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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/06/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

ROBERTA ANN YOUNG

Appellant;

-and-

ANDREW SYDNEY HAMILTON, JAMES SAMUEL HAMILTON, MARGARET JOAN HAMILTON AND LORRAINE THOMPSON

Respondents/Cross-appellants

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Before: Morgan LCJ, Coghlin LJ and Weir J

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MORGAN LCJ (giving the judgment of the court)

[1] These appeals arise from judgments given by Treacy J on 7 October 2011 and 24 February 2012. The proceedings concerned the purchase of a building site in 2000 by the plaintiff, Roberta Ann Young, and her husband, William James Young, from the Hamiltons. Mrs Young retained Lorraine Thompson as her solicitor in the transaction. It transpired that ownership of the laneway by which the site was accessed was disputed by the Russells, who owned a neighbouring site located further down the lane.

[2] In his first judgment the learned judge found that the Hamiltons, who had sold the site to the Youngs, made misrepresentations which induced Mrs Young to enter the contract for purchase of the site. He further found that the enquiries made by Lorraine Thompson concerning the purchase of the site had not been sufficient to discharge her duties to Mrs Young. He found that the Hamiltons and Mrs Thompson were not liable for losses arising from the actions of Mrs Young after November 2000, by which time she had affirmed her ownership of the site in the knowledge of the laneway dispute.

[3] In his second judgment the learned judge apportioned liability of 75% and 25% to the Hamiltons and Mrs Thompson respectively. He awarded general damages for distress and inconvenience of £2500 and interest. The remainder of Mrs Young's claim could not be sustained because she had not suffered loss in the value of the property and on 18 November 2004 the Russells had conceded good title to the disputed section of laneway. There was no evidence to support the other itemised heads of loss.

[4] There are four appeals now before the Court. We intend to deal with them in the following order:

(a) an appeal by the Hamiltons against findings that they made misrepresentations to Mrs Young which had induced her to enter into the contract to purchase the site;

(b) an appeal by Mrs Thompson against findings that she failed to discharge her duties to Mrs Young and was liable to her;

(c) an appeal by Mrs Young against Mrs Thompson, seeking the judgment in respect of damages and costs to be set aside and replaced by an order reflecting her true loss and costs; and

(d) an appeal by Mrs Young against the Hamiltons seeking judgment in respect of damages and costs to be set aside.

Mrs Young appeared on her own behalf in respect of the appeal against damages, Mr Kennedy QC and Mr Girvan appeared for her in defence of the cross-appeals, Mr Hanna QC appeared with Mr Henry for the Hamiltons and Mr Good QC appeared with Mr Dunlop for Mrs Thompson. We are grateful for the helpful oral and written submissions.

Background

[5] In September 2000 the Youngs entered into an agreement to purchase a building site with outline planning permission for a single storey dwelling at Carrowdore Road, Greyabbey. The agreement included a right of way along the lower portion of the laneway which provided access to the site. At the upper end of this laneway, beyond the site entrance, lay the property of the Russells, who, it transpired, asserted exclusive ownership of the laneway.

[6] Mrs Young purchased this property as a joint tenant with her husband. He subsequently became bankrupt and was dismissed from the action. Mrs Young's case is that she and her husband visited the site one Sunday in November 2000 shortly after they had bought it. She said that they met Mrs Russell who told them that she hoped they were not buying the site because she, Mrs Russell, owned the

entire laneway. Mrs Young said that this encounter in November 2000 was the first time she became aware of any dispute affecting the lower laneway or the right of way to her site.

[7] Having learned of the dispute, the Youngs did not take steps to rescind the contract. In December 2000 they applied for full planning permission for a house on the site. Mrs Young said that from the outset she and her husband were subjected to negative and hostile conduct by the Russells and their nephew Mr Boyd which was designed to discourage them from using the laneway and/or developing their site. This conduct became so upsetting that they decided to sell the site in the spring of 2001. The site was put up for sale and a number of persons expressed interest in buying it. Mrs Young's case was that no sale was effected because of the interference of the Russells and Mr Boyd.

