CONNOLL v. O'M

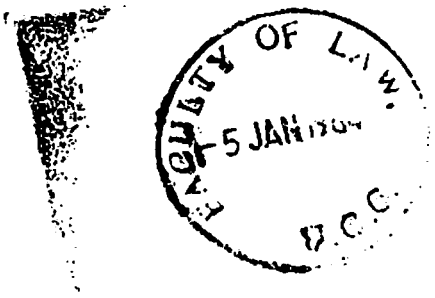
1979 No. 8260 P

THE HIGH COURT

ANTHONY CONNELL

.v.

THOMAS JOSEPH O'MALLEY



Judgment of Mr. Justice Barron delivered the 28th day of July 1983

The facts in this case are essentially uncontested. The main witness for the plaintiff was the plaintiff himself. He has been emotionally affected by the litigation and was clearly distressed in the witness box on a number of occasions. Notwithstanding this, he gave his evidence fairly without any obvious exaggeration. I accept his evidence as truthful evidence as I also accept as being truthful the evidence of the other witnesses called on behalf of the plaintiff. Only two matters of fact were seriously contested. The first was the date upon which the gates were put up across the laneway and the second related to the evidence of the plaintiff's brother. I am satisfied that the plaintiff and his wife as well as Francis Lynch are not mistaken in their evidence as to the date upon which the gates first appeared and I hold that they were first erected in or about the month of January, 1977. In relation to the evidence of the plaintiff's brother, while this is not material evidence to the matters in dispute, I accept having regard to the attitude expressed by the defendant

towards the plaintiff on a number of occasions that the bad temper and violence expressed did in fact take place.

The facts which emerge from the evidence and which I accept are as follows. The plaintiff lives in Navan. He has had considerable experience in the building industry largely with a principal English construction company in which organisation he reached the position of site manager on some of its larger contracts. In the year 1973, he became aware that the defendant had a site for sale together with outline planning permission for the erection of five dwelling-houses thereon. This site then formed part of the defendant's residential farm known as Boyne View, Navan. The defendant's farm comprised approximately 90 acres and was approached along a private roadway running for the first five hundred yards or so from the public road through the lands of the Convent of Mercy in Navan. When the laneway reached the defendant's lands, it continued passing some farm buildings on its right and then passing the site in question being a five acre field also on its right ending at the entrance gate leading up to the residential portion of the defendant's holding. The plaintiff and two others became interested to purchase the site and to develop it in accordance with the planning permission. These latter later dropped out of the picture. Accordingly when I refer to the plaintiff in relation

to this transaction, such reference includes those others during the period of their involvement.

The site for sale runs down to the River Boyne and is particularly suitable for the type of development for which permission was obtained. The particular permission sought by the defendant was granted in February 1973. The plaintiff agreed to buy the field together with the benefit of the outline planning permission already obtained, this agreement being reached on the 1st May, 1973. The evidence does not disclose all the matters discussed by the parties prior to reaching their agreement. It does however indicate that the question of access was discussed. This is to be inferred from the evidence of the plaintiff that the defendant had led him to believe that the laneway would be taken in charge by the Meath County Council. Following the agreement the plaintiff applied on the 12th May, 1973 for a full planning permission for the same type of development. This was granted in July 1973 subject to several conditions. Conditions 1 and 5 are as follows:

"1. That the water supply be taken from the convent side and not across the Boyne.

5. Proper sight distance to be provided at entrance on to lane and road to be radiused to curve A - B on attached map to the satisfaction of the Planning Authority".

It might have been assumed that following this grant of full permission the sale would have been completed and the development commenced and long since completed. Unfortunately this has not happened and instead there has been a history of almost continuous litigation. It was in the course of this and largely because of it that the plaintiff has become the sole person involved in the purchase of the site.

