

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

DAVID HOGG

Plaintiff

and

KIERAN M J McATEER P/A McATEER & COMPANY

Defendant

COGHLIN J

[1] In this case the plaintiff, David Hogg, claims damages for loss and damages which he alleges that he has sustained by reason of the professional negligence of the defendant solicitor in and about the purchase of certain premises situate at 63 North Circular Road, Belfast. The plaintiff was represented by Mr Thompson QC and Mr Jonathan Dunlop while Mr Hanna QC and Mr Robert Millar appeared on behalf of the defendant. I am grateful to both sets of counsel for their concise and well reasoned submissions both oral and written.

BACKGROUND FACTS

[2] The plaintiff is an insurance broker in his mid-forties who was originally employed by Bowring Martin and subsequently acquired his own business. It seems that he dealt mainly in liability insurance. In 1992 he says that he met a Mr Richard Agnew socially and arranged to place some insurance upon his behalf. The plaintiff wanted to diversify his business interests and the opportunity arose to purchase from Mr Agnew a property at 63 North Circular Road, Belfast which was being used as a multiple occupancy bed and breakfast hostel partially funded by the Northern Ireland Housing Executive in accordance with the provisions of the Housing (Northern Ireland) Order 1992. The function of the hostel was to provide accommodation for individuals from disturbed or difficult personal/social backgrounds while they were waiting to be re-housed.

[3] The plaintiff described how several meetings took place between himself and Mr Agnew as a result of which Mr Agnew's asking price of £125,000 was eventually reduced to an agreed purchase price of £100,000. The plaintiff said that he had no experience of this type of business but he was told by Mr Agnew that, although he had only acquired it recently, the business had been running for "quite a while" and "all necessary approvals were in place". The figure of £100,000 was agreed as the purchase price at the final meeting between the plaintiff and Mr Agnew and, according to the plaintiff, Mr Agnew then suggested that they should use the services of the defendant Mr McAteer in relation to the legal aspects of the transaction. The plaintiff stated that he had never used the services of Mr McAteer before, that he had not previously known of his existence but that he had "no reservations" about both parties using the same solicitor. In fact, it is the plaintiff's case that, quite apart from never receiving any advice or instruction, he never personally met the defendant solicitor until 7 November 2000, the date upon which these proceedings first came to trial but subsequently had to be aborted.

[4] The plaintiff claims that on 17 June 1993 Mr Agnew called at the plaintiff's business premises in Newtownabbey upon two occasions bringing with him contractual documents for the plaintiff to sign. Mr Agnew brought the first of these documents just before lunch at approximately 11.30/12.00pm. The plaintiff signed this document. According to the plaintiff, later on that same day, Mr Agnew returned at about 4.30pm and informed the plaintiff that the document that he had signed that morning was not correct. Mr Agnew then produced a second contractual document which the plaintiff again signed. The plaintiff believes that it was this second document which provided the legal basis for the transaction.

[5] According to the plaintiff, his intention was to fund the purchase of 63 North Circular Road with a loan of £70,000 from the Northern Bank, the bank which held the account used by the plaintiff's insurance business, and he agreed with Mr Agnew that the balance of £30,000 would be discharged by the plaintiff making such "reasonable" payments as the cash flow from the business permitted. The plaintiff said that these payments were to be made to Mr Agnew's partner, Peter Dunne, who was not then resident in Northern Ireland but who visited the plaintiff and left him the details of the bank account into which the payments were to be made.

[6] The plaintiff said that he started to run the business on 7 July 1993 but that he was contacted by the Planning Service in September/October of that year. According to the plaintiff, an officer from the Planning Service informed him that there was no planning permission to use the premises at 63 North Circular Road as a hostel and that the service had been attempting to serve a "cease and desist" order for a number of years. The plaintiff stated that his reaction to this news was one of "absolute horror" and he consulted

an architect who advised him to apply for planning permission. The plaintiff applied for planning permission on 16 May 1994 but on 22 June 1994 he was notified that his application had been unsuccessful. He submitted a notice of appeal to the Planning Appeals Commission on 11 November 1994 and was notified by letter dated 10 March 1995 that his appeal had been unsuccessful. After the refusal of his appeal the plaintiff had six months in which to stop using the premises for the purpose in respect of which no planning permission existed and the last client apparently left 63 North Circular Road on 15 September 1995.

