Mrs. Slattery received a letter in the Isle of Man informing her that there were new tenants in a flat in her premises in Bandon.

In June 1981 Mrs. Slattery visited the premises. Mr. and Mrs. Kelly informed her that they were paying £25.00 a week rent to Mr. Neville. Mrs. Slattery informed them that Mr. Neville did not own the premises, that she did. The Kellys enquired as to whom they should pay the rent to. Mrs. Slattery refused to advise them one



way or another. The Kellys ceased to pay rent to anyone between June 1981 and the time when they vacated the flat in November 1981.

Meanwhile on the 7th April 1981 the defendants' solicitors had written to the plaintiff informing him that the defendants understood that he had wrongly made a letting of portion of the premises, demanding £1,000 damages for breach of contract, and informing him that the defendants would not complete the sale until the matter had been cleared up to the defendants' satisfaction.

The plaintiff replied on the 14th April 1981 by letter in which he stated:-

"We are not charging any rent to the people we allowed in there. They are only in there as caretakers purely on the basis of preventing damage to the property underneath."

The plaintiff now admits that this statement was not true.

The defendants' solicitors wrote again on the 17th June 1981 a letter in which they stated that they understood that the tenants had been in possession since February 1981 and were paying a rent of £25 per week.

On the 25th June 1981 the plaintiff replied saying:-

"With regard to the tenants which (sic) are in the flat these

10.

"people were left in after we had sent the bank draft to you."

As the bank draft referred to was sent in April 1981 this statement was not true either.

On the 4th August 1981 the defendants' solicitors wrote again stating that, on their instructions, the plaintiff had been collecting a rent of £25 per week in respect of the portion of the premises over the Royal Liver office.

The plaintiff replied on the 6th August 1981 stating:-

"We collected a rent of £25 per week for four weeks in regard to this premises."

In context, this letter clearly suggests that the plaintiff collected a rent for four weeks only. Again, this is not true.

Later in the same letter the plaintiff says:-

"We will undertake to pay you the sum of £100 being the four weeks rent which we collected which was the only rent we collected in respect of this property."

Again this statement was totally untrue.

These various untruths were not corrected until the hearing before me. It appears to me that the vendor was entitled to an

accurate account of the rents which the purchaser had received as a result of the illegal letting to the Kellys and that she was also entitled not to close the sale until this accurate account was forthcoming. She might also have been entitled to claim rescission of the contract because of the plaintiff's conduct but she did not do so.

In the defence and counterclaim filed on the 15th June 1982 the defendants though complaining that the plaintiff had, without authorisation, admitted a tenant into portion of the premises for sale and collected rent from him and that he had failed to account to the defendants for the rents received from the purported tenants, claimed specific performance of the agreement on the defendants' terms. Moreover, in the same pleading the defendants deny that they had at any time indicated an intention no longer to be bound by the original agreement. Even in the defendants' reply to the plaintiff's defence to the defendants' counterclaim, which the defendants were permitted to file at the hearing, they did not claim rescission of the original contract but claimed that the plaintiff had wrongly breached and repudiated the said agreement or alternatively that there was no

12.

consensus ad idem between the parties. In these circumstances I do not think that the defendants are entitled to claim rescission of the agreement now but must accept interest on the balance of the purchase money payable on closing for the period of the delay occasioned by the plaintiff's failure to come clean in respect of the rents received by him from the unauthorised sub-letting.

#### THE BANK DRAFT

Originally the plaintiff, by letter dated the 2nd March 1981, offered to close the sale by giving the defendants' solicitors a cheque for the balance of the purchase money. But on the 31st March 1981 at a time when it appeared that the closing of the sale was imminent, the defendants' solicitors wrote to the plaintiff enclosing an apportionment account showing a balance of £16,245 due by the plaintiff on closing, and asking for a bank draft. They said:-

"If you will kindly let us have a draft for the sum of £16,245 we shall forward to you immediately the deed of conveyance with the p.p. stamp impressed thereon, the family home declaration and copies of the documents relating to the earlier title."

They went on to suggest that they would be agreeable to close the sale at the offices of the plaintiff's town agent if he wished.

