THE HIGH COURT

2008 7854 P

BETWEEN

PAUL JOYCE, LIAM LARKIN AND SUSAN JOYCE

PLAINTIFFS

AND

DECLAN O'SHEA

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 31st day of July, 2009

The function of the Court

The initial primary relief sought by the plaintiffs in these proceedings, which were commenced by plenary summons which issued on 24th September, 2008, was specific performance of a contract in writing dated 16th May, 2007 made between the plaintiffs, as vendors, and the defendant, as purchaser, whereby the plaintiffs agreed to sell and the defendant agreed to purchase certain land situated near the town of Tullow, County Carlow at the price of €10,734,356.00, in respect of which the plaintiffs only received a nominal deposit of €100.00. The plaintiffs sought, in the alternative, damages in lieu of specific performance. That contract has been referred to as "Contract Number 2" in the proceedings and I will use the same terminology. In the proceedings the plaintiffs also claimed interest for late completion of another contract in relation to adjoining lands referred to as "Contract Number 1". In relation to Contract Number 2 they also claimed interest for late completion at the rate of 10% per annum (viz at the rate of €2,940.92 per day) from 27th June, 2008 to the actual date of completion.

The defendant did not enter an appearance within the time limited by the Rules of the Superior Courts 1986. A motion for judgment in default of appearance was brought by the plaintiffs. It was first returnable on 15th December, 2008. There was no appearance by the defendant. The motion was adjourned until 12th January, 2009 with a direction from the Court (Charleton J.) that the solicitors for the plaintiffs notify the defendant of the adjourned date. Notwithstanding such notification, there was no appearance by or on behalf of the defendant on the adjourned date. On that date an order was made by Charleton J. that Contract Number 2 was to be specifically performed and ordering that that be done. In addition, it was ordered that the plaintiffs recover against the defendant the sum claimed in respect of interest on Contract Number 1. There was a further order that the plaintiffs do recover against the defendant the sum of €585,237.11 in respect of interest under Contract Number 2.

The order for specific performance was duly served on the defendant but he failed to comply with same. Another motion was brought by the plaintiffs by notice of motion dated 25th March, 2009 claiming a declaration that the plaintiffs be entitled to damages in lieu of specific performance, and for an order dissolving the decree of specific performance, and for an order providing for the hearing of the assessment of damages to which the plaintiffs are entitled. The defendant entered an appearance on 17th April, 2009 and responded to that motion. He sought to have the judgment in default of appearance set aside and to be given liberty to defend the proceedings. By order made on 22nd June, 2009, Charleton J. refused the defendant's application to set aside the order of 12th January, 2009. He declared that the plaintiffs were entitled to damages to be assessed in lieu of specific performance and he dissolved the part of the order of 12th January, 2009 which ordered Contract Number 2 to be specifically performed. He gave the plaintiffs liberty to apply to this Court for a hearing to have the damages assessed.

It is to be noted that the order of 22nd June, 2009 did not interfere with the portion of the order of 12th January, 2009 in which the plaintiffs were given judgment in the sum of €585,237.11, being interest for delay in completion of Contract Number 2.

The assessment of the damages to which the plaintiffs are entitled was listed for hearing, and heard, on 29th July, 2009. When the matter was first called, counsel for the defendant appeared and informed the Court that his instructions were that the defendant did not intend to participate in the hearing. The solicitors who had entered the appearance on behalf of the defendant were remaining on record. There was no appearance by or on behalf of the defendant at the hearing of the assessment.

This judgment is concerned with the assessment of damages in lieu of specific performance for non-completion of Contract Number 2.

The land in sale

The land the subject of Contract Number 2 is described in the particulars therein as "part of the lands contained in Folio 1475F and part of the lands contained in Folio 8405F both of the Register of Freeholders County Carlow and marked B on the map annexed hereto and thereon edged in Green". The land in question is on the outskirts of the town of Tullow and contains 15.98 acres. I will refer to the subject lands as "Plot B". To the east of Plot B there is an area of as yet undeveloped land, which I will call "Plot A", which contains 15.01 acres and was the subject of Contract Number 1, which came into existence contemporaneously with Contract Number 2 but was completed on 22nd August, 2008, when Plot A was transferred to the defendant for the contract price of €9,027,485.00, subject to the retention by the vendor of the sum of €39,000.00. While the plaintiffs contended at the hearing that they did not get the value agreed for the retention sum, this Court is not concerned with that complication.

