Neutral Citation Number: [2008] IEHC 348

THE HIGH COURT

10969P/2004

BETWEEN

P.J. McGRATH

PLAINTIFF

AND

DEREK STEWART

DEFENDANT

AND

10973P/2004

BETWEEN

P.J. McGRATH AND THOMAS McGRATH

PLAINTIFFS

AND

DEREK STEWART

DEFENDANT

Judgment of Mr Justice Roderick Murphy delivered on the 11th day of November, 2008.

1. Background to the proceedings

1. This is an application for a decree of specific performance of a contract for the sale of land entered into on 8th June 1998, between the plaintiff in the first action as purchaser and the defendant as vendor, of 9 and 13 Summerhill Place and 14 Rutland Street. The sale of number 13 was closed on 9th October 1998. These proceedings concern the remaining two.

2. The closing date fixed by the contract was 23rd July, 1998. The defendant held the legal title of the premises and was at all material times the solicitor for Mr. Matthew Kelly, the owner of the beneficial interest in all three premises. Earlier in 1998 the defendant had agreed to sell those premises to Mr. Black, a man Mr. Kelly knew and trusted. Mr. Kelly and the defendant gave evidence that they informed Mr. Black in pre-contract discussions that the sale of 9 Summerhill Place and 14 Rutland Street were subject to existing tenancies. Mr Black's evidence was that he had been so informed. The third property, 13 Summerhill Place, was derelict and untenanted. Its purchase price was £22,500, being less than the price of the two tenanted properties, for each of which a sum of £25,000 was to be paid.

3. It was understood that Mr. Black would not close the sale of the properties and he or a Mr. Maher would instead find an interested buyer for them. He discussed the matter with Mr. Maher, who arranged to purchase the properties. Mr. Maher in turn arranged for the plaintiff to purchase the properties and to pay a finder's fee in addition. The plaintiff's solicitor received the contracts signed by the defendant as vendor and indicating Mr. Black as purchaser. Mr. Black did not sign the contract. He tried to find another purchaser and expected to be paid a finder's fee for so doing. His name was erased with Tipp-ex and the plaintiff's name was inserted. The contracts were returned to the defendant signed by the plaintiff in trust. Mr. Black was paid a fee of £4,000. Mr Maher, who also gave evidence, was paid a similar fee. The plaintiff's evidence was that he was unaware that the sale was to be subject to tenancies. The plaintiffs' solicitor raised requisitions on title with the defendant on 25th June 1998, inquiring, *inter alia*, whether vacant possession of the property would be given. A legal executive employed by the defendant replied to the requisitions by referring to the tenancies. The plaintiff insisted on vacant possession, but the defendant was not prepared to close the sale on that basis. By letter dated 18th September, 1998, the plaintiff's solicitors suggested that a sum of £10,000 be placed on joint deposit to secure vacant possession. The defendant was not agreeable to this, but closed the sale of the vacant property, 13 Summerhill Place, on 9th October, 1998. On that date, he swore a statutory declaration in relation to all three properties concerning leases to which they were subject. However, the two tenanted properties remained with the defendant after that date. On 3rd November, 1998, the plaintiff's solicitors wrote to the defendant's firm seeking confirmation of the current position on the issue of vacant possession and expressing the plaintiff's eagerness to proceed. By letter of 28th March, 1999, the plaintiff's solicitors again raised the issue of completion with the defendant. Another letter of 23rd May, 2000, again sought confirmation of the position regarding vacant possession and noted the plaintiff's desire to close the sale. No response was received to any of these letters.

4. On 30th April, 1999, almost 11 months after the signing of the contract, Mr. Kelly went to the plaintiff's office to confront him. The plaintiff and his sister gave evidence that he threatened both of them. Mr. Kelly, in his evidence, agreed that the conversation was heated. He informed the plaintiff that he was the beneficial owner of the property and that he would not see it pass to the plaintiff without the tenants remaining in residence. The plaintiff said that he decided to wait until the properties were vacant before pursuing the matter further, hoping not to antagonise Mr. Kelly. Five years later he became aware, in June, 2004, that the property was vacant. On 11th June, 2004, his solicitor issued a 28-day Completion Notice requiring the defendant to close the sales. Mr. Kelly instructed his solicitor to ignore the notice. The present proceedings were instituted on 15th July, 2004, over six years after the signing of the contract.

