Neutral Citation Number: [2008] IEHC 276

THE HIGH COURT

2007 No. 1174 S

BETWEEN

HARRY PETER JACKSON AND MARY PATRICIA JACKSON

PLAINTIFFS

AND

JEFF STOKES

DEFENDANT

Judgment of Mr. Justice McCarthy delivered the 25th day of July, 2008.

1. This action was commenced by originating Summary Summons of the 9th July, 2007. By it the plaintiffs seek to recover the sum of €38,465.96 together with interest pursuant to statute. It is alleged that sum is money due for interest accrued on foot of a contract for sale made between the parties and in particular so due because the closing date in respect of such contract was the 2nd April, 2007 whereas closing occurred on the 24th May, 2007, interest being payable thereunder at a daily rate of €739.73 from such agreed date. Ultimately, when the matter came before the Master on a motion for summary judgment dated 5th November, 2007 it was put into the Judges List for hearing. The defendant sought to have the matter remitted for plenary hearing. In as much as it was agreed between the parties that no evidence beyond that which appeared on the affidavits sworn for the purpose of the motion was relevant and the matter could be disposed of on that evidence the hearing was, by consent, treated as the trial (on affidavit).

2. I think that the first issue which arises is to determine the agreed closing date. This was the 29th October, 2006 but it is not in dispute that this was initially changed to the 2nd April, 2007, on perusal of Mr. Jackson's affidavit and that of Mr. Stokes. It would appear from a letter sent by Messrs. Denis McSweeney (solicitors for the defendant purchaser) on the 9th October, 2006 that this change was agreed consequent upon a letter of 6th October, 2006 from Messrs. Collins on behalf of the plaintiffs. In his replying affidavit sworn on the 15th January, 2008, Mr. Stokes, at para. 5 therein, says that his solicitors requested a changed closing date of the 16th April, 2007; it is not clear whether or not it is suggested that this change was sought in writing but, in any event, there is nothing before me to indicate that it was. However, Mr. Stokes contends that a letter of 21st March from Messrs. Collins is to be read as confirming his assertion in as much as it refers to the closing "which is due to take place on 16th April next". In a later letter, of 26th March 2006, to Messrs. McSweeney from Messrs. Collins reference is made to "your conversation with David Ensor of our offices suggesting a closing date of 16th April next". Further, by that letter certain difficulties on the part of the plaintiffs in the event that the closing date was as late as the 16th April were mooted and it was stated "we would appreciate if you could get your clients instructions in this matter and facilitate our clients by completing on the morning of the 11th April": thus a further change was sought but there is no suggestion it was agreed.

3. It is accordingly clear that the closing date was the 16th April, 2007.

4. The contract was, to put the matter shortly, in accordance with the general conditions of sale published by the Law Society with, as is usual, of course, certain special conditions. Such general conditions at Clause 40 contemplate what are commonly known as "completion notices" and Clause 40(a) is to the effect that:-

> "If the sale be not completed on or before the closing date, either party may on or after that date (unless the sale shall first have been rescinded or become void) give to the other party notice to complete the sale in accordance with this condition, but such notice shall be effective only if the party giving it shall then either be able, ready and willing to complete the sale or is not so able ready or willing by reason of the default or misconduct of the party."

And Clause 40(b)

> "Upon service of such notice the party upon whom it shall have been served shall complete the sale within a period of 28 days after the date of such service… and in respect of such period time shall be of the essence of the contract without prejudice to any intermediate right of rescission by either party."

5. It seems clear in the present case that there was no obligation on the part of the defendant purchaser to close the sale before the 16th April, 2007 and, of course, time was not of the essence in respect of that date. The notice was accordingly served prior to the time agreed for closure and demanded closure 28 days thereafter i.e. 28 days from the 3rd April 2007, (excluding the day of service). *Prima facie*, accordingly, there was no breach of contract on the part of the defendant purchaser merely because the sale was not closed until 25th May following if that date was within a "reasonable time" of the 16th April. The notice was bad and is accordingly not relevant.

6. Interest is payable from the original or any subsequently agreed closing date, whether or not time is of the essence in respect of such date. Interest is not, of course, payable if closing does not take place on the ultimately agreed date because of the vendor if the purchaser is not himself in default or incapacity to close is not the due purchasers default. The benefit, of course, of a vendors completion notice in the event that a closing date has passed without closure and without default by the vendor is that finality is brought into the date for closing thereby disposing of any difficulties pertaining to any issue of closure only within a reasonable time of the agreed closing date (e.g. difficulties as to whether or not there is a breach giving rise to the remedies which flow therefrom, including forfeiture of a deposit and a claim for damages or for specific performance) but the vendor here does not have the benefit of such notice.

