

THE HIGH COURT

COMMERCIAL

[2018 No. 370 SP]

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF OLIVER MURPHY OBIT 31st DAY OF MAY 2016

AND IN THE MATTER OF THE CONSTRUCTION OF A CONTRACT MADE 1st DAY OF JUNE 2005

AND IN THE MATTER OF THE ENFORCEMENT OF A LIEN

AND IN THE MATTER OF THE PRIORITY OF ENCUMBRANCES

BETWEEN

KIERAN KELLY AND ANTHONY MULDERRY

PLAINTIFFS

AND

EAMON ROGERS, SEAMUS ROGERS AND LGSM VENTURES LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of December, 2018.

Summary – does alleged unpaid vendor's lien defeat lender's security?

1. This is a case concerning a contract dated 1st June, 2005 (the "Contract") for the sale of a 50% interest in 90 acres of development land at Moygaddy in Maynooth, County Meath (the "Lands") by Mr. Oliver Murphy ("Mr. Murphy"), who died on the 31st May, 2016, to the first and second named defendants, Mr. Eamon Rogers and Mr. Seamus Rogers (the "Rogers"), two building contractors, both with addresses in County Louth. The 50% interest was duly transferred to the Rogers and they were each registered as owners of a 25% interest in the Lands in the Land Registry on the 19th March, 2009
 2. This 50% interest is now worth in the region of €3.5 million according to the plaintiffs in this action. The plaintiffs are Mr. Kieran Kelly, a solicitor and Mr. Anthony Mulderry, a corporate finance consultant, and they are taking these proceedings in their capacity as the executors of Mr. Murphy's estate.
 3. The Rogers borrowed money from Irish Nationwide Building Society to finance the purchase of the 50% interest in the Lands. This loan was subsequently transferred to National Asset Loan Management Limited ("NAMA") and NAMA registered a judgment mortgage against the Rogers' interest in the Lands on 22nd January, 2015. This judgment mortgage was acquired by the third named defendant, LGSM Venture Limited ("LGSM") on 4th April, 2018.
 4. Although Mr. Murphy received €15 million under the Contract for the transfer of his 50% interest in the Lands to the Rogers, Mr. Murphy's executors, the plaintiffs, say that they are owed a further €5.4 million by the Rogers under the terms of the Contract. However, more importantly, the plaintiffs say that, because of this claim for €5.4 million, they have an unpaid vendor's lien over the Lands for the purchase money they say they are owed by the Rogers, which vendor's lien, they say, takes priority over LGSM's judgment mortgage.
 5. If this Court agrees that the plaintiffs have such a vendor's lien, the plaintiffs want a declaration to that effect and a declaration that the lien takes priority over LGSM's judgment mortgage. The plaintiffs also seek an order for the sale of the Lands to allow them recoup the €5.4 million which they say they are owed by the Rogers. Since the 50% interest of the Rogers in the Lands is said to be worth €3.5 million and thus less than the €5.4 million owed to the plaintiffs, if this sale occurs this will see LGSM receive nothing in respect of the loan taken out by the Rogers to acquire the Lands, which was acquired by LGSM.
 6. The essence therefore of this litigation is that the plaintiffs wish to establish that they have a vendor's lien over the Lands and thereby defeat a charge over the Lands which was registered by NAMA as security for the Rogers' borrowings, but has since been acquired by LGSM.
 7. When these proceedings were in court on 22nd October, 2018, counsel for the plaintiffs advised Haughton J. that the Rogers consented to judgment and to the orders being sought by the plaintiffs in these proceedings regarding the existence of the unpaid vendor's lien and the sale of the Lands. In this regard, LGSM alleges that there is collusion between the Rogers and the plaintiffs to ensure that LGSM's security claims are defeated and if these proceedings are successful LGSM claims that the Rogers will be looked after by the estate of Mr. Murphy. This therefore is the background to the dispute between the parties.
- Co-ownership agreement rather than outright sale**
8. The argument that the plaintiffs have an unpaid vendor's lien over the property, notwithstanding the fact that Mr. Murphy received €15 million for the sale of the 50% interest in the Lands arises from the nature of the Contract.
 9. When Mr. Murphy sold half of the Lands to the Rogers, he did not, as might be more common, sell 45 of the 90 acres to them, rather he sold them a 50% interest in the 90 acres of Lands (the "Transferred Share"), while Mr. Murphy retained the other 50% interest in the 90 acres (the "Retained Share"). This meant that by signing the Contract, the Rogers were entering a co-ownership arrangement with Mr. Murphy. The three co-owners were duly registered in the Land Registry on the 19th March, 2009 as tenants in common, with Mr. Murphy stated as being *'the full owner as tenant-in-common of 1 undivided ½ share(s)'*, Mr. Eamon Rogers stated to be *'the full owner as tenant-in-common of 1 undivided ¼ share(s)'* and Mr. Seamus Rogers stated to be *'the full owner as tenant-in-common of 1 undivided ¼ share(s)'*.
 10. Although not unprecedented, the foregoing arrangement is not the typical manner in which people buy land. This is because if the Rogers wanted to sell the interest in the lands they had acquired, any purchaser would not be buying 45 acres of land that he/she could sell on, but rather he/she would be buying a 50% share of 90 acres, with Mr. Murphy owning the other 50%. Thus, that prospective purchaser would be buying into what was essentially a co-ownership structure with Mr. Murphy. In this regard, the Court was referred, by counsel for the plaintiffs, to a Co-ownership Agreement between the Rogers and Mr. Murphy, which appears to have

