

THE HIGH COURT**2009 5272 P****BETWEEN****PATRICK O'DONNELL AND MARTIN WALSH****PLAINTIFFS****AND****JANICE O'BRIEN****DEFENDANT****JUDGMENT of Mr. Justice Birmingham delivered the 21st day of January, 2011**

This matter comes before the court by way of an application for a perpetual injunction restraining the defendant from entering on to a residential premises, interlocutory relief having been obtained at an earlier stage, and for ancillary relief. The defendant has counterclaimed for an order seeking the setting aside of a deed, the setting aside of two contracts and damages for breach of contract.

Background

The background to these proceedings is that the plaintiffs and the defendant were parties to a property arrangement. I use that rather vague phrase for reasons that will become obvious. The parties are in disagreement as to the nature of the transaction and indeed as to whether they are parties to one transaction or two transactions.

The first named plaintiff is a quantity surveyor by profession and has for many years been involved in the building industry. So far as the defendant is concerned, at the time of the events with which we are concerned, she was acting as manager of a leading entertainer.

In mid 2007, immediately prior to the events with which are concerned she resided with her two daughters at one of the two premises that are central to the present proceedings, Number 28, Clontarf Road, Clontarf, Dublin 3. Her husband had at one stage resided there also but at this stage they were estranged and family law and equity proceedings in the Dublin Circuit Court involving them were coming to a conclusion.

At that stage the plaintiffs had a history of collaborating in undertaking building projects and developments. In particular they had cooperated in the development of an apartment block, with others at Howth Road, Clontarf, Dublin 3, known as Glenbrian Hall, though it appears that the actual task of building was undertaken by someone else. Apartment No. 3 in that complex is the other property that is central to the present proceedings.

While there are significant areas of disagreement about how contact between the parties to the present proceedings came about and how they developed, the following broad sequence of events emerges and would not seem to be significantly in dispute.

In or about 2004 the plaintiffs and the mother of the defendant, who also lives in Clontarf, though some distance away from her daughter, were involved in a property transaction. It involved the plaintiffs purchasing part of the back garden of Mrs. O'Brien so as to facilitate a development that they were undertaking. It appears that all sides were happy with the way that that transaction proceeded. The relevance of this earlier transaction is that in mid 2007 Mrs. O'Brien decided to put her daughter, the defendant in contact with Mr. Robert Morgan, the son of the first named plaintiff. It appears that her purpose in putting them in contact with each other was so that the possibility of the defendant selling all or part of her back garden to Mr. Morgan or persons associated with him could be explored, her property has apparently a long back garden, which was seen as having development potential. The defendant had a pressing need for cash at this stage or certainly perceived that she had a need for a significant cash sum, if she was to avail of an option that had been made available to her by the Circuit Court judge who dealt with the matrimonial proceedings.

It appears that options and possibilities were discussed over a period by the defendant and Mr. Morgan. Options under discussion included that a house would be built in the back garden with access to the newly erected house being achieved by the demolition of a garage. While the initial focus was on the possibility of the defendant disposing of her back garden, it appears there was a change of direction and that the focus shifted to the possibility of the defendant disposing of the entire property as distinct from the back garden.

If the defendant was to sell her home then obviously she would need alternative accommodation for herself and her two daughters. The question of whether Mr. Morgan or the plaintiffs or persons associated with them could fulfil a role in meeting the defendant's needs was explored. It appears that a number of possibilities were considered including the house that had been built in the back garden of the defendant's mother, immediately rejected as outside the defendant's price range, an apartment owned by Mr. Morgan in the Hollybrook area of Clontarf, quickly rejected as too small to meet the defendant's requirements, it was only a two bedroom apartment and another apartment, a three bed roomed apartment No. 3, Glenbrian Hall, in the development to which I have made reference.

While there has been some controversy about this it appears to be the case that the apartment in question was in the beneficial ownership of Catherine O'Donnell, the wife of the first named plaintiff. Negotiations followed and the result of those negotiations was an outcome which would see the defendant selling No. 28 Clontarf Road in its entirety, and that property being acquired by the plaintiffs and persons associated with them. The defendant would acquire Apartment No. 3, Glenbrian Hall. The defendant in addition was to receive the sum of €335,000 of which a deposit of €125,000 was to be paid to her immediately, this having regard to her urgent need for funds. A significant issue between the parties in the present proceedings was whether what was agreed was an exchange of properties with a payment for equality of exchange or whether what was agreed was two separate, though linked sales, the sale of Clontarf Road by the defendant and the sale of 3 Glenbrian Hall to the defendant. It may be noted that up until this point the negotiations that I have been referring to were conducted between Robert Morgan and the defendant. However, thereafter a

more direct role was played by the first named plaintiff.

