

THE HIGH COURT**2006 No. 364 P****BETWEEN****KATHLEEN GERAGHTY****PLAINTIFF****AND****SEAN E. QUINN, DAVID ROGERS AND PETER O'SULLIVAN****DEFENDANTS****Judgment of Miss Justice Laffoy delivered on 5th June, 2008****Factual background**

1. At the date of her death, Agnes Armstrong was the owner in fee simple of lands at Ashbourne, County Meath. The lands were registered on folio 17975 of the Register of Freeholders, County Meath. Following the death of Agnes Armstrong, her personal representative, William McGrath (the vendor), sold two parcels of the lands registered on folio 17975 to Owen O'Brien (in trust) by two separate contracts, each dated 23rd September, 2002. The purchaser purchased in trust for the defendants. Ultimately, by virtue of two transfers dated 27th February, 2003, the two parcels of land were transferred by the vendor to the defendants.
2. The interest of Agnes Armstrong in the portion of the lands registered on folio 17975 not sold by the vendor (the retained lands) devolved to and the retained lands are now owned by the plaintiff. By an assignment in writing dated 25th January, 2006, the vendor, as personal representative of Agnes Armstrong deceased, assigned the benefit of the two contracts dated 23rd September, 2002 to the plaintiff. The plaintiff brings these proceedings as the owner of the retained lands and as the assignee of the vendor's interest in the two contracts. The defendants are sued as the principals for whom the purchaser contracted to purchase in trust and as the persons to whom the lands the subject of the two contracts (the sold lands) were transferred.
3. Before the sales to the purchaser, the lands registered on folio 17975, which comprised 15.0011 hectares, equivalent to approximately 37 acres, were used for agricultural purposes. On the southernmost portion of the lands there was a dwelling house and outbuildings. The lands, house and outbuildings were accessed over a roadway known as Race Lane, which was a public road in charge of the local authority, Meath County Council. The public road extended only a short distance northwards along the western boundary of the lands which were registered on folio 17975, along an area which mainly comprised a narrow spur of land to the south of the buildings. On the evidence adduced at the hearing, which was not precise, it would appear that the public road extended beyond the southernmost tip of the spur for a distance of between 12 and 13, or maybe 14, metres. A private road extended northwards beyond the public road at Race Lane along the western boundary of the lands registered on folio 17975. The private road was in the ownership of J. & M. McCabe Properties Limited (McCabe) which, as I understand the position, carried out development on its far (western side). I will refer to the McCabe private road as "the private road".
4. In one of the contracts dated 23rd September, 2002 the vendor sold part of the lands registered on folio 17975 comprising 1.562 acres to the purchaser for €200,000. In the other, an area comprising 9.47 acres was sold to the purchaser for €800,000. The retained lands comprise approximately 26 acres. The issues in these proceedings arise out of special conditions 6, 7, 8 and 9 in the contracts.
5. In special condition 6, having referred to the retained lands, it was provided as follows:

"The Purchaser shall apply for construction of a distributor road the width of 24 ft. or thereabouts through the lands being sold to facilitate access for future development of the vendor's retained lands and such roadway is to be constructed to the specifications of Meath County Council and is to be brought up to the boundary of the vendor's retained lands."
6. Special condition 7 provided as follows:

"The Purchaser hereby grants to the Vendors Licensees their Executors, Administrators, Assigns and Trustees the right to pass and re-pass over the distributor road to be constructed by the Purchaser and the further right to pass and re-pass by day or by night on foot or in vehicles over all estate roads to be constructed on the land being sold for the purpose of gaining access to the vendor's retained lands and the future development of the said lands."
7. In special condition 8 the purchaser granted the vendor and his successors in title a way-leave for services to and from the retained lands through the utilities then or at any time within the perpetuity period under or passing through sold lands with the usual right to connect up with and to cleanse, repair and renew the utilities. Special condition 8 also contained a provision, which might more sensibly have been included in special condition 6, which provided that, in the event of the purchaser failing to construct the distributor road within the period of six months of obtaining planning permission or not constructing the same to the satisfaction of the County Council, the vendor should have the right to carry out works to complete the road to the level and standard required by Meath County Council.
8. In special condition 9 the purchaser covenanted to bring all main services, to include main sewerage, water, gas, ESB and surface water, to the retained lands free of charge to the vendor and his successors in title for both domestic and development purposes.
9. In special condition 10, which at the hearing was raised by counsel for the plaintiff as being relevant, the purchaser agreed to furnish to the vendor copies of the plans submitted to Meath County Council to support his planning application. The submission of that planning application post-dated the contracts, but pre-dated the transfers of the sold lands to the defendants.
10. McAlinden Gallagher, Solicitors, acted for the vendor in the sales and Owen O'Brien & Company, Solicitors, acted for the purchaser. Contracts were furnished on 15th August, 2002. In a letter dated 20th August, 2002, which dealt with various issues, the purchaser's solicitors enquired whether it was possible to delineate the distributor road referred to in special condition 6 at that stage or whether the same would be dictated by the planning application, suggesting that, if it was possible to do so at that stage, a map should be prepared to reflect the route of the roadway for inclusion in the contract. The vendor's solicitors' response, by letter dated 22nd August, 2002, was to the effect that they had left the actual location of the distributor road at large lest it interfere with the planning application which the purchaser intended to make to Meath County Council. The vendor's solicitors emphasised that the essential point of special condition 6 was that the purchaser agreed to grant a legal right to the vendor –

"... to pass over a roadway of a certain width to enable our Client to get access to the property at the rear and also to facilitate entry should she intend to develop the retained lands at some stage in the future."

11. In response, by letter dated 5th September, 2002 the purchaser's solicitors stated that they noted the access required by the vendor and it was agreed to. It is clear from a letter dated 2nd September, 2002 from the vendor's solicitors to the purchaser's solicitors, that the vendor's solicitors were aware that the existing access to the lands registered on folio 17975 was a public road and was in charge of Meath County Council, that the continuation of the road northwards was owned by a neighbouring builder, McCabe, and that it was a private road.

12. The two transfers by the vendor to the defendants were simple transfers of the parts of the lands registered on folio 17975 comprised in the two contracts (i.e. the sold lands). The content of special conditions 6 to 9 was not addressed in the transfers and no easements or way leaves, as provided for in those special conditions, were reserved in favour of the vendor and his successors in title.

13. The defendants' application for planning permission to the planning authority, Meath County Council, was dated 4th December, 2002 and sought planning permission for the construction of thirteen houses on a portion of the lands being purchased by the defendants which comprised just short of 2.5 acres, the area in question being on the southernmost portion of the sold lands, so that it involved the demolition of the farmhouse and outbuildings. The planning application was accompanied by a document described as "Way-Leave Agreement" dated 4th December, 2002 and signed on behalf of McCabe, in which McCabe confirmed that it was agreeable to grant a way-leave involving access to all services involving sewerage, surface water and mains water and an entrance onto McCabe's private land at Race Hill, Ashbourne. It was stipulated that the way-leave was for only 2.5 acres approximately, being part of folio 17975, County Meath. On 26th May, 2003 Meath County Council issued notification of grant of planning permission on foot of that application (register reference DA/20379), subject to 34 conditions. The conditions required the submission of a revised site layout which would, *inter alia*, exclude one house, and a revised road layout. In fact, in August, 2004 the defendants submitted an application for change of house type in relation to two sites. Notices of decision to grant planning permission was issued by Meath County Council under register reference DA/40397 on 5th October, 2004. Twelve houses have been constructed on the area of 2.5 acres, which I will refer to as "the housing estate", in accordance with the planning permissions. Under a special condition in one of the contracts the plaintiff acquired and occupies one of those houses, but no issue arises in the proceedings in relation to that aspect of the transaction.

