Neutral Citation Number: [2008] IEHC 69

THE HIGH COURT

[2005 No. 586 S.P.]

IN THE MATTER OF SECTION 9 OF THE VENDOR AND PURCHASER ACT, 1874 (AS AMENDED)

BETWEEN

MONICA KIELY (NÉE PHELAN)

PLAINTIFF

AND

RONALD DELANEY AND PATRICIA DELANEY

DEFENDANTS

Judgment of Mr. Justice John MacMenamin delivered the 14th day of March, 2008.

1. By agreement in writing following an action dated 28th May, 2002, made between the plaintiff ('Ms. Kiely') as vendor and a Mr. James Gallagher in trust for the defendants ('the Delaneys') as purchasers, Ms. Kiely agreed to sell, and the Delaneys agreed to purchase, all that and those lands at Bettydoyle, Ballyboughal, in the County of Dublin, being land comprised from Folio number DN 3399 of the Register of Freeholders. The agreed purchase price of the lands in question was €88,000. It was a term of the agreement that the sale would be completed by 25th June, 2002.

2. The said land was acquired by Ms. Kiely from her predecessor in title Desmond Byrne, now deceased, on the 26th of September, 2000. She had previously rented the land from Desmond Byrne. It was stated in the Folio that the land benefited from an appurtenant right of way leading from a nearby road to the boundary of the lands.

3. Until the Delaney's solicitors, Messrs McGowans raised requisitions on title regarding this right of way, Ms. Kiely states that she believed that the land comprised in the folio benefited from the right of way. Ms. Kiely says she accessed the land thereby from the time she went into possession of the land as a tenant, and continued to do so up to the date of sale by auction. It appears from correspondence that Ms. Kiely was permitted to tarmacadam or gravel the path along the right of way.

4. The importance of this right of way is shown by the fact that it permitted access to the land in question from a main road. It is clearly of considerable importance as an amenity to the land.

5. It is asserted in affidavit sworn on behalf of the plaintiff that Mr Gallagher, a friend of the Delaneys who acted on their behalf at the auction, was informed by Thomas Potterton, Auctioneer, that the land could be accessed by the right of way. After the auction, Mr Gallagher says he specifically discussed the question of access both with the auctioneer and Mr Laurence Tierney, Ms. Kiely's solicitor. There is an apparent conflict of evidence as to whether he was shown both the folio and the file plan. This issue is dealt with later in this judgment. On the basis that access was by right of way as described on the folio, Mr Gallagher signed the sale agreement on behalf of the Delaneys.

6. As matters transpired, Ms. Kiely's predecessor, Desmond Byrne, on 21st May, 1998, had sold a plot of land which was then comprised in the same folio as the subject lands of the sale. Critically, this included a narrow strip of land which intervened between the boundary of the subject lands, and the right of way. While not creating a land lock, it unfortunately affected access. That plot of land now comprises Folio 123918F County Dublin. The registered owners thereof are Sean and Bernadette Boylan who are not parties to these proceedings.

7. In the 1998 sale to the Boylans, Desmond Byrne did not expressly except or reserve a grant of right of way for all purposes over the strip of land in that Instrument of Transfer. The original Folio, DN 3399 was not amended to reflect the transfer. It continued to describe the lands as previously comprised in the Folio, and so described at the auction, as benefiting from the appurtenant right of way.

Chronology

8. While the contract was signed after auction on 28th May, 2002, it was only on 5th July of that year that Mr Tierney, the vendor's solicitor, wrote enclosing the file plan, which he had "*now belatedly received*". This was five weeks after the auction. In the course of that letter, Mr Tierney described the right of way as depicted in yellow. But at that point he did not mention the essential problem. On 8th of July, 2002, Messrs. McGowans, the Delaneys' solicitor replied, pointing out that the right of way did not extend to the subject lands. On 12th July, McGowans sent a draft declaration as to user of the right of way for completion by Ms. Kiely as vendor. On 15th August, 2002, McGowans wrote to say that the declaration which had by then come to hand referred only to the right of way as far as a gap, that is to say did not go as far as the boundary to the subject lands.

9. On 3rd September, 2002, McGowans wrote saying that the Delaneys would require a right to pass and re-pass over the Boylans' lands in order to gain access to the lands. Despite the fact that correspondence was initiated in July 2002, it was only on 13th December, 2002, that Ms. Kiely's solicitor acknowledged the problem which had obviously existed all along in relation to the gap in the right of way. On 20th December, 2002, McGowans wrote requesting that an approach to the Boylans be made. She was met with a request she says was unreasonable to persuade a third party to grant a right of way to the Boylan's at another unspecified location. There is no evidence on which to make a judgment as to whether Ms. Keily's position on this particular issue was reasonable or unreasonable.