On the 13th August, 2007, a memorandum was signed by the first named plaintiff and by the defendant and witnessed by Mr. Robert Morgan. The memo which was on the headed notepaper of the first named plaintiff was of some significance in the context of the present proceedings and it is convenient to set it out here in full. I do so with handwritten amendments which were initialled by the parties:-

The document is headed up:-

"Contract of Sale/Purchase.

It is hereby irrevocably agreed between Patrick O'Donnell of 14 Glenbrian Hall, 98 Howth Road, Dublin 3, on the one part and Janice O'Brien of 28 Clontarf Rd., Dublin 3, on the second part that a contract exists between both parties on the following basis;

1. Patrick O'Donnell, Robert Morgan and Martin Walsh will purchase from Janice O'Brien her property at 28 Clontarf Road, Clontarf, Dublin 3, unencumbered, for the sum of €785,000 (Seven hundred and Eighty Five thousand Euro).
2. In tandem Janice O'Brien will purchase No. 3 Glenbrian Hall, 98 Howth Road, Clontarf, Dublin 3, unencumbered, from Mrs. Catherine O'Donnell for the sum of €450,000 (Four hundred and Fifty thousand Euro).
3. Both deals to conclude no later than the 30th September, 2007.
4. In consideration of clause 3 above Patrick O'Donnell will pay a deposit of €125,000 (One hundred and Twenty Five thousand Euros) immediately to Janice O'Brien.

It appears that the defendant signed the memorandum and in so far as the memorandum records an agreement or agreements, entered into that agreement or agreements without the benefit of legal advice. It was only after signing the memorandum, that the defendant first engaged the services of a solicitor. When she did engage the services of a solicitor, the solicitor that she went to, was not one of the two solicitors that had been involved at different stages in representing her in the matrimonial proceedings. The defendant appears to have from time to time, at least, entertained doubts about how good a deal or deals she had concluded. In particular she seems to have believed that the figure of €785,000 as the purchase price of No. 28 Clontarf Road, represented an undervalue of her home and was disappointed that the property she was acquiring was valued only at €450,000 and would have wished that the property she was acquiring would have been a more valuable one.

The plaintiff responds to this by saying that the defendant is over-looking the fact that the property market was on the turn in mid 2007. At the height of the market, the value of €950,000 put by the defendant on No. 28 Clontarf Road was not unrealistic. Indeed, an even higher valuation could have been justified. However, by the time the defendant was selling the market had turned. In relation to the value of No. 3 Glenbrian Hall, it is agreed that the apartment was at one stage on the books of selling agents quoting a price of €595,000, but it is said that there was no offer at that level or any expression of interest at that level and that the figure of €450,000 arrived at, was more realistic based on the price of another apartment in the block which was for sale by someone unconnected with the plaintiffs.

Whatever about the values to be put on No. 28 Clontarf Road and 3 Glenbrian Hall, it does not appear to be in dispute that the defendant was prepared to proceed with an arrangement that would see her disposing of her home at No. 28 Clontarf Road, and acquiring a new home at 3 Glenbrian Hall and also receiving a cash sum. If both properties were valued as contended for by the defendant and as the defendant says was agreed the cash sum would be €355,000, while if both were allocated the value contended for by the plaintiff, the cash sum would be €335,000.

In any event whatever about the level of enthusiasm that the defendant had for the arrangement, it appears inescapable that the defendant was prepared to proceed to a conclusion based on what was on offer and instructed a solicitor to give effect to that. Indeed, it appears that the defendant's concern was that she was more than anxious to see matters brought to a speedy conclusion.

While the defendant may have been having second thoughts about whether she had done a good deal, and may have been experiencing some regrets, it appears that at a meeting held in The Yacht Public House in or around the 16th of October 2007, a local licensed premises, attended by the first named plaintiff and the defendant, that the defendant recommitted to the deal. Also at this meeting the first named plaintiff agreed to make an additional interim payment of €10,000 on top of the deposit that had already been paid to the defendant, who was under considerable financial strain at this stage.

