IRISH LIFE

1984 No. 1536P
335

THE HIGH COURT

BETWEEN:

IRISH LIFE ASSURANCE COMPANY LIMITED

PLAINTIFF

AND

DUBLIN LAND SECURITIES LIMITED

DEFENDANT

JUDGMENT delivered the 2nd day of May, 1986, by Keane, J.

It is a truism that the sale of one ground rent in Dublin for fifty pounds can cause more nightmares to lawyers than that of an office block for millions of pounds. The difficulties involved in a sale of over nine thousand ground rent can scarcely be exaggerated and it is hardly surprising that it has given rise to a problem of spectacular dimensions in the present case.

It is many years since the Plaintiffs began investing some of the funds at their disposal in ground rents, principally in the Dublin area. In those days,they represented a not unattractiv form of investment. The fact that they generally produced a fixed income for the investor was not so important when inflatio was comparatively low and the cost of collecting them could be maintained at a reasonable level. While some householders regarded them as an irritating feudal survival, organised and militant campaigns against them were virtually unknown.

All that had changed by the mid 1970's. Inflation was now rampant, the cost of collection had increased significantly and extremely vocal resistance to ground rents had developed in many areas. This last development was a source of particular embarrassment to the Plaintiffs who numbered among their

policy-holders, or potential policy-holders, many people who also paid them ground rents. In addition, there was now on the statute book legislation enabling householders to buy out their ground rents and at the time of the events giving ris to these proceedings the ceiling price which had to be paid by a person wishing to buy the freehold represented just over six years' purchase. Not surprisingly, the Plaintiffs from this time onwards were actively interested in disposing of their ground rents portfolio if a buyer could be found at a reasonable price

In April 1981, Mr Peter White, a partner in the firm of Messrs Gilbert Leon and White, Estate Agents and Auctioneers, introduced such a purchaser to the Plaintiffs. He was Mr Philip Frederick, a London property developer, who had extensive interests in the United Kingdom and elsewhere, but had no experience of the Irish property market and, indeed, prior to the events giving rise to this litigation, had never been in this country.

Having regard to the number of properties involved, it was obvious to both parties that the most practical method of arriving at a price for the acquisition of the portfolio was to agree on an appropriate multiplier of the rental receive. Mr Frederick suggested a multiplier of 3.36 which would mean a purchase price in the region of £425,000. Mr.William Nowlan, the property portfolio manager of the Plaintiffs, agreed to recommend this offer to his Board for approval, which was eventuall forthcoming. Both parties instructed Solicitors to act on thei behalf in the transaction, Mr Frederick retaining Mr Stephen Miley of Messrs. Miley and Miley and the Plaintiffs'

side of the transaction being handled by their "in house" Solicitor, Mr James Devlin.

It was accepted by both parties that included in the ground rents portfolio there were properties which would provide a purchaser with some profitable opportunities. Thus, in some cases, the leases under which the ground rents were payable might have a relatively short reversion, giving rise to the possibility of an increased rent (or even vacant possession) on expiry. More relevantly in the context of these proceedings, it was not uncommon to find in residential estates in the Dublin area that not all the land was in the occupation of the householders or taken in charge by the local authority. These vacant sites offered possibilities for development which represented a major attraction of the transaction from the pruchaser's point of view. They were variously described during the course of the proceedings as "odds and ends" (by the Plaintiff and "plums" or "jewels in the potatoes" (by Mr Frederick).

Among the unbuilt sites in the ownership of the Defendants was a stretch of land at Palmerstown of over seven acres which straddled the boundary of Dublin City and County. This land had been reserved for road improvement purposes in the development plans of the two local authorities concerned for many years. In the case of the lands in the county, notice of the making of a Compulsory Purchase Order had been given by the Council on the 7th April 1977, and the Order had been confirmed by the Minister for the Environment on the 19th November 1979. A Compulsory Purchase Order had been made by Dublin Corporation in respect of the lands in the City on

17th April 1975,but was not confirmed by the Minister until the 13th December 1983. It was proved at the hearing that the total amount of compensation payable in respect of all these lands and adjoining lands acquired by agreement together with interest accrued was £594,761. No ground rents were payable out of these lands.

Mr Nowlan had no intention of including these lands in the sale of the gound rents portfolio to Mr Frederick or any other purchaser and he said in evidence that he so informed Mr White at a meeting in his (Mr Nowlan's) office on the 26th May 1981, at which a member of his staff, Miss Angela McGauran, was also present.

Mr White, in seeking a possible purchaser for the ground rents portfolio, was armed by the Plaintiffs with what was called the "Blue Book" containing details of the properties in the portfolio and the approximate rental income. It was accepted that the Blue Book was in many respects out of date: a significant number of the ground rents had, for example, been purchased by the tenants since it was originally compiled. In addition, there were a number of properties which although included in the Blue Book, the Plaintiffs wished to be excluded from the sale, since they did not form part of the ground rent portfolio proper, but were ground rents payable out of the Plaintiffs' own property or sites which they were in the process of developing. Conversely, there were properties not included in the Blue Book which the Plaintiffs considered did form part of the portfolio. Mr Nowlan, accordingly, informed

Mr Devlin's department of properties that were to be either excluded from or added to the properties being sold to Mr Frederick. Such information was conveyed to Mr Devlin's department before the contracts giving rise to the present proceedings were actually executed and exchanged on the 23rd December 1921 and among the properties expressly specified for exclusion were "vacant lands at Palmerstown". The process of either excluding the properties or adding them back in continued after the execution of the contract on that date.

