Neutral Citation No. [2014] NICh 21

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Judgment: approved by the Court for handing down

Delivered:	**12/08/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2011 No. 34315

BETWEEN:

JAMES McILHATTON

Plaintiff;

-and-

JOHN McMULLAN

Defendant.

MR JUSTICE DEENY

[1] On 16 March 2011 the plaintiff issued a writ against the defendant claiming, inter alia, rescission of an agreement whereby the plaintiff transferred lands and premises at Moyan Road, Ballymoney, County Antrim to the defendant, on the grounds of the misrepresentation, undue influence, deceit, fraud and breach of contract of the defendant. The writ further sought an account and restitution of all monies paid on foot of the defendant's alleged wrongdoing, with damages and costs.

[2] The statement of claim records that the plaintiff had transferred to the defendant Nos. 74 and 76 Moyan Road, Ballymoney with some 150 acres of land registered under Folios 31204, 31205, AN9813, 11612, 11613, 11615, 11616, 28735 and 30333 County Antrim. (These folios also include No. 75 Moyan Road). The plaintiff alleged that he suffered chronic pain and ill- health. He is now 73 years old. He alleged that the defendant persuaded the plaintiff that he could cure him of these various illnesses if, first of all, he left his property to the defendant and, subsequently, if he actually transferred the property in his own lifetime to the defendant. The plaintiff also alleged that the defendant had received approximately £500,000 from the plaintiff.

[3] In his defence the defendant claimed that he had known the plaintiff from childhood. (The defendant had had a difficult upbringing). He denied the allegations about purporting to be a healer and denied that he knew that the plaintiff was in bad health but he did not deny that the lands had been transferred to him nor that monies had been paid. His position is perhaps most conveniently summarised in the skeleton argument lodged on his behalf by senior and junior counsel on 1 April 2014 prior to the trial of the original action. In that, in addition to the matters briefly mentioned by me above, he said that the parties had agreed to a joint venture restoring and selling used cars with the profits to be split on a 50/50 basis. He claimed he was involved in the "smoothing running of the farm and later equestrian business". Some horses were certainly bought. "It is the defendant's case that the payments made by the plaintiff to him were variously contributions towards his share of the business, loans and gifts to him and his wife and family". He denies that they were "fines" payable by the plaintiff because of his "disbelief". The defendant accepted that £212,000 of the £500,000 was advanced to him by way of loans, to be paid back upon him selling off a site on the lands with planning permission at No. 75 Moyan Road together with 11 acres.

[4] The matter came on for trial before me for four days commencing on 9 April 2014. In the event it was compromised between the parties on 9 April 2014 without evidence having been called. I shall append to this judgment the Order of the court of 9 April 2014 on consent with the schedule to that order i.e. it was settled on terms scheduled in what is normally referred to as a Tomlin Order. The order provided for the parties to be at liberty to apply. In the terms the defendant agreed to transfer back some of the lands, those to the east of the Moyan Road, to the plaintiff. The terms do not provide for any repayment by the defendant to the plaintiff, even of the money he admitted owing the plaintiff. The defendant now says he is penniless. He had been in custody for 12 months on criminal charges. These had been discontinued. The defendant ascribed these proceedings to animus on the part of his estranged wife and a police officer against whom he had made a complaint. I have the original terms before me as I write, signed by the plaintiff and his wife and witnessed by their solicitor and also signed by Mr McMullan and witnessed by his solicitor.

[5] Subsequently, however, the defendant refused to execute the necessary transfer deed relating to the lands he had agreed to transfer back to the plaintiff. As a result of this the plaintiff issued a summons on 23 May 2014 seeking a lifting of the stay on foot of the agreement of 19 April and an order requiring the defendant to execute the necessary transfer or in default of same for the court to nominate a Master or Deputy Master of the Court of Judicature of Northern Ireland sitting in the Chancery Division to execute such transfer. The defendant has opposed that application. This judgment relates to the granting or otherwise of the relief now sought by the plaintiff on foot of that summons. The matter was heard before me on 25 June 2014. The court had the assistance of written and oral argument from Mr Mark Orr QC, with whom Mr Mark McEwen, for the plaintiff and Mrs Monye Anyadike-Danes QC, with whom Mr James Anderson for the defendant.

These submissions have all been taken into account even if not expressly referred to in this judgment.