14. It was the actual layout on the ground of the housing estate which prompted the correspondence between the vendor's solicitors and the purchaser's solicitors in the Spring of 2004 which in the fullness of time led to these proceedings. By letter dated 12th February, 2004 the vendor's solicitors wrote to the purchaser's solicitors inquiring how the defendants proposed to comply with special conditions 7, 8 and 9, because the vendor's solicitors had been informed by the plaintiff that she had "no access to the lands at the rear of the sold property" at the time. As I understand the plaintiff's concern it was that the road layout on the housing estate did not allow for access to the roads within the housing estate for the defendants' lands immediately to the north of the housing estate and from there to the plaintiff's lands further north. The response of the defendants' solicitors, which was dated 1st March, 2004, incorrectly suggested that provision was made in the defendants' planning application for the development of the housing estate that the northern boundary of the housing estate would be breached for the purposes of access northwards through the remainder of the defendants' lands and ultimately to the retained lands. In fact what the planning application had provided for was for the possible extension of the internal access road within the housing estate to adjoining zoned lands to the south of the housing estate, which are not relevant at all to these proceedings. Neither the original nor the revised layout of the housing estate allowed for access for the remainder of the defendants' lands (i.e. the sold lands other than the housing estate) or the retained lands through the internal access road within the housing estate. Although the letter of 1st March, 2004 incorrectly represented the position as provided for in the defendants' planning permission and on the ground within the housing estate, in that letter the plaintiff was given an assurance that the defendants would not be relying solely on access from "this point", which I understand to mean the supposed breach on the northern boundary of the housing estate, and stated that, in the event that the defendants were to "get access from any other point to allow continuum access into [the plaintiff's retained] lands then the conditions of the Contract will be met as soon as it is possible so to do".

15. The so-called "Way-Leave Agreement" was formalised in a deed of grant dated 4th December, 2002 made between McCabe of the one part and the defendants of the other part, whereby the defendants were granted a right of access over the private road and way-leaves in relation to services under the private road in fee simple, but for the benefit of the housing estate only. On the basis of the maps put in evidence, it would appear that the private road, which has not been taken in charge, extends northwards only a short distance, perhaps twenty metres, north of the northern boundary of the housing estate.

16. In November, 2003 the defendants transferred six of the sites in the housing estate to Cavalry Homes Limited, which developed those sites. I assume that the remainder of the sites have been disposed of by the defendants.

17. As I understand the position, the plaintiff, in relation to the retained lands, and the defendants, in relation to the sold lands other than the housing estate, are entitled to access their respective holdings over the private road for use for agricultural purposes by agreement with McCabe. Therefore, to the extent that the plaintiff contends the retained lands are landlocked, what is meant is that they are landlocked as regards development in the future.

18. Against that factual background, I will now consider the plaintiff's case as pleaded and the relief the plaintiff seeks and the defendants' response.

The case as pleaded

19. The plaintiff's case is pleaded in an amended statement of claim delivered on 26th April, 2007, and it is responded to in an amended defence delivered on 3rd May, 2007.

20. Having pleaded the contents of special conditions 6, 7, 8 and 9, the plaintiff pleaded that the defendants had agreed to provide the plaintiff with:

(a) a right of way measuring 24 ft. in width at all times, by day or by night, on foot or in vehicles over the defendants' lands (the sold lands) and "to and from the public road . . ."; and

(b) free and uninterrupted passage and running of services to and from the retained lands through the utilities constructed or placed on the sold lands.

21. The plaintiff also pleaded an entitlement to a right of way for the retained lands over the sold lands on alternative bases: an entitlement to an easement of necessity; that it was the common intention of the parties that the vendor's successors in title would have a right of way to gain access to the retained lands and sufficient to enable the future development of those lands; that it was an implied term of the contracts that the defendants would grant such a right of way to the vendor's successor in title; and that the

plaintiff's entitlement is to easements which are necessary to the reasonable enjoyment of the retained lands, whether as a result of the operation of principles relating non-derogation from grant or otherwise.

22. What is significant about the manner in which the plaintiff's case was pleaded is that it expressly stipulates an entitlement on the part of the plaintiff to a right of way "to and from the public road".

23. The plaintiff in her statement of claim has alleged a breach of contract on the part of the defendants, *inter alia*, in failing to ensure that the defendants are in a position to grant the rights which the plaintiff asserts she is entitled to, including a pedestrian and vehicular right of way over a way measuring 24 ft. in width to and from the retained lands from and to the public road.