[7] In January/February 1996 the plaintiff approached McQuitty Ross Estate Agents with regard to a possible sale of the premises and he states that they were ultimately sold to a Mr Dixon for £50,000.

WAS THE DEFENDANT GUILTY OF PROFESSIONAL NEGLIGENCE?

[8] Mr J W Russell, a practising solicitor who has been on the Roll of Solicitors for more than 50 years gave evidence on behalf of the plaintiff. In this case the defendant was purporting to act on behalf of both the vendor and the purchaser and thus, prima facie, he was acting in breach of Regulation 19 of the Solicitors Practice Regulations 1987. The need for the plaintiff to receive independent legal advice was particularly important in the circumstances of this case in which it is clear that the hostel business at 63 North Circular Road was being operated in the absence of appropriate planning permission. Mr Russell confirmed that, in normal circumstances, the responsibility for insuring that planning permissions were in order was a matter for the purchaser's solicitor under the applicable Conditions of Sale and the normal procedure would be for the purchaser's solicitor to obtain a property certificate from the Department of the Environment. Such a certificate would disclose the use being made of the property at the material time. In this case both copies of the contract contained special conditions providing that the purchaser was purchasing the premises being aware of all circumstances/matters affecting building control and planning permission, but, as Mr Russell pointed out, there was no evidence whatever that the defendant had carried out any form of pre-contract inquiries, whether with the DOE or any other body. There was no evidence that the defendant had ever provided the plaintiff with any advice, warnings, guidance or instruction and, indeed, he does not appear to have met the plaintiff until the morning of the previous aborted hearing. Mr Russell noted that planning permission was probably vital to the plaintiff in so far as he intended to derive income from the property by continuing to use it for multiple occupation and, in such circumstances, the duty of a defendant's solicitor was to inform the purchaser in a "clear and unmistakable manner" of any matter which might be relevant to the purchase.

[9] In the course of giving evidence on behalf of the defendant Mr Richard Agnew stated that he had originally bought number 63 North Circular Road from a Mr Sinclair for £32,500 approximately one year before the sale to the plaintiff. Mr Agnew stated that he had carried out some renovation to the property but Mr Russell was of the clear opinion that the defendant ought to have advised the plaintiff of the apparent substantial increase in value that had taken place during a period of one year.

[10] While the plaintiff does not appear to have been involved in any professional transactions or relationship with the defendant prior to the sale of 63 North Circular Road, it is quite clear from the discovered documentation that the defendant acted for Mr Richard Agnew in relation to his purchase of the same premises from Heather Rollins and Cathy Price in 1992. Mr Agnew himself gave evidence that he purchased the premises from Robert Sinclair but this appears to be a reference to the solicitors acting for Ms Rollins and Ms Price at the material time. A handwritten attendance note produced by the defendant refers to "Richard and Peter" buying the premises from Robert Sinclair and it may be that Cathy Price is the wife of Robert Sinclair. In any event, it is clear from this handwritten attendance note that the defendant was perfectly aware that the premises were being used as bed and breakfast accommodation for Northern Ireland Housing Executive tenants and that there was "no planning for this".

[11] In this case the defendant, a practising solicitor, agreed to act for both the vendor and the purchaser in relation to the transfer of 63 North Circular Road. The defendant had not previously acted on behalf of the plaintiff purchaser but he did have a professional relationship with the vendor for whom he had acted previously in relation to the purchase of the same premises. It is clear that, as a result of this previous relationship with the vendor the defendant was perfectly aware not only that these premises required planning permission before they could be used as bed and breakfast accommodation but that such a business had been carried on at these premises by the vendor in the absence of any planning permission for a significant period of time. He was also aware that the purchase price which the plaintiff was ostensibly being required to pay was approximately three times the price that had been paid by the vendor approximately one year ago. I am quite satisfied that to fail to ensure that the plaintiff purchaser received competent and adequate advice about these matters and the potential implications thereof would have constituted serious professional negligence on behalf of the defendant.

