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THE HIGH COURT
1983 No. 486 Sp COURT 6

8 AUG 1984

GREGORY McCAMBRIDGE

Applicant

and

BRIAN WINTERS

Respondent

Judgment of Mr. Justice Francis Murphy delivered the 28th day of May 1984

This is an application brought under Section 9 of the Vendor and Purchaser Act 1874 for the determination by the Court of the question whether a contract for sale dated the 26th day of January, 1982 and expressed to be made between Gregory McCambridge (the applicant) on the one part and Robert J. Downes (in trust) of the other part has been duly rescinded or terminated.

That question (and other subsidiary issues) arise in circumstances of such complexity of fact and such conflict of testimony as make it extremely unfortunate that the matter was not litigated by means of plenary proceedings and with the benefit of detailed pleadings; adequate particulars and perhaps discovery of documents by both parties. Whilst it can be appreciated that the parties - and in particular the applicant - would be anxious to adopt a procedure which would be more expeditious than a plenary hearing the fact remains that it is difficult to envisage proceedings less appropriate to be dealt with by way of special summons than those which

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arose in the present matter.

The facts of the matter are as follows.

By the agreement dated the 26th January, 1982 the applicant agreed to sell to Mr. Downes certain premises at 25 Lennox Street, Dublin, for the sum of £90,000. A deposit of £9,000 was paid and the closing date was fixed for the 14th April, 1982.

The special conditions of sale provided for the commencement of the title with a lease dated the 10th August, 1859 and the purchaser was fixed with notice of a number of documents referred to in the first part of the schedule to the contract. A plan annexed to the contract showed a right-of-way in favour of part of the premises and to the rear thereof.

The body of the printed form of contract, which was in the form provided by the Incorporated Law Society of Ireland, contained the usual clause in relation to planning permission in the following terms:

"17 (2) Unless the special conditions contain a provision to the contrary, the vendor warrants that planning permission has been obtained for any development (other than exempted development as defined in the said Act of 1963 or any amendment thereof or any statutory instrument made thereunder or development of trifling materiality) that has taken place

" on the property since the 1st October, 1964".

Mr. Downes was and is a solicitor carrying on practice under the style "R.A. Downes & Co" of 120 Pembroke Road, Dublin 4. In addition he was by coincidence a long standing friend of the applicant, Mr. McCambridge.

Negotiations for the sale of the premises in question began shortly before the date of the contract. The applicant believed that the negotiations may have continued for a period in excess of a week whereas the defendant and his witnesses gave evidence to the effect that the matter was completed in some two or three days from the time when negotiations commenced. In any event it is common case that the applicant was anxious to sell: that his views were coloured by the fact that the Budget was then shortly to be announced and that he wished to dispose of his interest in the property before that event occurred.

As appears from the contract Mr. Downes purchased "in trust". It subsequently appeared that the beneficiary was Brian Winters, the respondent in the proceedings. Nonetheless it was clear from the evidence that Mr. Downes retained a substantial beneficial interest in the transaction. Indeed it would appear that his financial commitment was more substantial than that of Mr. Winters. Moreover, Mr. Downes through his firm acted in connection with the transaction whether on behalf of Mr. Downes or Mr. Winters (sometimes together referred to as "the Purchasers") from the

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commencement of negotiations through the signing of the contract up to and including the raising of requisitions and until the 2nd September, 1982 when Messrs Tom Duffy and Co., Solicitors, informed the Solicitors on behalf of the applicant that they had been instructed on behalf of the respondent, Mr. Winters.

The crucial issue of fact in this matter is what representations were made, and what undertakings (if any) were given by the applicant in relation to planning permissions granted in respect of the property for sale and/or the nature and duration of the user made by the applicant of the premises. Mr. McCambridge was adamant that he represented in the course of negotiations that the only planning permission attaching to the premises was one dated the 16th September, 1964 permitting the same to be used as a store. He denied that he represented that any other permission had been sought or granted. What he did say was that since the month of September 1978 that the premises had been used as a furniture assembly plant but that he never represented that any such user had existed before 1964.

