

THE HIGH COURT

2005 No. 3000 P

BETWEEN

ANNE B. COURTNEY

PLAINTIFF

AND
THERESE MCCARTHY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 21st December, 2006**The facts**

1. The dispute which gives rise to these proceedings has arisen from the sale by the plaintiff of part of her holding of land at Rocky Road and Ballybeg Road, Ennis, County Clare. The entire holding is registered on Folio 11394F of the Register of Freeholders, County Clare. Part of the holding containing circa 6.6 acres was sold by public auction on 4th March, 2005. The sold lands were knocked down to the defendant, who executed a contract for sale on that day. The defendant had attended the auction with her accountant. She had not taken legal advice before bidding at the auction and executing the contract in relation to the conditions of sale. Her father, who is a property developer, owns land adjoining the sold land and it is clear, on the evidence, that he had an interest in the plaintiff's lands for some time.

2. The material provisions of the contract for present purposes are the following:

- The purchase price was €1,800,000.
- The deposit was €180,000, that is to say ten per cent of the purchase price and it was payable on the execution of the contract.
- The closing date, as provided for in special condition 16, was 8th April, 2005 unless an alternative closing date was agreed in writing between the parties. No alternative closing date was agreed in writing.
- The sold land had road frontage to Rocky Road, which is a private road, but over which the benefit of an appurtenant right of way was being granted. The lands retained by the plaintiff had road frontage to Ballybeg Road. Condition 11 of the special conditions provided that, in the event of planning permission being granted for the development of the sold lands that required that access be routed to Ballybeg Road, the plaintiff would grant the defendant for the benefit of the sold lands a non-exclusive right of way over the retained lands.
- Condition 12 of the special conditions obliged the defendant to construct roads and services for the purposes of development on the sold lands and to bring them to a point two metres inside the boundaries of the retained land and to enter into an indemnity in relation to the repair, maintenance and insurance of the roads and services until taken in charge by the local authority.
- The Law Society General Conditions of Sale (2001 Edition) were incorporated in the contract, including –
 - Condition 25(a)(i), which rendered the defendant liable for interest on the balance of the purchase money if by any reason of default on her part the purchase should not be completed on the closing date at the rate of 12% from the closing date until the date of actual completion.
 - Condition 40, which empowered the plaintiff to serve a completion notice if the sale should not be completed on the closing date giving the defendant a period of 28 days in which to complete, in respect of which time would be of the essence of the contract, and provided that, if the defendant did not comply with the notice, she should be deemed to have failed to comply with the conditions of sale in a material respect.
 - Condition 41(a), which provided that, in the event of failure by the defendant to comply with any of the conditions of sale in a material respect, the plaintiff should be entitled to forfeit the deposit and resell.

2. Despite the special condition which required the deposit to be paid on execution of the contract, the plaintiff did not pay the deposit until almost three weeks had elapsed after the execution of the contract. Around the same time she informed the plaintiff's solicitors that Messrs. W.B. Gavin & Co., solicitors practising in Galway, were acting for her in the purchase. The plaintiff's solicitors in the transaction were John Shiel, a firm practising in Dublin. The partner in that firm handling the matter, Michael Hickey, is a son-in-law of the plaintiff.

3. At the auction, the defendant raised with the auctioneer, Michael Fitzpatrick, and the plaintiff's solicitor, Mr. Hickey, certain matters in relation to access to the public road, services and such like which, if acceded to, would have involved variations of the terms of the contract. In the first letter of 6th April, 2005 from the defendant's solicitors to the plaintiff's solicitors four such matters were raised. By way of general observation, in my view, the plaintiff, through her solicitors, evinced a flexible approach to facilitating the defendant in relation to matters which were likely to impact on the future development of the sold lands. Moreover, over a period of almost three months, the plaintiff exercised a considerable degree of forbearance in the face of delay and prevarication on the part of the defendant, and on more than one occasion an intimation that she was resiling from her bargain.

4. It is not clear when the defendant arranged funding to enable her to complete the purchase. After the closing date, as late as 22nd April, 2005, her solicitors were enquiring whether the plaintiff would facilitate some type of stamp duty avoidance scheme involving a non-recourse mortgage because the plaintiff had not arranged funding to discharge the stamp duty which would be exigible on the transaction. The plaintiff declined. Later, between 4th and 11th July, 2005, when her last chance to complete the purchase was imminent, it is clear on the evidence that the defendant and her solicitor had to expend considerable energy to procure draw down of the balance of the purchase money.