The first dispute related to the original agreement in 1973. Proceedings were brought by the plaintiff for specific performance. These came on for hearing on the 25th November, 1975 and were compromised. The basis of the compromise was to establish the original agreement dated the 1st May, 1973 with variations in its terms. Notwithstanding this settlement, the defendant did nothing to complete the sale. He failed to reply to requisitions: he failed to apply for Land Commission consent to sub-division, A motion was brought by the plaintiff to compel compliance by the defendant with these requirements. The defendant did not appear on the motion and the order sought was made on the 21st June, 1976. Again it was ignored. Not only was the order ignored, but in January, 1977 the defendant placed two fifteen foot gates across the laneway as a first step to prevent uninterrupted access to the site and with the intention of preventing its development. The alleged reason for so doing was to prevent cattle when

being moved from one side of the lane to the other from straying down the laneway, something which the defendant had never previously thought necessary. While the defendant could have used the gate leading into the field off the laneway to bar part of the laneway while cattle were crossing, he deliberately rehung that gate on the other gate post so that when it opened it did so into the field and not across the laneway. As a result, he put up two new gates.

In a further effort to abort the sale, the defendant later in 1977 indicated to the plaintiff that he would not let him bring a water main to the site along the lane for the purpose of the development. In or about the same time as the defendant was taking these steps, he had approached the Mother General to the Sisters of Mercy Convent to induce her to object to the proposed development by the plaintiff on the ground that it invaded the privacy of the convent. He also approached the Mother General to know if she had been approached by the plaintiff to have a water supply connected from the convent lands to the site. Presumably this enquiry was for the purpose of persuading the convent not to allow such connection if in fact it had been requested. The Mother General rejected both approaches.

This attitude on the part of the defendant brought about further litigation. Three motions were brought by the plaintiff and one by the

defendant. These were heard on five separate dates between November 1976 and July 1977 and ultimately on the 27th October, 1977. The defendant on this latter occasion was ordered to sign the transfer and complete the sale. The plaintiff also succeeded in establishing a right to bring water to the site along the lane and to have free and uninterrupted access of the lane save while cattle were actually being moved from one side of the lane to the other. The relevant portions of the order were as follows:

> "The Court doth declare that the defendant is entitled to have gates across the drive or roadway leading to the lands the subject matter of these proceedings such gates however to be closed for the purposes of moving cattle from one side to the other otherwise such gates to remain open And the Court doth declare the plaintiff is entitled to have water brought up along or under said drive or roadway in a suitable manner and to cause excavators to lay pipes for this purpose And Accordingly It Is Ordered that the defendant do execute within seven days of the presentation to him by the plaintiff's solicitors the engrossment of the deed of transfer of the lands the subject matter of these proceedings.....And IT IS ORDERED that on the due execution of the said deed of transfer the plaintiff do forthwith close the sale of the said lands."

The defendant appealed to the Supreme Court. The only matter argued before the Supreme Court was in relation to that part of the order relating to the gates across the laneway. The appeal was heard on the 30th January 1977 and was adjourned for two weeks to see whether the parties might agree to the placing of a cattle grid across the laneway in place of the gates. The defendant refused to agree to this. But in any event the plaintiff would not have agreed because on enquiry from Meath County Council he discovered that the Council would not take over the laneway if there was a cattle grid on it, or indeed a gate. A letter from the County Council dated the 5th February, 1979 has been adduced in evidence without objection and it has been accepted that it correctly states the attitude of the Council. The letter which is addressed to the plaintiff is as follows:

"Dear Sir,

With reference to your enquiry regarding the taking over, as a public road, of a private road with a cattle grid on it, I wish to confirm that Meath County Council will not take over any roadway which has a cattle grid on it. The County Council will not take over any roadway on which there is a gate.

Yours faithfully,

R.M. Fenlon
County Engineer".

In the absence of the agreement sought by the Supreme Court, the appeal was dismissed with costs. Some time in or about the 13th February, 1979 on a date when the matter was being mentioned in the Supreme Court, the defendant erected a concrete wall about twelve feet in width across the laneway at a point about sixty feet from where he had previously erected the two gates but further from the public road way and also erected a gate which could close off the rest of the laneway at this point. By letter dated the 21st March, 1979 the plaintiff complained about this construction and required the defendant to remove all obstructions from the laneway so as to enable it to be taken over by the Local Authority. This letter was written by the plaintiff's solicitors and sent to the defendant's solicitor. The material part is as follows:

"Re: Connell and O'Malley

Dear Sirs,

While your clients recent and unsuccessful appeal was still waiting final judgment in the Supreme Court your client chose to erect a further obstruction to access to our client's property over your client's portion of the laneway. The obstruction, which still stands this time consists of a wooden fence, an iron gate and a stone wall which between them obstruct the entire lane. The obstruction is at

"a point sixty feet from where the former tubular gates - which were duly removed - stood further removed from your client's house, and more towards the public roadway.

