Neutral Citation No. [2012] NICh 4 | *Ref:* **TRE8426**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/02/12**

Judgment No 3 **2006 No.26866**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

ROBERTA ANN YOUNG

Plaintiff:

-and-

(1) ANDREW SYDNEY HAMILTON
(2) JAMES SAMUEL HAMILTON
(3) MARGARET JOAN HAMILTON
(4) DAVID RUSSELL
(5) THOMASINA PHYLLIS ALEXANDRA RUSSELL
(6) DAVID BOYD
(7) LORRAINE THOMPSON (formerly practising as Thompsons Solicitor)

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TREACY J

Introduction

[1] This judgment addresses the issue of quantum and costs arising from the Court's earlier judgment.

[2] When the present case was commenced the plaintiff's husband, William Young, was also a plaintiff. It transpired on the ninth day of the hearing that he was an undischarged bankrupt (a fact which he had not disclosed) and he was accordingly dismissed from the proceedings **[2010] NICh 11**.

[3] The trial continued with the present plaintiff, Roberta Young, and by reserved written judgment **[2011] NICh 19** the Court held that the Hamiltons made material misrepresentations which induced the plaintiff to enter into the contract dated 21 September 2000 to purchase the site from them. The Court also held that the plaintiff's solicitor, Lorraine Thompson, was negligent and in breach of her duty of care to her clients.

[4] The present proceedings were brought shortly before the expiry of the six year time limit and I formed a very strong impression that they were driven by irrecoverable losses resulting from the Youngs' construction of a dwelling house on the site in flagrant breach of planning law. I emphasised in my earlier judgment that the Plaintiff cannot claim damages for those losses from any of the defendants and that no-one else is responsible for them because no-one else took the action that generated them. Notwithstanding this the Youngs were not deterred from pursuing an outlandishly exorbitant claim in respect of matters which were plainly the mistake of the plaintiff. These grossly excessive and manifestly unjustifiable claims overshadowed the entire proceedings.

[5] Shortly after the commencement of the trial an amended Amended Statement of Claim was served on 23 March 2009. The damages claimed were particularised in para(e) of the prayer which included item (xxiii) "reduction in market value of the house – *to be quantified*". In a reply dated 11 March 2009 to a Notice for Particulars served on behalf of Ms Thompson the plaintiffs maintained that the property had been "devalued by virtue of the actions of the Russells and Mr Boyd". The quantification of this loss was *never* formally pleaded by the plaintiff.

[6] Jeremy Harbinson gave evidence on behalf of the plaintiff and produced a report dated 5 February 2009 in which he purported to quantify the plaintiff's loss including the alleged reduction in value of the subject site. In his report this loss was quantified as representing the *entire* purchase price of the property (£105,000) together with stamp duty (£1,050) and estate agent fees (£750) – total £106,800 together with interest thereon at 8% from October 2000 until 31 January 2009 (£96,151).

[7] The plaintiff claims that damages must be assessed at a single point in time which in this case should be October 2000 when the contract was entered into. She claims that at that date she suffered a loss of £105,000, loan arrangement fee in the sum of £1,000, consequential loss with the cost of mortgage loans and interest on the purchase monies at the rate of 8% per annum together with a claim of £10,000 for general damages for distress and inconvenience.

[8] Mr Hanna QC who appeared on behalf of the Hamiltons provided the Court with a detailed and extremely helpful Skeleton Argument in which he summarises, particularly between paras 11 and 15, relevant aspects of the evidence. Mr Brian Kennedy QC, on behalf of the plaintiff, did not dispute the accuracy of the factual summary. It was also adopted by the other defendants.

[9] Mr Harbinson, who is an accountant, not a valuer, gave evidence on behalf of the plaintiff. He expressed the opinion that a loss of £105,000 occurred as soon as the plaintiff and her husband purchased the site in October 2000. He referenced their attempts to sell the property during the period October 2001-October 2002 and included in an appendix to his report copies of documents from the plaintiff's estate agents, Thomas Orr Ltd, which purported to show that several offers ranging from

£100,000 - £130,000 had been received. The plaintiff's case was that all of these had been withdrawn when prospective buyers became aware of the ongoing dispute. This, he said, confirmed the property could not have been sold at the time and suggested it had a Nil value immediately after the Youngs had purchased it. On three of the four letters included in his appendix there is a handwritten note stating "withdrawn due to dispute" but on one of the letters apparently relating to an offer of £100,000 from Mr and Mrs Bruce the note states "*not accepted*". It was not disputed by Mr Kennedy that this handwriting was that of Mr Young. As the defendants correctly pointed out it cannot therefore be safely concluded that the Bruce offer was withdrawn as opposed to being simply unacceptable to the plaintiff. Mr Young's handwritten notes are in any event entirely self-serving and I cannot conclude on the basis of those notes that the reason why the offers were withdrawn was due to the title dispute.