2. The extent of the interest conveyed

5. In a conveyance of freehold land it is the duty of the vendor at common law to ensure the purchaser will have clear vacant possession of the entire property on completion: *Bank of Ireland v. Waldron* [1944] I.R. 303 at 305. The parties are of course free to exclude this duty by agreement, but in such an event the existence of any lease or tenancy agreement must be disclosed to the purchaser: *Healy v. Farragher* (Unreported, Supreme Court, 21st December 1972). Independently of common law, contracts for the sale of land often provide expressly for the giving of vacant possession. In such cases the vendor is obliged to ensure no tenants remain in occupation of the property: *Re Postmaster-General and Colgan's Contract* [1906] 1 IR 287, affirmed at 477. Condition 21 of the Law Society General Conditions of Sale, 1988, which was incorporated into the contract of 8th June, 1998, provides, in respect of those contracts made subject to it:

> "Subject to any provision to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the subject property on completion of the sale."

6. In this case the contract was expressly made subject to the Law Society General Conditions of Sale, 1988. There is nothing in the Particulars or Conditions to detract from the general guarantee in Condition 21. I was invited to infer an exclusion of that Condition from the nature of the transaction but I can see no ground capable of justifying such an inference. This was an ordinary conveyance of full and unfettered title to freehold property. No circumstance which would have altered the nature of that transaction as it appeared from the contractual documentation was brought to the attention of the purchaser.

7. Nevertheless, counsel for the defendant submitted that the plaintiff could not have acquired an interest in the property greater than that which was to be conveyed to Mr. Black. The situation, he argued, was consistent with the plaintiff having stepped into Mr. Black's shoes and becoming a nominee of Mr. Black as the original intended purchaser. Accordingly, it was submitted, neither Mr. Black nor the plaintiff could enlarge the interest passing to the plaintiff because neither could free the party in the position of purchaser from the limitations originally imposed on Mr. Black. I cannot accept this submission. Although the plaintiff became aware of the properties through the intervention of Mr. Black and Mr. Maher, he did not contract with them. He contracted with the defendant to purchase his interest in the property, not the qualified interest subject to tenancies that Mr Black would have acquired, in line with his discussions with the defendant and Mr Kelly, had he purchased the property. The agreement was that he would purchase the properties with vacant possession. The contractual documents are consistent only with the interpretation that the plaintiff was to acquire vacant possession. I am satisfied that it was not until after he entered into the contract that he was informed of the expectation that he would take the properties subject to the existing tenancies. Accordingly, he contracted not for a title subject to tenancies but for the acquisition of all three properties without tenants.

3. Mistake

8. Another issue was raised as to whether the parties had ever reached a consensus *ad idem*, and thus whether they had entered into a valid contract. I have reservations in relation to the consideration of this question, since the issue was not pleaded. However, in my view the submission is not well-founded in any event. Counsel relied on the decision of the Supreme Court in *Mespil Ltd. v. Capaldi* [1986] ILRM 373. There a written settlement agreement was understood by the defendants as a final resolution of all causes of action the plaintiff might have against the defendants, while the plaintiff considered it a settlement only of those issues which arose in the proceedings in being at the time. Henchy J. delivering the judgment of the court, held (at 376):-

> "In those circumstances of latent ambiguity and mutual misunderstanding, it must be held that there was no real agreement between the parties. The two counsel who negotiated the settlement were understandably at cross purposes. The result was that the seeming agreement expressed in the written consent was in fact no agreement. There was a fundamental misunderstanding as to the basis of the settlement."

9. He concluded (at 377):-

> "Objectively viewed, the situation justified the misapprehension on each side. The result is that, for want of correspondence between offer and acceptance, no enforceable contract was made."

10. In contrast however, in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166 Costello J. was faced with a settlement agreement which the defendants considered a final disposal of both sets of proceedings the plaintiff had instituted against them. The plaintiff understood that only one of those actions was within the scope of the agreement, largely because the heading to the letter of settlement gave the record number of one set only. Costello J. agreed with the plaintiff's interpretation. He held that there was no such latent ambiguity as to make it impossible reasonably to impute an agreement between the parties, or to prefer one or other interpretation as the more probable. Accordingly, the contract was valid and binding.

