Neutral Citation Number [2008] IEHC 374

THE HIGH COURT
COMMERCIAL DIVISION

2008 No. 2629 P

BETWEEN

VINCENT KELLY

PLAINTIFF

AND
JOHN SIMPSON

DEFENDANT

Judgment of Mr. Justice Charleton delivered on the 1st day of December, 2008

1. The fundamental ingredients in a contract for the sale of land require that the parties be identified as vendor and purchaser, that the land should be identified with substantial precision and that the price should be agreed. Of these three, the price of the land is the most common variable, it being dependant on many factors; among these are the state of the property, its location, the buoyancy of the market and the legal restrictions that are likely on development. Normally, the motivation for any person selling or buying land is irrelevant to any consideration of the validity of such a contract. In his application for a specific performance order, however, it seems to me to be crucial. I am being asked to exercise the equitable jurisdiction of the court in order to compel the defendant to purchase the plaintiff's property at a value agreed between the parties that is only referable to their motives in purchasing and disposing of it.

The Contract

2. The property in question is at Coosheen, Schull in County Cork. It consists of about 2.5 acres perched above the town, on which there is an existing bungalow together with an old stone ruin. On the eastern side of the property there was a wooded area with scrub undergrowth. The site enjoys an elevated view over the town of Schull and the Atlantic islands of Sherkin and Oileán Chléire. The plaintiff says that he bought this property in December 2006 through Martin Swanton, an auctioneer who trades under the name of Swanton Properties. He bought it to sell it. He thought that the site would be capable of development and put it on the market as such. As his agent Mr Swanton presented the property to the defendant, it was its development potential that attracted the potential purchaser's interest. But for that, I am convinced, the price agreed would not have been offered. That potential was of fitting two more houses onto the site and demolishing the existing bungalow and building a substantial replacement in the shape of an 'executive residence'. In the sale advice note, which was drawn up subsequent to the negotiations that fixed the price between the plaintiff as vendor and the defendant as purchaser, the selling agent is identified as Martin Swanton. Therefore, for the purposes of what follows, he was at all times the agent of the plaintiff, as vendor. In that context, I would infer that Mr. Swanton had kept the plaintiff informed as to all interest concerning the site.

3. Because Mr. Swanton knew the defendant, he approached him with a view to seeing if he was interested in purchasing the property. On 20th May, 2007 the defendant and a friend viewed the property and was told that the price was to be €1,500,000.00. There was no assent by the defendant to that price and, as of that stage, no contract was entered into. The defendant was anxious not to pay a 5% booking deposit and nor was he anxious to pay a 10% deposit on the signing of a contract of sale. When he later agreed to buy the property, payment of a deposit of €150,000.00 was deferred to an unspecified date prior to the sale closing, provided the plaintiff as vendor assented. As it turned out, the deposit was never sought by the plaintiff as vendor, because he regarded the business reputation of the defendant as sufficient proof of his intent. The defendant became interested in buying the property for the price of €1,500,000, however, and signed a form by way of registering an interest the next day: this is the booking advice form. I will return to the issue of why he was prepared to pay so much.

4. The sales advice note dated 21st May, 2007 gives the name and address and telephone number of both the vendor and the purchaser and also gives particulars of the legal representatives of both the plaintiff and the defendant. It specifies the purchase price and recites that:-

> "No agreement shall be deemed to be enforced or binding on the parties until a formal contract has been signed by both parties and a full deposit duly paid…"

The document states that a booking deposit had already been paid and sets out a provisional closing date of 31st July, 2007. No such deposit had been paid. This document was copied to both the vendor and the purchaser.

5. On 29th May, 2007 the vendor sent a contract for sale in duplicate to the purchaser. In the printed form, this specified the closing date as being 31st July, 2007 as had originally been envisaged. In the meantime, the defendant as purchaser had proposed that a certain number of trees should be cut down on the site with a view to facilitating a digital survey of the contours of the property. This was done with a view to making an application for planning permission for two dwellings, in addition to the one already present on the site, to the local authority.

