see also attachment at the end of this document

[2019] IEHC 182

THE HIGH COURT

[2014 No. 5465 P.]

BETWEEN

BRIAN LEGGETT

PLAINTIFF

AND
GAVIN CROWLEY

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 27th day of March, 2019

Introduction
1. The defendant has been in possession of his home in Kilsallaghan, Co. Dublin since it was built in 2003 and more significantly, since the closing date of 4th March, 2014, for its sale to the plaintiff and the prosecution of these proceedings seeking specific performance which were commenced in June 2014.

Background History

2. According to the defendant, he has been involved in the construction industry from his early days. He bought land which is now comprised in Folio 49441F, Co. Dublin ("*folio*") in 2002, when he was about 21 years of age. The defendant resides with his partner and his father in the home which was built on the lands comprised in the folio. The defendant also gave evidence that the total construction cost for his home was approximately €600,000 to which the defendant's father contributed a significant sum.

3. Notification of grant of approval issued in July 2003 to the defendant and a retention permission for a sunroom was granted in March 2004. An additional extension, referred to as "granny flat" during the course of the trial, has not been the subject of any specific permission.

Loan from Bank of Scotland Ireland

4. In May 2006, the defendant accepted an offer of an interest-only home loan of €725,000 with the "*Basis of Interest Rate*": 1% "*over ECB Main Refinancing operations rate*" from Bank of Scotland Ireland Ltd ("*BOS*"). The loan was secured by:-

(i) a first legal mortgage over his home, which was then valued at €1,500,000;

(ii) an assignment of a mortgage protection life policy on the defendant; and

(iii) an assignment of a life policy for the 40-year term of the loan with a note that BOS *"does not in any way represent or warrant that the surrender or maturity value thereof will be sufficient to discharge the principal of the loan".*

5. In March 2008, the defendant accepted an "*offer of further advance loan*" in the sum of €250,000 to be repaid over 38 years at "*0.83% plus the ECB main refinancing operation rate."*

6. The defendant testified that he did not repay the contribution made by his father to the building of the home because his father was content for the defendant to remain in the construction and property industry.

7. The collapse of the Irish property market caused BOS to appoint receivers over all of the properties belonging to the defendant which he had acquired with other loans advanced by BOS.

8. By letter dated 4th October, 2012, solicitors for BOS advised the defendant that he then owed BOS €997,482.02, pursuant to the loan facilities granted in May 2006 and March 2008, by reason of his failure to adhere to the repayment terms.

9. A further letter from solicitors for BOS dated 11th December, 2012, requested possession of the house and lands comprised in the folio ("*the property*") within seven days in order to avoid the commencement of proceedings.

10. Eamonn Greene & Company ("*Greenes*"), then solicitors for the defendant, in a reply telefaxed on 20th December, 2012, referred to the property as the principal residence of the defendant when expressing an understanding that the defendant was paying €1,000 per month and that the property was for sale. The defendant had discussed with BOS that the defendant himself should sell the property.

11. Up to this point, there is little controversy. Thereafter, the defendant recounts a story to the effect that he was prepared to enter into a contract for sale of the property with the plaintiff and release the proceeds of the sale to BOS in exchange for BOS releasing him from any further liability to BOS and for the defendant to obtain from the plaintiff a cash payment of €50,000 (later increased to €65,000). It is noted that not one professional adviser or any other witness called to give evidence testified that there was an intention for the defendant to obtain such a cash payment which lies at the heart of many allegations made by the defendant.

Release of Property as Security
12. The circumstances leading to the short letter from BOS to Greenes dated 18th February, 2014, and which reads as follows: "You must provide cleared funds in the sum of €445,887.20 to Bank of Scotland plc ('the bank') in order for the bank to release the secured property from its mortgage and charge", are at the centre of the dispute to be resolved in the context of the claim for specific performance of the contract which is the subject of these proceedings.

Leading up to the Contract
The First Viewing

13. The plaintiff gave evidence that he viewed the property with his partner and their young son on 22nd October, 2013, while the defendant and a Mr. O'Reilly (an auctioneer engaged by the defendant) were in attendance. The defendant alleged at trial that the

plaintiff inquired about the mortgage on the property and that the defendant informed the plaintiff about his negative equity in the property. The defendant further alleged that he informed the plaintiff that he could not enter into a binding agreement until he had a binding agreement with BOS. The plaintiff denied these exchanges during the viewing and asserted his intention and commitment to negotiate with the auctioneer only.