7. In any event, even if there was no obligation to complete the contract on a date agreed where time is not of the essence (i.e. here on 16th April, 2007) one of the consequences which that entails is a liability for interest subject to the qualifications referred to above and as I have said. It seems to me that it must be axiomatic that a party could not be liable for interest if a contract is not closed unless the vendor is able, ready and willing to so close on the date agreed. In this case it is contended on the part of the purchaser that the vendors, through no fault of his, were not so able, ready and willing to close on 16th April or prior thereto. I think whether or not such party was in a position to close is evidenced by the fact that, ultimately, on the 24th May, they were not in position t do so, and, in any event, at no time prior thereto.

8. In particular, it is contended on behalf of the purchaser that there were extant several encumbrances upon the plaintiff's title to the lands in sale. It appears that a negative search was available which disclosed these encumbrances. These consisted of four mortgages respectively dated the 24th April, 1992, the 14th August, 1981, the 14th March, 1982 and the 17th May, 1991. It appears that the amounts due thereunder had been discharged prior to the contract of sale as evidenced by the fact that Messrs. Collins in

reply to requisitions on title said that there were no encumbrances. The plaintiffs say that in truth there were no encumbrances, which was why they replied as they did and that they had no duty to furnish any vacate, release or other document to the purchasers on closing. That necessarily means the plaintiffs are contending that a good title can be furnished even though encumbrances still exist on the title, provided that the amounts secured thereunder are discharged, that it is a matter for any purchaser, if he so wishes, to ice the cake, so to speak, (quite unnecessarily from his point of view) and seek such vacate, release or other documents sufficient to remove them. I cannot believe that this is the law. Presumably as a minimum proof of the fact of payment would have been required even on the plaintiff's contention. As a minimum one would need to look at the mortgages to decide whether, say, they secured not merely a fixed capital sum with interest or, say, they secured not merely a fixed capital sum with interest or, say, indebtness to any of the financial institutions concerned in order to satisfy oneself that there were no liabilities. Much has been made of conveyancing practice to accept a title as good which was subject, *prima facie*, to encumbrances, on the basis of an assertion that the money secured thereby had been discharged. Of course the acceptance of an undertaking to furnish any relevant document or to produce evidence of discharge, by a vendor's solicitor, equally in accordance with common conveyancing practice, by the purchaser's solicitor would be proper but that is not the end of the matter, here.

9. One is accordingly thrown back on principle and as a matter of principle it seems to me that a party entitled to a good marketable title is entitled to just that and that the fact of the existence of encumbrances (whether or not any amount secured thereby has been paid) means that the title is not such. I should say, in the context of the present case, that undertakings were accepted, ultimately, in respect of the encumbrances. It is suggested that the sale might have been closed at an earlier stage if the defendants had been willing to accept such undertakings but I see no evidence to that effect and, even it were to be so, a party who waives its strict legal rights as in the present case does not thereby, in my view, acknowledge the proposition that its contentions are ill founded in law. This must be particularly the case here given the fact that as of the 31st August, the plaintiffs knew what was required of them. An undertaking is simply not the same thing as, say, a deed.

10. Undertakings pertaining to discharge of encumbrances are, of course, a commonplace since a three way closing will rarely occur. In the present case there was no reference to undertakings, it appears, at any time before the date of attempted closure on 24th May, 2007. It seems that the only reference to the encumbrances arose in correspondence between the solicitors, with special reference to a letter of 31st August, 2006. By that letter Messrs. Denis McSweeney indicate that they had apparently received the negative search from which the fact of the existence of the mortgages appeared. I do not have a copy of that search but the purchaser's solicitor thereby sought confirmation "that the originals of all mortgages will be handed over on closing with vacate/receipt endorsed thereon or alternatively a deed of release in respect of same duly registered". The vendor was accordingly on notice from that day as to the purchaser's requirements in respect of the encumbrances and *prima facie*, one would have thought that their requirements might reasonably have been capable of being met since it appears that on the relevant date the amounts due had, as a fact, been discharged and they were legitimate demands.

11. The purchasers contend that whatever may be conveyancing practice in terms of the acceptance of undertakings pertaining to encumbrances they have a free standing right to a perfected title and are not to be placed in a position of having to accept undertakings which do not, of themselves, give them title, merely the assurance that they will obtain title in the future or one which they must take steps themselves to achieve. This bald, freestanding position is unexceptional and unassailable whatever grace might be extended by purchasers to vendors. Presumably a mortgagee would in some circumstances be willing to take an undertaking from the vendor's solicitors to pay any amount due out of the proceeds of sale and, even prior to closure, to, say, deliver original mortgage deeds or execute deeds of release or otherwise act as might be necessary to divest themselves of the interest which they might have by virtue of the encumbrances. There might be other cases where what one might call a three way closing would be necessary.