[12] In addition, I note from his letter to Peter Dunn of 26 October 1994 that, in the absence of funds held on behalf of Mr Agnew and Mr Dunn, the defendant's solicitor attempted to compel the plaintiff to pay fees required by the vendor company to complete the sale of 63 North Circular Road. Furthermore, on the 6 February 1995 the defendant wrote to the plaintiff

seeking payment of £30,000 alleged to be outstanding from the sale to Richard Agnew threatening that, a failure to do so, would result in the institution of bankruptcy proceedings. Such action on the part of a solicitor who acted on behalf of both parties during the material transaction seems quite extraordinary and, ultimately, it seems to me that the papers relating to the defendant's dealings with this property should be referred to the Law Society of Northern Ireland for consideration by that body.

DID THE PLAINTIFF KNOW THAT THERE WAS NO PLANNING PERMISSION FOR THE BUSINESS THAT WAS BEING CARRIED ON AT 63 NORTH CIRCULAR ROAD?

[13] The plaintiff maintains that, at the time of the transaction, he did not know that the bed and breakfast business at 63 North Circular Road was being carried on without the requisite planning permission and that the first he knew of such an omission was when he was contacted by the Planning Service in September/October 1993. To use the plaintiff's own words his reaction was one of "absolute horror". During the course of the proceedings the plaintiff's credibility was tested in relation to a number of matters:

(1) The plaintiff stated that Richard Agnew brought the first copy contract to the plaintiff's office before lunch on 17 June 1993. The plaintiff had not spoken to the defendant at that stage but he was expecting Mr Agnew to call with the document. The first document brought to the plaintiff by Mr Agnew consisted of manuscript entries upon a Law Society form of Particulars and Conditions of Sale. The plaintiff maintained that he was only interested in the purchase price and could only recall looking at the page that he signed. The plaintiff denied that he had read the manuscript Special Condition relating to building control and planning permission. It appears that Mr Agnew returned to the plaintiff's office at approximately 4.30pm and, according to the plaintiff, there was no warning of this visit. The plaintiff was led to believe that the "original contract" was not correct although he said in evidence that he himself could not see "any difference". He said that he was very busy at the time and did not remember reading Special Conditions 1 and 2 contained in this document. According to the plaintiff he only "fleetingly" looked at the contracts and he did not think that he had an opportunity to compare the two documents at any time.

At the time of this transaction the plaintiff was not inexperienced in business affairs. He had worked for Bowring Martin and, before he met Mr Agnew, he had been running his own business for several years. The plaintiff had purchased that business from a family friend and had taken it over with the assistance of his father. The plaintiff accepted that, when this was taking place, he and his father had perused and discussed accounts and various other relevant details and statements. As a person involved in the insurance broking business he would certainly have been aware of the significance of

contractual documents and the conditions contained therein. He accepted in cross-examination that he realised that the contracts proffered by Mr Agnew, whom he did not know “particularly well”, were important legal documents which confirmed that he was about to enter into a serious commitment. In such circumstances it is difficult to accept that a person with the plaintiff’s experience of business would not have carefully read contractual documents which were brought to him by a person that he did not know particularly well, especially when, unexpectedly, a second contract was produced. The plaintiff himself maintains that he was only interested in the price and saw no difference in the pages that he signed. In my view, it is not possible to accept this assertion. The memorandum contained in the first contract, which was completed in manuscript, referred to the purchase money as being £100,000 with a deposit of £30,000 paid to the vendor’s solicitor. By contrast, the memorandum in the second contract did not contain any specific figures either for the purchase money or for any deposit but did contain a manuscript reference to “Special Condition 1”. Special Condition 1 provided for the purchase price of £100,000 to be discharged by a payment of £70,000 on completion to be followed by monthly payments of £2,000 until the final sum had been completed. Special Condition 2 which immediately followed this condition specified that the purchaser was aware of all circumstances concerning planning and building control regulations. It appears from the defendant’s discovery that copies of the two contracts together with a “promissory note” were sent to the plaintiff on 6 July 1993. If it was the intention of the vendors and the defendant to deceive the plaintiff as to the existence of planning permission the inclusion of such a Special Condition is extremely difficult to understand. On the other hand, assuming that the plaintiff was aware of the absence of planning permission, the inclusion of a special condition worded in such a way might have been thought sufficient to preserve the legal position between the parties without adversely affecting the commercial efficiency of the document. It seems to me that the evidence relating to the circumstances under which the plaintiff came to sign these two contracts is entirely consistent with knowledge on his part that the premises did not have the requisite planning permission.