10. The negotiations with the Boylan's broke down on 7th March, 2003, Ms. Kiely's solicitor wrote again. He again acknowledged the absence of the right of way and offered to refund the deposit of €8,500. On 14th April, 2003, the Delaney's solicitor served a completion notice. On 24th April, 2003, by then some eleven months after the contract, McGowans, relying Condition 33 (b) of the contract (quoted later) said that the purchaser would proceed, but would be claiming €25,000 in compensation. They asked Ms. Kiely's solicitor to propose three arbitrators if this sum was unacceptable. By letter of 15th May, 2003, Ms. Kiely's solicitor offered €5,000 compensation and said they would take their client's instructions in relation to an arbitrator. The financial offer was subsequently rejected. In the light of subsequent events it is most regrettable that matters were not either resolved by sensible negotiation. If this proved impossible, then the arbitration should have proceeded then.

11. Subsequently, the vendor/plaintiff, Ms Kiely, changed her solicitor. From 24th July 2003 onwards, McGowans were in correspondence with Messrs. Kilrane & Company, Ms. Kiely's present solicitors.

12. At some time during the course of 2003, Judge John Buckley, a former distinguished Judge of the Circuit Court and an acknowledged expert in this aspect of law, was appointed as an arbitrator by the parties. Lengthy but one sided correspondence took place on procedure.

13. On 13th October, 2003, the arbitrator wrote to Kilrane & Company complaining about their delay and the fact that they had not replied to his previous correspondence. He felt constrained to write further reminders on 21st October, 2003 and 6th November, 2003. Ultimately, by letter on 30th January, 2004, the arbitrator fixed the 22nd February as the date of the arbitration. A copy of the letter was furnished by McGowans to Kilrane & Company on the same date. Further correspondence took place between McGowans and the arbitrator on 30th January, 2004, setting in train procedures for the arbitration itself. Even as of 30th January, 2004 the thrust of the correspondence between the arbitrator and Messrs. Kilrane & Company was quite explicit. Ms. Kiely had been dilatory in making arrangements for the arbitration. It was unclear as to whether Ms. Kiely, intended to defend the arbitration at all. This conduct was regrettable. The blame for it can only be laid at Ms. Kiely's door.

14. It is noteworthy, and unexplained, that between September and November 2003, the arbitrator sent Ms. Kiely's solicitor no less than seven letters without eliciting even a response. Further correspondence took place into January and February 2004. (The arbitration had been postponed) Only on 26th May, 2004, by now two years after the contract, Messrs. Kilrane & Company furnished the arbitrator with any substantive response, to the effect that they had received instructions from Ms Phelan to defend the arbitration proceedings and to put in a defence.

15. There was yet a further delay in June and July 2004. On 31st July, 2004, the arbitrator sent another letter to Messrs. Kilrane stating that he was surprised to learn (as they had stated in correspondence) that they did not have a copy of the points of claim. The arbitrator furnished a copy of these on 25th August, 2004. Remarkably, on 6th September, 2004, Messrs. Kilrane again contacted the arbitrator with the same request, and in he turn forwarded yet a further copy of the points of claim. On 8th September, 2004, Messrs. Kilrane stated that their barrister was preparing points of defence. These were eventually received at the end of the month of September, 2004.

16. On 26th November, 2004, the arbitrator wrote to Messrs. Kilrane stating that he would be available to conduct a hearing on each Monday or Tuesday during the month of January, 2004. Messrs. McGowans, acting on behalf of the Delaneys, contacted Messrs. Kilrane on 7th January, 2005, suggesting three alternative dates in January or February, 2005. There was no response. Messrs. McGowans sent repeated reminders. On 24th January, 2005, Messrs. McGowans requested the arbitrator to fix a date. Repeated efforts were made to identify and fix a date. Ultimately, it was decided that 22nd February, 2005, would be a convenient date for the hearing. This was apparently postponed yet again, at the request of Messrs. Kilrane until the morning of the 8th March. Then a request was made by Mr Kilrane by a phone call to the arbitrator, requesting that the commencement of the arbitration be put back to the afternoon, apparently because of counsel's unavailability in the morning. The arbitrator pointed out that the arbitration had been fixed for 8th March instead of 22nd February because of the unavailability of Counsel from the earlier date. Ultimately, the arbitrator indicated that he proposed to proceed with the arbitration hearing at 10.30am on 8th March.

17. Six days before the date of the arbitration hearing, on 2nd March, 2005, Messrs. Kilrane wrote, stating that they wished specifically to put Messrs. McGowans, the Delaneys' solicitors, on notice that their client would now contend that the lands the subject matter of these proceedings, actually did enjoy the benefit of the right of way via the laneway at the northern boundary of the lands which currently was used to gain access to the lands; that at all material times this was used, and continue to be used, to gain access to the lands. Messrs. Kilranes indicated an intention to call evidence of this at the hearing of the arbitration on the day the plaintiff was said to be ill. The arbitration yet again was postponed. Tentative dates of 12th April or 26th April were suggested. Ultimately, a date of 26th April, 2005 was proposed. On 20th of April, 2005, six days before the next date of the arbitration Messrs. Kilrane sent a lengthy letter to McGowan & Company. They then asserted that, despite the fact that the right of way as marked stopped slightly short of their client's property, the "reality on the ground" was that the right of way continued on into their client's property and had been exercised as a right of way and was the only means of access to the property. They contended that no-one had ever raised any objection in relation to this and that this continued to be the situation. They stated that their client was prepared to give a statutory declaration verifying this. Thus, within a period of two months two different positions had been adopted by the vendor as to the gap in the right of way. And the arbitration had been postponed or adjourned twice, by reason of a letter written on a date close to the date fixed.

