Neutral Citation Number: [2010] IEHC 293

THE HIGH COURT

2006 1286 P

BETWEEN

GERALD McKENNY

PLAINTIFF

AND

ALEX MARTIN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 19th day of May, 2010.

Representation of the parties

1. Like too many matters which have come before this Court in recent times, the trial of this action, which was heard on 11th May, 2010, was played out in a most unsatisfactory fashion, because, after the action had been set down for trial by the defendant's solicitors, the solicitors who had been on record for the plaintiff had been allowed by the Court to come off record. Therefore, the plaintiff, Mr. McKenny, appeared in person on 11th May, 2010. The defendant, Mr. Martin, was represented by a solicitor and counsel. Because of those circumstances, in this judgment I propose to outline the relevant facts and principles and to set out my decision in terms which I hope a lay litigant can understand.

Procedural application

2. The proceedings have been ongoing since the 21st March, 2006, when the plaintiff's solicitors issued the plenary summons herein claiming specific performance of a contract for the sale of a site. The statement of claim was delivered on 18th July, 2006 and the defence was delivered on 5th September, 2006. I mention those procedural matters, because, when the action came on for hearing on 11th May, 2010, there was before the Court a motion, which issued on 6th May, 2010, in which the defendant sought an order deeming good service of a counter-claim which was "served" on the plaintiff's solicitors on the 28th March, 2007.

3. The position in relation to that motion is that, the defendant's solicitors having sent the counter-claim document by letter to the plaintiff's solicitors nine months after the defence was delivered, the plaintiff's solicitors responded promptly on 29th March, 2007 stating that they were taking their client's instructions in relation to it. The matter was not pursued at that stage, notwithstanding that a motion was brought before this Court in January 2007 for an order vacating a *lis pendens* which had been registered by the plaintiff. That motion was subsequently amended in May 2007 to include an application for an order striking out the plaintiff's claim on the grounds that it was frivolous or vexatious or that it must fail. The motion was heard on 6th June, 2007. An order was made on that day which preserved the *lis pendens* in relation to the site the subject of the contract between Mr. McKenny and Mr. Martin and refused the application to dismiss.

4. The matter of the counter-claim was not raised again by the defendant's solicitors until January 2009, when they wrote to the plaintiff's solicitors indicating that they would rely on Order 28, rule 12 of the Rules of the Superior Courts and would make an application at the hearing for an order pursuant to that rule. If I may say so, it was a bit presumptuous of the defendant's solicitors to assume that the Court would allow an amendment to a pleading on foot of a motion which issued less than a week before the listed hearing date. The fact that the defendant's solicitors were aware for three months that the plaintiff was not legally represented compounded matters. In my view, the defendant's solicitor's application was much too late and it would have been unfair and unjust to the plaintiff to accede to it. It was refused.

5. I will turn now to the substantive issues in the proceedings.

The substantive proceedings

6. Mr. Martin is the owner of land at Reaghstown, Ardee, County Louth which is registered on Folio 12593F of the Register of Freeholders, County Louth. It is common case that before July 2002 he did a deal with Mr. McKenny, who is a builder, to sell a site off those lands comprising 0.331 hectares to Mr. McKenny at the price of €38,092.14. The deal was a very unusual deal, in that it was agreed that a deposit of €31,743.45 would be paid by Mr. McKenny to Mr. Martin under the contract and that the deposit would be released to Mr. Martin, who needed the funds. The deposit represented, on my mathematics, over 83% of the purchase price.

7. On 29th July, 2002, Mr. Martin's solicitors, Richard H. McDonnell, sent contracts to Mr. McKenny's solicitors. Mr. John Mulvihill was the solicitor in the firm of Richard H. McDonnell dealing with the transaction. He testified at the hearing, although the firm of Richard H. McDonnell did not act for Mr. Martin in these proceedings.

8. The contract was in the standard form conditions of sale published by the Incorporated Law Society (2001 Ed.). The important provisions, for present purposes, are three of the special conditions.

9. Special condition 4 as it originally appeared in the contract provided:

> "The sale is subject to the purchaser applying for and obtaining a grant of outline planning permission for the erection of one dwelling house on the site within a period of six weeks from the 19th June, 2002 or such extended period thereof as may be agreed between the parties provided that in the event of the grant of outline planning permission not issuing within the aforesaid period or such extension thereof as may be agreed [between] the parties, then this contract shall be rescinded in which event the purchaser shall be entitled to return of his deposit without interest, costs or compensation."