5. On 22nd April, 2005, the plaintiff's solicitors served a completion notice in accordance with condition 40 of the general conditions of sale and claimed interest in accordance with condition 25. Subsequently, on 26th April, 2005 the plaintiff's solicitors furnished replies to the defendant's requisitions on title, on a without prejudice basis, because the requisitions had been submitted out of time. The

plaintiff's solicitors also furnished drafts of the documents which would be used on completion, the transfer, the statutory declaration for the purposes of the Family Home Protection Act, 1976 and the statutory declaration in relation to s. 72 burdens. From then on the issues which were raised on behalf of the defendant, if acceded to, would have involved the plaintiff agreeing to vary or relax the terms of the contract. While the plaintiff remained flexible, she was insisting on the transaction being completed. The defendant was tardy in producing definitive maps which would illustrate the variations she required.

6. By letter dated 17th May, 2005, the plaintiff's solicitors informed the defendant's solicitors that the notice to complete would expire on the following Friday, 20th May, 2005. A completion statement was submitted claiming interest in accordance with the contract. The response from the defendant's solicitors, which was dated 19th May, 2005, complained that the defendant had been induced to enter into the contract by representations made by Mr. Fitzpatrick, which it was alleged were incorrect. It was also contended that special condition No. 12 could not be fulfilled because it would require development of land designated as open space. It was asserted that the contract was at an end. The plaintiff was called upon to return the deposit paid by the defendant, failing which papers would be forwarded to counsel to draft "the appropriate proceedings". In a response dated 20th May, 2005 the plaintiff's solicitors indicated that the allegations were rejected, that the notice to complete expired on that day and that, if they did not receive the balance of the proceeds of sale on that day, they would take the plaintiff's instructions as to how she wished to proceed under the terms of the contract.

7. Before the plaintiff's election as to the course she proposed adopting was communicated to the defendant's solicitors, they wrote to the plaintiff's solicitors by letter dated 26th May, 2005 indicating that the defendant was prepared to complete, but without prejudice to what was stated in their letter of 19th May, 2005, on certain conditions which were stipulated, one being that the defendant would not be liable for interest on the balance of the purchase money. Two conditions were stipulated on which the plaintiff had agreed in principle to facilitate the defendant: relocation of open space and the immediate provision of access to Ballybeg Road over the retained lands. A further stipulation was that a way-leave be granted over the retained lands to connect to the lands owned by the defendant's father. Finally, the defendant was insisting that special condition 12 be altered.

8. By letter dated 30th May, 2005 the plaintiff's solicitors informed the defendant's solicitors that the plaintiff was rescinding the contract, that the deposit was forfeited, and that the sold lands would be re-sold without recourse to the defendant. The defendant's solicitors' response, which was dated 1st June, 2005, was that the plaintiff was not entitled to proceed as set out in the letter of 30th May, 2005 and that the papers had been forwarded to counsel to draft the appropriate proceedings.

9. On 2nd June, 2005 the plaintiff's solicitors wrote to the defendant's solicitors setting out proposals which were expressed to be "strictly without prejudice to the forfeiture and rescission notice" which had already been served. It was proposed that completion should take place on 3rd June, 2005 and it was expressly stipulated as follows:

- Interest would be payable in accordance with the contract.
- The open space could be revised as per a map previously furnished and agreed by the plaintiff.
- The plaintiff was prepared to grant immediate access to Ballybeg Road provided it did not hold up completion. However, the plaintiff's solicitors made the point that the reason the contract had provided that the right of way would be granted in due course if required by the provisions of the planning permission was that it was likely that the planning authority would specify the route of the access roadway and where it would come out onto Ballybeg Road. A draft deed of grant of the right of way together with the map showing its route were sought for approval.
- No way-leave would be considered to the defendant's father's lands until completion had taken place. However, this could be looked into further post-completion.
- Special condition 12 would stand.
- A postal completion was no longer appropriate and completion must take place at the plaintiff's solicitor's offices in Dublin.

10. The sale did not close on 3rd June, 2005. However, in a letter of 16th June, 2005, which was expressed to be strictly without prejudice to the letter dated 30th May, 2005 rescinding the contract, the plaintiff's solicitors noted that the defendant intended to complete the transaction on the following day and furnished an up-to-date completion statement claiming interest from 8th April, 2005 to 17th June, 2005 in accordance with the contract and quantifying the interest at €37,282.19.

