Neutral Citation Number: [2010] IEHC 192

**THE HIGH COURT**

**COMMERICAL**

**2008 10888 P**

**2009 23 COM**

**BETWEEN**

**COLUM MACKIN**

**PLAINTIFF**

**AND**

**GERARD DEANE**

**DEFENDANT**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 20th day of May, 2010**

1. The plaintiff is a builder and the defendant an experienced property developer. The plaintiff primarily seeks an order for a specific performance of an agreement in writing dated 12th July, 2007, for the sale and purchase of the property known as the mews to No. 13, Morehampton Road, or 13A Morehampton Road, Donnybrook, Dublin 4, in consideration of €2,365,000 ("the Contract"). The defendant denies the plaintiff's entitlement to an order of specific performance and counterclaims that he has rescinded the Contract by letter dated 20th November, 2009, and claims to be entitled to the return of the deposit paid of €25,000, together with interest and costs.

2. The proceedings were admitted to the Commercial List by order of the High Court (Kelly J.) of the 26th January, 2009. In accordance with Commercial List practice, witness statements had been exchanged. By agreement of the parties, the statements were treated as the evidence in chief of the witnesses, subject to some additional direct oral evidence, and the witnesses were cross-examined. It is regrettable that, having considered carefully the witness statements and the evidence given by each of the witnesses, and having observed their demeanour in the witness box, I have formed the view that the plaintiff, the defendant, the plaintiff's engineer, Mr. Cagney, and the defendant's witness, Mr. Cooke, each gave evidence to the Court which I find, in part, to be untrue. Each also gave some evidence which I accept as being true. The remaining two witnesses, Mr. McSweeney, architect for the plaintiff, and Mr. Furey, engineer for the defendant, appeared to be truthful witnesses.

3. There are a number of factual matters in dispute between the parties. Not all of these are relevant to the issues which I have to determine on the plaintiff's claim and the defendant's counterclaim. The following are my findings of the relevant facts, some of which were not in dispute.

4. The plaintiff owns the mews property known as No. 13A Morehampton Road. In 2006, and possibly earlier, the plaintiff was carrying out the construction of a house known as 17A Morehampton Road or the mews property to 17 Morehampton Road, owned by his brother, Sean Mackin. The plaintiff subsequently also carried out building on mews properties at numbers 11 and 15 Morehampton Road.

5. The defendant is an experienced property developer. The plaintiff gave evidence of a number of significant other properties developed by the defendant which was not disputed. Prior to the contract at issue in these proceedings, the defendant had purchased or agreed to purchase from the plaintiff's brother, Sean Mackin, the properties at 17 and 17A Morehampton Road.

6. In October, 2006, the plaintiff and defendant negotiated the sale and purchase of 13A Morehampton Road. The house was not yet built. Mr. Brian McLoughlin, an estate agent, who did not give evidence, was involved in the negotiations. In October 2006, there was an oral agreement between the plaintiff and the defendant for the sale and purchase of 13A Morehampton Road in consideration of €2,365,000 with a deposit of €25,000. The oral agreement between the plaintiff and the defendant, which was not in dispute in the proceedings, was that the agreement for sale related to a house to be built to a similar specification to the mews at 17A Morehampton Road which was then built or substantially built. It was to have a similar internal and external layout to 17A Morehampton Road and similar type finishes.

7. A written agreement for the sale and purchase of 13A was prepared and the Contract was signed by the defendant in January 2007, and by the plaintiff in July 2007, and is dated 12th July, 2007. The Contract lists, in the Documents Schedule, a copy decision of An Bord Pleanála with a Planning Register Reference Number 4053/02, granted on 19th August, 2003. Condition No. 2 of that decision, which granted permission for a proposed development of a house in accordance with the plans which had been lodged, provided "the attic space shall be used for storage only and shall not be used for or converted to habitable accommodation". The plans to which the permission related are of a two-storey house with a designated attic space inside a dormer roof with Velux windows. The plaintiff lodged a subsequent application with Dublin City Council with almost identical plans for the same property, save that the location of the house on the site was brought forward by one metre so that the proposed house at 13A lined up with the existing properties to the rear of Morehampton Road. This appears to have been lodged in November 2009. On 11th May, 2007, permission was granted with reference number 6134/06. This permission was subject to the conditions in permission 4053/02, including condition number two relating to the attic set out above. Permission 6134/06 was not expressly referred to in the Contract.