The properties agreed to be sold were described in the contract as those specified in the schedules A, B and C attached to the contract. The contract also contained provisions, which it is not necessary to notice in detail, dealing with the arrears of rents owing and the future collection of rents. The details of the rents payable out of the property were set out in a computer print out which was given the name of Schedule D.

Mr Miley was not happy about closing the sale on December 23rd, since he was not satisfied that all the properties which his client was entitled to acquire had been included in the draft contract proffered to him by Mr Devlin. Mr Devlin, was, however, equally concerned for his part to have the transaction completed without delay and he indicated to Mr Miley at the closing that, if the contracts as drafted were not signed and exchanged on that day, the transaction would be at an end. Mr Miley telephoned his client in London and received his authority to proceed as he (Mr Miley) thought best and, accordingly, Mr Miley agreed to the contracts being executed and exchanged.

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The Palmerstown lands consisted partly of registered freehold land and partly of unregistered leasehold land. The unregistered leaseholds were described in reference 75 of Part I of Schedule C as excluding

"those parts of the said lands...which are subject to Dublin County Council Compulsory Purchase Order."

The freehold lands were described at reference 57 in Part II of Schedule A as

"the lands comprised in Folio 5245 County Dublin, being the lands of Redcow Farm, Palmerstown, County Dublin."

Other than the reference to the exclusion of part of the unregistered leasehold lands, there was no mention anywhere in the contract of the exclusion of the Palmerstown lands which were the subject of Compulsory Purchase Orders. This was the result of an oversight in the legal department of the Plaintiffs when the schedules were being prepared: Mr Nowlan had advised the department that the vacant Palmerstown lands were not to be included, but this had been lost sight of in the course of the preparation of the contract.

Following the execution of the contract, there were further alterations to the schedules involving the removal of properties which it was thought should not be included in the sale and the addition of ones which it was thought should be. There was no serious difference between the parties as to these matters. It was not until March 1982 that Mr Devlin, while checking a matter in relation to the Palmerstown lands, realised for the first time that they had been included in error in the

contract. At a meeting in his office on the 23rd March 1982 with Mr Miley, Mr Devlin's Law Clerk, Mr John Hester, handed Mr Miley a letter in the following terms:

> "I refer to my reply to general requisition number 6 dated 11th March 1982.
>
> "It has now been brought to my attention that the Compulsory Purchase Order referred to at Schedule C Part I Lot 75 should also have been referred to as affecting Schedule A Part II Lot 57 part of the lands comprised in Folio 5245 County Dublin.
>
> "Consequently the parts so affected by the C.P.O. will not be transferred to your clients, Dublin Land Securities Limited, and will continue in the ownership of my clients, Irish Life Assurance Company Limited.
>
> "Perhaps you would note accordingly."

Mr Frederick on the advice of both Mr White and Mr Miley had decided to form an Irish company - the present Defendants - to take the conveyance of the ground rents and to administer their collection in the future. The contract had been executed in the name of this company. Difficulties were experienced, however, in completing the transaction because, among other things, of the concern of Mr Miley that his clients should acquire everything to which they were entitled under the contract. Eventually an arrangement was arrived at whereby the Defendants furnished Mr Devlin with a bank draft for the estimated amount of the money due on completion - £374,972.83 - which Mr Devlin undertook to place on deposit pending the closing.

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The purchase deed was engrossed in Mr Miley's office and forwarded to the Plaintiffs who indicated that they required certain alterations to be made to it. Mr Miley eventually took back the deed and it was still in his possession when the proceedings were instituted.

Mr Miley said in evidence that, although he had placed the letter from Mr Devlin of the 23rd March concerning the Palmerstown lands on his file, he did not appreciate its significance at the time. He said that towards the end of May he had a conversation with Mr Hester when for the first time he realised that it was the intention of the Plaintiffs to exclude the Palmerstown lands and also appreciated the significance of the mistake that had been made. He so informed Mr Frederick at the time.

At this time also, Mr Nowlan learnt for the first time from Mr Devlin of the error that had occurred. The correspondence continued between the solicitors as to the finalising of the transaction during the summer of 1982 and ultimately on the 2nd September 1982 Mr Miley, in the course of a letter to Mr Devlin dealing with a number of outstanding matters, said

> "I am aware of quite a large property at Palmerstown which is subject to a C.P.O. and in respect of which I understand substantial moneys will be paid by the local authority. As far as I am aware this property was originally included in the sale to my clients and it will be a matter for them to decide now how to deal with this."

Obviously concerned by the implications of this letter, Mr Nowlan spoke to Mr White about it. Mr Nowlan said in

evidence that Mr White told him that Mr Frederick did not expect to get the Palmerstown lands. This was conveyed by Mr Devlin to Mr Miley in a letter of 8th September 1982 but there was no indication from the Defendants that they were prepared to agree to the exclusion of these lands from the sale. It further emerged that two residential properties in Palmerstown, numbers 5 and 9 Turret Road, had also been erroneously included by the Plaintiffs in the draft contract: erroneously because the Plaintiffs were in receipt of rack rents and not ground rents from them.