Unless within seven days your client undertakes to remove all obstructions on any part of his laneway to the free passage of persons and vehicles of all kinds to and from our client's property, and in future desists from all that would militate against the development as contemplated of the small building estate complete with all such roads access and services as are necessarily appurtenant thereto we will advise our client that he must again approach the High Court for its aid.

Our client has very lately been informed by the Navan Urban District Council that it would not take in charge any way on which passage was obstructed in any manner. He has also been advised that unless the way can be such as may be fit to be taken in charge by the public authority no development of his lands can be a commercial success.

His application to the High Court will therefore be for an order - directing your client to remove permamently all obstructions that he ha placed on the laneway and not to restore them or any others. He will also seek a declaration that if the order is not complied with within

"a reasonable time (two weeks would appear to us to be reasonable) our client will be entitled to damages on the basis that by doing as he has done in breach of contract your client has frustrated and intends further to frustrate the development. It is likely that under this head damages would run into many tens of thousands of pounds".

This letter also dealt with the question of interest on the deposit but this is not being proceeded with and is not material to the issues raised in this case. No answer was ever received to this letter and the reason for this was given at the hearing to be that the letter had never been received or perhaps had been lost in the transfer of papers from the defendant's then solicitor to his present solicitors. However, if the latter be the reason that the defendant's present solicitors had no copy of it, it does not suggest a reason for failure on the part of the first solicitor to reply to it. The letter was pleaded in the statement of claim but since the defendant's advisers had no copy of it at the hearing it is clear that no effort was made to obtain a copy of it in accordance with the rules of Court. Counsel for the defendant, even as late as the closing speech on behalf of the defendant, sought to rely upon their ignorance of the contents of this letter as being a circumstance in the defendant's favour. This is clearly not so. On the contrary, the failure on the part of the defendant to reply to the

letter and to seek a copy of it once it was referred to in the statement of claim are circumstances which merit adverse comment on the defendant.

As well as placing the tubular steel gates across the laneway in January 1977, the defendant also placed notices on the gate to the effect that the same was to be kept closed; on occasions placed a tractor across the laneway to indicate that it was his private property and that he was entitled to do with it as he wished; and on occasions complained of in the evidence by the plaintiff acted in a truculent and violent manner towards the plaintiff so as to cause the plaintiff to believe that any effort by him to assert his rights would be met by violence. His attitude was expressed to the plaintiff by the defendant in the words "it is my property and I will do with it as I want." Since the Supreme Court decision, the wall and the single gate have remained. However no apparent obstacle has been placed to prevent the plaintiff from developing the site though it is obvious from the plaintiff's evidence that he believes that the defendant is merely bidin his time till he is even more committed to the site. Past history suggests that such a belief is not unreasonable. Nevertheless, works have been carried out on the site since the Supreme Court decision and one house is no partially constructed.

Notwithstanding the urgency of the matter the proceedings in this case

were not commenced until the 13th December, 1979. The general endorsement of claim on the plenary summons was as follows:

"The plaintiff's claim is for:

(a) an injunction restraining the defendant, his servants and agents from maintaining on any part of a certain portion of laneway owned by or under the control of the defendant any obstruction to the free passage of persons and vehicles of all kinds and at all times and for all purposes to and from the plaintiff's land as described in Folio 6311F of the Register County Meath, in derogation of grant.

(b) An injunction restraining the defendant, his servants and agents from all acts in derogation of grant that may militate against the free use and enjoyment by the plaintiff of the said lands, his property.

(c) Punitive damages in respect of the loss occasioned to the plaintiff to date by the defendant's misconduct in causing and maintaining such obstruction as aforesaid.

(d) Punitive damages in the event of the defendant continuing the said misconduct and obstruction.

(e) Further and other relief.

