

## THE HIGH COURT

[2013 No. 1182 P]

BETWEEN

DOMHNALL MAC A BHAIRD

PLAINTIFF

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

DEFENDANTS

(No. 2)

**JUDGMENT of Ms. Justice Baker delivered on the 8th day of November, 2016.**

1. In a judgment delivered on 5th April, 2016, [2016] IEHC 223, I made an order that the plaintiff be entitled to a decree of specific performance of a contract for the sale of certain premises in Glanmire in the County of Cork. This judgment is given in the claim of the plaintiff for interest on the balance of the purchase price, and damages for the defendant's delay in completing the transaction.

2. The defendant denies that the plaintiff is entitled to either interest or damages.

3. By contract for sale made on the 4th November, 2011 the plaintiff agreed for the sale to the defendant of the premises in consideration of the payment of the sum of €862,600. After taking into account the deposit of €86,260, the contract balance is €776,340.

4. Interest is claimed on the balance of the purchase price, and the parties agree that the date from which interest may be claimed is 9th January, 2013, at which point the plaintiff vendor was able, ready and willing to complete the sale.

**The claim for interest**

5. The statement of claim seeks interest in the following terms:

"A declaration that the plaintiff is entitled to interest on the balance of the said purchase moneys from the closing date to completion herein."

6. The contract for sale was made in the form of the Law Society General Conditions of Sale, and general condition 25 sets the basic framework in which the claim for interest is made.

7. General condition 25(a) provides as follows:

"25. (a) If by reason of any default on the part of the Purchaser, the purchase shall not have been completed on or before the later of (a) the Closing Date or (b) such subsequent date whereafter delay in completing shall not be attributable to default on the part of the Vendor

i. the Purchaser shall pay interest to the Vendor on the balance of the Purchase Price remaining unpaid at the Stipulated Interest Rate for the period between the Closing Date (or as the case may be such subsequent date as aforesaid) and the date of actual completion of the Sale. Such interest shall accrue from day to day and shall be payable before and after any judgment, and

ii. the Vendor shall in addition to being entitled to receive such interest, have the right to take the rents and profits less the outgoings of the Subject Property up to the date of the actual completion of the Sale.

8. The contractual position, then, is that a vendor is entitled to interest only if the delay in closing the sale is caused by a default on the part of the purchaser.

9. In *In re Young & Hartson's Contract* [1885] 31 Ch. D. 168 Bowen L.J. defined default as follows:

"Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances – not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

10. I have already found that the purchaser was not entitled to rescind the contract, and there is no real dispute between the parties that, subject to the right of the defendant to appeal my judgment decreeing specific performance, the purchaser has been in default.

11. The purchaser argues that general condition 25 provides a distinct and express mechanism by which a claim for interest may be maintained, and that as the plaintiff failed to activate his claim for interest in accordance with the contractual provisions, the claim for interest must fail.

**Notice before interest is recoverable: General condition 25(b):**

12. The purchaser relies on the provisions of general condition 25 (b) which I quote in full:

"25. (b) If the Vendor by reason of his default shall not be able, ready and willing to complete the Sale on the Closing Date he shall thereafter give to the Purchaser at least five Working Days prior notice of a date upon which he shall be so able ready and willing and the Purchaser shall not before the expiration of that notice be deemed to be in default for the purpose of this Condition provided that no such notice shall be required if the Vendor is prevented from being able and ready to complete or to give said notice by reason of the act or default of the Purchaser."

13. "Working Days" and "Closing Date" are defined in general condition 2. The general condition is mandatory in its terms in that it is clear that no liability for interest "shall" accrue before the expiration of the notice. General condition 49 contains provisions to

construe the meaning of the word "notice", and the notice must be in writing and served in the manner provided.

14. The purchaser argues that the vendor failed to give notice in accordance with this mechanism.

### Discussion

15. No authority has been opened as to the meaning and effect of condition 25(b). This may be because in many conveyancing transactions there will be an amount of correspondence post contract, and the parties will well know in many cases when closing is proposed. I consider that may be one reason why general condition 25(b) does not make any provision for a variation of an agreed later closing date, as is found in 25(a).

16. The purpose of the general condition is to provide a means by which a vendor may unilaterally vary an agreed closing date, as absent such, a vendor could be in breach of contract on account of an inability to close on the agreed date. While time is not of the essence of a contract for the sale of land, the closing date is not an indicative date on which closing is agreed to occur, but a contractual term.

17. The condition provides a mechanism by which the vendor can set another closing date, avoid being in default for failure to be ready to close on the agreed date and fix a date from which interest may be claimed.

