

**THE HIGH COURT
DUBLIN**

BETWEEN

OCHRE RIDGE LIMITED

PLAINTIFFS

**CORK BONDED WAREHOUSES LIMITED
& PORT OF CORK COMPANY LIMITED**

DEFENDANTS

Judgment of Mr. Justice T.C. Smyth delivered the 28th day of February 2006.

1. In these proceedings the Plaintiff claims against the 1st Defendant specific performance of a contract for sale dated 8th October 1999 (and a range of declaratory reliefs claimed to arise out of the contract). There is also claimed - and the claims were pursued at the hearing - for damages for

(a) breach of contract and

(b) conspiracy.

2. The property in suit is an old bonded warehouse situated at the top end of an island of land in Cork City, which is divided by the river. The premises is effectively owned by the 2nd Defendant, which has a lease thereof of 999 years, and carved out of that interest is a 99 year lease made between the 2nd Defendant and the 1st Defendant.

3. The contract is conditional (*inter alia*) upon:-

a) The Plaintiff concluding negotiations to its satisfaction with the 2nd Defendant regarding the development of the premises;

b) The consent by the 2nd Defendant to assignment and change of use; and

c) The obtaining by the Plaintiff of an opinion from Senior Counsel to the effect that the 2nd Defendant is not a "State Authority".

4. This latter provision (Special Condition 13) relating to the status of the 2nd Defendant, being not a State Authority, was established and accordingly this condition is of no relevance to the proceedings.

5. The Completion date of the Contract was 10th April 2000 in respect of which time was of the essence (Special Condition 9(b), which further provides that:-

"It is agreed that if, for whatever reason, the purchaser fails to complete on the Completion Date, this contract shall automatically be at an end and the Purchaser's deposit, less the Non-Refundable Element (herein defined) shall be returned to the Vendor's Solicitor in exchange for all copy title documents furnished in connection with this agreement."

6. The Plaintiffs' case is that the consent of the 2nd Defendant both as to assignment and change of use was wrongfully withheld and furthermore that the Defendants conspired together to ensure that the contract fell or would be frustrated.

7. The Plaintiff is a private limited company and was the 'vehicle' used, by one Mr. Tim Tallent, with a view to carrying out an intended scheme of development. Mr. Tallent was not a property developer. His business was in 'packaging', a family business of which he had become, over time, the Managing Director. His family roots were in the Cork area, but he has spent the greater part of his business life in England. In his career in the packaging business he had been in some property transactions, buying or selling, leasing or letting premises for the packaging business. Without detracting from such experience, it could be fairly described as modest dealings in property.

8. Prior to the Plaintiff and the 1st Defendant entering into the contract of 8th October 1999 the 2nd Defendant had served on the 1st Defendant a Schedule of Dilapidations in relation to the premises which had been seen by the Plaintiff. This fact was expressly referred to in Special Condition (5) which then noted:-

"The Vendor has not carried out any of the works referred to therein, nor does it intend to do so prior to completion. The Purchaser shall take the premises subject to the said Schedule of Dilapidations and subject to the obligations to comply with same. Following execution of this Agreement, the Vendor shall write to the Landlord, informing it of the existence of the Agreement and requesting the Landlord to hold the Schedule of Dilapidations in abeyance, pending the outcome of negotiations in relation to the premises to be conducted between the Purchaser and the Landlord. If the Landlord refuses to agree to this course of action, the Vendor shall negotiate with the Landlord in good faith to agree a Schedule of Dilapidations. The Vendor shall consult with the Purchaser before agreeing such schedule with the Landlord. The Vendor shall endeavour to postpone commencement of the works to be carried out under the Schedule to date after the Completion Date."

