Neutral Citation Number: [2006] IEHC 54

THE HIGH COURT

2005 No. 288 SP

**IN THE MATTER OF A CONTRACT DATED 21ST NOVEMBER, 2002
MADE BETWEEN LAURETTE HEGARTY IN TRUST FOR HERSELF
AND JOSEPH HOGAN AS PURCHASERS
AND FUSANO PROPERTIES LIMITED AS VENDORS
AND IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874**

BETWEEN

LAURETTE HEGARTY AND JOSEPH HOGAN

PLAINTIFFS

AND
FUSANO PROPERTIES LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered 24th February, 2006.

1. The special summons in this matter issued on 1st June, 2005 and was returnable before the Master on 5th October, 2005. In the special endorsement of claim it was pleaded that, by a contract in writing dated 21st November, 2002, the plaintiffs agreed to buy and the defendant agreed to build and sell "new property therein described". The price was stated in the endorsement of claim to be £625,000 but that is patently an error and the reference should have been to €625,000. It appears from the documentation put before the court that the property in question is a third-floor apartment in Block A, now designated apartment 117, in the Smithfield Market development in Dublin 7.

2. Essentially, the plaintiffs pleaded two matters in the special summons. The first was that, notwithstanding that the property was not complete, the defendants had served a notice to complete. While the date of the notice to complete was not stated, it was a notice of 3rd May, 2005 from the defendant's solicitors to the plaintiffs' solicitors, which was served on 4th May, 2005. The plaintiffs claim a declaration that the notice to complete is invalid and of no effect. The other matter pleaded was that the defendant misrepresented "the quality of the appurtenances and services available" to the property, that the same is not worth the price contracted for it, or is worth substantially less than that price and is not worth the service charge demanded for it. It was pleaded that the defendant has refused to compensate the plaintiffs by reducing the price and the service charge. In respect of this matter, the relief which the plaintiffs claim is an order that the purchase price and the service charge be reduced by an amount sufficient to compensate the plaintiffs for the misrepresentation.

3. The evidence before the court discloses that the first named plaintiff paid a booking deposit of €5,000 for the property in September or October, 2002. The property was sold off the plans. At that time the first plaintiff was furnished with a brochure entitled "Smithfield Market Residential", which both physically and figuratively was a glossy production. The plaintiffs' case in relation to the misrepresentation of "the quality of the appurtenances and services available" to apartment 117 is founded on the first of a number of statements in the brochure under the heading "Focus on details" in the following terms:

> "*Concierge*
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> The development will have a concierge and extra security of a video entry facility in each apartment to allow residents to monitor visitors."

4. I note that the brochure contains a statement in the following terms:

> "These particulars and accompanying price list are issued strictly on the understanding that they do not form part of any contract. Measurements are approximate and maps are not drawn to scale. The builder reserves the right to make any alterations to the design and specifications in the interest of the overall quality of the development."

5. Neither side brought that provision to the court's attention, understandably, perhaps, because it is an example of "small print" in the physical sense. As the provision was not the subject of argument at the hearing, I place no reliance on it.

6. The contract dated 21st November, 2002 was in the form of the Building Agreement (2001 edition) and Contract for Sale (2001 edition) issued jointly by the Incorporated Law Society and the Construction Industry Federation. It was a combination of a building agreement and agreement for sale, which referred to the first plaintiff as the employer and the defendant as the contractor. The provisions of the contract which are relevant for present purposes are:

> · The definition of "the Works", which defined that expression as meaning the apartment specified on the agreed plan "together with such necessary works and services as may be necessary to render the apartment and premises reasonably habitable when completed".
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> · The definition of "the completion date", which provided for the earlier of two alternatives, the operative alternative for present purposes being "the date upon which the employer shall receive from the contractor a notice in writing that the works have been completed". Consistent with this definition, clause 12 of the building provisions provided that the contractor should fix the completion date by giving notice in writing to the employer of the completion of the works.
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> · The definition of "closing date", which was defined as being the day fourteen days after the completion date, as defined.
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> · In relation to the sale provisions, clause 27 provided that, save where excluded or amended by the Special Conditions therein, the General Conditions contained in the Incorporated Law Society of Ireland General Conditions of Sale (2001 edition) were deemed to be incorporated in the agreement. Neither side has put the relevant provisions of the General Conditions of Sale before the court. This omission is highly significant, because the notice to complete dated 3rd May, 2005 invoked General Conditions 40(d) and 41. There is no evidence before the court as to the content of those provisions.
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> · The following further provisions of the sale provisions were relied on by the defendant:

- Clause 9, which is headed "Warranties/Representations" and provided that warranties/representations not agreed by the contractor's solicitor in writing prior to signing should not form part of the agreement. The position of the plaintiffs is that this clause is of no relevance because they are not asserting that there was an oral warranty or representation in relation to the concierge; they are relying on the statement in the brochure.

- Clause 10, which is headed "Model/Brochure", in which the employer acknowledged that there might be modifications in the layout of the apartment block and the development from the model and/or from the brochure.

- Clause 17, which is headed "Right to alter development". The development is defined as meaning the development known as Smithfield Market, to comprise residential and non-residential units, including retail, cultural, office, public car park facilities, hotel, leisure, local authority and health board facilities as depicted for the purpose of identification only on plan 1 annexed to the contract. The essence of clause 17 is that the defendant reserved the right to alter the development or to discontinue the development "other than the property being sold", subject to obtaining planning permission.

7. I now propose to consider the evidence on affidavit which is before the court which is relevant to the issues raised on the special summons, namely, that the notice to complete was ineffective because the property which the plaintiffs had agreed to purchase was not completed, and that the plaintiffs are entitled to an abatement of the purchase price because of a misrepresentation of "the quality of the appurtenances and services available" to the property. In particular, at the hearing the plaintiffs did not pursue a complaint based on the advice of their "snagging engineer" that the apartment as completed is a fire hazard because the windows do not open sufficiently to provide a means of escape in case of fire, which was alleged to be in breach of the Building Regulations, an allegation which was vigorously disputed by the defendant. The plaintiffs did pursue an issue in relation to Land Registry file plans, contending that their absence impacted on whether the defendant was ready, willing and able to complete when the notice to complete was served. Even if this were of some relevance if the terms of General Condition 40 were before the court, the plaintiffs' solicitors asked for the file plans on 31st May, 2005, the day before the notice to complete was due to expire, and they were furnished with them on the same day. This is obvious from the correspondence put before the court, but the matter was not raised on the pleadings in any way and, in my view, is a "red herring".

8. The affidavit evidence before the court consists of:

(1) an affidavit sworn by the second plaintiff on 4th October, 2005, the day before the special summons was returnable before the Master and four months after it issued (the plaintiffs' first affidavit), a rather limp excuse being given for the affidavit not having been filed and served contemporaneously with the special summons;

(2) an affidavit of Joseph Linders, who averred that he is responsible for the general management of the Smithfield Market development, which was sworn on 1st November, 2005 (the defendant's affidavit); and

(3) a further affidavit sworn by the second plaintiff on 13th December, 2005 (the plaintiffs' second affidavit).

9. On the issue as to the effectiveness of the completion notice, in the plaintiffs' first affidavit the second plaintiff averred, by reference to a booklet of photographs, that the outside approaches to the apartment were still a "hard hat" building site, both on the date of the notice (3rd May, 2005) and the date of the purported forfeiture (1st June, 2005). He averred that he inspected the property on 1st June, 2005 and observed that the approaches were still a "hard hat" building site and there was still a "*Danger, Do Not Enter*" sign on a barrier blocking the principal entrance that had been displayed in that position for at least most of the month of May and well into June, 2005.

