

THE HIGH COURT

2008 307 SP

IN THE MATTER OF THE VENDOR AND PURCHASER ACT 1874

AND

IN THE MATTER OF A CONTRACT FOR SALE DATED THE

14TH DAY OF SEPTEMBER 2006 MADE BETWEEN THE DEFENDANT VENDOR OF THE ONE PART AND THE PLAINTIFF PURCHASER OF THE OTHER PART FOR THE SALE OF PREMISES KNOWN AS

NO. 35 BEECHPARK WOOD, LEIXLIP, COUNTY KILDARE

BETWEEN

LIAM BYRNES AND MARIE NEYLON

PLAINTIFFS

AND

MEAKSTOWN CONSTRUCTION LTD.

DEFENDANT

JUDGMENT of Mr Justice Brian McGovern delivered on the 18th day of March 2009

1. The plaintiffs agreed to purchase an apartment at 35, Beechpark Wood, Beechpark, Leixlip, County Kildare, subject to contract and good marketable title.

2. In this Vendor and Purchaser Summons, the court is asked to determine the following issues:

(i) Was the evidence of easement provided by the Defendant through its Solicitors at the date of expiry of the completion notice dated 10th December, 2007, adequate to show good and marketable title to the right-of-way contracted for under the said agreement?

(ii) Was the Defendant in a position to show good and marketable title as of the date of expiry of the completion notice dated 10th day of December, 2007?

(iii) Were the plaintiffs entitled to rescind the said contract for sale dated the 14th September, 2006?

(iv) Are the plaintiffs entitled to the return of the deposit paid on foot of such contract in the sum of €16,000?

The Facts

3. On 14th September, 2006, the plaintiffs entered into a contract for sale with the defendant for the purchase of an apartment, namely, Number 35, Beechpark Wood, Beechpark, Leixlip, County Kildare. The contract price was €330,000 of which €16,000 was paid as a deposit. The usual pre-contract enquiries were made. These proceedings concern a right of way over County Council lands from a roadway to the land on which the apartment is situated. The plaintiffs' apartment is part of a large development. The development is on lands comprised in folio 40572F County Kildare, part of folio 1890. The development site did not have direct access to the public road, but when the lands were sold to the developer, the vendor purported to give a right of way from the roadway onto the lands across a strip of land now comprised in folio 47656F and 33451F County Kildare. Kildare County Council has been registered as full owner of folio 33451F since 27th November, 2002, and folio 47656F since 1st November, 2005.

4. The development site was originally sold by Mr. Michael Finnegan to Mr. Cormac Finnegan, Fionnuala Finnegan, John Finnegan, Peter Finnegan, Joseph Finnegan and Elizabeth Desjardins as "*the original purchaser*" and to Durkan New Homes Ltd., as the "*sub-purchaser*". A Deed of Transfer to that effect was completed on 17th February, 2003. Kildare County Council was registered as the full owner of the lands comprised in folio 33451F and 47656F of the Register of Freeholders, County Kildare, on 27th November, 2002, and 1st November, 2005, respectively. Thus, at all times since the plaintiffs entered into a building contract and contract for sale, Kildare County Council have been owners of the strip of land over which it was purported to give a right of way from the public roadway to the development.

The issue

5. The plaintiffs' solicitors raised pre-contract enquiries concerning the right of access to the property being sold. The plaintiffs maintained that the right of way offered was not a general right of way, but merely gave the developer the power to make a road from the public roadway to the development site. The contracts were returned to enable the vendor to furnish evidence of a right of way and the plaintiffs maintain that the vendor accepted the returned contracts

on that basis. Over a number of months, the correspondence continued to deal with the issue and the plaintiffs' solicitors were still asking for evidence of a right of way. As the matter had not been resolved by December 2007, the plaintiffs' solicitors served a completion notice on the vendor on 10th December, 2007. If one discounts Christmas Day, the notice expired on 8th January, 2008. Before the expiration of the notice, the vendor's solicitors, on 21st December, 2007, enclosed a deed of grant of right of way from Kildare County Council. This was a deed of confirmation in which the County Council consented to the registration of the deed as a burden on the lands concerned. The plaintiffs maintain that the granting of a right of way by the County Council over their lands was, in fact, a "disposition" and required a resolution of the Council which had not been obtained. In the circumstances, the plaintiffs rescinded the contract. The plaintiffs maintain that at all material times, they were ready, willing and able to complete the contract.

6. The defendant maintains that it has provided, within the twenty-eight day period of the completion notice, proper evidence of a right of way and that the plaintiffs are exploiting a downturn in the property market to contrive a situation where they can resile from the contract but that they are not entitled to do so.