18. At this point and for the first time, Messrs. Kilrane asserted that General Condition 18 of the Conditions of Sale was applicable.

19. This provides:

> "If the purchasers shall make and insist on any objection or requisition as to the title, the Assurance to him or any other matter relating or incidental to the Sale which the Vendor shall, on the grounds of unreasonable delay or expense or other reasonable ground, be unable or unwilling to remove or comply with, the Vendor shall be at liberty (notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with the same) by giving to the purchasers or his solicitor not less than five working days notice to rescind the Sale. In that case unless the objection or requisition in question shall in the meantime have been withdrawn, the Sale shall be rescinded at the expiration of such notice".

20. Three years after the auction, therefore, Messrs. Kilranes now asserted that as their client was unable and unwilling to comply with the requisition on title as to the right of way. They were requiring McGowans as solicitors for the purchasers, not later than 29th April, 2005, being a date in excess of five working days from the date of receipt of the letter, to withdraw the requisition and objection raised in relation to the right of way. They said that unless this objection and requisition was withdrawn, the sale would be regarded as rescinded by their client and the deposit would be returned.

21. Messrs. McGowans replied, noting that the defence in the arbitration did not refer to General Condition 18, and enquiring whether it was the intention to apply to the arbitrator to amend the defence. They requested confirmation that the arbitrator was to have jurisdiction to deal with any such issue.

22. Further delays took place, again attended by yet more reminders from the arbitrator. On 17th May, 2005, he stated that if there was no response from Messrs. Kilranes by close of business on 23rd of May, he would have to consider calling a further meeting of the arbitration. It appears there had been an inconclusive meeting earlier but what transpired is not in evidence.

23. On 10th June, 2005, Messrs. Kilranes wrote to McGowans stating that they had discussed the matter with their client and that their instructions were to rescind the contract and return the deposit in the sum of €8,500. The arbitrator indicated that he would refrain from proceeding with the arbitration unless there was a response to the issues raised in correspondence as to his jurisdiction.. Messrs. Kilranes did not so inform him.

24. On 21st June, 2005, the vendor's solicitors wrote that their client had rescinded the contract pursuant to General Condition 18 and that if this was not accepted, that Court proceedings should be initiated. Yet further correspondence took place between the arbitrator, Messrs. Kilranes and McGowans, on the specific question as to whether or not the former had jurisdiction to deal with the

question of Condition 18. This included a proposal made on 27th June, 2005, by the arbitrator, that he states a special case for the High Court pursuant to the Arbitration Acts for a decision on the issue. This offer was not availed of. More correspondence dealt, inter alia, with considerations on relevant legal authorities, cited in correspondence, and the legal situation pertaining to the impasse.

25. A letter of 28th June, 2005 from Messrs. McGowans, set out their understanding of the legal position on a number of issues then arising: one such issue was as to the circumstances in which a vendor might rescind. Messrs. McGowans pointed out that Ms. Kiely had consistently and for a period exceeding three years, adopted an approach to this matter both in correspondence and following the emergence of the difficulty that was fundamentally at odds with the position now being adopted. As a result of this, their client had engaged in a lengthy, stressful and costly process in which Ms. Kiely had also participated. Thus they said to purport to rescind at that point was unreasonable, arbitrary and capricious, particularly in circumstances where the purchasers were not insisting that the vendor remedy the defect on title at all, but merely required compensation for the error and the resulting loss of value relative to this bargain.

26. Throughout the months of July, August and September, 2005, further efforts were made to establish a hearing date for the arbitration.

27. On 27th September, 2005, Messrs. Kilranes wrote to McGowans stating that they had received an authority from a further firm of solicitors, Messrs. Greg O'Neill & Company, who, they said, were now acting for Ms. Kiely and indicating that they may not have any further instructions. There was no change of solicitor.

28. Ultimately, on 30th November, 2005, Messrs. Kilranes issued the special summons herein and requested McGowans to confirm that they had instructions to receive service thereof. The summons does not appear to have been served with any speed as on 13th December, 2005, Messrs. McGowans wrote a letter to Kilranes indicating they intended to issue Circuit Court proceedings to deal with the matter as expeditiously as possible. Ultimately, on 14th December, 2005, the special summons herein was served.