[10] Mr Victor Conroy, Estate Agent, from Thomas Orr Ltd, gave evidence in respect of marketing this site on behalf of the plaintiff and her husband. He said that a number of offers had been received in 2001/2002 ranging between £100,000 and £130,000. Some of these offers had been *refused*. The last two offers were subsequently withdrawn. Bidders had also bids on other sites. The offer of £130,000 had been accepted and was subsequently withdrawn on 28 June 2002. The purchaser had just telephoned to withdraw it. As the defendants had pointed out *there was no evidence of any reason being given for the withdrawing of the offer and the estate agent confirmed that he had no knowledge of any offer being withdrawn because of the title dispute.*

[11] I accept the defendants' submission that the accountant was clearly not qualified to give evidence about the value of the property nor could it be concluded from Mr Conroy's evidence (or that of Harbinson) that the effect of the dispute was to render the site of Nil value whilst it remained unresolved. Indeed the Bruce offer and its rejection by the Youngs are hardly consistent with such a claim.

[12] Mr Denis Neill was the only professional valuer to give valuation evidence on behalf of the plaintiff. Before turning to consider his evidence briefly I refer to the submissions of Mr Horner QC. In his written submissions he stated as follows:

> "25. ... From the very outset of the case the plaintiff made a claim that she was entitled to a sum in excess of £500,000 being the full value of the house as if it had been constructed in accordance with the planning permission granted. The house had not been constructed in accordance with the outstanding planning permission whether deliberately or negligently as a consequence of the actions of the plaintiff and her husband. This claim was always devoid of any merit; see the previous submission on this issue. Such a loss was not caused by any of the defendants but <u>solely</u> by the plaintiff and her

> husband. It was this claim that wasted at least half of the Court's time. The valuation evidence and accountancy evidence to support such a claim was thoroughly discredited. Indeed both Mr Harbinson and Mr Neill effectively apologised to the Court for their reports and evidence. Part of the reason such evidence was discredited was because the plaintiff and Mr Young had put pressure on their forensic accountant and the valuer to make the case that the plaintiff desired and which would allow her to extricate herself and her husband from a situation where they had constructed their house contrary to planning permission. In the end the Court completely ignored the evidence of these experts. Many days of Court time were taken up with what was an exaggerated and, the Court may feel, a dishonest claim. The comments of District Justice White on this issue in respect of the enforcement proceedings about Mr Young's knowledge are particularly pertinent."

[13] There is much force in these submissions. In any event, as Mr Hanna QC points out at no time was Mr Neill asked to give evidence as to his opinion of the value of the property in *October 2000* at the time when a contract was made – which is the time at which the plaintiff submits the damages must be assessed. In his original report of 1 April 2008 he said that if the property was put on the market for sale *at that time* any potential purchaser would be deterred from buying it in the full knowledge of the difficulties with the Russells over the laneway *and* a further difficulty with regard to the lack of full planning approval. He said that it could be argued that the property would have a Nil value under the circumstances and that a prudent purchaser would not bid for the property under current circumstances. That was not, as Counsel pointed out, an opinion of value, subject only to the laneway issue as at October 2000. The effect of this is that the Court has been left with no expert evidence acceptable or otherwise as to the value of the site, subject to the laneway issue, as at October 2000. I agree that in the absence of such evidence the Court is not entitled to speculate.

[14] Mr Neill did however give his opinion of the value of the site, assuming no issues relating to the laneway, estimating its value at **£150,000** in *2003* and **£175,000** in March *2009* and that, on the same basis, the property was worth £105,000 in October 2000. Moreover since May 2003 the Youngs evinced commitment to the site by commencing building work to construct their dwelling house.

