Neutral Citation [2012] IEHC 385

THE HIGH COURT

[2008 No. 1922P]

BETWEEN

WYNN CLONS DEVELOPMENT LIMITED

PLAINTIFF

AND

KEITH COOKE

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 1st day of October, 2012.

Factual background

1. These proceedings concern a contract for the sale of an office unit in the development known as Pugin Court, Gorey, County Wexford by the plaintiff, as vendor, to the defendant, as purchaser. Pugin Court, a retail and office development comprising six retail units and twelve office units in a modern three storey building, was developed by the plaintiff around 2006. Two firms of auctioneers in Gorey, Warren Estates Limited and Kinsella Estates acted as joint agents for the plaintiff in the sale of the units in Pugin Court. However, the defendant dealt solely with Mr. Niall Slattery of Warren Estates Ltd. In mid-August 2006, the defendant agreed, subject to contract, to purchase Office Unit 12 (Unit 12) in Pugin Court at the price of €330,000 plus VAT. He paid a booking deposit of €5,000 to Warren Estates Ltd., and the balance of the deposit, €28,000, was to be paid on the signing of the contract.

2. Keans Solicitors, acted for the plaintiff in the sale. Anthony F. O'Gorman & Co., Solicitors, acted for the defendant. There were two contractual documents: a contract for sale in the form of the Law Society General Conditions of Sale; and a building agreement in the form issued jointly by the Law Society and the Construction Industry Federation. While both bear the date 21st November, 2006, it is clear on the evidence that both contractual documents were executed on behalf of the plaintiff on 5th December, 2006. It is beyond question that the defendant, as well as the plaintiff, became contractually bound on that day to comply with both contractual documents. By that day, the defendant had paid the balance of the deposit amounting to €28,000.

3. The purchase price of €330,000 was split between the contract for sale and the building agreement. The purchase price in the contract for sale was €91,646 and the contract price in the building agreement was €238,354 plus VAT.

4. The contract for sale envisaged the sale of Unit 12 to the defendant being effected by way of long lease for a term of eight hundred and fifty years, but nothing turns on that. As regards the closing date, condition 14 of the special conditions in the contract for sale provided that the closing date would be seven days from the date on which the defendant should receive notice in writing from the plaintiff that the plaintiff was in a position to complete. In the building agreement it was provided that the closing date would be "the day 7 days after the Completion Date", which was defined as the earlier of the date on which the defendant should agree in writing that the works had been completed, or the date upon which the defendant should receive from the plaintiff a notice in writing that the works had been completed. The works were defined as meaning the unit specified in the plans, that is to say, Unit 12 "together with such ancillary works and services as may be necessary to render the unit and premises reasonably habitable when completed". In the building agreement the plaintiff covenanted to build and complete and finish in a good, substantial and workmanlike manner the works and to deliver the same to the defendant.

5. It is important to emphasise that the contract for sale and the building agreement only referred to Unit 12 and not to any car parking space. However, by letter dated 24th November, 2006, Mr. Slattery of Warren Estates Ltd., notified the plaintiff's solicitors that certain car parking spaces had been booked by certain purchasers, including the defendant, whom it was represented had booked car park space No. 6 at a price of €12,000. I am absolutely satisfied on the evidence that the contract for the sale of Unit 12 to the defendant did not include, and was not in any way conditional upon the defendant acquiring car park space No. 6 at the price of €12,000.

6. By 18th December, 2006, the plaintiff's solicitors were putting pressure on the defendant's solicitors to complete the transaction. However, the defendant's solicitors, who were familiar with Pugin Court, by letter dated 19th December, 2006 informed the plaintiff's solicitors that the works were not sufficiently advanced for the defendant's engineer to carry out a worthwhile inspection. The pressure from the plaintiff's solicitors to complete was renewed in early 2007. By letter dated 9th January, 2007 the plaintiff's solicitors notified the defendant's solicitors that they were "in possession of the Certificate of Completion", and queried when the defendant would be in a position to close. That message was reiterated in letters of 16th January, 2007, 23rd January, 2007 and 2nd February, 2007, the last letter being accompanied by a final architect's opinion on compliance with the relevant planning permission. The defendant's solicitors, by letter dated 21st February, 2007, sought confirmation in writing that Unit 12 was finished and completed and that there were no workmen any longer on the premises, and stated that on receiving such confirmation the defendant's instructions would be taken with a view to having the premises "snagged" and with a view to closing. By letter dated 22nd February, 2007 the plaintiff's solicitors informed the defendant's solicitors that Unit 12 had been completed. At the end of February 2007 title matters and other contractual matters were attended to by the plaintiff's solicitors.