[8] In September 2001 the Hamiltons issued a Civil Bill against the Russells in order to have the ownership of the lane clarified and to enable them to deliver good title to the Youngs as required under the contract of sale. This occurred as a result of pressure from Mrs Thompson who was anxious to protect her clients from the hazards of right of way litigation. While their site was on the market for sale and while the Hamiltons' County Court proceedings against the Russells were under way, the Youngs were also actively pursuing planning permission for a house on their site. Full planning permission was granted in March 2002.

[9] The County Court proceedings between the Hamiltons and the Russells concluded in February 2003 with a decree that the Hamiltons owned the lower laneway. That decision was appealed later in the same month. The appeal was determined in November 2004 by the issue of a Tomlin Order confirming that the Hamiltons did indeed have good title to the disputed section of the laneway.

[10] Despite the undetermined appeal the Youngs commenced building work on the site around May 2003 shortly after the initial County Court decree in favour of the Hamiltons. Mrs Young alleged that throughout the building operations and thereafter the Russells and Mr Boyd continued a hostile course of behaviour in relation to the laneway. The lower court found that whilst the Russells had acted with incivility, the evidence was inconclusive and in any event did not establish harassment or otherwise constitute a pleaded or actionable tort. That decision was set aside on appeal but the action against the Russells was again dismissed by Deeny J. Mrs. Young's appeal against this finding was ultimately dismissed by the Court of Appeal on 7 February 2014.

[11] Shortly after the Youngs began building work the Planning Service issued them with an "At Risk" letter drawing attention to alleged breaches concerning their planning permission. The Youngs continued building despite this warning. The building was completed in December 2003. In January 2004 the Planning Service issued an enforcement notice against them. In December 2004 the Youngs lodged a

retrospective application for retention of the building. Since that time the Youngs have been engaged in litigation involving the Planning Service and its enforcement notice which is separate from the present case and is only relevant insofar as Mr Hanna submitted that it was evidence of risk taking.

The Hamiltons' Appeal

[12] It was common case that there were two parts to the laneway, the lower part and the upper part. Ownership of the upper lane was disputed, with the Hamiltons alleging that they shared ownership of it 50/50 with the Russells while the Russells asserted that they owned it outright and the Hamiltons had no right to use it. By 2000 this dispute had been on-going for some time and the Russells had on occasion obstructed the upper laneway and interfered with the Hamiltons' use of it.

[13] In relation to the lower laneway the Hamiltons asserted title subject to a right of way for the Russells to access their property. The Hamiltons were the owners of the fields on either side of the lower laneway. The site which they sold to the Youngs was in the field on the northern side of the lower laneway. They initially applied for outline planning permission to develop that site in August 1999. On 24 September 1999 the Divisional Planning Office wrote to the Hamiltons' agent informing him that as a result of neighbourhood notification and advertising it had been brought to their attention that the Hamiltons "may not own the access lane included within the red line of the site indicated on the location plan" and clarification was sought. A letter dated 29 September 1999 from Mr Haddick, the solicitor acting on behalf of the Hamiltons, was forwarded to the Divisional Planning Office confirming that the Hamiltons owned the relevant part of the laneway. The representation had been made by the Russells who claimed ownership of the entire laneway.

[14] A revised application for outline planning permission had to be submitted for various technical reasons which resulted in a repeat of the representation made by the Russells, a further enquiry from the Divisional Planning Office and a further letter from Mr Haddick dated 29 March 2000 again confirming that the Hamiltons owned the relevant part of the laneway. The Russells' representations to the Divisional Planning Office were never shown to the Hamiltons or their solicitor. At or about this time the Russells had physically obstructed access to the upper laneway as they had on previous occasions. On 4 April 2000 their then solicitor had written to the Hamiltons claiming outright ownership of the upper laneway but making no mention of the lower laneway.

[15] On 15 May 2000 Mr Haddick, the Hamiltons' solicitor, received a phone call from Mr Bradley, a solicitor in Messrs Stewart of Newtownards, informing him that he, Mr Bradley, now acted for the Russells in relation to the laneway dispute. Mr Haddick's note of this conversation recorded four salient points:

(i) that Mr Bradley reported the Russells' allegation that they had acquired possessory title to the entire lane by use of it;

(ii) that Mr Bradley told Mr Haddick the Russells had found two potential witnesses who would say the Hamiltons had not used the laneway;

(iii) that Mr Bradley's view was that the Russells would be legally aided; and

(iv) that Mr Bradley proposed a solution to the laneway dispute whereby the Russells would give up their claim to the lower laneway if the Hamiltons did likewise in respect of the upper part.