Plot A and Plot B were sold by the plaintiffs with the benefit of planning permission granted by Carlow County Council on 21st October, 2006 for a housing development of 326 dwellings of varying sizes, six apartments, a crèche and all associated site works. The Court's attention was drawn to condition 28 of the planning permission which stated that the scale of the application required a high standard road access and stipulated the parameters of the external access roadway and provided that the external access road would be taken in charge by Carlow County Council prior to the commencement of the development.

To the east of Plot A and closer to Tullow town there are lands, which I will call "Plot C", which were formerly owned by the plaintiffs and were sold to Pat Neville Developments Limited. Those lands are in the course of development and are now known as Oakley Wood. The significance of Plot C for present purposes is that the recent sales history of the recently constructed dwellings in Oakley Wood is reflective of the demand for, and the current market value of, housing in the Tullow area.

Plot A is of greater significance, in that it is now in the ownership of the defendant and it effectively hinders the provision of an appropriate means of access for the development of Plot B in accordance with the existing planning permission.

The evidence
The Court heard evidence from:

(a) Mr. Liam Fitzgerald, Roads Engineer with Carlow County Council;

(b) John W. Dawson, an experienced estate agent and valuer operating in Tullow and Carlow; and

(c) the first plaintiff, Paul Joyce.

The purpose of Mr. Fitzgerald's evidence was to explain to the Court the importance of the Tullow Outer Relief Road to the development of both Plot A and Plot B. Traditionally, Tullow has been serviced by a national secondary road from Dublin to Enniscorthy, which passes through the town and gives rise to congestion. The need for a relief road has been recognised and measures for its provision have been in gestation for a long number of years. Provision for it has been included in the County Carlow Development Plan since the 1970s. The location of the relief road, which would "semi-circle" the town of Tullow to the west, has been fixed. Any development on Plot A or Plot B would be accessed from the relief road. Phase 1 of the relief road has been constructed, but it does not extend as far as the eastern boundary of Plot A. Phase 2 would extend the relief road along the northern boundary of Plot A and Plot B providing the means of access to the housing developments on both plots.

Mr. Fitzgerald's evidence was that Carlow County Council received confirmation in February of this year that funds would be available for the construction of Phase 2. However, there has been a difficulty in acquiring the land adjoining Plot A for that purpose. Mr. Fitzgerald's evidence was that Carlow County Council has been unable to procure agreement with the defendant under which the defendant would either construct the portion of Phase 2 which runs along Plot A himself or, alternatively, cede the necessary land to Carlow County Council at no cost. Mr. Fitzgerald's evidence was that the defendant's position was that, as consideration for ceding the land to Carlow County Council, the defendant required to be relieved from his obligations under Part V of the Planning and Development Act 2000. Whatever the cause of the failure to agree was, the current position is that there was an announcement in the public press in May 2009 that Phase 2 has been postponed indefinitely. Mr. Fitzgerald's evidence was that this was because the Council could not get the land for the road development. Even if Carlow County Council could get the land, it would have to go back to the Department of Environment, Heritage and Local Government for funding. In the prevailing economic climate, Mr. Fitzgerald was not optimistic that funding would be forthcoming. Indeed, he was not optimistic that Phase 2 of the relief road would be constructed during the currency of the planning permission for Plot A and Plot B, which expires in October 2011.

Mr. Dawson in his comprehensive valuation report of 24th July, 2009 gives his opinion that the present day market value of Plot B is €639,200.00 or €40,000.00 per acre. That valuation is based on the nature and location of Plot B and, in particular, the fact that the planning permission expires in October 2011. Mr. Dawson acknowledges in the report that it is without "any available comparisons for such development sites anywhere in County Carlow in the last twelve months".

Mr. Dawson's opinion of €40,000.00 per acre contrasts with the price of €671,736.00 per acre which the defendant agreed to pay for Plot B in Contract Number 2. In explaining such a dramatic drop in value in two years, Mr. Dawson described Tullow, with a population of 2,800, as an agricultural town with some light industry. There have been eight building developments in the town. Mr. Dawson's evidence was that it was a "commuter town for a while". He did a survey of unsold houses in the locality and his evidence was that, in addition to unsold "second-hand" houses, there are 211 newly built houses unsold. He could not hazard a guess as to how long it will take to sell those properties.

He illustrated the problem by reference to Plot C, which has the benefit of planning permission for 111 houses. Mr. Dawson's firm is joint selling agent for that estate. The development commenced in 2007. Sixty five houses have been built, of which twelve have been sold or sales agreed. The prices of the units have dropped twice. In relation to one type of unit, Mr. Dawson gave an example of a drop from €240,000.00 to €179,000.00.

Mr. Dawson summarised the property market in Tullow as being "stagnant". The price of development land has collapsed and there is an overhang of unsold houses. No development land has been sold in County Carlow in 2008 or 2009.