(f) Costs."

The statement of claim was delivered on the 9th May, 1980 and having set out the facts upon which the plaintiff relied sought the same relief as contained in the summons save that the words "in derogation of grant" which appeared in paragraphs A and B of the general endorsement of claim to the summons do not appear in the relief sought in the statement of claim. No submission was addressed to me that this in any way altered the nature of the plaintiff's claim.

The evidence at the trial was as I have said largely common case. The reason for this was that each party sought to rely upon the basic facts in support of his own case, though obviously placing a different legal interpretation upon these facts. What each party sought to establish on the facts was that the damage sustained by the plaintiff by reason of his inabilit to develop the site arose out of the refusal of the Local Authority to take the laneway in charge. In turn each party sought to show that this refusal was directly connected to the existence of the gateways across the laneway; the plaintiff to show that the defendant was responsible for the refusal, and the defendant to show that the refusal arose out of lawful behaviour on his part. The plaintiff's case was that the defendant had derogated from his grant. The defendant's case was that he was doing no more than he was

lawfully entitled to do and that if the plaintiff had wished to prevent the erection of a gate across the laneway the contract of sale should have contained a specific provision imposing an obligation on the defendant to leave the laneway unrestricted at all times.

The doctrine of derogation from grant imposes implied obligations whic arise where the owner of land disposes of part of it while retaining the balance. The most usual application is in relation to easements, but it is not limited to the creation of easements by implied grant. The obligations which are implied depend upon the particular nature of the transaction and arise from the presumed intention of the parties. In Birmingham, Dudley and District Banking Company .v. Ross, 38 Ch. D. 295 Cotton L.J. dealing with the nature of obligations implied by the doctrine said at page 308:

"By an implied obligation or an implied right I mean this: an obligati n or right arising not from the express words of an instrument, nor fro that which, having regard to the circumstances, must be considered the true meaning and effect of the words in the instrument; but that obligation or that right which results from the position into which the parties have placed themselves by the contract. For instance, where one man grants to another a house, then prima facie he cannot interfere

"with that which he has granted; there is an implied obligation on him not to interfere with that which he has granted; namely, the house, and enjoyment of the house. That obligation arises, I repeat, not from any interpretation of the conveyance, but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee."

This doctrine is not new. In the same case, Bowen L.J. said of it at page 312 that it was "a maxim which really is as old, I will not say as the hills, but as old as the year books, and a great deal older."

In Harmer .v. Jumbil (Nigeria) Tin Area Limited, 1921. 1 Ch. 200, Younger L.J. expresses the nature of the maxim very succinctly, and, so far as the facts of the present case are concerned, very aptly when he says at page 225:

"Now if these questions are to be answered in a sense favourable to the lessee, it must be on the principle that a grantor shall not derogate from his grant, a principle which merely embodies in a legal maxim a rule of common honesty. "A grantor having given a thing with one hand," as Bowen L.J. put it in Birmingham, Dudley and District Banking Company .v. Ross" is not to take away the means of enjoying it with the other"."

In the present case, the plaintiff seeks to rely upon the doctrine to establish an implied obligation on the part of the defendant not to do anything to prevent the Local Authority from taking the access route to the site in charge. His case is that the land was sold to him for a particular purpose which was known to the defendant and that the defendant cannot now be allowed to behave in a manner which will prevent such use. The manner in which the doctrine applies to a case of this nature was considered by Parker J. in Browne .v. Flower, 1911 1 Ch. 219. At page 225 in relation to the aspect of the doctrine relied upon by the plaintiff he said:

> "But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implications of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made."

Later in the same passage he said:

"I can find no case which extends the implied obligations of the grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all".

Again later in the same passage he says:

"It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort."