The Second Viewing

14. On 23rd October, 2013, the plaintiff attended at the property again. He said that he had mentioned this intention to Mr. O'Reilly because they were unable to view the granny flat while the tenant was present on 22nd October. The defendant alleged that the plaintiff attended unannounced when the defendant and his father were at home. The plaintiff insisted that he never met the defendant's father until these proceedings came on for trial originally in October 2017.

Initial sale price

15. The defendant's auctioneer, by letter dated 24th October, 2013, confirmed to Greenes that he had accepted an offer for the sale of the property for €475,000 from the plaintiff who had furnished a booking deposit of €10,000. This supports the plaintiff's evidence that he negotiated with Mr. O'Reilly exclusively and it is what one would expect when an auctioneer is involved. The asking price in the brochure produced by Mr. O'Reilly was €525,000. The defendant did not allege that Mr. O'Reilly was instructed not to negotiate with the plaintiff; rather the defendant alleged that the plaintiff was informed by the defendant about achieving a binding agreement with BOS.

Revised Sale Price

16. The plaintiff and Mr. O'Reilly testified that they renegotiated the sale price down to €460,000, which was confirmed by the standard typed letter sent by Mr. O'Reilly to Greenes dated 6th November, 2013. The plaintiff was looking at similar properties and it was apparent that the market at that stage was one which suited buyers as there were few then. The plaintiff remarked that his original offer was "*a bit of a stretch*" and that he had actually paid a booking deposit for another house. He preferred the property and that was his reason for pursuing a reduction in the price.

Defendant's claims regarding the sale price

17. The defendant claimed during the trial that at the second viewing the plaintiff had come to the property with a proposal. The defendant said that he had explained to the plaintiff the situation with BOS: that the property was mortgaged for over €1 million and that a binding agreement with BOS was required. He surprised the plaintiff and the solicitors who gave evidence at trial with his allegations that he informed the plaintiff at the second viewing about a boundary dispute. The defendant also referred to his father's interest in the house due to his financial contribution to the construction of the house.

18. The defendant alleged under oath, which was denied vehemently by the plaintiff, that the plaintiff offered to pay the asking price of €525,000 of which €50,000 would be in cash. That would mean that BOS and the Revenue would be informed of a sale price of €475,000 whereas the true price was the asking price of €525,000. The defendant's allegations about the plaintiff referring to having untaxed cash from his business and realised properties in Spain and Eastern Europe were denied calmly, but firmly by the plaintiff.

19. There was not a shred of corroborating evidence to support these serious allegations. In fact, all of the solicitors who gave evidence said that any knowledge or suggestion of such an arrangement would have obliged them and the late Maurice Leahy, a solicitor by all accounts with impeccable professional standards, to cease their involvement with the parties.

20. The defendant's explanation for the sale price reduction to €460,000, further persuades this Court that the defendant will stop at nothing to hinder the plaintiff from completing his purchase of the property. The defendant alleged that he received a phone call from the plaintiff on 25th October, 2013, during which the plaintiff allegedly offered a further €15,000 in cash in exchange for a corresponding reduction in the price to be recorded in the contract. The Court accepts the plaintiff's evidence that the only conversation which he had with the plaintiff, during which the defendant was loquacious, concerned the closing of the sale as quickly as possible.

21. The plaintiff testified that he only discussed the closing of the sale with the defendant and he did not renegotiate the price with the defendant at any stage. The plaintiff mentioned the ramblings of the defendant in calls which lasted between 22 minutes and 32 minutes on 25th October, 7th November and 18th November, according to mobile account statements produced in the discovery process.

22. The defendant consistently fails to appreciate that the plaintiff is entitled to rely on an executed contract and that it does not permit for pre-contractual beliefs or understandings which he may have had to be part of the equation. No matter how many conversations, misunderstandings or reinventions of the facts which the defendant puts forward for consideration, a written contract for the sale of land has legal effect.