18. Because general condition 25(b) is framed by reference to the defined "closing date", and not by reference to a later agreed closing date, it could be said that the general condition has no application in circumstances where the vendor does not wish to avail of the right to unilaterally change the contractual closing date for his own reasons. It would have no application when the parties agree a different closing date from the one expressed in the contract itself. Notice would not have to be given for the interest provisions to be applicable when the closing date is changed by agreement other than by unilateral act of the vendor in reliance on condition 25(b). The vendor never relied on a power to unilaterally change the closing date and instead the parties agreed and varied the date on a number of occasions, as can be seen from the judgment in the substantive case. On that construction of 25(b), I consider that it is not engaged in the present case.

19. In case I am wrong in this analysis, I will examine the arguments of the parties with regard to the condition.

20. The vendor argues that as the purchaser had rescinded, the general condition cannot be applicable, as a requirement of notice is not one contained in a subsisting contract. I do not consider that the vendor is correct. The purchaser did rescind the contract and I have already held that the purchaser did not lawfully do so. The contract continued to subsist, and was actionable. Furthermore, general condition 25 is designed and intended by the parties to be one mechanism by which the parties have agreed as a form of remedy in the event of default. It was intended therefore to be a class of secondary obligation.

21. The purchaser says no document can be identified as having given the required notice.

22. Three documents can be construed as a notice for the purposes of general condition 25(b). The completion notice itself was an express statement by the vendor that he was ready and willing to close. The fact that the vendor was not in a position to close on the expiry of the time fixed by the notice does not in my view make the completion notice ineffective for all purposes. It was a notice by which the purchaser was advised that the vendor was ready and able to close.

23. The vendor gave notice on 9th January, 2013 that he was in a position to close, but as general condition 25(b) requires at least five working days' prior notice the notice is not effective to deal with the notice requirements of condition 25(b).

24. By a letter of 11th January, 2013 the solicitors for the vendor did indicate that he "remains ready, willing and able to complete this contract" and called upon the purchaser to close within 7 days. A reminder letter which contained a threat to commence proceedings seeking specific performance was sent on 22nd January, 2013.

25. It is not required by general condition 25(b) that the notice should make express reference to the fact that it is served under the condition, and no procedural requirement as to the form of the notice is expressed. In my view, provided the purchaser can know from a letter or notice given in writing of the vendor's readiness to close, the purchaser is on sufficient notice as to the claim for interest, and the date from which it may accrue.

26. I am satisfied in those circumstances that adequate notice was given for the purpose of general condition 25(b), if such was required. The completion notice and the letter of 11th January, 2013 were both adequate to comply with the notice requirements of general condition 25 (b).

27. For completeness, I reject the argument of the plaintiff that notice was de facto given by the issue of proceedings in which interest is claimed. No authority was advanced for the proposition. That the service of proceedings amounts to contractual notice in accordance with the general conditions of sale seems to me to be an incorrect proposition. The parties have agreed an express mechanism and I consider that there is no scope in those circumstances to argue for an implied means by which notice can be given.

28. The service of proceedings is notice of the commencement of a claim, and cannot be viewed as a notice that a claim may be brought in default of an identified event or thing.

29. For these reasons I consider that the vendor is entitled to interest under the contract.

### Simple or compound interest

30. The plaintiff argues that the interest under the contract should be calculated as compound interest. The plaintiff relies on a recent judgment of House of Lords in *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v. Inland Revenue Commissioners & Anor.* [2008] 1 A.C. 561, in which the House of Lords held that it was proper to measure damages on the plaintiff's claim for restitution as compound interest at conventional rates. The several judgments of the court describe the common law and statutory provision that simple interest only is recoverable as being out of step with ordinary commercial reality. The House of Lords considered the question in the context of the nature of the claim for damages and the purpose of the award. If the purpose of the award is to defray the cost of borrowing money, Lord Nicholls said, "that cost may include an element of compound interest" and took a view that the question for the court was always how it was to ascertain a "fair measure of what the plaintiff lost".

31. The decision of the House of Lords in *Sempra Metals v. Inland Revenue Commissioner* arose in the exercise of the court's jurisdiction in restitution and the judgment is authoritative only on the exercise of the common law restitution jurisdiction where the actual loss to the plaintiff included interest that had been compounded, and therefore flowed naturally from a breach of contract

32. I can find no express provision in the contract to provide for the compounding of interest. I am not persuaded that there can be implied into the general conditions an agreement that interest be compounded.

33. I consider that I am bound by the dicta, albeit obiter, of Costello J. in *Trustee Savings Bank Dublin v. Maughan* [1992] 1 I.R. 488 at p. 494, that:

“...the law leans against compound interest....

The principle that such interest cannot be charged in the absence of special agreement was, it is pointed out, recently applied by the Court of Appeal in *Bank of Credit and Commerce International S.A. v. Blattner* ...”