Ultimately, in an effort to resolve the outstanding matters, a meeting was held in Dublin at the Plaintiffs' offices in November 1982 which was attended by all the parties concerned, including Mr Nowlan, Mr Frederick and Mr White. In the course of the meeting, Mr Frederick said that he was quite prepared to accept that a mistake had been made in the preparation of the contract, but that he also considered he was entitled to benefit from any such mistake. Mr Frederick said in evidence that his attitude was that he had been required to sign the contract in the form presented to his Solicitor on the 23rd December 1981 and that, since he was prepared to accept it with whatever consequences that might entail for him, he considered that the Plaintiffs should adopt the same approach.

An impasse having thus been reached, the present proceedings were instituted in which the Plaintiffs claim

(i) Rectification of the contract dated the 23rd December 1981 so as to embody the agreement alleged to have actually been made between the parties or their

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true intentions at the time of executing the same and

(ii) An Order for specific performance of the agreement as so rectified.

The Defendants in their defence and counterclaim seek

(1) A declaration that the Defendant is the owner of the Palmerstown lands

(2) A declaration that the Plaintiffs duly executed and delivered a conveyance of these lands

(3) If necessary, an Order for specific performance of the contract.

It is necessary at the outset to consider the status of Mr White in this transaction. It was contended on behalf of the Plaintiffs throughout the proceedings that he never at any stage acted as agent for them and that he was at all times the agent of Mr Frederick. (I may say in passing that it was agreed at the Bar that nothing turned on the fact that the pre-contractual negotiations were between the Plaintiffs and Mr Frederick, although the contract was actually executed in the name of the Defendants). While it was conceded on behalf of the Defendants that Mr White ultimately became the agent of the Defendants since Mr Frederick decided to retain him for the purpose of administering the ground rent portfolio and collecting the rents, it was submitted on their behalf that he was not the agent of Mr Frederick prior thereto, but was acting on behalf of the Plaintiffs. In particular, it was submitted that he was not acting as the agent of Mr Frederick

in May 1981, when Mr Nowlan said that he told him expressly that the Palmerstown lands were being excluded from the sale.

Mr Nowlan said that in February 1981 he was invited to lunch in Messrs. Gilbert Leon and White and was asked during the course of the lunch whether he had any properties for sale. He mentioned the ground rents portfolio and a house at 133 Lower Leeson Street. Mr White subsequently contacted him about the Leeson Street property and arranged to inspect it. Having inspected it, he told Mr Nowlan that he had not got a client for it, but asked him if he would give his firm authority to sell. Mr Nowlan got the necessary authority from his superiors and conveyed this in writing to Messrs. Gilbert Leon and White. Mr White in due course put up the property for auction and was paid his fees by the Plaintiffs.

On the 24th April 1981, Mr White wrote to Mr Nowlan saying

> "I have had an enquiry from an English client, Philip Frederick Investments Limited, who are interested in acquiring substantial ground rent portfolios in Ireland. I have taken the liberty of giving them brief details of your collection which I had."

He added in the same letter

> "I should add that Messrs Philip Frederick Investments Limited are a substantial English fund, who have specialised in ground rent collections in England, and I am relatively optimistic that we may be able to obtain a satisfactory offer from them, in which case, we would like to know that we had been retained by Irish Life if a sale does arise."

Mr Nowlan replied on the 28th April 1981 confirming the Plaintiff's interest in disposing of the portfolio and said

> "Finally, I would like to confirm that Irish Life will pay your fees in the event of a sale to a party introduced by you. I must however advise you that Irish Life are in the process of negotiating the sale of its portfolio with another prospective purchaser from the U.K. and introduced by a U.K. firm of estate agents and surveyors. Although nothing conclusive has been agreed, perhaps you should keep your client fully informed of the situation."

Mr Nowlan said that he had been deliberately cautious in his wording of this paragraph, since he was aware of the complications that could ensue for the Plaintiffs if Mr White purported to negotiate a sale of the portfolio to a purchaser as the Plaintiffs' agent.

Mr White wrote on the 3rd June 1981 to Mr Nowlan as follows:-

> "Mr Frederick, while somewhat concerned about the collection difficulties, has confirmed to me that, subject to contract, and his Solicitor being satisfied with the titles being offered, he will, on my advice form an Irish company for the proposed acquisition of the entire portfolio subject to the following terms and conditions...".

There followed the agreement as to the appropriate multiplier to determine the purchase price. As I have already mentioned, the parties had at a relatively early stage

instructed their respective Solicitors in relation to the transaction. Mr Miley, having received a copy of the proposed contract, wrote on the 17th September 1981 to Mr White in the following terms:-

"Dear Peter,

As arranged I enclose a copy of the letter which I have now received from Irish Life, together with a copy of the proposed contract. Subject to what you say it appears to me to be substantially in order so far as it goes. There are quite a few amendments which I would like to make, but I do not think these would upset the other side too much.

"I think we should meet as soon as you have read through the documents so that we can decide on the precise amendments we require.

"I note also that the contract is in the name of Philip Frederick Investments, but as the new company is available I think we should use this to sign the contract.

"I look forward to hearing from you.

Yours sincerely."

On the 11th September, 1981, Mr White wrote to Mr Frederick as follows:-

"Dear Philip,

I send you herewith a photocopy of a letter which I have

received from Irish Life, together with a photocopy of my reply.

"I have today spoken to Stephen Miley who tells me that he has just received a very lengthy and involved draft contract.

