Neutral Citation Number: [2008] IEHC 233

THE HIGH COURT

2007 No. 402SP

IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874 AND

SECTION 9 THEREOF AND IN THE MATTER OF A CONTRACT FOR THE SALE OF 12, AMIENS SQUARE, DUBLIN, 1, EXECUTED ON OR ABOUT 21st FEBRUARY, 2007

BETWEEN

MAHMOUD ZAHEDI AND NOUJ S ZAHEDI

PLAINTIFFS

AND

EAMON McCANN AND PAULA McCANN

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on the 9th day of July, 2008.

Factual Background

1. In these proceedings, which were initiated by special summons which issued on 21st May, 2007, the plaintiffs have invoked s. 9 of the Vendor and Purchaser Act, 1874 (the Act of 1874) and seek the determination of certain questions which arise out of a contract, which, for present purposes, it can be accepted came into existence on 21st February, 2007, whereby the defendants agreed to sell to the plaintiffs at the price of €317,500.00 Apartment No. 12, Amiens Square, Amiens Street, in the City of Dublin (the Premises). The Premises were held by the defendants under a lease dated 19th September, 1997 (the Lease) made between Cruson Developments Limited of the first part, Amiens Square Management Company Limited (the Management Company) of the second part, Irish Intercontinental Bank Limited of the third part and the defendants of the fourth part, which created a term of 500 years from 31st May, 1997 at a nominal rent and subject to the covenants on the part of the lessee, including the covenant for payment of service charges, and conditions therein contained.

2. The history of the transaction, insofar as it is relevant for present purposes, is as follows:-

· On 7th November, 2006, the defendants' solicitors furnished, on a "subject to contract" basis, the contracts to the plaintiffs' solicitors, together with copies of the title. The contracts were in the standard form General Conditions of Sale (2001 Revised Edition) published by the Law Society.

· On 13th November, 2006, the plaintiffs' solicitors raised certain queries. What is relevant for present purposes is that the plaintiffs' solicitors furnished what I understand to be requisition 37 (but was described as requisition 36) of the Law Society's standard Requisitions on Title (2001 Edition) headed "Second hand flats/second hand managed properties" and requested replies.

· On 22nd November, 2006, the defendants' solicitors informed the plaintiffs' solicitors that they had asked the "Managing Agents" to reply to requisition 37 and would revert as soon as they heard from the Management Company.

· On 29th January, 2007, the plaintiffs' solicitors returned the executed contracts together with the balance of the deposit to the defendants' solicitors on a "subject to contract" basis.

· Although the defendants had not executed the contracts, on 1st February, 2007, the defendants' solicitors requested the plaintiffs' solicitors to furnish requisitions on title and a draft deed for approval. The plaintiffs' solicitors obliged. The defendants' solicitors returned one part of the contract duly executed by the defendants together with the replies to the requisitions on title with a letter dated 21st February, 2007. The closing date which appeared in the contract predated the coming into existence of the contract. As I understand it, it is agreed that the closing date was 16th March, 2007.

· By letter dated 22nd February, 2007, the defendants' solicitors returned requisition 37 with replies, together with an invoice and copy documentation received from the Management Company, to the plaintiffs' solicitors. I will consider these documents in detail later. Of particular significance is that the accompanying documentation included a Companies Registration Office (CRO) print-out dated 16th February, 2007, which showed the status of the Management Company as "normal". It is accepted for the purpose of these proceedings that prior to returning the contracts and the contractual relationship coming into existence, the plaintiffs' solicitors had done a Companies Office Search and had ascertained that the status of the Company was "normal".

· The plaintiffs contend that on or before the 16th March, 2007 it was agreed between the solicitors for the parties that there would be a closing by post. In truth, it was more a closing by courier and fax, but, in any event, what happened is consistent with an arrangement that the plaintiffs' solicitor would not attend in person at the defendants' solicitor offices with the balance of the purchase money. The following steps were taken by the parties on 16th March, 2007:

The defendants' solicitors sent the original documents of title and the executed assignment in favour of the plaintiffs to the plaintiffs' solicitors and requested them to hold the same on trust "pending receipt of the balance of the funds".