7. The defendant's solicitors furnished the defendant's "snag list" to the plaintiff's solicitors with their letter dated 8th March, 2007. The "snag list" was dated 6th March, 2007 and was signed by the defendant personally, who listed the following matters as matters that were of concern to him and that he would like dealt with before closing the transaction:

(a) dampness on the inside of the windowsill area of the main window facing the road;

(b) two scratches that were very noticeable on the outside of the main window;

(c) scratches on the middle window facing the landing area; and

(d) the fact that the fire hose was located in Unit 12, suggesting that it could be located in the landing area so as to be accessible to everyone if required to be used.

8. In the letter of 8th March, 2007 the defendant's solicitors also requested the plaintiff's solicitors to deal with the situation regarding the car parking space. On 6th March, 2007 Warren Estates Ltd. had issued a sale advice note, which was headed "Subject to Contract – Contract Denied", evidencing the proposed sale of car park space No. 6 to the defendant at the price of €12,000 plus VAT. The response of the plaintiff's solicitors by letter dated 12th March, 2007 was that the reference to a car parking space had been deleted from the proposed lease "as no car parking space follows with this property". By letter dated 21st March, 2007, the defendant's solicitors informed the plaintiff's solicitors that they were "gathering in the funds" from the defendant, but in the meantime they required clarity in relation to the car parking space, contending that space No. 6 had been allocated to the defendant. In the course of communications between the plaintiff's solicitors' office and the defendant's solicitors' office over the next week, the plaintiff's solicitors undoubtedly created a confused situation in relation to the car park space. However, by letter dated 28th March, 2007, the plaintiff's solicitors confirmed that there was no car parking space with Unit 12 and gave notice that interest in accordance with terms of the contract for sale and the building agreement would be charged in the event of the sale not being completed within twenty four hours.

9. What happened next, according to the evidence of Anthony F. O'Gorman, the principal of the defendant's solicitors, was that he visited Unit 12 on the following day, 29th March, 2007 and he detected a "very strong odour". He telephoned his client, the defendant, who was on holidays in County Cork, to tell him that there was a "heavy smell of diesel" in Unit 12 and he suggested that the defendant engage an engineer. The defendant retained Mr. D.J. Lunn of Dunbar Lunn, Civil and Structural Consulting Engineers. He visited Unit 12 on 31st March, 2007 and carried out an inspection, having been admitted to Unit 12 by Michael Kinsella of Kinsella Estates. Mr. Lunn issued a short report to the defendant's solicitors, which was dated 5th April, 2007. The two short paragraphs which dealt with the condition of Unit 12 stated as follows:

> "On 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.
>
> Two other matters noted in the inspection were scratching on the bay window glass and damp penetration on the window board."

10. Mr. O'Gorman's evidence was that the defendant's solicitors wrote to the plaintiff's solicitors by letter dated 29th March, 2007, stating that "there is a strong smell of diesel/kerosene" in Unit 12, which was not in any of the other units in Pugin Court, and that this would have to be resolved before the defendant would close the sale. The principal of the plaintiff's solicitors, Dr. Gerald Kean, testified that that letter was not received in his office. The only reasonable inference to be drawn is that the letter got lost in the document exchange system or otherwise went astray.

11. The plaintiff's solicitors issued a notice under Condition 40 of the general conditions in the contract for sale which was dated 17th April, 2007. In that notice the plaintiff required the defendant within twenty eight days to pay the balance of the purchase monies together with interest thereon in accordance with the terms of the contract for sale and threatened, in the event of failure to comply with the notice, that the deposit would be forfeited and that the plaintiff would either rescind or take proceedings for specific performance.

12. By letter of the same date, 17th April, 2007, the defendant's solicitors informed the plaintiff's solicitors that, because of the "strong smell of diesel or kerosene in Unit 12", the defendant did not wish to complete the transaction and continued:

"We have taken Counsel's opinion on this matter and have been advised that there has been a breach of a number of terms of the contract but in particular condition A(vi), 1(a) of the Building Agreement and condition 1 of the conditions annexed thereto and that the breaches are such that would entitle our client to repudiate the contract and/or treat the contract as discharged by reason of frustration.

