

**THE HIGH COURT**  
**COMMERCIAL**

**2008 1767 P**

**BETWEEN**

**ADRIAN O'CONNOR**

**PLAINTIFF**

**AND**

**JOSEPH MCNAMARA**

**DEFENDANT**

**JUDGMENT of Mr. Justice Brian McGovern delivered on the 24th day of April, 2009**

1. This is an action for the dissolution of a partnership and for an order for specific performance of a dissolution agreement dated 4th July, 2007. The defendant has delivered a defence and counterclaim, seeking a declaration that the said agreement of 4th July, 2007, is null and void and of no effect. The defendant also claims damages for breach of contract and misrepresentation.

**Facts**

2. The plaintiff and the defendant were formerly business partners in property development. They met in January 2006. In their business partnership, they acquired the following assets:-

- (i) A 75% beneficial interest in lands situated at Tuam Road, County Galway, and comprised in folio 29362 County Galway;
- (ii) lands at Barna, County Galway, comprising approximately 1.6 acres, and
- (iii) premises known as No. 17, William Street West, Galway.

3. Differences arose between the parties early in 2007, and in April of that year, they decided to dissolve the partnership. For that purpose, they entered into written dissolution agreement on 4th July, 2007 ("the agreement").

4. Under the terms of the agreement, the three properties were referred to. The interest of a Mr. Michael McPhilips was recorded as being 25% of the site at Castlegar, Tuam Road, Galway.

5. The agreement provided, *inter alia*, as follows:

*"(a) Adrian O'Connor agrees to transfer, assign and assure all his rights, title and interest to the site at Castlegar, Tuam Road, Galway, to Joseph McNamara, subject to the said Joseph McNamara accepting full responsibility for all encumbrances thereon, whether in the nature of title and/or charge, and, in particular, all monies owing and due to Ulster Bank Ltd. on foot of a first legal charge for circa €6 (six million euro) plus interest and with the full knowledge and cognisance of the 25% shareholding in the said property by Michael McPhilips, and, furthermore, the possible rights and title of the Cullinane family who are registered to a portion of the said lands.*

*(b) Joseph McNamara to transfer, release, assign and assure all his rights, title and interest in the properties situate at Barna, County Galway, and William Street, Galway, over unto to the said Adrian O'Connor, absolutely, but nevertheless, subject to all encumbrances thereon by way of title or charge and, in particular, responsibility for the charge over the Barna Site in favour of Ulster Bank Ltd. circa in the region of €2.2 (two million and two hundred thousand euro) plus interest and, furthermore, in particular, the charge over the site at Williams Street in favour of Anglo Irish Bank Corporation Plc. circa €1.2 (one million and two hundred thousand euro) plus interest."*

6. Under the terms of the agreement, the parties agreed that they would arrange their own finance and security in respect of the acquisition of the properties to be transferred and would complete the necessary transfers, deeds of assurance and all ancillary documentation within four weeks from the date of the agreement.

7. The agreement further provided that both parties would bear;

*"... equally, the interest and charges accumulated on the said three properties until completion."*

In the event of either party defaulting and failing to complete within the four week time limit provided in the agreement, the defaulting party was to be responsible for all interest accumulated on the three properties until completion, and in the event of both parties defaulting and failing to complete on the appointed date, the parties were to continue to be responsible, equally, for the interest on all three properties which would continue to be their joint and equal responsibility, until such time as either party cured their default and was in a position and was ready, willing and able to complete. In that event, the continuing defaulting party would assume responsibility for all interest on all three properties until that party was ready, willing and able to complete.

8. Under the terms of the agreement, the plaintiff, as part of the settlement of the partnership affairs between him and the defendant, agreed to pay and discharge the sum of €127,729, representing the balance of monies due to Econ Developments Ltd., in which the defendant is the proprietor. This was for construction works carried out to the premises at William Street. The plaintiff was to discharge this sum before Friday 13th July, 2007, failing which, interest would accrue on the sum at the rate of 1% calendar month or part thereof computed as simple interest.