6. On 11th July, 2007 an architect's report relevant to planning was received by the defendant as purchaser. This recites that the Cork County Development Plan had set out a strategy for settlement in this rural area that sought to focus development into towns while providing for "the genuine needs of locals wishing to live in the rural area in which they were brought up". The report indicates that the site is located within a scenic amenity zone where the development plan envisaged the preservation of the natural beauty of those areas and to preserve the character of the views and prospects from existing roads. A further restriction on planning was noted in the context of the capacity of coastal areas to absorb additional houses. The report from the architect mentions that the county development plan provides specific guidance on ruinous dwellings in the countryside, noting that it was not the intention of the planning authority to prevent renovation "in appropriate cases". It remained possible that the planning authority might consider that there was sufficient upstanding remains of a ruin to grant permission "subject to appropriate design and general proper planning and development considerations". The report concludes:-

> "The subject site is located in a sensitive coastal location. The area is both highly scenic and also located within the greenbelt area for Schull village. It is therefore considered that any development of the site should take a place on an individual basis by locals who meet the qualifying criteria for rural housing. It is considered that one additional dwelling may be permitted on the site."

7. It is contended in this case that a contract was not entered into between the plaintiff as vendor and the defendant as purchaser because of issues concerning the closing date. As has been noted, the original closing date was that specified in the contract which was the same as on the sale advice form. After some negotiation, the contract was returned to the vendor by the purchaser with the

closing date, as originally specified on 31st July 2007, crossed out and with the date of 18th September 2007 substituted by the defendant as purchaser. This was, apparently, to give the defendant more time to raise the considerable finance needed. On 19th June 2007 the plaintiff, as vendor, sought in correspondence to complete the transaction no later than 20th July, 2007. Matters were left to her in abeyance in consequence of what appears to have been the holiday period. It is claimed that the parties later agreed 18th September as the closing date. In any event, on 29th August, 2007 the vendor returned to the purchaser a copy of the signed contract with the completion date of 18th September 2007 unchanged. A further period for completion was sought by the purchaser and this was agreed by the vendor as being 18th October. Closing dates being put back for various reasons are the norm, rather than the exception, in land and house sales. This sale, however, did not close. A completion notice was served on 9th January 2008 and, for the sake of certainty, another one was served on 26th February 2008.

8. Were it not for what follows, I would be satisfied that the plaintiff and the defendant had entered into an otherwise enforceable contract for the sale of this property.

Equity
9. A court exercising a jurisdiction in equity to grant a remedy such as the specific performance of a contract must look beyond the legal form of transactions to the elements of conscience that may impact on whether it is fair to grant the remedy. The responsibility to do equity is that of the court. If one party, for instance, has taken advantage of the distress or recklessness of the other, such an unconscionable dealing should be left without a remedy should a court order be sought. Similarly, parties are not entitled to come to equity seeking a remedy that will enable them to profit through their bad faith. If there is, to take another example, something in a contract which restricts the purchaser's right to investigate a title, this may have the consequence of suppressing a fair enquiry and result in a court refusing equitable relief. There may also be exceptional cases where hardship requires a court to override legal principles even though the contract was, at that time of its formation, fair and proper but where to enforce it would cause unusual and exceptional hardship; *Roberts v. O'Neill*, [1983] I.R. 47 @ 57.

10. In *John Farrell - Irish Law of Specific Performance*, (Dublin, 1994) at paras. 9.3.5 and 9.3.7 the following passages appear:-

> "If a court applying equitable principles is truly to act as a court of conscience it must consider the conduct of the parties with particular regard to whether it unjust or unfair and it must consider the consequences and the justice of those consequences from both side's points of view… The court will not assist unfair dealings or allow a party to profit by his bad faith…
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> Judges in specific performance actions sometimes refer to the maxims of equity. These aphorisms have played an important role in the development of a number of features of equitable jurisdiction… The plaintiff must come into court 'with clean hands' and, if he fails to do, equitable relief sought by him will normally be refused. The obligation to come to court with clean hands relates only to matters affecting the parties and not to dealings with third parties. Failure to have clean hands may jeopardise a person's position in many other areas. For example, a decision of an owner of an equitable interest in property to stay silent when a mortgage is being effected with the intention of asserting it later when the mortgagee sought to realise his security would be conduct of which a court administering equity could not possibly approve and could leave that owner open to a charge of coming to court with hands which were not clean. A husband who puts land into his wife's name, to avoid a substantial stamp duty will not be allowed to take advantage of his own dishonesty and succeed in a claim that she holds in trust for him".