11. The decision in *Ferguson v. Merchant Banking Ltd.* [1993] 1 ILRM 136 is in a similar vein. There the defendant agreed to sell property to the plaintiff, mistakenly including a site with development potential. On discovering the error the defendant refused to complete the transaction. Murphy J. accepted the defendant had not intended to include the site in the agreement, but held that the property to be sold was clearly defined in the contractual documentation and no material provision had been neglected or overlooked. Accordingly, the contract was not vitiated by an absence of consensus *ad idem* or by the doctrine of mistake.

12. As already stated, in this case the written agreement was perfectly clear. It was open to one interpretation; that the property was to be conveyed with vacant possession. As in O'Neill and Ferguson the parties may have differed in their understanding of the transaction but they freely entered into an unambiguous written agreement. If anything the present case is a fortiori the decision in Ferguson, since in that case the mistake was much greater and more far-reaching, concerning as it did not the terms on which the property was to be conveyed but the question of what lands were being acquired. In the present case there is no latent ambiguity on the face of the agreement as in Mespil. Taking an objective view of the circumstances it cannot be said that the defendant's mistaken understanding of the agreement was justified.

4. He who comes to equity must come with clean hands

13. I am satisfied that the parties entered into a valid contract for the sale of the three properties with vacant possession. However, that is not sufficient to resolve the matter. Specific performance is, of course, a discretionary remedy, though that discretion "must be exercised in a manner which is neither arbitrary nor capricious" (*Smelter Corporation v. O'Driscoll* [1977] IR 305 at 310-311). In *Curust Financial Services Ltd. v. Loewe Lack-Werk* [1994] 1 IR 450, Finlay C. J. with whom O'Flaherty J. and Egan J. agreed, said (at 467):

> "I accept that, the granting of an injunction being an equitable remedy, the court has a discretion, where it is satisfied that a person has come to the court, as it is so frequently expressed, otherwise than "with clean hands", by that fact alone to refuse the equitable relief of an injunction. It seems to me, however, that this phrase must of necessity involve an element of turpitude and cannot necessarily be equated with a mere breach of contract."

14. Although that case concerned an application for an injunction, the principle applies equally to specific performance because, as the Chief Justice noted, the discretion derives from the equitable nature of both remedies (see *Kavanagh v. Caulfield* (Unreported, High Court, Murphy J. 19th June 2002)). Accordingly, the court must consider whether, in relation to this transaction, the plaintiff comes to equity with clean hands. It was submitted that the circumstances prevailing at the time the contract was entered into pointed to the conclusion that he had acted otherwise than in good faith. The plaintiff was said to have acted in an opportunistic manner. He failed to take certain steps that a prudent purchaser should take. Specifically he did not inspect the property before entering into the contract, nor did he contact Mr. Black, Mr. Kelly or the defendant to discuss the transaction. Mr. Black asserted in evidence that the contract price was so far below the market value of the properties at that time that any purchaser must have realised they were not to be conveyed with vacant possession. All this was set against a backdrop in which the parties were contracting at arms' length, the plaintiff was not familiar with the defendant, and he knew he was not the originally intended purchaser. In fact, his name was inserted on the contract after Mr. Black's had been erased with Tipp-ex.

15. I am mindful of these considerations and I accept that a prudent purchaser, in order to satisfy himself as to the nature and quality of what he was to receive under the contract, might have taken the steps whose absence here has been emphasised. However, I cannot accept that the plaintiff's omission to take these steps involved any element of moral turpitude. I have already noted that the contract provided for vacant possession; that this was confirmed by the defendant's own office; and that the common law imposed a duty on the vendor to disclose the existence of any tenancies. The plaintiff did not mislead the defendant,

either knowingly or otherwise, to induce him to enter into the contract. I accept that the properties were to be sold at an undervalue. However, that was not sufficient to alert the plaintiff to the existence of tenancies, particularly when 13 Summerhill Place, the only vacant propety of the three, was to be sold for £22,500, a price lower than what had been contracted for in respect of the other two. Even if this had not been the case, in view of the contractual assurances the plaintiff had received he had no cause for suspecting the properties were tenanted, or that they would be tenanted on completion.