A myriad of difficulties, some of them quite unusual have surrounded the subsequent conveyancing of both properties. In discussing these I will for convenience refer to the contract for the sale of No. 28 Clontarf Road, by the defendant as the Clontarf Road contract and refer to that for the purchase of No. 3 Glenbrian Hall by the defendant as the Glenbrian contract.

The situation in relation to No. 28 Clontarf Road, the property being sold by the defendant.

This sale closed in the ordinary way. However, during the course of a subsequent attempt by the plaintiffs, which proved unsuccessful, to sell on No. 28 Clontarf Road, it emerged that the property was subject to a mortgage dated 11th October, 2006. This was not known up until then. This mortgage was in favour of the second of the two firms of solicitors that acted for the defendant in her matrimonial proceedings and it would appear to have been designed to secure their fees as well as the fees due to the solicitor who had acted for the defendant at an earlier stage. Neither the solicitor who acted for the plaintiffs in relation to this purchase nor the law searchers engaged by them, referred to the existence of this mortgage. The solicitor who was acting for the defendant in relation to the sale has stated that he was quite unaware of the existence of this mortgage and that this was so notwithstanding that he had put questions to his client about the existence of encumbrances as was his normal practice and that he been told nothing about this mortgage. That does not seem to be disputed by the defendant who has repeatedly disavowed any intention to criticise the solicitor that she initially engaged to represent her in relation to No. 28 Clontarf Road and 3 Glenbrian Hall. However, she says that she knew nothing about the existence of the mortgage. She says this notwithstanding that the mortgage appears on its face to be signed by her. Whatever about that, it may be said in favour of the defendant that she has sought to address the problems created by the existence of the mortgage and has done so with some success. While this case was at hearing she has succeeded in procuring the agreement of her former solicitors to waive the greater portion of the fees due to them and it is likely that this will help resolve the difficulty created by the existence of the mortgage.

3 Glenbrian Hall, the property being acquired by the defendant

The problems that arose stem, to a significant extent, from the fact that the plaintiffs engaged the services of a solicitor, whose performance left much to be desired. Following an intervention by the Law Society, quite unconnected to the present case, the solicitor in question has ceased to practice as such and his files were taken over by another firm of solicitors. The relevance of the inadequacy of the performance of the solicitor is that when the time came to close, there were a number of issues that had been left outstanding by him. The solicitor for the defendant chose to agree to close on the basis of an undertaking, it appears an oral undertaking, from the solicitor acting for the vendor that the outstanding matters would be addressed and the outstanding documentation furnished. The sale was closed and the defendant and her two daughters moved into occupation. However, notwithstanding the undertaking that had been given, the matters outstanding were not attended to and this gave rise to a campaign being undertaken by the solicitor for the defendant purchaser to achieve action on foot of the undertaking that he had received. This involved increasingly anxious contact with the solicitor who had given the undertaking, with the firm that had subsequently taken charge of that practice and with the Incorporated Law Society.

At this stage there was a change of legal representation all round. The defendant changed from the solicitor who had originally represented her interests, Mr. John Plunkett of Plunkett Kirwan and Company, to another firm based in the area, Thomas Loomes and Company. She has said in evidence that this was not the result of any dissatisfaction on her part with the services she was receiving but was for other reasons.

More or less simultaneously the plaintiffs and Ms. Catherine O'Donnell, whose interests up until this point were being looked after by the firm that had been nominated by the Law Society to look after the affairs of the solicitor originally instructed moved to another solicitor. The firm in question that they turned to was one that the plaintiffs had dealings with for many years. Indeed, it is worth mentioning that the solicitor who was so seriously in default was also a solicitor with whom the plaintiffs had a long standing and up to then entirely satisfactory relationship.

There is a further dimension to which I should refer. The defendant appears to have become increasingly unhappy with her situation in 3 Glenbrian Hall and in particular unhappy with her living conditions in Glenbrian Hall. She complains that the property was damp and indeed was so damp as to be unhealthy and uninhabitable. The plaintiffs, while pointing out that the property purchased by the defendant was not a new apartment, but rather one that had been built some seven years earlier and which had been let out for some four years prior to sale, say that the property sold by them, or more precisely by Catherine O'Donnell, was in fact in show house condition, and was sold after very significant sums had been expended on it after it was recovered from the long term tenants.