## Evidence

9. The plaintiff and the defendant each gave evidence. There were no other witnesses. Each of the parties adopted their witness statements. The plaintiff said that his intention was to have a long term partnership with the defendant. Both of them had other interests as well. They each had other interests independent of the partnership. The plaintiff said that after the acquisition of the William Street premises, he was not inclined to make further investments. The defendant had enquired if he was interested in investing in two further sites on the Tuam Road and he informed him that he was not interested in getting involved. The defendant was not happy with that response and there was also some disagreement over a site in Athy, County Kildare. The plaintiff got a telephone call from the defendant to meet him at a licensed premises in Galway with Mr. Pdraig Audley, the defendant's project manager. In the course of that meeting, the plaintiff told the defendant that he wanted to split the properties which they had purchased in the course of their relationship and a discussion took place as to how the properties would be split up. The defendant told the plaintiff that he could take William Street and Barna "warts and all" or, as he said in his witness statement, "nuts and bolts", and the defendant agreed to keep Tuam Road on the same basis. There was some dispute between them subsequently as to what had been agreed and eventually the parties met Mr. Keane, a solicitor, to finalise the matter. Mr. Keane prepared the dissolution document and both parties signed it. It was agreed that they would contact their respective banks and proceed to comply with the terms of the agreement as soon as possible. At the meeting to finalise the arrangements, the plaintiff and defendant were present with Mr. Peter Keane and Mr. Patrick Keane, solicitors. The plaintiff explained to those attending the meeting that the defendant had contacted him and explained that he needed his interest in William Street finalised and transferred to the plaintiff before he could proceed with the rest of the agreement. The plaintiff informed the defendant that he was accepting his word and was prepared to proceed with the purchase of his interest in William Street and to take over the debt of €1,361,641. The plaintiff duly completed the purchase of the defendant's interest in William Street. The plaintiff also informed the Ulster Bank and Anglo Irish Bank of the deal which they had reached. The banks' solicitors informed the plaintiff that they were waiting on documents from the defendant. The defendant complained to the plaintiff about delays in the transfer of William Street and told the defendant he needed this deal to be completed. The plaintiff said that he was proceeding to carry out his side of the agreement as fast as he could but that there were delays with the banks. Eventually, he effected the transfer. Correspondence from the plaintiff to the defendant by way of email and fax was opened in court which establishes that the plaintiff was trying to get the defendant to complete his side of the agreement. It also suggests that the plaintiff warned the defendant that he would apply to the court for specific performance if he did not do so. The plaintiff claims that he only received one reply to all this correspondence which was a letter of 22nd January, 2008, from the defendant's company, Econ Developments, which stated:

*"As you did not fulfil your part of the above mentioned agreement, in accordance with what was agreed at the time, this agreement is now null and void and must be renegotiated. In this regard, please revert to me as soon as possible or, alternatively, please nominate a solicitor with whom I can communicate in relation to this."*

10. Under cross-examination by the defendant, it was put to the plaintiff that he knew that the defendant had put up a property in Achill as security for the William Street loan and that he needed this released within the four-week period specified in the agreement. The plaintiff said that he did not know how important it was and had never been told. He was never made aware that the issue of the release of the Achill property, as security, was paramount or a fundamental term of the agreement.

11. The defendant gave evidence and said that he had put everything he had into the property transactions and that if the Achill property had been released as security, it might have meant that he could have got the finance to fulfil his side of the agreement. He claimed not to be an experienced businessman. He adopted his witness statement. In that statement, he asserts that he had to put up a house in Achill as security for the William Street transaction, and that the house was valued at €750,000 at the time. His principal argument in his defence was that the agreement which dissolved the partnership was drawn up on the basis that all matters referred to in it were to be completed within four weeks of the date on which it was signed, namely, 4th July, 2007. In particular, he says that his property in Achill was to be released within the four-week period and that this was of crucial and fundamental importance to him and that the plaintiff was aware of this. As a consequence of the failure to complete the arrangements within the four-week period, the defendant said that he wished to renegotiate the agreement. When the plaintiff re-mortgaged the property in William Street West, the defendant claims he did not benefit from this other than having his house in Achill released. This occurred months later than the date on which it was due to occur under the termination agreement. The defendant complains that by the time the Achill property was released in November 2007, the market had changed and the property did not provide sufficient security for him to obtain the finance to complete the deal for which he had previously received verbal approval. But, it seems that he needed the Achill property, not only to complete his part of the agreement, but also to secure finance to cover his liabilities on other commitments including the site on Tuam Road. This appears clear from his evidence.