5. Laches

16. The defendant also invoked the doctrine of laches in his defence. The criteria which must be satisfied in order for that defence to be successful appear from the judgment of Keane J. in *JH v. WJH* (Unreported, High Court, Keane J, 20th December 1979) at page 35:

> "I have no doubt that the interval of time which elapsed before the proceedings were issued in the present case could properly be described as substantial. That, however, is not sufficient…there must also be circumstances which render it inequitable to enforce the claim after such a lapse of time. I must accordingly consider the circumstances in which the defendant will now find himself if the plaintiff's claim is allowed, as contrasted with the circumstances in which he would have found himself if the plaintiff had successfully prosecuted proceedings in 1973 or earlier."

17. In that case the plaintiff had entered into an agreement with the defendant, her son, whereby she waived her legal right share in her husband's estate in exchange for periodic payments from the defendant. The agreement was made in January 1969. In 1973 however, the plaintiff's solicitors, in a letter to those acting for the defendant, asserted the plaintiff's legal right share and threatened litigation. The matter was left to rest until 1976, at which point her solicitors repeated the assertion. After a further year her solicitors advised those acting for the defendant that they believed the agreement was invalid. In November 1977 they instituted proceedings seeking to have the agreement set aside. Keane J. held that he would have used his equitable jurisdiction to set aside the agreement had it not been for the long delay rendering it inequitable to enforce the plaintiff's claim. The defence of laches succeeded on two grounds. Firstly, the plaintiff had not instituted proceedings until some eight years after learning of her legal rights in relation to the matter. Secondly, there had been a huge increase in the value of agricultural land in the years leading up to the inititiation of proceedings. Accordingly, had the plaintiff acted several years earlier, as she could reasonably have been expected to, the financial burden that the defendant would have faced in satisfying her claim to a legal right share of the estate would have been considerably less. The court held that she should have instituted proceedings either on learning of her rights in 1969 or at the latest by November 1973. As she had delayed for years afterward, equitable relief was refused.

18. In the present case this court is confronted with a delay of lesser duration, but a substantial delay nonetheless. The contract was entered into in 1998. It became clear later that year that the defendant did not intend to convey the property otherwise than subject to existing tenancies, and in 1999 Mr. Kelly, the beneficial owner of the property, stated the same position. The completion date specified in the contract was 23rd July 1998 and the defendant was in breach from that date in failing to complete. Unlike in *JH*, it cannot be doubted that at the time of the breach the plaintiff must have been aware that his legal rights had been infringed. It was, at least from his perspecive, a simple case of breach of contract. However, the present proceedings were not instituted until July of 2004.

19. Where the defendant has indicated an intention not to perform the contract, either by express repudiation or otherwise, the plaintiff is expected to pursue his claim with greater expedition. The same is true where, during the period of delay, the plaintiff knew of the manner in which the defendant would be prejudiced by his failure to act expeditiously (Spry, Equitable Remedies, 5th Ed, 1997, p 232-233). Both of these circumstances arise here. The plaintiff, an experienced property dealer in the local area, must have been well aware of the steadily increasing value of the properties and the consequent prejudice to the defendant. In addition, the defendant closed the sale of the vacant property but did not complete in respect of the other two, and the following year the beneficial owner of the properties indicated his own rejection of the agreed transaction. The defendant made a statutory declaration in relation to all three properties, but it bore no relation to the issue of vacant possession and cannot be construed as an indication of the defendant's intention to convey the properties with vacant possession. This is so not merely because the declaration makes no reference to the issue, but because the defendant closed the sale of the vacant property only. The defendant did not agree to the joint deposit proposal, and by the time the statutory declaration was made it was clear to the plaintiff that the defendant had not intended to convey otherwise than subject to tenancies. As the court has indicated this is not sufficient to release the defendant from his contractual obligations, but it does mean it must have been clear in the circumstances that the defendant did not intend to close the sale with vacant possession. Finally, successive letters in 1998, 1999 and 2000 were all ignored. The cumulative import of these circumstances is clear: the defendant would not go ahead with otherwise than subject to tenancies. This must have been clear to the plaintiff.