11. The sale did not close on 17th June, 2005 either. The defendant's solicitors wrote to the plaintiff's solicitors on 22nd June, 2005 advising that counsel's opinion had been obtained in relation to condition 12 and that it had been pronounced "probably void for uncertainty". It was stated that the plaintiff's insistence on compliance with condition 12 posed the difficulty for the defendant "that the validity of the contract comes into question on the basis of uncertainty and ambiguity evident in same". By letter of the same date the plaintiff's solicitors intimated that they did not agree and pointed out that, in any event, the contract had been rescinded and the deposit forfeited. In reply, in a letter of 24th June, 2005 the defendant's solicitor said that they did not accept that rescission or forfeiture had taken place. They were still awaiting a map from the defendant's engineers. They hoped to be in a position to complete the purchase on Friday, 1st July, 2005 in Dublin, but the question of interest would have to be resolved. That letter was sent by facsimile transmission on 24th June, 2005 and the following Monday, 27th June, 2005, the plaintiff's solicitors advised the defendant's solicitors that the contract was rescinded, the defendant's deposit forfeited and the matter was at an end.

12. The foregoing outline of the dealings between the parties is based primarily on the inter partes correspondence. What follows is based primarily on the testimony of the witnesses called on behalf of the plaintiff and the defendant and has necessitated resolving conflicts of evidence.

13. Mr. Hickey went to Kerry on holidays on either 28th or 29th June, 2005. He arranged with his partner, David Fowler, that he would let him know if anything occurred on the file. There was no contact from the defendant's solicitors until Friday, 8th July, 2005, and Mr. Hickey was not apprised of anything having happened on the file before he returned to his office after midday on 11th July, 2005.

14. However, in the background, the defendant was, she testified, constantly in touch with Mr. Fitzpatrick both in person and on the telephone. Mr. Fitzpatrick in turn, was in contact with the plaintiff's daughter, Anne Courtney, who is the wife of Mr. Hickey and who is a tax consultant by profession. Her evidence was that Mr. Fitzpatrick phoned her on a number of occasions after the contract had been rescinded and that he eventually phoned her and asked her whether the plaintiff would consider "one last chance". Ms. Courtney discussed the matter with her mother, who decided that she would give the defendant one last chance in relation to the

transaction.

15. Ms. Courtney telephoned Mr. Fitzpatrick on Monday 4th July, 2005. Mr. Fitzpatrick made a short contemporaneous note of that call and of what he did after it in the following terms:

"Phone call from A.C. Tell Purchaser to arrange to close sale Monday next 2 p.m. in accordance with contract. No correspondence.

Informed Therese McCarthy."

16. There was a conflict as to what was the purpose of the meeting which was to take place at 2 p.m. on 11th July, 2005. Ms. Courtney's evidence was that she did not say it was to "close" the sale; it was to talk, to see if the matter could be progressed. Mr. Hickey's evidence was that the meeting was to be a face to face meeting in his office to see if something could be done. Mr. Fitzpatrick's evidence was that Ms. Courtney asked him to contact the defendant with a view to closing the sale on Monday, 11th July, 2005. I am satisfied that Mr. Fitzpatrick's note properly reflects what he was instructed to do, save that it does not record that he was told that the meeting was to be in the offices of the plaintiff's solicitors in Dublin. The purpose of the meeting was to close the sale. Of course, there was always the possibility that at the meeting it would not be possible to achieve consensus on some matter and that the sale would not be completed. However that possibility, in my view, does not justify the nuanced account of the offer to be conveyed by Mr. Fitzpatrick given by Ms. Courtney and Mr. Hickey. Mr. Fitzpatrick was instructed not to do anything to prejudice the position which had been adopted by the plaintiff, that the contract had been rescinded and the defendant's deposit forfeited and, in that context, he was told not to issue any correspondence.

17. I am satisfied that Mr. Fitzpatrick complied with the instructions he had been given. He immediately telephoned the defendant and told her that her last chance to complete the transaction was on Monday, 11th July, 2005 at 2 p.m. in Dublin and that the transaction was to be completed in accordance with the terms of the contract signed on 4th March, 2005. I do not accept the defendant's evidence that Mr. Fitzpatrick represented to her that she would not have to pay interest on the balance of the purchase money between the closing date and the date of actual completion. Moreover, in the light of what had gone before, I do not think she could have reasonably assumed that the plaintiff would not insist on the payment of interest. Notwithstanding that the plaintiff had not furnished an up-to-date completion statement, in my view, there was no tacit acceptance on the part of the plaintiff that the defendant would not be liable for interest.

18. The defendant contacted Mr. Fitzpatrick on the next day or at any rate before 7th July, 2005. She asked Mr. Fitzpatrick if he would do a valuation of the lands for mortgage purposes. He explained to her that he could not, because he would have a conflict of interest. However, he did agree, at her request, to write to the branch of Ulster Bank in Limerick stating the result of the public auction on 4th March, 2005. He sent that letter on 7th July, 2005.