The documents

7. In order to resolve the issues between the parties, it is necessary to look, in some detail, at the documents and the correspondence passing between them.

8. On 17th August, 2006, the plaintiffs' solicitors wrote to the defendant's solicitors raising certain pre-contract enquiries. Under the heading 'Title' the following paragraph appears:

"2.6 We refer to clause 3 in the Second Schedule in the said Deed of Transfer. We note that Durkan New Homes Ltd. was given the right to enter on that part of the retained property shown coloured yellow on the plan with workmen and others etc., to lay a road and what ever utilities may be required to provide services for the benefit of the sole (sic) land and any building thereon leading from the sole (sic) land over that portion of the retained property shown coloured yellow to and from the public road and services. As Stephen Manning, in his draft Declaration of Identity at paragraph 2(3) confirms that folios 40572F, 1889 and 12920 County Kildare abut directly on to the road way shown coloured yellow on the plan attached to the said Deed of Transfer dated 17th February, 2003, which abuts directly on to the public road, please confirm and furnish evidence that a general right of way was granted to Durkan New Homes, its Executors, Administrators and Assigns over that portion of the road way shown coloured yellow on the plan attached to the said Deed of Transfer which abuts directly on to the public road."

It is clear that the word "sole" where it appears in that paragraph should be "sold".

9. Clause 3 of the Second Schedule in the Deed of Transfer reads as follows:

"The right at any time within the Perpetuity Period and subject to compliance with the provisions of the local government (Planning and Development) Act, 1963 to date or as amended and on giving reasonable notice to the Vendor to enter onto that part of the Retained Property shown yellow on the Plan with workmen and others and all necessary vehicles, equipment and machinery at its own expense to lay a road and whatever of the Utilities as may be required to provide whatever of the Services as may be required by the Purchaser for the benefit of the Sold Land and any buildings erected thereon within the Perpetuity Period leading from the Sold Land over the portion of the Retained Property shown coloured yellow on the Plan to and from the public road and services."

On 18th March, 2006, this right of way or easement was registered as a burden on folio 1890 County Kildare. The vendor's solicitors replied on 22nd August, 2006, saying:

"Clause 3 is explicitly for the benefit of the sold land and the Buildings thereon which would allow the use of the roadways."

The plaintiffs' solicitors then wrote, asking the vendors to:

". . . furnish evidence that a general right of way was granted to Durkan New Homes, its Executors, Administrators and Assigns over that portion of the roadway shown yellow on the plan attached to the Deed of Transfer dated 17th February, 2003, which abuts directly onto the public road as evidence that it has the right to grant a similar right of way over the said area coloured yellow to the purchasers or properties within the above development."

10. By letter dated 14th September, 2006, the vendor's solicitors accepted the return of the contracts:

". . . conditional on our clients furnishing you with evidence of a right of way over the said roadway extending to the above property."

On 18th September, 2006, the plaintiffs' solicitors wrote to the defendant's solicitors asking them to furnish the evidence of a right of way as soon as possible and, in any event, prior to completion. The vendors replied, confirming that they would do so. On 4th December, 2007, the plaintiffs' solicitors wrote to the defendant's solicitors confirming that they were still awaiting evidence of the right of way and that letter was replied to on the same date as it appears the earlier letter had been sent by fax. In their reply, the vendor's solicitors stated:

"It transpires that the said area coloured yellow on the map attached to the 2003 Transfer is in fact in the ownership of Kildare County Council. The access road serving Beechpark has already been laid by our clients on the yellow lands in accordance with the planning permission and as provided for by the 2003 Transfer and is being used

by the public for access to and from Beechpark."

They also confirmed that the roads and services at Beechpark were to be taken in charge by the local authority. A copy of the folio showing the Council's title to the lands was produced and the vendors were informed:

"As this access road is already owned by the Local Authority, a Deed of Grant of Right of Way will not be furnished in relation to it."

11. The plaintiffs' solicitors replied saying that it was not sufficient to provide a copy folio showing Kildare County Council as the registered owner of this land and that this was not evidence of the right of way as requested by them and upon which the contract was made conditional. On 10th December, 2007, the vendor's solicitors wrote to the plaintiffs' solicitors confirming that the apartment which they were purchasing is comprised entirely within folio 40572F County Kildare, and that the property has the benefit of the easement contained in paragraph 3 of the Second Schedule of the 2003 transfer which granted the right to lay a road for the benefit of the sold land and any buildings erected thereon. They asserted that:

"The apartment, quite clearly therefore, has the right to benefit from the road by using it."