The plaintiffs' solicitors sent bank drafts which aggregated the balance of the purchase monies to the defendants' solicitors by courier on the basis that the monies would be held in trust and to the plaintiffs' solicitors order "pending our receipt and satisfaction with all closing documents and explanation of searches".

The plaintiffs' solicitors submitted their searches by fax to the defendants' solicitors and sought explanations. The only issue which arose on the searches of relevance in these proceedings arose on the CRO search in relation to the Management Company. The designation of the Management Company was given as "Strike Off Listed" and the date of that designation was given as 18th February, 2007.

The defendants' solicitors' explanation of that designation which was furnished to the plaintiffs' solicitors was: "not our client".

The plaintiffs' solicitors' immediate response was that that explanation would not suffice, that the defendants' solicitors' client was a member of the Management Company and was selling the premises with all easements and rights contained in the Lease, and that they would not accept the stated position of the Management Company "without satisfactory explanation and proposed resolution from the managing agent". They also requested the defendants' solicitors to confirm that they continued to hold the purchase money in trust and to their order. That letter was sent by fax.

3. A controversy arises on the affidavits as to whether the keys of the premises were furnished to the plaintiffs' solicitors, so as to enable the plaintiffs to get possession of the Premises. The Court can not resolve that controversy.

· On 20th March, 2007, the plaintiffs' solicitors served a notice to complete in accordance with General Condition 40 of the contract on the defendants' solicitors.

· The defendants' solicitors responded by letter of 22nd March, 2007. The essence of the response was that the plaintiffs' solicitors should take the matter up with the Management Company; they did not act for the Management Company and had no knowledge of its affairs. It was their understanding that the Management Company had not yet been struck off and, in the circumstances, it was for the plaintiffs' solicitors to deal with the matter and to make enquiries in the CRO.

· The plaintiffs' solicitors were not happy with that response and, by letter dated 27th March, 2007, sought an explanation as to why the Management Company was listed for strike off, an undertaking from the Management Company that a strike off would be avoided, and an indemnity from the Management Company that the plaintiffs would not be responsible for any levies which might be incurred in relation to reinstatement of the Management Company in the register. They sought return of the purchase monies if the defendants' solicitors were not in a position to comply because the plaintiffs were incurring interest on a daily basis on the purchase monies.

· The defendants' solicitors responded by letter dated 29th March, 2007, in which they contended that the contract had been complied with in full by the defendants. They made the point that the Management Company had not been struck off. It was a matter for the plaintiffs to contact the CRO or the Management Company to ascertain the position and take such action as might be required. As far as the defendants were concerned the matter was completed and they would be releasing the purchase monies to the defendants forthwith.

· The correspondence between the solicitors continued in a similar vein. The parties accept that the Court can not resolve the issues as to the basis on which the purchase monies were paid and whether the plaintiffs got the keys of the Premises and possession. The final letter from the plaintiffs' solicitors which has been exhibited prior to the initiation of the proceedings, a letter dated 17th April, 2007, made the point that the status of the Management Company was integral to title and ultimately to the certificate of title which they would be required to furnish to the plaintiffs' mortgagees. In the final letter from the defendants' solicitors, a letter dated 18th April, 2007, the position adopted by the defendants' solicitors was that the fact that the Management Company had been listed for strike off was not a matter which entitled the plaintiffs to refuse to close the sale.

4. Before these proceedings were initiated, the Management Company was dissolved for failure to file annual returns, the date of dissolution being 11th May, 2007. The Court was informed that the Management Company was restored to the register within twelve months of its dissolution by the Registrar of Companies.