Findings on evidence

29. A number of points arise from the course of events described at length. First, I am satisfied that Ms. Kiely engaged in what can only be seen as procrastination, delay and excuses in an effort to avoid the arbitration taking place. With the benefit of hindsight, it is difficult to avoid the conclusion that not only was the correspondence (and its absence) discourteous to the arbitrator, it was misleading. The correspondence unfortunately does not allow for any conclusion other than that there was an effort to frustrate the arbitration taking place by any expedient available. This can only be laid at Ms. Kiely's door. She was instructing her solicitor who was acting on her instructions.

30. Second, a point which also emerges is that, on 13th December, 2002, Ms. Kiely's then solicitor was prepared to acknowledge that a problem existed. But even from that point onwards, her stance was that any difficulty was inconsequential. As of 27th September, 2004, the defence received by the arbitrator again included a denial that any error had been made by the vendor in the contract of sale.

31. Third, as pointed out earlier, the vendor's position shifted on at least two if not three occasions between the time of the auction and the bringing of the summons herein.

32. Fourth, Ms. Kiely's conduct and delay led the Delaneys to act to their detriment. By any standard the issue could have and should have been resolved satisfactorily when the problem first came to light. This could have been done promptly by negotiation or arbitration. The policy was simply one of avoidance of any conclusion. All these events took place when the property market in Ireland was extremely active and when prices were escalating.

33. Fifth, in conjunction with the conduct which I consider was most regrettable, Ms. Kiely was guilty of delay of the most substantial kind before first raising the issue of the contractual conditions some three years after the auction. I consider this delay was substantial and blameworthy.

Consideration

34. On the particular facts which arise in this case I would have concluded that Ms. Kiely, is by her conduct and delay, estopped from relying on Condition 18 by reason of such conduct and delay - if estoppel could be relied upon in a contractual situation such as this. The position here stands entirely outside anything that might have been reasonably contemplated within the terms of condition 18 itself. A court would in equity not countenance or permit the vendor to avail of a right of rescission in such circumstances.

35. In the circumstances, however, the issues are best seen within the context of reasonableness, as it is defined in the authorities to which reference is made later.

36. While Ms. Kiely now seeks to rely on Condition 18 of the contract, the Delaneys in turn, rely on Condition 33 of the Conditions of Sale. This condition provides:

> "33. (a) In this Condition, 'error' includes any omission, non-disclosure, discrepancy, difference, inaccuracy, misstatement or misrepresentation made in the Memorandum, the Particulars or the Conditions or the Non-Title Information Sheet or in the course of any representation response where negotiations leading to the Sale and whether in respect of measurements, quantities, descriptions or otherwise.
>
> (b) The Purchaser shall be entitled to be compensated by the Vendor for any loss suffered by the Purchaser in his bargain . . . as a result of an error made by or on behalf of the Vendor provided, however, that no compensation shall be payable for loss of trifling materiality unless attributable to recklessness or fraud on the part of the Vendor nor in respect of any matter of which the Purchaser shall be deemed to have had notice under section 16 (a) nor in relation to any error in a location or similar plan furnished for identification only.
>
> (c) Nothing in this Memorandum, the Particulars or the Conditions shall:
>
> (i) Entitle the Vendor to require the Purchaser to accept property which differs substantially from the property agreed to be sold whether in quantity, quality, tenure or otherwise, if the Purchaser would be prejudiced materially by reason of any such difference,
>
> or

(ii) Affect the right of the Purchaser to rescind or repudiate the Sale where compensation for a claim attributable to a material error made by or on behalf of the Vendor cannot be reasonably assessed.

(d) Save as aforesaid, no error shall annul the Sale or entitle the Vendor or the Purchaser, as the case may be, to be discharged therefrom".

These provisions will now be considered.

The Law

37. The right of rescission sought by Ms. Kiely as vendor is a restriction on the purchaser's rights. A court must be alert to ensure that it is not abused. Thus, a number of qualifications to such right of rescission have been identified in relevant case law. The vendor must exercise such right in a reasonable manner or, as is more usually put, must not invoke it without reasonable cause. He or she must not act capriciously or arbitrarily and may have to convince the Court that the objection or requisition which has led to the invocation of a right of rescission is one which will cause substantial expense or involvement in litigation if there is to be compliance with it. Thus, such right may not be used as a method of extracting the vendor from a contract with a purchaser in order to accept a higher offer from a third party. The findings and conclusions made on the estoppel issue are relevant and applicable here also.

38. The Courts will refuse to allow a vendor to invoke the right where he was guilty of "recklessness" in entering into the contract. This is to be distinguished from fraud or dishonesty. It generally consists of an indifference towards the purchaser as regards whether they will obtain the title contracted to be sold. Thus, a vendor must not induce a purchaser to enter into a contract by making some misrepresentation to where there was little ground for believing such was true and then purport to exercise a right of rescission when the purchaser raises an objection or requisition about the same matter. Other circumstances are not here material.

Has the right of rescission been exercised in a reasonable manner?