You mentioned to me that you are arranging funding with the Lombard Bank and I think it is important at this stage that their Solicitors should be brought in also to vet the contract. Stephen is in agreement with me regarding this, and accordingly, perhaps you would like to let us know with whom you are dealing with in the Lombard so that we can make the necessary arrangements.

"As I told you during my visit, when we have had an opportunity to go through all the individual properties in the portfolio, we can start taking steps to rationalise the situation. I would prefer however to wait until contracts have been exchanged before starting to do this for obvious reasons.

"You will of course require an Irish company for the acquisition and perhaps you would like to speak to Conor Davitt or Tom Phelan of Phelan Prescott and Company, both of whom you met with me, regarding this. They should be able to provide you with nominee Irish directors so that your name does not appear in the situation

"Should you like to give me a call about any of the above items, perhaps you would do so at my home number which is Dublin 970467, as I told you, I am gradually withdrawing

from my role as an estate agent and will be working more from my house in future. I hasten to add, however, I will still be keeping a watching brief on your behalf on the ground rent situation."

There followed various letters from Mr White to Mr Miley and Mr Frederick concerning details of the formation of the proposed company. It was arranged that Mr Phelan and Mr White should be joint signatories on the account for the new company. On the 17th December 1981, Mr White wrote to Mr Frederick as follows:-

"I had a look through the contract myself and I must say it will take us some time to wade through all the plots and sites which are mentioned. When the contracts have been exchanged, we can really get down to business on this. I have a feeling that there are so many areas which nobody from Irish Life has ever visited, we may have some pleasant surprises! Let's hope so in any case. I also have received details of parties who are interested in buying out their rents which Irish Life have been good enough to forward to me. We can deal with these once again in due course."

Mr Frederick in evidence said that Mr White only acted as his agent after the contract had been signed. Mr White did not give evidence.

I accept Mr Nowlan's evidence that he never at any stage intended to appoint Mr White as the agent of the Plaintiffs and that he did no more than agree to pay Mr White a commission

in the event of his (Mr White's) introducing a purchaser for the portfolio. It is also clear from the correspondence to which I have referred that Mr White regarded himself as acting on behalf of Mr Frederick and in his interest. Mr Frederick may not have considered Mr White to be his agent in a formal sense until after the execution of the contract and his retention to manage the portfolio, but is is perfectly clear from the correspondence that Mr Frederick made his offer to acquire the ground rent portfolio through Mr White and that in turn the Plaintiffs' acceptance of his offer was communicated to Mr White as Mr Frederick's agent. Mr Farrell submitted that the letters in question were equally consistent with the actions of an agent (Mr White) reporting to his own principal (the Plaintiffs) on an offer made by a third party (Mr Frederick), but I think so to hold would be to ignore the realities of the situation as abundantly demonstrated by the correspondence to which I have referred.

I also accept Mr Nowlan's evidence that at the meeting with Mr White on 26th May 1981, he informed him that there was a significant holding of land at Palmerstown which was subject to a Compulsory Purchase Order and which was not to be included in the sale.

Mr Brian Hughes, who was employed by the Plaintiffs as a valuation surveyor, said that at the signing of the contract on the 23rd December 1981, he recalled saying to Mr Miley that the vacant Palmerstown land was not included in the sale. Mr Miley said in evidence that he had no recollection of this having been said. Mr Devlin said that he remembered when the

contract was being signed that he "flicked over the schedules" and told Mr Miley that he did not want the land in reference 75 in Part II of Schedule C included. He was not referring to the land comprised in reference 57 of Part II of Schedule A. He did not recall Mr Hughes making any reference to the Palmerstown lands.

I accept the evidence of Mr Miley that nothing was said to him at or before the execution of the contract which drew his attention to the Plaintiffs' intention that the lands at Palmerstown should be excluded.

In summary, I am satisfied that the evidence establishes:-

(1) It was at all times the intention of the Plaintiffs to exclude the lands the subject matter of the two Compulsory Purchase Orders together with the adjoining land acquired by agreement at Palmerstown and the houses at Turret Road from the contract.

(2) Mr Nowlan on behalf of the Plaintiffs informed Mr White, who was then acting as the agent of Mr Frederick, that a significant holding of land the subject of a Compulsory Purchase Order at Palmerstown was to be excluded from the sale at the meeting of the 23rd May 1981.

(3) The lands at Palmerstown the subject of the two Compulsory Purchase Orders, the adjoining lands acquired by agreement and the houses in Turret Road were included in the contract of the 23rd December 1981 because of an oversight in the legal department of the Plaintiffs.

(4) Neither Mr Miley nor Mr Frederick was aware of the mistaken inclusion of the Palmerstown lands or its significance until late May 1982. Mr White had not said anything to Mr Frederick about their exclusion from the sale and, while Mr Miley received the letter of the 23rd March 1982 from Mr Devlin, he did not appreciate its significance at the time and had forgotten about it until he was reminded of its existence at the meeting in November 1982.