9. The evidence established to my satisfaction that the Plaintiff, prior to entering into the contract with the 1st Defendant, had in March 1999 suggested to the 2nd Defendant that it issue a Schedule of Dilapidations on the 1st Defendant. Furthermore, the Plaintiff wished to be informed by the 2nd Defendant as to, if and when such Schedule would issue before fixing on a purchase price and terms of contract with the 1st Defendant. A Schedule of Dilapidations (which was quite extensive) was served on the 1st Defendant in June 1999. Subsequent to the execution of the Contract, the 1st Defendant by letter dated 14th October 1999 sought consent to the assignment of the lease and change of use of the premises. This was not a defeatist application, truthful information was given by the 1st to the 2nd Defendant and the case is clearly distinguishable from *Costello -v- Krishna Props (Ir) Ltd. & McVeagh* (unreported 10/7/1975 Finlay, P.) The letter recorded the understanding (confirmed by the evidence of the 1st Defendant) that Mr. Tallent would contact the 2nd Defendant to discuss the matter of the dilapidations with them. The letter concluded:-

"In relation to the Schedule of Dilapidations, I understand that Mr. Tallent intends to redevelop the property and that these redevelopment works, would, on the whole, render unnecessary the works required under the Schedule of

Dilapidations. Accordingly, I would be grateful if you would confirm that the schedule may be left in abeyance pending the outcome of discussions between Port of Cork Company and Mr. Tallent. "

10. The letter seeking the consents drew a refusal from the 2nd Defendant and in the clearest terms signalled that such would not be forthcoming "until such time as effective arrangements have been put in place to comply with the Schedule of Dilapidations." I am satisfied that both Mr. Tallent and the 1st Defendant realised that there was little point in going to the trouble and expense of carrying out the repairs in the Schedule of Dilapidations if the property was to be re-developed. The contract had expressly given the power Mr. Tallent to negotiate with the 2nd Defendant on this issue. While the 1st Defendant did from time to time carry out works of repair to maintain the integrity of the building during the building of the Cork Main Drain and some such could coincide with items of dilapidations, they did so on the advice of their own engineer - not in purported compliance with the entire Schedule of Dilapidations, or the Schedule of Dilapidations at all.

11. Indeed, Mr. Tallent immediately on learning of the position of the 2nd Defendant contacted Mr. O'Mahony of the 1st Defendant and agreed on presenting a united front to the 2nd Defendant. Furthermore, Mr. Tallent was organising full surveys - structural, dimensional and historical, which would be required in any event to submit to the Planning Authority. Mr. Tallent's telefax of 9th November 1999 copied to Mr. O'Mahony concluded:-

"Therefore, whilst Cork Bonded Warehouse and Ochre Ridge accept that the Schedule is in place there seems little point in complying with it until both the reassignment and change of use are granted and the overall scheme is put before the planners as a concise conservation package."

12. Later that month, on 23rd November 1999, Mr. Tallent wrote to Mr. Pat Keenan, the Secretary Or Chief Executive Officer of the 2nd Defendant, with reference to the surveys stating:-

"On receipt of these reports Scott Tallon Walker will be in a position to advise the way forward in both architectural and heritage terms, at which stage I will copy you with our proposals. At that time, I shall contact you again so that we can arrange to meet and discuss further the redevelopment of the site, and demonstrate how our proposals meet or exceed the schedule currently in place..."

13. Mr. Tallent carried forward his intended enterprise and informed Mr. O'Mahony of his intention to meet with Mr. Keenan after consulting surveyors and architects. Furthermore, Mr. Tallent informed Mr. Keenan that as soon as he consulted his advisors:-

"I will contact you to arrange a meeting to address both the Dilapidations Schedule and Port of Cork's consent to the change of use. I have advised Mr. Liam O'Mahony at that Cork Bonded Warehouse Limited should apply to Port of Cork for consent to assign their interest in the lease so that it can be dealt with by your Board. "

14. Why this latter matter was raised in this way in the light of Mr. Tallent clearly knowing on 9th November 1999 that consent had been refused was not made clear. In the events, Mr. Keenan by letter dated 11th January 2000 made it quite clear to Mr. Tallent that such an application had been made, was refused and "this was a very definite decision, unanimously taken, and it is most unlikely that it will be overturned."