In relation to Plot B, Mr. Dawson's view is that it will not be possible to find a buyer unless the relief road is built. He mentioned the possibility of finding a speculator who might buy or a farmer interested in the land for agricultural purposes.

The figure of €40,000.00 per acre suggested by Dawson is higher than the agricultural value of the land. His evidence was that, on average, agricultural land would fetch from €8,000.00 to €10,000.00 per acre currently and exceptionally €10,000.00 to €12,000.00. However, he cautioned that there are very few comparisons.

There was exhibited in an affidavit sworn on 20th March, 2009 by the first plaintiff, to ground the motion of 25th March, 2009, a letter dated 13th March, 2009 from Matthew Conry putting the then "present day market value" for Plot B at €100,000.00 per acre. Mr. Conry is a member of Mr. Dawson's firm. Mr. Dawson testified that the situation has changed since Mr. Conry gave his opinion in March last. Mr. Conry expressly stated in the letter that his opinion was on his understanding "that the property has access to all main services". Mr. Dawson ascribed the deterioration in value since

March 2009 to the fact that, when, as he put it, the plug was pulled on the relief road, it became apparent that nothing would happen. Plot B is left effectively land-locked.

The first plaintiff in his evidence informed the Court that the plaintiffs are under serious pressure from their Bank, National Irish Bank, having borrowed on the security of Plot B. There is a balance in the region of €9.2 million due to the Bank currently, with interest running at approximately €0.5 million per year.

The law
Counsel for the plaintiffs submitted that the measure of the damages to which the plaintiffs are entitled is the difference between the contract price and the value of the land at the date of the assessment. No authority was cited for that proposition. In view of the fact that the defendant did not participate in the assessment, I consider it appropriate to set out the relevant legal principles.

In *Conveyancing Law* by Wylie and Woods (3rd Ed.) the relevant principles in relation to the amount of damages recoverable by a vendor where the purchaser has failed to perform a contract for the sale of land are set out in para. 13.79 as follows:

> "… the vendor, on breach of contract by the purchaser, is left with the land in his hands and obviously cannot have both the land and the full contract price which was intended to represent its value. Instead, his damages must be limited to any loss he suffers by reason of the land having fallen in value since the contract price was determined. Thus, the general rule is that the damages are to be assessed as the difference in value between the contract price and the value of the land at the date of the breach of contract. However, in recent times the courts on both sides of the Irish Sea have come to recognise that strict application of this rule may cause hardship, especially in times of inflation in property prices. It is now accepted that the common law rule is not inflexible and that the court has a discretion to choose the most appropriate date at which to value the land for the purposes of calculating the damages to be awarded."

As authority for the last sentence, the decision of the House of Lords in *Johnson v. Agnew* [1980] AC 367, which was applied by the High Court (McWilliam J.) in *Vandaleur v. Dargan* [1981] ILRM 75, is cited. In the *Vandaleur* case, having quoted passages from the speech of Lord Wilberforce in *Johnson v. Agnew*, McWilliam J. stated (at p. 77)

> "Lord Wilberforce came to the conclusion at page 498 that 'The vendors should have been entitled, upon discharge of the contract, on the grounds of normal and accepted principle, to damages appropriate for a breach of contract'. And he decided that, as the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendor's fault) should logically be fixed as the date on which damages should be assessed. In the present case, this must be the date of the application to dissolve the order for specific performance on the ground of non-compliance with it by the defendant."

On the basis of that authority, I am satisfied that the measure of the damages to which the plaintiffs are entitled is the difference between the contract price and the value of the lands at the date of the application to Charleton J. to dissolve the decree of specific performance, that is to say, 22nd June, 2009, but the plaintiffs must also bring into account to be credited against the damages any deposit forfeited by them, as is pointed out by Wylie and Woods.

Application of the law to the facts
As the defendant has chosen not to participate in the assessment of damages, the only evidence before the Court as to the market value of Plot B in June/July 2009 is the evidence of Mr. Dawson. In his comprehensive valuation report and in his oral evidence Mr. Dawson has rationalised the basis on which he has arrived at a valuation of €639,200.00 and I accept his evidence. Therefore, the measure of damages to which the plaintiffs are entitled is the contract price (€10,734,356.00) less the current market value (€639,200.00) less the deposit paid by the defendant (€100.00), which amounts to €10,095,056.00. There will be judgment in that sum.

As I have already noted, the judgment given in the order of 12th January, 2009 for €585,237.11, being interest for delay in completion of Contract Number 2, stands. It seems to me that that is consistent with the decision of McWilliam J. in the *Vandaleur* case.