10. In the defendant's affidavit, Mr. Linders averred that around 1st June, 2005 some finishing works such as tiling and the laying of paving stones etc. were still going on around the entire development, including Block A, and, accordingly, it was necessary to direct access of people coming and going to apartments as and when such finishing works were going on. He acknowledged that this created a certain amount of inconvenience for residents and persons who had purchased units, but he averred that it did not amount to a situation where the apartment contracted for by the plaintiffs was not reasonably habitable by the date on which the completion notice took effect. He exhibited a photograph taken on 7th June, 2005 in the vicinity of Block A and averred that, far from being the "hard hat" area suggested by the plaintiffs at that time, the area was virtually completely finished. He suggested that the plaintiffs were disingenuous in that the photographs they put before the court were taken at various locations around the entire development, which did not reflect the real position around Block A.

11. In the plaintiffs' second affidavit the second plaintiff reiterated that at the time of the determination of the notice to complete on 1st June, 2005, there was no way of accessing apartment 117 without passing through a "hard hat" site. In reliance on the photographs which were put before the court, he averred that they show that from time to time there were no less than two tower cranes, a cherry-picker, various lifts, hoists, unprotected scaffolding, unmade ground, building materials and debris, and other typical hazards of a "hard hat" building site there, and that the position was much worse at the date of the service of the notice to complete (4th May, 2005). He averred that the work continuing in the area around Block A around 1st June, 2005, was of a far heavier nature than mere tiling and paving. He averred that the apartment was not reasonably habitable at either the date of delivery, or at any time up to the determination of the notice to complete, or indeed for a long period afterwards, as it was not possible to access the apartment safely, if at all. On this basis he averred that the vendor was not ready, willing and able to close the sale on 1st June, 2005.

12. Turning now to the misrepresentation issue, in the plaintiffs' first affidavit the second plaintiff averred that the plaintiffs were made aware of the location of the conciergerie. They took the reference to the concierge in the brochure to mean that the entry to apartment 117 would be through the conciergerie and that the plaintiffs would have the benefit of the security and services of a concierge, but they were not alerted to the contrary. In fact, the entrance to apartment 117 is from a street called "The Curved Street" or "Thundercut Alley". However, the post box for apartment 117 is in the conciergerie, at some distance from the apartment, involving a walking through the weather and the open air, which cannot be undertaken in a relaxed state of dress, or without protection from bad weather. The second plaintiff further averred that nothing in the brochure or in the documents available when the booking deposit was paid contradicted "the misrepresentation as to the entrance facility through the conciergerie". The plaintiffs have ended up without the security of a concierge and with an inconvenient walk outside in the open to the post box. The budget documentation in relation to the service charge furnished later made it clear that the plaintiffs would be paying an equal share of the €135,000 initially estimated as the cost of the concierge service, which misled them into thinking that they would have the benefit of the expenditure. The second plaintiff, without indicating what, if any, expertise he has in relation to valuing residential property, averred that apartment 117 is worth less than the price the plaintiffs contracted for. He further averred that, regardless of any effect on market value, the loss of value to the plaintiffs, by comparison with the apartment they thought they were buying is in their

estimation, of the order of 10% to 20% of the purchase price, that is to say, between €62,500 and €125,000. While acknowledging that the Curved Street is a "broad alley, built in a pleasing style" the second plaintiff averred that it contains many design features that would provide excellent hiding places for thieves and muggers and it is distant from the conciergerie and the security man for whom they will be paying.