The Plaintiffs say that, in these circumstances, the contract of the 23rd December 1981, was drawn up and signed under a mutual mistake of fact and that they are accordingly entitled to rectification of the contract so that it carries out the actual intentions of the parties. It was submitted by Mr Keane on their behalf that it was not necessary for the Plaintiffs to establish that there had been an antecedent agreement enforceable in law: all that was required was that there had been a common continuing intention in regard to the particular provision of the agreement which had found expression in outward agreement together with convincing proof that the concluded instrument did not represent the parties' common intention. He relied in this context on the decisions of the Court of Appeal in Joscelyne .v. Nissen (1970) 2 Q.B. 86 and of the Northern Ireland Court of Appeal in Rooney and McParland .v. Carlin (1981) N.I. 138. He submitted that both the Plaintiffs and Mr White, as the agent of the Defendants, intended to exclude the lands at Palmerstown, and had manifested

that intention at the meeting of 23rd May 1981. Since that common continuing intention had not found expression in the written contract, the Plaintiffs were entitled to have it rectified so as to give effect to that common intention.

Mr Farrell submitted on behalf of the Defendants that there was no mistake in the contract of 23rd December 1981: the Plaintiffs intended to sell and the Defendants intended to purchase the properties set out in the schedules whatever they might be. While accepting that it was not necessary that there should have been an enforceable antecedent agreement, he argued that there must at least have been a concluded antecedent agreement certain in its terms. He submitted that the reference by Mr Nowlan at the meeting of the 23rd May to a "significant holding of land the subject of a C.P.O. at Palmerstown" was so lacking in precision that the parties could not be said to have reached a concluded agreement in regard to this particular matter which was certain in its terms. It was not clear, he said, whether the reference was to the lands included in both the Compulsory Purchase Orders or one or other of them. Moreover, not all the lands which the Plaintiffs were now seeking to exclude from the agreement were in fact the subject of either Compulsory Purchase Order: some of the adjoining land had been sold to the County Council by agreement. Nor had there been any reference to the houses at Turret Road which it was now sought to exclude.

Mr Farrell further submitted that this was in truth a case of unilateral mistake, even though not pleaded as such. He submitted that there could be no rectification where the mistake is merely unilateral, as where one party (in this instance

Mr Frederick) had never even heard of the terms sought to be inserted, and that this would be so even if Mr White could be regarded as being Mr Frederick's agent, since Mr White had never told him of the term in question. Mr Farrell relied in support of this latter proposition on Farlow .v. Scottish Equitable Life Insurance Society, 1984 L.J. Ch 225. He submitted that the present case fell within none of the established exceptions to the principle that the Court will refuse rectification in such cases of unilateral mistake.

The conditions which must be satisfied before a Court will order rectification of a written contract on the ground of mutual mistake were defined as follows by Lord Lowry LCJ in Rooney and McParland .v. Carlin at p. 146:-

"1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but

2. The antecedent agreement need not be binding in law.... nor need it be in writing: such incidents merely help to discharge the heavy burden of proof;

3. A complete antecedent concluded contract is not required, so long as there is prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in Joscelyne .v. Nissen."

It had been held by Dixon J. in Monaghan County Council .v. Vaughan (1948) IR 306 adopting the view of the law taken by Clauson J. in Shipley UDC .v. Bradford Corporation (1936) Ch 375 that, in the case of mutual mistake, the power of the Court to

order rectification did not depend on the existence of an antecedent agreement capable of being enforced: it was sufficient that there was such an agreement, whether enforceable or not. Joscelyne .v. Nissen and Rooney and McParland .v. Carlin make it clear that one additional element is required, namely, that the antecedent agreement or "common continuing intention", to use the phrase preferred by Russell LJ in Joscelyne .v. Nissen and Lord Lowry LCJ, has been reflected in some outward expression of accord. In addition, these later decisions place renewed emphasis on the heavy burden of proof which lies upon a Plaintiff in such cases and which was referred to by Haugh J. in Nolan .v. Graves and Hamilton (1946 IR 376 at p.389) as "a very onerous burden".

It is, I think, clear that the principles to which I have referred, supported as they are by eminent authority, represent the law in this jurisdiction. Accordingly, if the Plaintiffs had discharged the heavy burden of proof which lies upon them and established that there was a common continuing intention on the part of Mr Frederick and the Plaintiffs to exclude the lands at Palmerstown from the sale which was mistakenly not embodied in the contract but was outwardly expressed and communicated between the parties thereto, the Plaintiffs would be entitled to rectification of the contract in accordance with the legal principles to which I have referred.

I have already found that Mr Frederick was unaware until May 1982 of the intention of the Plaintiffs to exclude the lands at Palmerstown. The Plaintiffs, of course, rely on the fact that the intention to exclude the lands had been communicated by Mr Nowlan to Mr White as Mr Frederick's agent and say that the

knowledge thus obtained by Mr White must be imputed to Mr Frederick.

The law is stated as follows in Bowstead on Agency, 15th Edition, at p.412:-

"When any fact or circumstance, material to any transaction, business or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken; provided that where an agent is party or privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal."

While this is no doubt a correct statement of the law, it does not of itself lend support to a further proposition which is an inherent part of the Plaintiffs' case. The learned editors do not say that where such knowledge takes the form of the agent's awareness that a particular term is to be included in a proposed contract, the principal is not merely deemed to have notice of the proposed term but is also deemed to have assented to its inclusion in the proposed contract and to be bound by it, even where it is omitted from the contract because of a mistake by the party seeking to rely on it. No authority has been cited for that proposition and such

authority as there is appears to be against it.