On this basis the lower court considered that, by 15 May 2000 at the very latest, the Hamiltons' knowledge of an adverse claim over the lower laneway had crystallised.

[16] Mr Haddick discussed his conversation with Mr Bradley with his client. Mr Hamilton said he could work with the terms that had been suggested. On foot of their conversation Mr Haddick sent a 'Without Prejudice' letter to Mr Bradley on 19 May 2000. This was referred to by Mr Haddick as the "Heads of Agreement" letter. The proposed agreement was that the Hamiltons would abandon their claim to the upper laneway if, in return, the Russells did likewise in respect of the lower laneway. The Russells would also refrain from objecting to the Hamilton's planning application. That reflected the fact that at this stage at least the Hamiltons had concluded that the representations to the Planning Service had been made by the Russells claiming ownership of the entire laneway. This proposed agreement was never finalised. Mr Haddick did not receive any response to his letter to Mr Bradley. He spoke to him on 10 August 2000 but was told that Mr Bradley considered that his instructions had been withdrawn. Outline planning was granted in August 2000.

[17] In August 2000 the Hamiltons knew that the Youngs were willing purchasers for the site. A letter dated 10 August 2000 from Mr Haddick to Mr Hamilton read:

> "With regard to the sale of the site, we suggest that we proceed on the basis that there is no problem with Mr and Mrs Russell. As explained during our telephone conversation Lorraine Thompson, acting on behalf of Bill Young, will invariably ask questions about the laneway, etc and matters will come to the surface at that time. There is always the possibility that Mr and Mrs Russell might co-operate in accordance with the proposed terms we had previously sent forward. On the other hand that might be just wishful thinking."

[18] On 22 August 2000 Mr Haddick sent copy title documents for the site together with outline planning permission and a site map to Mrs Thompson. He also sent the standard form contract document and he enclosed Replies to Pre-Contract Enquiries (the "PCE replies"), again in the standard form. The relevant parts of the PCE replies are set out below, along with the replies written by Mr Haddock on behalf of the Hamiltons:

> "6. **ADVERSE RIGHTS, RESTRICTIONS, ETC.**
>
> (a) Does the vendor know of any person claiming or having adverse rights over the property?"
>
> Answer No
>
> (b) If so, please furnish details.
>
> Answer N/A
>
> 18. **LITIGATION**
>
> (a) Please confirm there is no litigation threatened or pending or anticipated affecting the property.
>
> Answer Confirmed
>
> (b) Please furnish full details of any disputes with neighbours or others relating to this property or its enjoyment.
>
> Answer None"

[19] Mr Haddick also enclosed a covering letter with this bundle of documents which included the following:

> "We have raised with you in a recent telephone conversation problems our clients have encountered with Mr and Mrs David Russell and the upper part of the laneway leading to their house. Stephen Scott initially acted for the Russells then Mr Bradley of Stewarts, Solicitors.
>
> Heads of Agreement were drawn up but Mr Bradley's instructions appear to have been withdrawn and the matter remains unresolved.

> The difficulty related to our client's use of the laneway beyond the part so coloured blue on the map hereto. The Russells claimed that the Hamiltons had no right to use this. This was refuted by our clients, the Russells proceeded to lock the gate onto this stretch of laneway.
>
> In an endeavour to avoid further argument our clients constructed a pathway inside their own field running parallel to the disputed strip of lane. This appears to have resolved matters.
>
> The Russells were attempting to lay claim to the ownership of the laneway over which the right of way will be granted. This has been strenuously refuted by our clients. The Russells have, however, taken no steps to pursue their claim."

Mr Haddick did not include a copy of the Heads of Agreement.

[20] Mrs Thompson's evidence was that Mr Haddick's letter "did ring a warning bell" in her mind. She telephoned him and asked the following questions:

(i) whether or not the Hamiltons had been using the laneway;

(ii) whether or not Mr Haddick had "seen any document" that would lead him to believe there was any adverse possession claim to the laneway; and

(iii) whether or not the laneway had ever been obstructed.

On foot of these enquiries and the replies she received Mrs Thompson was satisfied that any claim to adverse possession of the lower laneway was unlikely to succeed. She drove past the laneway to check that there was no gate or other obstruction at the bottom of it. Finding that there were none, she was satisfied that there was no possibility of a successful claim for adverse possession over the lower laneway.