13. In the defendant's affidavit, Mr. Linders averred that the provision of a central concierge facility in the development is to benefit occupants of residential units in all apartment blocks in relation to taking in of packages and general assistance. The plaintiffs will have the benefit of this service, as much as any other resident in the development and all the purchasers of apartments who contribute to the same via the service charge. A concierge is not a security guard. The development will have a security man on duty on a constant basis. Each apartment block, including block A, is equipped with a CCTV camera outside the main entrance, which is connected to the concierge's office, so that there is constant monitoring of the various blocks. Each individual apartment has a video facility which allows the occupant to monitor the entrance to the block. Mr. Linders further asserted that, insofar as the plaintiffs complain that the conciergerie depicted on the initial sales literature for the development was not in fact where they imagined it would be, they should have checked the position before signing the contract, so that the principles of *caveat emptor* apply. My understanding of the plaintiffs' complaint is not that the conciergerie is not where they imagined it would be but that apartment 117 is not accessed through it. Mr. Linders exhibited a valuation dated 24th October, 2005 from Hooke and MacDonald, Auctioneers, Valuers and Estate Agents, to the effect that the value of apartment 117 has increased since the plaintiffs contracted for it and the approximate likely sale price now is in the region of €715,000.

14. In the plaintiffs' second affidavit the second plaintiff contradicted some of the averments made by Mr. Linders in the defendant's affidavit: some only (Nos. 106 to 127), not all, of the apartments in Block A are accessed through the entrance on Thundercut Alley; there are three, not one, concierge areas servicing the seven residential blocks in Smithfield Market; and there is no CCTV security camera outside the door of Block A. The second plaintiff also suggested that the connection between apartment 117 and the conciergerie intended when the contract was signed has been altered because the connecting corridor has been "bisected by the extension of two apartments". It was suggested that this is apparent from a drawing put before the court by the plaintiffs. I have to say it is not apparent to me. Finally, the second plaintiff persisted in his contention that the value of apartment 117 to the plaintiffs is less by in the region of 10% to 20% because what they contracted to buy was an apartment "with the full amenity, including security protection, of a conciergerie".

15. The defendant raised a jurisdictional issue, contending that the plaintiffs were seeking to litigate matters which are outside the scope of what a vendor and purchaser summons is designed to deal with having regard to the provisions of s. 9 of the Vendor and Purchaser Act, 1874 (the Act of 1874).

16. Section 9 of the Act of 1874 set out first the jurisdiction of the English courts as follows:

> "A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incidental to the application shall be borne and paid."

17. Section 9 then went on to deal with the jurisdiction of the courts in Ireland as follows:

> "A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incidental to the application shall be borne and paid."

18. Under the Rules of the Superior Courts, 1986 a vendor and purchaser summons may be brought by way of special summons. The summons is grounded on affidavit, but a party may seek to cross-examine a deponent (Order 38, rule 3). It is of significance that in this case, which has thrown up a plethora of factual conflicts on the affidavits, neither side sought to cross-examine the other's deponent. Further, neither side suggested that this was an appropriate matter to go to plenary hearing.

19. The court was referred to the comprehensive commentary on vendor and purchaser summonses in Farrell on *Irish Law of Specific Performance* (Butterworths) at paras. 8.53 to 8.59 and the commentary on the same topic in Wylie on *Irish Conveyancing Law* (2nd Edition, Butterworths) at paras. 13.26 to 13.29.

20. I am satisfied that the court has jurisdiction to determine a question as to the validity of a notice to compete on a vendor and purchaser summons. Further, s. 9 expressly empowers the court to determine any claim for compensation on a vendor and purchaser summons. However, it is well settled that the claim for compensation must arise out of or be connected with the contract. As Farrell points out at para. 8.59, in principle, this would cover a claim for a declaration that a purchaser is entitled to compensation or an abatement of the purchase money by reason, for example, of the existence of a right of way, or a shortfall in the area of land sold. However, Farrell goes on to say that for a number of reasons there does not seem to be very much opportunity in practice for the use of s. 9 in relation to a claim for compensation. The reasons are: that standard contracts contain clauses likely to cover parties' rights in relation to misdescription and abatement and they are likely to have arbitration clauses; in the absence of a standard contract there is a greater chance of an issue "affecting the existence or validity of the contract", which would take the matter outside the scope of s. 9; and some English case law has distinguished between compensation and damages, the latter being outside s. 9.