Boundary Dispute

23. This Court accepts that the plaintiff only became aware of a possible and unpursued boundary dispute after the defendant's newly appointed solicitor mentioned same in November 2017. The plaintiff quite reasonably explained that if he had been aware of a boundary dispute in 2013, he *"would have stopped right there … who would buy a house with a boundary issue?".*

Execution of the Contract

24. Mr. Jeff Greene of Greenes gave evidence that the defendant came in to sign the contract for the sale of the property to the plaintiff on or around 24th or 25th February, 2014, and that he witnessed the signature of the defendant. Greenes forwarded the contract for sale to the plaintiff's solicitor by letter dated 25th February, 2014, and enclosed a copy of the letter from BOS dated 18th February, 2014, which lies at the heart of the dispute to be resolved. Mr. Greene confirmed that replies to requisitions on title were given in accordance with instructions and that there was no boundary dispute to be notified. Further, there was no litigation pending or threatened in relation to the property and no other person had any direct or indirect interest in the property according to Mr. Greene and his then instructions from the defendant.

25. The defendant originally alleged that he did not sign the contract but does not now deny his actual signature on the execution of the contract. He claimed that the first time that he became aware of the signed contract was when it was emailed to him by his auctioneer on 5th March, 2014. The then very irate state of the defendant is not disputed by Mr. Greene who produced an attendance by a secretary dated 7th March, 2014, concerning the alleged execution by the defendant of the contract. The

defendant advised in this call that he was going to An Garda Síochána and the Law Society about the conduct of Greenes in proceeding with the sale which he had not authorised.

26. Mr. Greene denied that the defendant had repeatedly given instructions to him not to send the contractual documents until the BOS situation and the cash payment had been sorted. Mr. Greene was emphatic that he would have immediately stopped acting for the defendant if the defendant had told him about an "*under the table*" cash payment.

27. The defendant's allegation that the now deceased Maurice Leahy, solicitor with the plaintiff's solicitors, knew of the cash payment is further evidence of the level to which he will stoop. Mr. Fran Mulligan, solicitor with the plaintiff's solicitors at the time, assured this Court that the late Mr. Leahy would not have countenanced such a cash payment. It does the defendant little credit to impugn the professional reputation of a deceased professional in the way that he has done, whether to secure his home or whatever arrangement he wants to achieve with BOS.

28. In the context of these proceedings, this Court does not need to consider whether the defendant has committed perjury, is delusional or suffers from a memory alteration due to strained circumstances. The balance of probabilities is the relevant standard of proof. The defendant is a poor and self-serving historian with little consideration for the effects on others as a result of his story telling.

Discovery

29. The defendant's failure or omission to complete discovery, as directed by Gilligan J. on 4th April, 2017, assisted the obfuscation which has occurred in these proceedings. The correspondence from BOS and particularly the letters of 18th February, 2014, is crucial to a consideration of the factual matrix. This Court does not have to consider whether the defendant has a claim against Greenes and refrains deliberately from commenting further because Greenes are not a party to these proceedings although the evidence of Mr. Greene is particularly relevant. The alleged difficulties which the defendant had with various firms of solicitors is not a matter of concern for the plaintiff; the defendant has the primary duty to complete discovery.

30. Ultimately, the plaintiff and the Court got access to copies of relevant communications including copies of the facility letters with BOS mentioned earlier in this judgement. This Court does not condone the failure or omission of the defendant to understand or comply with the order for discovery. The defendant's conduct in this regard does not assist him in persuading the Court that he should be believed in respect of the crucial facts where there is a conflict of evidence. The conclusion of the Court about the inadequacies of the discovery undertaken by the defendant is that the Court does not need to rely on those inadequacies in order to determine the crucial facts on the balance of probabilities.

Failure to Call the Father of the Defendant

31. The plaintiff submitted that the Court should take into account the fact that the defendant failed to call his father to give evidence in this case. This failure was significant according to Counsel because:-

> (i) the defendant maintained that his father was present at both viewings and was a witness to the discussions involving an "*under the counter*" payment, both allegations being denied by the plaintiff; and
>
> (ii) the plaintiff was precluded from cross-examining the defendant's father in relation "to the circumstances in which he came to issue proceedings claiming an interest in the property (and registering a *lis pendens*) … [in circumstances where the defendant] instead received an indefinite loan from his father".