> We now inform you that we are repudiating the contract because of the said breaches and are treating the contract as discharged by reason of frustration."
>
> (Emphasis in original)

The defendant's solicitors called for a return of the deposit of €33,000.

13. In the interests of clarity, I should record the following: condition A(vi) of the building agreement is the definition of the works, which I have partly quoted above; condition 1(a) is the covenant to build, which I have partly quoted above; and Condition 1 is a general condition under which the defendant, as employer, acknowledged that the plaintiff, as contractor, was entitled to possession of the site and it was provided that the plaintiff, as contractor, would commence and actively carry out and complete the works and make the same fit for habitation and use.

14. The position immediately adopted by the plaintiff's solicitors in response to the letter of 17th April, 2007 from the defendant's solicitors was to rely on the notice to complete. However, for a short period, there was a certain inconsistency in the stance subsequently adopted by the plaintiff's solicitors. In a letter of 1st May, 2007, while rejecting the entitlement of the defendant to pull out of the transaction because of an alleged "smell", they stated that they intended forfeiting the defendant's deposit if the sale was not completed and putting the property back on the market after the deposit was forfeited and after the completion notice had expired and thereafter the plaintiff would be holding the defendant responsible for any financial loss or damage occasioned to the plaintiff. Just over a week later, the plaintiff's solicitors, by letter dated 9th May, 2007, informed the defendant'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.

15. Subsequently, there was correspondence backwards and forwards between the plaintiff's solicitors and the defendant's solicitors sporadically in relation to the independent review. By letter dated 29th June, 2007 the plaintiff's solicitors nominated two professionals to conduct the independent review and inquired as to the defendant's preference. The defendant's solicitors responded over a month later, by letter dated 3rd August, 2007, indicating that they had no difficulty with either nominee "as the smell in the Unit is still very pungent". The next letter between the parties was a letter of 28th September, 2007 from the defendant's solicitors expressing disappointment that they had not had a response to the letter of 3rd August, 2007. They 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". There was a relatively prompt response from the plaintiff's solicitors, by letter dated 8th October, 2007, to the effect that the deposit had been forfeited and they

expected to serve proceedings for specific performance shortly. In fact, the plenary summons in these proceedings was issued on 5th March, 2008 after certain other communications between the solicitors, which I do not consider it necessary to outline. However, there are two further factual matters which I consider should be recorded.

16. The first is that after the notice to complete was served, the defendant instructed Edward Mooney, of Mooney Estates Ltd., a firm of auctioneers and estate agents practising in Gorey, to inspect Unit 12 to determine the projected rental income it would yield and the likely demand for it. Mr. Mooney produced a report dated 25th April, 2007 in which he stated that when he visited the premises on 20th April, 2007 he noticed "a chemical odour permeating the entire unit" which remained for the duration of the inspection. On his second visit on 25th April, 2007, "the odour was significantly stronger". His view 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".

17. The second matter is that after the proceedings were initiated, in late 2008, the plaintiff put the property back on the market and Kinsella Estates, on behalf of the plaintiff, 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 plaintiff's loss would have been mitigated. Unit 12 remains in the ownership of the plaintiff.

The pleadings
18. In the statement of claim, having pleaded the contract for sale and the building agreement, in particular, the provisions in both in relation to closing the transaction, and the notice to complete dated 17th April, 2007, and having further pleaded that the defendant had failed and refused to complete the purchase and that the plaintiff had at all material times been and still was ready, willing and able to perform its outstanding obligations, the plaintiff claims by way of primary relief specific performance of the contract and the building agreement or damages in lieu of specific performance.

19. The defendant delivered a defence and counterclaim on 3rd September, 2007. In the defence, apart from putting the plaintiff on proof of the matters alleged in the statement of claim, and denying that he had failed and refused to complete the purchase, it is also denied that the plaintiff was ready, willing and able to perform its outstanding obligations "for the reasons set out in the counterclaim". The nub of the counterclaim is paragraph 4 in which it is alleged as follows:

> "However, ultimately and in breach of the said agreement, it was found that the Plaintiff had not built, constructed or provided to the Defendant a unit fit for the purpose for which it was sold, and further, same was unfit for human habitation. In particular, it was found that a noxious smell, which appeared to be diesel fuel eminated (*sic*) into the said unit to the extent that same rendered it uninhabitable as an office. Notwithstanding extensive investigation, the source of the said fumes could not be located by the Defendant."

