Neutral Citation Number: [2009] IEHC 305

THE HIGH COURT

COMMERCIAL

2008 8910 P

BETWEEN

ADRIAN MURPHY AND SEÁN MACKIN

PLAINTIFFS

AND

TOM RYAN, GERARD MCGREEVY AND

MCGREEVY ENTERPRISES LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 24th day of June, 2009

Introduction
The plaintiffs claim specific performance of a contract which they entered into with the first and second defendants on 25th May, 2008. The contract provided for the sale by the plaintiffs of lands at Mullingar, County Westmeath to the first and second defendants for a purchase price of €16,500,000. The third defendant is joined in the proceedings as the guarantor of the payment obligations undertaken by the first and second defendants.

The background to the case is unusual. One of the more extraordinary features of it is the admission by the second defendant that he signed the contract in suit to help his friend the first defendant and without having seen the lands or indeed ever having been in Mullingar in his life.

Background
On 19th July 2006, the plaintiffs and the first defendant entered into a contract for the sale of the lands in suit for a purchase price of €18,000,000. The first defendant failed to honour his obligations on foot of that agreement and specific performance proceedings ensued. On 10th December, 2007 the court was informed that those proceedings had been settled. That settlement was not honoured. Consequently, on 11th February, 2008 the plaintiffs obtained a decree for specific performance of the contract of 19th July, 2006.

Notwithstanding that decree, negotiations continued between the parties and the second defendant, who is a friend of the first defendant, arrived on the scene. These negotiations resulted in a further agreement being entered into on 25th May, 2008.

The May 2008 Agreement
Under the terms of this new agreement, the parties agreed to rescind the contract of 19th July, 2006 with the deposit of €900,000 which had been paid thereunder being forfeited to the plaintiffs. A further contract for the sale of the property between the original parties but with the addition of the second defendant was executed. The original proceedings were, by consent, struck out and all orders made therein vacated.

The New Contract for Sale
On the same date (25th May, 2008), a new contract for the sale of the land was entered into between the plaintiffs and the first and second defendants. The contract contained twelve special conditions and incorporated the Law Society of Ireland General Conditions of Sale 2001 edition.

On this occasion, the purchase price was reduced from the original €18,000,000 to €16,500,000. Unusually, a deposit of just €400,000 was provided for in this contract. The remainder of the purchase price was to be paid in two tranches. The first, the sum of €12,100,000 was to be paid on Friday, 25th July, 2008. That is also the date which was described as the '*closing date'* in the contract. The remainder, a sum of €4,000,000, was to be paid on Thursday 25th September, 2008. These payment terms were contained in special condition 10.

The first and second defendants agreed to procure the obtaining of a valid and effective written guarantee from the third defendant guaranteeing payment of all sums due under the contract.

As the title to the lands was by then well known to the defendants, special condition No. 9 of the contract expressly acknowledged that replies to requisitions had been furnished, were confirmed by the plaintiffs and the defendants accepted that they would raise no further requisitions in relation to the lands.

Condition No. 11 provided as follows:-

> *"It is acknowledged that both the purchaser, Gerard McGreevy and Tom Ryan are jointly and severally liable for payment of all sums due under this contract. Title documents will be handed over on payment of €12,100,000 and this contract will remain valid and effective as regards the balancing payment of €4,000,000 and the purchaser shall in addition, as further security procure a valid and effective written guarantee from McGreevy Enterprises Limited complying with all Company Act (sic) Legislation in order to guarantee payment of all sums due under this contract. In this regard, Gerard McGreevy in his capacity also as Director of McGreevy Enterprises Limited and*

duly authorised officer on behalf of the Company, hereby agrees that McGreevy Enterprises Limited will provide said guarantee. In the event the sums due herein are not paid on time on the payment dates referred to, interest will accrue at the contract rate from the date the payment was due and the vendor shall be at liberty to refuse to complete if such interest is unpaid on the date of any late payment of the said principal sums."