Mr. McCambridge was clear in his evidence given in Court and in the affidavit sworn by him that he had made no representations and given no warranties in respect of planning permission. In his affidavit and in evidence

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given under cross-examination Mr. McCambridge emphatically denied that he had represented that the property for sale had been used prior to 1964 as a factory. He maintained, as did Mr. Liam Murphy, that Messrs Winters and Downes had discussed a number of possible uses of the premises including use as a billiard hall and as a car showrooms. Mr. McCambridge says that it was his belief and understanding that the purchasers intended to apply for planning permission to use the premises for whatever purposes they ultimately decided upon. The evidence on behalf of the purchasers can be summarised by quoting the final paragraph from the affidavit of Mr. Downes which is in the following terms:-

"As far as I am concerned and I am in no doubt that I was informed that a statutory declaration would be provided by the vendor that the property had been used as a furniture factory, store, offices, showrooms and maintenance depot prior to the 1st October 1964."

It was argued by the purchasers and by Counsel on their behalf that it was improbable in the extreme that any person would enter into this transaction, that is to say, to purchase and develop property if his entire investment was dependent upon securing appropriate planning permissions after he had committed himself financially to

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both the purchase and the development. Whilst I would readily accept that most developers would take steps to safeguard their investment from the serious consequences which might flow from an adverse decision on a planning application I have, in fact, no hesitation in preferring the evidence given by Mr. McCambridge to that of either Mr. Downes or Mr. Winters.

In fact the purchasers were given possession of the premises immediately after signing the contract for sale. A contractor was employed almost at once to renovate and restore the premises. The cost of these works was estimated at £34,000 by the respondent's witnesses. Within weeks of the execution of the contract for sale Mr. Winters was negotiating with intending sub-purchasers for the re-sale of the developed premises. There cannot be any doubt at all but that at that stage any questions relating to planning permission or any assurances given with regard thereto would have been matters of immediate concern to the purchasers. The fact of the matter is that requisitions on title were apparently raised by Messrs R.A. Downes & Co. on the 11th February 1962 and replied to by the solicitors on behalf of the vendors on the 5th April 1962. If the applicant had given an undertaking that he would provide a statutory declaration with

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regard to the user of the premises for a particular purpose over a 20 year period less than three months earlier, it is amazing that that declaration was not specifically referred to in the requisition. In fact, the purchaser did not pursue further the matters raised in the requisitions on title except to the extent that in a letter of the 21st April 1982 they sought copies of the planning permissions in existence relating to the property. The planning permissions were, in fact, forwarded to the solicitors on behalf of the purchasers on the 26th April 1982. This was the permission dated the 1st September 1964 approving the construction of the premises in accordance with the plans lodged on the 10th August 1964 for use as a store.

In his affidavit Mr. Winters (at paragraph 13) swore that the letter of the 27th April 1982 and the permission enclosed therewith was, as he said, "the first I knew of any planning problems". That statement is wholly inconsistent with the evidence which Mr. Winters himself gave in relation to the prompt development of the property and the problems which he was experiencing in negotiating the onward sale of the property, having regard to planning permission difficulties. However, it is even more dramatically in conflict with the fact that

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Messrs P.N. Shaffrey and Partners, Architects, had, on the instructions of Mr. Winters himself, applied on the 31st March 1982 to Dublin Corporation for a change of use from storage to retail and for the retention of first floor offices on the premises 25 Lennox Street.

Not only is it clear that there were "planning problems" as early as March 1982 but that the purchaser's solution at that stage was to apply to the Corporation for a change of user permission. In the considerable correspondence between R.A. Downes and Co. and Messrs Fitzpatricks, on behalf of the vendor, no complaint whatever was made about any alleged failure of the vendor to provide evidence of the user of the premises for a particular purpose at the relevant date for planning purposes. It was only in September 1982 when Messrs Tom Duffy & Co. replaced Messrs R.A. Downes & Co. as solicitors on behalf of the purchasers that it was contended in correspondence that crucial representations had been made in relation to the nature and duration of the use made of the premises. Furthermore, it must be recognised that this case was made by the new solicitors on behalf of the purchasers in the context that the vendor/applicant was purporting to rescind the contract for sale and had, indeed, returned the deposit for £9,000.