32. The plaintiff submitted that the Court should take an adverse inference from the failure to call the defendant's father to corroborate this part of the defendant's defence.

33. In *Crofter Properties Limited v. Genport Limited* [2002] 4 I.R. 73, McCracken J. held that "[t]*here is certainly ample authority that the failure to call a witness is something which the court may take into account*." (p. 85). He referred to the decision of the House of Lords in *R. v. IRC ex parte T.C. Coombs & Co*. [1991] 2 A.C. 283, where Lord Lowry stated that:-

> *"In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."* (p. 300 at p. 85 of Crofter).

34. Having considered Lord Lowry's dicta above, Brooke L.J. in *Wiszniewski v. Central Manchester Health Authority* [1998] PIQR P324 (also known as *Wisniewski*) derived the following principles to be applied where there is an absence of a witness:-

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
>
> *(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."* (p. 340)

35. These principles were applied by Kelly J. (as he then was) in *Smart Mobile Limited v. Commission for Communications Regulation* [2006] IEHC 338, (unreported, High Court, 31st October, 2006) (pp. 96-97).

Conclusion

36. The decision not to call the defendant's father, even though it had been indicated that he would testify to support the defendant's version of events of the two controversial viewings of the property by the plaintiff in October 2013, was understandable when one considers the alleged ill-health of the defendant's father. Nevertheless, the defendant cannot expect this Court to assume that the defendant's father would have assisted the defendant in his version of events. Therefore, the Court is not drawing any inference adverse to or in favour of the defendant arising from the decision not to call the defendant's father. The Court is willing to accept in the absence of evidence to the contrary that the defendant was assisted financially by his father. This does not mean that this alleged fact was made known to the plaintiff or any of the professionals who denied knowledge of the alleged interest of the defendant's father in the property.

Legal Submissions on the Claim

37. The plaintiff seeks specific performance of the contract that was concluded on 25th February, 2014. The defendant relies on two separate defences. First, he argued that there was never any agreement as he did not recollect signing the contract. The situation now is that no one disputes the existence of the written contract. Second, he claimed that specific performance should not be granted for the following reasons:-

(i) it was an illegal contract;

(ii) impossibility; and

(iii) hardship.

38. The plaintiff submitted that an award of damages in lieu of specific performance will be worthless as there is little, if any, chance of such an award ever being satisfied by the defendant, given the extent of his known indebtedness.

Illegal Contract

39. The defendant alleged that the contract for sale was unenforceable because it was an illegal contract due to the cash payment that was agreed between the parties with the intention of defrauding the Revenue. As noted above, the defendant alleged that the plaintiff wished to use untaxed income from either his restaurant business or his properties. The plaintiff argued that the issue of illegality did not arise because he did not agree to make an additional cash payment to the defendant.

40. The burden of proving an illegal contract lies with the party alleging the illegality. This is clear from the case of *Whelan v. Kavanagh* [2001] IEHC 14, (unreported, High Court, 29th January, 2001), where Herbert J. stated that:-

> *"… a party who has executed a contract required by Law to be evidenced in writing and which is regular and lawful on its face, and whose execution of that contract has been witnessed by his or her Solicitor should not lightly be permitted to impugn that contract, particularly to his or her own advantage, by pleading illegality as a defence to a claim for specific performance. The onus of proving such alleged illegality lies firmly with the party raising it and the burden of proof is the same as in all civil actions."* (pp. 11-12)

41. Murphy J. reiterated in *Kavanagh v. Caulfield* [2002] IEHC 67, (unreported, High Court, 19th June, 2002) that it was "*… clear that the onus of proving illegality of a contract is, in this case, on the Defendant. The Defendant must prove an illegal intention on the part of the Plaintiff.*" (para. 7.1).

Conclusion

42. This Court, applying the relevant standard of proof (balance of probabilities), has already found that the defendant did not agree to cash payments in addition to the final contract price of €460,000, (the balance of the 10% deposit, after accounting for the earlier booking deposit of €10,000 given to the auctioneer, was paid by an AIB bank draft dated 17th January, 2014, and forwarded to Greenes by letter from the plaintiff's solicitor dated 24th January, 2014). The defendant, therefore, cannot rely on illegality as a ground of defence.