Replies to Requisition 37

5. As I have stated, the replies to requisition 37, which had been submitted by the plaintiffs' solicitors as a pre-contract enquiry, were furnished by the defendants' solicitors with their letter of 22nd February, 2007, after the contract came into existence. In fairness to the defendants' solicitors, it took six letters and numerous phone calls over a period from 10th November, 2006 to 22nd February, 2007, to get the information necessary to reply to requisition 37 from the Management Company.

6. The replies to requisition 37 furnished by the defendants' solicitors were the replies written in manuscript by the agent of the Management Company. The information furnished in the replies was as follows:-

(a) Evidence was enclosed to show by way of the search in the CRO that the Management Company was still registered. As I understand it, that evidence was the CRO search of 16th February, 2007, which showed the Management Company status as "normal". However, it also disclosed that the last annual return filed was in respect of 31st December, 2004 and that the return for 31st December, 2005 was outstanding.

(b) It was stated that the common areas were still vested in the name of the developer, presumably Cruson Developments Limited, and that the deed of assurance of the reversionary interest to the Management Company was "currently in the process of transfer".

(c) Details of the "Block Insurance" were given and the replies were accompanied by a letter dated 21st February, 2007 from the insurers which confirmed that the interest of the plaintiffs and their mortgagee was noted on the policy, the insured being the Management Company.

(d) Copies of the certificate of incorporation and memorandum and articles of association of the Management Company were furnished.

(e) It was stated that the service charge in respect of the Premises was in arrears and an invoice was enclosed setting out the service charge for the years ended 31st July, 2006 and 31st July, 2007. No issue arises in relation to the service charge because the defendants' solicitors gave to the plaintiffs a letter dated 16th March, 2007 in which they undertook to discharge the service charge up to and including that date and to furnish a receipt as soon as practicable after closing.

7. In summary, the information given in the replies was that the Management Company was still registered in the CRO, that the common areas had not yet been transferred by the developer to the Management Company, but the Management Company was managing the Estate. Requisition 37 presupposed that the Premises were the subject of a scheme of disposal of the type usually utilised for residential or mixed commercial and residential developments. That supposition was correct as the provisions of the lease disclosed.

The Lease
8. The lease recited in a general way how the scheme of disposal would operate in relation to the Estate, as defined, of which the Premises form part. The leases of the apartments on the Estate would all be in the same form as the Lease of the Premises, to the intent that the restrictions and stipulations would be mutually enforceable. Each lessee would be a member of the Management Company. It is clear from the articles of association of the Management Company that only the lessees of the units in the Estate would ultimately be members of the Management Company. It was further recited in the Lease that the lessor, Cruson Developments Limited, had agreed to assure its interest in the Estate to the Management Company subject to and with the benefits of all leases in the Estate, the effect being that the Management Company would become the owner of the Estate in the sense of they would be owner of the reversions on the leases of units and the owner of the external common areas, the structural elements of the block and the internal common areas.

9. The Management Company joined in the lease to confirm the demise, including the demise of easements and way-leaves over the common areas and structural elements, and to covenant to perform the lessor's covenants from completion of the assurance of the Estate to it.

The Issue
10. While a number of questions were set out on the endorsement of claim on the special summons for determination by the Court, it was agreed at the hearing that the issue for the Court is whether the defendants were ready, willing and able to complete the sale on 16th March, 2007, and, in particular, whether they were in a position to give good title to the plaintiffs in accordance with the contract, given the status of the Management Company, which, on the closing date, was designated as listed for strike off in the CRO. My understanding is that the parties will deal *inter se* with the consequences of the Court's finding on that point.