21. It is notable that two of the authorities relied on by counsel for the parties were cases in which the vendor was relying on a condition which entitled him to annul the sale, if the purchaser persisted in an objection or requisition which the vendor was unable or unwilling to comply with (In *Re Terry and White's Contract* [1886] 32 ChD 14, cited by counsel for the plaintiffs; and *Re Molphy v. Coyne* [1919] 53 ILTR 177, cited by counsel for the defendant). For present purposes, those authorities go no further than to establish jurisdiction, which I am satisfied the court has. They are no assistance to the court beyond that, because this is not a case in which the defendant sought to rely on a condition of the type under consideration in them, the jurisprudence in relation to which is conveniently summarised in Wylie *op. cit*. at paras. 15.27 to 15.35 inclusive.

22. In relation to the issue as to the effectiveness of the notice to complete, the case made by the plaintiffs was that apartment No. 117 was not reasonably habitable either on 4th May, 2005, the date of service of the notice, or on the date of its expiry, 1st June, 2005, because it was not possible to access the apartment safely. It is not possible to determine whether the notice to complete was

effective or not having regard to the current state of the evidence for the following reasons. First, the court does not have evidence of all of the relevant contractual terms. The "completion date", as defined in the contract, relates to the completion of the works, that is to say the construction of apartment 117 together with such necessary works and services as may be necessary to render it reasonably habitable. The contract provides a mechanism for fixing the completion date (clause 12 of the building provisions). The closing date is defined as being fourteen days after the completion date. However, in the absence of evidence of the relevant general condition in relation to service of notices to complete after the closing date, which I assume are conditions 40 and 41 of the 2001 edition of the General Conditions, it is not possible to express any view on whether the notice to complete was properly served in accordance with the conditions invoked by the defendant. Secondly, and more importantly, there is a total conflict on the affidavits as to whether apartment 117, including the necessary works and services to render it reasonably habitable, had been completed either on 3rd or 4th May, 2005 or on 1st June, 2005. That conflict cannot be resolved. As I have stated, neither side saw fit to cross-examine the other side's deponent. For the foregoing reasons, it is not possible to find that the plaintiffs have established that the notice to complete was ineffective. On the other hand, that does not mean that it was effective.

23. Fortunately, the concierge issue can be dealt with more definitively. What the brochure stated was that the development would have a concierge. The court was referred to the definition of concierge in *The Concise Oxford Dictionary of Current English* (Clarendon Press, 9th edition, 1995), which gives one definition of concierge, especially in France, as "a door-keeper or porter of a block of flats etc.". What the brochure represented was that the development, which obviously means the residential development at Smithfield Market, would have a concierge. On the plaintiffs' own case the residential development has no less than three concierges. To that extent the representation has been fulfilled. The case being made by the plaintiffs on the basis of the statement in the brochure is that the defendant represented that apartment 117 would be accessed through the conciergerie. In my view, the statement in the brochure is not, on any reasonable construction, open to such interpretation. Even if one assumes that it was to be inferred from the entire statement that the concierge would be a security feature, the entire statement is not open to the construction that the plaintiffs seek to put on it. Therefore, in my view, the statement in the brochure was not a representation that apartment 117 would be accessed through the conciergerie. That, in my view, is a complete answer to the plaintiffs' allegation of misrepresentation.

24. If it were not, the court could not advance the matter any further on the current state of the evidence. It would not be appropriate to express any view on whether the alteration to the access to apartment 117 which the second plaintiff merely speculates may have happened would have been permissible under condition 10 of the building provisions in the contract. Finally, if the plaintiffs had established that there was a compensatable misrepresentation, I think it improbable that the measure of compensation provided by law for such a wrong is an injured party's subjective estimation of the value of the lost amenity to him, for example, the second plaintiff's broad brush estimation. However, no submissions were offered on the measure of compensation. Further, no evidential basis at all was laid for measuring an appropriate reduction in the service charge.

25. The plaintiffs have not established entitlement to any of the reliefs sought in the special summons and their claim is dismissed.