The plaintiff had his account with the Allied Irish Banks. But,

for the purposes of closing the sale, he obtained a loan of £15,000 from the Bank of Ireland and used the proceeds of this loan, together with other moneys, to purchase a bank draft in the sum of £16,245 from Allied Irish Banks. This bank draft was made out in favour of the defendants' solicitors and was sent by the plaintiff to his town agents. On the 14th April 1981 the plaintiff wrote to the defendants' solicitors saying that he was sending this draft to his Dublin agents Messrs Peart and Sons. When, later, trouble arose in respect of the rents receivable out of the premises the plaintiff wrote to the defendants' solicitors complaining of the delay and pointing out that he was paying interest on the moneys raised to purchase the bank draft. On the 25th June 1981 the plaintiff suggested that the defendants' solicitors might attend at Peart's office and cash the bank draft so as to enable the defendants to get the benefit of the money. The plaintiff added that this could be done without prejudice to whatever agreement the parties might arrive at in respect of the rents.

On the 9th July 1981 the defendants' solicitors wrote to the plaintiff noting that he had sent a bank draft to Messrs Peart. They

14.

also said that on the 17th June Messrs Peart had telephoned their office enquiring about closing the sale. They repeated that they would not close the sale until the plaintiff had furnished them with a letter undertaking to pay over, in due course, to the defendants "our client's share of the new increased rent that will be payable by Dr. Callanan and the Royal Liver Trustees Ltd."

On the 27th August 1980 the plaintiff again wrote to the defendants' solicitors complaining that the bank draft had been lying in Peart's office since April and that it had cost the plaintiff £1,470 to date.

Eventually Messrs Peart, despairing of an early closing, sent the bank draft back to the plaintiff, but, as the payees named in the bank draft were the defendants' solicitors, the Allied Irish Banks refused either to cash or cancel the draft. Mr. O'Brien, the officer of the Bank of Ireland, who gave evidence in this case said that his Bank would have adopted the same attitude in the same circumstances. It would not cash or cancel a bank draft in the absence of indorsement by the payee.

Meanwhile interest continued to run on the loan which the plaintiff had obtained from the Bank of Ireland to finance the purchase of the draft.

On the 8th September 1981 the plaintiff wrote to the defendants' solicitors enclosing the bank draft and requesting them to endorse it so that the moneys could be placed on deposit receipt.

15.

On the 11th September 1981 the defendants' solicitors wrote acknowledging receipt of the draft, saying that Mrs. Slattery was in Ireland and that they were expecting a call from her on September the 17th. They added that they would hold the draft until she called when they would take her instructions on the matter.

On the 14th September 1981 the plaintiff again wrote complaining that interest was running on the overdraft used to finance the purchase of the draft. On the 15th the plaintiff wrote again asking the defendants' solicitors to do all they could to have the sale closed and pointing out that the plaintiff was in an intolerable position.

On the 17th September 1981 the defendants' solicitors wrote to the plaintiff stating as follows:-

"Our client Mrs. Margaret Slattery has called here and she has instructed us to return the draft to you unendorsed."

They accordingly returned the draft to the plaintiff unendorsed. The draft has remained unendorsed ever since and I am satisfied on the evidence adduced before me that the plaintiff has been unable to cash it or to have it cancelled.

I am satisfied also that interest has continued to run on the moneys used to finance the purchase of the draft at the rate of £294 per month and that this interest has cost the plaintiff the sum of at least £5899.40.

It is not for the court to make contracts for people. But my understanding of the law is that each party to a contract of sale has the right to expect that the other will be reasonable in taking such necessary steps as may be incidental to the closing of the sale. The suggestion that the sale should be closed by way of bank draft came from the defendants' solicitors and it was, in the context of the practice of Dublin solicitors, a reasonable suggestion. The plaintiff complied with the suggestion and, as a result, left himself in an exposed position. I am satisfied that Mrs. Slattery was fully aware of the financial predicament in which the plaintiff was arising out of the purchase of the bank draft. In September 1981 Mrs. Slattery had legitimate grounds for grievance against the plaintiff. She might reasonably have closed the sale or sued the plaintiff for damages or perhaps, rescinded the sale. She might, then or earlier, have taken up the plaintiff's offer to have the proceeds of



the bank draft placed on deposit pending the resolution of the disputes between the parties. But she did none of these things. I am quite satisfied that the decision to send back the draft unendorsed was her decision and that her solicitors in sending it back were merely acting on her instructions. I am also satisfied that she knew perfectly well what she was doing and that her action was consistent neither with a desire to close the sale or to rescind the sale but with a desire to cause the maximum financial embarrassment to the plaintiff.