They also informed the plaintiffs' solicitors that the solicitors for other purchasers had accepted the position as outlined.

12. On 10th December, 2007, the plaintiffs' solicitors sent a notice of completion of the same date to the vendor's solicitors. This was a twenty-eight day notice and confirmed that the purchasers were ready, willing and able to complete the sale. On the following day, they sent a letter to the vendor's solicitors informing them that the evidence which had been offered as to the right of way was insufficient. On 21st December, 2007, the vendor's solicitors enclosed a copy Deed of Grant of Right of Way from Kildare County Council. The Deed stated *inter alia*:

"... the Council, as beneficial owner and as the party entitled to be registered as owner of the yellow lands, hereby confirms onto Durkan and for the avoidance of doubt, hereby grants onto Durkan for the benefit of the lands comprised in folio 40572F of the Register, County Kildare, and any buildings now or at any time within twenty-one years from the date hereof erected thereon full right and liberty for Durkan, its successors and assigns and its servants and agents, workmen, licensees, invitees, tenants and under tenants in common with the Council and all other persons who have or may hereinafter have the like right to pass and re-pass over the Yellow Lands leading to and from the lands comprised in folio 40572F County Kildare from and to the public road at all times by day and by night on foot and with or without motor vehicles."

The Deed also confirmed that the Council assented to the registration of the Deed as a burden on the yellow lands. "Durkan" referred to in the Deed was Durkan New Homes (formerly known as Durkan New Homes Ltd.).

13. On 3rd January, 2008, the plaintiffs' solicitors asked the vendor's solicitors to furnish a copy of the resolution of the Council authorising the grant of the right of way and/or Ministerial consent to the creation of the said easement in circumstances where no consideration has passed. In a reply of 4th January, 2008, the vendor's solicitors said that this was not necessary and that the Deed confirmed that the rights granted were existing rights and that the consideration is as expressed in the Transfer of 2003. On the same date, the plaintiffs' solicitors wrote again to the vendor's solicitors repeating their request and stating:

"We require a copy of the resolution of the Council authoring (sic) the granting of the said right of way. We do not understand your submissions that the Deed 'confirms that the rights granted were existing rights'. If such was the case, there would be no requirement for this Deed. However, the Deed has been furnished in response to our queries concerning the inadequacy of the prior grant as a grant of right of way. We had submitted, that contrary to your stated position, the prior grant did not grant a right to pass and re-pass over the lands coloured yellow contain (sic). This position was accepted by you and has resulted in the said Deed. The new Deed, accordingly, entails the grant of an easement not heretofore granted for no consideration expressed therein and, accordingly, the statutorily prescribed administrative procedures must be adhered to and we are entitled to seek proof thereof."

As the deadline for the expiration of the completion notice was expiring, the vendor's solicitors wrote again to the plaintiffs' solicitors on 7th January, 2008, stating that they never accepted that the 2003 transfer did not grant a right of way to pass and re-pass over the lands coloured yellow in respect of the units comprised in folio 40572 F. They admit that they accepted that the purchasers were entitled to insist on a grant being furnished in relation to units forming part of the adjoining folios, and since the purchasers would not accept the 2003 transfer, they agreed to furnish evidence of a right of way. They maintain that they have done this by furnishing confirmation by way of a Deed under Seal from the owner of the yellow lands that the grant in the 2003 transfer includes a right to pass and re-pass over the yellow lands. They therefore insisted on the purchasers completing the sale. On 8th January, 2008, the purchasers' solicitors maintained their position that the Council was obliged to comply with statutorily prescribed administrative procedures and that if they failed to do so, the Deed would be void. A letter was obtained from W.A. Osborne & Co., the solicitors to Kildare County Council, to clarify the position. This letter was dated 10th January, 2008, and was furnished by the vendor's solicitors to the purchasers' solicitors. The letter stated *inter alia*:

"The Deed of Confirmation of 21st December, 2007, between the Council and Durkan New Homes is not a disposal of land for the purposes of section 183 of the Local Government Act, 2001, or section 211 of the Planning and Development Act, 2000. The said Deed would amount to an agreement regarding the use of land as referred to at paragraph 4 of Schedule 15 of the Local Government Act, 2001, which said Schedule sets out the functions to be done by Managers Order. We enclose a copy of the Managers Order Number ES14740 of 20th December, 2007, in respect of same."

This was rejected by the plaintiffs' solicitors by letter date 11th January, 2008, in which they informed the vendor's solicitors that they had instructions to rescind the contract. They returned the documents and asked for the return of

the deposit.