[15] Thus, even if it is assumed that there was some, unquantified dimunition in value at the time of the transaction such loss was never sustained because they did not in fact sell the property at a loss. The effective cause of any assumed, albeit

unquantified, loss was erased or dissipated, if not when the County Court Decree had been obtained on 7 February 2003 (following which the Youngs were confident enough to commence building operations) certainly by 18 **November 2004.** On that date the Russells *conceded* the Hamiltons (and Youngs) good title to the disputed section of the laneway. As I noted at para 7 of my earlier judgment the appeal by the Russells was determined in November 2004 by issue of a Tomlin Order confirming that the Hamiltons did indeed have good title to the disputed section of the laneway – a matter about which there was in truth no real doubt.

[16] The valuation evidence and accountancy evidence to support the plaintiff's extravagant claim for damages was, as Mr Horner put it at para26 of his Skeleton Argument, "thoroughly discredited" with Mr Neill and Mr Harbinson both "effectively apologis(ing)" to the Court for their reports in evidence. Mr Horner submitted that part of the reason such evidence was discredited was because the plaintiff and Mr Young had put pressure on the forensic accountant and the valuer to make the case that the plaintiff desired and which would allow her to extricate herself and her husband from a situation where they had constructed their house contrary to planning permission.

[17] In any event the evidence satisfies me that from November 2004 any potential purchaser could have been shown a copy of the Court Order confirming that the dispute had been resolved by consent and that the Russells had conceded the Hamiltons good title to the disputed section of the laneway. As already recalled the Hamiltons had been successful in the County Court when they obtained the Decree on 7 February 2003 and that a short time thereafter the Youngs felt confident enough to risk commencing building work to construct the house on their site.

[18] With the cause of any unsubstantiated dimunition in value having been effectively removed the property would have regained its full market value and from November 2004 at the latest the plaintiffs were in the same financial position they would have been as if there had been no title dispute. They paid £105,000 in October 2000 and in November 2004 it would have been worth at least £150,000 and probably more given the rising property values at that time.

[19] Accordingly, I hold:

(i) That as there has been no expert valuation of the value of the site at the date of the contract any alleged loss has not been properly quantified and it is not the function of the Court to speculate on this vital issue;

(ii) The plaintiff (and Mr Young) has not, fortuitously, suffered any loss. In fact they have secured a gain of at least £45,000 reflecting the normal increase in the market value of the property over the relevant period.

[20] As I previously held, losses resulting from the Youngs' decision to build a house that did not comply with planning permission, were self-evidently never

recoverable. As Mr Hanna pointed out at para 20 of his Skeleton Argument the Youngs were perfectly entitled to sell the property with the benefit of planning permission *or* they could have built a house in accordance with the terms of the planning permission. If they had done either of these things the value of their property, including the house, would have necessarily reflected the full open market value of the site at that time.

The Law

[21] If any damages are recoverable in this case they fall to be assessed under section 2(1) of the Misrepresentation Act (Northern Ireland) 1967 which provides:

> "2(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

[22] It is common case that the *prima facie* measure of damages under Section 2(1) is the amount by which the claimant is out of pocket as a result of relying on the misrepresentation. The basic measure of recovery for such misrepresentation is well established. The claimant is entitled to damages based on the difference between his present position (ie the position in which he found himself having entered into the contract in reliance on the defendant's statement) and the position he would have been had he not relied on the defendant's statement. In the typical case of negligent misinformation, where a claimant has entered into some transaction as a result of being misled, the normal measure of loss is the difference between the amount paid by the claimant and the value, if any, he received in return – see **Butterworth's Common Law Series – *The Law of Damages* at para17.14.**

[23] While damages are *prima facie* reckoned as at the time of reliance on the representation, this is not a strict and inflexible rule. On occasions some other date has been taken. In ***Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*** **[1997] AC 254, 263** Lord Browne-Wilkinson stated the principles applicable in assessing damages for a party who has been induced by a fraudulent misrepresentation to buy property as follows:

> "(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction;

(2) although such damage need not have been foreseeable, it must have been directly caused by the transaction;

(3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;

(4) *as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;*

(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.