Impossibility

43. The defendant argued that specific performance should not be granted where the defendant is unable to extinguish the interest of a third party in the land. The defendant referred to an alleged ongoing trespass onto the lands of the adjoining owner. Proceedings were issued, *Glynn v. Crowley* [2004 No. 18384 P.] on 27th July, 2004. They were set down for trial on 27th May, 2005, and came on for hearing on 20th June, 2006, when the proceedings were adjourned generally. A notice of intention to proceed was issued on 13th September, 2012, but since then nothing has occurred in those proceedings. The defendant argued that the Court cannot make an order for specific performance which would result in the plaintiff trespassing on Ms. Glynn's property, thereby adversely affecting the property rights of a party who was not before the Court.

44. The defendant further referred to the "*unascertained position*" of Start Mortgages, the successor of BOS. On 18th February, 2014, BOS wrote to the defendant's solicitors confirming that it was willing to accept the net proceeds of sale in order to release the security of BOS over the property. This offer was dependent on the defendant executing a short settlement agreement and providing the funds within 30 days of the letter. The defendant gave evidence that he did not sign any short settlement agreements. Start Mortgages issued proceedings claiming a sum in excess of €1 million as monies due by the defendant. Proceedings (*Start Mortgages DAC v. Crowley* [2016 No. 2025 S.]) were issued on 28th October, 2016, and came into the list of the Master of the High Court as a motion for summary judgment on 11th January, 2019, when it was adjourned until 15th February, 2019. At that stage, it was transferred to the Common Law Motion List for hearing on 29th April, 2019. The defendant gave evidence that the loan was an interest-only loan and while there were arrears of repayments, he was confident that he could pay them. The defendant argues that in light of these developments, it was unlikely that Start Mortgages feels itself bound to accept the originally agreed net proceeds of sale to the plaintiff.

45. In *O'Regan v. White* [1919] 2 I.R. 339, a statutory tenant sold a portion of his holding without the consent of the landlord. The plaintiff purchaser sought specific performance of the contract but, notwithstanding the efforts of the defendant, the consent of the landlord could not be obtained. O'Connor L.J., in the Court of Appeal, noted that "[e]*very plaintiff in an action for specific performance has to face the possibility of his eventually being unable to obtain it, owing to the incapacity of the defendant, for one reason or another, to perform it"* (p. 387).

46. In *Wroth v. Tyler* [1974] 1 Ch. 30, an English case, the defendant entered into an agreement to sell his home, where he lived with

his wife and grown-up daughter, to the plaintiffs with vacant possession. Subsequently, the defendant's wife entered on the Land Register a notice of her rights of occupation, namely a right not to be evicted, under s. 1(1) of the Matrimonial Homes Act 1967. The defendant tried unsuccessfully to persuade her to remove the notice so that the agreement could be completed. He then informed the plaintiffs that he was unable to complete and offered to pay damages. The plaintiffs sued seeking specific performance.

47. Megarry J. in the High Court held that if the plaintiffs were entitled to specific performance of the contract with vacant possession, the form of order sought would require the defendant to make an application to the court under the 1967 Act to terminate the rights of occupation of his wife which became a charge on the estate of the defendant.

48. He noted that where a third party has some rights over the property, there are three possibilities:-

> *"First, there are those cases where the vendor is entitled as of right to put an end to the rights of the third party, or compel his concurrence or co-operation in the sale. Second, and at the other extreme, there are cases where the vendor has no right to put an end to the third party's rights, or compel his concurrence or co-operation in the sale, and can do no more than to try to persuade him to release his rights or to concur in the sale. An example of the first category would be the vendor's rights, as mortgagor, to pay off a mortgage, or his right, as a mortgagee, to obtain possession from the mortgagor. An example of the second category would be when the third party is entitled to an easement over the lands.*
>
> *In between those two categories there is a third category, namely, where the vendor cannot as of right secure the requisite discharge or concurrence, but if it is refused he can go to the court, which has power, upon a proper case being shown, to secure the release or concurrence. …"* (pp. 47-48)

49. Megarry J. held that the defendant fell into the third category and noted that he had endeavoured to persuade his wife but had failed. In those circumstances, it was stated that the Court should be slow to grant a decree of specific performance which would require a husband to take his wife to court, especially while they are still living together. He held that it would be "*highly unreasonable to make such a decree if there is any other form of order that could do justice …"* (p. 51). He awarded damages to the plaintiff.