19. Ms. Courtney's evidence was that she telephoned Mr. Fitzpatrick on either Thursday, 7th July or Friday, 8th July to ascertain if there had been any update. There was none. She told Mr. Fitzpatrick that Mr. Hickey was going to Dublin in any event on the following Monday and that they would just have to wait and see what happened.

20. The defendant's solicitor, Mr. Colm Gavin, was out of the country until the evening of Thursday, 7th July. When he returned to the office on the morning of Friday, 8th July he telephoned the plaintiff's solicitors' office. He was told by the receptionist that Mr. Hickey was on holidays. He then asked for Mr. Fowler and was told that he would not be there on that day. Immediately after that Mr. Gavin sent a letter to the plaintiff's solicitors, addressed to Mr. Fowler, by facsimile transmission stating that the defendant had instructed him that the sale was back on track and was to be completed immediately. He had arranged with Allied Irish Banks (AIB) to "draw down the monies", which could be forwarded by draft or by electronic transfer, on Monday morning. In another letter of the same date, 8th July, 2005, to Mr. Fowler the defendant's solicitors furnished three maps, which depicted the new access over the retained lands to Ballybeg Road and the relocated open space. It was stated in the letter that the original map showing the right of way had been sought, presumably, from the defendant's engineer. It was also stated that this would not hold up the closing of the sale and that the undertaking of the plaintiff's solicitors to furnish the deed of right of way executed would be accepted by the defendant. There was no response to either letter from the plaintiff's solicitors.

21. On the morning of Monday, 11th July, 2005 Mr. Gavin telephoned the plaintiff's solicitors' office. When he asked for Mr. Hickey he was told he was on holidays. He then asked for Mr. Fowler and he was told that he was in court and he would be there all day. He explained the urgency of the matter and asked that Mr. Fowler telephone him. Mr. Gavin's evidence was that Mr. Fowler telephoned him at about 11.30 a.m. and told him that he was caught up in court all day and could not complete the matter, but that he would do it on the following day, which Mr. Gavin understood to mean that the closing would be on the following day. Mr. Fowler did not testify.

22. Before receiving Mr. Fowler's telephone call, Mr. Gavin had sent a letter dated 11th July, 2005 to the plaintiff's solicitors by facsimile transmission. In that letter Mr. Gavin stated that he was arranging for AIB to immediately electronically transfer to the plaintiff's solicitors' account the sum of €1,620,000.00, being the balance of the purchase money. However, he stipulated that the money was being transferred on the undertaking of the plaintiff's solicitors not to part with it until he (Mr. Gavin) acknowledged receipt of all documents. He reiterated that he would accept an undertaking in relation to the deed of grant of the right of way to Ballybeg Road. The sum of €1,620,000.00 was transferred from the defendant's account into the account of the plaintiff's solicitors shortly after 1 p.m. on 11th July, 2005.

23. Some time between 11.30 a.m. and 12.30 p.m. on 11th July Mr. Fowler telephoned Mr. Hickey, as a result of which Mr. Hickey telephoned Mr. Gavin on his mobile phone at around 12.30 p.m. At that stage, Mr. Hickey had not been into his office since returning to Dublin. Mr. Hickey learned that Mr. Gavin would not be attending at his office at 2 p.m. that afternoon, but that Mr. Gavin was going to have the money electronically transferred on the basis that it would not be released to the plaintiff. Mr. Hickey's evidence was that he told Mr. Gavin that it had been made clear that a meeting in his office was "the only way this could happen" and that, as Mr. Gavin would not be there, the plaintiff had "had enough" and that was the end of the matter.

24. After that telephone conversation Mr. Gavin sent another letter dated 11th July, 2005 by facsimile transmission to the plaintiff's solicitors, addressed to Mr. Hickey, referring to the telephone conversation and stating that it was in order to release the monies that day. That letter was prompted by a statement made by Mr. Hickey in the course of the telephone conversation that he would talk to his client, the plaintiff, but that the monies would have to be released. In the same letter Mr. Gavin stated that Mr. Hickey might send the documents on to him and that, as regards the right of way, the map had to be agreed between the parties and when it was agreed, he would be grateful if Mr. Hickey would have the relevant deed executed.

25. Mr. Gavin's facsimile letters of 8th July and 11th July, 2005 were awaiting Mr. Hickey when he returned to his office that afternoon. His evidence was that he took his client's instructions and, as a result of those instructions, he sent a letter, by facsimile transmission, to the defendant's solicitors that afternoon advising that the contract for sale was rescinded, the deposit forfeited and the matter was at an end. The monies forwarded would be returned immediately. The monies were returned by cheque under cover of a letter of 14th July, 2005.