(2) Despite his reaction of “absolute horror” to the visit of the planning officer in September/October 1993 the plaintiff appears to have taken no immediate action against Mr Agnew, Mr Dunn or the defendant. Instead, the course adopted by the plaintiff was to consult a firm of architects and institute an application for planning permission, which was ultimately refused on 10 March 1995. The plaintiff chose this course, notwithstanding the fact that he had already paid over the £70,000 that he had borrowed from the bank. In his direct evidence the plaintiff said that he had sent a cheque to the defendant “made out to him” for £70,000 although the plaintiff’s cheque journal indicates that the cheque was made out to “R Agnew” and the contracts specified the vendor to be Minex Investment Corporation Ltd. At one stage in his evidence the plaintiff said that he thought he had made the first payment

to Mr Dunn towards the end of 1993 in November or December although, at another stage, when dealing with the entries in his cheque journal he said that he had paid £1,400 to Mr Dunn by the end of October. In either event, the plaintiff's evidence was that he continued to make these payments after he had learned that there was no planning permission and did so despite his belief that there might be something "shady or dishonest" about Dunn. Indeed, he said that he wanted to disguise these repayments because he could not see that Dunn was "wholly legitimate". The plaintiff did not write to or call with the defendant to seek an explanation why he had not been advised as to the absence of planning permission. At that time it appears that the plaintiff's current solicitors were acting for him in relation to some other transactions but the plaintiff said that they simply advised him to apply for planning permission. Again, it seems to me that the failure to raise the issue of the absence of planning permission with the defendant at this stage together with the alleged continued payments to Mr Dunn is inconsistent with the case made by the plaintiff but consistent with a situation in which he did know of the absence of planning permission and when the risk matured he simply set about trying to remedy the situation as best he could. I note that the first clear allegations of professional negligence on the part of the defendant did not appear until the plaintiff's solicitor's letter of 4 May 1995 which was written subsequent to the dismissal of the plaintiff's planning appeal by the Planning Appeals Commission on 10 March 1995.

(3) I found the plaintiff's explanation of the circumstances in which he allegedly made payments to Peter Dunn to be wholly unconvincing. He said that he would gather together two or three cash cheques from the 63 North Circular Road account at his bank at Mallusk which he would then cash and transfer to Peter Dunn by way of credit transfer. He accepted that there would have been credit transfer slips in respect of these transactions but stated that he did not keep any of these, despite his doubts about Mr Dunn. He claimed that he did tell his current solicitors about these credit transfers but also said that he did not tell them because he did not hold any of the transfer slips. He also said that "I assumed I had told my solicitors about how the payments were made". After correspondence commencing on 3 October 2001 between the plaintiff and the defendant's solicitors the suggestion that the payments were made by credit transfer eventually emerged in a letter from the plaintiff's solicitors dated 31 January 2002.

It seems that at the time of the aborted hearing the plaintiff marked a number of entries in his bank statements as representing payments made to Mr Dunn and he was closely cross-examined about the relationship between these entries and entries in his cheque journal by Mr Hanna QC. This cross-examination revealed a number of what the plaintiff termed "mistakes" that he sought to explain on the basis that he did not have access to the cheque journal when he originally marked the bank statements with asterisks. He continued to maintain that the majority of payments marked with asterisks

were made to Mr Dunn. When the plaintiff was asked why the letter from his solicitors of 17 February 1995 written in response to the demand from the defendant for £30,000 did not refer to the fact that he had apparently paid Mr Dunn £16,000 by that date he maintained that he had told his solicitors that he was still paying Mr Dunn and that he, the plaintiff, had “spoken to him”.