### **The claim for damages.**

34. The plaintiff also claims damages for breach of contract at common law and pursuant to s.2 of the Chancery (Amendment) Act, 1868 (“Lord Cairn’s Act”). The claim is maintained for damages in addition to interest and specific performance.

35. While Lord Cairn’s Act has been repealed, the section has been saved by a complex series of enactments explained at paragraph 10.16 of Buckley, Conroy and O’Neill, *Specific Performance in Ireland* (Dublin, 2012), noted with approval by Laffoy J. in *McGrath v. Stewart & Anor.* [2016] IESC 52.

36. The provisions of the Act are often described as giving the Courts of Chancery the power to award “equitable damages” in addition to specific performance

37. The jurisdiction to award damages in addition to specific performance has been considered by Finlay P. in the High Court in *Duggan v. Irish Allied Building Society* (Unreported, High Court, 1st March, 1976).

38. The vendor argues it was known to the purchaser that the vendor’s title to the premises in sale was subject to a mortgage, and special condition 9 of the contract for sale contained an express arrangement for the discharge of the mortgage from the proceeds of sale. It is argued that damages are recoverable measured as the amount of interest accrued on the balance of €776,340 (the contract price less the deposit) from 9th January, 2013 to 5th July, 2016 at the relevant prevailing loan interest rates with Bank of Ireland. The evidence is that the relevant amount of interest accruing on the loan account is €79,160.15 to 5th July, 2016, a few days before the case came on for hearing before me.

39. It is clear from the express terms of special condition 9 that all of the proceeds of sale were to be applied to discharge the mortgage, i.e. that the use for which the vendor intended to put the monies was identified and the monies were earmarked for that purpose. It is said that the claim is no different from the claim that a disappointed vendor may have for loss of the opportunity to buy another premises upon the closing of a sale.

40. It is argued that the plaintiff is entitled to damages in addition to interest.

41. The plaintiff relies in particular on the judgment of the House of Lords in *Rainieri v. Miles* [1981] A.C. 1050.

42. It is argued that the claim for damages is a claim of a different class to the claim for interest, as the entitlement to interest is not dependant upon breach of contract because it derives from the proposition that the vendor is entitled to the purchase money from the completion date, and interest is payable because the purchaser continued to have the benefit of the money and the vendor was kept out of his money.

43. The purchaser makes an argument from first principle that the plaintiff is not entitled to damages in addition to interest having regard to the contractual mechanism agreed between the purchaser and the vendor to deal with default. It is argued that as the parties agreed a mechanism to measure the amount of loss, and as the particular loss claimed by the plaintiff was a loss incurred by the vendor owing to the failure by the purchaser to complete on time, that loss was one which was capable of being compensated by interest under the general conditions, and damages under any other head do not arise.

### **Discussion**

44. The claim for interest is one that arises following breach by a purchaser of a contractual term. I do not accept the argument of the vendor that the right to interest arises independently of contractual breach. Interest is payable by a purchaser who breaches the contract and fails to close on the agreed date. The fact that the rate of interest is agreed does not mean that a vendor is contractually entitled to claim interest absent a breach of the term regarding closing.

45. In *Rainieri v. Miles* the House of Lords was considering a claim where a contract of sale had not been completed following the service by the purchaser of a 20-day completion notice. The purchaser sought the cost of temporary accommodation by way of a claim for damages. The House of Lords found that there was a breach of contract when the vendor failed to complete on the contractual date and although equity did not allow rescission without a notice to complete or unreasonable delay, at common law the vendor had a right to claim damages *inter alia* for the cost of temporary accommodation.

46. I agree with the argument of the purchaser that *Rainieri v. Miles* is not authority for the proposition advanced by the plaintiff, as it concerned a claim by a purchaser for damages on account of late completion. The general conditions of sale do not provide any mechanism for the ascertainment of a purchaser’s claim for damages. There was no basis for the court in those circumstances to consider whether the contractual provision for interest on account of late completion was an agreed means by which damages be assessed and precluded the award of damages under other heads.

47. The plaintiff relies also on a general statement at paragraph 278 of Vol. 23 of the 5th Ed. of Halsbury’s Law of England, to the effect that a claim for interest is in addition to any claim for damages. Halsbury, however, identifies this as the position at common law, but suggests that such provisions are “usually replaced by specific contractual provisions providing for compensation” as is found in the standard conditions of sale. That is precisely what is done in the Law Society General Conditions, but parties may expressly provide for additional damages, or that damages be calculated on a different basis and that the measure of damages is not confined to the interest agreed to be paid for late closing.

48. The purchaser however argues that the claim in damages may be made only in respect of circumstances where the loss is something other than the loss arising from being kept out of one’s money. The example is given of a vendor losing a known opportunity

to use the purchase money to buy another property as a result of an improperly delayed sale. It is because the purchaser has also suffered an anticipated class of loss that damages might lie in that case.