14. On 16th January, 2008, the defendant's solicitors wrote to the plaintiffs' solicitors reiterating their position. In the course of the letter, they stated:

"It is clear from the foregoing that you are quite simply determined not to accept that a right of way exists, although it clearly does.

The events which have unfolded also indicate that you and your clients have since 10th December, being (sic) engaged in a cynical exercise to find a way out of this contract. Market conditions are now poor and when the opportunity presented itself to query the right of way, you wasted no time in serving a twenty-eight day Completion Notice demanding that evidence of a general right of way from the Council be furnished in the meantime. We did not challenge a right to do this but took you at face value and sought and obtained the required Deed. You then demanded a copy of the Council's Resolution and Ministerial Consent. On 8th January, you expanded this to seek also certified copy Notice to Councillors and certified copy minutes of the Council meeting. You would have been well aware that the various items you requested would have been most difficult to obtain in the twenty-eight day period which fell during the Christmas break. Now that you have been shown that those items do not apply, you simply refuse to accept the position."

The vendors indicated that they would be instituting proceedings for specific performance.

15. This is the background against which the court is asked to answer the questions posed in the Vendor and Purchaser Summons.

Legal issues

16. The legal issues can be summarised as follows:-

(i) What is the nature of the right of way in clause 3 of the Second Schedule of the Transfer dated 17th February, 2003?

It seems to me that it is quite clear in its terms. In an easement granted to the sub-purchaser, namely, Durkan New Homes Ltd. "its successors and its servants, agents, workmen, licensees, invitees, tenants and under-tenants", on giving reasonable notice to the vendor to enter upon the lands marked yellow with workmen and others and all necessary vehicles and equipment and machinery to lay a road and whatever utilities may be required to provide services for the benefit of the "sold land". The easement did not grant a general right of way, allowing people to pass and re-pass on foot and/or with vehicles.

Where a right of way is established for a particular purpose, it cannot normally be expanded into a different or broader purpose although such a broader purpose could be acquired over time by prescription. I hold that the purchasers were within their rights to reject this clause as evidence of a right of way to pass and re-pass along the newly laid road from the public roadway to the development site.

(ii) Is the Deed of Confirmation of 21st December, 2007, valid? If the Deed between Kildare County Council and Durkan New Homes is not valid, is this technical defect fatal to the creation of a right of way over the yellow lands? What is the effect of the confirmation being registered as a burden on the yellow lands?

The plaintiffs maintain that the Deed of Confirmation is invalid because the creation of the right of way amounted to a disposal of land requiring the formalities set out in s. 183 of the Local Government Act 2001, be complied with. The plaintiffs freely admit that the point they are taking is a technical one but that they are, nevertheless, entitled to rely on what is, in effect, a statutory requirement. If a conveyance does not mention the creation of easements expressly, they may be created by implication or on a true construction of the Deed. In this case, there was no general easement to pass and re-pass, but merely an easement granted to lay a roadway. In general, a grant will be construed in favour of the grantee and this can result in the creation of an implied easement, for example, an Easement of Necessity. It is quite clear that the plaintiffs cannot use their apartment without a right of way from the public roadway to the development site. If the developer owned the land surrounding the development site (including the marked yellow), then an Easement of Necessity would seem to arise. But the adjoining land is owned by a third party, namely, Kildare County Council. Therefore, I do not think an Easement of Necessity can arise in this case.

Gale on 'Easements' (16th Ed.) at para. 3-86, states:

"A way of necessity, strictly so called, arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained, is left without any legally enforceable means of access. In such a case, the part so left inaccessible is entitled, as of necessity, to a way over the other part."

The rule cannot apply to third parties who are the owners of adjoining land. Such third parties would have to give their consent to any right of way over their lands.

17. In this case, the vendors agreed to provide evidence of a right of way by means of the Deed of Confirmation. In order to determine whether or not the Deed of Confirmation provided sufficient evidence of a right of way, it is necessary to consider whether or not the granting of a right of way is a disposal of land by a local authority within the meaning of the Planning and Development Act 2000, and the Local Government Act 2001.

18. Section 183 (1)(f) of the 2001 Act, provides that a disposal (not being a demise for a term not exceeding one year) of land which is held by a local authority:

" . . . shall not be carried out otherwise than in accordance with paragraph (d) or (e) and subject to the consent of the Minister where consent is required under section 211 (2) of the Act of 2000."