been drafted with the intention of governing the co-ownership between the parties. However, the document produced in evidence was not signed by the parties.

11. The fact that this arrangement was not a typical sale of land is also highlighted by Condition 6 of the Contract. Insofar as relevant, this states:

"Consideration:

(a) On the date which is fourteen days after the date hereof, [the Rogers] shall pay to [Mr. Murphy] the sum of €15m (Fifteen Million Euro) (the "Downpayment") in consideration of which [Mr. Murphy] shall transfer one undivided half-share in the Subject Property to the Purchaser to be held by the Purchaser and [Mr. Murphy] (who shall retain the other undivided half-share) as tenants-in-common.

(b) If all or part of the Lands are Rezoned within ten (10) years from this date of the Contract, [the Rogers] agrees to pay additional consideration (the "Top-Up") to [Mr. Murphy], calculated at the rate of €1,000,000 (One Million Euro) in respect of each statute acre of the Lands which is Rezoned as Medium Density Residential (as hereinafter defined) and €800,000 (eight hundred thousand euro) in respect of each statute acre which is Rezoned as Low Density Residential (as hereinafter defined) less (in the aggregate) the amount of the Downpayment. Sixty-six percent (66%) of such Top-Up (the "First Instalment") payment shall be paid by [the Rogers] to the [Mr. Murphy] on the date which is 12 months after the date upon which Rezoning occurs and takes legal effect and the balance thirty-four percent (34%) (the "Second Instalment") shall be paid on the date which is 12 months thereafter. Each Second Instalment payment date shall be treated as a "Closing Date" for the purpose of Special Conditions 40 and 41.

(c) It is acknowledged that no Top-Up shall be payable by [the Rogers] to [Mr. Murphy] in respect of any Rezoning which occurs after the date which is 10 years following the date of the Contract (the "Long Stop Date"). As and from the Long Stop Date, [Mr. Murphy] and [the Rogers] shall (subject to Special Condition 6(b)) hold the balance of the Lands (excluding the Retained Commercial Lands) which at the Long Stop Date are not Rezoned as tenants in common in equal shares, one undivided moiety being held by [the Rogers] and the other by [Mr. Murphy].

