THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 317

Peart J.
Hogan J.
Hedigan J.

Appeal No. 2014/719

BETWEEN

WYNN CLONS DEVELOPMENT LTD

PLAINTIFF / RESPONDENT

-AND-

KEITH COOKE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Hedigan delivered on the 4th day of November 2016

Background
1. This is the defendant's appeal against an order made in the High Court on the 10th October, 2012, by Laffoy J. The order was for specific performance of a contract for the purchase of a commercial unit. Judgment was given on the 1st October, 2012. The appellant's counterclaim was dismissed.

2. The commercial unit in question formed part of an office and retail development. The agreed price was €330,000 plus VAT in 2006. Prior to the completion of the purchase in March 2007, the appellant was informed by his solicitor that there was a strong odour of diesel in the unit. An engineer was engaged to inspect and confirmed the existence of a strong smell of diesel. In April, 2007 the appellant attempted to repudiate the contract and have his deposit returned. A plenary summons issued on the 5th March, 2008. A defence and counterclaim were delivered on the 3rd September, 2009. The following helpful chronology of events was set out in the appellant's submissions.

Chronology of Events

August, 2006 The appellant agreed, subject to contract, to purchase the office unit (Unit 12) at the price of €330,000 plus VAT and paid a booking deposit.

5th December, 2006 A contract for sale and a building agreement were executed on behalf of the respondent, with a closing date of seven days after the completion date.

9th January, 2007 The respondent's solicitors notified the appellant's solicitors that they had the certificate of completion.

21st February, 2007 The appellant's solicitors sought confirmation that there were no workmen any longer on the premises, and stated that the appellant would then have the premises "snagged".

22nd February, 2007 The respondent's solicitors informed the appellant's solicitors that Unit 12 had been completed.

End of February, 2007 Title matters and other contractual matters were attended to by the respondent's solicitors.

8th March, 2007 The appellant's solicitors furnished the appellant's snag list to the respondent's solicitors. Various correspondence occurred about whether a parking space was being acquired with the unit.

29th March, 2007 The principal of the appellant's solicitors visited Unit 12 and detected a "very strong odour' of diesel, and telephoned his client and suggested that the appellant engage an engineer.

29th March, 2007 The appellant's solicitors wrote to the respondent's solicitors reporting the smell, but it appears that the letter got lost in the DX system or otherwise went astray.

31st March, 2007 Mr. Lunn of Dunbar Lunn, Civil and Structural Consulting Engineers visited Unit 12 and reported that " [o]n entering the office we were struck by an odour which we concluded to be the same smell emanating from diesel fuel. No source for this odour could be found and inspections in adjacent offices found no odour present."

17th April, 2007 The respondent's solicitors issued a notice under Condition 40 of the Law Society General Conditions requiring payment of the balance of the purchase monies. By letter on this day the appellant's solicitors informed the respondent's solicitors that, because of the "strong smell of diesel or kerosene in Unit 12", the appellant did not wish to complete the transaction and informed the respondent that the appellant was repudiating the contract because of a breach of contract, *inter alia*, and sought return of the deposit of €33,000.

20th and 25th April, Mr. Mooney, of Mooney Estates Ltd., a firm of auctioneers and

2007 estate agents practising in Gorey, inspected Unit 12 to determine the projected rental income it would yield and the likely demand for it, but reported on 25th April, 2007, that after two visits on these dates the position was that it would be extremely difficult, if not impossible, to rent the unit, "as the aforementioned odour would be immediately apparent to any prospective tenant". Mr. Mooney confined that the smell was "very strong" on his second visit.

1st May, 2007 While rejecting the entitlement of the appellant to pull out of the transaction because of an alleged smell, the respondent wrote that it intended forfeiting the appellant's deposit if the sale was not completed and putting the property back on the market, and thereafter the respondent would seek redress from the appellant for any financial loss.

9th May, 2007 The respondent's solicitors informed the appellant's solicitors that they had been given instructions to issue proceedings seeking specific performance or damages in lieu of specific performance. However, they suggested an "independent review" of Unit 12.

29th June, 2007 The respondent's solicitors nominated two professionals to conduct the independent review and inquired as to the appellant's preference.

3rd August, 2007 The appellant's solicitors indicated that they had no difficulty with either nominee "as the smell in the unit is still very pungent".

28th September, 2007 The appellant's solicitors complained that they had not had a response to the letter of 3rd August, 2007, and stated that the smell "up to the last few days was extremely bad". They sought return of the deposit and "a mutual rescission of the contract".