15. While the contract made it clear that the 1st Defendant did not intend to carry out any of the works in the Schedule of Dilapidations and that it would endeavour to postpone any such works being carried out before April 2000, (the completion date) - the problem with the consents had not been resolved by February 2000. Mr. Tallent knew that while there was little point in carrying out the works in the Schedule of Dilapidations, however if the 2nd Defendant would grant consent to the assignment and change of use - his company (the Plaintiff) would as part of its re-development of the property - agree to carry out all of the relevant works included in the Schedule of Dilapidations and reinstate the roof without seeking any part of the contribution of the 2nd Defendant towards the reinstatement cost of the roof (which was a joint obligation between landlord and tenant under the lease). This proposal was put and supported by the 1st Defendant. The response of the 2nd Defendant was unequivocal in a letter of 24th March 2000 from Mr. Keenan to Mr. O'Mahony:-

"....I can confirm that there is no change in the position of the Port of Cork company in relation to any proposed assignment of the lease of the property now occupied by Cork Bonded Warehouses Limited. The Port of Cork Company will not agree to any assignment which involves the change of use for the premises."

16. The day before (i.e. 23rd February 2000) Mr. Keenan had written to Mr. O'Mahony in (*inter alia*) the following terms:

"Lest there be any misunderstanding about the contents of my letter of the 19th October, my Board decided that complying with the Schedule of Dilapidations was a matter of necessity and we have spoken about this since. I would not wish you to have the idea that it was 'essentially a precondition to the Board giving its consent' to your request to assign the lease because this is not necessarily so."

17. I am satisfied and find as a fact that events at that time and since left Mr. O'Mahony with the opinion that it would make no difference to the 2nd Defendant who an intended assignee might be - a refusal to consent was probable and that the 2nd Defendant (as Landlord) would 'sit out the remainder of the term of the lease.'

18. In the course of cross-examination of Mr. O'Mahony, it was put to him that he ought to have challenged the refusal to consent in litigation. Altogether from there being no contractual obligation to do so, not only had the 1st Defendant put Mr. Tallent's proposal forward, it had also sought and obtained Counsel's opinion. It was not at all clear that a legal challenge would succeed and furthermore the 1st Defendant, very understandably, did not wish to weaken any bargaining position it might have in the future by attracting an unfavourable Court Order.

19. Furthermore, General Condition 10(d) of the contract dealing with consent to assignment of a lease provides (*inter alia*) that-

"... the Vendor shall not be required to institute legal proceedings to enforce the issue of any such consent or otherwise as to the withholding of the same. If such consent shall have been refused or shall not have been procured and with written evidence of the same furnished to the purchaser on or before the closing date, or if any such consent is issued subject to a condition, which the purchaser shall on reasonable grounds refuse to accept, either party may rescind the sale by seven days' prior notice to the other."

20. At all material times, what was envisaged under the Contract was a consent to assignment and change of use. It was only when

the response of the 2nd Defendant was unfavourable that Mr. Tallent considered that perhaps he could accept consent to assignment or change of use. But he made it clear in his fax of 24th January 2000 to Mr. O'Mahony that they should be not treated as separate issues. That the consents would not be decoupled is clear from the letter of 24th March 2000 from the 2nd Defendant (earlier referred to).

21. It is clear from both oral and written evidence that the 2nd Defendant had a sense of the time frame of the contract between the Plaintiff and the 1st Defendant. I am satisfied and find as a fact that Mr. O'Mahony did not discuss with Mr. Keenan the contract with the Plaintiff during its currency and that the 1st and 2nd Defendant did not conspire to deprive the Plaintiff of the benefits of the intended fruits of the contract of 8th October 1999.

22. Of all material matters in the evidence where there is a conflict between that of Mr. Tallent and Mr. O'Mahony, I prefer the evidence of Mr. O'Mahony as being more reliable, notwithstanding that on occasion he could not recollect some details of meetings or events. I found him a reliable and forthcoming witness. I am further satisfied and find as a matter of fact and as a matter of law that the sale was not completed by the 10th April 2000 but that this was not because of any failure by the 1st Defendant to comply with its contractual obligations.