(d) Upon payment of the entire Top Up related to any Rezoning (and on the date of payment of the Second Instalment relative thereto), [Mr. Murphy] shall transfer the unencumbered freehold interest which he holds in respect of the relevant Rezoned portion of the Lands to [the Rogers] or its nominees. In addition, [Mr. Murphy] shall transfer the unencumbered freehold interest in such other parts of the Lands (as is required to provide access to and/or open space related to the Rezoned Lands) as may be clearly identified by the [the Rogers] and notified to [Mr. Murphy] on or before payment of the relevant First Instalment of the Top Up (over and above the amount of the Downpayment) and these lands shall be treated as Medium Density Residential Rezoned lands for the purposes of calculating the Top Up due on the relevant First Instalment and Second Instalment payment dated determined under Special Condition 6(b) above. Provided however that [the Rogers] shall be entitled when making payment of the Second Instalment of the first Top Up (over and above the amount of the Downpayment) to receive a transfer of up to two statute acres (without payment of Top Up payment to be made in respect of same) where such portion of the Lands is required to be used for the construction of a public road and/or for other non-beneficial uses of a permanent nature."

12. Under this condition therefore, the payment of €15 million under the Contract for the transfer of the 50% interest in the Lands was termed a 'Downpayment'. The Contract then provides for a possible future payment, which is termed a 'Top-Up' of an additional €1 million per acre (less the €15 million already paid) for those parts of the Lands rezoned as Medium Density Residential within 10 years of the date of the Contract. Of considerable significance is that, as can be seen from the foregoing terms of Condition 6(d), 'upon payment' of the Top-Up, Mr. Murphy was required to transfer the Retained Share to the Rogers and thus the transfer of the Retained Share is clearly part of the consideration for the payment of the Top-Up, as along with the rezoning of the Lands. The Top-Up could therefore be described as a payment in consideration for the possible future rezoning of the Lands within a 10 year time-frame combined with the transfer of the Retained Share.

Rezoning of the Lands led to additional money owed by the Rogers

13. As it transpired (as clarified more fully below) 18.07 acres of the Lands were rezoned, leading to a gross Top-Up of €18.07 million less the Down Payment of €15 million, i.e. a net Top-Up of €3.07 million plus interest, being payable under the Contract by the Rogers to the plaintiffs. Accordingly, the plaintiffs claim that they are now owed €3.07 million plus interest from the Rogers, giving a total of €5.4 million.

14. A summary of what happened therefore is that the Rogers, who were building contractors, paid €15 million to Mr. Murphy in 2005 for a 50% interest in 90 acres of agricultural land. However, under the terms of the Contract, they agreed that if the lands were rezoned for residential development within 10 years of the Contract, they would pay an additional sum, which under the terms of the Contract ended up being a figure of €3.07 million plus interest, in return for which they also became entitled to the transfer from Mr. Murphy of the remaining 50% interest in the 90 acres. That was the deal that was entered into by Mr. Murphy and the Rogers on the 1st June, 2005. It is important to note however that the remaining 50% interest retained by Mr. Murphy was never transferred to the Rogers. Nonetheless for the reasons set out below, the plaintiffs are claiming that they are owed the Top-Up of €5.4 million and have an unpaid vendor's lien in respect thereof which they say defeats LGSM's judgment mortgage.

15. It is relevant to note that the Lands were rezoned in April 2009 but this rezoning was initially disputed by the Rogers. This led to the operation of a dispute resolution mechanism under the Contract which led to a binding expert determination by Dermot Flanagan S.C. to the effect that there had in fact been a rezoning of the Lands. This was followed by an Area Certificate issued by Land Surveys (Lynwood) Ltd to the effect that 18.07 acres of land were rezoned, which was not challenged by the Rogers. This led to the sum of €3.07 million plus interest (a total of €5.4 million) being claimed by Mr. Murphy's estate from the Rogers. Eventually this led to the Rogers consenting to the orders being sought by the plaintiffs in the present proceedings, which happened when this matter appeared before Haughton J. on the 22nd October, 2018.