It is of course an important feature of the efficient conduct of business that parties should be able to rely on notice to an agent as adequate notice to his principal within the limitations to which I have already referred. But in a case such as the present, those considerations may have to yield place to a principle of fundamental importance, viz., that the Courts will not reform a contract in writing save on convincing proof that the contract, as the result of a mistake, has failed to give effect to the common intention of the parties previously manifested in outward accord. The authorites eloquently underline the anxiety of the Courts to ensure that uncertainty is not introduced into freely negotiated commercial transactions by the successful invocation of rectification except within these strict constraints.

Thus, in Shipley Urban District Council .v. Bradford Corporation, Clauson J. remarked that many, perhaps even most, rectification cases dealt with the reforming of a final instrument such as a conveyance or a settlement, so as to accord with a previous instrument, such as a contract for sale or articles for a settlement. He added that the high standard of mutual mistake, which the Court requires made cases where mutual mistake could be proved, in the absence of any previous written instrument "very rare". Within this framework, it seems contrary to principle that, in a case such as the present, the Court should infer from the knowledge of the agent of the disputed term the assent of the principal to its inclusion in the contract, where the principal had no actual knowledge of the omitted term and the

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omission was due to a mistake by the party seeking to rely on it.

In this context, the circumstances of the present transaction must constantly be borne in mind. Mr Frederick was not simply making an investment which would yield him a fixed income. He was buying the ground rents portfolio in the knowledge that it would contain at least some opportunities for profitable exploitation of vacant sites and short reversions. It was wholly impractical for him or anyone acting on his behalf to conduct a detailed investigation of all the properties comprised in the folio with a view to establishing how worthwhile such opportunities were within the time scale insisted on by the Plaintiffs. He was,in short,taking a calculated business risk in the hope that it would yield him a substantial bonus above and beyond the fixed income which would be singularly unattractive to most investors in these times. The Palmerstown lands were not as I have already said, the only property which the Plaintiffs intended to exclude from the sale although technically forming part of their ground rents portfolio. The evidence establishes that a list of these properties was furnished by Mr.Nowlan to Mr Devlin's department with a view to ensuring that they were excluded from the contract. Accordingly, when it came to signing the contract, Mr Miley found himself in a position where he had to advise his client that he was not at that stage satisfied that the contract proposed by the Plaintiffs included all the properties to which Mr Frederick might have thought himself entitled. Mr Frederick was nonetheless prepared to take the risk that the contract would still prove commercially

attractive from his point of view. To conclude in these circumstances that there had been a prior concluded agreement between Mr Frederick and the Plaintiffs that the Palmerstown lands should be excluded which by a mistake common to both parties was not embodied in the written contact seems to me wholly unreal and I would be reluctant to come to such a conclusion, unless I were coerced so to do by authority.

The law is stated as follows in Snell's Principles of Equity (28th Edition) at p.614:-

"The general rule is that there can be no rectification where the mistake is merely unilateral, as where one party had never even heard of the term sought to be inserted because his agent had not told him of it."

Mr Farrell conceded that the only authority cited in the text for this proposition (Farlow .v. Scottish Equitable Life Insurance Society) did not support the statement of law in the wide terms in which it appears in the text. But the case does afford an interesting example of the reluctance of the Courts to allow rectification on the ground of common mistake where one of the parties has never heard of the proposed term.

In that case, R. and K. who carried on business as merchants in the City of London agreed to give credit to T.H. Since he lived abroad and had no property in England, R. and K. decided to effect a policy of insurance on his life and to that end negotiations were conducted between K. and C., the London Agent of the Defendants. H, in the course of his business, was in the habit of visiting ports in the Mediterranean and on the coasts of Africa and of Asia and it was made clear by him and K.

to C. that the policy should not be vitiated by reason of his visiting ports out of Europe. In fact, however, the policy as executed by the Defendants contained a clause which only entitled H. to visit ports within the Mediterranean. H, in the course of his business, visited Casa Blanca on the Atlantic Coast of Morocco and died there. The assignee of R. and K. brought proceedings claiming rectification of the policy to give effect to what was alleged to be the real agreement. Their claim was rejected by Stuart V.C. and, in the course of his judgment, he had this to say:-

> "One of the contracting parties to the instrument which is now sought to be reformed confessedly never heard of that which is said to be the real agreement. The result, upon the whole, is plain, that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. K, who made the agreement with the London agent, never intended to be bound by the stipulation which he himself framed in a mistaken form. The result is that there is no agreement at all. That being so, the Plaintiffs seem entirely to have mistaken their remedy..."

He accordingly declined to order rectification, but ordered that the premiums which they had paid should be refunded to the Plaintiffs and the policy delivered up to the Defendants.

I observe in passing that the Plaintiffs in the present proceedings have at all times confined their claim to one of rectification and this is a point to which I shall return at a

later stage.

I am satisfied that the present is also a case of unilateral mistake rather than common or mutual mistake. Even if Mr White's knowledge could be treated as an adequate basis for Mr Frederick's notional assent to the inclusion of the disputed term, the difficulty remains as to what that term is alleged to have been. Mr Nowlan went no further than saying to Mr White that there was a significant holding of land at Palmerstown subject to a C.P.O. which was not included in the sale of the portfolio. He did not specify - and, of course, is not to be criticised in the slightest for not specifying - whether he was referring simply to the lands in the County Council C.P.O. or those in the Corporation C.P.O. or both. Nor did he indicate whether the exclusion was confined to the C.P.O. lands or included those portions which were ultimately transferred to the local authority by agreement. Nor was there any reference, at least so far as the evidence goes, to the houses in Turret Road which were also mistakenly included in the contract and which it is now sought to exclude. So far as the vacant lands at Palmerstown are concerned, I think there is no doubt that it was Mr Nowlan's intention to exclude them all, whichever C.P.O. they were in and indeed whether they were in a C.P.O. or not. But he did not say so, and understandably so since he had no reason to suppose that the written instructions which were in due course conveyed to the legal department to exclude them would not be implemented, and such uncertainty can only be fatal to a Plaintiff seeking to discharge the heavy burden of

proof in a case such as this.