20. The explanation advanced for the delay is that, because Mr. Kelly allegedly approached the plaintiff aggressively at the latter's office on 30th April 1999, he was intimidated to such an extent that he refrained from enforcing his legal rights. It may be that the defence of laches fails if the court finds that the delay has been explained (*Horgan v. Deasy* [1979] ILRM 71). That said, however, the explanation must surely be a plausible one if it is to defeat an otherwise well-founded defence. I cannot conclude that this is so in this case. I accept that Mr. Kelly may have acted in an intemperate manner on the occasion referred to, and that the plaintiff may have felt intimidated as a consequence. However, that sense of intimidation cannot have been operative in the mind of the plaintiff for nearly so long as to account for the length of the delay at issue here. In addition, a period of over nine months had already elapsed before the meeting with Mr. Kelly and after the agreed closing date.

21. I turn now to consider whether the circumstances are such as to render an order for specific performance inequitable. The circumstances are similar to those which arose in *JH*, in that, owing to increases in the value of property, the defendant would suffer greater financial hardship if the claim were enforced now than he would have in the event of enforcement at the time of breach or soon after. This case is not precisely analogous to *JH*. There the defendant would have been compelled to choose between selling a farm in which he had invested 10 years' work and assuming the burden of a substantial loan. The defendant's difficult position in that regard was held to constitute a further circumstance making enforcement inequitable. However, Keane J. had already concluded, before reaching that point in his judgment, that the defence of laches was made out by virtue of the added financial burden that resulted from the massive increase in market value. This circumstance applies here also, and indeed applies to a greater extent. The contract price was fixed at £25,000 for each of the tenanted properties and £22,500 for the vacant one. Mr. Black suggested their true value was between £35,000 and £40,000. Expert evidence was given at the trial of this action to the effect that the value was now somewhere between €250,000 and €270,000. Even in the uncertain climate currently prevailing in the property market, the defendant could not hope to acquire equivalent properties for a sum equivalent to the contract price agreed in 1998. Accordingly, I am satisfied that to make an order of specific performance against the defendant would be inequitable.

6. Decision

22. The defence of laches must therefore, in my view, succeed. The delay of nearly six years between the closing date and the institution of these proceedings has resulted in the value of the properties generally and in the present case escalating. It is not

equitable that a purchaser can delay to such an extent and expect to benefit from a rising market, any more than a vendor could delay in a falling market.

23. Accordingly, the decree of specific performance should be refused on the ground of laches. However, even if I am wrong in that conclusion, it has been established that where a decree of specific performance is sought, damages can be awarded in lieu thereof where a delay such as to make damages more appropriate has occurred, even where the defence of laches has not been established (*White v. McCooey* [1976-77] ILRM 72).

7. Damages

24. Even where a plaintiff has sought a decree of a specific performance in circumstances where he had no right to do so, it is open to the court to award damages in lieu of a decree (*Duggan v. Allied Irish Building Society* (Unreported, High Court, Finlay J., 4th March 1976)). The plaintiff has sought such damages in the event of the refusal of a decree and the court must now consider how they are to be quantified.

25. In *Holohan v. Ardmayle Estates* (Unreported, Supreme Court, 1st May 1967), Walsh J, with whom Budd J. and Fitzgerald J. agreed, held (at page 4):

> "when the facts of the case are such that the trial judge is of opinion that he could make an order for specific performance but in his discretion does not do so but awards damages in lieu thereof, he must take into account in assessing the damages not merely such items as the loss of bargain and other loss which flows from the breach but the out of pocket expenses and other money laid out by the plaintiff which would naturally include any part of the purchase money already paid."

26. There the plaintiff purchaser was awarded the difference between the contract price and the market value realised on resale of the property by the defendants to a third party, together with the deposit paid. The court also held that a sum equal to the auctioneers' fees and the costs of investigating title could have been awarded had it been claimed. Where damages are awarded in lieu of specific performance the general rule is that the courts assess the market value of the property at the time of judgment and subtract from it the contract price (*White v. McCooey* [1976-77] ILRM 72; *O'Connor v. McCarthy* [1982] ILRM 201; *Roberts v. O'Neill* [1983] IR 47). However, only *White* was concerned with delay. There Gannon J. rejected the defence of laches, holding that there was no evidence before him either indicating an intention to abandon the claim or disclosing any injurious affect on the defendant's position as a consequence of the limited delay that had occurred. In that case approximately one year had elapsed between the date on which the agreement was entered into and the institution of proceedings. The value of the property with which that decision was concerned had risen, and damages in lieu were nonetheless assessed according to the normal rule. In *White* the delay was not so great that the prejudice to the defendant could properly be attributed to it. In my view the result would have been different had the delay been much greater, in which case the court could readily have inferred that the prejudice to the defendant was attributable to that delay. This conclusion draws support from the decision in *JH*.