There is no reference to the defendant's solicitors' letter of 17th April, 2007 in the counterclaim, and it is not pleaded that the defendant was entitled to repudiate the contract or that it was discharged by reason of frustration. However, it is pleaded that the plaintiff is in breach of contract with the defendant. The primary relief sought by the defendant in the counterclaim is the return of the sum of €33,000 paid by the defendant to the plaintiff. There is also a claim for damages. Under the heading "Special Damages" there is a reference to "loss of potential rent", which is "to be ascertained". The defendant's replies dated 29th March, 2011 to the plaintiff's requests for particulars throw no further light on the defendant's counterclaim for damages or, indeed, on any other aspect of the defence and counterclaim.

20. The reply and defence to counterclaim delivered by the plaintiff's solicitors on 3rd February, 2010 contains a joinder of issue on the defence and a denial of the various matters alleged in the counterclaim.

The core issue
21. Counsel for the plaintiff, in their written legal submissions, correctly identified that the only issue which had been raised by the defendant in relation to the plaintiff's ability to comply with its contractual obligations was the alleged existence of a smell in Unit 12 and that, accordingly, there is a net issue for the Court, namely, whether or not there was a smell in the premises and, if so, whether or not that smell was sufficient to entitle the defendant to repudiate the contract. Put another way, the issue is whether, when the notice to complete was served on 17th April, 2007, Unit 12 in its then condition was substantially in the condition in which the plaintiff had contracted to sell it and the defendant had contracted to acquire it by the combined operation of the contract for sale and the building agreement. That is a question of fact.

The evidence on the core issue
22. Of the eighteen witnesses called at the hearing, only four were experts in construction or environmental matters. Mr. Brian Mahony, the structural engineer retained by the plaintiff in relation to the Pugin Court project, testified that he had certified compliance with the structural engineering aspects of the project. He never detected a noxious odour. However, he had effectively left the site when the structure was completed in autumn 2006. Mr. Michael Kiely, an architect with Raymund Kelly, Architects, the firm retained by the plaintiff in connection with the Pugin Court project, put in evidence a copy of a certificate of practical completion dated 21st December, 2006, in which it was stated that all works were practically complete with the exception of some tiling and balustrading to common areas and some balustrading to stairs to units, but all works were subject to "snagging". Mr. Kiely also produced a preliminary "snag list" dated 4th December, 2006 and a "snag list" dated 18th January, 2007. Unit 12 was addressed in each. In the later list, in relation to Unit 12, the following matters were listed: clean out generally; finish MDF window boards; and in relation to condensation to underside of slab to head of bay window – "vapour barrier/insulation and fill". Mr. Kiely's evidence was that he detected no noxious odour prior to practical completion. He never noticed it as a problem and there was nothing he could think of which could cause a smell. After he had been was told of the complaint in relation to Unit 12, he visited the premises to investigate the complaint. There was no smell in Unit 12 and no problem. He reported that back to the client, the plaintiff, by telephone.

23. In April 2011 the plaintiff retained AWL Consulting to carry out an indoor air quality assessment in Unit 12. Dr. Fergal Callaghan, Director of AWL Consulting, testified on behalf of the plaintiff and put the report on the assessment in evidence. The conclusion was that measured levels of volatile organic compounds and hydrocarbons in Unit 12 were significantly below occupational exposure limits, where available, and would not pose any health and safety risk to staff working there. Unit 12 was fit for human habitation and safety, health and welfare at work standards were not offended.

24. The fourth expert was Mr. Lunn, who testified on behalf of the defendant. In outlining the factual chronology, I have already referred to Mr. Lunn's report of 5th April, 2007. Mr. Lunn's evidence was that notwithstanding that he has a bad sense of smell, because he smokes a pipe, he detected a very strong smell in Unit 12. He agreed with Mr. O'Gorman, who has acquired a duplex office unit on the first and second floors in Pugin Court and who testified before him, that the level of smell was in the order of "ten out of ten". He conducted no air testing. However, he thought the smell might have been coming from outside and his recollection was that he suggested that the windows in Unit 12 be shut. His recollection was that he came back a few days later, and the situation was

still the same, so that he concluded that the smell did not come from outside.

