Neutral Citation Number: [2010] IEHC 272

THE HIGH COURT

2008 8805 P

BETWEEN

ARANBEL LIMITED

PLAINTIFF

AND

STEPHEN DARCY AND LINDA CRAMPTON

DEFENDANTS

THE HIGH COURT

2008 8806 P

BETWEEN

ARANBEL LIMITED

PLAINTIFF

AND

SEAMUS MCGIVERN AND AUDREY MCGIVERN

DEFENDANTS

THE HIGH COURT

2008 8807 P

BETWEEN

ARANBEL LIMITED

PLAINTIFF

AND

RICHARD DARCY AND MARY DARCY

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 9th of July, 2010

1. Introduction

1.1 Many people who bought property at the height of the market are now in significant financial difficulty. Those who bought homes at that time, largely based on borrowing, face very significant negative equity. Those who bought investment properties are faced with significant losses. Many such persons have now come before the courts faced with difficulties relating to meeting their obligations on loans taken out to fund the relevant purchase.

1.2 However, there is a second category of persons who entered into contracts to buy property at or near the peak of the market, who are now faced with being called on to complete the relevant sales at a time when the agreed purchase price significantly exceeds the current value of the property concerned. These three connected cases involve such a situation. The cases are not untypical in one sense. The relevant contracts were signed in September and October, 2006. Each contract related to a separate apartment in a development known as Fortunes Lawn at Citywest in County Dublin. The properties were purchased at a time when it was anticipated that it would take another year or so for the building works relevant to the properties concerned to be completed. That, in due course, happened and the parties were called on to complete in October, 2007. In some of the cases there were further completion notices which pushed back the completion date until the Spring of the following year. It is not disputed but that by March of 2008 each of the defendants in the respective proceedings was legally obliged to complete the sales of the respective apartments which they had contracted to purchase.

1.3 There is, however, one unusual feature of these cases. In past times when the property market was either increasing, stagnant, or at worst suffering a minor reversal, it was common place that sellers who found a purchaser either unable or unwilling to complete, simply forfeited the relevant purchaser's deposit, kept the property, and went on to deal with the property as the seller concerned wished.

1.4 In more recent times, it has the been the experience of the courts that a number of cases have been brought where the seller concerned asserts that the forfeiting of the relevant deposit is insufficient to compensate for the difference between the contract

price and the price which the vendor could now get for the property in question. Given that deposits are typically fixed at 10% of the purchase price, and that property prices have, it would appear, fallen by upwards of 50%, it is hardly surprising that that case is made. The extent of the difference does, of course, depend on the facts of each individual case.

1.5 However, what is sought by the plaintiffs ("Aranbel") in each of these proceedings is an order for specific performance. Counsel for the defendants in each of the cases has quite properly accepted that there was a binding contract in place and that his respective clients are in breach of their obligations under that contract by not having completed the sale in each case at the time when each set of defendants was legally obliged so to do. That Aranbel is entitled to relief in those circumstances is not disputed. However, in substance it is argued on behalf of each of the sets of defendants that they are no longer in a position to complete the sale in question and that specific performance should not, therefore, be ordered. In those circumstances, it is contended on behalf of each of the sets of defendants that the Court should order damages in lieu of specific performance with those damages to be assessed in a manner yet to be determined.

1.6 While not unique, it is unusual for a developer such as Aranbel to seek specific performance in those circumstances. These cases, therefore, raise the general question of the proper approach which the Court should take to such a claim.

2. Specific Performance

2.1 As the term implies, an order for specific performance is an order which requires the relevant defendant to complete the contract which is the subject of the proceedings in question. Specific performance is an equitable remedy. It has often been said that equity will not act in vain. A court should, therefore, be reluctant to make an equitable order where there is no reasonable prospect of the order concerned being complied with. I should add one qualification to that statement. There obviously may be cases where persons may simply decline to obey an order of the court. The fact that a party might be most unlikely to obey a court order could not, in my view, be a reason for the court not making the order in the first place. However, where it is clear on the evidence that a party would not, in fact, be able to comply with a court order, then a court should be most reluctant to make such an order.

