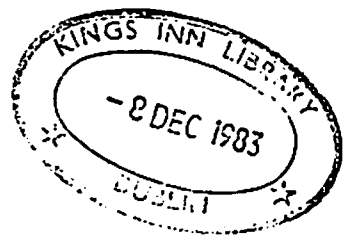


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1979 No. 7213 F

NEIGHBOURHOOD PUBLIC HOUSE LIMITED



-v-

THOMAS McINERNEY & COMPANY, LIMITED

Judgment of Mr. Justice McWilliam delivered Tuesday 21st June, 1983.

The Plaintiff has claimed damages for breach of a covenant in a contract dated 25th November, 1975 made between the Defendant and Louis Fitzgerald, purchasing in trust, for the sale of part, containing a little over five acres of the lands of Oldbawn, Co. Dublin, whereby the Defendant, as vendor, covenanted to reserve right out of any conveyance or transfer of the Defendant's adjoining land so as to give to the purchaser, who had purchased in trust for the Plaintiff, all necessary rights of way, access and passage in connection with roads, drains, surface water drains and mains water supply and electricity supply in order to service the sites (and development thereof) thereby agreed to be sold.

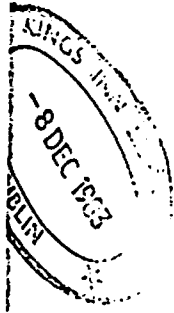
The Defendant had, on appeal to the Minister for Local Government in 1974 obtained planning permission for a very extensive development on a site containing approximately eighty acres. This development included 607 houses, a shopping centre, a church, a school and

community facilities. The portion purchased for the Plaintiff was designated for the shopping centre, a public house and other non-residential purposes except those associated with shops.

Special condition 3 of the contract provided as follows:-

"The lands herein are sold with the benefit of and subject to the several obligations and conditions imposed by order of the Minister for Local Government made on appeal on the 23rd day of December, 1974, under Planning Register Reference Number F 762 and more particularly Conditions numbered 1, 2, 3, 8, 15, 16, 18, and 19 thereof in so far as they relate to the commercial area referred to therein." Of the conditions, the only one in any way relevant to these proceedings is No. 3. It is as follows:- "The construction of the shopping centre and ancillary facilities in the proposed neighbourhood centre which are to be the responsibility of the developers shall be commenced at the earliest possible date after commencement of the overall development and shall be completed before half of the houses covered by this permission are built or occupied."

As mentioned above, the plans in respect of which permission F 762 was given included a public house, a business in which Louis Fitzgerald, then the main shareholder and director of the Plaintiff,



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was already involved elsewhere. It appears that he did not propose to proceed with the development himself if, as happened, he did not succeed in obtaining the preliminary declaration entitling him to obtain a licence.

A fortnight prior to the date of the agreement with Louis Fitzgerald, the Defendant had entered into an agreement for the sale to Kilnamanagh Estates Limited (Kilnamanagh) of adjoining land which contained the following special condition:- "5. The Purchaser hereby agrees to grant to the Vendor or its agents or assigns appropriate wayleaves for the purpose of connecting the adjoining lands of the Vendor to the sewers and other services on the land for sale and also to grant the Vendor, its agents, licensees or assigns rights of way over such public roadways as shall be constructed on the lands the subjectmatter of this sale. The Vendor agrees to grant the Purchaser similar rights over the said adjoining lands of the Vendor." This contract provided, at special condition 3, that the sale of the lands was subject to and with the benefit of the Planning Permission of 1974.

A transfer to Kilnamanagh dated 30th December, 1975, did not contain any reservation of the rights agreed to be granted by special

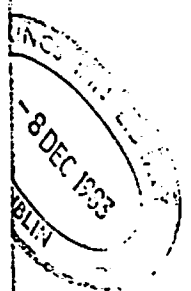
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condition 5, and no grant of those rights was obtained by the Defendant.

The site purchased on behalf of the Plaintiff was transferred to the Plaintiff by transfer dated 18th January, 1977, and this deed did contain a grant by the Plaintiff to the Defendant of a right of way reserved by condition 10 of the contract with Louis Fitzgerald.