24. The primary relief claimed by the plaintiff is declaratory relief, declaring the plaintiff's entitlement to a right of way and way-leaves for services over and through the sold lands. The plaintiff also claims injunctive relief to restrain activity on the part of the defendants which would interfere with the plaintiff's alleged rights over the sold lands in the terms pleaded. An alternative approach on the part of the plaintiff is to claim specific performance of the contracts. Finally, the plaintiff claims damages.

25. In the amended defence, the defendants admitted special conditions 6, 7, 8 and 9 according to their terms and in their entirety. However, they denied that they agreed to provide a right of way connecting the retained lands with the public road. They also denied the alternative bases on which the plaintiffs claimed the right of way: easement of necessity, common intention and implied term and denied that the plaintiff was entitled to easements save as expressly admitted, that is to say, the express terms of the special conditions. Those averments put in issue the entitlement of the plaintiff to easements and way leaves connecting the retained lands with the public road and services. The defendants denied that they have refused to comply with or honour the terms of the contracts and, in particular, that the development of the housing estate prevents or in any way constrains them from complying with the terms of the contracts. The defendants denied that the plaintiff is entitled to any of the reliefs claimed, and, in particular, denied that the plaintiff is entitled to declaratory relief in the terms claimed, which it is contended is not and cannot be construed to be within the terms of the special conditions. Finally, the defendants asserted that there has been no failure on their part to perform the contracts and that these proceedings are misconceived, premature and anticipatory.

26. My analysis of the amended statement of claim and the amended defence is that the defendants acknowledge that they are contractually obliged to comply with conditions 6, 7, 8, 9 and 10 of the special conditions but they assert that the case being made by the plaintiff goes beyond what they contracted to give the plaintiff in the special conditions in claiming an entitlement to easements and way leaves which connect the retained lands to the public road and public or main services.

27. Special condition 10 is not alluded to in the plaintiff's statement of claim and no breach of that special condition is pleaded by the plaintiff. However, at the hearing of the action the plaintiff asserted that there was a breach in that the purchaser did not furnish to the vendor the documents lodged with Meath County Council in support of their planning applications. Assuming there was such a breach, I do not think it adds to or detracts from the essence of the plaintiff's case, which relates to the defendants' contractual liability to construct a road and to grant easements and way leaves to the plaintiff.

Liability issue only

28. At the hearing the court was told that it was concerned only with the issue of liability, that is to say, whether the defendants are in breach of their duties under contract or at common law to the plaintiff in relation to the construction of the distributor road and the grant of a right of way and way leaves.

Defence on liability issue advanced at the hearing

29. At the hearing, counsel for the defendants contended that the defendants are under a contractual duty to provide a distributor road through the sold lands only but not otherwise, in other words, that they are not obliged to extend the distributor road to an existing public road. In particular, it was contended that the defendants are not obliged to procure rights for the plaintiff over the private road and that it is up to the plaintiff to make her own arrangements with McCabe. It was asserted that the plaintiff cannot be put in a better position *vis-à-vis* McCabe than her predecessor, the vendor, was before the contracts were entered into.

30. The defence on the liability issue was summarised by counsel for the defendants as follows:

(1) It is physically impossible to provide a distributor road having regard to the extent to which Race Lane is in charge of Meath County Council without the involvement of McCabe. It was asserted that both contracting parties were aware of this at the time of the execution of the contracts and the contracts were executed knowing that to be the position.

(2) Special condition 6 does not, and could not, impose an obligation on the defendants to deal with a third party. This proposition is based on the construction of special condition 6, together with the knowledge of the contracting parties, prior to the execution of the contract. The defendants are not required to involve McCabe. Both contracting parties were aware that, without McCabe's co-operation, they would be "snookered".

(3) The distributor road was to be constructed only in the event of the development of the retained lands. There is no obligation on the defendants to build the distributor road until the plaintiff has obtained planning permission for the retained lands and the location of the distributor road can be determined. There was only agreement in principle between the contracting parties in the contracts.