[21] Mrs Thompson sent a letter to her clients on 4 September 2000 enclosing a copy of Mr Haddick's letter of 22 August 2000 with a covering letter directing them to "please read carefully". Her letter also invited the plaintiff and her husband to make an appointment to call and discuss the matter with her. Her records show that she had a meeting with the plaintiff on 7 September 2000 at which the laneway and the Russells were specifically discussed. Her attendance note of this meeting reads:

> "Russells – Mrs okay – looks after lambs only claiming top part of laneway which does not affect site".

Mrs Thompson indicated that this was information she had received from Mrs Young.

[22] Mrs Thompson also gave evidence about a meeting on 14 September between herself and the Youngs. She asked them if they had read all the documents she sent them and they confirmed that they had. She recalled Mr Young asking about the right of way. She recalled showing them the folios and Mr Young asking if the Hamiltons could give the access to the site via the laneway. She recalled confirming that they could. She remembered saying that Mrs Young had already mentioned the upper laneway to her and commenting that the dispute there did not affect the access to the site. She remembered that the Youngs then signed the contract.

[23] The learned judge considered that the letter of 10 August 2000 from Mr Haddick to the Hamiltons indicated several things:

(i) that these parties understood that there was a problem with the Russells;

(ii) that they did not expect the Russells to co-operate in the sale of the site;

(iii) that they *hoped* the Russells *might* accept the Heads of Agreement terms as a way of resolving the problem; but

(iv) that they recognised that this was a remote possibility; and

(v) that in relation to the sale of the site Mr Haddick was suggesting that they proceed as if the recognised and unresolved problem with the Russells did not exist.

[24] The learned judge found that the Hamiltons did make material misrepresentations to Mrs Young in the circumstances of this case. These were:

(i) that they did not know of any person claiming adverse rights over the property;

(ii) that no litigation was threatened or anticipated in relation to the property; and

(iii) that no neighbour disputes affected the property or its enjoyment.

[25] He stated the applicable principle of law was that an actionable misrepresentation was an unambiguous false statement of existing fact made by or

on behalf of the representor to the representee which induced the representee to enter into a contract with the representor. There was no dispute about that principle. The Hamiltons had not told Mrs Young that they had a problem with the Russells affecting the lower laneway and, whilst the basic principle of conveyancing contracts was *caveat emptor* and there was no general liability for non-disclosure of information, it was trite law that if a vendor chose to answer a question about the property, he had a duty to answer truthfully.

[26] The learned judge then found that the PCE replies were false. He considered that:

(i) the reply to enquiry 6(a) was given at a time when the Hamiltons knew the Russells had been asserting a claim to own the lower laneway since 1999 when they first made that claim to the Planning Office. The Hamiltons also knew that in May 2000, only 3 months earlier, the Russells had instructed a solicitor to advance this claim on their behalf;

(ii) the reply to enquiry 18(a) was given at a time when Mr Bradley had told the Hamiltons that the Russells were claiming adverse possession of the whole lane, that they had found 2 witnesses who would support their claim, that they had appointed him to act as their solicitor in the matter and that, in his view, they would be entitled to legal aid. The learned judge considered that, in such circumstances, no reasonable party could NOT have 'anticipated' litigation. The Hamiltons anticipated litigation so strongly that they had offered terms to try to avoid it, and had recently enquired whether those terms would be acceptable; and

(iii) the reply to enquiry 18(b) was also not an accurate reflection of the Hamiltons' state of knowledge at the time.

[27] The learned judge then considered the letter dated 22 August 2000 from Mr Haddick. He found that the first 4 paragraphs of the letter compounded the misleading impact of the PCE replies because they all expressly related to the dispute about the upper laneway and so implied that the dispute was restricted to that area alone. The third paragraph was in past tense, implying that the dispute was historical, an impression further promoted by the final sentence of paragraph 4; yet Mr Haddick was actively and recently pursuing a reply to his 'heads of agreement' letter. The final paragraph of the letter was not restricted to the upper lane and was the only intimation that there could be an issue affecting the lower laneway. However, it expressly said that the Russells had 'taken no steps to pursue' this aspect of the claim. The learned judge considered that this paragraph, sent out despite everything the Hamiltons knew about the Russells' dealings with Mr Bradley, reinforced the inaccurate reply to PCE 18.