I am satisfied accordingly that the Plaintiffs have failed to discharge the onus of proof that lies upon them of establishing that the exclusion of the Palmerstown lands in the contract was the result of a common or mutual mistake which entitles them to rectification. It was at one time thought to be the law that rectification could not be granted to a party on the ground of unilateral mistake and that his remedy, if any, was rescission: see Gun .v. McCarthy, 13 LR (Ir.) 301. Later authority suggests, however, that rectification may be granted in cases of unilateral mistake, provided that there has been some element of fraud or sharp practice on the part of the person against whom the relief is sought; or, to put it at its lowest, where it would be inequitable in the circumstances to allow that person to retain a benefit derived from the mistake Since the Defendants take no point on the absence of any plea of unilateral mistake, I have considered whether those authorities lend any support to the Plaintiffs'claim for rectification.

In approaching this question, it is necessary for me to emphasise that there was not the slightest element of fraud, dishonesty or even sharp practice, in Mr Frederick's conduct during this transaction. He was wholly unaware of the mistake until long after the contract which it is sought to rectify had been executed. Nor would it be proper to impute anything amounting to sharp practice to Mr White simply because he did not report the conversation with Mr Nowlan to Mr Frederick. It may be that Mr White considered that this was a matter which in any event would have to be sorted out by the Solicitors in

due course and that Mr Miley,as a prudent and experienced Solicitor,would let his client know of any significant exclusions in the contract before it was signed. But it is not for me to speculate as to what Mr White's reasons may have been for not communicating the substance of this conversation to Mr Frederick, since he was not called by either party.

The first of the later decisions is A. Roberts and Company Limited & Anor .v. Leicestershire County Council (1961) Ch 555. In that case, the Plaintiff Company had put in a tender with the Defendants for the erection of a school specifying that the works would be completed within eighteen months. The tender was accepted, but two officers of the Council altered the period for completion to thirty months. This alteration was for their benefit and not for the benefit of the company: the lower price at which the works were tendered for related to the eighteen month period. The company were unaware of the alterations when the contract was executed and, although one of the officers knew that they (the company) were under a mistaken impression as to the period for completion, he did nothing to draw their attention to the mistake. In an action for rectification, Pennycuick J held that the company was entitled to rectification. In the course of his Judgment, he says (at p.570):--

> "The second ground (of the Plaintiffs' claim) rests upon the principle that a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party

concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included. (Counsel) for the Council formulated the principle in slightly different terms, as follows, viz., the plaintiff must show that his intention was that the term sought to be introduced by rectification should be included in the contract and (so far as now relevant) that the omission of the term was occasioned by the dishonest conduct of the defendant in acceptance of the formation of the contract without the term in the knowledge that the plaintiff thought the term was included. (Counsel) thus introduces into his formulation of the principle the word 'dishonest', but he accepts that such conduct by the defendant in his formulation is of its nature dishonest, so that the word 'dishonest' appears to carry the matter no further. I do not think that there is any substantial disagreement as to the scope of the principle."

He also cited the following passage from the 25th Edition of Snel

"By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."

He adds the following comment:-

"The exact basis of the principle appears to be in some doubt. If the principle is correctly rested upon estoppel

it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think this high standard of proof must equally apply where the claim is based on the principle indicated above."

It may be that this passage puts the burden of proof on th Plaintiff at too high a level (See the observations of Brightman L.J. in Thomas Bates and Son Limited .v. Wyndham's (Lingerie) Limited (1981) 1 ALL E.R. 1077 at p.1090). It is of more relevance in the present context, however, to note that in that case there was the clearest evidence that the Defendants, througl their officer, executed the contract in the knowledge that it contained a term which the Plaintiffs never intended to include and refrained from drawing their attention to it. The facts are, accordingly, clearly distinguishable from the facts as found by me in the present case.

The next decision is Riverlate Properties Limited .v. Paul (1975) Ch 133. In that case, the Plaintiff Company made a leas of a maisonette to the Defendant. As executed, the lease impos d the entire responsibility for the exterior and structural repairs of the building on the lessors. It was, however, the lessors' intention that the lessee should contribute to those costs, but neither the lessee nor her Solicitor appreciated that that

was the case. It was not the lessee's Solicitor's intention that the lessee should be liable for such a contribution, but when he was examining the draft lease he did not appreciate that the clauses which relieved her of that liability were the result of erroneous draftsmanship. The lessor brought an action in which it was claimed, inter alia, that there had been a unilateral mistake of such a character as to entitle the lessor to rescission of the lease, subject to the lessee being put to her election whether or not to retain the lease but rectified so as to impose on her the appropriate contribution originally intended by the lessor. Templeman J., dismissed the action and his decision was upheld unanimously by the Court of Appeal. Delivering the Judgment of the Court, Russell L.J., said (at p.140):-

> "It may be that the original conception of reformation of an instrument by rectification was based solely upon common mistake: but certainly in these days rectification may be based upon such knowledge on the part of the lessee: see, for example, A. Roberts and Company Limited .v. Leicestershire County Council. Whether there was in any particular case knowledge of the intention and mistake of the other party must be a question of fact to be decided upon the evidence. Basically it appears to us that it must be such as to involve the lessee in a degree of sharp practice."