[6] In an affidavit sworn 2 June 2014 the defendant averred that on his arrival at court on 9 April he was advised that the deeds of transfer into his name were faulty due to the fact that the plaintiff had not reserved a right to reside in the bungalow occupied by him and his wife and for that reason they were as good as 'scrapped' and 'for the bin' and it was unlikely he could successfully defend the action. On foot of that he agreed to the proposed terms of the settlement. I observe that the failure to preserve a right of residence for life for the grantor or his wife would be highly relevant to the unconscionability or otherwise of the transaction.

[7] He further avers at paragraph [9] of his affidavit that he considered the terms of settlement included the fact that the residential property at 75 Moyan Road, Ballymoney would be returned to him "in a habitable condition" whereas in fact it was in a damaged and deteriorated condition when he inspected it a few days later.

[8] He averred that on 29 April 2014 he engaged Conor Agnew and Company, solicitors, in preference to his former solicitors, Anderson Agnew and Company, and he exhibited correspondence written both to his former solicitors and to the plaintiff's solicitors. He did not exhibit various replies received to that correspondence, an omission to be deplored, particularly in a litigant with legal representation. He went on at paragraph [13] to say that the Single Farm Payment relating to the lands had not been apportioned between the parties as agreed. Furthermore all lettings monies had been released to the plaintiff without allowance for any reasonable solicitor's costs. All of the agricultural machinery and property referred to in the counterclaim had not been returned to him. For those reasons he believed that he was entitled to oppose the applicant's application to enforce the consent agreement.

[9] The matter was originally listed for a short hearing before me on 9 June. However on the application of counsel for the defendant I adjourned the matter to 25 June in ease of the defendant. At that hearing the defendant's counsel not only sought to resist the order which the plaintiff sought but invited the court to make an order setting aside the settlement on the grounds that the parties were not in agreement as to fundamental terms of the settlement, that the defendant had signed under unilateral mistake and, thirdly, that he had signed on the basis of mistaken legal advice.

The law

[10] On foot of their opening claim in their skeleton argument counsel for the defendant relied on Chitty on Contracts, 31st Edition, Volume 1, General Principles paragraphs 5-072 and 5-073 to set out the law in support of their claim that there was a failure to agree fundamental terms.

> "If one party has misled the other even unintentionally, he may be precluded from relying on the normal interpretation of the others words or conduct, with a result that even on an objective criterion no agreement results. Scriven v Hindley (1913) 3 KB 564.

They also relied on Foskett's Law and Practice of Compromise (7th Edition), paragraph 4-21. I shall stop there to deal with this first contention on behalf of the defendant. There is literally no evidence of the plaintiff misleading the defendant, unintentionally or otherwise. It will be necessary to expand on this under the topic of mistake in due course but that issue simply does not arise here on the facts. Nor can the defendant bring himself within the heading raised by Foskett that the offer and acceptance were in "a completely different sense". The original claim here was for the restoration of over 150 acres of land, valued at about £1.5m and the restoration of monies of about £500,000. Whether or not a small dwelling was or was not as habitable in 2014 as it looked from an external viewing in 2013 could not amount to a fundamental misapprehension between the parties. Nor could the other grievances of Mr McMullan to which I will turn in due course. It is perhaps significant that this claim only arrived at a late stage of proceedings. The fundamentals of this agreement were that the plaintiff was to get back his home and some of his lands and in return for that the defendant was allowed to retain some of the other land which he had acquired and was relieved of an acknowledged debt of £212,000 and a possible claim for restitution of about another £300,000. These are fundamental and central to the agreement – the state of No. 75, a building not even mentioned in the agreement, was not. Other findings of mine below, particularly on credibility, would also negative this claim on behalf of the defendant.

[11] The defendant goes on in support of his second ground of unilateral mistake to rely again on Chitty on Contracts and on Foskett. Both the former, at 5-075 and the latter at paragraph 4.22, are in like terms. Chitty says the following:

> "A mistake as to the terms of the contract, if known to the other party, may affect the contract. In this case the normal rule of objective interpretation is displaced in favour of admitting evidence of subjective intention."

Foskett at 4-22 says:

> "Where one party to a compromise is labouring under some misapprehension about its terms that is known to, or has in some way been encouraged by, the other party, it is arguable that there is no genuine agreement between them even though, if viewed

> objectively it would appear that an agreement has been concluded."