[28] In this appeal the Hamiltons challenged the conclusions of the learned trial judge that they knew that the Russells were making an adverse claim in respect of the laneway. It was submitted that the correspondence from Stephen Scott in April 2000 related only to the upper laneway. The only assertion in respect of the lower laneway was the telephone call with Mr Bradley. Although Mr Bradley had agreed to write to Mr Haddick about this claim he did not do so. Mr Haddick described his letter of 19 May 2000 with a proposed settlement as "Heads of Agreement" but in fact it was no more than a without prejudice proposal. After speaking to Mr Bradley on 10 August 2000 Mr Haddick wrote to the Russells on the same date but they did not reply. Mr Hanna submitted that the question was answered in the present tense and at that date there was no subsisting claim.

[29] Secondly, the question whether litigation was anticipated was a matter of opinion. Mr Hanna accepted, however, that the issue of whether someone held the opinion was a matter of fact. It was submitted that there was no evidence from which the court was entitled to conclude that Mr Haddick did not in fact believe that litigation was not anticipated. Thirdly, the answer in relation to the disputes with neighbours and others relating to the property was again given in the present tense. It was submitted that on 22 August 2000, when the answers were given, there was no ongoing dispute concerning ownership of the lower laneway.

[30] The fourth point relied upon by the appellant was that if there was a misrepresentation the judge was wrong to conclude that Mrs Young was induced by it to enter into the contract to purchase the property. Mr Hanna submitted that there was clear evidence that Mr and Mrs Young were reckless risktakers. The learned trial judge accepted the evidence of Mrs Thompson that on 14 September 2000 she had advised the Youngs not to proceed with the purchase because they could not afford to finance it. They had relied upon credit cards to enable them to do so.

[31] Secondly, it was submitted that having obtained planning permission for a dwelling house on a portion of the site they then proceeded to construct it further up the hill with a better view contrary to the permission. In those circumstances it was submitted that even if they had been advised that there was some risk of litigation about the lower laneway Mrs Young would still have proceeded.

[32] The last point in which Mr Hanna relied on this issue was Mrs Young's evidence that if she had seen the letter of 22 August 2000 she would not have proceeded with the purchase. The learned trial judge accepted the evidence of Mrs Thompson that the letter was sent out to her with a clear instruction to read it carefully. If she did not read the letter it was submitted that she could not have been induced by the PCE replies to enter into the contract.

[33] The grounds of appeal in this case require an analysis first of the issue of whether there was a claim and neighbour dispute at the time of answering the PCE replies. The Hamiltons were correct to point out that neither of the objection letters

to the Planning Service was seen by them. They were however aware that the objections related to the laneway and could not have failed to appreciate that the objectors were the Russells or their associates. In any event, by 15 May 2000 when Mr Bradley contacted Mr Haddick to assert the claim by the Russells, the Hamiltons were well aware of the identity of the claimant. That claim was never withdrawn and the proposed resolution was never accepted. The learned trial judge was correct to conclude that the claim and the dispute were continuing on 22 August 2000. He was reinforced in his view that the PCE replies misrepresented the situation from the inferences he drew from the letter of 10 August 2000 set out at paragraph 23 above. He was entitled to draw those inferences. We consider that the conclusion that the answers to PCE replies 6(a) and 18(b) were misrepresentations was unimpeachable.

[34] The challenge to the conclusion that Mr Haddick anticipated litigation and that Mrs Young was induced by the representation to enter the contract are challenges to factual conclusions. The approach that an appeal court should take to such challenges was helpfully set out in Murray v Royal County Down Golf Club [2005] NICA 52.