8th October, 2007 The respondent's solicitors wrote to the effect that the deposit had been forfeited and they expected to serve proceedings for specific performance shortly.

5th March, 2008 The plenary summons issued.

Late 2008 The respondent put the property back on the market and Kinsella Estates, on behalf of the respondent, agreed the sale of Unit 12, subject to contract, to a third party at the price of €300,000 plus €10,000 for a car park space. However, that sale subsequently fell through. If it had proceeded, the respondent's loss would have been mitigated. Unit 12 remains in the ownership of the respondent.

3rd September, 2009 Defence and counterclaim delivered.

April, 2011 Dr. O'Callaghan for the respondent carried out tests and found no hydrocarbons present.

June, 2011 Mr. Mooney, estate agent, re-visits the property and confirms the smell had "paled into insignificance compared to what it was in 07".

3. At the hearing of this appeal, counsel for the appellant outlined three grounds of appeal upon which the appellant relied.

(i) The trial judge's finding on the core issue of the existence of a smell was contrary to the weight of the evidence.

(ii) The respondent both in 2007 and at the opening of the trial on 6th October, 2011, abandoned their claim for specific performance and elected to sue for damages in lieu. Thus the trial judge had no jurisdiction to grant an order of specific performance.

(iii) The trial judge should not have awarded High Court costs to the respondent in the absence of evidence that the rateable valuation of the property in question was in excess of the jurisdiction of the Circuit Court.

Appellant's Submissions

4. On the first ground the appellant relies upon the principles set out by the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210. These principles were summarised by Ryan P. in *Emerald Isle Assurances v. Dorgan* [2016] IECA 12 at para. 31 as follows:-

"(a) Were the findings of fact made by the trial judge supported by credible evidence? If so, the appellate court is bound by the findings, however voluminous and apparently weighty the testimony against them.

(b) Did the inferences of fact depend on oral evidence of recollection of fact? If so, the appeal court should be slow to substitute its own different inference.

(c) In regard to inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge in that regard. Did the judge draw erroneous inferences?

(d) Was the conclusion of law drawn by the trial judge from a combination of primary fact and proper inference erroneous? If so, the appeal should be allowed.

(e) If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly."

5. On the second ground, the appellant argues that the respondent unequivocally waived its right to specific performance and opted for a suit in damages in its original correspondence when it forfeited the deposit and placed the property on the market. Moreover at the outset of the hearing the respondent informed the trial judge that it was seeking damages in lieu of specific performance. This, the appellant argues was a second waiver of the respondent's right to sue for specific performance. The appellant argues that allowing the respondent to forfeit and sell (albeit unsuccessfully) and at the same time pursue an action for specific performance was to allow it "run with the hare and chase with the hounds". The appellant relies upon *Guerin v. Heffernan* [1925] 1 I.R. 57 where the Supreme Court, due to both delay and acts of the parties showing a belief all round that the transaction was at an end, refused specific performance. The appellant also relies upon *Flanagan v. Forde* (Unreported, High Court, Feeney J., 6th March, 2009) where Feeney J. held the remedies of forfeiture, damages for breach of contract and specific performance were alternatives and a vendor cannot be awarded all three. Feeney J. went on to hold that the party seeking said remedy must elect at the very latest at the hearing of the action. The appellant also relied in this regard on the judgment of Lord Wilberforce in *Johnston v. Agnew* [1980] 1 A.C. 367 and referred the Court in particular to page 392. In that case Lord Wilberforce held that:-

> "First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.
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> Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.
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> Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance."

6. On the third ground the appellant argues that in the absence of any evidence of the rateable valuation to the effect that the property was in excess of the jurisdiction of the Circuit Court, proceedings should have been brought there and consequently only Circuit Court costs should be allowed.

Respondent's Submissions

7. On the first ground relating to findings of fact the respondent argues that the test is whether there was credible evidence before the trial judge, allowing him prefer one case over the other. The respondent referred the Court to the assessment of the evidence as appears in the transcript. It shows that the appellant had a range of reasons why he did not wish to proceed apart from the alleged smell which only emerged immediately after it was confirmed by the respondent's solicitor that a parking space was not included in the sale. The snag list prepared only three weeks before had not made any mention of the smell. The real reason argues the respondent, is that the appellant had no finance, no tenant and a car park space was not included. Counsel referred the Court to a whole range of witnesses all of whom gave evidence of no smell in Unit 12. Against this was the evidence of the appellant's solicitor, the solicitor's daughter in law, the solicitors' secretary and the engineer Mr. Lunn. Mr. Lunn did not carry out any scientific testing. In fact he agreed in evidence that the only source of the odour was probably outside. He also stated that due to his being a devoted pipe smoker, he had a poor sense of smell. In para. 24 the trial judge properly analysed his evidence and her conclusions reached were solidly based on that analysis.