The solicitors newly appointed by the defendant purchaser, by letter dated the 18th March, 2009, purported to serve what was described as a "completion notice" on the solicitors who now act for the plaintiffs.

The "completion notice" is headed: In the Matter of Apartment No. 1 Glenbrian Hall and is addressed to the solicitors now acting for the plaintiffs, to the solicitor originally engaged and to the firm that took over the affairs of the solicitor originally engaged. The solicitors now acting in these proceedings, Messrs Smith Foy and Partners responded by querying why the "completion notice" was being served on them when the plaintiffs were represented at the time by the solicitors appointed by the Law Society to deal with the affairs of the solicitor originally instructed.

The solicitors for the defendant, Messrs Loomes, then served a document described as "a repudiation notice". On this occasion the notice did refer to No. 3 Glenbrian Hall. Again, Messrs Smith Foy responded by pointing out that they did not act in relation to that conveyance and that they failed to see why this document was being served upon them. Thomas Loomes and Co. responded that the plaintiffs could not hold the title deeds and ownership of No. 28 Clontarf Road, while retaining ownership of 3 Glenbrian Hall. The defendant, through her then solicitors was in effect asserting that as they were contending that the contract in relation to No. 3 Glenbrian Hall was set aside, that so also were they contending that the defendant was entitled to treat the contract in respect of No. 28 Clontarf Road as rescinded.

On or about the 16th April, 2009, the defendant accompanied by members of her family re-entered the premises at No. 28 Clontarf Road, and began to resume occupation. There was some dispute about how she was actually able to achieve this. She says that she came across a spare key that she had retained and was able to use it to gain entry but little turns on this. This re-occupation precipitated the present injunctive proceedings.

Against this background the plaintiffs argue that what was in issue here was two separate contracts. So far as No. 28 Clontarf Road is concerned, they say there is a contract there that is clear and unambiguous on its face and that the court's sole function is to interpret the contract and to give effect to it. In interpreting the contract the court should approach its task, having regard to the well established principles that were comprehensively reviewed by the Supreme Court in the case of *Analog Devices Limited & Ors v. Zurich Insurance Company* [2005] 1 I.R. 274. Counsel for the plaintiffs draws attention to the observation of Lord Hoffman in *ICS v. West Bromwich* [1998] 1 WLR 896 at 913, where he commented:-

"The law excludes from the admissible background, the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

a passage which was cited with approval by Geoghegan J.

Counsel for the plaintiffs goes on to say that an examination of the details of the transaction relating to No. 28 Clontarf Road and all the circumstances surrounding it leaves one in no doubt whatever that the sale was completed. He says that following on from the sale his clients were the legal and beneficial owners of the property in question and that the defendant has no entitlement whatever to reoccupy the premises on Clontarf Road. By doing so she committed an act of trespass and created an entitlement on the part of the plaintiffs to seek and obtain an injunction.

He says that it is not open to the court to view the arrangement between the parties as a single contract for the exchange of their respective properties with a payment for equality of exchange. Notwithstanding the view of the plaintiffs, that it was not possible to treat the arrangement as a contract of exchange, the defendant who appeared in person says that was precisely what was involved. The position taken by the defendant is summarised in the defence and counterclaim, a document signed by her then solicitor and by senior and junior counsel. The document is not a lengthy one and it is convenient to set it out in full.

"1. The defendant denies each and every paragraph of the plaintiff's (sic) Statement of Claim but states as follows:-

- (a) By agreement made in or about October 2007, the parties agreed to the exchange of their respective properties, with a payment for equality of exchange in favour of the Defendant of the sum of €355,000.
- (b) The Signed contracts which the Plaintiff contends for do not contain all the terms of the agreement but are unfortunately misleading as to their nature and effect:
- (c) The properties were to be exchanged and completion of the title were, (sic) to take place simultaneously;
- (d) However there was a payment of the cash balance to the Defendant which the Defendant acknowledges;
- (e) The Plaintiff was not the owner of the property contracted to be exchanged to the Defendant.
- (f) There was a pretended completion of the agreement in so far as the Plaintiff took possession of the Defendant's premises but has never provided good title to the Defendant of the premises in exchange;
- (g) There was a Deed of Conveyance executed by the Defendant in favour of the Plaintiff but however the Deed was to have been held in Escrow pending the completion of the Deed by the plaintiff conveying the exchanged property to the Defendant;
- (h) As that completion has not taken place and as the time for completion has long since passed, the Defendant has served on the Plaintiff a completion notice. The Plaintiff has failed/refused to complete and the Defendant was thereby entitled to forfeit the contract and consequently to a restitution to her original position by a repudiation of the exchange agreement and to be compensated for her loss, damage, inconvenience and expense incurred by her as a result of the Plaintiff's breach of contract.