50. In the case of *Watts v. Spence & Anor* [1976] Ch. 165, the first defendant signed a contract to sell the family home to the plaintiff. The wife of the first named defendant was a joint owner of the house and never gave her husband authority to sell the house on her behalf. She refused to join in the sale and the plaintiff sued for specific performance. Graham J. refused to order specific performance as the first defendant's wife, a third party interested in the property, would be seriously prejudiced. The plaintiff was awarded damages.

51. In *Lehmann v. McArthur* [1868] L.R. 3 Ch. App. 496, there was a covenant in a lease which required that the lessee could not assign without licence. The lessor covenanted not to refuse his licence unreasonably or vexatiously. The lessee contracted to assign his lease to the plaintiff subject to the landlord's approval. The lessee applied for a licence but it was refused by the lessor because he wished to buy up the lease in order to rebuild the premises. The Court of Appeal in Chancery held that the defendant lessee was not obliged to take legal proceedings to oblige the lessor to give his licence. It was sufficient that he had used all reasonable efforts to induce the lessor to consent. Specific performance was refused.

52. In *Aranbel Ltd v. Darcy & Ors* [2010] 3 I.R. 769; [2010] IEHC 272, ("*Aranbel Ltd*") Clarke J. (as he then was) stated 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*." (para. 7). However, Clarke J. noted that "[t]*here 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."* (para. 7).

Conclusion

53. This Court will indeed not act in vain but it can fashion a remedy to ensure that the rule of law and justice applies. This Court is not satisfied that Smart Mortgages, the successor to BOS, is entitled to retract its position about receiving the net proceeds from the sale of the property which will cause the release of its security on the property. No one from BOS or Start Mortgages was called on behalf of the plaintiff. BOS issued a letter dated 18th February, 2014, to the defendant's solicitors which confirmed the provision of €445,887.20 for the release of the relevant security on the property. In a separate letter of the same date addressed to the defendant, care of Greenes (the receipt of which by the defendant was put in doubt by the defendant in evidence) stated in the fifth paragraph of the first page:-

> *"Therefore the bank is willing to accept €445,887.20 (being the net proceeds of sale) in accordance with the repayment terms of the shortfall balance as set out in short settlement agreement but strictly without prejudice to your liability to discharge in full the total debt due under the mortgage account."*

54. It was submitted on behalf of the defendant that the third paragraph of the second page of that letter dated 18th February, 2014, which read:-

> *"This contractual agreement shall only be concluded when the bank is in receipt of the following:-*
>
> *(i) one part executed and dated short settlement agreement;*
>
> (ii) [unconditional contract for sale];
>
> *(iii) agreed amount in cleared funds."*

means that Smart Mortgages cannot be foisted with the sale.

55. The defendant is effectively relying on a possibility that Smart Mortgages may not accept the net proceeds while not adducing any evidence that Smart Mortgages will do that. The defendant cannot rely on his own default with a third party such as BOS (now Smart Mortgages) without establishing on the balance of probabilities that Smart Mortgages will not release its security at the closing of the sale to the plaintiff. As mentioned, the order to be made by this Court will afford Smart Mortgages, or the current owner of the relevant charge, the opportunity to seek all necessary orders and directions. It is noted that the Court was informed that Start Mortgages had a representative in Court (albeit without a right of audience) when settlement was mentioned following the

commencement of the plenary hearing in October 2017.

56. With regard to the rights of the neighbour and the boundary dispute there is no evidence of a continuing dispute. The plaintiff is aware of this risk and accepts the disclosure for the closing of the sale.