This latter passage indicates the limits of the doctrine. Since it depends upon the presumed intention of the parties it cannot apply to a situation which could not have been anticipated. While the grantor must have knowledge of the particular purpose for which the property is acquired, before any obligation arises, nevertheless he cannot have imputed to him more than ordinary knowledge of what such purpose involves. In Robinson .v. Kilvert, 41 Ch. D. 88 property had been let to the plaintiff for use as a paper warehouse. It was found that some types of paper being stored by the plaintiff were being damaged by heat rising from the cellar of the premises retained by the defendant. The plaintiff sought to restrain the defendant

from so heating the cellar so as to cause the damage of which he complained. He failed in his action on the ground that the defendant could not reasonably have anticipated that his use of the basement would affect the plaintiff's use of the property demised as a paper warehouse. Lopes, L.J. said at page 97:

> "Then as to the contention that the defendants have broken an implied agreement not to do anything which will make the property unfit for the purpose for which it was let, we must look to what the defendants at the time of letting knew as to the purpose for which the demised property was to be used. They knew that it was to be used for a paper warehouse, but they did not know that it was to be used for the storage of a kind of paper which would be damaged if the temperature were raised beyond the natural temperature of the air. If the goods to be stored wanted that special protection the plaintiff should have bargained for it."

This case was followed by Stirling J. in Aldin .v. Latimer Clark, Muirhead and Co, 1894, 2 Ch. 437, where he expressed this aspect of the doctrine from that and other cases to which he referred at page 444 as follows:

> "The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business,

"he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection."

The obligation imposed on the grantor is not to use the land retained by him in such a way as to render the land granted unfit or materially less fit for the particular purpose for which it was acquired. The extent of the obligation depends on the extent of the knowledge which can be imputed to the grantor of the conditions required to render it fit to be so used. The test formulated in the first of the passages from Browne .v. Flower to which I have referred was approved by the English Court of Appeal in Harmer .v. Jumbil (Nigeria) Tin Areas Limited and followed more recently by Plowman J. in Woodhouse and Company Limited .v. Kirkland Limited 1970 1 W.L.R. 1185. It is the test which I propose to adopt in the present case. There are two questions to be considered:

(1) Whether the property granted has been rendered unfit or materially less fit for the particular purpose for which it was acquired; and if it has been so rendered,

(2) Whether the grantor ought to have anticipated as a result of the knowledge to be imputed to him that the conduct complained of would have that result.

In Browne .v. Flower the plaintiff was the tenant of a ground floor flat.

With the permission of the landlord, a flat on the first floor was altered in such a way that the entrance to it was by a stairs placed between two windows of the plaintiff's flat. This affected the privacy of her flat and if she preserved this by the use of curtains, then she suffered a loss of light. Parker J. did not regard this loss of privacy as being something which rendered the flat any less fit for use as a residence. He said at page 227:

"Under these circumstances the question is whether the existence of this staircase renders the plaintiffs premises unfit or materially less fit to be used for the purposes for which they were demised, that is, for the purposes of a residential flat. In my opinion it does not. The two rooms in question can be and are still in fact used for the same purpose for which they were used prior to the erection of the stair-case. It is only the comfort of the persons so using the rooms that is interfered with by what has been done. Either they hav less privacy, or if they secure their privacy by curtains they have le s light. Much as I sympathise with the plaintiffs it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation."

In Harmer .v. Jumbil (Nigeria) Tin Areas Limited, premises were leased to be used as an explosives magazine. Such use required a licence to be issued by the local justices. A particular licence was applied for prior to the date of the lease and granted subsequent to its date. Later the landlord granted a licence to the defendants to open up some old mine workings in the area. In the course of these operations, buildings were erected adjoining the workings. A condition of the licence granted to the plaintiff by the justices was that no building should be erected within a prescribed distance of the magazine. The buildings erected by the defendants were within this distance and as a result the licence issued to the plaintiff became forfeit. The plaintiff claimed that by permitting the erection of the mine buildings there was a derogation from grant on the part of the plaintiff's lessor. It was clear that the magazine could no longer be used within the terms of the licence granted to the plaintiff. It was held that the loss of the licence rendered the premises unfit for use as an explosives magazine and that this was so even though the premises remained physically fit to be so used. Warrington L.J. said at page 223:

"Undoubtedly, this is the first case in which the particular question has arisen, but I confess I can see no reason why the principle should be limited in the way contended for by the defendants. The premises

"have become unfit. They are unfit because it is no longer legal to use them for the purpose. They have become so unfit by the acts of the defendants. I cannot see why, if the acts of the defendants should by some physical change cause the premises to be so unfit, it should not have the same effect where the change brought about by them is not a physical change in the condition of the demised premises themselves, but is a change in their condition brought about by an act rendering it illegal to use them for that purpose."