27. Here a decree of specific performance would compel the defendant to part with the two properties in question for a sum which today would be regarded as almost minuscule by comparison to how that same sum would have been regarded in 1998, a sum which also represents only a small fraction of the current market value of the properties. The plaintiff would also be permitted to profit from his own delay by acquiring them at a gross undervalue.

28. It might be pointed out that the defendant would have suffered financially in this regard even if proceedings had been instituted in a timely fashion. In such a case, specific performance would have been ordered despite the financial hardship to the defendant, as happened in *Roberts*. McWilliam J. indicated in that case that even if the defence of hardship had succeeded, the defendant would have had to pay damages assessed according to the normal measure outlined above. However, the defence of hardship does not depend for its success on the presence of any fault on the part of the plaintiff. It is logical then that in such cases the defence of hardship should not generally succeed on the ground of inflation even where it affords the plaintiff purchaser something of a windfall.

29. Different considerations apply in relation to laches, since that defence is contingent on a delay attributable to the plaintiff. If the same principle were applied in relation to laches in a case such as the present as applies in the context of the defence of hardship, the court would be impelled to a conclusion of dubious rationality. While acknowledging the fault on the part of the purchaser in the form of a substantial and harmful delay attributable to him, the court would nevertheless be forced to ignore this in the assessment of damages. Having concluded that a dramatic rise in market value rendered the award of specific performance inequitable, it would then be required to ignore this inequity in the assessment of damages, producing an outcome which is for all practical purposes equally inequitable. For this result to follow in where the court has already found that the plaintiff is at fault in delaying the bringing of this action would appear untenable. In my view the authorities which expressly consider the questions of delay and laches are more instructive in the assessment of damages in lieu of specific performance in cases such as this, where the plaintiff is at fault and specific performance is refused for economic reasons.

30. At page 37 of his judgment in *JH*, Keane J, in refusing the equitable relief sought on the ground of laches, contrasted the financial harm to the defendant which would flow from the grant of the relief with the great benefit to the plaintiff. He noted the incongruity of allowing the plaintiff to "obtain a significant financial windfall as a result of her dilatoriness in prosecuting her claim". The same inequitable result would follow in the present case were damages to be assessed according to the normal measure, with the plaintiff profiting substantially from his own failure to act promptly.

31. In *Malhotra v. Choudhury* [1980] 1 Ch 52, the plaintiff had been awarded specific performance of an option to purchase premises from which he and the defendant had carried on a medical practice. The Court of Appeal had set aside this decree and awarded in its place a declaration that the plaintiff was entitled to exercise the option. The defendant refused to convey and the plaintiff sought damages. The Court of Appeal allowed the plaintiff's appeal on the quantum of damages awarded. Cumming-Bruce L.J., with whose judgment Stephenson L.J. agreed, held (at p 79) that the damages to be awarded in equity should be quantified according to common law principles:

> "So I am satisfied that equity is following the law if in relation to an award of damages in substitution for an order for specific performance of a contract of sale of real property, it awards damages assessing the value of the realty at date of judgment and not at the date of breach."

32. However, the defendant argued that, if the market value of property rose during the period in which the plaintiff delayed, and the plaintiff could have avoided such a windfall by acting more expeditiously in pursuing the proceedings, his damages should not be enhanced by his own delay. In response, Cumming-Bruce LJ recognised that the plaintiff had been grappling with complex issues of law, but concluded (at p 81):

> "Nonetheless, when all is said and done, it is unfair to the defendant that the deliberation with which the plaintiff moved from the middle of 1975 until he issued the present proceedings in January 1977 should be allowed to enhance the damage which the defendant has to pay the plaintiff if the price level of real property has risen during that period. For my part I would think that justice is done between them by holding that the plaintiff did not sufficiently mitigate his damage by proceeding with greater celerity in the various and difficult legal convolutions that he has been forced to undergo."