23. Notwithstanding it being suggested that the 1st Defendant did not pursue the 2nd Defendant on receipt of the refusal to the consents. Mr. Tallent made it perfectly clear and it is clearly agreed between himself and Mr. O'Mahony that Mr. Tallent, who was the person (or whose company) was going to carry out scheme of redevelopment with the Port of Cork Company, was going to make the running and bring about whatever arrangement would best suit himself. I reject as unfounded and unwarranted by the evidence that there was any lack of good faith on the part of the 1st Defendant in seeking to give effect to the terms of the contract or that the 1st or 2nd Defendants conducted themselves in a manner motivated by the fact that there was an element of non-refundability of the deposit or that it might be more convenient and beneficial for them later to contract with the 2nd Defendant. Furthermore, in each of the separate cases the relationship was contractual not fiduciary, therefore no obligation of good faith arises.

24. I am satisfied that the contract entered into between the Plaintiff and the 1st Defendant is a conditional contract and was understood by both parties. An understanding and applicability of the law in this regard is as set out in *Aberfoyle Plantations Limited - v- Cheng* [1960] A.C. 115 at p.124/5 viz (i) where a conditional contract of sale fixes a date for the completion of the sale then the condition must be fulfilled by that date; and more particularly (iii) where a conditional contract of sale fixed (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles. The contract read as a whole and in particular Special Condition 9(a) - approval of a scheme, Special Condition (14) - the obtaining of consents and General Condition 10(d) indicated its conditional character and the parties proceeded and regarded compliance with these provisions as necessary ingredients to give force to the contract. Further, there was a mutuality of benefit in the contractual conditions (*Maloney -v- Elf Investments Limited* [1997] ILRM 253) Special Condition 9(b) is quite specific.

"It is agreed that if, for whatever reason, the purchaser fails to complete on the completion date, this contract shall automatically be at an end...."

25. That is what the parties agreed - they agreed not to be bound after 10 a.m. on 10th April 2000: No interest existed under the Contract thereafter. I am satisfied and find as a matter of fact and of law that the 1st Defendant was not in breach of Contract. Insofar as it is pertinent I am not satisfied that there was any sound credible convincing evidence upon which damages could be awarded. Even if consents were unreasonably withheld, it is the tenant who may claim damages (if proven) *Meagher -v- Luke J. Healy Pharmacy Ltd.* [2005] 1 EHC 120, Murphy, J. citing *Kelly -v- Cussen* (88 I.L.T.R 97) For completeness, I was unconvinced to a probability on adequate and imprecise evidence that the Plaintiff was in funds at the appropriate time such as to be able, ready and willing to complete the sale.

26. A great deal of the trouble that arose in this case had its origin in the instigation of the Plaintiff to have the 2nd Defendant prepare and serve the Schedule of Dilapidations to assist in its negotiating a price with the 1st Defendant. The Plaintiff did not disclose this fact prior to the contract to the 1st Defendant. In opening the case, considerable emphasis was laid on the candour and up front approach of Mr. Tallent. The words of Goulding J. in *O'May -v- City of London Real Property Co. Ltd.* (1979) 245 E.G. 1065 at 1069 have a particular resonance. "After all, the purpose of legal contracts is to reduce the mutual dependence of parties on one another's morality."