26. The facts as to what transpired between 4th July and 11th July, 2005 lead to some inevitable inferences. The first is that there was a breakdown of communication within the plaintiff's solicitors' office. A matter which Mr. Hickey perceived to be of crucial importance, a face to face meeting with the defendant and Mr. Gavin at 2 p.m. on 11th July, 2005 was to be communicated to Mr. Gavin indirectly via Ms. Courtney, Mr. Fitzpatrick and the defendant. Despite his telephone calls on the mornings of 8th and 11th July, and the tenor of his two letters of 8th July and his first letter of 11th July to the plaintiff's solicitors' office from which it should have been obvious that he had not got the message that there was to be a face to face meeting, he was not directly apprised that he was expected there at 2 p.m. on 11th July until he had the telephone conversation with Mr. Hickey at about 12.30 p.m. on that day. Secondly, it is likely that there was a breakdown of communication between the defendant and Mr. Gavin. The defendant appears to have been aware that her attendance might be required in the plaintiff's solicitors' office in Dublin at 2 p.m. on 11th July, 2005. It is by no means clear on the evidence that she conveyed to Mr. Gavin that his presence was required in Dublin at that time. If she did, he did not take it on board.

27. The defendant did not accept that the matter was at an end. By letter dated 4th August, 2005, the solicitor who acted for her in this litigation, Michael Houlihan & Partners, informed the plaintiff's solicitors that she intended issuing specific performance proceedings. By letter dated 5th September, 2005, Messrs. Houlihan informed the plaintiff's solicitors that they were not prepared to withdraw the threat of proceedings, notwithstanding that they had been apprised that the plaintiff was in the process of completing a re-sale of the property to another party. That led to the commencement of these proceedings.

Relief claimed

28. In her plenary summons, which was issued on 7th September, 2005, the plaintiff claimed declarations that –

- (a) the contract has been validly determined,
- (b) the deposit paid by the defendant has been validly forfeited, and
- (c) that the defendant holds no contractual or other right, title or interest in the sold lands.

29. In the statement of claim the narrative is taken as far as the letter of 30th May, 2005 informing the defendant that the deposit had been forfeited and that the property would be re-sold without further recourse to her. It was further pleaded that the defendant had asserted that the contract remained in being, that the closing date of the transaction was 11th July, 2005 and that specific performance proceedings would be issued against the plaintiff. The plaintiff has also sought an injunction restraining the defendant from claiming any contractual or other right in the sold lands.

30. The defendant has counterclaimed. The primary relief sought by her in the counterclaim in its original form was an order for specific performance of an agreement for the sale of the sold lands to her as evidenced by –

- (i) the contract in writing dated 4th March, 2005, and/or
- (ii) the course of written memoranda of the plaintiff's auctioneer, and performed either wholly or partly by payment of €1,620,000.00 to the account of the plaintiff's solicitors at 12.45 p.m. on 11th July, 2005.

31. In a letter dated 8th September, 2006 to the plaintiff's solicitors the defendant intimated that she would seek to amend the reliefs for which she counterclaims at the hearing of the action to include a declaration that the plaintiff is estopped from relying on the purported rescission of the contract or forfeiture of the defendant's deposit by reason of the defendant's reliance on the plaintiff's conduct of negotiations leading to a revival of the said agreement and waiving the purported rescission of same by agreeing to closure of the sale on 11th July, 2005, by which the date the defendant had acted to her detriment by paying the full amount of the consideration under contract to the plaintiff. The amendment was allowed.

The contractual position at 30th May, 2005, 4th July, 2005 and 11th July, 2005/ the claim for specific performance

32. The defendant has not pleaded nor established any ground on the basis of which it could be concluded that the contract was not validly rescinded and the plaintiff's deposit forfeited on 30th May, 2005. After the closing date and at a time when the plaintiff was ready, willing and able to complete the sale, the plaintiff served a notice to complete in accordance with condition 40 of the general conditions on the defendant. The defendant did not comply with that notice. At the expiry of the period of the notice the plaintiff elected to rescind, as she was entitled to do. In my view, she did so effectively and that was the end of the contractual relationship between the plaintiff and the defendant. In their submissions, counsel for the defendant accepted that the contract terminated on 30th May, 2005, properly in my view.

33. The plaintiff, through her solicitors, did deal with the defendant, through her solicitors, after 30th May, 2005 and those dealings, which commenced and terminated with the letters from the plaintiff's solicitors dated respectively 2nd June, 2005 and 27th June, 2005 are characterised by the defendant in her defence and counterclaim as "negotiations ... for the purpose of reinstating the sale to the defendant ... on certain terms". In my view, what the correspondence evidences is a willingness on the part of the vendor to complete the original contract in accordance with its terms notwithstanding her legal entitlement to walk away, having rescinded. Her solicitor was meticulous in making it clear at every stage that the plaintiff's offer to complete was strictly without prejudice to her legal rights, that is to say, to her entitlement to rely on the termination of the contract and the forfeiture of the deposit. Therefore, as of 4th July, 2005 the original contract remained rescinded.