The Submissions
11. Counsel for the plaintiffs submitted that the status of the Management Company could not be other than an issue of title and that it was an issue which required to be resolved before the plaintiffs could be required to take on the obligations of the Lease and their financial consequences. He submitted that, having regard to the terms of the Lease, the Management Company was on the title and it was integral to the successful management and viability of the development. Its status impacted on the operation of the scheme of management. The plaintiffs' mortgagee might not accept the title and it was intolerable that the title should be foisted on the plaintiffs. As regards the use and enjoyment of the Premises, the status of the Management Company was crucial in terms of the repair, maintenance, upgrading and such like of the common areas. Counsel for the plaintiffs pointed to the possibility of the plaintiffs, as the owner of the Premises, incurring costs in connection with the restoration of the Management Company to the register if it was struck off. The nub of the case advanced by counsel for the plaintiffs was that the defendants' title was defective on the closing date, that the defect had arisen between the contract coming into existence and the closing date, and that the defendants were not in a position to fulfil their contractual obligations until the defect was removed, meaning until the status of the Management Company reverted to "normal".

12. The position adopted by counsel for the defendants was that, as of 16th March, 2007, the Management Company was still in being. By reference to s. 12 of the Companies (Amendment) Act, 1982, he submitted that the outstanding annual returns could have been filed and the company could have been saved from dissolution. Apart from that, he submitted that the question for the Court is whether the status of the Management Company is a matter of title, urging that it is not. He identified the functions of the Management Company as twofold: to be the owner of the reversions; and to provide services to the unit lessees. In relation to the first function, he pointed out that, as things stood, the lessees of units still had their rights vis à vis the lessor, Cruson Developments Limited, and were safeguarded irrespective of the status of the Management Company. As regards the provision of services function, he submitted that the services could be provided by anybody, for example, the unit lessees could get together to resolve any difficulty which arose in the provision of services.

13. In reliance on the decision In Re Flynn and Newman's Contract [1948] I.R. 104, counsel for the defendants submitted that the change in the designated status of the Management Company in the CRO did not affect the defendants' title, in that, notwithstanding that change, they were no less entitled to occupy the Premises and enjoy the easements over the common areas and to give title to a third party. On the closing date they were in a position to give to the plaintiffs what they had contracted to give.

14. Counsel for both parties informed the Court that they could not find any authority either in this jurisdiction or in the United Kingdom which dealt with the type of issue which has arisen in this case, involving a second or subsequent sale of a unit in a multi-unit development.

Conclusions
15. As I have stated, the core issue for determination is whether, given the status of the Management Company as listed for strike off on the agreed closing date, the defendants were in a position on that date to furnish title to the Premises to the plaintiffs in accordance with the contract. It seems to me that that issue falls to be determined by the application of first principles to the particular facts of this case. Kingsmill Moore J. in his judgment *In Re Flynn and Newman's Contract* set out (at p. 112) the relevant principles governing contracts for the sale of land as follows:-

> "In the absence of any express provision to the contrary, the vendor undertakes and is bound, in law, to show a good title to the property to be sold and to convey land corresponding substantially, in all respects, with the description contained in the contract. If he fails to do these things, the purchaser may rescind and recover his deposit. The vendor may, of course, limit his obligation to show good title by suitable special conditions but, if he does so, he must fairly indicate what is the defect in his title to which the purchaser must submit, and must take care that he is not guilty of any misrepresentation. A liability to ejectment for forfeiture, crystallised by service of a repairing notice by the landlord, is clearly a defect in title to which the vendor must call attention. Mere disrepair which may involve an action for breach of covenant, but which, in the absence of a proviso for re-entry, cannot be a ground for forfeiture, is not a defect of title, but a defect in subject matter. Provided that the terms of the lease were known to the purchaser before signing the contract, and inspection of the property was open to him if he so desired, it seems to me that no breach of any legal obligation would be involved in failure to disclose the state of repair or the letter from the landlord …".