The judgment goes on to deal with the claim for rescission. Because that claim has not been made in the present proceedings, it is unnecessary to consider in any detail whether it would lie

in the circumstances of the present case. The observations of Russell, L.J., on the merits of such a claim are, however, peculiarly apposite, in my view, in the present context. He says at p.141:-

> "Is the lessor entitled to rescission of the lease on the mere ground that it made a serious mistake in the drafting of the lease which it put forward and subsequently executed, when (a) the lessee did not share the mistake, (b) the lessee did not know that the document did not give effect to the lessors intention, and (c) the mistake of the lessor was in no way attributable to anything said or done by the lessee? What is there in principle, or in authority binding upon this Court, which requires a person who has acquired a leasehold interest on terms upon which he intended to obtain it, and who thought when he obtained it that the lessor intended him to obtain it on those terms, either to lose the leasehold interest, or, if he wished to keep it, to submit to keep it only on the terms which the lessor meant to impose but did not? In point of principle, we cannot find that this should be so. If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high minded men might consider it appropriate that he should agree to a fresh bargain to

cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties."

He goes on to review a number of older decisions which were cited as authority for the proposition that the Plaintiff was entitled to rescission of the lease on the ground of mere unilateral mistake or, at the least, to put the Defendant to her election. The judgment concludes that, insofar as the cases lent support to such a proposition, they were wrongly decided, but, as I have already indicated, since no such claim is made in the present proceedings, it is unnecessary to say anything further on this aspect of the case.

The final case in the series is Thomas Bates and Son Limited .v. Wyndham's (Lingerie) Limited. In that case, there was omitted from a rent review clause in a lease a provision for arbitration in the event of the parties failing to agree the rent. The omission of the arbitration clause was due to a mistake on the part of the Managing Director of the lessors and it is also clear that when the lessees executed the lease they were aware of the omission and did not draw the lessors' attention to it. However, in the Court of Appeal, Buckley, L.J. declined to associate himself with the strictures passed by the trial Judge on the conduct of the then lessees' Managing Director. He nonetheless upheld the finding of the trial Judge that the

Plaintiff was entitled to rectification. Having referred to one of the passages which I have already cited from the judgment of Russell L.J., in Riverlate Properties Limited .v. Paul, he says (at p.1086 ab):-

> "In that case the lessee against whom the lessor sought to rectify a lease was held to have had no such knowledge as would have brought the doctrine into play. The reference to 'sharp practice' may thus be said to have been an obiter dictum. Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies 'some measure' of sharp practice, so be it; but for my part I think that the doctrine is one which depends more on the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake."

It is perhaps somewhat over fastidious to shrink from applying the description of "sharp practice" to the conduct of party who recognises that the other party to the contract is executing it under a mistake which can only be detrimental to him and deliberately suppresses his recognition of that fact. But it is unnecessary to consider such fine distinctions any further in the present case, because it is clear that Mr Frederick was not aware that a mistake was being made in

the execution of the contract and there was accordingly neither "sharp practice" on his part nor anything in his conduct prior to or at the time of the execution of the contract which rendered it unconscionable for him to take his stand on the contract as it was executed by both the parites. It follows that the Plaintiffs in my opinion are not entitled to rectification on the ground of unilateral mistake.

One further matter remains to be noticed. Notices to Treat in respect of the lands comprised in the Dublin County Council Compulsory Purchase Order were served on the 25th September 1980. In the case of the lands comprised in the Dublin Corporation Compulsory Purchase Order, the Notice to Treat was not served until the 5th April 1984. It was submitted on behalf of the Plaintiffs that, in the case of the land comprised in the Dublin County Council Compulsory Purchase Order, the Plaintiffs had ceased to be the owners of the land as of the date of service of the Notice to Treat and that, accordingly, it would in any event be impossible for them to comply with any decree of specific performance in relation to those lands. In support of this submission, Mr, Keane relied on the decision of the Supreme Court in re Green Dale Building Company Limited (1977) I.R. 256. I am satisfied, however, that the service of the Notice to Treat did not of itself vest any estate or interest in the land in Dublin County Council. This is made clear by the following passage in the judgment of Henchy, J., in re Green Dale Building Company Limited:-

"The service of the notice to treat does not, of itself, pass any estate or interest in the land to the acquiring

authority, nor does it constitute a contract; but it creates a relationship which ripens into an enforceable contract when the compensation has been either agreed by the parties or assessed by the arbitrator."

Accordingly, when the contract was executed on December 23rd 1981 the legal and equitable estate in the C.P.O. lands was vested in the Plaintiffs. This they had agreed to convey to the Defendants in the present proceedings and the Defendants thereupon became entitled in equity to the lands or to any compensation that might be paid by the County Council, whether as a result of agreement or by arbitration: see also Hillingdon Estates Limited .v. Stonefield Estates Limited (1952) Ch.627.

It follows that the Plaintiffs' claim must be dismissed. The Defendants are entitled to a declaration in the terms of paragraphs 1 and 3 of the counterclaim and an Order for specific performance of the contract for sale.

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