34. What transpired between the plaintiff's agent, Mr. Fitzpatrick, and the defendant directly on 4th July, 2005 was a further intimation of the willingness of the plaintiff to complete the contract in accordance with its terms provided that there was a closing at the offices of the plaintiff's solicitors at 2 p.m. on 11th July, 2005. I am satisfied that Mr. Fitzpatrick, as the agent of the defendant, made it clear that this offer was strictly without prejudice to the plaintiff's legal rights. The defendant did not meet the requirement stipulated by the plaintiff as a condition to her forgoing her legal rights by completing on 11th July, 2005. Leaving aside the failure of the defendant or her solicitor to turn up at the plaintiff's solicitors' office at 2 p.m. on that day, for which I find it difficult and unnecessary to attribute fault, it was contended on behalf of the plaintiff that the defendant did not meet the plaintiff's requirements in the following respects:

(1) She did not tender or otherwise evince a willingness to discharge the interest due under the contract. In their letter dated 2nd June, 2005 the plaintiff's solicitors made it absolutely clear that the basis on which the plaintiff was offering to complete without prejudice to her legal rights was that interest would be payable in accordance with the contract. On the evidence, I conclude that the defendant was not at any time prior to 2 p.m. on 11th July, 2005 willing or prepared to pay interest. When suggesting the closing date of 1st July, 2005 in their letter of 24th June, 2005, her solicitors introduced the qualification that the question of interest would have to be resolved, which I construe as meaning that the claim for interest would have to be waived or compromised. The evidence of the defendant and her solicitor was that, if she had been constrained to do so, in other words, if the plaintiff was unwilling to waive her entitlement to interest, the defendant would have paid the interest. In the post-11th July, 2005 correspondence from the defendant's solicitors (letters of 12th and 14th July, 2005) the stance adopted was that all monies due to the plaintiff had been transferred on 11th July and there was no recognition that interest was due to the plaintiff. Accordingly, I must conclude, as a matter of probability, that the plaintiff would not have been proffered or paid the interest she was due and, accordingly, her requirement in this regard would not have been met.

(2) The access to Ballybeg Road was not defined and the terms of the grant of right of way over the retained lands to Ballybeg Road were not agreed. In their letter of 2nd June, 2005 the plaintiff's solicitors indicated that the plaintiff was prepared to concede to the defendant's request that the access to the Ballybeg Road be granted on completion. However, as I have stated, the plaintiff's solicitors sought a draft deed of grant and a copy of the relevant map for approval. It is quite clear that the plaintiff did not want these matters left at large and it is understandable that she should adopt this stance having regard to the history of the transaction. The map which accompanied the defendant's solicitors letter of the 8th July, 2005, which was dated the 29th June, 2005, showed the location of the access road between points marked "A" and "B" indicated by red circles. It did not show the precise line of the access road. Moreover, the legend indicated that the detail would be in accordance with the requirements of Clare County Council which would include the setting back of the boundary at "B" to provide junction site lines and accommodate local road widening. In their letter of the 8th July, 2005, the defendant's solicitors stated that their understanding from discussions with the defendant was that the entrance from "A" to "B" would probably be altered. Of course, in their letters of the 11th July, 2005, the defendant's solicitors intimated that the absence of the deed of grant of the right of way need not hold up the closing. In the first letter they indicated a willingness to accept an undertaking to have the deed of grant executed as soon as they had received the correct map. In the second letter they acknowledged that the map had to be agreed between the parties. The reality is that, if the sale had been completed on the 11th July, 2005, the location of the right of way would have had to be left at large, primarily because the defendant and her advisors had not made a final decision themselves on the precise location of the right of way. This was contrary to the basis on which the plaintiff had made the concession to vary her obligation under special condition 11.

(3) The defendant had not committed to complying with condition 12 of the special conditions in the contract. In the letter dated 2nd June, 2005, the plaintiff's solicitors made it clear that special condition 12 must stand. The defendant's last word on the condition was contained in the letter dated 22nd June, 2005, in which she was asserting that it was probably void for uncertainty and that it was ambiguous. Nonetheless, the defendant's solicitors had approved, implicitly if not expressly, the draft transfer which was furnished by the plaintiff's solicitors with their letter of 26th April, 2005 and which included a covenant in the terms set out in special condition 12. Therefore, had the sale been closed on 11th July, 2005, the defendant would have had to commit to the covenant.