30. It is hardly surprising that counsel for the plaintiff took issue with those propositions, contending that he was taken by surprise in that –

(a) the submission that it was physically impossible to provide the distributor road was not part of the case as pleaded,

(b) that both contracting parties were aware that McCabe held the key was not pleaded, and

(c) that both executed the contracts knowing that the position was that McCabe held the key was not part of the case as pleaded.

31. In response, counsel for the defendants pointed to the defence pleaded which put in issue whether the defendants' contractual obligations extended to providing a distributor road and easements and way leaves which connected the retained lands "to and from the public road". While the defendants' defence did not refer to impossibility, the defendants were not introducing something radically new, in that, both the contracting parties knew that they would have to deal with McCabe, because what was agreed could not be achieved otherwise.

32. At the request of counsel for the plaintiff, I ruled that the issue on the case as pleaded was whether there was an obligation on the defendants to connect the retained lands via a distributor road to the public road, and to grant easements for the benefit of the retained lands "to and from the public road". I assumed that both parties were ready to address that issue and to adduce whatever evidence was necessary to deal with it. Evidence going to that issue was admissible.

Evidence adduced by the parties

33. The only evidence adduced by the defendants was the evidence of Robert McGreevy, Engineer, of R.C. Design Services Limited, Architects, Engineers and Project Managers. Mr. McGreevy furnished a written report dated 29th June, 2007, to the defendants, which was put in evidence. It is clear that the focus of his instructions was the portion of the lands sold to the defendants which was contiguous with the public road at Race Lane. As I have already stated, that area, comprising the spur of land and a small area of what is now part of site 1 in the housing estate, has a frontage extending for about 12 metres to 13 metres, or maybe 14 metres, along the public road. The thrust of Mr. McGreevy's evidence was consistent with the report and it was that a frontage onto the public road of the extent available would not accommodate an entrance to a housing estate in accordance with the requirements of Meath County Council in relation to turning radius, provision of sight lines and so forth. He further testified that a width of 24 ft. would not accommodate a distributor road to the standards required by Meath County Council in relation to footpaths, cycle lanes, grass verges and such like.

34. In cross-examination, Frank Burke, the engineer who gave evidence on behalf of the plaintiff, acknowledged that, as a matter of probability Meath County Council would require a land width of greater than 24 ft. for the provision of a distributor road. However, the frontage of the sold lands onto the public road had the potential to make the provision of a 24 ft. width road feasible.

35. Mr. McGreevy was the only witness called on behalf of the defendants. One witness, apart from Mr. Burke, was called on behalf of the plaintiff, namely, Jerome Gallagher, of the firm of McAlinden Gallagher, the solicitor who acted for the vendor in the sale to the purchaser. In relation to the defendants' proposition that both contracting parties knew in September, 2002 that the co-operation of McCabe was necessary and that they would be "snookered", that is to say, landlocked, without that co-operation, Mr. Gallagher's testimony was that a lot of work had been done prior to the contracts being exchanged on 23rd September, 2002. His position was that the contracts stood alone and that, if the defendants were unable to comply with the special conditions, they should have asked to have them altered or amended. Contracts were not signed subject to a third party's co-operation being forthcoming. He knew the lane was owned by McCabe. However, he had no note of any conversation in relation to that with his opposite number at the time. As far as he was concerned, the basis of the contract was that it stood alone. Mr. Gallagher accepted as correct the proposition put to him in cross-examination that while the retained lands remain undeveloped there is no imperative for the construction of the road or the grant of the right of way.

The defendant's closing submissions

36. Counsel for the defendants, in his closing submissions, persisted in the contention that compliance with special conditions 6 and 7 in relation to the construction of the road and the grant of the right of way is impossible. Both parties contracted to do something which is now impossible, it was submitted. The problem was portrayed as being the dependence on McCabe to access the retained lands. However, it was recognised that, if the private lane was taken in charge by Meath County Council, there would be no problem.