2. The Plaintiff is not entitled to the relief claimed or any relief.

3. The Defendant repeats her defence and counterclaims as follows:-

- (a) An order setting aside the Deed dated the 1st day of December 2009.
- (b) Damages for breach of contract.
- (c) An Order setting aside (if necessary) both contracts herein.
- (d) Further and other relief.
- (e) Costs.

Whatever about the underlying nature of the arrangement that the plaintiffs and the defendant were party to, it must be said that what was signed were in fact two contracts. It is true that there was a clear link between the two contracts. This emerges most obviously from Special Condition 10 of the Clontarf Road contract which was in these terms:-

"This contract is subject to the completion of 3 Glenbrian Hall taking place on the same date as the closing of the sale herein".

Support for the view that we are dealing with two separate contracts, is to be found in the fact that the parties to the two contracts are not identical. The plaintiffs in these proceedings, Patrick O'Donnell and Martin Walsh, being named as the purchasers on the Clontarf Road contract, while the vendor in the Glenbrian contract is Catherine O'Donnell.

Further powerful support is to be found in an examination of the approach taken by the solicitor, Mr. John Plunkett of Plunkett Kirwan and Company, who acted on behalf of the defendant in relation to both Clontarf Road and Glenbrian.

Called on subpoena as a witness by the plaintiffs he testified that to his knowledge there were two transactions, a purchase and a sale, and that his position was that he would never deal with two transactions in the one document, and would always issue a separate contract for the sale of the property he was selling. It was pointed out to him that he had given an undertaking to discharge a mortgage taken out by the defendant in favour of the Educational Building Society in relation to No. 28 Clontarf Road and he confirmed that he had and that he had complied with that undertaking, the question of compliance by way of redemption arising only after closing had occurred.

Throughout the extensive correspondence that he engaged in, as he sought to have the undertakings that he had accepted honoured, Mr. Plunkett was consistent in stating that the Clontarf Road transaction had concluded. This position was most explicitly stated in a letter dated 26th March 2008 to Burke and Company, the solicitors who had taken over the affairs of the solicitor originally instructed by the plaintiffs. The letter headed:-

"Re: Your Clients Patrick O'Donnell and Martin Walsh

Premises: 3 Glenbrian Hall, Howth Road, Dublin 3

and 28 Clontarf Road, Dublin 3"

Began in these terms

"Firstly we would point out that sale of 28, Clontarf Road to your clients was a totally separate matter and does not effect in any way the purchase by our client of the property at 3 Glenbrian Hall".

It seems to me on the basis of the relevant documentation and what those involved have had to say that there can be no real dispute but that there was a distinct contract for the sale and purchase of 28 Clontarf Road. That fact of itself has major implications

for the ability of the defendant to resist the reliefs sought against her. Nonetheless, I propose to proceed to consider the various aspects which have left the defendant unhappy with what has transpired.

She is unhappy about the financial details of the arrangements and is of the view that she was taken advantage of in a situation where she was vulnerable by reason of her need for immediate cash, if she was to avail of the option that she had been given by the Circuit Court. In that regard one has to say that in any transaction one party may be disadvantaged in negotiations by a need or desire to conclude a deal while the other may be correspondingly advantaged by being in a position to display something close to indifference as to whether a deal is done or not. However it could not be seriously suggested that by reason of that any question mark is placed over the validity of agreements in that category.-