These cases show that the question of fitness of the property for the purpose for which it was acquired is one of fact depending for its answer upon the particular circumstances of each case. In the present case, it is true that the site can still be used for the erection of five dwellinghouses. However, such houses would be very difficult to sell, if they could be sold at all, unless the laneway was taken in charge, and would certainly sell at a price far less than that at which they would otherwise sell if the laneway was taken in charge. The inference to be drawn from the evidence is that they could not be sold at a profit unless the laneway is taken in charge so that applying ordinary common sense there would seem to be no point in building them for sale in the first instance. The evidence suggests that the optimum use of the site is probably to erect one or at most two houses for persons who are prepared to

accept private access only. Even so, it remains doubtful whether such use would be economic. The site was bought to be developed commercially. If it can be accepted that the optimum use is as is suggested, then it would have a commercial use though a substantially different one from that intended. If this use would be commercially unacceptable, then it would have no commercial use for building purposes. This is not just a case where it would be more difficult or even more costly to build and so less desirable for the plaintiff to complete the development. Whether one accepts the optimum use or not, the whole nature of the development will be altered. In my view, the plaintiff has satisfied the first element of the test.

The state of knowledge of the grantor was considered by each of the judges in Harmer .v. Jumbil (Nigeria) Tin Areas Limited. Sterndale M.R. said at page 220:

"One question is: what knowledge has to be imputed to the lessor of the circumstances connected with a magazine for explosives. I am not at all sure that practically everything was not known to him. There were notices published of the application which was going to be made. The plaintiff has to deposit not only his application for a licence, but the terms upon which he proposes to ask for it, and those terms are heard by the Authority when the application comes before them.

"It is very difficult to me to suppose that all that was not perfectly well known to the lessor and his agents, but there is no evidence that it was, and I will assume, as the learned judge in the Court below did, that he did know all those particulars. I will not assume, as the learned judge did, that he must be taken to have known all the provisions of the Explosives Act 1875 but I think he must have known that a licence was necessary for the carrying on of this business. I think he must have known that the licence would contain some condition. All the conditions I will assume he did not know. But I think he must be taken to have known that anything which violated the conditions of the licence would cause a withdrawal of the licence. As a matter of fact, according to the terms of the licence, it was ipso facto withdrawn on the acts which happened."

Warrington L.J. dealt with this aspect of the doctrine at page 222 where he said:

"Now there is one matter, a question of fact, which has still to be dealt with. What was the knowledge of the lessor at the time of the lease as to the terms upon which this building would be licensed as an explosives magazine? There is no evidence as to actual knowledge of the lessor, but, in my opinion, we are justified in imputing to

"him a knowledge of circumstances to which I will refer directly."

He then referred to the facts and continued:

"Under these circumstances, I am satisfied that we are entitled to impute to the owner of this land knowledge that an explosives magazine could not be used without the licence of the Secretary of State, and owing to the nature of the purposes for which the building was to be used, I think we may further impute to him the knowledge that any such licence would lay down limits within which buildings and works such as those erected by the defendants could not lawfully be erected, or at least, would provide that if they were erected within those limits, the terms of the licence would be infringed. I do not mean to say that we can impute to him knowledge of the actual limits which would be laid down, and if there had been anything unusual or extravagant in the distance as specified in the licence, difficult questions might have arisen. But there is no suggestion that these limits were either unusual or extravagant, and I think therefore we are quite safe in imput to the lessor - either himself personally or through his agents - knowledge that the explosives magazine could not be used if the buildings came within the distances actually so specified."

In the same case Younger L.J. having referred to the nature of the

maxim in the passage which I have already quoted, continued later in the same passage:

> "But the difficulty is, as always, in its application, because the obligation laid upon the grantor is not unqualified. If it were, that which was imposed in the interest of fair dealing might, in unscrupulous hands, become a justification for oppression, or an instrument of extortion. The obligation, therefore, must in every case be construed fairly even strictly, if not narrowly. It must be such as in view of the surrounding circumstances, was within the reasonable contemplation of the parties at the time when the transaction was entered into, and was at that time within the grantor's power to fulfil. But so limited, the obligation imposed, may, I think, be infinitely varied in kind, regard being had to the paramount purpose for the exercise of which it is imposed."