11. I must now refer to the conduct of the vendor and purchaser. This was put before the court without any attempt to qualify it, much less to deny it. It concerns the manner at which the price of approximately €300,000 per half acre was regarded an appropriate sale value in this scenic part of rural Ireland. There is nothing to suggest to me that the solicitors on either side knew anything of what follows as to the negotiations in May and June 2007 leading to that price between the plaintiff as vendor, through his agent Martin Swanton, and the defendant as purchaser.

12. I have to look to the supporting documentation for the purpose of verifying how this price came about. No booking deposit or legal deposit on signing the contract was ever paid by the defendant as purchaser. However, one cheque passed between the parties. The sum of €1,800 was paid by the defendant to Mr. Swanton, the agent of the plaintiff, in consequence of an instruction following on the site visits of June 2007. The evidence of the defendant, which is crucial to the issue of the appropriateness of the court exercising an equitable remedy, was never contradicted or challenged. It is as follows:-

> "On Sunday May 20th, 2007 I viewed the site and discussed a number of possibilities in relation to its development. [Mr. Swanton] told me that the local authority planner for the area had said that she would allow three houses on the site. He then went on to outline his proposal for developing the site which was broadly:
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> (1) To replace the roof on the ruin, thereby rendering it suitable as a redevelopment building in the eyes of the planner.
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> (2) To redevelop the existing residence for a 2000 plus sq foot executive residence.
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> (3) To apply for planning for a residence on the site area covered by trees in the name of suitable qualified local person, which he said he would provide.
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> In relation to values he reasoned that site no. 1 above would costs approximately €250k to redevelop and would yield approximately 1 m in a sale. In relation to site no. 2 he reasoned that it would costs approximately €450k to redevelop and would yield approx 1.8 m in a sale. In relation to site no. 3 he reasoned that it would cost approximately €300k to develop but it would take approx 5 years to sell on this due to planning restrictions".

13. The architect acting on behalf of the defendant gave the following account, unchallenged, of his attendance with the defendant and the plaintiff's agent Mr Swanton at the site meeting on 9th June, 2007:-

> "I met Martin Swanton whom I had known previously and who was introduced to me by John Simpson as the agent selling the property. Martin Swanton stated that he had met with the local planner for the area and asserted that three residential units could be developed on the site. His reasoning for this was that the existing dwelling could be replaced with a larger and more elaborate structure. He stated that if the roof on the ruined dwelling were replaced that this would allow for a second house to be built. He also said that the portion of the site to the east could be developed by a local qualified person with a housing need. During the discussion I indicated that a survey of the lands would need to be carried

> out and that if the site to the east were to be developed, then a number of trees and scrub would need to be removed. Martin Swanton stated that he could arrange for the removal of the trees and scrub and the replacement of the old roof on the ruin. He also stated that an associate of his could carry out a digital survey, [but] this was never provided to us. John Simpson requested me to carry out a planning appraisal on the property which my firm subsequently provided".

14. There is no doubt that the selling agent on behalf of the plaintiff, Mr Swanton, was very well aware from the first meeting with the defendant as potential purchaser, of the planning restrictions in this area. The price at this high monetary level was achieved through inducing the defendant to partially transform an old ruin. This was with the intention of making it appear to the planning authorities that it was a substantial roofed and ruined, although uninhabited, dwelling. A conflict of fact arises here. The defendant claims he never asked Mr. Swanton to replace the roof on this ruin. Mr. Swanton said that he did and that the plan was to use special old timbers and cover them with corrugated iron so as to achieve the desired antiquarian effect. I have a problem with the evidence of Mr Swanton. In 2008 he did something extraordinary. He wrote to the solicitors for the defendant asking them for instructions as to how to dispose of this property, unequivocally asserting that it was the property of their client, at a time when he knew that the issue of whether the defendant had entered into a valid contract was in dispute. As is clear from the reply, the solicitors for the defendant were amazed by this letter. It suffices to say that I do not accept Mr Swanton's evidence that he could not have otherwise contacted the defendant: I note the relevant name and address in the booking form from 21 May 2007 and the frequent telephone contact and email exchanges between them subsequently. In respect the roofing issue, exercising appropriate caution, I accept the evidence of Mr. Swanton. The defendant also denies any instruction to cut down trees on the property, notwithstanding that he later paid Mr. Swanton a cheque for €1,800 requesting the removal of the trees. He did so instruct the plaintiff's agent and again I accept the evidence of Mr. Swanton.