12. *Dublin Laundry Company Limited (in liquidation) v. Malachy Clarke*, [1998] I.L.R.M. 29, strongly relied upon by the plaintiffs, was a case where the issues were decided in the context of the service of a completion notice and it is of some assistance in the present context. In it the liquidator (selling on behalf of the company) did not, at the time service of the completion notice, have releases in respect of certain equitable mortgages, but could have had them at any time up to and including the date of expiration: this did not render the notice bad. Certainly, of course, whether there is a completion or not the vendor should be in a position to produce good marketable title on the closing date (i.e. whether that date is agreed or fixed by completion notice or, time not being of the essence, any later relevant date).

13. Of potential relevance also in the present case is the position pertaining to the provision of a certificate under the Family Home Protection Act, which, apparently, had not been executed on the date the completion notice was served: Costello J. held *inter alia* that this document could have been obtained without any difficulty if the sale had been completed – the fact that it had fallen through (giving rise to the action) forestalling the need to produce it. The relevance of the certificate was in the context of the defendant's submission that it was not in existence at the time of service of the completion notice. In any event, it is clear from the report that the property was not a dwelling house and the vendors were a company; presumably, accordingly such certificate was merely a document certifying to the former effect and was not such consent as is required from a spouse pursuant to s. 3 of the Family Home Protection Act, to which I will turn below. It is thus no authority for the proposition, for example, that a party is ready willing and able to close if he does not have an appropriate consent, where that is required.

14. It is not in dispute is that there was at the time at which closing was sought to be made no *separate free standing* prior consent on the part of the second named plaintiff wife as contemplated by s. 3 of the Family Home Protection Act to the grant or assurance in respect of a portion of the lands in sale (the remainder being in the joint names of the plaintiffs). It is suggested that the absence of a prior written consent would be a *de minimus* error but I do not think that if a consent was required it could fall into that category since any disposition without a consent, where that was requisite (as here) would be void.

15. It is contended, however, that the execution of the contract itself constitutes a consent to the ultimate grant. I am told by counsel that there is no authority upon this point and presumably this is because whether or not a document is a consent for the purpose of the Act is purely a matter of interpretation of such documents in the ordinary course. The face is the first page of the contract contains a standard form provision, capable of being signed by a spouse, consenting to the sale of the property described in the particulars, pertaining to the contract. This was not executed. No such consent is of course necessary where property is jointly held by a husband and wife and even though the property was held under separate titles it is one lot. Consent was required only in respect of the disposition of part of it. Notwithstanding the fact that the separate portion directed to the Family Home Protection Act (pertaining to parts of the property in sale) was not executed the operative part of the contract is described as being between the plaintiffs and the defendant:-

> "Whereby it is agreed that the vendor shall sell and the purchaser shall purchase in accordance with the annexed special and general conditions of sale the property described in the within particulars at the purchase price mentioned below".

16. It seems that while conveyancing practice contemplates a separate consent to the assurance (whether endorsed on it or

otherwise) directed towards the Family Home Protection Act be executed it is hard to conceive how there would be a want of consent to the disposition of part of the property in sale in the current, or perhaps, in any, case where the document is explicitly described as a memorandum of agreement pertaining to the sale of specified property and where both spouses are party thereto. The alternative proposition is that where two persons are parties to a contract, even in a case where part of the lands in sale (as one lot) are held solely by one of them (they being spouses) participation in the contract expressed be in respect of the entirety of the lands, does not be betoken consent for all purposes. I cannot believe that this is the case. I therefore am of the view that there was a prior consent to the deed produced as executed by the vendors on 24th May. Whilst the point is irrelevant having regard to my conclusion it seems to me that it would be hard to conceive how an undertaking to produce the consent, unless it existed, could fulfil the duty of the vendor to complete the sale having regard to its fundamental nature. Thus, even if I am wrong in my conclusions in respect of the question of encumbrances, and in particular, the insufficiency of undertakings, an undertaking to afterwards produce a consent unexecuted prior to the sale would never be sufficient. I do not think that the decision of Costello J. in *The Dublin Laundry Company Limited* case is authority to the contrary since what was contemplated there were a statutory declaration and a certificate under the Family Home Protection Act to prove that the property was not a family home rather than a prior written consent by a spouse.