8. Special Conditions 10 and 11 of the Contract provide respectively:

> "10. The purchaser shall be furnished with a Certificate of Compliance with Planning Permission and Building Regulations as per the draft enclosed herewith. No amendments will be tolerated in respect thereof.

> 11. The contract is subject to all but (sic) [built] works as agreed between the parties been (sic) [being] completed in satisfaction to both parties. Completion shall take place fourteen days after the Vendor has notified the purchaser that the works have been completed in full. In the event that there is any dispute as to completion of the works, the Vendor's Engineer shall be regarded as an Expert and his opinion shall be final."

No draft of the Certificate of Compliance was attached to or enclosed with the Contract.

9. The plaintiff and the defendant were in agreement in their evidence that the works agreed (and to which Special Condition 11 refers) were that the house at 13A would be built to the same specifications and with the same fit out as 17A. This included, in the attic, a room finished for use as a bedroom and *en suite* bathroom. I do not accept the evidence of the defendant that he was unaware of the planning permission with the condition relating to the attic when he entered into the Contract. It appears to me totally improbable that an experienced developer would have signed a contract to purchase a house for approximately €2.35 million without having made some enquiries about planning permission. He had also previously purchased a similar house at 17A with what is stated to be similar planning permission with a restrictive condition relating to the attic. I find, as a fact, that the works which were agreed between the plaintiff and the defendant, and to which Special Condition number 11 relates, included, to the knowledge of both the plaintiff and the defendant, works in contravention of condition (2) of planning permission 4053/02 which applied to and were incorporated in planning permission 6134/06. It is unclear how the parties intended to complete the sale in accordance with Special Conditions 10 and 11, having regard to the agreed works and the requirement for a Certificate of Compliance. The agreed works were inconsistent with a proper Certificate of Compliance.

10. In making the above findings of fact, I have taken into account the defendant's evidence that he asked Mr. Furey to carry out a planning search in October 2009. I accept that he did so, but do not believe the defendant's evidence that this was the first time he became aware of the planning condition restricting use of the attic as a bedroom.

11. The house at 13A Morehampton Road was substantially built by May, 2008. There is some dispute between the parties as to the precise condition of the property in May 2008, to which I will return. On 23rd May, 2008, the plaintiff's solicitor wrote to the defendant's solicitor as follows, "our client is now seeking completion and proposes Friday 27th June, 2008. Please confirm whether this date is suitable to your client". No response was received to this letter. On 6th August, 2008, the plaintiff's solicitor wrote again, enclosing a copy of the Certificate of Compliance of Mr. Cagney dated 8th July, 2008, and indicating the original would be provided on completion. She also stated, "As discussed, this property is ready to complete and we await hearing from you that you are in funds to complete". Again, there was no response to this letter. On 11th September, 2008, the plaintiff's solicitor wrote again, and on this occasion, formally notified that, "this property is complete and all works have been completed in full and we call upon you to complete the purchase herein". Reference was made to the Certificate of Compliance and as she had not received requisitions, the enclosed replies to requisitions and a draft Transfer Deed for approval and indicated that unless she heard within seven days, she would assume that everything was approved and arranged for the Vendor to sign. A warning was given that if she did not hear within fourteen days, that she would serve a "Notice to Complete and make time of the essence herein". Again, there was no response. There was one further letter on 30th September, 2008, in relation to a relevant wayleave and again, no response.

12. On 10th October, 2008, what transpired to be a final warning letter seeking confirmation that the defendant's solicitor was in funds to complete, was sent. There was, again, no response from the defendant's solicitor. It is common case that there was a meeting between the plaintiff, the defendant, the plaintiff's brother and Mr. Paul Cooke on 15th October, 2008, in a café in Donnybrook. There is a dispute as to how this arose and its purpose. I find that the meeting was requested by or on behalf of the defendant and that its purpose was for him to seek further time from the plaintiff to complete the Contract by reason of his then difficulty in raising the money to complete. The plaintiff refused this, and indicated that he would serve a Notice to Complete.