33. Accordingly, the court found that the material date for the assessment of damages was 21st October 1976, one year before the date of judgment.

34. In *Malhotra* the original proceedings for specific performance had been instituted in 1973, within months of the breach of the obligation to comply with the option. The delay of a year and a half referred to in the passage just quoted refers to a delay not in the institution of the second set of proceedings, but in the carriage of those proceedings once instituted. In the court's view that principle applies *a fortiori* where, as in the present case, there is a delay in instituting proceedings at all: where proceedings have been instituted, the defendant is at least aware that the plaintiff intends to hold him to his contract.

35. In the present case there was a period of nine months between the agreed closing date, which would constitute the date of breach since the properties were not conveyed on that date, and the date of the meeting with Mr. Kelly. As already indicated, I do not accept that his behaviour on that occasion produced an inhibiting effect on the plaintiff which remained operative for such a time as to adequately explain the delay in instituting the present proceedings. For the reasons noted above, the circumstances in this case justified an expectation that the plaintiff should act quickly. He should have instituted proceedings early in 2001 at the very latest. This action instead commenced in the middle of 2004. It therefore seems appropriate to assess the date for the relevant date for the assessment of damages as being three and a half years preceding the date of judgment in this action. While I accept that this exact date cannot be grounded on any precise basis, the same could have been said in *Malhotra*. In addition, it appears to provide a solution in accord with equitable principle, in that it makes allowance for the delay of the plaintiff but also exhibits a degree of indulgence toward him, countenancing a more than reasonable lapse of time in recognition of the defendant's breach and the plaintiff's fair expectation of performance.

36. In *O'Connor*, Costello J. followed the long-established rule that the damages payable for a breach of contract should be such as may fairly and reasonably be considered as arising according to the usual course of things from the breach or such as may reasonably be supposed to have been in the contemplation of both parties when they entered into the contract as the probable result of its breach. Costello J. reviewed the authorities and concluded that the plaintiff should not be permitted to succeed in his claim for loss of profits, or for the cost of reconstruction of new premises, on the ground that these losses constituted special circumstances which had not been communicated to the vendor at or before the time of contracting. He had not been informed of the purpose for which the plaintiff had intended to use the premises.

37. Similarly, in this case the evidence does not indicate that the defendant was informed of the purpose for which the plaintiff intended to use the property. Evidence has not been adduced as to any loss of rental income, or as to any intention on the part of the purchaser to lease the premises. Indeed, the evidence indicates that he wished, at least initially, to have vacant possession of the property. In these circumstances it has not been shown that a loss of rental income was within the contemplation of both parties, nor that it flows naturally from the breach.

38. The current market value of the properties with which the court is concerned is not clear. The estimate of €250,000 to €270,000 which is a current valuation was put forward. This estimate was based on an external inspection only, but expert evidence was given to the effect that the internal condition of the properties would not have substantially affected their value, unless they were derelict which did not appear to be the case. It is now necessary to assess the market value of the properties as at mid 2005 with the proviso that if that should exceed the current market value then damages should be quantified by reference to the date of this judgment. If it were otherwise, the order of the court would enable the plaintiff to profit to a greater extent because of his delay than he would have done if confined to the normal rule, notwithstanding that the departure from the normal rule in this case is justified only because of that very delay for which the plaintiff is at fault.

39. From the market value as at mid 2005 (or the date of judgment if the latter is a lesser figure) will be subtracted the contract price of the properties. In light of the decision of the Supreme Court in *Holohan*, the plaintiff is also entitled to the return of the deposit paid in respect of the two properties. The total arrived at is to be calculated according to this method in respect of each property. The resulting total in respect of 14 Rutland Street is awarded to the plaintiff, while the figure in respect of 9 Summerhill Place is awarded to the plaintiff to be held in trust for his brother, the second plaintiff in the action concerning the latter property. This is because the plaintiff contracted to purchase that property in trust for him.

40. There is no evidence before the court as to any further losses which might be compensated in damages.