Mr. McKenny's solicitors made three amendments to special condition 4. First, they deleted the word "outline" where it appeared, so that the condition, as amended, made the contract subject to Mr. McKenny obtaining full planning permission. Secondly, they changed the period of "six weeks" to three months. Thirdly, they changed the commencement of that period from 19th June, 2002 to 1st August, 2002. In the light of what happened immediately after the contract was returned by Mr. McKenny's solicitors and, in

particular, the fact that, at the request of Mr. Martin, the deposit was released to him, there can be no doubt but that Mr. Martin accepted those amendments and the amendment to special condition 10 referred to later. Having said that, in my view, the most important element in special condition 4 was the fact that the period within which planning permission was to be obtained was subject to "such extension thereof as may be agreed between the parties". Special condition 4 was clearly for the benefit of the purchaser, Mr. McKenny.

10. Special condition 8 provided:

> "The purchaser agrees that the deposit in the sum of €31,743.45 shall be [released] to the purchaser immediately upon the exchange of contracts herein."

That special condition came after special condition 5, which provided that no contract "shall be deemed to be in existence until such time as the same has been signed and exchanged and full deposit specified paid". I will return to that provision later.

11. Special condition 10, as drafted by Mr. Martin's solicitors, provided that the sale should be completed on 9th August, 2002. However, that special condition was amended by the solicitors for Mr. McKenny to provide that the sale was to be completed "seven days after the issue of formal grant of planning permission".

12. Mr. McKenny signed the contract in duplicate. He furnished the deposit of €31, 743.45, which he drew down from the Credit Union, to his solicitors. Both parts of the signed contract together with the deposit were returned by Mr. McKenny's solicitors to Mr. Martin's solicitors, who received them on 14th August, 2002. Mr. Mulvihill testified that he contacted his opposite number in the office of Mr. McKenny's solicitors seeking permission to release the deposit to Mr. Martin. He got that permission. He sent the deposit cheque to Mr. Martin's bank with Mr. Martin's consent. Accordingly, Mr. Martin had 83% of the agreed purchase price from mid-August 2002.

13. While Mr. Martin never signed the contract and one part thereof signed by Mr. Martin was not returned to Mr. McKenny's solicitors, as is the usual practice, I am satisfied that the agreement in relation to the release of the deposit brought the contract into being, notwithstanding special condition 5. Although the case made in the defence is that there was no binding agreement, counsel for Mr. Martin acknowledged at the hearing of the action that there was a binding agreement in the terms of the contract. That was a realistic and a proper approach to adopt. I surmise that it was through oversight that Mr. Martin did not sign the contract. In any event, as Mr. Mulvihill testified, as late as 8th September, 2005, he notified Mr. McKenny's solicitors that Mr. Martin was prepared to proceed with the sale upon payment of the balance of the purchase money. At that stage replies to requisitions on title were furnished together with a draft statutory declaration for the purposes of the Family Home Protection Act 1976.

14. In the interim, Mr. McKenny had made three applications for planning permission. At the hearing Mr. McKenny alleged that Mr. Martin frustrated his attempts to get planning permission. It is specifically pleaded in the statement of claim that Mr. Martin caused his solicitors to write to the planning authority, Louth County Council, on 14th February, 2006 for the purposes of frustrating the grant of planning permission to Mr. McKenny. I find it unnecessary to make a finding on the allegation that Mr. Martin frustrated Mr. McKenny's attempts to get planning permission.

15. Insofar as I consider it relevant for present purposes, the planning history is as follows:

> (a) Mr. McKenny's first planning application in relation to the site was dated 31st October, 2002 (file No. 021336). That application was subsequently withdrawn.
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> (b) The second application was made on 31st July, 2003 (file No. 031030). On 13th October, 2003 Louth County Council issued a notification of decision to refuse that application on the ground that the proposed development (a dormer dwelling house with waste water treatment plant) would be prejudicial to public health, as Mr. McKenny had not demonstrated that the site was suitable for a waste water treatment system and details had not been submitted of associated excavation and mounding works required.
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> (c) The third planning application was made on 29th August, 2005. It is clear from the correspondence from Mr. Martin's solicitors to Mr. McKenny's solicitors that, by early September 2005, Mr. Martin was aware that the third planning application had been submitted. It was ultimately refused, but the important point for present purposes is that it was still pending when Mr. Martin purported to withdraw from the contract, thus provoking these proceedings.