Does a vendor's lien apply to defeat LGSM's security?

16. The essence of the plaintiffs' claim now is that they are owed €5.4 million by the Rogers under the Contract arising from the rezoning of the Lands and they wish to sell the Lands jointly owned by the Rogers and the plaintiffs, so as to recover as much of that €5.4 million as they can from the proceeds of the sale of the Lands. They say that, as they have an offer of €7 million for the Lands, and as the Rogers' 50% share is only worth €3.5 million, they will not recover the full amount owed by the Rogers. Of course this also means that there would be nothing left over for LGSM in respect of the loan taken out by the Rogers to pay €15 million for the Lands, which loan was acquired by LGSM.

17. The plaintiffs say they are entitled to seek this sale because they have an unpaid vendor's lien over the Lands in respect of what they say is the unpaid Top-Up which they say is the purchase price for the Transferred Share which Mr. Murphy transferred to the Rogers. Most significantly, they say that this vendor's lien takes priority over the judgment mortgage held by LGSM.

18. They argue that the vendor's lien arises because Mr. Murphy entered into the Contract for the sale of the Transferred Share and that the purchase price for that Transferred Share was the sum of €15 million, with the possibility of an uplift of €3.07 million plus interest if the Lands were rezoned, which they were in April 2009, and that as and from April 2009 Mr. Murphy, and on his death, his executors, the plaintiffs, became entitled to this unpaid vendor's lien. It is this alleged unpaid vendor's lien which they wish to enforce in priority to LGSM's judgment mortgage.

Whether plaintiffs have an unpaid vendor's lien at all?

19. The law on a vendor's lien for unpaid purchase monies is summarised in *Wylie and Woods, Irish Conveyancing Law* (2005, 3rd ed.) at para. 12.15 as follows:

"Where the vendor has retained possession, he has a common law lien, i.e., the right to retain possession until the debt is paid, but not the right to sell or otherwise deal with the property in discharge of the debt. If he has parted with possession he still has an equitable lien on the land, i.e., an equitable charge which entitles him to apply to the court for an order of sale of the land in discharge of his debt out of the proceeds of sale."

20. It is clear therefore that an equitable lien on the part of an unpaid vendor arises where the vendor has parted with possession of property and has not received full consideration for the sale of the property. However, it is this Court's view that on any reading of the Contract entered into between the Rogers and Mr. Murphy, and in particular Condition 6, what occurred in this case was not the calculation of a purchase price to be paid for the Transferred Share which was duly transferred under that Contract, but rather it was a co-ownership agreement which was to last for 10 years which provided for a *possible* future payment of money, the Top-Up. The consideration for the payment of the Top-Up was the rezoning of the Lands, *if* that occurred within 10 years of the date of the Contract and crucially also part of the consideration was the transfer of Mr. Murphy's Retained Share. However, as previously noted the Retained Share was never transferred to the Rogers.

21. If the Retained Share had been transferred by Mr. Murphy to the Rogers then it seems clear that the plaintiffs would have an equitable lien over the Lands, since this Court would then be dealing with a situation where a vendor (Mr. Murphy) had transferred an interest in lands (the Retained Share) but had not been paid (the Top-Up) for that interest in lands.

22. What actually occurred under the Contract is that Mr. Murphy was paid €15 million for lands (the Transferred Share) which he did transfer to the Rogers and an equitable lien cannot arise where lands have been transferred and the purchase monies have been paid for those lands.

23. However, the plaintiffs sought to characterise the payment of the Top-Up as being part of the purchase price for the Transferred Share. In this way, the plaintiffs claimed that they are unpaid vendors in respect of this 'part' of the purchase price for the Transferred Share which clearly Mr. Murphy did transfer to the Rogers.