39. In the light of the findings earlier in this judgment the conclusion here is self evident. It is clear that a vendor may not invoke the right of a rescission without reasonable cause, and must not act capriciously or arbitrarily. She may have to persuade a court that the right is one which will cause him substantial expense or involve him in litigation if he is to comply with or remove it. (See Wiley: *Irish Conveyancing Law* 2nd edition, paras. 15.27 to 15.35). There is no such evidence.

40. In *Selkirk v. Romar Investments Limited* [1963] 1 W.L.R. 1415, Viscount Radcliffe observed that: "The vendor must not act arbitrarily, capriciously or unreasonably", and that "He must not use the power of rescission to get out of a sale '*brevi manu'* since by doing so he makes a nullity of the whole elaborate and protracted transaction". The Judge in that case observed that the vendor's solicitor "On receiving the relevant requisitions, showed no arbitrary or highhanded temper in replying to them but, on the contrary, made a serious attempt to meet them and to allay the [purchaser's] misgivings. *In Smith v. Wallace* (1895) 1 Ch. 385, Romer J. observed that the vendor, in exercising his contractual right of rescission, "was bound to exercise the [right] fairly, and to *determine promptly* whether he would emphasise the power or not" (emphasis added). In *Lyons v. Murphy* [1986] I.R. 666, Murphy J. decided the issue as to whether the vendor was entitled to exercise the right of rescission on the basis of whether or not there had been reasonable conduct on his part stating "it could hardly be suggested that a purchaser who insists upon a right to be compensated for damage to property in which he is interested is acting unreasonably". (at p. 681)

41. He added:

> "Under the terms of the contract for sale and in accordance with established legal principles the purchaser is entitled to be paid a substantial sum by the vendor by way of compensation for the vendor's wrongdoing. Whilst in my view it is entirely understandable that the vendor should wish to escape this liability, I could not accept that it would be reasonable for a vendor to invoke a rescission clause so as to escape a liability which was caused by and indeed consisted of his or her wilful default."

42. On this basis, Murphy J. concluded that the rescission clause had not been validly invoked, and in so doing made it clear that a court is entitled to have regard to the question of reasonableness, not merely of the vendor, but of both parties. He also made clear that the question of reasonableness is one to be judged on the basis of the post-contract conduct of the parties. This latter point is also of particular relevance to the findings made. The vendor's conduct was not reasonable here. I will adopt and apply the dictum of Murphy J.

43. In *Williams & Anor. v. Kennedy* (the Supreme Court, Unreported, 19th July, 1993) Finlay C.J. observed that one of the four principles identified as governing the invocation by the vendor of Condition 18 is that "it must be shown … that he has acted reasonably, not arbitrarily, not capriciously". I again apply this principle.

44. In the context of this case it is necessary only to refer to the unfortunate sequence of events described earlier in the chronology, starting from and including the auction onwards. As I have already found, the conduct of the vendor was, by silence, misleading in that the purchaser was misled more than once into concluding that a meaningful arbitration process was going to take place. Unreasonable too in the manner in which Ms. Kiely, on a number of occasions postponed the process of arbitration or hearings taking place; or put matters on a long finger by excuses, or by seeking to adjourn the arbitration date, once it was fixed. This procrastination and avoidance endured for a period from 28th May, 2002 until December, 2005, more than three and a half years.

45. As pointed out above, this must be seen in the context where the vendor, more than once, changed her stance as to whether or not a problem existed at all and if so, what she proposed should be done. These changes of stance took place at widely spaced intervals. The purported invocation of Condition 18, so late in the day, created yet another obstacle to the arbitration.

46. This sequence of events occurred also against a background where property prices were rising sharply. If the vendor was seeking to exercise her right to rescind in a reasonable fashion, this should have been done promptly and without delay, one of the indicia identified by Romer J. in *Smith v. Wallace*. Furthermore, when the vendor eventually purported to exercise her right of rescission she did not offer to reimburse the purchaser's costs incurred in the interim period which had been incurred by reason of the fact that the purchasers had (they might have thought) embarked upon a joint arbitration process. There is no indication in the negotiation other than that the purchasers bear this expense. The unreasonableness of the vendor is, in the circumstances, the more remarkable, having regard to the fact that the purchasers did not insist on the right of way being included in the conveyance (which could not be achieved in any case) but instead merely insisted upon compensation in the form of an abatement of the purchase price. Consequently, the purchaser was merely asking to purchase what the vendor could actually sell.

47. The fact that this case proceeded to hearing in the High Court, with all its attendant cost and expense, must be seen in light of

the fact that at a point earlier identified in negotiations, the only issue between Ms. Kiely and the Delaneys was whether the abatement or compensation should be €5,000 or €25,000. It would hardly require imagination to envisage that there should have been some sensible middle ground which might have been arrived at, although obviously, the court cannot be apprised of any without prejudice negotiations. On more than one occasion during the course of the hearing the parties were urged to negotiate. Unfortunately, they were unable to avail of these opportunities.