(4) Mr Cole the plaintiff’s bank manager gave evidence about his interviews with the plaintiff in relation to the financing of the purchase of 63 North Circular Road. Mr Cole stated that he was informed by the plaintiff that documentation from the NIHE indicated that the income for 63 North Circular Road for 1992 was £59,443 which equated with 58% occupancy. He also said that the plaintiff’s stake was to be provided by way of £30,000 in Insurance Bonds which had been purchased from declared income and were available on 7 days notice. The plaintiff maintained that the Housing Executive documents which he had obtained from Mr Agnew and which he supplied to Mr Cole showed the income for the property in 1992 to be £35,000. He said that he had “no idea” where Mr Cole got the figure of £59,443 this figure may have been produced by assuming that each of the 7 rooms was occupied by one adult and one child for 365 days and calculating 58% of the total.) Mr Hogg also maintained that he did not mention Insurance Bonds to Mr Cole, that he had never possessed any such bonds and he did not know why Mr Cole included such a reference in his record. I accept the evidence of Mr Cole in relation to these issues and reject that of the plaintiff. Mr Cole was an impressive and credible witness who was supported not only by his own contemporary record but also by the Housing Executive documents in relation to the income during 1992.

(5) Mr Thompson QC on behalf of the plaintiff submitted that the substantial difference between the figure of £32,500 which had been paid for the premises approximately one year before and the £100,000 which the plaintiff was prepared to pay was a clear indication that the plaintiff believed that he was obtaining a legitimate business especially when the value of the premises as “bricks and mortar” was only £60,000. However, the “legitimate” valuation of the premises at £100,000 depends upon the plaintiff’s evidence that the income for 1992 was approximately £35,000. The plaintiff stated that he reached the valuation of £100,000 by applying a multiplier of 3 to this income. As I have already indicated above I reject the plaintiff’s evidence in relation to the figure of £35,000. Even in the absence of the missing 11 weeks, the Northern Ireland Housing Executive documents for 1992 indicate an income of £40,818 and applying an average generated from this figure to the missing 11 weeks will produce an annual figure of £51,769. This would suggest that the figure of £59,443 which Mr Cole says that he received from the plaintiff was realistic and that was clearly a figure reached as a result of calculation rather than estimation. Mr Cole says that the plaintiff represented this figure to him as being based on 58% occupancy. The plaintiff himself admitted in evidence that during the two years for which he ran the business

he made approximately £4,000 per month or £48,000 per year. In such circumstances it seems to me that there is no real substance in the point advanced by Mr Thompson QC and the figures are consistent with the plaintiff believing that the transaction represented an attractive profit even with the risk arising from the absence of planning permission.

(6) Mr Richard Agnew, who carried out the pre-contract discussions and negotiations with the plaintiff, gave evidence from the Philippines by way of video-link and, in the course of doing so, confirmed that the plaintiff was perfectly aware of the absence of planning permission prior to and at the time that he signed the contract. Mr Agnew stated that, at the time of his discussions with the plaintiff, there were 5 or 6 other properties in North Belfast being used for a similar purpose without planning permission and he confirmed that the premises had been sold to him by Robert Sinclair on the basis that they did not have the appropriate planning permission. In Mr Agnew's words the absence of planning permission "did not seem like a big issue". However, Mr Agnew also maintained that the purchase price for 63 North Circular Road that was agreed between the plaintiff and himself was £60,000 rather than £100,000. According to Mr Agnew this was to be discharged by the payment of £30,000 upon completion with the balance being paid by way of instalments. Mr Agnew accepted that the contractual documents showed the purchase price as £100,000 but he explained that this figure was used so that the plaintiff would be able to obtain a commercial loan for the real price of £60,000. Mr Agnew stated that, at the material time, banks or other financial institutions, as a rule of thumb, would provide 60% of the purchase price of property by way of a commercial loan. This was confirmed as being the general practice of the Northern Bank at the material time by Mr Cole when he gave evidence. It may not be without significance that attendance notes contained in the defendant's discovery relating to the sale of the premises to the plaintiff contain references to a figure of £65,000. One of these notes, dated 6 May 1993 refers to "figure for deed £65,000" and another, after recording the plaintiff's name and address, refers to "paying £65,000" "£100,000 to go on the deed". On the other hand, both these notes also contain a reference to payments of £200 a month until the figure reached £100,000 and, in the context of the defendant failing to give evidence, I do not think much weight should be placed upon such documents. Mr Agnew confirmed that Peter Dunn was still his partner but maintained that he had no knowledge of any payments being made to Mr Dunn although he agreed that, if he had been asked, he would have been prepared to approve such an arrangement to discharge the balance of £30,000. In his own evidence, the plaintiff had said that he understood Richard Agnew and Peter Dunn to be "a team", that Dunn had visited him after completion in July 1993, before the £70,000 was paid to the defendant, and informed him that he had arranged with Mr Agnew that he, Peter Dunn, was to receive the £30,000. To that end, Mr Dunn provided the plaintiff with his bank account details including sort number, account number etc.