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I am completely satisfied that the Purchasers were fully aware of the position with regard to the prior user of the premises and the planning permissions attaching thereto by the months of March 1982. If the alleged representations had been made to them in the relatively short period before that date as they contend it is inconceivable that they would not have complained vigorously and in writing to Mr. McCambridge and his solicitor. Mr. Downes explained this omission as being due to his friendship with Mr. McCambridge. This is wholly unconvincing. Indeed, his very friendship would, presumably, have caused a sense of betrayal which would have heightened rather than lessened the controversy. Again, it is noticeable that the tenor of Mr. Winter's affidavit was to suggest that an application for planning permission had been made in October 1982 by Mr. Downes to break the deadlock which he alleged arose due to the failure of Mr. McCambridge to take action. The statement that such an application had been made without reference to the earlier application made by Messrs Shaffrey and Partners in March of the same year could only be interpreted as an effort to mislead the Court.

In these circumstances and having regard to the impression which

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the witnesses made on me I prefer the evidence of Mr. McCambridge to that given by either Mr. Downes or Mr. Winters in each and every respect in which there is a conflict between the two sets of testimony. I am of opinion, therefore, that whilst the matter of planning permissions was discussed that the vendor merely informed the intending purchaser that the permission existed for user as a store and that the premises had been used for a light furniture assembly plant since 1978 and no other undertaking or representation was given or made.

The plaintiff/vendor purported to rescind the contract by notice dated the 27th August 1982. At that stage the plaintiff had not performed his part of the contract because of his failure to make title to a right-of-way to the rear of the premises. In those circumstances it was not contended that the notice given in the month of August was effective to terminate the contract. The problem with regard to the right-of-way had been resolved, however, when a second notice was served on the 11th November 1982.

On behalf of the purchaser it was contended that this notice too was invalid first because the purchaser had not affirmed the contract subsequent to the vendor's purported termination thereof by

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the notice dated the 27th August 1982 and, secondly, because the vendor was not, even on that date, willing and able to perform his part of the bargain inasmuch as he had failed to comply with clause 17 (2) thereof which I have already quoted. I cannot see any reason why the giving by the applicant of a defective notice of rescission in any way altered the right of the vendor to give a valid notice subsequently if and when the giving of such a notice was justified by the circumstances of the case. In particular, I cannot see that the right of the vendor to serve a valid notice of rescission is in any way conditional upon the prior affirmation of the contract by the purchaser. However, even if that were the case the fact that the purchaser remained in possession of the premises subsequent to the first notice to complete: that, notwithstanding such notice, he registered the contract for sale in the Registry of Deeds and, furthermore, applied for planning permission in October 1982 all constitute clear affirmation by the purchaser of the contract.

With regard to the provisions of clause 17 (2) of the contract for sale it must be recognised that this was not a contractual term in the sense of imposing a promissory obligation on one party

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or the other. That clause contains a statement of fact which, in the ordinary way, the plaintiff would be estopped from denying. However, the very essence of the principle of estoppel is that the party making the statement is to be precluded from making a case in conflict with the facts on which the representee has relied as a result of the statements or conduct of the plaintiff. In the present case when it has been found as a fact that the purchasers were informed as to the true position with regard to the user of the premises and the nature of the planning permissions attaching to them there is no room for the operation of the doctrine of estoppel. It seems to me that this view of clause 17(2) is fully supported by the decision of the Court of Appeal in England in Lowe and Lombank Limited 1961 W.L.R. page 196 and I would adopt as a correct statement of the law in this country a statement made by Diplock, J., (as he then was) at page 204 (when he was commenting upon a clause in a hire purchase agreement under consideration in that case in which the hirer acknowledged that he had examined the goods prior to executing the agreement), as follows:-

"Insofar as it was a representation, it could operate only as an estoppel preventing the plaintiff from asserting the contrary, but Mr. Roche expressly disclaims reliance upon it as

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"an estoppel, no doubt for the very good reason that there was no evidence (and it is difficult to see how there could have been truthful evidence) that the defendant believed in the truth of the representation. To call it an agreement as well as an acknowledgement by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer "agrees" that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise."

In these circumstances it seems to me there is no answer to the plaintiff's contention that the second notice dated the 11th November 1982 was valid and that the contract was duly terminated.

A number of other questions were raised in the summons but postponed by agreement between the parties. I would hear argument as to which of these questions now fall to be dealt with and the procedure which should be adopted in relation to them.

Francis J. Mc...
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