24. This is not accepted by this Court as, has been illustrated, the very essence of Condition 6 is a *possible* future transfer of money to reflect the uplift in the value of the Lands *combined with* the future transfer of the Retained Share. This is the essence of Condition 6, and not a calculation of the purchase price for the Transferred Share under the Contract.

25. Quite apart from the clear wording of Condition 6 which supports this conclusion, further support is provided by s. 44(1) of the Stamp Duties Consolidation Act, 1999. This section deals with a situation which the plaintiffs say occurred, i.e. where the consideration for the transfer of land is unascertained. On the plaintiffs' version of events, the consideration for the transfer of the Transferred Share could not be ascertained at the time of the transfer since the plaintiffs allege it amounted, not just to €15 million but also to then unascertained amount of money to be paid in the future (the Top-Up). The section states:

"(1) Where the consideration for a sale cannot be ascertained at the date of execution of a conveyance and such consideration would, if ascertainable, be chargeable with ad valorem duty in respect of such sale, then stamp duty shall be charged on such sale based on the amount or value of the consideration that could be obtained from a purchaser paying full consideration for such sale."

26. It is significant that the plaintiffs are seeking to establish that the purchase price for the Transferred Share consisted not just of the €15 million but also the Top-Up payment, yet in support of their argument that an unpaid vendor's lien exists, they provided no evidence to the Court that Mr. Murphy had stamped the conveyance of the Transferred Share at a consideration which was greater than €15 million, i.e. of an amount that included the Top-Up payment.

27. It seems clear to this Court that the consideration for the Top-Up payment was not the transfer of the Transferred Share, as alleged by the plaintiffs, which it would have to be for the equitable lien to arise, but rather it was the rezoning of some 18 acres of the Lands combined with the transfer of the Retained Share of the Lands. Since the transfer of the Retained Share to the Rogers never occurred, it seems clear to this Court that the plaintiffs cannot claim that they have an unpaid vendor's lien in respect of the Top-Up payment. This is because it is an essential condition for there to be an unpaid vendor's lien that there be a transfer of the land to which the payment relates, i.e. the Retained Share, and there was no such transfer in this instance.

28. Although not determinative in this Court's decision, in passing this Court notes that if the Rogers had not consented to the orders being sought in these proceedings, the plaintiffs might have had trouble establishing that all or any of the Top-Up is due from the Rogers, since part of the consideration for this Top-Up was the transfer by the plaintiffs/Mr. Murphy of the Retained Share to the Rogers, yet this never occurred.

29. It is also relevant to note that the plaintiffs sought to argue that their claim for an unpaid vendor's lien in the circumstances of this case was something of a hybrid between an equitable lien, where possession of the land is parted with, and a legal lien, where a vendor retains possession of the land in question, which he is entitled to retain until payment of the purchase price is paid.

30. No authority for such hybrid lien was opened to the Court and this Court cannot see how the application of a common law lien or a combination of a common law lien and equitable lien assists the plaintiffs. This is because for the reasons set out above this Court rejects the notion that the plaintiffs have an equitable lien, namely that the Retained Share, to which the Top-Up clearly relates under the terms of Condition 6, was *not* transferred to the Rogers. Equally, a common law lien simply means that until the plaintiffs receive the Top Up from the Rogers, they are entitled to retain possession of the Retained Share. Yet the plaintiffs entitlement to

retain possession of the Retained Share is not in dispute between the parties since LGSM's mortgage is registered only against the Transferred Share and the plaintiffs are entitled to do what they wish with the Retained Share. This court rejects therefore the suggestion by the plaintiffs that this case falls within the circumstances of some kind of hybrid equitable/legal vendor's lien for unpaid purchase money.

Conclusion

31. For the reasons set out above, this Court concludes that the plaintiffs are not entitled to an unpaid vendor's lien over the 50% interest in the Lands which were transferred to the Rogers. Counsel for the plaintiffs has conceded that in the event of such a finding, that this is the end of the case.