16. Mr. Martin's change of heart came about in early December 2005, just three months after he had instructed his solicitors that he would complete the deal. At that stage, Mr. Martin contacted Mr. Mulvihill and told him that it looked as if Mr. McKenny would get planning permission. He also told him that the site had trebled in value since the price payable under the contract was agreed and that he was seeking an additional sum of €30,000 (inclusive of the balance of €7,748.69 due on foot of the contract) to close. That proposition was put by Mr. Mulvihill to Mr. McKenny's solicitors in a letter of 20th December, 2008.

17. To say that Mr. McKenny was not best pleased by that suggestion is an understatement. I think Mr. Mulvihill stated that he was informed by Mr. McKenny's solicitor that he was "livid". In any event, things went from bad to worse, although not, I think, not due to the fault of Mr. McKenny or his solicitors. The chain of events was as follows:

> (1) In an letter of 8th February, 2006 Mr. McKenny's solicitors refuted Mr. Martin's solicitors' contention made earlier that there was no binding contract and pointed out that, not only had Mr. Martin acquiesced in the planning applications, but had received the deposit of in the region of €31,750 in part performance of the contract. It was also pointed out that Mr. McKenny had incurred expenditure in doing works to the site. Legal proceedings were threatened if the sale was not closed. It was made clear that, because the parties had been friends for a long time, Mr. McKenny was reluctant to bring proceedings, but he would do so if it was necessary.
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> (2) Mr. Martin's response, in his solicitor's letter of 14th February, 2006, was to state that "this transaction is at an end" and to return the sum of €31,743.45. At the same time, Mr. Martin's solicitors wrote to the planning section of Louth County Council stating that he had withdrawn from the sale of the site to Mr. McKenny.
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> (3) By letter dated 16th February, 2006 Mr. McKenny's solicitors returned the cheque for €31,743.45 and indicated that they were relying on the contract and on part performance and inquired whether Mr. Martin's solicitors had authority to accept service of proceedings.

(4) The response of Mr. Martin's solicitors, by letter of 23rd February, 2006, was that they had authority to accept proceedings. Once again, they sent the cheque for €31,743.45 to Mr. McKenny's solicitors, where it has remained uncashed to the present day.

As I stated at the outset, the proceedings were then commenced on 21st March, 2006.

18. The nub of Mr. McKenny's case for specific performance of the contract, as pleaded in the statement of claim, is that -

(1) there was a binding agreement between the parties,

(2) it was part performed by Mr. McKenny by the release of the bulk of the purchase money to Mr. Martin and his expenditure on the site in connection with his planning applications,

(3) Mr. McKenny fulfilled his obligations under the agreement and was ready, willing and able to perform all his obligations thereunder, and

(4) Mr. Martin, to use legal terminology, wrongfully repudiated the agreement in refusing to complete the sale.

19. Although the primary position adopted by Mr. Martin in his defence was that there was no binding agreement, as I have already indicated, the position adopted by counsel for Mr. Martin at the hearing was to accept that there was a binding agreement. However, the case made on behalf of Mr. Martin was that the contract, as provided for in special condition 4, was subject to planning permission, that Mr. Martin had afforded Mr. McKenny every opportunity to seek planning permission and had acted more than reasonably in the time allowed and that he was entitled to terminate the contract on returning the deposit when he did so in February 2006.

20. In my view, Mr. Martin was not entitled to "pull the plug" in February 2006. It is true that a long time had passed between the making of the deal in July/August 2002 and February 2006 – three and a half years. However, as I have emphasised earlier, special condition 4 provided for such extension of the period allowed to Mr. McKenny to obtain planning permission as might be agreed between Mr. Martin and Mr. McKenny. On the evidence, there can be no doubt that Mr. Martin, implicitly, if not expressly, agreed to the extension of the period to beyond the date on which Mr. McKenny submitted his third application, which was 29th August, 2005. That is clear from what transpired in September 2005. It was only when Mr. Martin perceived that Mr. McKenny might be successful in his planning application that he decided that he wanted more money or, alternatively, he would renege on the deal. In my view, Mr. Martin was not entitled to withdraw from the sale unilaterally and peremptorily while Mr. McKenny's third application for planning permission was pending. Accordingly, Mr. Martin was in breach of contract in purporting to withdraw from the sale on 14th February, 2010. Mr. McKenny did not treat that breach as bringing the contract to an end, as he might have. He made it clear that the contract continued in being and that he wanted it enforced.