16. The letter from the landlord referred to was, in effect, a schedule of dilapidations which the lessor had served and of which the vendor lessee was aware before signing the contract but had not been disclosed to the purchaser. The Lease was for a term of one hundred and fifty years of which about seventy years were left to run. Although the Lease contained a covenant to keep and yield up and repair, there was no proviso for re-entry in the event of breach of the covenant to repair. Kingsmill Moore J. held that the state of disrepair which, in the absence of a proviso for re-entry, could not be a ground for forfeiture, was not a defect in title but a defect in subject matter. The vendor was not under any legal obligation to disclose the defective state of repair or the schedule of dilapidations.

17. Although the affidavits filed on behalf of each side in these proceedings have sought to highlight perceived shortcomings of the other side, there are a number of facts which are not in dispute on the basis of which deductions can be made which are crucial to the determination of the core issue. First, on the evidence of the two copies thereof exhibited, it would appear that there were no special conditions whatsoever in the contract presented by the defendants' solicitor for execution and as ultimately executed by both sides, so that the defendants' obligation to show good title was neither specifically limited nor expanded. Secondly, while the plaintiffs' solicitors raised the pre-contract requisitions in the form of requisition 37, they were not replied to prior to the coming into existence of the contract, so that the replies thereto neither induced the plaintiffs to enter into the contract nor did they become terms of the contract. Thirdly, while I am of the view that the replies furnished on 22nd February, 2007 must be regarded as the replies of the defendants' solicitors and must be stood over by them, there was no incorrect or misleading information or misrepresentation contained in the replies, because the Management Company was still registered in the CRO and the CRO printout furnished, although a few days out of date, correctly showed the status of the Management Company on 16th February, 2007. Fourthly, at all times prior to the closing date the status of the company in the CRO and its position in relation to filing of annual returns was a matter of public record. It follows that there was no material nondisclosure on the part of the defendants. There was no obligation on them, either at common law or under condition 15 of the General Conditions of the contract to disclose the change in the status of the Management Company in the CRO prior to the plaintiffs assuming contractual liability. Finally, and most significantly, the Management Company was still registered in the CRO as of the closing date, and, although it was under the threat of strike off, strike off was not inevitable.

18. That the change in the status of the company recorded in the CRO on 18th February, 2007 did not constitute a defect of title is obvious when one analyses the defendants' position on the closing date. On the closing date the defendants were in a position to give to the plaintiffs the title to the Premises they had contracted to give. They were in a position to assign to the plaintiffs the leasehold interest created by the Lease in the Premises. The defendants, in fact, executed such an assignment and it was delivered to the plaintiffs. Such assignment passed the right of possession to the Premises to the plaintiffs for the residue unexpired of the term created by the Lease and the benefit of all of the appurtenant easements and of the lessor's covenants contained in the Lease. As things stood, the obligation to perform the lessor's covenants was still vested in the lessor, Cruson Developments Limited. Moreover, the Management Company was still in being as a corporate entity. The assignment also passed to the plaintiffs the entitlement to membership of the Management Company. Accordingly, the defendants were in a position to pass, and they did pass, to the plaintiffs everything they were contractually bound to pass.

19. It is true that, with the benefit of hindsight, we know that, as regards the Management Company, as counsel for the plaintiffs put it, "the path was already mapped out" to dissolution, which occurred approximately two months later. It is also true that dissolution of a Management Company in a multi-unit development may, and frequently does, give rise to adverse consequences for individual unit owners, in that they may incur accountancy fees, penalties and legal fees in having the Management Company restored. Some prospective purchasers may be wary of purchasing a unit in such circumstances. However, as a matter of contract, in this case the defendants, as vendors, were under no obligation to ensure that the status of the Management Company was designated as "normal" at the closing date. Its designation as listed for strike off did not render the defendants' title defective.

Order

20. While I will hear the parties on the precise form of order which will be made, it seems to me that, having regard to the manner in which the proceedings were conducted at hearing, there should be a declaration that, notwithstanding the designation of the status of the Management Company in the CRO as "Strike Off Listed" on 18th February, 2007, on the closing date the defendants were in a position to furnish title to the Premises to the plaintiffs in accordance with the contract.