Hardship

57. McCarthy J. in the Supreme Court in Roberts v. O'Neill [1983] I.R. 47 held that it is well established that a court "*… will not enforce the specific performance of a contract the result of which would be to impose great hardship on either of the parties to it."* (p. 55)

58. The hardship must exist at the time of the execution of the contract (Roberts v. O'Neill, p. 56). Quoting Budd J. in *Lavan v. Walsh* [1964] 1 I.R. 87, McCarthy J. stated that the "*… exceptions to the general rule appear very rare."* (p. 55). He further noted that it:-

> *"… requires a strong case to be made out before one should accede to a plea for the exercise of judicial discretion in a quite unusual way, that is, by reason of hardship arising subsequently to the contract, and, the onus being on the defendant to satisfy me of the existence and genuineness of the alleged hardship on her, the proof of it should be strong and above suspicion."* (p. 103 at p. 56 in *Roberts v. O'Neill*).

59. McCarthy J. concluded:-

> "*While recognising that there may be cases in which hardship arising after the date of the contract is such that to decree specific performance would result in great injury, there must be few such cases and, in my view, they should not include ordinarily cases of hardship resulting from inflation alone. To permit, as an ordinary rule, a defence of subsequent hardship, would be to add a further hazard to the already trouble-strewn area of the law of contracts for the sale of land*." (p. 56).

60. In *Patel v. Ali* [1984] 1 Ch. 283 the English High Court allowed the defence of hardship where the circumstances of the defendant-vendor had changed dramatically. Goulding J. held that:-

> "The important and true principle, in my view, is that only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property. A person of full capacity who sells or buys a house takes the risk of hardship to himself and his dependents, whether arising from existing facts or unexpectedly supervening in the interval before completion*." (p. 288).*

61. The Court found that in the four-year delay between the date of the contract and the hearing of the action for specific performance, the defendant had suffered from ill-health, had one leg amputated, and had two more children. If forced to sell the property she would have to move from the area and lose the support of family and friends. The Court noted as important that the delay was not attributable to the defendant's conduct.

62. In *Aranbel Ltd* the defendants had entered into contracts for the purchase of apartments in late 2006 and by March 2008 they were legally obliged to complete the sale. In the meantime, the value of the properties had significantly dropped. The plaintiff-vendor sought an order for specific performance. The defendants argued that they were no longer in a position to complete the sale and as such, specific performance should not be ordered. Although Clarke J. considered the case under impossibility rather than hardship he noted that if the purchaser had to sell their family home in order to complete the purchase of an investment property, "… 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." (para. 14).

63. In obiter remarks, Clarke J. stated:-

> *"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 party 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*." (para. 35).

64. The defendant sought to rely on Clarke J.'s *obiter* comments and argued that "*if hardship is to be considered in the light of the loss of a family home it hardly matters if that home is lost by the Defendant acting as a vendor as opposed to a purchaser."* This is a forced argument. The defendant entered into a contract for the sale of his family home and is now arguing that an order for specific performance would cause him hardship due to the loss of said family home. The hardship that is alleged must be external to the contract to preclude performance of the contract. It is also unclear if the defendant is alleging that this hardship existed at the time of the execution of the contract for sale or whether the hardship has subsequently arisen.

65. The defendant claimed that his father had made a contribution of €50,000 to the defendant for the home and in the circumstances where his father also lives in the property, granting specific performance will operate an exceptional hardship as he will lose his home and receive no compensation.

66. The plaintiff submitted that there is no basis for the claim that an order for specific performance will cause hardship for the following reasons:-

> (i) This claim arose for the first time during the hearing of the action and was never pleaded or articulated in advance of the trial;
>
> (ii) The defendant did not identify how he will suffer hardship as:

a. The completion of the contract and the payment of the purchase price will result in a substantial reduction of the debt owed by the defendant;

b. The defendant at all relevant times contemplated the sale of his home. This case is to be contrasted with a claim for hardship where a party might be forced to sell their family home to complete some other transaction.

Conclusion

67. The defendant entered into the contract willingly and in an effort to deal with BOS. The defendant's own evidence indicated even at the height of his case that he was prepared to sell his home in 2014. The issue about moving home was never discussed even on his version of events. The law is that the Court looks at matters at the time of the contract save in exceptional circumstances which do not arise here.

Summary

68. The Court has set out above its conclusions on the appropriate facts and has applied the law as it has determined to be relevant to the issues arising. The Court will now set a date for the parties to consider and make further submissions if necessary on the proposed order for specific performance which is now circulated. In the meantime, the Court requests the solicitors for the plaintiff to copy this judgment to the owners of the charge on the folio along with a copy of the proposed order so that representations, if necessary, can be made on the adjourned date for finalisation of orders.