2.2 It needs to be emphasised that there is a whole spectrum of circumstances with which a court might be faced where it is said that difficulty might be encountered by a party in completing the sale of a contract for land. In many of the decided cases there was a legal impossibly in completion. A vendor might not have title. There would, in an ordinary case, be little point in making an order for specific performance against a vendor who did not have title although, in an appropriate case, (see *Mount Kennett Investment Ltd v. O'Mara* [2007] IEHC 420) a court may make an order for specific performance where it is satisfied that the vendor concerned has it within its power to cure any problem with its title.

2.3 Indeed *Mount Kennett* is an example of, perhaps, an intermediate case. On the facts of that case, Smyth J. was satisfied that the vendors concerned would be able to comply with their contractual obligations provided that they were prepared to offer a sufficient sum to buy in a freehold interest in the property in question sufficient to satisfy the Charity Commissioners as to the adequacy of the relevant consideration. In other words, the vendors could cure their title provided they were prepared to pay a sufficient sum of money to procure the relevant consent. In those circumstances specific performance was ordered. There will, therefore, be cases where, to a greater or lesser extent, there is a realistic possibility that a party may be able to complete the sale in question within a realistic timeframe. In those circumstances, a court may well consider that specific performance is appropriate on the understanding that if, despite best endeavours, it proves impossible to complete for whatever reason, then the court may be constrained to discharge the order of specific performance and direct that damages in lieu be assessed. At the other end of the spectrum there will be cases where, while there may be some technical difficulty in a defendant completing, the court is satisfied that any such difficulty can readily be overcome by the defendant concerned. In such circumstances, and in the absence of any good reason for not ordering specific performance, it would normally follow that the court would direct specific performance of the contract concerned.

2.4 It seems to me, however, that the only point in the court ordering specific performance is if there is some realistic possibility that the sale may complete. If there is no such realistic possibility, then the making of an order for specific performance will be in vain. It will inevitably be followed by a failure to comply and the matter will come back before the court. Provided that the court is satisfied that the failure to comply was not due to steps taken (or not taken) by the defendant concerned after the order for specific performance was made, it is difficult to see how the court could, in those circumstances, take any action other than to discharge the order of specific performance and award damages in lieu. Where a party is, in substance, in contempt of an order for specific performance the court has, of course, a wider range of options open to it, up to and including imprisonment. However, it hardly needs to be said that a court would not impose any such penal sanctions unless the relevant defendant was culpable in relation to a failure to comply with the order of the court.

2.5 It follows that, if it is obvious that there is no realistic possibility of the sale closing, a court should not, in the absence of highly unusual circumstances, order specific performance for in so doing nothing would be achieved. The ordering of specific performance will simply lead to a further hearing at which the order will be discharged and damages in lieu directed. Such would be a pointless exercise.

2.6 In setting out that principle, I should emphasise that in a case where there is some realistic prospect of the sale closing, the court can have regard to that fact and can, in an appropriate case, order specific performance within whatever timeframe might appear appropriate on the implicit understanding that, in the event that closure should prove impossible through no fault of the defendant concerned, it will follow that the order will be discharged. However, in such circumstances there would be some point in the exercise. It is possible that whatever problems may exist may be overcome. The relevant defendant will be obliged, on pain of being found in contempt, to try to overcome them. If they are overcome, then specific performance will be effective.

2.7 Against that general background, it is necessary to consider what the situation should be where the impossibility is said to flow from the impecuniosity of a purchaser. It is important that I should emphasise at this stage that the point currently under discussion concerns impossibility and not hardship. There may be circumstances (to which I will refer) where a court may decline to order specific performance because it would cause hardship. However, hardship is not the same thing as impossibility.

