

MARAH

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Finlay C.J.
Hederman J.
McCarthy J.

THE SUPREME COURT

(255/261-84)

EDWARD ANTHONY MARAH
AND CELINE MARY MARAH

Plaintiffs/
Respondents

AND

T.C. GERARD O'MAHONY

Defendant/
Appellant

JUDGMENT delivered on the 1st day of November 1985 by

MCCARTHY J. *nem. diss.*

By agreement for sale of the 17th July 1979, the defendant agreed to sell to the trustee for the plaintiffs a site at Nutley Avenue, Ballsbridge, Dublin, for the sum of £33,000, the property being stated to be "held by vendor in fee simple." Before completion of the sale, it transpired that there had been an assignment of the 27th August 1969 which along with a lease of the 13th August 1969 reduced the defendant's title to less than the fee simple. On foot of certain warranties and representations given and made by the defendant, the sale was completed on the 17th August 1979 by

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Indenture whereby the defendant purported to convey the estate in fee simple. The estate conveyed was not an estate in fee simple in possession free from encumbrances, since the fee simple interest was subject to an Indenture of lease of the 20th March 1907 for the term of 99 years from the 25th March 1907 and to a reversionary lease of the 3rd December 1955 for the term of 99 years from the 25th March 2006, and to a sub-lease of the 13th August 1969 for the term of 150 years from the 25th March 1954, and, in particular, subject to a covenant restrictive of building on the site. In the premises, it has not been contested that the plaintiffs are entitled to damages for breach of contract; it is right to say that, whilst criticism may be made on the basis of undue optimism on the defendant's part, there is no suggestion of any impropriety, much of the difficulty arising from strained relations with parties who are not involved in this litigation.

The plaintiffs are husband and wife but it is clear that the first plaintiff, a director of a Merchant Bank, had control of the claim. The agreement for sale was on the 17th July 1979, the sale completed on the 17th August, but it was not suggested that any particular use

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would have been made of the site in the then succeeding months or, indeed, years. No evidence was given by either plaintiff in the hearing of the action and it would be speculative to try to determine their intentions, save that it was intended to have an auction of the site in October 1981. Because of the difficulties about the title, the auction was called off with consequent loss. The action was heard in the High Court in May 1984, at which time the property had not been resold. The learned Judge held that as of the time of the abortive auction the site value was £42,000 and as of the date of trial £38,000. This is not challenged.

MacWilliam J. assessed damages as follows:-

1. Interest at 11 per cent on the sum of £33,000 from the 17th August 1979 to the 26th May 1984, the date of effective purchase of the fee simple - £17,344.44.
2. Interest at the same rate on the sum of £9,000 from the 19th September 1981 (earliest date of auction) to 26th May 1984, £9,000 being the difference between £33,000 (the original purchase price) and £42,000 (the 1981 value) - £2,674.36.
3. A deduction in the sum of £5,000 (the difference between

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£33,000 ('79 price) and £38,000 (1984 value), as a profit to the plaintiffs on the basis that the purchase was in the nature of an investment.

- 4. The costs of the Circuit Court proceedings to obtain the consent of the landlord to building and the costs of the proceedings to require the representatives of the owner of the leasehold interest to raise representation.
- 5. The price paid to buy out the head interest - £120.
- 6. The legal costs incurred in rectifying the title, together with the cost of the abortive auction.

These latter three items were measured at £4,441.80.

The defendant challenges these assessments as follows:-

- 1. The award of damages arising out of the loss of use of the £33,000 paid in 1979 is wrong in principle since that sum would have been tied up in the property which was not offered for sale until September/October 1981 at which time it was valued for £42,000 the sum which might be reasonably expected to have been realised on auction; the plaintiffs' claim under this heading should, accordingly, be an appropriate sum in respect of that

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figure of £42,000 from September/October 1981 until May 1984.

The plaintiffs do not contest this.

2. This amount is subsumed into paragraph 1.
3. The reduction is, in the circumstances, inappropriate; rather, should the plaintiffs receive an additional sum of £4,000 being the difference between the £42,000 (abortive auction value) and £38,000 (1984 value).
4. The auction costs, part of the rectification costs, are not recoverable since they would have to be paid at sometime in any event. £1,910 represents the direct cost of rectifying the defect in the title but the balance - £2,531.80 is auction related and would have to be deducted from the amount the plaintiffs could have expected to recover in 1981. The short answer is that the plaintiffs may still have to sell by auction with consequent fresh cost save that the percentage fee may be marginally reduced if the price is £4,000 less; I would accede to this branch of the argument by deducting £60 - being 2½ per cent of £4,000.