[12] There is a helpful review of this sphere of law in the decision of Gillen J in Redevco UK One Limited v W H Smith Plc [2008] NIQB 116. The learned judge had to address the issue there in the context of a Calderbank offer to agree rent in the sum of £775,000 per annum when the figure that the surveyor for one party intended to cite was £745,000. In considering that he had to consider the judgment of Mance J, as he then was, in O. T. Africa Lines Limited v Vickers Plc [1996] 1 Lloyds Report 700. Mance J, in light of earlier dicta, proceeded "on the basis that Vickers would not be bound if they could show that O.T.A.L, or those acting for O.T.A.L, either knew or ought reasonably to have known that there had been a mistake by Vickers or those acting for Vickers"; p.703. The solicitors for Vickers had inadvertently offered the sum of £150,000 in attempting to settle an action when they meant to offer $150,000. The other side accepted the offer of £150,000 and were held to be entitled to do so. Like Gillen J and some academic writers I have, with respect, hesitation in following that view, which was, in any event, obiter. One might have thought that if equity were to intervene in the law of contract as applicable here it would be on the well-grounded and traditional basis that to do otherwise would be unconscionable. I have considerable hesitation in subscribing to a view that a court should intervene in a binding legal contract between parties, particularly where advised by solicitors, senior and junior counsel, on the basis that one side or someone on that side "ought reasonably to have known" that the other side were making a mistake. The principal duties of lawyers are to their clients and to the court. One would hesitate to stray beyond the existing law on misrepresentation in adding any further duty on them to their opponents or to their clients, unless material actions were unconscionable.

[13] In the events this is not a matter on which I have to express a final view here because of the evidence in this particular case. That evidence is very different from a case such as Hartog v Colin and Shields [1939] 3 All ER 566 where the defendants offered hare skins for sale to the plaintiffs at a price per pound when they meant to offer it at a price per piece. That was a fundamental difference and a mistake which someone familiar with the trade could readily have seen. That is not this case. Counsel for the plaintiff relied in their skeleton argument on the Law of Rescission by O'Sullivan Elliott and Zakrzewski, paragraphs 70.72 to 72.27, dealing with unilateral mistake. The three elements they identified were that there was an operative mistake; that the other side had knowledge of that mistake and that there was sharp practice or other unconscionable conduct on the part of the other party in connection with the mistake.

Conclusions

[13] The defendant's case here has been a somewhat moveable one, but I shall seek to address it as fully as possible. His first claim is that he believed he would get a house in a habitable condition at No. 75 and he did not do so; for this to defeat the

plaintiff's claim for enforcement and lead to rescission that would have to be a fundamental or central matter. As outlined above at [10] it does not seem to me that that is the case.

[14] However, in case I am wrong in that view, I shall consider whether such a mistake, if it were viewed as fundamental, would assist the defendant here. The onus is on him to prove this. See O. T. Africa op. cit. Mr Orr QC, without objection from the defendant, drew attention to an entry in the minutes of the local authority of 16 February 2009. That, at item 18, set out an application from the defendant, initiated on 23 September 2008, for planning permission to build a replacement dwelling in place of this very house at 75 Moyan Road, Ballymoney. Mr Orr says that points to the fact that he knew perfectly well from years before that this was a house that he would want to replace rather than live in. In the event the application was recommended for refusal, inter alia, because "the dwelling to be replaced is worthy of retention as an unlisted vernacular dwelling". Mrs Danes was instructed that someone was living in this building until in or about 2009 but there was no actual evidence of that. In any event that still means that the house had lain empty and unused for 4 or 5 years in April 2014.

[15] There is no evidence, not even an assertion on affidavit, that the plaintiff or his advisors were in any way alerted to this being something that the defendant desired. If the defendant is truthful in what he says and his advisors failed to carry out his instructions his remedy is against them. I make it clear that I am not encouraging such an application because it seemed to me, from the limited view that a judge has of the case from the papers before it is tried before him, that Mr McMullan's advisors had secured an advantageous settlement for him. But if they failed to carry out his instructions and he suffered loss as a result of any legal fault of theirs, a difficult proposition here, his remedy is against them. His remedy is not for rescission where the plaintiff had not behaved unconscionably or been guilty of misrepresentation and indeed, so far as I can see, was unaware of any such belief on the part of Mr McMullan, if such existed, a point to which I shall return.