The defendant has pointed to the fact that she signed the document of 13th August 2007 without the benefit of legal advice. In general terms, it may be said that the defendant was unwise to commit to an arrangement that was one of such significance for her without pausing to take legal advice. However, while in a general sense that may be true, the reality is that once the defendant did instruct a solicitor there was no question of her seeking to withdraw from the transaction, or to reopen it or even to explore what other options might have been open to her, but on the contrary it seems clear that she was pressing to have matters brought to a conclusion as quickly as possible. Furthermore, even at a time when, on the defendant's account, she was coming to the view that she had received a very poor deal indeed, she did not extricate herself from the transaction or attempt to do so or even explore whether it was possible to withdraw but rather in or around the 16th of October 2007 at the meeting in "The Yacht" public house, she recommitted herself to the arrangement. I pause to note that there is in fact a disagreement about the circumstances in which that meeting came to take place. Mr. Morgan indicated that it arose out of the defendant's extreme anxiety to bring matters to a conclusion, while the defendant says that her purpose in attending was to express her extreme disappointment at the details of the surrounding circumstances that were emerging. However, whatever the defendant may have had in mind in attending the meeting, or whatever her purpose in doing so may have been, what actually happened is that the first named plaintiff and the defendant recommitted to the arrangement with the defendant accepting a further interim payment of €10,000. I understand the defendant to recognise that the meeting in "the Yacht" public house represented an opportunity for her to extricate herself from the situation which she did not take. Indeed while being cross-examined, the defendant told the Court "...I went along with it. Mr. O'Donnell persuaded me with a cheque for €10,000 in a pub in Clontarf and I was under enormous pressure at the time and I went ahead with the deal and I can't blame anybody except myself for that." During his evidence in chief, Mr O'Donnell told how he said to the defendant at that meeting that she had "the option to walk away."

If one looks at the details of the figures, little support emerges for the suggestion that the defendant now makes that she was underpaid/overcharged by €150,000. Her view in that regard is based on the fact that she believes that she had an agreement to sell Clontarf Road for €950,000, that the apartment she was receiving was valued at €595,000. If one factors in, that she says that the price for Clontarf Road was to be reduced downwards by €15,000 to €935,000 because she was going to be exempt from service charges on Glenbrian Hall for a period, then there was really only a quite marginal difference between what the defendant was achieving and what she would have hoped to achieve. On the basis of the figures she says were under discussion in respect of both properties, she would have moved to Glenbrian Hall with €340,000 while on the basis of the figures recorded in the memorandum of the 13th August 2007, she was going there with €335,000. A discrepancy of this order does not support the suggestion made by the defendant that there was an element of oppression or the taking of unfair advantage.

Moving then to the Glenbrian Hall transaction the defendant has two major grievances. Firstly she complains about the condition of the apartment which she says is so damp as to be uninhabitable and a danger to health. Secondly and more fundamentally she says that she has not acquired good title to No. 3 Glenbrian Hall and goes on to say that by reason of this that the plaintiffs have not acquired title to No. 28 Clontarf Road and that she retains the ownership of No. 28 Clontarf Road and that she is entitled to occupy it.

The defendant and her daughter have given disturbing evidence of how their quality of life has been affected by the condition of the apartment in which they were living. I have also had the benefit of expert engineering evidence called by both sides. From that evidence it emerges that there is a conflict about the cause of such problems as exist. In particular there is disagreement about the extent to which a conservatory erected by the defendant may have actually caused or contributed to the difficulties. While the erection of the conservatory may have been unwise, I express no view in that regard, but I am satisfied that all of the problems identified cannot be attributed to the conservatory. However, that comment must be put in context. It seems that at least some of the problems would appear to go back to the time when the apartment was constructed. The apartment when sold to the defendant was not a new apartment – it had been occupied for several years, apparently without any problems. The defendant purchased without having the property surveyed, though it must be said that it is far from certain that even had a survey been conducted on the part of the defendant prior to purchase, that the difficulties now identified by the engineer who carried out the inspection on her behalf would have come to light. The engineer instructed for the purpose of these proceedings had the advantage that the property had been opened up at the time of his inspection. The difficulty for the defendant stems from the fact that this was not a newly built apartment but a previously occupied one. The contract that the defendant signed included general condition No. 15(a) which provides that the purchaser shall be deemed to buy with full notice of the actual state and condition of the property.

Faced with these obstacles, the defendant in effect acknowledges that if there was no issue in relation to title and that if she had received good title then, in a situation where she had failed to carry out a survey that she would be in great difficulty in seeking to raise now the state and condition of the property.