The main thrust of the appellant's argument, however, was directed to the award of interest or, more correctly, the award of damages measured by interest at 11 per cent on the £42,000. If it be interest, under any guise, then, it is argued, income tax at the appropriate rate must be deducted in respect of each taxable year, and the damages reduced accordingly; here, it is said, by 60/65 per cent with an additional deduction for the 2 "temporary" levies of 1 per cent each which have been part of the taxation system during the relevant years (see Glover v. BLN - (1973 I.R.) 388). The short answer to this argument is that the case was not made during the trial, although I accept the assurance from Counsel that the point was made in argument at the close of the evidence. A perusal of the transcript of evidence makes it quite clear that no attempt was made to explore the tax liability of either of the plaintiffs in the relevant years or what steps might have been taken by them to reduce such liability; this is of particular significance having regard to the elaborate evidence given as to the level of return, net of tax, that could be obtained by careful investment and reinvestment at the relevant time.

I do not, however, rest my view on that valid, albeit, technical

ground. The learned trial Judge referred, in his judgment, to the evidence given on behalf of the plaintiffs as to the "possible profit which could have been made by shrewd investment of any sum realised on the sale in 1981, if it had proceeded. No evidence was given by the plaintiff as to what he proposed to do with the purchase price if a sale had been completed at that time or as to the use he had intended to make of the plot when he bought it. There are a great many possible alternatives to adopting the ^{not} possible suggestions made on his behalf by his accountants." It is clear, that the learned trial Judge was alive to the possibility that the plaintiffs might have availed of the opportunity of what was called "bond-washing" at the relevant time, so as to secure the maximum return net of tax. He commented on the failure of the plaintiffs to give direct evidence to this effect and may have been adverting to the decision of this Court in East Cork Foods Limited v. O'Dwyer Steel (1978 I.R.) 103, to which the Court directed attention during the course of argument. In that case the appellant had succeeded in wholly reversing a finding of liability against it and accordingly was entitled to recover from the

respondent, co-defendant in the High Court, the sum that the appellant had paid to the injured party - the appeal deals solely with the right to interest or other compensation in respect of the loss of use of the money in the interval. As was stated in the judgment of Henchy J. at 112 "In such circumstances the order in favour of the second defendant (the appellant) should be as fully restitutive as the justice of the case will allow. However, it would first have to be shown that the second defendant made a loss and that the first defendant made a profit. But on those matters there is no evidence one way or the other. We have been told that the reality of the situation is that the £20,000 was paid by one insurance company to another. Yet we have no information as to the financial consequences of that transaction to either company. We are not entitled to assume that the paying company would have made a profit on the £20,000 if they had not parted with it; for all we know it might have been credited to an account, or applied in a commercial activity, on which a profit would not have been made. Likewise, the receiving company may not have made a profit on the £20,000. If it were a question of quantifying a profit or a loss, the necessary enquiry and account could be directed. But that is something the

Court should not direct when, as in this case, the necessary foundation evidence is absent. Therefore, I would hold that the second defendant has not made out a case for the payment to it of a sum for loss of profit resulting from the first defendant having had the use of the money." The appeal in question was concerned with the correctness of the finding of the High Court Judge as to the apportionment of liability for an accident at work as between the two defendants in the High Court hearing. The High Court had been solely concerned with the resolution of the same problem. No party had adverted to any question of interest or the use of money until after the determination of the appeal in the Supreme Court which preceded the argument. As to the present plaintiffs it seems highly likely that they would have adopted their accountant's advice as to the best method of achieving the highest tax free income available, with complete security, at the relevant time. Whilst the learned trial Judge does not refer to the question of tax on interest in his judgment, he cannot but have been aware of such a potential liability or, at least, the arguments supporting it. To me it is entirely clear that he assessed a level of interest, net of tax, based upon

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the evidence which he had heard, mitigated to allow for a variety of circumstances that might have lessened the advantage to a particular investor or investors, and arrived at a figure of 11 per cent on that basis. He was fully entitled to do so. I am far from saying, however, that there is an obligation on every claimant in circumstances of a like kind to go through the motions, as it were, of testifying that he would act on the advice of his financial advisors, particularly when no issue is raised with that financial advisor as to the benefit or advantage of the particular investment.

On behalf of the respondents to the appeal, it was further argued that, in fact, there could be a liability to tax on the damages when paid, as trading receipts. Such an argument, I find unappealing but it is unnecessary to decide it in the present appeal. The respondents further cross-appeal in making a claim that the assessment of damages should be based on a compounding of the rate of interest annually. Certainly, here, the point about the absence of evidence from the plaintiffs would be a very valid one. There is no basis whatever for such a method of computation without impressive evidence that at all relevant times those entitled to the use of the money being paid or realised in some form of interest on

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capital would have all of this available for further and immediate investment.

I would vary the Order of the High Court as follows:-

1. Cost of rectifying the defect in the title including extra cost of abortive auction - £1,970.
2. 11% interest on £42,000 from 1.11.1981 to 1.7.1984.
3. £4,000 loss of value on sale.

Subject to these variations I would dismiss the appeal and the cross-appeal.

Approved.

[Signature]

19.11.84.