[16] Mr McMullan claims now that the property deteriorated between May 2013 when he had an opportunity to inspect it and April 2014 following the settlement of the case. But there is no doubt on the photographic and other evidence that it was already in poor condition by 2013. Mr McMullan did not enter the premises in 2013.

[17] A valuation report prepared for the case by Brian Mullan on 19 March 2008 referred to this house as: "potential replacement dwelling set on circa one acre of land - £50,000".

[18] As has been said the plaintiff was a gentleman in poor health now aged 73. There is no evidence that he would have known of the state of 75 Moyan Road save, perhaps, implicitly, from some superficial observation of it. There is no evidence of him having a key, which his counsel says that he did not have.

[19] As I have said above Mr McMullan signed this agreement. He is a man of mature years. He has sought to engage in various businesses. He has sworn some four articulate affidavits in all in these proceedings. He is not, therefore, a person under a disability or vulnerable. The schedule to the order of the court setting out what the parties have agreed does not even mention 75 Moyan Road let alone saying, as Mr McMullan now claims, that it should be in a habitable condition. I find it wholly incredible that if that was of any importance to the defendant that he signed this clearly important legal agreement without noticing that there was no reference to No. 75 at all.

[20] Mr Mark McEwen, in his helpful closing submissions on behalf of the plaintiff, points out that this assertion about the habitable state of No. 75 was only made after the plaintiff had issued its summons for enforcement of 12 May. The claim was not made in correspondence on behalf of Mr McMullan after he went to the house in April. This was despite the fact that his then solicitors had written six letters on his behalf. Counsel pointed out that the defendant had chosen to waive any privilege he might have in a letter of complaint he wrote to the Law Society of Northern Ireland on 28 May (also after the summons was issued). Again there seems no complaint, despite sharp criticisms of his legal advisors, that they had failed to ensure that he got a house in habitable condition.

[21] I reject as wholly lacking in credibility the belated claim that the defendant did expect to get the house in habitable condition, for the reasons set out above. This appears to me to be a retrospective excuse for not completing his bargain. In any event there is no evidence that the plaintiff was aware of any such mistake on the part of the defendant and, clearly on the evidence, no persuasive case that he "ought to have known of that" even if that were the appropriate test, contrary to the views expressed above.

[22] I propose to deal with the other points raised on behalf of the defendant. I do so not without difficulty. Senior counsel for the defendant admitted to a degree of confusion in their case.

[23] At paragraph 2(iii) of their second skeleton argument counsel for the defendant relied on the claim that the defendant signed the settlement "following receipt and on the basis of mistaken legal advice". There is literally no evidence of mistaken legal advice, as indicated above. It seems to me the defendant got a very good settlement so far as the circumstances are known to the court. In any event, the remedy there would lie against the defendant's legal advisors. It is not a ground for rescission or other interference by the court with the legally binding agreement.

[24] At paragraph 13 of his affidavit John McMullan complains of three other terms of the order which he says have not been complied with by the plaintiff. I shall deal with them seriatim.

[25] The defendant says that "the Single Farm Payment which relates to the land shown on the farm map, have not been apportioned between the plaintiff and the defendant in proportion to the holdings which the parties agreed they should hold". Mr Orr's simple answer to that was that the Single Farm Payment could not be apportioned until the legal title to the lands had been changed. Although this grievance was included in counsel's written argument on behalf of the defendant at paragraph 8(i) Mrs Anyadike-Danes in argument accepted Mr Orr's answer to the point.

[26] At paragraph 13(2) of his affidavit and at paragraph 8(ii) of the skeleton the defendant complained that all letting monies had been released to the plaintiff without allowance for the reasonable cost of the parties' solicitors, in particular those of the defendant, pursuant to Clause 4 (of the agreement of 9 April 2014).

[27] Clause 4 of the schedule to the Tomlin Order reads as follows:

> "The plaintiff shall be entitled to the lettings in relation to the whole of the lands which are presently held by J. M. Wreath, auctioneers, Ballymoney, save that the parties agree that the reasonable costs of the solicitors for both parties in respect of the transfer of the lands which lie to the east of the Moyan Road from the defendant to the plaintiff shall be payable from this fund."

[28] Clause 4 seems tolerably clear. Whatever lettings i.e. monies from renting the land, held by J M Wreath, auctioneers, were to go to the plaintiff but out of those monies the plaintiff would discharge the cost of both his own solicitors and Mr McMullan's solicitors in respect of the transfer of the lands to the east of the Moyan Road from the defendant to the plaintiff, as part of the settlement.