13. By letter of 21st October, 2008, the plaintiff's solicitor served a Completion Notice, calling on the defendant to complete the sale within twenty-eight days in respect of which time was to be of the essence. She indicated that it would expire on Wednesday 19th November, 2008. Even this did not elicit any written response from the defendant's solicitor. At this time, there was unresponded to correspondence from the plaintiff's solicitor seeking completion from 23rd May, 2008, until 21st October, 2008. However, it appears from a letter of 14th November, 2008, from the plaintiff's solicitor to the defendant's solicitor that the latter telephoned her office on 13th November, 2008, and stated that the defendant was refused access to the house to prepare a snag list. In the letter of 14th November, 2008, the plaintiff's solicitor stated:

> "Please note that Paul Cooke, your client's agent previously attended at the premises approximately at the end of April and provided this (sic) to our client of works he required prepared and/or snag list. Our client duly attended to all of these. It is now unreasonable for your client to be seeking further access to the premises. The completion date has long since passed and Notice to Complete has been served and in fact expires on 19th November, 2008. Please confirm your client is in a position to complete and you will forward balance funds to us."

14. On 20th November, 2008, the defendant's solicitor wrote for the first time, referring to the Completion Notice of 21st October, 2008, and the letter of 14th November, 2008, and then stated:

> "The said Completion Notice has expired and we are instructed to notify you that our client has elected to rescind the Contract for Sale dated 12th July 2008 (*sic*) the Vendor having, through his actions and (*sic*) repudiated the Contract for Sale and/or alternatively not being "able, ready and willing" to close this sale, being in breach of, *inter alia*, special condition 10 and special condition 11 in the Contract for Sale.
>
> Accordingly, we hereby request the return of our client's deposit in the sum of €25,000.00 paid on foot of the Contract for Sale within fourteen days of today's date."

They subsequently corrected the incorrect reference to the date of the Contract of Sale and sent an identical letter referring to the Contract dated 12th July, 2007. Nothing turns on this.

15. Notwithstanding the terms of this letter, I find as a fact, that the primary reason for which the defendant did not complete the purchase was his inability to raise finance and the change in the market conditions. The reliance on Special Conditions 10 and 11 were a convenient excuse for the defendant. The defendant had previously completed the purchase of 17A with a similar planning restriction and bedroom in the attic.

16. On 26th November, 2008, the plaintiff's solicitor wrote, disputing the vendor's entitlement to rescind and asking how the defendant considered that the plaintiff was not ready, willing and able to complete regarding Special Condition 11. Reference was made to the fact that the property was already snagged and it was asserted that the vendor was now estopped from seeking to

claim any dissatisfaction with the state or condition of the property. It was also stated that she had a full Certificate of Compliance with planning permission and building regulations on file and available for completion. Litigation was threatened. These queries were not answered. Thereafter, proceedings commenced by plenary summons on 18th December, 2008.

17. On 2nd February, 2009, after the case was admitted to the Commercial List by agreement of the parties, an inspection of the house was conducted by Mr. Furey, an engineer on behalf of the defendant, and was attended by Mr. McSweeney, an architect retained for that purpose by the plaintiff. Mr. Cagney was stated not to be available on that day.

**Issues**

18. The pleadings, evidence and submissions, both written and oral, raise the following issues for determination:

(1) Was the plaintiff ready, willing and able to complete the sale on 21st October, 2008, when the Completion Notice was served? The defendant contends that he was not, on two separate grounds:

(i) the Certificate of Completion, the copy of which had been produced, refers to compliance with planning permission 6134/06, whereas the Contract requires a Certificate of Compliance with planning permission 4053/02, and

(ii) the house, as built, was not then in compliance with either planning permission 6134//06 or 4053/02 as the attic had been converted to habitable condition and at that date remained so converted.

(2) Even if the plaintiff was ready, willing and able to complete on 21st October, 2008, should he be denied an order for specific performance by reason of his unwillingness to permit the inspection requested about 13th November, 2008.