2.8 To take a simple example it is possible to envisage a person who entered into a contract to purchase an investment property for (say) €400,000 and where the current value of the property is only €200,000. If the same person owns their own home, which had been purchased sufficiently long ago that a significant equity (say €300,000) in favour of the owner remains in it, then it could not be said that the completion of the sale for the purchase of the investment property was impossible. It could be done. The person could sell their own home and move into the investment property, if necessary (if their equity in their own home was insufficient) by relying on some limited mortgage facility secured on the investment property to fill any shortfall. It might well be that imposing such a course

of action on the individual concerned might amount to a hardship and the court might have to consider whether, in all the circumstances, in exercise of the court's equitable jurisdiction, it was appropriate to impose such a course of action on the person concerned. However, the point to be made is that such a course of action would not be impossible. Provided an appropriate period of time was given to allow the original home to be sold, the sale could be closed and, therefore, completion would not be impossible.

2.9 However, the case which is made here is that completion is impossible although, as a fallback position, reliance is placed on the hardship jurisprudence. In order for a purchaser to be able to say that completion is impossible, it is necessary for such a purchaser to demonstrate that the purchaser has no realisable assets or borrowing capacity that could be brought to bear to pay the contracted purchase price.

2.10 I am satisfied that, as a matter of principle, where a purchaser demonstrates that fact, *i.e.* demonstrates that the purchaser concerned does not have the assets or borrowing capacity sufficient to allow them to purchase the property concerned at the contracted price, then a court should not make an order for specific performance for such an order would be in vain. Where the application of that test is in doubt (for example where it may be clear that the purchaser has some assets and/or some borrowing capacity or both but it may be open to doubt as to whether the combined effect of those assets and borrowing capacity is sufficient, then a different situation may arise where the court will need to consider whether, in all the circumstances, it would be appropriate to make an order for specific performance and thus impose an obligation on the relevant purchaser to use best endeavours to come up with the money, whether by the realisation of available assets or the raising of borrowing or both. While the established jurisprudence seems to be concerned with impossibility arising from title difficulty and the like, I am satisfied that impossibility arising from lack of funds on the part of a purchaser provides an equal reason for refusing specific performance. A decree of specific performance is no less in vain if it is made against a purchaser with no access to the necessary funds as if it is made against a vendor with no title. Equally just as a title problem that can (or may) be solved is no barrier, a lack of funds that can be remedied will also not be a barrier.

2.11 It should also be noted that each of the defendants argued that the Court should exercise its discretion to refuse specific performance on the grounds of alleged delay on the part of Aranbel in issuing proceedings. In the first two cases, where Stephen Darcy and Linda Crampton, and Richard Darcy and Mary Darcy are respectively the defendants, the defendants' solicitors wrote to Aranbel's solicitors on 27th September, 2007, stating as follows:-

> "We regret that our clients above named are unable to continue with the purchase of the above matter. They realise that they will forfeit their deposit and may be sued for breach of contract however they are prepared to put their case to the court due to dreadful financial difficulties."

Those defendants point to the fact that proceedings were not issued by Aranbel until 28th October, 2008. In the case where Seamus and Audrey McGivern are the defendants, Aranbel served a completion notice on the defendants' solicitors on 10th October, 2007 and proceedings were issued by Aranbel on 28th October, 2008. Correspondence between the parties continued through the later months of 2007 and into early 2008.

2.12 Each of the defendants argued that the fact that the property market and the economy generally was falling so dramatically at that time meant that the value of the relevant apartment, the prospect of the respective defendants obtaining finance to comply with any order for specific performance and the prospect of selling the apartments diminished as Aranbel delayed. Aranbel asserted that at no time did it engage in any act or make any representation which could have lead the defendants to reasonably believe that Aranbel considered the deal to be at an end.

2.13 As a general principle a plaintiff who delays unreasonably in bringing proceedings may fail to obtain specific performance where, by reason of the delay, it would be inequitable to grant the relief. Delay alone may be insufficient and it will usually be necessary to show circumstances which, when considered in conjunction with the delay, would render unjust the granting of specific performance. Aranbel asserted that such special circumstances are not present in these proceedings. It is also, of course, the case that damages may remain open as a remedy to a plaintiff even where delay has been held to preclude specific performance. See for example *Lark Developments Ltd v. Dublin Corporation* (Unreported, High Court, Murphy J., 10th February, 1993).