> "[11] On an appeal in an action tried by a judge sitting alone the burden of showing that the judge was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed – *Savage v Adam* [1895] W. N. (95) 109 (11). But the court's duty is to rehear the case and in order to do so properly it must consider the material that was before the trial judge and not shrink from overruling the judge's findings where it concludes that he was wrong – Coghlan v Cumberland [1898] 1 Ch 704.
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> [12] In Lofthouse v Leicester Corporation (1948) 64 T.L.R. 604 Goddard LCJ described the approach that an appellate court should take thus: -
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> > 'Although I do not intend to lay down anything which is necessarily exhaustive, I would say that the Court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the Judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended

> certain of the evidence, or that he has drawn an inference which there is no evidence to support.'
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> [13] And in this jurisdiction Lord Lowry CJ outlined a similar approach in Northern Ireland Railways v Tweed [1982] NIJB where he said: -
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> '… while the jurisdiction of the Court of Appeal is unrestricted when hearing appeals from the decision of a judge sitting without a jury, the trial judge was in a better position to assess the credibility of the witnesses and his decision should not be disturbed if there was evidence to support it'."

[35] Applying those principles we consider that the learned trial judge was entitled to rely on the letter of 10 August 2000 as substantial evidence that the Hamiltons anticipated litigation in respect of the lower laneway. Mr Haddick gave evidence but it is clear that he did not dispel the view which the judge had formed on the correspondence. The impression which the judge who heard the evidence formed of the evidence should not easily be disturbed where the issue is one of credibility (see Benmax v Austin Motor Co Ltd [1955] AC 370). We are satisfied that the judge was entitled to conclude that the answer to PCE reply 18(a) was a misrepresentation.

[36] Similarly in respect of the submission that Mrs Young would not have proceeded with the contract if she had known about the dispute over the laneway the judge concluded on her evidence that the right of way was a matter of serious concern for her. In his consideration of the evidence he accepted the evidence of Mrs Thompson where it conflicted with Mrs Young. Mrs Thompson indicated that on 7 September and 14 September 2000 she had discussed in detail the matters arising from the correspondence. That was clearly sufficient to demonstrate that the replies and correspondence were inducements to Mrs Young to enter the contract. We find no error in the judge's approach.

Mrs Thompson's Appeal

[37] It was common case that as the purchaser's solicitor Mrs Thompson was required to satisfy herself that the property being sold corresponded with that which the purchaser believed she was acquiring, that the vendors had good title to the property and that she made the necessary enquiries of the vendors to be satisfied that the property which the client wished to acquire was free from any charges, encumbrances or adverse interests other than those disclosed by the vendors and agreed to or accepted by the purchaser. There is no allegation that in carrying out

these tasks Mrs Thompson breached any regulatory practice and the sole issue concerns whether or not she carried out sufficient enquiries to discharge her duty.

[38] Evidence on this issue was provided by two solicitor experts. Neither of them disagreed on the extent of the duty. One of them indicated that he considered that adequate investigation had been carried out by Mrs Thompson whereas the other indicated that further enquiries should have been made. In Baird v Hastings [2013] NIQB 143 Weatherup J noted the trend in England against the admission of such evidence.

> "[15] While expert opinion evidence will be admissible as a matter of law on the question whether a professional defendant was negligent, in relation to a solicitor as defendant, the courts in England and Wales have limited the manner in which one solicitor may give evidence criticising or defending the conduct of another solicitor. The reasons were stated by Oliver J in Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp [1979]Ch 384 at 402B-E and approved by the Court of Appeal in England and Wales in Bown v Gould & Swayne [1996] PNLR 130 at 135 B-D. –
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> > 'Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence that really amounts to no more than an expression of opinion by a particular practitioner had he been placed hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for it is the very question which it is the court's function to decide.'
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> [16] Flenley and Leech on Solicitors Negligence and Liability 3rd Edition at page 80 states that it is

now settled that leave to adduce expert evidence will not be given in solicitor's negligence cases unless that evidence goes to a professional practice and the existence or scope of that practice is genuinely relevant to an issue in the action. Jackson and Powell on Professional Liability 7th edition at page 222 refers to solicitors negligence cases as an instance where supportive expert evidence is not necessary for a finding of negligence. The rationale is stated to be that the courts themselves possess the necessary professional expertise to decide the question. In Bown v Gould and Swayne Millett LJ commented that if a judge needed assistance with regard to conveyancing practice the proper way was to cite the relevant textbooks. The footnote records that in May v Woolcombe Beer and Watts [1999] PNLR 283 expert evidence was admitted in relation to conveyancing matters where there was no answer provided by textbooks.