The evidence of knowledge in the present case seems clear. The defendant knew that the land was being purchased to be developed as a building site. He must have known the importance to be attached to the access laneway being taken in charge by the Meath County Council since he led the plaintiff to believe that this would be done. While he may not have known every condition which the Local Authority would impose before taking the roadway in charge, I am

prepared to impute to him knowledge that it was necessary for the development of the site that the Local Authority should take the laneway in charge and that the Local Authority would not take a laneway in charge which had any obstruction across it. He was also aware that the site could only be developed in accordance with the planning permission. Even if he was unaware of the exact nature of the conditions in the planning permission in relation to access and the provision of a water supply, these are matters which he would have known might be the subject matter of conditions attaching to any permission. It is knowledge which I am prepared to impute to him. The only reasonable inference from the Defendant's conduct is that he wished to go back on his bargain and to impede the development and was aware that it would be impeded if access was restricted or if water could not be brought to the site. This conduct manifested itself originally by his refusal to complete the sale; then by the placing of the gate across the laneway and later by the erection of a wall; by his truculence: by his attitude as expressed to the Plaintiff; and by his approach to the Mother General to the Sisters of Mercy Convent. This conduct has at all times been deliberate and carried out with the intention of stopping the development so far as he could. Not only could the Defendant have anticipated that his conduct would render the site unfit for the purpose for which it was required, but he actually intended such consequence. In my view the Plaintiff has also satisfied the second element of the test.

Counsel for the Defendant raised two basic defences to this action. He contended that the restriction which the Plaintiff was seeking was one which

he could have ensured was reserved to him by the contract of sale. This wa an argument raised by the defendant in Harmer .v. Jumbil (Nigeria) Tin Areas Limited, but rejected on the basis that if valid it would have applied equally to both parties. However, it seems to me that the argument is one which should be applied, if at all, the other way. When there are quasi easements, then, on a sale of part of the land, the grantee does not have to contract specifically to retain the benefit of such rights for the benef of the land granted, because they are implied. But, if the grantor wishes to retain quasi easements for the benefit of the land retained, he must specifically reserve them. It is correct that the purchaser must protect himself specifically when the grantor could not anticipate that he would require such protection, but that is not the case here. I reject this defence.

The second submission is that the defendant is not obstructing the lane way any more than he is entitled to and that it can be and has been used as a means of access for all the vehicles which the plaintiff wishes to bring to the si . This would be a good plea if this case was merely a claim for nuisance caused by the obstruction of the servient tenement. But this is not a case of nuisance. It is a case of derogation from grant where the issue is not whether the use of the servient tenement is practically and substantially as convenient as before, but whether the property sold has been rendered unfit

or materially less fit for the purpose for which it was acquired. The defendant's submission was that although the nature of the present obstruction differed from that with which the Court had previously dealt, the effect on the plaintiff was in all respects the same. This is a submission that he has done nothing wrongful. Since I have already found to the contrary, this defence must fail. The defendant did rely both in his pleadings and in his argument upon the judgment and Order given and made in October 1977. This could only have availed him, if at all, in the context of res judicata, but this principle was neither pleaded nor argued. Also, he himself had repudiated the terms of that Order by his action in building the wall and changing the gates.

In my view there has been a clear derogation from grant by the actions of the defendant. The defendant is in breach of the implied obligation imposed upon him by the circumstances of the sale of the site in question to the plaintiff. Common honesty requires that the plaintiff should obtain relief. The nature of the relief should be to ensure that the defendant does not prevent the Local Authority from taking the laneway in charge nor prevent the plaintiff from developing the site in accordance with the

existing or any other planning permissions which he may obtain or otherwise make the site unfit or materially less fit for use as a building development.