2.14 Against that general background, it is necessary to turn to the facts of the case. However, before so doing it is necessary to say something briefly about the procedural history of these proceedings insofar as same is still material to the issues which I have to decide.

3. Procedural History

3.1 In each of the three cases Aranbel brought the proceedings in October, 2008 and subsequently filed a statement of claim. No defence having been filed, a motion for judgment in default was brought. When the motion for judgment came before the court (Gilligan J.), it was indicated on behalf of each of the defendants that it was not intended to defend the proceedings as such but rather that it was intended to make the argument that damages in lieu were a more appropriate remedy than specific performance because of the impossibility argument to which I have already referred. The matter was part heard before Gilligan J., who directed that further evidence concerning each of the defendants' financial means should be put before the court. This was done, although Aranbel raises at least some questions about the adequacy of the information made available. When the matter was ready to be listed again, Gilligan J. was unavailable and it fell to me to consider the case.

3.2 It may well be that, strictly speaking, the proper course of action to have adopted would have been to have required each of the defendants to put in a defence which admitted liability on the relevant contract but which raised the question of the appropriate remedy. However, for entirely understandable reasons the defendants wished to minimise the costs of these proceedings and Aranbel was happy to go along with the suggestion that the question of whether specific performance or, in the alternative, damages in lieu, should be awarded, could be dealt with in the context of the motion for judgment. Thus, as a matter of procedure, I am currently considering a motion for judgment on the part of Aranbel in each of the three cases, in which the only issue raised on behalf of the respective defendants is that damages in lieu rather than specific performance should be ordered, and where Aranbel has agreed that that issue can be definitively determined within the confines of the relevant motion.

3.3 Finally, before going on to consider the separate circumstances of each of the relevant sets of defendants, it is important to note that what was filed in each case were affidavits, replying affidavits, and statements of assets and income prepared by a person with financial expertise. There are similarities between the cases. Indeed, the three sets of defendants are themselves connected. However, the case in which Stephen Darcy and Linda Crampton are defendants is one where the current financial circumstances of those defendants are at least as positive as in the other two cases. In those circumstances, it is appropriate to turn first to case 2008/8805 P in which those parties are the defendants.

4. The Darcy and Crampton Case

4.1 A report on the financial affairs of these parties was prepared by a Michael Simon, who is a tax consultant and a member of the Irish Taxation Institute. While, as I understand it, Gilligan J. directed that reports from accountants be filed, I am not satisfied that anything turns on the question of Mr. Simon's qualifications. That report sets out what is said to be a statement of affairs as of the 30th September, 2009. The relevant family home is stated to have a value, net of mortgage, of €229,900. There follows a listing of a series of investment properties, all but one of which are owned as to 50% by Stephen Darcy and Linda Crampton with the other 50% being owned by Richard and Mary Darcy, the defendants to proceedings 2008/8807 P. On the basis of the statement of affairs, the investment properties are said to have a net deficit of €159,484.

4.2 Taking that statement of affairs at face value, it would appear that Stephen Darcy and Linda Crampton have net assets of just over €70,000.

4.3 A series of questions concerning the various properties identified in the statement of affairs was raised by solicitors on behalf of Aranbel. Answers were given to many of the queries raised, although complaint is made on behalf of Aranbel that not all information requested was supplied. While the principal component of the statement of affairs is the value of the relevant properties, no formal vouching or evidence as to those values is supplied. On the other hand, detailed replies were given as to the time and price of purchase of each of the properties concerned. In that context, the valuations do not seem unreasonable. To take one example, an investment property at 75 Woodlands Green, Arklow is included in the statement of affairs. In a letter of reply of the 2nd December, 2009, solicitors for certain of the defendants indicated that that property was purchased in 2003 at an original cost of €163,000 with a 100% mortgage in the same sum. It is also indicated that there was a re-mortgage of the property concerned in 2006 for the purposes of releasing equity in order to purchase another property. The mortgage is now said to stand at €190,644. On that basis, and in the light of the fact that Stephen Darcy and Linda Crampton own 50% of the property, the liabilities in the statement of affairs in respect of that property are put in at €95,322. The property (or more accurately 50% of it) is said to be worth €90,000, which would value the property as a whole at €180,000. In the light of a purchase in 2003 at €163,000, that estimate does not seem unreasonable. Indeed, it may well be generous.