[17] In the House of Lords in Moy v Pettman Smith [2005] UKHL 7 Lord Hope and Baroness Hale expressed notes of caution in connection with a claim against a barrister in dealing with the compromise of a medical negligence action. Lord Hope stated -

> 'Where a claim is brought for professional negligence the court will usually expect to be provided with some evidence to enable it to assess whether the relevant standard of care has been departed from. No such evidence was adduced in this case. Judges, recalling how things were when they were in practice, no doubt feel confident that they can do this for themselves without evidence. But judges need to be careful lest the decision in the case depends on the standard they would set for themselves. If this were to happen, it would vary from judge to judge and become arbitrary'."

[39] We accept that there should be a degree of flexibility about the admission of such evidence but in a case of this sort it is difficult to see what added value was

gained by the admission of the conflicting personal opinions of both experts on this issue. The decision on the extent of necessary investigation is ultimately for the judge and the extent to which such evidence is likely to be helpful is one that might usefully be considered at an early review in this type of professional negligence case. In an appropriate case this can save cost and time.

[40] The learned judge found that the enquiries made by Mrs Thompson were not sufficient to discharge her duties to fully advise Mrs Young and to warn her of the risks involved in buying this site. She failed to investigate the possible existence of undisclosed adverse claims over the property or that there was potential litigation. He came to this conclusion based on the following considerations.

(i) By 7 September 2000 Mrs Young held an independent view that there was a dispute affecting the laneway but that it only related to the upper part of the laneway and did not affect access to the site she proposed to buy. This was an erroneous view which she shared with Mrs Thompson at their meeting on 7 September 2000 and which accorded with the Hamiltons' representations.

(ii) Mrs Thompson did not warn Mrs Young that she had misunderstood the position because Mrs Thompson's enquiries had not uncovered the true position. Her enquiries to Mr Haddick following receipt of his letter were not sufficient to uncover the possibility of litigation affecting the site. The first and third questions were directed to ascertaining the *strength* of any claim to adverse possession, as opposed to ascertaining whether any such claim *existed*. The second question did investigate the possible existence of a claim to adverse possession of the lower laneway, but was limited to claims notified via "a document" and did not elicit the information needed.

(iii) Further, Mrs Thompson did not approach either of the two solicitors who had been on record for the Russells and who might have told her much more about the nature and extent of the dispute. Finally, driving past the bottom of the lane was insufficient to inform her of whether or not an adverse claim *existed* on the lower laneway or whether it was being pursued, possibly with litigation.

[41] When considering the extent to which the solicitor has complied with the duty of investigation it is important to avoid the temptation to analyse the question with the benefit of the facts as we now know them. Liability does not depend on hindsight (see Morritt LJ in Adams v Rhymney Valley DC [2000] 3 EGLR 25 CA). As the judge found the PCE replies and the associated correspondence constituted a misrepresentation in that they asserted that there was no adverse claim, no neighbour dispute and no anticipation of litigation whereas in fact there were such claims and disputes and litigation was anticipated. The learned judge recognised that the correspondence of 22 August 2000 compounded the misleading impact of the replies. Having been alerted to the dispute affecting the upper laneway Mrs

Thompson properly made enquiries in respect of the lower laneway. The correspondence of 22 August 2000 alerted her to the fact that there were Heads of Agreement proposed in relation to the dispute affecting the upper laneway. The upper laneway did not affect her clients' interest. Her enquiry about any document leading Mr Haddick to believe that there was an adverse claim ought to have led to disclosure of the Heads of Agreement which specifically dealt with the lower laneway.

[42] Where a solicitor in general practice receives representations from a colleague acting on behalf of the vendor the solicitor is not fixed with an obligation to anticipate or assume that the representations are false. Such representations form a proper basis upon which to advise a purchaser in the absence of something giving rise to a further duty of enquiry. Mrs Thompson sensibly inspected the laneway to ensure that that was nothing about the lower laneway to suggest that it might be the subject of a successful adverse claim. She was entitled to take that into account along with the representations. She was also entitled to take into account Mr Haddick's indication that there was no documentary material supporting a claim affecting the lower laneway. The correspondence to Mr Bradley containing the without prejudice proposal should have been disclosed in answer to that enquiry. The failure to disclose it compounded the misrepresentation further.