The plaintiff also claims damages. Although these are claimed on the basis of punitive damages, no argument was addressed to me on that basis and I do not propose to deal with that claim on that basis. Damages are recoverable for breach of a contract for the sale of land when no question of title is involved on the same basis as damages for the breach of any other contract. The amount of the damages is the extent of the loss which flows from the breach and which it could reasonably have been anticipated would have been incurred. Within this context of reasonable forseeability, the amount of the damages arising out of the breach of a contract for the sale of land is normally the difference between the value of what the plaintiff has on the date upon which damages are to be assessed and the value of what the plaintiff would have had on that date if there had been no such breach. This calculation must be made in the light of the events which have actually occurred and not in the light of what might have occurred. In the present case, on the date of breach the plaintiff should have had the site and the freedom to develop it in accordance with his contract. On the date of assessment, having regard to the relief being granted to him he will have what he ought to have had in

1976, that is the site and the freedom to develop it in accordance with his contract. The only difference in his position now would be the effect, if any, of the intervening period. The measure of damages is the financial cost to the plaintiff caused by this delay.

The plaintiff has claimed the profits which he would have earned if he had been free to develop the site during the period of delay together with interest on these profits. This is not a true measure. First, because it is based on something which has not happened. The site was not developed. Secondly, because the plaintiff was free during the period to carry on business elsewhere or to seek employment elsewhere. It is true that the evidence suggests that as a result of the matters which have occurred the plaintiff has earned less than he would otherwise have done at such alternative employment. However, no evidence has been adduced from which such damage could be computed.

What the plaintiff has lost is the cost of holding the site while he was unable to develop it as he had anticipated. His loss is the cost of financing the purchase price for the period during which he had been unable to use the site in this sense. He is also at a loss of the cost of financing the sum spent on development to date.

I am aware that the value of the site has increased and that the profit

which he can now expect has likewise increased. However, such increase on the evidence has been proportionate to the rate of inflation. The plaintiff by having the same site with the same right to develop it is in reality no better off now than he would have been with the same thing when the breach occurred. Normally a Court is asked by an award of damages to put a plaintiff back into the same position in which he would have been but for the wrong done to him. Here he is in that same position. However instead of having to finance his purchase price during the period of development, he has had to finance it also during the period of delay.

The plaintiff has had to establish his right. Accordingly, his damages should normally be assessed as of the date of the declaration of such right. Here however there has been unnecessary delay in the commencement and prosecution of these proceedings which should not be held against the defendant. The letter on which the claim is based is dated the 21st March, 1979, yet the summons was not issued until the 13th December, 1979. While the defence was delivered on the 2nd July, 1980, the reply was not delivered until the 27th October, 1980 and the matter was not set down until the 16th July, 1981. This latter step followed the furnishing of particulars on the 13th July, 1981 to a notice requesting particulars dated the 4th May, 1980. In the circumstances it seems to me not unreasonable to suggest

that there was at least one years delay.

The contract in this case was made on the 25th November, 1975 when the original agreement was confirmed with variations. It would be reasonable to suppose that this sale should have been completed in or about the 1st February, 1976. The loss runs from this date and in my view should by reason of the delay to which I have referred be taken to have run until the 1st August, 1982.

The cost of financing the purchase of the site was £14,000 made up as to £11,900 to purchase the site, the sum of £900 to buy out his partner, and the sum of £1200 as an initial part of the price representing the defendant's costs of the first action. The cost of the development to date is less easy to ascertain. It is given a sale value of £25,000 by Mr. Harrington which I accept. Having regard to the evidence of Mr. Dickson which I also accept the gross profit should be one third of the selling price. This suggests a cost of say £16,000. I propose to allow 11% interest on these sums for the period such sums were outstanding. This is the figure allowed by statute and I have no evidence which would entitle me to depart from it. I would allow interest on the items of the purchase price from the 1st February, 1976 or the date upon which they were paid, whichever is the later. The development work has been carried out since the decision of the

Supreme Court. The plaintiff says that he brought bulldozers in during 1980 or 1981 to prevent his planning permission from running out but did not wish to commit himself further. On this evidence, I must take this assumed expenditure of £16,000 to have been incurred in 1981. Accordingly, I will allow one year's interest on this sum.

Henry Dixon.
25/7/83.