(6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

(7) *the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."*

[24] In the same case Lord Browne Wilkinson also said at 266:

> "Turning for a moment away from damages for deceit, the *general* rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected. *Thus in the law of contract, the date of breach rule "is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances:" per* Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 401A. Similar flexibility applies in assessing damages for

conversion (*IBL Ltd v Coussens* [1991] 2 All ER 133) or for negligence (*Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 WLR 433). As Bingham LJ said in *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co.*, [1987] 1 WLR 916, 925-926:

> 'While the general rule undoubtedly is that damages for tort or breach of contract are assessed at the date of the breach … this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule.'

In the light of these authorities the old 19th century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. 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 influences

> 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.
>
> Finally, it must be emphasised that the principle in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, strict though it is, still requires the plaintiff to mitigate his loss once he is aware of the fraud. So long as he is not aware of the fraud, no question of a duty to mitigate can arise. But once the fraud has been discovered, if the plaintiff is not locked into the asset and the fraud has ceased to operate on his mind, a failure to take reasonable steps to sell the property may constitute a failure to mitigate his loss requiring him to bring the value of the property into account as at the date when he discovered the fraud or shortly thereafter."
> [emphasis added]

[25] *The **overriding principle** in assessing any damages is to do justice on the particular facts of the case.* The principles outlined above were applied to do justice (and avoid doing injustice), to the plaintiff in cases where, for example, the misrepresentation continued to influence the conduct of the plaintiff, or where the plaintiff was locked into the transaction. By parity of reasoning the defendants submit that this principle should also be applied where application of the normal rule would do injustice *to the defendants*. They emphasised what Bingham LJ said in ***County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*** **[1987] 1 WLR 916** that the rule "*should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule*".

[26] The court has concluded that the plaintiff has in any event failed to evidentially establish and quantify its loss as at the date of the contract. However *if* the loss claimed as of that date had been established it would, on the unusual facts of this case, be grossly unjust, disproportionate and unfair for the plaintiff to recover it by mechanistic application of the normal rule. Recovery thereof would not accurately reflect the overriding compensatory rule. This is because the impact of the misrepresentation was *temporary* in effect operating to artificially reduce the true value of the property only so long as the Russells' unjustified claim to title remained unresolved. During the period between the transaction date (October 2000) and the date of valuation proposed by the defendants (November 2004) the *only* relevant factor arguably influencing the value or resale price of the property was the Russells' unjustified claim to title. Accordingly I accept that the relevant date for assessing any loss should be November 2004, with the inevitable consequence that there has been no true loss.

[27] The plaintiff has not in fact suffered any loss in the value of the property as a result of the misrepresentations. If the Court had concluded that the plaintiff did suffer a loss, there has been no evidence quantifying it and the court will not speculate.

[28] The other heads of financial loss, including stamp duty, claimed by the plaintiff represent costs and expenses that would have been incurred in any event if they had bought and retained the property in the absence of any misrepresentation. I have not been persuaded that the misrepresentations caused any relevant pleaded or quantified delay in their use and enjoyment of the property. The plaintiff would have had to obtain planning permission in any event and would have incurred interest charges and other costs associated with obtaining and paying for finance during the period of obtaining planning permission and constructing the property. The figure of £750 claimed in respect of estate agents' fees for attempting to sell the property on behalf of the plaintiff and her husband in the period from October 2001 to October 2002 might have been recoverable - this figure is mentioned in Mr Harbinson's report. However, no invoice or fee note relating to this item was ever produced and Mr Conroy was not asked about any fees and did not say that his firm had submitted any invoice for the work which he did or that he received any remuneration for it. Accordingly, in the absence of any evidence to support this item it is disallowed.

[29] Mr Hanna correctly conceded that, in principle, a court has power to award general damages for distress and inconvenience in cases of misrepresentation. It is however clear he said that awards in such cases are invariably modest – see ***Shelly v Paddock*** **[1978] 2 QB 120** (£500 awarded to a claimant who had sold her house in England with the object of moving to Spain only to find that, due to the defendant's fraudulent misrepresentations, she had obtained no title to the house in Spain); ***Archer v Brown*** **[1985] QB 401** (£500 to a claimant who, in an attempt to buy his way into a business, had been swindled by the defendant into buying shares therein which the defendant did not own, and who had in consequence become unemployed, heavily in debt and deeply upset); ***East v Maurer*** **[1991] 1 WLR 461, CA** (£1000 to claimants who had bought a hairdressing salon which to their distress failed, the failure being because of the defendant's fraudulent competition).