In December, 1978, an application on behalf of the Plaintiff was made in the name of Greenfield Estates Limited for permission for a revised plan to include 22 dwellinghouses on the site, Louis Fitzgerald having, on 18th August, 1978, agreed to sell his interest in the site to Anthony Vaughan either by way of sale of the site or by a sale of the shares in the Plaintiff. Kilnarnagh opposed this application on the ground that the Plaintiff had no access and no permission for service connection to the site. By letter of 4th January, 1979, the solicitors for Kilnarnagh stated bluntly that the Plaintiff's site was landlocked and that the Plaintiff would have to negotiate in order to get any rights of way or service. By this letter the solicitors also refused to furnish a copy of the contract between the Defendant and Kilnarnagh.

To add to the difficulties of the Plaintiff, the solicitors for



the Defendant, by letter dated 5th January, 1979, stated that the Defendant would not furnish a copy of the agreement either, and did not even furnish details of the covenant by Kilnarnagh which they had furnished to the solicitor for Louis Fitzgerald in the previous November.

As a result, Anthony Vaughan through Greenfield Estates Ltd. entered into an agreement with Kilnarnagh in February 1979 whereby Kilnarnagh would grant the necessary ways and wayleaves and withdraw its objection to the application for amended planning permission in consideration of the payment of £1500 in respect of each house for which planning permission was granted.

The letter of 4th January, 1979, from the solicitors for Kilnarnagh in terms denied all right of access to the site. I am of opinion that any such claim was unsustainable and this seems to have been accepted by Kilnarnagh and the Defendant and the claim of the Defendant now is that the covenant referred only to the original permission for the development of the site for the non-residential purposes therein specified and was not applicable to amended permissions for dwellinghouses. Although I have referred to the attitude of Kilnarnagh, Kilnarnagh is not a party to these

proceedings either as a defendant or as a third party and the contract with which I have to deal is the contract between the Defendant and the Plaintiff.

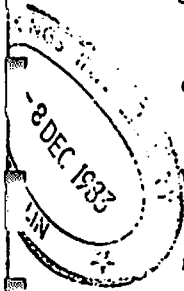
At the time of the contract with the Plaintiff, the Defendant had already entered into the contract with Kilnarnagh and I am of opinion that, on the completion of the sale to Kilnarnagh, it was the duty of the Defendant, under its contract with the Plaintiff, to obtain the necessary grant or reservation of the rights of way or wayleaves. This was not done, although it is clear that the Defendant appreciated the advantage of such a course by reserving a right of way in the conveyance to the Plaintiff.

During the period since the dates of the contracts for the sale of the two portions of the Defendant's property, the various parties were engaged in many other disputes. Louis Fitzgerald and Anthony Vaughan had a dispute about the completion of their agreement. The County Council threatened Kilnarnagh with penalties if it proceeded with more than half its development before the business and amenity site was developed. Kilnarnagh, in turn, threatened the Defendant with proceedings if the County Council carried out its threat. Kilnarnagh also brought proceedings to

compel Anthony Vaughan to pay the sums due under the agreement whereby Kilnamanagh granted wayleaves. All these matters and others, including the profit actually made by the Plaintiff out of its enterprise, were discussed at the hearing before me, but they all appear to be irrelevant to the main issues which are, whether the Defendant complied with the terms of its covenant with the Plaintiff, whether this covenant was applicable to amended permissions for dwellinghouses, and whether the Plaintiff sustained any damage.

I accept the evidence that it is a regular occurrence for applications to be made for the alteration of permissions already granted. It is open to any person who is prejudiced to object to any alteration and it is significant that no witness was called, either from Kilnamanagh or elsewhere, to establish that Kilnamanagh would have been prejudiced by reason of the lack of capacity of the sewers, drains or roads or otherwise by reason of the proposed alterations.

In all the circumstances of the case I have formed the opinion that the covenant was intended to apply and did apply to any normal development of the land. I have already stated my opinion that the Defendant did not observe the terms of its covenant with the



Plaintiff.

By agreement, the question of damages was not argued before me, but on the evidence I have heard it seems possible that the only damage sustained by the Plaintiff, notwithstanding the very large sums claimed, was the sum properly paid to Kilnarnagh under the terms of the agreement of February, 1979. The determination of the amount of damages to which the Plaintiff is entitled will be adjourned.

*Michael J. [unclear]*  
*1/11/83*