So far as the question of good title is concerned it is appropriate in the first instance to draw attention to the provisions of special condition No. 4, a clause on which the defendant places particular reliance. This provides "the contract is subject to the purchaser being satisfied with the title to be furnished within seven days from the date hereof". The plaintiffs say in this regard that the title was in fact accepted by the solicitor for the defendant and they point to correspondence emanating from the then solicitor for the defendant which repeatedly refers in the past tense to the purchase of No. 3 Glenbrian Hall as having been completed. Completion was on the basis of an undertaking from the solicitors then acting for the vendor to furnish to the solicitor for the defendant/purchaser the purchase deed and outstanding title deeds.

The position being taken by the solicitor for the defendant and through him by the defendant is summarised in a letter dated the 26th October, 2007, to the solicitor then acting for the vendor. The letter is headed up:

"Re: Our Client: Janice O'Brien,

Your Clients: Robert Morgan, Patrick O'Donnell and Martin Walsh,

Premises: 3, Glenbrian Hall, Howth Road, Dublin 3,

Premises: 28 Clontarf Road, Clontarf, Dublin 3."

The body of the letter states as follows:

"I refer to the recent completion of the above matter and now enclose herewith original CG50A having faxed through a copy on the 25th instant.

Please note that I await the following documents:-

1. Original Lease to your client duly stamped and registered.
2. Original Assignment to my client with memorial and PD Form.
3. Family Home Protection Act declaration of your client.
4. Family Home Protection Act Certificate in respect of the original lease to your client.
5. Architects certificate of compliance with planning permission and building regulations.
6. All planning documents.
7. Receipt for financial contributions.
8. Agreement between the developer and the management company for the transfer of the common areas.
9. Approved draft conveyance of the common areas to the management company.
10. Membership Certificate.
11. Share transfer form.
12. Accounts of the management company.
13. Certified copy booklet of title.

I look forward to hearing from you when you are in a position to forward the above documents so that we can register our client's title."

In fact, as we have seen the matters outstanding were not attended to by the solicitor then acting for the plaintiffs and the matter was regularised only when the solicitors who have acted for the plaintiff in the present proceedings became involved. When the solicitors now acting were first instructed there was an understandable hesitancy on their part about becoming involved in relation to No. 3 Glenbrian Hall, this in a situation where they were uncertain as to the implications for them of any solicitors' undertakings that might have been given by the solicitors that acted previously. When they did ultimately become involved all of the outstanding documentation was handed over. Indeed it appears that most if not all of the documents in question had been simply sitting on the file of the previous solicitor. When the solicitors newly instructed reviewed the situation, they were satisfied that the title to the development was in order, but that an unsatisfactory situation was that in respect of a number of sub sales of apartments that deeds had not been created for each sale. Specifically in relation to apartment No. 3, there had been a number of intervening sales which had not been properly recited in the lease furnished to the defendant. In those circumstances they decided to redraft the lease and to fully and correctly recite all transactions.

The solicitor in question says that the lease that had been shown by his predecessor to Mr. Plunkett, acting for the defendant was adequate, the word used by him was "fine". As a result of his actions the defendant who was always getting good marketable title was now getting a better title.

The delays which occurred and to which the defendant was subjected were entirely unsatisfactory. However, be that as it may, it is the case that the defendant through her then solicitor agreed to close on the basis of undertakings. Notwithstanding the unacceptable delays that occurred she has in fact received good title to No. 3 Glenbrian Hall.

I have set out the history of this controversy at some length. I have done so in deference to the defendant who feels a deep sense of grievance at what has happened. However, notwithstanding that sense of grievance there is no possible justification for her actions in reoccupying her former home. Quite simply that was an act of trespass and the plaintiffs are entitled to an injunction to restrain any repetition. Her unhappiness about aspects of the Glenbrian contract cannot provide a basis for trespassing on No. 28 Clontarf Road. In so far as there are areas about which she is unhappy, it would seem that that unhappiness should have been directed at Mrs. Catherine O'Donnell, if it was to be directed at anyone. In making that observation I am not at all to be taken as suggesting that the defendant has a valid claim against Mrs. O'Donnell or indeed against anyone else. I am simply drawing attention to the fact that Mrs. O'Donnell is not a party to the present proceedings. In the circumstances I have no alternative but to grant the injunction sought, and to dismiss the counterclaim.