(3) Even if the plaintiff was ready, willing and able to complete and otherwise entitled to an order for specific performance, should the Court, in its discretion, refuse to make such an order by reason of the admitted agreement to complete the attic in a manner which made it fit for habitable accommodation in breach of the planning permissions.

(4) Was the defendant entitled to rescind the Contract on 20th November, 2008, and is he entitled to the return of the deposit and other relief claimed.

**Conclusions**

19. Counsel for both parties submit that the plaintiff must establish that he was ready, willing and able to complete the Contract on the date he served the Notice of Completion to render same valid. Clause 40(a) of the Law Society General Conditions of Sale so require. Counsel for the plaintiff submits that the Contract required the house to be built in accordance with the relevant planning permission and that, on the evidence, the Court should find that it was then in a condition which rendered it built in accordance with planning permission 6134/06. Correctly, in my view, he does not simply seek to rely upon the fact that the plaintiff had procured a Certificate of Compliance from Mr. Cagney for the purpose of satisfying Special Condition 10 of the Contract. Condition 36 of the Law Society General Condition of Sale required the house to be built in accordance with planning permission.

20. As set out above, the defendant contended that on two separate specific grounds the plaintiff was not ready, willing and able to complete the sale on 21st October, 2008. First, I have concluded, on the undisputed evidence before me, that the plaintiff could never have been ready, willing and able to complete the sale in accordance with the Contract, having regard to the inherent conflict in its terms. The Contract in General Condition 36 requires compliance with planning permissions and Special Condition 10 expressly requires production of a Certificate of Compliance. Nevertheless, Special Condition 11 expressly makes the Contract subject to all built works as agreed between the parties being completed in satisfaction of both parties. It is commoncase that the agreed works which had to be completed included the fitting out of the attic as a bedroom with an equipped *en suite* bathroom. Fitting out is in breach of the planning permission. I have found that both parties were aware that such agreed works was in breach of the planning permission. On that finding, to the knowledge of both parties, and by reason of the agreement reached between them, the sale could never have been completed in accordance with the Contract. Counsel referred to this as the 'conundrum' in the case.

21. The defendant, through his counsel, did not seek to rely upon this inherent conflict and inability of the plaintiff ever to be ready, willing and able to complete the sale in accordance with the Contract. Rather, as set out above, he relied upon specific contentions in relation to failure to comply with the relevant planning permission.

22. Having regard to the terms of the Contract and the evidence, I consider it would be sufficient for the plaintiff to establish that the house, in October 2008, was built in compliance with planning permission 6134/06, and that a Certificate of Compliance with that planning permission would suffice. Planning permission 6134/06, with the change of location, was applied for in November 2006, shortly after the negotiations, and obtained in May 2007. It only alters the location of the house for which permission was given in planning permission 4053/02. The grant of permission was after the Contract had been drawn up and signed by the defendant. It was prior to the signing by the plaintiff. Whilst the Document Schedule undoubtedly only refers to planning permission 4053/02, there is no express term requiring the house to be built in accordance with that particular permission. General Condition 36 does require that all planning permissions be complied with substantially unless the Special Conditions contain a stipulation to the contrary. Further, Special Condition 10 requires a Certificate of Compliance as *per* a draft which was never enclosed with the Contract. All built works were to be as agreed between the plaintiff and the defendant. There is no evidence that those built works included a house in the exact location as specified in the application for planning permission 4053/02. Hence I have concluded that in the autumn of 2008, General Condition 36, required compliance with planning permission 6134/06. Accordingly, it appears to me that certification of compliance with permission 6134/06 would constitute compliance with the terms of the Contract.

23. It follows, on the agreed legal principles, that the plaintiff must establish that the house was in compliance with planning permission 6134/06 at the date of service of the Notice of Completion. The issue is whether or not, on that date, the attic was, "converted to habitable accommodation". It is common case that the attic had been so converted in the month of February, 2008.