8. On the second ground raised in this appeal the respondent argues that the claim brought was always one in specific performance. The completion notice of the 17th April, 2007, provided the alternative remedy of specific performance. At the opening of the trial the respondent's counsel did not withdraw the claim for specific performance. In fact he argues he reiterated it but specified that the respondent sought damages in lieu of specific performance. It was certainly not an unequivocal repudiation of specific performance. The respondent argues that in an action for specific performance a plaintiff may pursue a claim for damages in lieu of specific performance where it has not been established that the defendant is in a position to complete the purchase. See *Aranbel Ltd v. D'Arcy* [2010] 3 I.R. 769 as relied upon by Clarke J. at para. 32 of his judgment. Thus the respondent argues the appellant always had to meet a claim for specific performance and the opting by the respondent for damages in lieu was no more than an option for one of the remedies available in an action for specific performance. The appellant cannot claim to have suffered any prejudice. Damages in lieu of specific performance may only be granted where a right to specific performance has been established and so it was a case of specific performance that he had to meet anyway. See the judgment of Finlay Geoghegan J. in *Collins v. Duffy & Callan* [2009] IEHC 290.

9. On the third ground relating to costs the respondent argues that the appellant has cited no authority to support the proposition that the trial judge could take judicial notice of the rateable valuation of a commercial property and no evidence thereof was given. No argument was made to the trial judge on this issue. No application to remit the case was made and in any event the potential level of damages was likely to be well above the jurisdiction of the Circuit Court.

Decision

10. The specific performance case made by the appellant is based upon two grounds. Firstly, it is argued that on the 1st May, 2007, the respondent's solicitors wrote to the appellant's solicitors informing them that it was intending to put the property on the market after the completion notice had expired and the deposit had been forfeited. This, the appellant argues was an unequivocal election for common law damages instead of pursuing specific performance. In addition or in the alternative, at the opening of the respondent's case before Laffoy J., counsel for the respondent in answer to the judge's question stated that his client was seeking damages in lieu of specific performance.

11. Did the respondent in 2007 unequivocally elect to abandon its specific performance rights? I do not think so. The completion notice dated the 17th April, 2007, at para. 3 thereof retains all options for the vendor ie. forfeiture of deposit, rescission of contract, re-sale of the property with a claim over for any deficiencies suffered together with a claim for costs, losses, damage and expense incurred and finally specific performance. Far from being an unequivocal abandonment of its specific performance rights, it in fact expressly retains them. The vendor was faced with an apparent attempt by its purchaser to repudiate the contract just as the development had reached completion. Its response was to bring all due pressure to bear upon the purchaser, but also to attempt to market the property so as to mitigate its loss. It seems to me that any vendor in such a financially exposed situation, as here seemed to be the case, is entitled - and perhaps even obliged - to do everything he can to mitigate his potential loss. Dealing with a similar situation, the Court of Appeal in New Zealand in *McLachlan v. Taylor* [1985] 2 N.Z.L.R. 277 at p. 285, Cooke J. stated:-

> "It is elementary that an election at common law must be an unequivocal choice between inconsistent courses of action. We cannot read this letter as an unequivocal choice of damages rather than specific performance. If the efforts of the vendors had produced an unconditional contract by them to resell, the result might have been different. As it is, they did no more than intimate that that they were trying to resell. A mere attempt by a vendor to mitigate his position by reselling, if it proves to be fruitless, does not we think relieve the purchaser from his ordinary contractual duty or deprive the vendor of his primary remedy of specific performance."

I gratefully adopt this statement of the law by the Appeal Court of New Zealand.

12. In my reading of the transcript, I do not find support for the appellant's claim of abandonment by the respondent of its specific performance claim. In answer to the judge's query, its counsel seems to be opting for damages in lieu in the specific performance action because the respondent did not believe the appellant was actually in a position to complete the purchase of the property. In fact a proper reading of the full transcript of the 18th October, 2011, including pp. 55, 78, 79 and 81 shows that the learned judge is clearly dealing with the case as one for specific performance. (See p. 81, at line 26 and 32 where she explicitly states at the end of

the hearing that it is a specific performance action with which she is dealing). Clearly the learned trial judge did not consider that the claim for specific performance had been abandoned.