(7) The circumstances in which the plaintiff came to dispose of 63 North Circular Road did not serve to enhance his credibility. The bed and breakfast business closed in October 1995 and the plaintiff approached McQuitty Ross Estate Agents with a view to selling the premises in January/February 1996. As I have noted above he had earlier been advised that the premises as "bricks and mortar" were worth approximately £60,000. The plaintiff received what he believed was a cash offer from a Mr Lindsay of £50,000 which was later increased to £53,000 provided the sale was effected before the premises were formally advertised and an estate agent's board was in position. The plaintiff said that, at approximately the same time, McQuitty Ross approached a Mr Dixon, an existing client of that firm, who offered £50,000. Mr Dixon was known to the plaintiff as a person from whom the plaintiff had purchased rental houses in late 1993 which were managed by the plaintiff by Mr Dixon's company - Kentona Investments. It appears that Mr Lindsay withdrew his offer when the board went up and the plaintiff agreed to sell to Dixon for £50,000. However, Dixon had difficulties in completing on the appropriate date and, according to the plaintiff, Mr Dixon's cheque for £10,000 deposit "bounced a few times". The plaintiff said that he then went back to Mr Lindsay who offered £50,000. However, despite this offer, which, presumably, was still cash, the plaintiff decided to sell to Mr Dixon. Initially the plaintiff maintained that the price agreed with Mr Dixon was £50,000 made up of a deposit of £10,000 and £40,000 to be paid on completion. In cross-examination, it was put to the plaintiff that all the documents discovered from McQuitty Ross indicated that the sale to Dixon was for £40,000. Initially, when confronted with these documents, the plaintiff was unable to explain the inconsistency. However, he ultimately stated that his agreement with Mr Dixon was that the figure of £40,000 would be given to McQuitty Ross as the agreed price but, separately, Mr Dixon would pay an additional £10,000 personally to the plaintiff in accordance with "a purchasing arrangement". The plaintiff added that he had subsequently discovered "discrepancies" in relation to the other properties that he had purchased from Mr Dixon and that, as a result, litigation had been instituted.

(8) In the course of cross-examination the plaintiff admitted that in 1998 he had received three convictions for stealing premiums from his insurance clients. These sums totalled just over £4,000 and the offences took place between May 1994 and March 1996 at the same time as he was running the business at 63 North Circular Road. The plaintiff pointed out that he had been convicted after pleading not guilty.

[14] After carefully considering all of these matters I have reached the conclusion that I am satisfied on a balance of probabilities that, at all material times, the plaintiff was perfectly aware that the business of a bed and breakfast hostel was being carried on at 63 North Circular Road without the requisite planning permission. I am satisfied that in entering into the contract

with Richard Agnew/Minex Limited the plaintiff was prepared to take the risk that the absence of planning permission might be discovered. Even if the absence of planning permission was discovered, an application and appeal could be made and, even if these were ultimately unsuccessful, sufficient income would be generated in the meantime to ensure that the transaction represented a commercial proposition.

[15] Consequently, I reject the plaintiff's claim that he did not know there was no planning permission in respect of these premises prior to the transaction and that he would not have entered into the transaction had he been in possession of such knowledge. Any loss that the plaintiff has sustained was not caused by the defendant's negligence. While I am far from satisfied that I have received a full and accurate account of this transaction and the activities of the various parties, in the circumstances, there will be judgment for the defendant.