35. By reason of the failure of the defendant to meet matters dealt with at (1) and (2) above, in my view, after 2 p.m. on Monday 11th July, 2005, the plaintiff was entitled to revert to the position which prevailed before she made the offer through Mr. Fitzpatrick on 4th July, 2005, that the original contract was terminated and she was no longer obliged to complete it.

36. No contract, apart from the contract of 4th March, 2005, existed between the parties. It would be perverse to construe what happened between 4th and 11th July, 2005 as evincing an intention on the part of the plaintiff to create a new contractual relationship between the parties. As no new contractual relationship came into existence, the issue of enforceability and whether there was a sufficient note or memorandum in writing to satisfy the Statute of Frauds (Ireland) Act, 1695 or sufficient acts of part performance does not arise.

37. Accordingly, in my view, the plaintiff's claim for specific performance fails.

Estoppel: The Law

38. Notwithstanding the very comprehensive and erudite submissions on the law in relation to estoppel made by counsel for the defendant, I find that the relevant legal principle can be stated simply by reference to the first authority relied on by the defendant, the decision of the Supreme Court in *Doran v. Thompson Limited* [1978] I.R. 223. In his judgment in that case Griffin J. stated (at p. 230):

"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise or assurance must be clear and unambiguous to found such an estoppel: see Bowen L.J. at p. 106 of the report of *Low v. Bouverie*. But this does not mean that the representation must be one positively incapable of more than one possible interpretation. Where, however, more than one construction is possible, the meaning relied upon must clearly emerge in the context and circumstances of the case, although in other contexts and other circumstances the same words might possibly have borne a different construction. In addition, the party relying on the representation must show that the representation was reasonably understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up ..."

39. That principle was applied more recently by the Supreme Court in *Ryan v. Connolly* [2001] 1 I.R. 627 (where the judgment of Keane C.J. (at p. 632).

Application of the law to the facts

40. The basis on which the defendant pleaded the doctrine of estoppel both as a defence to the plaintiff's claim and as a foundation for its counterclaim was that the plaintiff by her conduct is estopped from denying that 11th July, 2005 was the closing date for the completion of the sale, and that she ought to be estopped, denied or otherwise prevented from purportedly insisting upon her strict legal rights as a matter of justice, equity and good conscience having regard to the dealings which have taken place between the

parties.

41. I have found as a fact that the plaintiff, through her agent, Mr. Fitzpatrick, informed the defendant that she would close the sale in accordance with the contract at her solicitors' offices at 2 p.m. on 11th July, 2005. But, of course, as with dancing the tango, it takes two to close a sale. In my view, it was implicit in the plaintiff's offer to close that the defendant would be willing and in a position to close in accordance with the terms of the contract. In other words, the promise or assurance which the plaintiff gave the defendant on 4th July was that, if the defendant was prepared and able to close the sale in accordance with the terms of the contract at the appointed hour, she would close.

42. As was submitted by counsel for the plaintiff, the fundamental difficulty for the defendant in raising the doctrine of estoppel against the plaintiff is that she did not meet the requirements stipulated by the plaintiff for completion on 11th July, 2005. While this argument largely overlaps with the observations I have made above in relation to the status of the contractual relationship of the parties after 4th July, 2005, for completeness my observations on the points made by the plaintiff are as follows:

(1) If completion took place in accordance with the contract, the defendant would have been liable for interest. She never evinced any willingness to pay interest and, therefore, as I have found, she was not willing or prepared to complete on 11th July, 2005 in accordance with the terms of the contract.

(2) I do not go along entirely with the plaintiff's argument that, in order to meet the plaintiff's requirement that completion be in accordance with the terms of the contract, the defendant had to accept condition 11 of the special conditions, so that she would have only been entitled to access from the sold lands to the Ballybeg Road in the event of such access being stipulated by the planning authority. The plaintiff had made a concession in the letter of 2nd June, 2005 to grant the access to Ballybeg Road on completion provided the terms of the deed of grant and the map depicting the line of the access were agreed. In my view, in accordance with the principles set out in *Doran v. Thompson Limited*, the plaintiff could have been held to that concession, if the defendant had met her requirements in relation to finalising the terms of the deed and the map. However, as I have outlined when dealing with the contractual situation, that was not done.