24. The evidence of the plaintiff and of Mr. Cagney is that following an inspection by Mr. Cagney in February 2008, the bathroom fittings were removed and that the pipes were boxed and tiles covered with plasterboard and the floor area with a carpet, as described by Mr. Furey on his inspection in February 2009. The remainder of the attic space remained plastered and painted to the same finish as the rest of the house, save that the electric sockets were removed and in their place were electrical covers. 25. The expert view expressed by Mr. Furey was that even if those alterations had been made prior to 21st October, 2008, that the attic space remained an area "converted to habitable accommodation" in breach of condition (2) of planning permission 4053/02 and therefore in breach of planning permission 6134/06. He expressed his expert view that the property, when viewed by him in February 2009, was "converted to habitable accommodation". Mr. Cagney and Mr. McSweeney expressed the alternate view. Each sought, in

particular, to rely upon the fact that in the area in which there had been the *en suite* bathroom, there was now an area of plasterboard with a rough finish. They also emphasized the fact that the building regulations would require habitable accommodation in an attic space to have an alternative means of escape for fire purposes and particular requirements for the stairs leading to the attic.

26. It is well established that the planning permission must be construed in accordance with the normal meaning of the words used. It is common case that the majority of the area in the attic, in terms of plastering, painting and electrical wiring was finished to a similar standard as the rest of the house. It was fully finished with skirting boards and central heating radiators. I have concluded that in accordance with the normal meaning of the term "habitable accommodation", that the attic, in the state inspected by Mr. Furey in February 2009, was an area which had been finished to a standard suitable for habitable accommodation, and in that sense, must be considered to be an area which had been converted to habitable accommodation in breach of condition (2) in planning permission 4053/02 which formed part of 6134/06. It does not appear to me that the failure to include appropriate escapes to comply with building regulations, of itself, makes it an area which is not converted for habitable accommodation. It was so converted, albeit that it was possibly in breach of building regulations if used as habitable accommodation. Similarly, the removal of bathroom fittings and rough finish over a small area does not alter the fact that, taking the attic space in its entirety, it remained converted for habitable accommodation.

27. This conclusion makes it, strictly speaking, unnecessary for me to determine whether or not the removal of the bathroom fittings took place prior to 21st October, 2008. However, as this was a significant factual dispute between the parties and might be relevant if my prior conclusion were considered to be incorrect, I think I should set out my findings of fact in relation thereto.

28. I have concluded that I cannot accept the evidence of the plaintiff and Mr. Cagney that these changes were made prior to 2nd April, 2008, as they both asserted. First, regretfully, I find that the oral evidence of Mr. Cagney is inconsistent with his written witness statement and also difficult to reconcile with the Certificate of Compliance furnished in the absence of any explanations from him as to the delay in preparing same to 8th July, 2008. Mr. Cagney, in his written witness statement, the truth of which he confirmed in his oral testimony, stated that he attended at the house on 2nd February, 2008, to carry out a final inspection and prior to the provision of a Certificate of Compliance. He then states that having inspected the attic space, he found it plumbed for a bathroom and advised that the plaintiff should take out the bathroom and leave same simply as an open storage place. He then states that the plaintiff agreed to do this, and that he would call at the property "a number of days later to re-inspect, which I duly did, a number of days later". He then states that on that inspection, he was satisfied that any bathroom and fittings were fully dismantled and removed and that the attic was left as open storage space only and that he then agreed to provide the Engineer's Certificate of Compliance.

29. In his oral evidence, when asked about the fact that his Certificate of Compliance refers to an inspection on 2nd April, 2008, he then stated he would have gone back a third time and carried out a final inspection on that date for the purpose of his Certificate. No substantiated explanation was given as to why the Certificate was not drawn up until 8th July, 2008, and subsequently furnished. There is, at minimum, a lack of coherence, and more probably, inconsistency in this evidence.