[30] I agree that damages under this heading will ordinarily be modest. The figure of £10,000 suggested by the plaintiff appears to have been plucked from thin air and is inconsistent with the general jurisprudential trend. Doing the best I can the sum under this head which I allow is £2500 plus interest at the appropriate rate.

Costs

[31] Order 62 Rule 3(3) of the Rules of the Supreme Court provides:

> "If the Court in the exercise of its discretion sees fit to make any Orders as to the costs of any proceedings, the Court shall order the costs to follow the event,

> except where it appears to the Court that in the circumstances of the case some other Order should be made as to the whole or any part of the costs."

[32] Accordingly the normal Order is that costs follow the event. Mr Horner QC submitted that whilst that rule forms the background as to how the court should exercise its discretion, the court should also take into account other Rules such as Order 1 Rule 1(1)(A) which forms the overarching imperative as to how the Rules should be construed.

[33] Order 26 Rule 29(2) provides that where proceedings:

> "... could have been brought in the County Court the Plaintiff shall not be entitled to any more costs than those which she could have recovered if proceedings had been brought in the County Court unless the parties otherwise agree or, by reason of the question of law or issues of fact involved or the extent of the right to property affected or the full amount of the claim or other circumstances, the Judge shall otherwise direct."

[34] In the County Court damages awards of £2000 and under attract *no* costs if the claim could have been brought by way of a small claim. In respect of a claim, which has not been commenced in the District Judge's court but the award is £5000 or under (i.e., within the District Judge's jurisdiction), only two thirds of County Court scale costs may be awarded (see Order 55 Rule 19 (1) of the County Court Rules).

[35] The plaintiff's excessive and unjustified claim for damages together with the discredited accountancy and valuation evidence to support it took up a lot of the courts time. I agree with the defendants that at least half of the Courts time was wasted on dealing with this issue. Mr Horner submitted that there are many examples of the Courts penalising a Plaintiff in such circumstances. He referred me to ***Michelle Fenney v Tyco Healthcare (U.K.) Manufacturing Limited*** **[2008] NIQB 133** where Girvan LJ disallowed the following items of costs against the Defendant where the Plaintiff exaggerated her claim of disability. Mr Horner stated that the Order records that the following costs were disallowed:

> (i) Costs of and incidental to amendments to pleadings relating to a monetary claim for loss of earnings and special damage.
>
> (ii) The report of Breda Jamison and fees and expenses of Breda Jamison as a witness.

(iii) The report of the accountants ASM Howarth and the fees and expenses of those accountants of and in connection with the proceedings.

(iv) The Plaintiff's recoverable costs in respect of the actual trial should be abated by thirty per cent; and

(v) The Defendant should be entitled to off-set against the Plaintiff's recoverable costs the costs incurred by the Defendant in retaining Harbinson Mulholland, Accountants in the preparation of their report and consulting them in connection with meeting the Plaintiff's claim.

[36] Mr Horner also submitted that there are many decisions in the Courts of England and Wales where the Courts have penalised a plaintiff where, as here, a grossly exaggerated claim was put forward eg see ***Molloy v Shell UK Limited*** **[2001] EWCA Civ 1272*; Painting v University of Oxford*** **[2005] EWCA Civ 161*; Jackson v Ministry of Defence*** **[2006] EWCA Civ 46*; Strakere v Tutor Rose*** **[2007] EWCA Civ 368.**

[37] My order as to costs is as follows:

(i) Costs are awarded on the County Court scale to the plaintiff against the Hamiltons and Ms Thompson;

(ii) The plaintiff's recoverable costs in respect of the actual trial should be abated by 50 per cent;

(iii) The reports of the accountant and the valuer and their fees and expenses in connection with these proceedings are disallowed.

(iv) The costs of and incidental to the hearing concerning Mr Youngs bankruptcy are disallowed;

(v) As far as the fourth, fifth and sixth defendants are concerned I make no order as to costs given their behaviour and contribution to what occurred;

[38] As between the Hamiltons and Ms Thompson I apportion responsibility under section 2 of the Civil Liability (Contribution) Act 1978 on a 75 (Hamiltons)/25 (Thompson) basis with cross contributions against each other to that extent.