25. Two witnesses who had been served with subpoenas were called on behalf of the plaintiff. One was Mr. Michael Cullen, a solicitor practising in Gorey, who contracted to acquire an office unit, Unit 5, on the first floor of Pugin Court in December 2006 and completed the acquisition in June 2007. He acquired the property for archival purposes. His evidence was that he never noticed any smell in Pugin Court. The other was Mr. Hughie Doyle of Horizon Financial Services. Mr. Doyle acquired two office units, Unit 6 and No 7 in Pugin Court and moved in in 2006 and has been there ever since. The two units are on the second floor and are directly across from Unit 12. Mr. Doyle's evidence was that he uses the units daily. He never detected an odour, whether of diesel or kerosene, in his own units or in the hall.

Conclusion on the issue of fact
26. 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.

Consequence of the factual finding on the core issue
27. The consequence of that finding is that the defendant was not entitled to repudiate the contract for sale and the building agreement, as he purported to do in his solicitors' letter of 17th April, 2007. The defendant is not entitled to the return of the deposit of €33,000 paid by him, nor is he entitled to any remedy at law or in equity against the plaintiff. The defendant's counterclaim must be dismissed.

28. It also follows that, as the defendant was not entitled to repudiate the contract as he purported to do on 17th April, 2007, he was and is in breach of contract in not completing the transaction in accordance with the contract for sale and the building agreement. It remains to consider the remedy to which the plaintiff is entitled against the defendant for that breach of contract.

The plaintiff's remedy
29. In opening the case, counsel for the plaintiff made it clear that the remedy the plaintiff was pursuing was damages in lieu of specific performance. However, although both Mr. Kinsella of Kinsella Estates and Mr. Slattery of Warren Estates Limited were called to testify on behalf of the plaintiff, neither gave any evidence of the current market value of Unit 12. Even if it were appropriate at this juncture to order that the defendant pay damages to the plaintiff in lieu of specific performance, there is no evidence before the Court on which the measure of damages could be assessed.

30. At the hearing, the defendant testified that, while he had hoped to get funding from a financial institution to partially fund the acquisition of Unit 12, it was his intention to use his own finances to partially fund the acquisition. Further, his evidence was that, although he had not got loan approval by March or April 2007, he was in a position to complete the acquisition out of his own resources. Mr. O'Gorman, his solicitor, corroborated that evidence. Significantly, for present purposes, no evidence was adduced that at the time of the hearing the defendant did not have the resources to comply with an order for specific performance.

31. In their closing written submissions, counsel for the plaintiff took a somewhat different line to the line which had been taken in opening the case. It was submitted that, if the Court were to determine that the defendant had wrongfully sought to repudiate the contract, the plaintiff is entitled to an order for specific performance. Alternatively, it was submitted that, if the Court were to decide that specific performance was not the appropriate remedy, then an order for damages in lieu of specific performance would be an appropriate remedy once the Court was satisfied as to the impossibility of the defendant, by reason of impecuniosity, complying with an order for specific performance. That last submission was made on the basis that it is supported by the judgment of the High Court (Clarke J.) in *Aranbel Limited v. Darcy* [2010] 3 I.R. 769.

32. As he stated in his judgment in the *Aranbel* case (at para. 2), in the three connected cases before him, Clarke J. was concerned with defendants in the category of persons who entered into contracts to buy property at or near the peak of the market in Autumn 2006, who by 2010 at the time of the hearing were faced with being called on to complete the relevant purchases at a time when the agreed purchase price significantly exceeded the then current value of the property concerned. In the three cases with which he was concerned, which fell within that category, the plaintiff vendor was seeking an order for specific performance, whereas the defendant purchasers, while not disputing that they were contractually bound, argued that, given that they were no longer in a position to complete the purchase, specific performance should not be ordered. They argued that the Court should instead make an order for damages in lieu of specific performance. Having stated (at para. 10) that the only point in the Court ordering specific performance is if there is some realistic possibility that the sale may complete, Clarke J. continued (at para. 11):

> "It follows that, if it is obvious that there is no realistic possibility of the sale closing, a court should not, in the absence of highly unusual circumstances, order specific performance for in so doing nothing would be achieved. The ordering of specific performance will simply lead to a further hearing at which the order will be discharged and damages in lieu directed. Such would be a pointless exercise."