30. Secondly, the removal of the bathroom's fittings in the attic prior to 2nd April, 2008, I have concluded, is inconsistent with the plaintiff's own evidence as to the state of the house in May 2008, and his evidence in relation to prospective tenants in May and June 2008. The plaintiff's evidence is that he agreed to put the bathroom fittings in the attic at the request of the defendant. They formed part of the agreed works to be carried out. His further evidence (part of which is disputed) is that Mr. Paul Cooke, on behalf of the defendant, inspected the property in May 2008, for the purpose of preparing a final snag list, and the plaintiff produced a snag list alleged to have been prepared by Mr. Cooke. Mr. Cooke denies having done this, but admits to having been in the house in May 2008. That snag list does not refer to any work which had to be carried out in the attic area. As it had been agreed that the bathroom would be installed in the attic area, it appears to me inconceivable that if it was not installed at the time Mr. Cooke is alleged to have inspected the property in May 2008, and prepared a snag list, that he would not have made reference to it. Mr. Cooke's own evidence is that it remained installed when he inspected the property in May 2008. This appears to me probably to be correct, particularly having regard to the plaintiff's evidence in relation to the prospective tenants. The plaintiff stated that prospective tenants were shown over the property on behalf of the defendant in May 2008. He relied, in particular, upon a number of visits made by a French couple and the plaintiff asserted that he was informed that agreement was reached between the defendant and the French couple that they would take a letting of the house for three years at a rent of €4,000 per month. Again, whilst this is disputed by the defendant, on this, I accept the evidence of the plaintiff insofar as he alleges that there was a French couple who were shown over the property on a number of occasions and may have even orally agreed to take a letting. He produced, in evidence, letters addressed to the French couple at the property. He also asserted, and again I accept this, that he was requested, both by the defendant and by Mr. McLoughlin, on his behalf, to let the plaintiff into the property prior the completion of the purchase. This is entirely consistent with the view which I have formed that the reason for which the defendant was not completing the purchase in the summer of 2008, was the lack of finance. However, again, it appears to me inconceivable that the property would have been shown to the French tenants with the *en suite* area in the attic in the condition it was, as when inspected in February 2009, or that they would have agreed to take a letting, if this was then the condition of the property.

31. Accordingly, I find, on the evidence, as a matter of probability, that the attic area remained with an interior finish which included an *en suite* bathroom in May/June 2008. There is no evidence to suggest that any works were carried out between that and 21st October, 2008, on the service of the Notice of Completion. It follows from this finding of fact, and the acknowledgement made on behalf of the plaintiff in submission, that the *en suite* bathroom in place in the attic space rendered it converted to habitable accommodation in breach of the condition in the planning permission that it was so at the date of service of the Notice of Completion.

32. As the house was not in compliance with the planning permission at the date of the service of the Notice of Completion, the plaintiff was not ready, willing and able to complete the Contract at that date and hence not entitled to an order for specific performance.

33. This conclusion makes it unnecessary for me to determine the further issues identified on the plaintiff's claim. There is, however, one further factual dispute between the parties which is of some relevance to the counterclaim, and for that reason, I am setting out my finding. The plaintiff contends that Mr. Paul Cooke, an interior designer, was retained by the defendant to make decisions on the defendant's behalf in relation to the interior finish of No. 13A Morehampton Road, and to pick out certain fixtures to be installed such as bathroom fittings, tiling and the kitchen. The background to Mr. Cooke's involvement is common case. He had worked for the defendant as an interior designer in relation to the refurbishment of a mews house purchased by the defendant, off Fitzwilliam Square. When the defendant purchased No. 17 Morehampton Road from Mr. Sean Mackin, Mr. Cooke was also retained to assist in the interior finish of that house (a refurbished old house). Mr. Cooke contends that it was agreed that Mr. Sean Mackin would pay his fees in respect of that work. The defendant then purchased the mews at 17A Morehampton Road from Mr. Sean Mackin, and it appears that Mr. Cooke was requested by the defendant "to finish the interior in a similar style and to the same values as I had previously executed in the main house". He states, in doing this that he worked for Mr. Sean Mackin who paid his fees.