Part XIV of the Planning and Development Act 2000, is concerned with the acquisition of land by local authorities for the purposes of its functions under that Act or any other enactment. Section 211 (1) of the Act states:

"Any land acquired for the purposes of or appropriated under this Act or any other Act or acquired otherwise by a local authority, may be sold, leased or exchanged, subject to such conditions as it may consider necessary where it no longer requires the land for any of its functions, or in order to secure -

(a) the best use of that or other land and any structures or works which have been, or are to be, constructed, erected, made or carried out on, in or under that or other land or,

(b) the construction, erection, making or carrying out of any structures or works appearing to it to be needed for the proper planning and sustainable development of its functional area."

19. It seems to me that neither s. 211 of the 2000 Act nor s. 183 of the 2001 Act, can be interpreted as including the granting of a right of way. It is interesting to note that in Gale on 'Easements' (16th Ed.) at para. 2-16, the author states:

"The grant of an easement is a 'disposition'."

In a footnote attached, a reference is made to the Law of Property (Miscellaneous Provisions) Act 1989, s. 2 (6) incorporating the definition in s. 205 (1)(ii) of the Law of Property Act 1925, which states:

"'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument except a Will; 'convey' has a corresponding meaning; and 'disposition' includes a conveyance and also a devise, bequest, or an appointment of property contained in a Will; and 'dispose of' has a corresponding meaning;"

20. Section 2 of that United Kingdom Act requires that a contract for the sale or other disposition of an interest in land can only be made in writing and sub-section (6) states:

"In this section-

'Disposition' has the same meaning as in the Law of Property Act 1925;

'Interest in land' means any estate, interest or charge in or over land or in or over the proceeds of sale of land."

What these sections, taken together, seem to mean is that where a grant of an easement is made by agreement, it must be done in writing. But it does not, in my view, mean that the grant of an easement is a disposal of land by a local authority within the meaning of the Planning and Development Act 2000, or the Local Government Act 2001.

21. In a letter of 10th January, 2008, the solicitors for Kildare County Council stated that the Deed of Confirmation of 21st December, 2007, between the Council and Durkan New Homes was not a disposal of land for the purposes of s. 183 of the Local Government Act 2001, or s. 211 of the Planning and Development Act 2000. I believe that was a correct statement of the position. The solicitors for the County Council then stated:

"The said Deed would amount to an agreement regarding the use of land as referred to at paragraph 4 of Schedule 15 to the Local Government Act 2001, which said Schedule sets out the functions to be done by Manager's Order."

They enclosed a copy of the Manager's Order of 20th December, 2007, in respect of that matter. Schedule 15 to the 2001 Act sets out the functions to be done by Manager's Order and they include:

"4. The acquisition or disposal of land or an agreement regarding the use of land."

These functions are delegated by s. 151 of the 2001 Act which provides that the manager shall, in carrying out the executive functions of each local authority for which he or she is manager, act by a written order signed and dated by him or her in respect of the functions to which this section applies. The section applies to every executive function which is mentioned in Schedule 15. The County Manager's Order was signed on 20th December, 2007, and on the following day, the Deed of Confirmation was executed. In that Deed, the Council assented to the registration of the Deed as a burden on the yellow lands. It is clear that as of that date, the plaintiffs knew that the County Council was confirming:

" . . . the right to pass and re-pass over the Yellow Lands leading to and from the lands comprised in folio 40572F County Kildare from and to the public road at all times by day and by night, on foot and with or without motor vehicles."

The County Council also assented to the registration of the Deed as a burden on the yellow lands. In those circumstances, the County Council could not have refused the purchasers the right to enter and leave their premises across the yellow lands, either on foot and with or without motor vehicles. At the very least, the County Council would

have been estopped from preventing the plaintiffs from doing so. But the plaintiffs also knew that the Council was assenting to the registration of the Deed as a burden on the yellow lands. The right of way was registered as a burden on folio 33451F on 29th January, 2008, after the expiration of the twenty-eight day period in the completion notice. The effect of the registration of the burden was to make it a legal interest in the land enforceable against all owners of the land as long as it remained on the Register. The Register is conclusive evidence of any burden appearing thereon. See s. 31 of the Registration of Title Act 1964.

22. In this case, the defendants argue that by furnishing the Deed of Confirmation it amounted, in effect, to the giving of an undertaking with regard to the right of way and that it is common to accept undertakings to be discharged at a later date. The Deed of Confirmation and the Council's assent therein to the registration of the Deed as a burden on the yellow lands gave the purchasers the assurance they needed that they had a right of way and that this would be registered as a burden.

23. I conclude, therefore, that the plaintiff has received sufficient assurances concerning the right of way and evidence of the right of way before the expiration of the Completion Notice.

24. Accordingly, I answer the questions posed in the Special Endorsement of Claim as follows:

(i) Yes

(ii) Yes

(iii) No

(iv) No