(3) The plaintiff's case is that the requirement for a face to face closing in the plaintiff's solicitors' offices in Dublin was imposed to obviate the difficulties which had been encountered in the transaction previously, for example, the issue of the location of the access to Ballybeg Road. The defendant's solicitor was not in Dublin at 12.30 p.m. on 11th July, 2005 and it is reasonable to assume that he could not have been in Dublin by 2 p.m. In evidence, he made the point that, if necessary, he could have asked a Dublin colleague to attend the closing on his behalf, if Mr. Hickey had not effectively "pulled the plug" at 12.30 p.m. Given what had transpired previously and what was still outstanding between the parties, I doubt if that would have been a practical solution. In dealing with the contractual situation I sidestepped the issue of the failure of the defendant and her solicitor to appear at the plaintiff's solicitors' offices at the appointed hour. However, in the context of the application of the principles of equitable estoppel, if all other things were equal, in other words, if before the appointed hour the defendant had indicated a willingness to complete in accordance with the terms of the contract, including the payment of interest, given the breakdown of communication within the plaintiff's solicitors' office and the failure to give Mr. Gavin any response either on 8th July or on the following Monday morning, I think the equity of the situation would have been in favour of the defendant. However, that is entirely hypothetical.

43. Applying the doctrine of promissory estoppel, as set out by the Supreme Court in *Doran v. Thompson Limited* and *Ryan v. Connolly*, to the situation which arose between the plaintiff and the defendant between 4th and 11th July, 2005 I conclude as follows:

(a) The plaintiff, through her agent Mr. Fitzpatrick, expressly represented to the defendant in a clear and unambiguous manner that, if the defendant was able and willing to complete the purchase in accordance with the terms of the contract in her solicitors' offices at 2 p.m. on 11th July, 2005, she would complete.

(b) That representation was intended to affect the legal relations between the plaintiff and the defendant and to be acted on by the defendant, although, as I have concluded, it did not create a new contractual relationship. In my view, equity would not have permitted the plaintiff to renege from that representation between 4th and 11th July, 2005. While not conceding that an estoppel could arise at all, counsel for the plaintiff submitted that at most there was merely a suspension of the plaintiff's legal rights. In my view, the effect of the representation was that the plaintiff's legal rights were suspended in the period in question.

(c) While, following the representation, the defendant acted and she suffered a detriment, in the sense that she drew down the sum of €1,620,000.00 from AIB and became liable for interest on that sum for a period of approximately a week, in my view, it would not be correct to say that she acted and suffered that detriment on foot of the representation. The representation was that the plaintiff would close on the terms of the contract, which included the payment of interest. Indeed, in advancing her claim, the defendant recognised that if she was successful she would be liable to pay interest, at any rate for the period from 8th April, 2005 to 11th July, 2005. The position adopted by the defendant and acted upon was that she was closing on her own terms and, in particular, that she was not liable for interest under the contract and could leave the precise definition of the access to the Ballybeg Road at large until after completion.

(d) Given the failure of the defendant to indicate an ability and willingness to complete in accordance with the terms of the contract by 2 p.m. on 11th July, 2005, the plaintiff's representation was spent and she was then entitled to revert to reliance on her legal rights arising out of the termination of the contract.

44. In my view, the facts of this case do not give rise to an estoppel by convention of the type recognised by the Australian High Court in *Grundt v. Great Boulder Proprietary Gold Mines Limited* (1937) 59 C.L.R. 641, which was followed by Lord Denning M.R. in *Amalgamated Property Co. v. Texas Bank* [1982] 2 B 84. Nonetheless, I think it is worth quoting the following passage from Lord Denning's concluding observations in the latter case. He said (at p. 122):

"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during that last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been thought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now seem to merge into one general principle shorn of limitations. When the parties to a

transaction proceed on the basis of an underlying assumption – either of law or of fact – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.”

45. The last two sentences in the above passage were approved of and applied by the Supreme Court in *Webb v. Ireland* [1988] I.R. 353.

46. In applying the general principle which he stated in that passage to the facts of the case before him, Lord Denning, later in his judgment, appears to have loosely equated the general principle of estoppel in the case of a representation with whether it would be unconscionable for the representor to go back on his representation. Even if it were appropriate to take such a broad brush approach to the issue which arises in this case, in my view, it could not be said that it was unconscionable for the plaintiff to rely on her legal rights after 2 p.m. on 11th July, 2005. The plaintiff acceded to the defendant’s request for one last chance to complete. She suspended her legal rights for a period of one week on the basis that the sale would be completed in accordance with the terms of the contract at the end of that period. In my view, there was nothing unconscionable in the plaintiff standing on her legal rights at the end of that period when the defendant did not indicate a willingness to fulfil her end of the bargain, the condition imposed by the plaintiff as to completion in accordance with the terms of the contract. In my view, in this matter the equity is strongly in favour of the plaintiff.

Order

47. There will be declarations in the terms of paras. (a) and (b) of the plenary summons that the contract has been validly determined and the deposit has been validly forfeited.

48. The defendant’s counterclaim will be dismissed