37. Counsel for the defendants also submitted that, until the retained land is zoned for development in the Meath County Council development plan and until there is planning permission for the development of the retained lands, the question of the defendants' failure to comply with the special conditions should not arise and, accordingly, the plaintiff's complaint is premature. If that is the case, and I believe it is, it is pertinent to query on what basis the defendants can stand over the contention that they are discharged from their contractual obligations on the grounds of impossibility of performance at this juncture. It is also pertinent to observe that there are a lot of imponderables in relation to how the obligations of the defendants will be implementable when they require to be fulfilled in the future, for example, the location of the distributor road at the relevant time, the requirements of Meath County Council in relation to it, and whether the private road is in charge of Meath County Council and such like.

Conclusions

38. No submission on the applicable law was made by either side. However, when the matter was first before the court for hearing on 26th April, 2007, I drew the parties' attention to the similarities between this case and the issues which were considered by Kinlen J. in *Dwyer Nolan Developments Ltd. v. Kingscroft Developments Ltd.* [1999] 1 I.L.R.M. 141.

39. To ascertain the contractual obligations of the defendants to the plaintiff it is necessary to construe the special conditions in the contracts. In my view, the closing submission made by counsel for the plaintiff that, while the special conditions do not expressly refer to connecting the retained lands to the public road, any other construction would not be sensible, is correct. Special condition 6, which imposes the obligation on the defendants to construct the distributor road through the sold lands expressly states the purpose as being to facilitate access for future development of the retained lands. The right of way to be granted in accordance with special condition 7 is for the stated purpose of gaining access to the retained lands and the future development of those lands. As a matter of common sense, access to the retained lands could only be achieved by a new road terminating in a public road. Therefore, as a matter of construction of the words in the contract, I am of the view that the special conditions envisage the defendants providing the retained lands with access from and to a public road. Alternatively, it is to be implied that the defendants' contractual liability is to furnish access for the retained lands from and to a public road. Similarly, special condition 9 expressly provides that the defendants are to bring all main services to the retained lands. Accordingly, as a matter of construction of special condition 8, it must envisage that the way-leaves to be granted by the vendor will connect the retained lands to the main or public services.

40. It is not necessary to resort to reliance on an easement or way-leave of necessity. If it were, the decision of Kinlen J. in *Dwyer Nolan Developments Ltd. v. Kingscroft Developments Ltd.* would certainly avail the plaintiff in making out a case for an easement or way-leave of necessity. However, I am of the view that the plaintiff does not have to make that case.

41. Accordingly, I find that as a matter of contract, the defendants are contractually bound by special conditions 6, 7, 8 and 9 of the contracts. Apart from the fact that the defendants have deliberately abrogated their liability in the defence of these proceedings, I would be of the view that there could not be a breach of contract on the part of the defendants. If the defendants had continued to adopt the stance which was adopted in the defendants' solicitor's letter of 1st March, 2004, the plaintiff would not be able to establish a breach of contract because the retained lands have not been zoned for development nor has planning permission been sought and the plaintiff's complaint would in reality be premature. However, the defendants have contested the plaintiff's proper entitlement under special conditions 6 to 9 inclusive, thereby breaching their contractual obligations to the plaintiff. Accordingly, the plaintiffs are entitled to be protected by an appropriate remedy.

Remedy

42. I will hear further argument from the parties as to the appropriate remedy on foot of the finding of a breach of contract. It occurs

to me that the situation would be best met by declaratory relief which declares the entitlement of the plaintiff to have special conditions 6, 7, 8 and 9 complied with in accordance with what I consider to be the true meaning of those provisions, namely, that they entitle the plaintiff, for the benefit of the retained lands, to a right of way and way leaves for services through the sold lands to the public road and main services. In view of the attitude adopted by the defendants in these proceedings, I think the plaintiff is entitled to have her rights protected by the registration of the declared rights as burdens on the defendants' folio on which the sold lands, other than the sites within the housing estate which have been disposed of, are registered. However, I have formed no determinative view on this point.

The question of impossibility of performance by the defendants does not arise at this juncture, as the retained lands are not zoned for development purposes and no development is planned in the immediate future. Therefore, the court does not have to give any consideration to what would be the appropriate remedy if, and when, it arises.