15. Upon receiving the defendant's architect's appraisal on 11th July, 2007, two relevant emails were exchanged between the parties. Both are dated the 18th July, 2007. At 12.19 hours, the defendant wrote to Martin Swanton, the selling agent on behalf of the plaintiff, in the following terms:-

> "I am attaching the planning report from F.H.L. Architects in relation to this. It does not make for great reading. However, I think on balance if you can pull north of €2m for the centre house we just might make it work. Have you had any luck finding a local applicant for the third site? What are your thoughts on this? F.H.L. require the digital survey 'minus the trees' to advance a design concept for the site."

16. This same email was replied to by the selling agent for the plaintiff in the following terms:-

> "I don't see a problem with selling the middle house, (existing house) once I have some kind of sketch/drawing to show them. I am aware of all the jargon in the development plan but I attended a meeting this morning with… [the] county Manager and I can't really see any problem in the tree house on this site…
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> P.S. I think I have local for the adjoining site."

Discretion

17. Where an equitable remedy is sought, the court shall always remember that the parties are subject to human folly before dismissing a claim on the grounds of conscience. Temptations may arise which may be unwisely succumbed to. Where on the balance of all competing interests, it may be regarded as fair for the court to grant an order to a plaintiff of specifically performing a valid contract, the court should make that order. In *McGrath v Stewart* [2008] IEHC 348, at heading 4, Murphy J. stated the relevant principle on the exercise of this equitable remedy in this way:

> "Specific performance is, of course, a discretionary remedy, though that discretion "must be exercised in a manner which is neither arbitrary nor capricious" (*Smelter Corporation v. O'Driscoll* [1977] IR 305 at 310-311). *In Curust Financial Services Ltd. v. Loewe Lack-Werk* [1994] 1 IR 450, Finlay C. J. with whom O'Flaherty J. and Egan J. agreed, said (at 467):
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> > "I accept that, the granting of an injunction being an equitable remedy, the court has a discretion, where it is satisfied that a person has come to the court, as it is so frequently expressed, otherwise than "with clean hands", by that fact alone to refuse the equitable relief of an injunction. It seems to me, however, that this phrase must of necessity involve an element of turpitude and cannot necessarily be equated with a mere breach of contract."
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> Although that case concerned an application for an injunction, the principle applies equally to specific performance because, as the Chief Justice noted, the discretion derives from the equitable nature of both remedies (see *Kavanagh v. Caulfield* (Unreported, High Court, Murphy J. 19th June 2002)). Accordingly, the court must consider whether, in relation to this transaction, the plaintiff comes to equity with clean hands."

18. Most of the case law on this issue has focussed on the rights of the individuals involved in the transaction. That is not the only consideration. The community is also entitled to be protected. In *Post v Marsh* (1880) XVI Ch. 395, specific performance was refused for an agreement to write a literary work where the plan was to publish it as having been edited by a respected author who had, in fact, had nothing to do with the book in question and was merely lending his name as a commercial device. The plan was for the proposed book to appear as "Kenny's Illustrated London", that author having previously produced other guide books, but not this one. Fry J. refused any relief as to do so would be to assist in the deception of the public.

19. The planning code exists for the purpose of ensuring that one of our most valuable economic resources, the Irish countryside, should be maintained, as to what is left of it, in its attractiveness so as to allow it to continue as a draw for tourist revenues for generations to come. Drawing a distinction between settlement areas and rural areas makes sense from traffic safety and energy considerations as well. I cannot comment on any individual plan as it is within the sphere of government. Courts are not there to formulate policy to foster or protect our resources. Where the Oireachtas has formulated a legislative policy on planning, and local government has exercised devolved powers to set out a county plan on how the countryside is to be developed, the courts are bound to respect it. It is part of the legal order. Apart from preserving economic and natural resources, the planning code exists to ensure that neighbours are not taken by surprise through developments which might impact upon them and to minimise the inevitable disputes that would then arise. Even in that context, a misrepresentation in applying for planning permission in terms of the description of proposed changes, or how they are to be effected, or the undertakings that can often be given in a letter to the planning authority in support of the application can be regarded as disturbing as it undermines trust.