21. The position on the ground, over the four years since these proceedings were initiated, is that Mr. McKenny is in possession of the site. His evidence was that he currently has material, for example, scaffolding, on the site and that he has a lorry parked there. He continues to hope to get planning permission for the site. However, his third attempt was not successful, nor was a fourth attempt. That last planning application was made on 9th May, 2006 (file No. 06549). Notice of intention to refuse the application was issued by Louth County Council on 23rd June, 2006. Mr. McKenny appealed to An Bord Pleanála but his appeal was unsuccessful on two grounds. The first was that it was the policy of the then current development plan for County Louth that not more than four dwellings should be permitted per landholding except where family members were concerned and that the proposed development would contravene this policy. That state of affairs was contributed to by the fact that Mr. Martin had sought and obtained planning permission for an adjoining site. The second ground for rejecting the appeal was that An Bord Pleanála was not satisfied, on the basis of submissions made on the planning application and on the appeal, that the site could be drained satisfactorily, notwithstanding the proposed use of a proprietary waste water treatment system, so that the development would be prejudicial to public health.

22. As I have stated, Mr. McKenny is optimistic that he will be able to obtain planning permission. The basis of this optimism is that the current development plan for the area does not contain the "four dwellings" restriction.

23. Mr. McKenny told the Court that the remedy he wishes to pursue is to get the site, that is to say, specific performance. He is still making repayments in the sum of €100 per week to the Credit Union in respect of the sum he borrowed to pay the deposit in 2002. His evidence was that he has paid €50,000 to the Credit Union already. In response to a question from the Court, he stated that at this stage he probably will have "to take his chances" on getting planning permission. I understand this to mean that he is prepared to waive special condition 4 of the contract.

Decision

24. Although these proceedings involved a lengthy pleading process and a substantial interlocutory application, unfortunately no submissions on the law were made at the hearing. The legal position as between Mr. McKenny and Mr. Martin when the contract came into being was that enforcement of the contract against Mr. McKenny was conditional on special condition 4 being fulfilled (*O'Connor v. Coady* [2005] 1 I.L.R.M. 256). However, special condition 4 was exclusively for the benefit of Mr. McKenny and it was, and is, capable of being waived by him while still extant (*Maloney v. Elf Investments* [1979] I.L.R.M. 253). In my view, it was still extant and the contract was still in being when Mr. Martin purported to terminate, because he had implicitly, if not expressly, agreed to an extension of the period for obtaining planning permission until Mr. McKenny's third planning application was finally adjudicated on. By his peremptory action, Mr. Martin was in breach of his contractual obligations to Mr. McKenny. The contract remained extant and continues in being as of now, as that is what Mr. McKenny elected for. It is still open to Mr. McKenny to waive special condition 4.

25. Accordingly, it seems to me that the proper course both on the facts and in law, and, in particular, having regard to the Court's equitable jurisdiction, is to make an order for specific performance of the contract but excluding special condition 4 so as to give effect to Mr. McKenny's waiver of that condition. This means that on payment of the balance of the purchase money (€7,748.69) by Mr. McKenny to Mr. Martin, Mr. Martin will have to transfer the site to Mr. McKenny and furnish him with marketable title to it in accordance with the contract. In order that the parties may avoid the cost and expense of further appearances in Court, I will direct that the contract, subject to the exclusion of special condition 4, be completed by 18th June, 2010.

26. The plaintiff also has a claim for damages in addition to specific performance. The losses he itemised were consultants' fees in the sum of €3,000 in relation to his various planning applications and the spreading of soil on the site, as requested by Louth County Council, as planning authority, at the cost of €1,100. All of that expenditure related to Mr. McKenny's endeavours to comply with his obligations under the contract and it must be assumed that he got value for the money he expended. In my view, that expenditure cannot be laid at the door of Mr. Martin. Accordingly, no damages are awarded to the plaintiff.

27. On the issue of costs, I find it peculiar that an action in relation to the sale of a site measuring less than an acre, the purchase price of which is less than €40,000, should be the subject of a High Court action. I would assume that the rateable valuation of the site, or even if it is not separately valued, the holding of which it forms part, is less than €253.90, the jurisdictional limit of the Circuit Court. I do not intend making any decision in relation to costs until such time as there is evidence of the rateable valuation before the Court.

28. I will list the matter to deal with the question of costs on 22nd June, 2010 at 10.30am.