## Findings on the evidence

12. I am satisfied that at the time the dissolution agreement was entered into on 4th July, 2007, the defendant had not informed the plaintiff of the significance of the Achill property and having it released within a four-week period. I accept the evidence of the plaintiff that he was never aware of the significance of this. The defence and counterclaim delivered by the defendant makes no mention of the Achill Island property. In paragraph 5 of the defence and counterclaim, he refers to a security on a property at Munster Avenue, Galway City, and that this was to be released within four weeks from the date of the dissolution agreement. It may well be that this was an error and should have referred to the Achill property because it is clearly referred to in the witness statement of the defendant and was given great prominence in his evidence. Insofar as there was a conflict of evidence on this issue, I prefer the evidence of the plaintiff and hold that he was not aware of the significance of the Achill property and the necessity to ensure that it could be released as security within a period of four weeks.

## The law

13. In his legal submissions, the plaintiff argues that time was not of the essence in the dissolution agreement. The defendant argues that it should be considered of the essence and that it was necessary to give business efficacy to the transaction. In *Trollope & Collis Ltd. v. Northwest Metropolitan Hospital Board* [1973] 2 All ER 260, at 267-268, Pearson L.J. said:

*"An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties, as reasonable men, if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, is part of the contract the parties made for themselves."*

In *Tramways Advertising Pty. Ltd. v. Luna Park (NSW) Ltd.* [1938] 38 S.R. (N.S.W) 632 at 641, Jordan C.J. said:

*"The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term, or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be,*

*and that this ought to have been apparent to the promisor."*

The question of whether or not stipulations as to time may be disregarded, may be implied from the nature of the subject matter or the circumstances of the case which could lead to the conclusion that the parties intended time to be of the essence, even though they did not say so (see *United Yeast Company Ltd. v. Cameo Investments Ltd.* [1975] 111 I.L.T.R. 13).

14. The law of equity does not treat contractual time limits in an agreement as being of the essence unless the parties to the agreement have expressly so agreed or unless one of the parties to the agreement has made time of the essence. This was acknowledged in *Hynes v. Hynes* in the judgment of Kenny J. Unreported, 21st December, 1984. In *Hopkins v. Geoghegan* [1931] I.R. 135 at 139, Johnston J. stated:

*"Where time is not made of the essence of a contract by the contract itself, although a day for performing it is named, of course, neither party can strictly make it so after the contract; but, if either party is guilty of delay, a distinct note is written by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named, will be treated in equity as binding on the party to whom it is given."*

## **Conclusion**

15. I am satisfied, on the evidence, that the defendant did not make time of the essence in this case and that the plaintiff was not aware of the significance to the defendant of the Achill property and having it released as security within the four-week period. The plaintiff has completed his part of the agreement, albeit outside the four-week period. He has released the defendant from his liabilities to Anglo Irish Bank Corporation plc. in the manner provided for in clause 3(b) of the agreement. He has also paid the sum of €127,791 to Econ Developments Ltd., being the balance of monies due to that company in respect of works carried out by them to the premises at No. 17, William Street West, Galway. The defendant, for his part, has, in accordance with clause 3(b) of the agreement transferred, assigned and assured all his rights, title and interest in No. 17, William Street West, Galway, to the plaintiff by an indenture dated 10th October, 2007. There is, therefore, part performance of the agreement by both the plaintiff and the defendant.

16. The defendant is not entitled to claim that the agreement is null and void and of no legal force or effect. It appears that he has failed to complete his part of the agreement because of the downturn in the property market. The defendant has not claimed that he is unable to complete the agreement.

17. Having considered the evidence and the legal submissions, I hold that the plaintiff is entitled to an order for specific performance of the dissolution agreement by the defendant and a declaration that the partnership was dissolved by the agreement of 4th July, 2007. By fax message of 26th November, 2007, the plaintiff notified the defendant that he had until Friday 30th November, 2007, to comply with the terms of the agreement. That fax message appears to make time of the essence of the contract and the defendant will be liable to pay interest in accordance with the terms of the agreement from 30th November, 2007.