4.4 I am, therefore, satisfied that the statement of affairs represents a broadly accurate account of the net worth of Stephen Darcy and Linda Crampton as of September of last year. It should also be noted that, in general terms, all of the publicly available information suggests that property prices have continued to fall since that time by a cumulative figure of the order of 10%. In addition, the realisation of any assets would almost invariably give rise to transaction costs.

4.5 The only complicating factor is the fact that there is a significant net equity in the family home. Even allowing for transaction costs and a further diminution in the value of the family home, it seems likely that a net sum of at least €150,000, if not €175,000, could be generated by the sale of the family home. The purchase price of the apartment in question was €360,000 of which €36,300 was paid by way of deposit. The balance outstanding is, therefore, €326,700 but it is also said that interest to a sum in excess of €33,000 was outstanding as of the date of the statement of claim. Doubtless that figure has increased significantly since. It seems, therefore, that in order to close in accordance with the relevant contract, Stephen Darcy and Linda Crampton would almost certainly now have to pay a sum of the order of €400,000. Thus, even if their family home were to be sold and it were possible to apply the entire proceeds towards a purchase of the property in question, borrowing finance of somewhere between €225,000 and €250,000 would be required in order to meet the sum that would need to be handed over on closing. In the light of the fact that the property must now be worth significantly less than the original contract price of €360,000, and in the current mortgage climate, I do not believe there is any realistic possibility that Stephen Darcy and Linda Crampton could arrange such borrowing. Even on the basis of a drop of 33% in value, a 100% mortgage would be required. Such mortgages are, for good reason, no longer available. In addition, the income of Stephen Darcy and Linda Crampton is not such that other significant borrowings could be secured or sustained. I am, therefore, satisfied that there is no realistic possibility of Stephen Darcy and Linda Crampton being a position to complete the contract in question, and it follows that specific performance would not be appropriate.

4.6 Having analysed that case in some detail, it is possible to deal more shortly with the other two cases.

5. The Other Cases and some General Comments

5.1 It is clear on any view that the situation of the defendants in the other two cases is, if anything, less favourable than that which pertained in the case of Stephen Darcy and Linda Crampton. I cannot, therefore, see any basis for taking a different overall view in those cases than the one which I have already identified as being appropriate to the case of Stephen Darcy and Linda Crampton.

5.2 However, a number of general points do require some attention. The first is the onus of proof. Where a party contends that they are unable to complete a contract for financial reasons and wishes to resist an order for specific performance on the basis of impossibility, then it seems to me to be clear that the onus of proof rests on that party to establish their inability to complete. It should be emphasised that inability to complete is not the same thing as inability to complete in the way originally intended. It may well be that a party originally intended to fund a purchase of a property by borrowing (perhaps even 100% borrowing). The mere fact that borrowing on the scale originally contemplated is no longer available is not the end of the matter. As pointed out earlier, a party who has sufficient assets which are capable of being realised (even if it be a family home) and some sufficient borrowing capacity cannot say that completion is impossible.

5.3 In addition, as the onus of proof rests upon the party pleading impossibility by impecuniosity, it follows that that party must put before the court all reasonable evidence necessary to allow the court to assess whether there is a true case of impossibility. While I am not satisfied on the facts of these cases that there was any inappropriate failure on the part of the respective defendants to provide information (and in particular no suggestion was made that Seamus McGivern and Audrey McGivern were deficient in any respect in the provision of information), nonetheless it does need to be emphasised that the onus of proof rests on the person asserting impossibility and with that onus of proof comes an obligation to be particularly forthcoming in relation to their financial affairs.