48. I conclude, therefore, that the vendor was not entitled to rescind on the basis of her capricious, arbitrary and unreasonable conduct and the delay which has taken place.

49. I am fortified in my conclusion by a further aspect of Ms. Kiely's conduct, already briefly touched upon.

50. Although it is true that a vendor can rescind under General Condition 18, notwithstanding the fact that there has been intermediate negotiation or litigation, Wiley points out that 'negotiation' is not the same as 'dispute' so that the vendor is not protected by the provision if he instead denies that any defect exists which should justify the objection or requisition. Clearly, and on more than one occasion this was the position here. The defence ultimately delivered in the arbitration proceedings on 27th September, 2004, two years and three months after the auction, pleaded, *inter alia*, that the claimants (i.e. the Delaneys in these proceedings) were deemed to purchase the property in sale with the full knowledge of all rights of way that might affect same (and) to have inspected the property and:

> "Further or in the alternative the respondent claims that no error was made by or on her behalf in relation to the sale of the property."

This defence was delivered on behalf of Ms Kiely after months of involvement in an arbitration process predicated on the basis that the defect did exist. In addition to the defence, on 2nd March, 2005, immediately prior to the next date fixed for the arbitration hearing, the purchaser's solicitors received a letter from the vendor's solicitors again reiterating that the respondent would contend that the lands the subject matter of the proceedings has the benefit of a right of way via the laneway at the northern boundary of the lands and that it was intended to call evidence of this at the hearing of the arbitration.

51. The effect of both this letter and the specific point of defence were to make it clear that the vendor was then asserting that the right of way did indeed exist and that she actually required the purchasers to complete the contract on that basis. Indeed, it apparently was pointed out during an inconclusive hearing of the arbitration by counsel for the vendor that the vendor was asserting the existence of a right of way and that the arbitrator had no jurisdiction to determine this issue. This stance is hardly consistent with averments contained in affidavits sworn on behalf of Ms. Kiely that –

> "as soon as Ms. Kiely became aware of the defect in title she acknowledged that defect in the title and did not as alleged seek to deny it. She did so in open letter sent by her solicitor, Mr. Lawrence Tierney, to the defendant's solicitors dated 13th December, 2002 and dated 7th March, 2003"

Nor is it consistent with an averment that –

> "in agreeing to refer the matter to arbitration Ms. Kiely was again acknowledging that there was a defect in the title and was prepared to attempt to resolve the matter by way of arbitration having failed to negotiate a resolution with the defendant."

(See affidavit of Ms. Kiely's solicitor, sworn 21st June, 2006)

52. In *Gardom v. Lee* (1865) 6 H&C 651, a contract for sale included a condition permitting the vendors in the event of the purchaser making any requisitions or objections, either to answer them or to rescind the contract, returning the deposit without interest. A further condition provided that the vendor's right of rescission should not be waived or affected or prejudiced by any negotiation as to any objections or requisitions or an attempt to obviate or comply with same. The purchaser became aware that the vendor had no power of sale. He pointed this out suggesting the contract be rescinded. The vendor asserted his power of sale and called on the purchaser to complete the purchase. The purchaser then incurred expense in investigating the title, the result of which was that his concerns were upheld. Thereupon, the purchaser purported to exercise his right to rescind. The court held that the vendor had lost his right to rescind, essentially by reason of having insisted that the purchaser were mistaken and that the contract should be performed.

53. In the course of his judgment, Pollock C.B. observed:

> "There was no negotiation or attempt to obviate any objection, but a dispute, the vendees saying that the vendor had no power to sell, the vendor saying that he had."

He continued:

> "The vendor should either have obviated the objection when called upon, or at once have rescinded the contract. But they did neither *and much too long a period elapsed before they expressed any intention to rescind*"

54. In *Gardom*, a period of just under one year had elapsed between the objection and the communication of the decision to rescind. The comparable period in this case is thirty-three months, a period which speaks for itself.

55. I am satisfied that on the basis of the conduct in this regard also, Ms. Kiely lost her power to rescind.

Imprudence or recklessness?

56. A further circumstance disentitling a vendor to rescind is whether the vendor was guilty of recklessness (see *Selkirk v. Romar Investments*). There would appear to be some uncertainty as to whether the appropriate test is imprudence or recklessness. It cannot be denied that these are different criteria (see *Baines v. Tweddle* (1959) Ch. 679*; Merrett v. Schuster* (1920) Ch. 240; In *re Jackson and Haydens Contract* (1906) Ch. 412; *Kennedy v. Wrenn* [1981] I.L.R.M. 81, Costello J.). It is noteworthy that in *Williams v. Kennedy*, a case in 1993 and referred to earlier, Finlay C.J. adopted the traditional test of recklessness.

57. In this context, however, it is necessary to examine carefully the evidence as to the conduct of Ms. Kiely and her then solicitor.