[29] It follows from that that any payments which J M Wreath held up to 9 April went to the plaintiff subject only to discharging the conveyancing costs arising out of the settlement. If some of the lands were not let for 2014 by April 9 then those that remained in the ownership of the defendant could be let by him. It appears from the letter of J M Wreath and Company of 19 May 2014 they had let the lands for the season 2014. I was told that the defendant's share of that was the item noted by J M Wreath and Company in the sum of £2,901.60. That is what Mr McMullan "lost". I note that J M Wreath and Company forwarded a cheque to the plaintiff's solicitors for £33,272.44 on 24 April but that was in respect of the letting for the previous four years which they had been holding pending the outcome of the proceedings.

[30] In her oral submissions Mrs Anyadike-Danes went beyond what had been set out on affidavit or in correspondence or in her written argument to say that the defendant understood he was getting the conacre lettings of the lands he was to retain. This is not properly before the court but out of an abundance of caution I say

that even if that were true, it could hardly constitute anything approaching a fundamental term. Again there is absolutely no evidence that the defendant knew he was getting the conacre lettings, contrary to the fairly plain words of Clause 4.

[31] Although not in the affidavit nor in the skeleton argument but, it is right to say, touched on in the correspondence there was an issue as to whether or not the defendant was expecting and was entitled to vacant possession of his lands. Obviously if they had been let by the auctioneer already that year his possession of the lands would be subject to that contractual letting for the 2014 season, which was to conclude on 1 November. Again this could not be described as fundamental and in any event there was no indication that the plaintiff on 9 April was told that the defendant believed he was getting something different from the terms of the written settlement which he signed. The plaintiff's solicitor on 14 April wrote about vacant possession. I do not see any reply from either of Mr McMullan's solicitors making the case that he instructed his counsel to make at the hearing before me. I do not accept the credibility of this assertion and it is in any event of no legal efficacy.

[32] The final point raised by Mr McMullan at paragraph 13(iii) of his affidavit of 2 June was that "all of the agricultural machinery and property referred to in the counterclaim have not been returned to me". This is a reference to Clause 6 of the agreement of 9 April which reads as follows:

> "The defendant is entitled to retain the ownership of a BMW X5 and the agricultural machinery referred to in the Counterclaim to include all items returned to the defendant by the Police Service for Northern Ireland."

[33] As counsel for the defendant accepted in argument the non-return of such machinery did not amount to a failure of the agreement. It can be seen from the wording that the defendant was entitled to retain these rather than there being an obligation on the plaintiff to return them; in fact this follows from the plaintiff's position that he has no such items belonging to the defendant.

[34] For completeness I would add a few points. The reference to vacant possession in the agreement of 9 April is a reference to the <u>plaintiff</u> getting vacant possession of the lands transferred to him. There is no corresponding assurance for the defendant, perhaps because it was believed the lands had been let, as they were.

[35] Mr McEwan said from the Bar that the task of actually drafting the agreement fell to him and that neither 'habitable condition' nor any synonym for the same had ever been mentioned let alone included in such drafts. However, as the counsel instructed on behalf of the defendant were not the counsel who were present with Mr McEwen I do not propose to take into account his, no doubt, honest statement in that regard.

[36] It can be seen therefore that the defendant entered into a legally binding agreement, with the assistance of a solicitor, senior and junior counsel on 9 April 2014. He has advanced no good reason in law for that agreement not to be enforced. It is the duty of the court to assist parties in the enforcement of legally binding agreements. I shall therefore grant the plaintiff the order which he seeks. The defendant shall, within 14 days of this judgment, time being of the essence, execute a transfer to the plaintiff of those lands at Moyan Road, Stranocum, Ballymoney, more particularly delineated in the map attached to the order of the court of 9 April 2014, and signed by the defendant, outlining the said area in red.

[37] In default of the execution of the said transfer by the defendant on or before the said date and pursuant to Section 33 of the Judicature (Northern Ireland) Act 1978 the Master in Chancery shall execute a transfer from the defendant to the plaintiff of the said lands, on receipt of the same in draft from the plaintiff's solicitors.

[38] Costs would normally follow the event but I shall hear counsel as to the respective financial circumstances and legal status of each party.