I respectively agree with those observations.

33. Another factor which was addressed by Clarke J. in the *Aranbel* case was delay on the part of a plaintiff purchaser in initiating specific performance proceedings. The context in which he considered that matter was that in two of the cases before him the defendant purchasers' solicitors had written to the plaintiff's solicitors on 27th September, 2007 stating that the defendant purchasers were unable to continue with the purchases, but realised that they would forfeit their deposit and might be sued for breach of contract, yet the proceedings were not initiated until 28th October, 2008. In the third case the plaintiff vendor had served a completion notice on 10th October, 2007 but the proceedings were not initiated until 28th October, 2008, although there was correspondence between the parties in the interim. On this aspect of the matter, Clarke J. stated (at para. 19):

> "As a general principle a plaintiff who delays unreasonably in bringing proceedings may fail to obtain specific performance where, by reason of the delay, it would be inequitable to grant the relief. Delay alone may be insufficient and it will usually be necessary to show circumstances which, when considered in conjunction with the delay, would render unjust the granting of specific performance. The plaintiff asserted that such special circumstances are not present in these proceedings. It is also, of course, the case that damages may remain open as a remedy to a plaintiff even where delay has been held to preclude specific performance: see, for example, *Lark Developments Ltd. v. Dublin Corporation* (Unreported, High Court, Murphy J., 10th February, 1993)."

Again, I respectfully agree with those observations.

34. The application of the principles outlined by Clarke J. in the Aranbel case gives rise to the following conclusions on the facts of this case:

> (a) At the hearing the plaintiff was equivocal and inconsistent in relation to the remedy it was pursuing, whether it was an order for specific performance or an order for damages in lieu of specific performance. Apart from that, as I have indicated, the plaintiff adduced no evidence on the basis of which the damages in lieu of specific performance could be measured.
>
> (b) The defendant, on the other hand, did not make the case that he would have financial difficulty in complying with an order for specific performance. In this connection, it was held by Clarke J. in the *Aranbel* case that an impecunious purchaser resisting specific performance bears the onus of proof to establish an inability to complete and is obliged to provide all reasonable evidence necessary to allow the Court to assess whether there is a true case of impossibility.

35. In the circumstances, given that I have concluded that the plaintiff is entitled to a remedy, the only remedy which the Court can afford the plaintiff at this juncture is an order for specific performance. If it is the case that the defendant is in a position to discharge the onus of proving inability to complete on financial grounds, then a hearing will have to be held to assess his evidence on that point. If it is the case that the appropriate remedy is damages in lieu of specific performance, then both sides will have to adduce evidence on the basis of which the Court will be in a position to measure the damages. I wish to emphasise that I consider that both the plaintiff and the defendant have contributed to the state of affairs which gives rise to the likelihood that a further hearing may be necessary in this matter.

36. The question of delay, although not pleaded, was raised in the closing written legal submissions submitted on behalf of the defendant. Even before the notice to complete had expired, the plaintiff's solicitors had made it clear that the plaintiff would be pursuing the remedy of specific performance or damages in lieu, as was stated in the letter of 9th May, 2007. Thereafter, until the proceedings were instituted, approximately ten months after the notice to complete expired, the plaintiff maintained a consistent position. In the light of the observations of Clarke J. in the *Aranbel* case quoted earlier and his application of the relevant principle in that case, I am satisfied that the plaintiff's claim for an order for specific performance is not defeated by delay or laches.

37. For the avoidance of doubt, given that, in pursuing the remedy of specific performance since 9th May, 2007 the plaintiff must be regarded as treating the contract for sale and the building agreement as continuing in existence and as being specifically enforceable, the deposit cannot have been forfeited despite what was stated in the letter of 8th October, 2007 referred to at para. 15 above.

Order

38. There will be an order for specific performance of the purchase of Unit 12 by the defendant from the plaintiff in accordance with the contract for sale and the building agreement, the said order to be complied with by 31st October, 2012. As I have indicated earlier, the defendant's counterclaim will be dismissed.