Appendix

Chronological Summary of Prosecution

1. For the sake of completeness, the following is a chronological summary of the prosecution of and the events occurring in these proceedings in case any party or the Court needs to consider the alteration of the proposed order for specific performance when this matter returns to Court for the making of final orders or at some early date in the future:-

24/01/2014 Contracts for sale were signed by the plaintiff and these, along with a bank draft for €36,000, were sent to the then solicitors for the defendant.

25/02/2014 The defendant's solicitors returned one part of contract for sale duly executed by the defendant which had a closing date of 4th March, 2014.

06/03/2014 The plaintiff's solicitors contacted the then solicitors for the defendant requesting that the transaction be completed.

07/03/2014 The defendant's solicitors contacted the plaintiff's solicitor informing them that their instructions had been revoked and that they no longer acted on behalf of the defendant.

10/03/2014 The defendant's solicitors wrote to the plaintiff's solicitors attempting to refund the deposit of €36,000. The plaintiff's solicitors also registered a caution on the folio.

11/03/2014 The plaintiff's solicitors rejected the attempt to refund the deposit and stated that the solicitors were contractually bound to hold the deposit as stakeholders.

12/03/2014 The plaintiff's solicitors served a completion notice on the then solicitors for the defendant.

20/06/2014 The plenary summons herein was issued.

28/07/2014 An order for substituted service on the defendant was granted.

21/08/2014 The plenary summons and statement of claim were served on the defendant.

19/09/2014 A new firm of solicitors entered an appearance on behalf of the defendant.

20/11/2014 A defence was delivered.

18/05/2015 An order for discovery was made by Gilligan J.

10/03/2016 The plaintiff issued a motion seeking to strike out the defence for failure to comply with the discovery order.

23/06/2016 The Master of the High Court struck out the defence of the defendant.

28/06/2016 A motion was issued on behalf of the defendant to discharge the order of the Master.

21/03/2017 A notice of change of solicitors was filed and served.

04/04/2017 Gilligan J. set aside the order of the Master and ordered that the defendant file an affidavit within seven days in compliance with the order for discovery and listed the proceedings for trial on 10th October, 2017.

06/04/2017 An affidavit in purported compliance with the order of Gilligan J. was sworn by the defendant.

24/05/2017 The plaintiff requested particulars arising from the defence.

02/10/2017 The defendant delivered replies to the particulars sought.

10/10/2017 The proceedings came on before this Court for hearing and on the second day, following the adducing of evidence, the case was adjourned on the suggestion that a settlement was imminent.

27/10/2017 The matter came before this Court for mention and it was stated that Start Mortgages did not get a financial statement from the defendant.

08/11/2017 The matter again came before this Court for mention when the outstanding financial statement requested by Start Mortgages was mentioned again while the then legal team for the defendant was granted liberty to issue a motion to come off record.

14/11/2017 The defendant served a notice of discharge of his solicitors.

22/11/2017 These proceedings came before the Court for mention when the plaintiff elected to continue with the hearing of the case without having a legal team.

15/12/2017 The matter came before the Court again for directions and the 21st-23rd March, 2018, were provisionally allocated for the hearing of the balance of the trial.

23/02/2018 The matter came before the Court for mention in anticipation of the provisional hearing date and the Court recommended the defendant to obtain the services of solicitors and counsel.

15/03/2018 A new firm of solicitors came on record for the defendant when the matter came before the Court for mention only. An order was granted allowing the solicitors to take up the Digital Audio Recording of the evidence heard on 10th October, 2017, and the proceedings were adjourned to get a date for hearing.

10/04/2018 The proceedings came before this Court for mention and a hearing date of 17th July, 2018 was allocated.

29/06/2018 The matter was listed for mention before the Court because the Court had other assignments for July 2018 and the proceedings were put back into the Chancery List to get a date for hearing.

04/12/2018 The matter resumed hearing on 5th, 6th, 12th and 18th December, 2018.

06/03/2019 Oral submissions were made on behalf of the parties in relation to written submissions that had been delivered and which had not afforded the other side an opportunity to address.