34. In relation to No. 13A the mews, the defendant and Mr. Cooke maintain that Mr. Cooke was retained by Mr. Colm Mackin. I do not accept this evidence. I find that in relation to No. 13A the mews, Mr. Paul Cooke was retained by or acted on behalf of the defendant in the following sense. Mr. Cooke made decisions in relation to the interior finish and certain fixtures and fittings on behalf of the defendant as to what was to be done by the plaintiff in the building of the house or what fixtures and fittings were to be purchased and installed. Mr. Cooke, in his own witness statement, said, "Gerry Deane hardly ever called to inspect construction. It was I who called every two weeks or thereabouts to inspect works, having been specifically delegated this task" [emphasis added]. In my view, there can be no ambiguity about this statement: Mr. Cooke was delegated that task by Mr. Deane, the defendant. Mr. Cooke, in his oral evidence, attempted to backtrack from this. In my view, he was influenced, wrongly, by the evidence given by the defendant who, for the most part, disputed that Mr. Cooke was retained by him in relation to No. 13A. However, the defendant, in his oral evidence, in the context of disputing the fact that he ever visited No. 13A when being built, stated that Mr. Paul Cooke kept him informed. The defendant also stated in evidence that Mr. Paul Cooke was left "to make decisions on my behalf" but that he was paid by the plaintiff. The plaintiff disputes any agreement to pay Mr. Cooke and it is common case that he has not been paid. The person by whom Mr. Cooke was to be paid is not determinative of the issue as to the person on whose behalf he was carrying out inspections or making decisions. It would not be unusual in a contract for one party to agree to pay an expert retained by another party. I make no finding as to the arrangements for the payment of Mr. Cooke. I am satisfied, however, that Mr. Cooke was retained by the defendant to carry out inspections of No. 13A on his behalf in the course of building, and also on his behalf to make decisions in relation to the interior finish and fixtures and fittings. Insofar as the defendant and Mr. Cooke sought to assert otherwise, I regret that I am satisfied they were making assertions which are untrue. The finishes, paint and otherwise, and bathroom furnishing chosen by Mr. Cooke included those in the attic space of No. 13A.

**Counterclaim**

35. The defendant counterclaims for a decree in the sum of €25,000 together with interest thereon pursuant to the contract and/or statute. He makes this claim on the basis that he has validly rescinded the Contract by the letter dated 20th November, 2008, and is entitled to the return of the deposit monies together with interest and costs. As pointed out by the former Chief Justice Keane in his text, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) at p. 254, "The word 'rescission' is used in a number of different senses and these must be carefully distinguished". The learned author then went on to identify three different meanings as follows:

> "In the first place, rescission may arise where one party to a contract has been in breach of a term which is essential or as is sometimes said 'goes to the root of the contract.' In that case, the innocent party has an option: he may elect to treat the contract as remaining in force and confine himself to a claim for damages or he may treat his obligations under the contract as at an end, in which case he is said to rescind the contract and his election so to do is properly called 'rescission'. Rescission in this sense is a purely common law doctrine and is the act of the party himself.
>
> In the second place, the contract itself may provide that in defined circumstances a party may put an end to the contract and again this is described as 'rescission'. Thus, contracts for the sale of land provide that the vendor may rescind the contract where, for example, the purchaser insists on a requisition with which the vendor is unable to comply. Again rescission in this sense is the action of the party alone.
>
> In the third place, there are a number of cases in which the courts themselves in the exercise of their equitable jurisdiction will set aside transactions, including not merely contracts, but deeds or other instruments. This may arise for a variety of reasons . . ."

36. The primary submission made on behalf of the defendant was that where, as in this instance, the plaintiff had served a Completion Notice, pursuant to clause 40 of the General Conditions of Sale, and was not, at the time, "ready, willing and able" to complete the sale, then the defendant was entitled to rescind the Contract once the notice expires. Counsel for the plaintiff did not dispute the general principle that the service of a Completion Notice binds the person serving the notice and makes time of the essence and an established view that if that person fails to complete, he is considered to be in breach of contract such that the other party may elect to rescind. However, he drew attention to submissions contrary to such a construction of General Condition 40 referred to by Clarke J. in *Windham v. Maguire* [2009] IEHC 359 at p. 28, and also submitted that on the unusual facts of this case, the defendant has not validly rescinded.

37. Similar to Clarke J., it does not appear to me necessary, for the purpose of determining the counterclaim, to consider the proper construction of General Condition 40. The issue is whether or not the service of a Completion Notice by a person who is not ready, willing and able to complete, merely makes such notice ineffective or whether the service of a Completion Notice by a party who is not ready, willing and able, entitles the receiving party to rescind when the notice expires. The defendant's contention that he has rescinded the contract must, I think, be determined on the facts of this case.