This ground of appeal fails.

13. Were the findings of fact made by the trial judge supported by credible evidence? The principles applicable are agreed. They have already been summarised at paragraph 4 above. The key principle applicable to this case is set out by McCarthy J. in *Hay v. O'Grady* at p. 217 of the judgment as follows;-

> "If the findings of fact made by the trial judge are supported by credible evidence, this court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority."

14. The findings of fact made by Laffoy J. are set out succinctly at para. 26 of her judgment:-

> "Having considered the evidence outlined in the preceding paragraphs and all the other evidence adduced by both parties on the condition of Unit 12 in April and May 2007, it is impossible to conclude that the plaintiff, as vendor, was not in a position to deliver to the defendant Unit 12 in the condition in which the plaintiff was contractually bound to deliver that unit. In particular, it is impossible to find that there existed in Unit 12 a noxious smell which rendered Unit 12 unfit for human habitation or unsuitable on safety, health and welfare at work grounds for use as an office."

15. The essence of the finding is in the final sentence. The appellant's key objection to this finding is that Laffoy J. did not engage with the evidence in the manner required *by Doyle v. Banville* [2012] IESC 25 and, specifically, gave inadequate reasons for her conclusion that there was no noxious smell.

16. Starting at para. 21, Laffoy J. addressed the evidence. She described the net issue for the Court, i.e., whether there was a smell in the premises and, if so, whether that smell was sufficient to entitle the appellant to repudiate the contract. Continuing in para. 22, the learned judge noted only four experts were called. Brian Mahoney, Structural Engineer, who certified compliance with engineering aspects of the project. He detected no noxious odour albeit he had left the site when it was first mentioned by the appellant. Michael Kiely, Architect, produced a certificate of practical completion of the 21st December, 2006, indicating completion subject to "snagging". Two such snag lists were provided dated the 4th December, 2006, and the 18th January, 2007. Both included Unit 12. No noxious odour was referred to therein. He never detected any smell and there was nothing he could think of which could cause such a smell. After the complaint of a smell was made by the purchaser's solicitor following his visit to Unit 12 on the 29th March, 2007, Mr. Kiely visited the premises to investigate the smell. He detected none. In April 2011, Dr. Fergal O'Callaghan did an indoor air assessment on Unit 12 and found no health or safety risk to staff working there. The Unit he reported was fit for human habitation. This it must be noted was the only scientific report done on the premises. The fourth expert was Mr. Lunn. He admitted to having a bad sense of smell, but said he had detected a bad smell in Unit 12 at the time of the complaint. He agreed with Mr. O'Gorman, the appellant's solicitor who had also acquired units at the same premises and who described the level of smell as 10 out of 10. Mr. Lunn conducted no air testing or any scientific investigation. Two other witnesses were subpoenaed by the respondent, both of whom purchased and occupy units in the same building. Neither had ever detected any smell in the building. Edward Mooney, Auctioneer instructed by the appellant stated in a report of April 2007, that he noticed a chemical odour which was stronger on his second visit. Other witnesses not referred to by the learned judge were Charles O'Reilly Hyland, Gerald Kean, the respondent's solicitor, Michael Kinsella and Niall Slattery, all of whom testified that there was no smell. Josephine Dunne of O'Gorman Solicitors, Anthony O'Gorman, solicitor, Lana O'Gorman, solicitor and Susan Byrne, Legal Executive with O'Gorman Solicitors gave evidence of the existence of a smell.

17. It is clear there was a conflict of evidence. The learned judge did not however, have to choose whom to believe as to whether there was, in fact, a smell. It is apparent from her succinct conclusion that even taking the appellant's evidence at its height, she considered that it could not support a finding that there existed in Unit 12 a noxious smell which rendered it unfit for human habitation or unsuitable on safety, health and welfare grounds for use as an office. Although she did not specifically say so in terms, it is implicit in her judgment that she concluded that the appellant had produced no scientific evidence of such unfitness sufficient to free the purchaser from his obligation to complete. It is obvious that this is why the learned judge decided as she did. That finding is based on credible evidence and thus this Court cannot interfere with the learned judge's finding of fact. This ground also fails.

18. As to the award of costs on the High Court scale, the appellant did not raise the issue of an incorrect choice of jurisdiction either in pleadings or in submissions made to the trial judge. No evidence was given as to the rateable valuation of the premises. Had the issue been raised the parties may have been given the opportunity to produce evidence. This is a court of appeal and cannot address such an issue anew. This ground also fails.

I would dismiss the appeal.