58. Mr. William Devine, an eminent conveyancing solicitor, swore an affidavit in the proceedings admitted without objection. He states

that where lands in sale do not abut a public highway, and they are not sold subject to any express restriction relating to access, it is the duty of the vendor to satisfy himself that they have the benefit of a right of way and that any restriction on the exercise of that right of way is notified to potential purchasers.

59. Mr. Devine points out that the manner in which this issue can be dealt with is to inspect the file plan, which takes approximately six to eight weeks following a request being made for it. There is little practical reality to any purchaser procuring such a plan from the Land Registry in advance of an auction. This was an additional reason why the vendor's solicitor should have ensured that a copy of the file plan was taken up prior to the auction. It would not be sufficient for the vendor's solicitor to rely on the entries on the folio for the purpose of confirming the existence of a right of way appurtenant to the lands because it is well known that such entries are often not updated and are often out of date and inaccurate. Mr. Devine also avers that it would be insufficient for a vendor's solicitor to rely on assurances from his client that the lands had been in fact accessed over a particular route, particularly where the period of such user is less than twenty years. It will remain incumbent on the vendor's solicitor in such circumstance to ascertain by consulting the file plan or the instrument creating the easement, whether a registered or express easement exists and that for the vendor's solicitor to advise a prospective purchaser that the lands benefit from an express or registered right of way in circumstances where the file plan disclosed to the contrary would invariably amount to carelessness.

60. No response in evidence has been provided to this affidavit as part of the case. Consequently, the point must be approached on the basis of having gone evidentially uncontested. Whether or not the purchaser's solicitor might have discovered the problem for himself is not to the point. The question here is whether the vendor may avail of a contractual provision for rescission. It is the conduct of the vendor or her agents that is in issue. I do not consider that mere imprudence on the part of a purchaser could excuse conduct on the part of the vendor to induce the vendor's agents in making a positive statement to induce bids which apparently happened at auction. This must be seen in the context of the fact that it was a point then raised by the purchaser's representative. The obligations of Ms. Kiely's then solicitor must be seen in the light of the fact that there appears very considerable doubt in the light of correspondence as to whether Ms. Kiely's solicitors then had in fact then requisitioned the file plan. It is difficult to reconcile averments by affidavit to the effect that the file plan had been obtained prior to auction, and the subsequent correspondence already referred to on 2nd July, 2002 where Ms. Kiely/vendor's then solicitor wrote that he had "again requested the Land Registry to furnish [him] with a map showing the right of way duly coloured". In a further letter on 5th July, 2002, he wrote that he had "now belatedly received the map from the Land Registry". In an averment in the grounding affidavit sworn on behalf of the vendor, it is said that the purchaser's representative, Mr. Gallagher, discussed the question of access to the lands after the auction with the auctioneer and Laurence Tierney, Ms. Kiely's solicitor at the time and "*was shown the folio and file plan and informed that access was by right of way as described on the folio*". This conflict must be seen in the light of the fact that the deponent in this affidavit, Ms. Kiely's present solicitor was not present at the time of the auction and is acting on instructions and received information. Neither Ms. Kiely nor Mr. Shields nor the auctioneer swore any affidavits in the proceedings. No notice to cross-examine was served.

61. In the present case, the vendor furnished prospective purchasers with a copy of the folio and folio map. There is conflict as to the special file plan. The folio stated that there was a right of way. The folio map appeared to depict a right of way to the northern end of the lands. In the circumstances, any prospective purchaser inspecting the documentation furnished by the vendor could be expected to assume that the entry relating to the right of way was accurate. This belief would have been bolstered by confirmation by the auctioneer that access to the lands was "via a laneway to the northern end of the lands".

62. The map prepared by the auctioneers depicts the lands that were transferred out of the folio and now comprised in a different folio. An examination of the manner in which they were depicted suggests, as was the position, that they might once have formed part of folio 3399. The right of way as depicted on this map runs only as far as a point close to the boundary of the lands for sale. All these facts, combined with the statement on folio 3399 that two parts thereof had been transferred out of the folio, should at the minimum, I consider, have alerted the vendor's solicitors to the possibility that the right of way no longer served the plot in sale without an easement.

63. I do not consider that the authorities fully establish that ordinary imprudence on the part of a vendor's solicitor would be sufficient to prevent rescission. But what occurred here must be seen as a preparedness on the part of the vendor's solicitor to take a calculated risk when there were significant warning signs to the contrary. I think this fell well short of what would be considered ordinary prudent conveyancing practice. This was compounded by the statements made by the auctioneer prior to bidding. All these circumstances, taken together, justify a finding of a very high degree of imprudence sufficient on the facts to constitute a bar to rescission.

Reliance on General Condition 18

64. For completeness, a further question which may arise (if necessary) is whether Ms. Kiely would in law be entitled to rely on General Condition 18 (recited earlier) to avoid completion of the contract at an abated price by reason of her own default.

65. A number of additional observations are relevant here. The first is that the defendant purchasers opted first for compensation under condition 33. A misrepresentation by Ms. Kiely and her agents of what she had to sell was "an error" within the definition of that term given in General Condition 33(a) of the contract. I consider that that is compensable by condition 33(b).