5.4 In addition, it is necessary to comment on the circumstances that arose in case 2008/8806P in which Seamus and Audrey McGivern are the defendants. On the evidence it would appear that, at a time after completion was due in respect of the property in question in that case, the relevant defendants came into some property by inheritance. It would also appear that, at the same time, those defendants were embarked on an extension to their own family home, and that much of the inheritance found its way into discharging liabilities to builders in those circumstances. However, irrespective of the precise rights and wrongs of what occurred, it seems to me that an order for specific performance needs to be considered as of the date when the court is invited to make the order concerned. Even if a party had wrongfully put itself in a position where it cannot complete, it does not seem to me that the court should order specific performance in those circumstances for it will remain an order in vain, irrespective of how blameworthy the relevant party may have been in creating the situation which renders it in vain.

5.5 There may be other remedies that might be available to an aggrieved plaintiff in those circumstances. However, specific

performance would not seem to me to be one of them. Likewise, the actions of a party in the period between the time when the contract ought to have completed and the time when specific performance comes to be considered by the court, might be very relevant in a case of hardship rather than a case of impossibility. I will shortly turn to the fallback hardship argument made on behalf of the defendants in these proceedings. It might well be that in many cases a court would be reluctant to require a party to sell a family home in order to complete a contract for the purchase of an investment property (although each case will, of course, turn on all of its own facts). However, a significant factor in viewing the competing equities of a situation in which a party relies on hardship (rather than an impossibility) may be the extent to which the relevant party may have affected his or her own position in the period between the completion date and the time when the court has to consider an appropriate order. For example, a case in which the court was satisfied that a party could complete by selling a family home is not a case of impossibility, although it may very well be a case where the court would have to give very careful consideration to an argument based on hardship. Even if a court were minded, in general, to decline specific performance in such circumstances, based on a hardship argument, it might well be that different considerations would apply if the relevant party would have been in a position to complete without selling the family home but chose to deal with their assets in a way which now placed those assets in a position where they were no longer available to assist in completion.

5.6 Next, it is necessary to say something about hardship. For the reasons which I have sought to analyse, I am satisfied that these cases fall into the impossibility category and that the question of hardship does not, therefore, arise. I would wish to defer to a future, more suitable case, in which the issue was determinative, any definitive ruling on the way in which the hardship jurisprudence might be said to apply in cases where a defendant purchaser could complete, but only by disposing of assets such as a family home or business assets which action would have significant practical consequences. There would be an obvious reluctance on the part of a court to require such a course of action. On the other hand, the court also has to take into account the fact that an inevitable consequence of the court not ordering specific performance is that an award in damages would be likely to be made which damages will, of course, ultimately be able to be charged on any relevant property of the defendant concerned. It seems to me that it is likely that any such case would require careful analysis to ascertain the consequences of an award of damages; for the relevant defendant may be equally badly off as a result of a significant award of damages as from a decree of specific performance, particularly if a reasonable period of time was afforded for completion.

5.7 Also, if I had been satisfied that specific performance was otherwise appropriate I would not have considered delay to be a bar in this case. Correspondence continued to six months or so before proceedings issued and nothing done or not done in that period could have reasonably left any of the defendants with a legitimate view that the matter was not to be proceeded with.

6. Conclusions

6.1 For the reasons which I have sought to analyse, I am satisfied that completion by each of the sets of defendants in these proceedings would be impossible for those defendants do not have available assets or borrowing capacity which would enable them to pay the sums contracted for.

6.2 In those circumstances, it seems to me that making an award of specific performance would be in vain and that the Court should not, therefore, make such an order.

6.3 It follows that Aranbel is entitled to an award of damages in lieu of specific performance (there being no other defence) and I will hear counsel as to the manner in which these proceedings should now progress.