38. On the findings of fact made, I have concluded that the plaintiff was not ready, willing and able to complete this Contract for sale when he served the Completion Notice on 21st October, 2008, as the house, as built and fitted out, was not in compliance with the relevant planning permission. I have also found that the reason for which the house was not in compliance with planning permission was that by agreement of the plaintiff and the defendant, the plaintiff was to fit out the attic as a bedroom with an *en suite* bathroom. Further, that such fitting out was, to the knowledge of both the plaintiff and the defendant, in breach of planning permission.

39. Even if General Condition 40 should, in general, be construed as permitting a purchaser who receives a Completion Notice from a vendor who is not ready, willing and able to complete the sale prior to the expiry of the notice as entitled to rescind the contract, it does not appear to me that it should be construed as including a factual situation where the cause of the vendor not being so ready, willing and able is an agreement between the vendor and the purchaser that the vendor carry out works which then preclude him from being able to complete the sale in accordance with the terms of the Contract. General Condition 40(a) provides that such a notice "shall be effective only if the party giving it shall then either be able, ready and willing to complete the Sale or is not so able, ready or willing by reason of the default or misconduct of the other party". The express exception does not apply to the facts of this case insofar as the reason was not simply the default or misconduct of the defendant. Insofar as the agreement reached between the plaintiff and the defendant may be described as misconduct, it is misconduct of both parties.

40. Nevertheless, General Condition 40 does not give an express right to rescind. The defendant relies *inter alia* upon the common law principles to so construe it. As appears from the extract above, essential to this is that one party is in breach of an essential term of a contract such that the other or "innocent party" to the contract may elect to treat the contract at an end. I have concluded that on the facts of this case, which are unusual, that the defendant cannot be considered to have been "an innocent party" to the fact that the plaintiff was in breach of contract by being unable to complete the Contract at the expiry of the Completion Notice by reason of his then inability to convey a house built in compliance with planning permission. The plaintiff was in breach because of an

agreement with the defendant as to the works to be carried out for the purpose of Special Condition 11 of the Contract. Accordingly, I have concluded that notwithstanding that the plaintiff was not ready, willing and able to complete the sale upon the expiry of the Completion Notice, General Condition 40 did not permit the defendant to rescind the Contract on this ground.

41. The defendant also claims to have rescinded by letter of 20th November, 2008, at common law as the plaintiff was in breach of Special Condition 11 of the Contract in refusing inspection in November 2008. The defendant contends, in relation to Special Condition 11, that it includes an implied entitlement of the defendant, as purchaser, to inspect the property after he was notified that it had been fully built. The defendant is probably correct in his contention that Special Condition 11 includes an implied entitlement of the defendant to inspect the property. Inspections had taken place on his behalf throughout the building period by Mr. Cooke. Mr. Cooke's evidence was that he last was in the property on 21st May, 2008. His evidence was that it was not fully complete at that stage.

42. Insofar as there is an implied right to inspect, even when notified that the property is built and the sale ready for completion, such implied right could only be to inspect within a reasonable period of time. The first written notification that the plaintiff was seeking completion was sent on 23rd May, 2008. On 6th August, 2008, the plaintiff's solicitors again wrote, stating the property was ready to complete. On 11th September, 2008, the plaintiff's solicitors expressly notified the defendant, through his solicitors, that, "this property is complete and all works have been completed in full". No request was made to inspect in response to this. I accept the submission made on behalf of the plaintiff in reliance upon the authorities cited by Finnegan J. in the Supreme Court in *Duffy v. Ridley Properties Limited* [2008] 4 I.R. 282 at p. 305, that the parties to a contract for the sale of land are under a duty to cooperate with each other in the performance of the contract. The defendant, having failed to request inspection of the property within a reasonable time of the notification given on 11th September, 2008, was not, in my view, entitled to further request inspection after the service of the Completion Notice on 21st October, 2008. It follows that the plaintiff was not in breach of Special Condition 11 in refusing inspection when requested in November 2008, after service of the Completion Notice. Accordingly, the defendant's claim to have rescinded on this ground also fails.

43. I have concluded that the defendant has not established that he has validly rescinded the Contract and his claim for the return of the deposit fails.

**Relief**
There will be orders dismissing both the plaintiff's claim and the defendant's counterclaim.