66. Furthermore, there has been a finding that the conduct of the vendor prior to reliance on the condition has been unreasonable, capricious and has put the purchaser to additional expense. Ms. Kiely only sought to rely on General Condition 18 only on 20th April, 2005, some thirty-three months after the purchasers pointed out the error and almost a month after the first hearing date of the arbitration. There was extreme indecision and unjustifiable delay. General Condition 18 may not be relied upon by a vendor who on the facts first denied the existence of the difficulty affecting the sale on which the purchaser is insisting. Ms. Kiely repeatedly denied that there was a problem with the promised right of way.

67. In the instant case it is possible to summarise the position of the parties thus. Ms. Kiely said:

> "Even though the problem originates with my own error and even though the purchasers say they will take the land even with the defect, subject only to an abatement in price that will limit what they have to pay to that which they still have to give me, nevertheless I may use my own error to get out of the contract entirely."

68. The Delaneys say:

> "Even though the problem is the vendor's mistake, we are still willing to proceed with the bargain and we will not insist in the impossible or on what it would cost or take too long to achieve. We are still willing to buy the land at, in general, the agreed price, subject only to an abatement to ensure we will only pay for that which, as it transpires, the vendor can give us."

69. In *re Terry & White's Contract* (1886) 32 Ch. 14 is of little assistance to Ms. Kiely, because, the case turned on the fact that the contract excluded any right to compensation so that the resolution sought by the purchaser was impermissible. It is noteworthy that in that case the condition provided *inter alia*:

> "No error, misstatement or misrepresentation shall annul the sale, *nor shall any compensation be allowed in respect thereof*."

This quite clearly is at variance with the provisions of the conditions in the instant case. Furthermore, the observations of the judges in that case are, in their general tenor, supportive of purchasers who might make the same claim in similar cases where there was no exclusion of compensation.

70. On the very different facts of this case and the findings thereon outlined earlier, I do not consider that the authority cited by counsel for the vendor of *Ashburner v. Sewell* (1891) 3 Ch. 409 is of assistance, even if it still constitutes a persuasive authority. The facts, here as described earlier are so different as to render it of no value to Ms. Kiely. It is doubtful whether it is in any case decisive of the issue which might arise in this case, that is an apparent conflict between Condition 18 and Condition 33.

71. While the decision in *Ashburner* is stated to be reliant on the decision of the Court of Appeal in *Mawson v. Fletcher* (1870-1) 6 Law Reports Ch. App. 91, *Mawson* is not an authority for preferring a clause giving a vendor a right of rescission over a clause giving a purchaser a right to compensation and excluding the vendor's right to rescind from cases where compensation is taken. The court held that the defect, if any, was not a misdescription within the meaning of the compensation clause and that therefore the vendor having acted *bona fide*, was entitled to invoke his statutory right of rescission. The rationale for the decision was that the defect, if any, did not come within clause 14 (the provision for compensation).

72. *Ashburner v. Sewell* has seldom been followed. The decision does not appear to address the conflict between conditions that might arise where, as here, they may both apply to the same error and from the provision in the compensation clause against annulment for error save with the purchaser's limited option. I do not think that the assessment of the contract outlined in that judgment can be said to be reliant upon objective reasonableness.

73. In fact clause 18 and clause 33 as they now are, are reconcilable, even where they do apply to the same errors but only by recognising that to treat a claim for compensation as "insistence" within the meaning of clause 18 might be to create a direct contradiction between the clauses. Clause 18 says the vendor may rescind and clause 33 says she may not, so that in respect of errors within clause 33 a claim of compensation must take the case out of clause 18 by removing the element of "insistence" required for it to apply. One cannot give the concept of insistence a meaning which produces a direct contradiction between the clauses. I consider that clause 18 is designed to protect a vendor from the trap of being obliged to give what he or she cannot reasonably give. That trap is removed where a purchaser can and does opt for compensation. I do not consider that Ms. Kiely had a right to rescind under clause 18 for the reasons outlined earlier and where the Delaneys sought compensation, and indeed had done so and progressed the claim almost to hearing before Ms. Kiely made any effort to rescind.

74. Condition 18 is not an unfettered licence to avoid a contract in reliance of one's own error. Because of the plaintiff's conduct and delay, her solicitor's very substantial imprudence to the initial and subsequent denials that there was any misdescription, and because of the capriciousness and unreasonableness in seeking to rely on condition 18 at such a late stage, I do not consider reliance on Condition 18 is available to the plaintiff either for the reasons outlined above. I consider that the plaintiff's claim fails under this heading also.

75. In the light of the foregoing, I must decline the relief sought in the summons herein on the various grounds identified in this judgment. The Court will hold that the sale has not been rescinded by the plaintiff in accordance with Condition 18 of the contract the question to be determined in the vendor and purchasers summons herein.