The plaintiff was placed in this position because of his compliance with the reasonable request of the defendants' solicitors as to the method of closing the sale. I am also satisfied that Mrs. Slattery in instructing her solicitor as she did on the 17th September 1981 knew perfectly well that the financial consequences for the plaintiff would be very serious and that she intended him to suffer these consequences. Under these circumstances it appears to me that as part of the closing of this sale, the plaintiff should receive a credit of the amount of interest lost (that is to say £294 per month) from the 17th September 1981 until date of closing or

until such earlier time as the defendants' solicitors have, on the instructions of the defendants, endorsed the bank draft, and paid it into Court to the credit of this action, or returned it to the plaintiff

REPAIR

The contract provides at Clause 26 as follows:-

"The property shall as to any damage from whatever cause arising at the date of the sale be at the sole risk of the purchaser and no claim shall be made against the vendor for any deterioration or damage unless occasioned by the vendor's wilful neglect or default."

The property, which is an old one, was in poor repair on the date of the contract on the 26th January 1981. It would, according to the plaintiff's building contractor, who is familiar with the property and did some salvage work on it, have cost between £2,000 and £3,000 to put it into proper repair in early 1981. The plaintiff, without authority, had some salvage work done on the property in May 1981. But the defendants made no effort whatsoever to maintain the property. Mrs. Slattery says that she received no complaint in respect of the property and also complained that the plaintiff changed the lock on the door. I am satisfied that there was no intention to exclude

the defendants from possession of their own property and that they were not in fact excluded. Mrs. Slattery was able to visit the property and interview Mr. and Mrs. Kelly in June 1981. Mrs. Slattery also says that she received no complaints about the condition of the property. But the defendants were the only persons under any obligation to maintain the property. I am satisfied that the defendants neglected the property totally and that this wilful neglect of the defendants is responsible for the deterioration which has taken place in the property. The plaintiff's building contractor has sworn that the property could have been put into reasonable repair in early 1981 at a cost of £2,000 to £3,000 but that it would now cost about £9,000 to put it in order. On this basis it appears to me that the deterioration in the property attributable to the wilful neglect of the defendants comes to £6,000 and that the plaintiff is, on closing, entitled to a credit for this sum.

In all the circumstances it appears to me that the contract is one which ought to be specifically performed in accordance with the principles set out in this judgment.

*Done Bg*

27/3/84

—

## THE HIGH COURT

IN THE MATTER OF (1) THE TRUSTS OF:

- (a) A DECLARATION OF TRUST DATED THE 25TH DAY OF APRIL, 1919 AND MADE BETWEEN ERIC HENRY COOK ALLEN OF THE FIRST PART, AGNES AMY LEONORA ALLEN OF THE SECOND PART AND DAVID (DRENNAN) TREVOR ALLEN OF THE THIRD PART
- (b) A SETTLEMENT DATED THE 6TH DAY OF DECEMBER, 1923 AND MADE BETWEEN DAVID ALLEN OF THE ONE PART AND THE SAID ERIC HENRY COOK ALLEN, AGNES LEONORA ALLEN AND DAVID (DRENNAN) TREVOR ALLEN OF THE OTHER PART
- (c) A SETTLEMENT DATED THE 28TH DAY OF NOVEMBER, 1924 AND MADE BETWEEN THE SAME PERSONS AS ARE PARTIES TO THE SETTLEMENT AT (b) AND IN THE SAME ORDER
- (d) A DEED OF RELEASE AND VARIATION OF TRUST DATED THE 14TH DAY OF AUGUST, 1925 AND MADE BETWEEN THE SAME PERSONS AS ARE PARTIES TO THE DECLARATION OF TRUST AT (a) AND IN THE SAME ORDER

AND IN THE MATTER OF (2) THE WILL DATED THE 19TH DAY OF DECEMBER, 1924 AND A CODICIL THERETO DATED THE 10TH DAY OF AUGUST, 1925 OF DAVID ALLEN LATE OF MIRAMAR KILLINEY IN THE COUNTY OF DUBLIN DECEASED

BETWEEN:

NORTHERN BANK LIMITED, JOSEPH HUGH MURRAY  
AND BERNARD JAMES McCORMICK

Plaintiffs

and

SAMUEL CARSON F. ALLEN, DAPHNE JOAN MARSH,  
OWEN CHARLES COOK, MICHAEL CLIVE TYRONE  
ALLEN AND MARIE LILLIAN COOK

Defendants

Judgment of Mr. Justice Barrington delivered the 10th day of February, 1984

The plaintiffs are Trustees of the Declaration of Trust, Settlement and Deed of Release and Variation set out at (1) above. In these proceedings they seek to have determined certain questions and matters arising in relation to the distribution of the funds comprised in the Trusts and in the execution of the Trusts in the events which have happened, determined by this Court. Each defendant is a beneficiary or potential beneficiary or a member of a class of