17. A number of other decisions were brought to my attention. In *Quadrangle Development and Construction Company Limited v. Genor*, [1974] 1 WLR 68 the plaintiff failed to complete in accordance with a completion notice of a type which appears to be analogous to that here and the defendant sought to rescind the contract and forfeit the deposit; it is authority only for the proposition that when a completion notice is served both parties are bound thereby. In *Re The Post-Master General and Colgan's Contract*, [1906] 1 I.R. 287 the vendor was held not to be entitled to close a sale with the Post-Master General because he was not in a position to give vacant possession of the property on completion in as much as there was in existence a tenancy originally conceived to be quarterly (at the time of the contract) but ultimately held to be yearly whereby an attempt to secure possession, for the purpose of giving vacant possession to the purchaser, by serving three months notice to quit was ineffective. The questions of "default" and "wilful" were addressed but it seems hard to conceive, on any view of the matter, that the purchaser had an obligation to close the contract whilst the tenancy was outstanding. In *Allied Irish Banks v. Finnegan*, (Unreported, Supreme Court, Blayney J., 16th February, 1996) the issue concerned the efficacy of a consent of a spouse to the creation of an encumbrance: on its face it was valid but it was asserted that it was no true consent: obviously this has no relevance here. In *Tyndarius Limited v. O' Malley and Others* (Unreported, High Court, T.C. Smyth J., 11th January, 2002), a completion notice was served by the vendor but it was contended that it was invalid because the vendor was not ready and willing at the time of its service to fulfil his own outstanding obligations and this was indeed held to be so.

18. In so far as reference was made to conveyancing practice in *Patel v. Daybells (a firm)* [2001] All E.R. 398 (July) an issue arose as to whether or not a purchaser's solicitor was negligent by accepting an undertaking from the vendor's solicitor to redeem the vendor's mortgage out of the proceeds of sale and it was held that there was no negligence in doing so having regard to the fact that the approach in question complied with normal conveyancing practice, in circumstances where the practice did not expose a client to a "foreseeable and avoidable risk" or could not be defended on rational grounds (i.e. there were circumstances where the application of the practice would not exclude liability). It is mentioned here for the purpose of stressing the nature of an undertaking described *inter alia* as:-

> "…between the solicitor who gives the undertaking and the purchaser, the undertaking is unconditional and unqualified. Moreover it is backed by the summary procedure available for its enforcement, and by the Solicitors Indemnity Fund (or the equivalent arrangements which have now replaced it) and the Compensation Fund."

In *Domb and Another v. Isoz*, [1980] 1 All E.R. 942 an issue arose as to whether or not a contract for sale was binding on the defendant vendor and while the issue of undertakings was not germaine to the judgment, a portion of the judgment of Templeman L.J. made reference to the nature of conveyancing transactions and in this connection *inter alia* he stated that:-

> "Binding and enforceable undertakings between professional men play an essential part at different stages."

No one doubts these principles.

19. I was also referred to *Glenkerrin Homes v. Dunlaoghaire Rathdown County Council*, (Unreported, High Court, Clarke J., 26th April, 2007). There is no suggestion in this however, or any other authority opened to me, that there is an obligation to accept undertakings in substitution for ones strict rights, desirable though this is in many circumstances and in the present case might be. In *Glenkerrin* reference was made inter alia to the provision of letters from a local authority confirming compliance with financial contribution conditions of planning permissions. These, he held, have achieved a status "which might be described as a *quasi* document of title" and that there was an entitlement to their provision in the context of legitimate expectation. I cannot see how this bears on the nature of an undertaking or that it establishes any general principle that undertakings are, and there is a degree of repetition here on my part, a substitute for fulfilment of substantive obligations. I do not think there could, by the way, be any question of legitimate expectation that an undertaking would be accepted or, even if it be normal conveyancing practice, one could assume that undertakings would be accepted and to purport to complete or offer to complete on the basis of them. In this case by letter of 31st August, 2006 the purchasers made their position abundantly clear as to there requirements, requirements which were never disputed and which, I have held, in any event, were perfectly proper.

20. In summary I am accordingly satisfied, that the plaintiffs were not able, ready and willing to close, on the 16th April or, indeed, on the 24th May by reason of the absence of appropriate vacates or releases of the encumbrances, that there is no obligation to accept undertakings in lieu of one's strict rights and that their failure to close, was not due to any fault on the part of the purchaser and that interest is not payable. No demand was made by the purchaser for anything to which he was not, in strictness, entitled. The completion notice is irrelevant. The vendor seems at all times, and ultimately at closing to have been unwilling to close on the basis required by law, even if he was able or ready because he possessed the capacity to perfect the title but did not and of course he must not only be able and ready but also willing. I dismiss this action.