20. Planning legislation does not exist as a fig leaf that can be treated with disregard by anyone of its fundamental purpose in

preserving natural assets and ensuring that the development of our habitat takes place by a transparent process. If approaches to the planning process are not honest, then is it fundamentally undermined. Such attitudes are destructive of the rule of law. Though planning, an area can change its character from being, for instance, industrial to light industrial, or rural to suburban or suburban to urban. In *Lanigan v. Barry and South Tipperary County Council*, [2008] IEHC 29 at para. 22 I said the following:-

> "…the wider question as to how an area is to develop is to be determined in accordance with the Planning and Development Act, 2000. The legislation is an example of the application of democratic principle to the important question as to how the area in which a citizen lives, or carries on his or her business, may change. In essence, the Act requires that any development of a site, including a material intensification of its use, should be subject to an application for planning permission to the local authority. This application can only be made through lodging detailed plans which indicate precisely what those effected by the development may reasonable expect. The entire community is given notice of the essence of what is proposed through newspaper advertisements and site notices. People may then inspect the plans. Representations may be made to the local authority as to why planning permission should not be granted and these will be primarily directed towards the effect any proposed development may have on the neighbourhood or area. Those who have made observations for an application for planning permission may appeal to An Bord Pleanála and those who have failed to make observations but who were directly affected, by reason of the immediate proximity of the proposed development, may also appeal. Were the legal mechanism of the scrutiny of planning permission not to exist and were it not the case that notice must now be given in a direct manner though what is in effect an advertisement as to what may happen at the site of a proposed development, then persons might feel aggrieved at being taken by surprise when a factory, set of apartments or some house extensions, suddenly spring up beside them. The legal mechanism is there, however, to allow participation in decisions which may effect the environment, the value of property and the nature of such quiet and comfort as may be the settled expectation of people in any particular area".

21. The effect of a planning decision can be that what would have been a nuisance because of the intrusion on the quiet, comfort and enjoyment of those occupying the area, as it was prior to the lawful grant a development through planning permission, may be changed in something which those living in the area will simply have to tolerate; see the approach of Buckley J. in *Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd.* [1993] Q.B. 343 at 595. Those who are elected to fulfil the role of the local planning authority can be hoped to a take a longer term view as to how the development of their area could best be effected through fitting in housing and industry within an appropriate setting and without ruining the economic draw of an area. Those applying for planning permission must fulfil elaborate criteria so as to ensure that proper scrutiny takes place. All of this is undermined if people feel themselves entitled to be less than honest. Regrettably, there is no avoiding the meaning of the uncontested evidence and the clear import of the correspondence in this case.

22. Essential to the formulation of any valid contract for the sale of the land is, as I have said, the price. I have no doubt that the price in this instance would never have been achieved by the plaintiff, through his agent, had the defendant not been induced to consider it as being more valuable than it in fact was by specific representations designed to undermine the planning code and the entitlement of the local planning authority to properly control planning in this area. This is an instance that the court cannot ignore. The parties have sought to avoid the issue as to the appropriateness of an equitable remedy by arguing this issue as if the court were dealing with an illegal contract. I make no ruling on that issue, even though, on the case law, the court is entitled to intervene even in the absence of a specific pleading in that regard. Rather, this case concerns the duty of the court not to grant an equitable remedy where the effect of specific performance will be to require a purchaser to take property at a price that was only achieved due to an agreed scheme to undermine the planning code decided on by the Oireachtas and local government in specific form and which depends for its effectiveness on honest dealing. The price here would never have been achieved but for the plan to rebuild a ruin with suitably ancient timbers and, worse than that, the other scheme to find a person from the Schull area with housing needs and to do some kind of a deal with him or her to pretend to apply for planning permission as if he or she were to be permanently housed in the site, whereas the reality would have been as set out in the correspondence and evidence quoted.

Result

23. I therefore refuse the Court's aid to enforce this contract.