49. I agree with that argument. The remedy this vendor has for late payment of the purchase price is governed by the contract for sale. It should be presumed in the circumstances that the vendor fixed the rate of interest applicable under that contract by reference *inter alia* to the rate of interest then being charged by Bank of Ireland on the borrowings. It was a matter within the power of the vendor to fix interest in such a way as would provide adequate compensation for being unable to discharge the bank loan on time. The parties have chosen a contractual mechanism by which to compensate the plaintiff for not being in a position to repay the moneys to Bank of Ireland. The loss of which the vendor complains is the loss of the money that was to be repaid directly to the mortgagee. It is not a special loss or injury suffered by reason of an anticipated loss arising from a lost opportunity or from another use of those moneys.

50. As is apparent from the calculation, the amount claimed by way of compound interest of €175,000 or simple interest in the amount of €162,000 (both expressed in round figures) far exceeds the amount of interest actually paid by the plaintiff to the Bank in the relevant period. The plaintiff more than adequately covered the amount of its loss. The contract was sufficiently drafted so as to ensure that interest arising from any delay would adequately compensate the plaintiff for the interest that he would unnecessarily pay to his bank, and the claim by the plaintiff for damages in addition to contractual interest is not in my view correct.

51. The Standard Conditions of Sale applicable to contracts in the jurisdiction of England and Wales provides for the payment of interest in condition 7.3, but describes the interest as "compensation". The purpose of the interest clause is therefore clear under those general conditions.

52. The provision for interest in the Irish general conditions does not describe interest as compensation. The provision, however, is intended to provide compensation to the vendor arising from the delay as a result of which he is out of pocket. That this is so is clear from the fact, conceded by both sides, that the vendor is not competent to claim interest on the whole purchase price, but only on the balance price after taking into account the amount paid by way of deposit.

53. The claim for interest is a claim for compensation for late closing to be assessed on an agreed formula, and although the general conditions make no reference to "compensation", the intention of the interest provision is clear. It is to award compensation to the vendor on account of the failure by the purchaser to hand over the monies.

54. I am persuaded by the decision of the Court of Appeal in *Wentworth v. Wiltshire County Council* [1993] 2 All E.R. 256, a judgment relied on by the defendant. The plaintiff was a dairy farmer who had been in dispute with the local authority over the repair of a public road which served his farm. Damages were awarded. Stuart-Smith L.J. explained the purpose of awarding Courts Act interest as follows:

"The award of interest is compensatory and not additional damages. In the present case, because of his shortfall in profits, the plaintiff had to borrow from the bank until the loss was made good by the judgment. An award of interest on the loss of profit was designed to make good the cost of his borrowing, although it may not necessarily have done so pound for pound because the bank no doubt charged compound interest."

55. That is not to say that there may not be cases where a claim could lie for interest and damages for breach of contract. The purchaser does not argue that the court does not have any jurisdiction to award damages in addition to an award for specific performance, or even in addition to an award for contractual interest. This is a correctly made concession, as Lord Cairns' Act is clear that damages may be sought in a specific performance suit in addition to or in lieu of specific performance. However, damages will arise only in circumstances where the claim by a plaintiff for such damages arises in respect of the different class of loss, such as an anticipated loss of a known opportunity and not merely a delay in receiving the money. The loss in the present case is the loss arising from the delay suffered by the plaintiff in being in a position to repay the monies borrowed on foot of the security for the premises, and no other class of loss arises.

56. It seems to me that the plaintiff's claim for damages as well as interest can also be usefully considered in the context of the general prohibition on double recovery. Halsbury, later in the paragraph noted at 41 above, identifies the proposition as follows:-

"Where the amount of compensation payable does not adequately compensate a party for the loss occasioned by the delay, the balance may be recoverable through a claim for damages for breach of contract."

57. The standard conditions of sale provide an express reflection of this general provision, but it seems to me to arise as a matter of first principle.

58. The claim for damages in addition to interest is a claim for double compensation for a single loss. It was agreed that the entire of the purchase monies (save the amount to be reserved to deal with legal costs and outlay) was to be transmitted to Bank of Ireland. The plaintiff cannot identify any loss that he suffered other than the loss of the interest that he was charged by his bank, and he cannot show, for example, a loss of opportunity to use the money which might have generated a profit, as it was clear what was to happen to the purchase monies. The delay in closing caused the plaintiff one type of loss only, a loss in the form of the extra interest paid to his bank in the relevant period.

59. No argument is made that the interest provisions are a penalty, i.e. not a genuine attempt to agree a mechanism by which non-performance is to be calculated.

60. For these reasons, therefore I conclude that no claim for damages, other than by way of interest at the agreed rate, can arise in this case.

## **Conclusion**

61. There will be an award to the plaintiff for contractual interest in the sum of €162,939.