[43] In our view the learned trial judge approached this matter as an obligation of result in light of the facts as he then knew them. It is clear that there were steps which Mrs Thompson might have taken which would have exposed the truth, but that is not the test of liability in these circumstances. We consider that the obligations on Mrs Thompson have to be viewed taking into account firstly, the representations made to her upon which she was entitled to rely and secondly, the investigations carried out by her. We do not consider that the level of investigation fell below the standard of the reasonably competent solicitor in all the circumstances. Her appeal is allowed.

Damages

[44] In her Amended Amended Statement of Claim Mrs Young claimed damages by way of the reduction in the market value of the house as built, to be quantified, various claims for interest on bridging loans and credit card facilities, interest owed to Swift Advance, costs associated with the selling of her previous home, reduction in the sale cost of that home, various associated fees and damages for distress and inconvenience. The learned trial judge made an award of £2500 plus interest in respect of the latter claim.

[45] The Hamiltons maintained that apart from the amounts for distress and inconvenience none of the other claims were sustainable. They contended that as a result of the proceedings taken by them against the Russells Mrs Young had received precisely what she had bargained for. Any diminution in value of the property was

as a result of the decisions made by the Youngs to build on the site in an area for which they did not have planning permission.

[46] The learned trial judge broadly accepted the submissions made by the Hamiltons. He concluded that the date on which he should assess loss was November 2004. By that time he concluded that Mrs Young had not suffered any loss in the value of the property as a result of the misrepresentations. In any event he was of the view that there had been no evidence quantifying any such loss and the court would not speculate.

[47] In assessing the proper approach to the question of damages in this case the learned trial judge quoted extensively from the judgement of Lord Browne Wilkinson in Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254. He recognised the general rule that where a party has been induced by a fraudulent representation to buy property he is entitled to recover by way of damages the full price paid by him. He must account for the benefit received by him including the market value of the property acquired as at the date of acquisition. The general rule is not to be inflexibly applied especially where to do so would prevent the plaintiff obtaining full compensation for the wrong suffered.

[48] We agree with the learned trial judge that there is no strict and inflexible rule that the date of the transaction is the date on which damages are to be assessed but where the asset acquired was readily marketable and there was no special feature suggesting otherwise the transaction date was likely to produce a fair result. The benefits of that date were identified by Lord Browne Wilkinson:

> "The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the

> result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired."

[49] The learned trial judge relied upon this passage to find the corresponding obligation to ensure that no injustice was caused to the defendants. No express authority was adduced to support that approach. The evidence upon which the plaintiff relied was from a valuer who contended that if the property was put on the market at any time the potential purchaser would have been deterred from buying it in light of the difficulties with the Russells over the laneway and a lack of full planning approval. He said that it could be argued that the property had a nil value in the circumstances. It appears that no other evidence about the value of the property at the time of the transaction in September 2000 or the date when the misrepresentation became known to the plaintiff in November 2000 was adduced. No evidence was apparently called on this issue by the defendant. There was, however, evidence about the subsequent market value of the site in 2003 and 2009.

[50] Although the learned trial judge indicated that he should not speculate on the residual value of the site in October 2000 he did not in any event pursue this aspect further since he had concluded that the appropriate date for valuation of the loss was November 2004.

[51] This is a case in which each of the parties has maintained that subsequent events have influenced in varying respects the value of the claim. We are satisfied that this is a case in which the site had a value at the date of the transaction. The Hamiltons owned both sides of the laneway and the Russells' claim in respect of the lower laneway was unsupported by any evidence of blockage or gates and contradicted by the Hamiltons continued use of the laneway. In those circumstances we see no reason to depart from the general rule that damages ought to have been assessed at the date of the transaction. In particular there was no injustice whatsoever to the Hamiltons because it was a matter entirely for the Youngs to decide what course to take once the breach was established. We do not consider that there was any feature justifying a departure from that general rule.

[52] We have concluded, therefore, that we should remit the question of damages to the learned trial judge. It will be for him to determine whether he should receive further evidence in light of the proper approach to the award of damages. It follows that the order as to costs on the County court scale, the recoverable costs of the trial and the order in relation to the report of the valuer should be set aside.

Conclusion

[53] For the reasons given we allow the appeal of Mrs Young against the Hamiltons in relation to damages, we allow the appeal of Mrs Thompson against Mrs Young and we dismiss the appeal by the Hamiltons. We invite the parties to

make short written submissions on the question of costs which we will deal with next term.