27. I refuse the Plaintiff any relief against the 1st Defendant.

28. The relationship between the Plaintiff and the 1st Defendant is based on the contract of 8th October 1999 that of the Defendants inter se by the terms of the lease of 22nd March 1918. There is no legal relationship between the Plaintiff and the 2nd Defendant. Undoubtedly the Plaintiffs sought to negotiate a business arrangement with the 2nd Defendant, but those negotiations bore no fruit and no concluded agreement ever arose. Notwithstanding the initial overture made by the Plaintiff to offer 15% of the benefit of the scheme of redevelopment being rejected by the 2nd Defendant, the Plaintiff thereafter entered into the contract of 8th October 1999 with the 1st Defendant. This was a commercial decision made by Mr. Tallent. I am satisfied and find as a fact that no support was given to Mr. Tallent by the 2nd Defendant to enter into the contract of 8th October 1999. Mr. Tallent may have assumed that because he was minded to enter into a form of agreement to redevelop the site/premises at some time in the future with the 2nd Defendant that the 2nd Defendant would grant the consents required under the lease. In my judgement, there was no warrant or legal basis upon which he could rely or make such assumption. In my judgement, there can have been no legitimate expectation that his intended or hoped for agreement with the 2nd Defendant would be realised in October 1999 because his offer had been rejected. Nothing in the evidence provided a base either for such belief. The first task of the Court is always to construe the particular words of the particular contract against the factual background known to the parties at or before the date it is entered into (*Charter Reinsurance Co. Ltd. -v- Fagan* (CA)[1997] AC 313 per Nourse J. At 394)

29. The Plaintiff in its legal submission contended that both *Rice and Kenny V Dublin Corporation* [1947] IR 425 and *W&L Crowe Ltd. & Anor -v- Dublin Port and Docks Board* [1962] IR 294 were authority for the proposition that a Plaintiff as a proposed assignee is entitled to bring an action (based on a breach of an implied term in a contract between the proposed assignor and the proposed assignee) against the proposed assignor's landlord under S.67 of the Landlord and Tenant (Amendment) Act 1980 for the withholding of consent to assignment or change of use. The cases do not support such contention. Furthermore, the instant case is site and circumstances specific, unlike Rice's case - where the decision of refusal was a blanket policy decision.

30. The privity of contract in this case between the Plaintiff and the 1st Defendant is wholly separate and distinct and apart from the privity created by the lease between the 1st and 2nd Defendant (*Ashworth Frazer Ltd. -v- Gloucester City Council* [2001] 1 WLR 2180 at p.2183 per Lord Bingham of Cornhill). I am satisfied and find as a fact and as a matter of law that even if the 2nd Defendant

did act unreasonably -and I make no such finding: good estate management to retain a port related use as a Bonded Warehouse may be a consideration within the terms of the lease.

31. Indeed in the course of his judgement in *Crowe's* case, Haugh J. stated:

"In Lloyd & Anor -v- Earl of Pembroke & Anor 89 I.L.T.R 40 at p.44, Mr. Justice Dixon has said:- "In considering for themselves" [the landlords] "whether they would or would not give consent, they are entitled to take everything affecting the position into account, including considerations of their own estate management and including questions of their own interests." In Rice -v- Dublin Corporation [1947] IR 425 at p.436 Maguire C.J., says:- "...I am of opinion that while it is the duty of the Court to consider each case upon its merits, there is no reason why a landlord may not properly base a refusal of consent upon grounds of general policy in relation to the management of his estate."

32. The instant case is distinguishable from *Crowe's* case in (*inter alia*) in that case both plaintiffs were applicants for the consent sought - that is not the position in the instant case. Even if the reasonableness or otherwise of the consents withheld required determination, 'the onus is on the tenant to establish that the landlord is unreasonably withholding its consent.' [*OHS Ltd. -v- Green Property Company Limited* [1986] IR 39 - in my judgement, the evidence does not prove that the refusal of consents by the 2nd Defendant was unreasonable. The Plaintiff in this case seeks declaratory relief - such is a matter of discretion, in this case even if there was a supporting evidential basis for doing so, I would refuse to exercise my discretion in favour of the Plaintiff for a variety of reasons arising from some unsatisfactory features of the evidence and more particularly because the Plaintiff by instigating the preparation and service of the Schedule of Dilapidations without disclosure to the 1st Defendant and by this generation putting the 1st Defendant at a disadvantage before the contract and inhibiting the 1st Defendant in dealing with the property afterwards and agreeing that the agreement would automatically be at an end" as of 10th April 2000, by registering *alis pendens*. The latter in my judgement was wholly unwarranted. I am satisfied and find as a fact on the evidence and as a matter of law that there was no case in estoppel resting against either Defendant.

33. I dismiss the Plaintiffs' case.