Given the previous history, it is probably not surprising that yet again there was a failure to comply with the terms of this new contract. The €12,100,000 due to be paid on 25th July, 2008 was not paid. On that date, a letter was written to the defendant's solicitors confirming that if the funds were not received on the due date, a notice to complete would be served on 30th July. The letter pointed out that it should not be construed as an extension of the completion date but rather as a gesture of good will. It did not produce any result and so a completion notice was served.

The Completion Notice
On 30th July, a completion notice in the following terms was served on the defendant's solicitors. It read:-

"Completion Notice

Vendors: Adrian Murphy and Seán Mackin

Purchasers: Tom Ryan and Gerard McGreevy

Premises: Lands at Ardmore Road, Co. Westmeath

In respect of the premises known as part of the lands at Ballinderry, barony of Moyashel, and Magheradernon in the County of Westmeath together with other premises being the premises more particularly described in memorandum of agreement dated 25th day of May, 2008 made between Adrian Murphy and Seán Mackin (the vendors) and Tom Ryan and Gerard McGreevy (the purchasers) NOTICE is hereby given by the vendors that the vendors are ready, willing and able to complete the sale in accordance with the conditions contained in the said agreement dated 25th day of May, 2008. NOTICE is hereby further given by the vendors that the vendors require the sale to be completed in accordance with the conditions in the said agreement and the vendors hereby call on the purchasers to complete the sale within a period of 28 days after the date of service of this notice and in respect of such period time shall be of the essence of the said agreement. The vendor hereby fully claims interest at the rate specified in the said agreement.

Dated this 30th day of July, 2008"

The completion notice was not complied with and these proceedings were commenced on 30th October, 2008.

The Trial
Neither plaintiff gave evidence. The sole testimony for the plaintiffs was given by their solicitor Catherine Allison. The defendants did not contest the existence of either the contract in suit or the guarantee given by the third named defendant. Neither did they dispute the history of events leading up to or indeed subsequent to the execution of the contract of 25th May, 2008 which I have already outlined in this judgment. Although the plaintiffs were put on proof of various documents, there was in fact no challenge to the validity of the contract or the service of the notice to complete.

During the course of the hearing of evidence and the subsequent submissions it became clear that the case was sought to be defended on two bases only.

The first issue raised was as to the validity of the completion notice of 30th July, 2008. The second was an invitation to the court to decline, on equitable grounds, to enforce the contract. I will consider each of these in turn.

The Completion Notice
The defendants contend that the plaintiff's claim is premised on the basis that a valid completion notice was served on 30th July, 2008 and by its terms expired on 28th August, 2008. The defendants argue that the completion notice was premature because the closing date of the contract was not Friday, 25th July, 2008 but rather Thursday, 25th September, 2008. They allege that where special condition No.11 speaks of *"title documents will be handed over on payment of €12,100,000"*, it is qualified by the proviso that *"this contract will remain valid and effective as regard the balancing payment of €4,000,000".* They call particular attention to the concluding sentence of special condition No. 11 which reads:-

"In the event the sums due herein are not paid on time on the payment dates referred to interest will accrue at the contract rate from the date the payment was due and the vendor shall be at liberty to refuse to complete if such interest is unpaid on the date of any late payment of the said principal sums."

The defendants argue that the completion notice was invalid because it called on the defendants to complete the sale within 28 days when they had no legal obligation to do so. The act of handing over title documents, they argue, is not the same as completion of the sale. The completion notice does not limit itself to calling upon the defendants to pay the outstanding €12,100,000 which had fallen due on 25th July, 2008. It unilaterally sought to vary the terms for payment.

Finally, the defendants point out that whilst the contract refers to a closing date of 25th July, 2008 such cannot be reconciled with general condition 24(a) which requires the sale to be completed and the balance of the purchase price paid by the purchaser on or before the closing date. Fortification for this argument they say is also to be found in clause 24(c)(iv) of the general conditions which requires completion to take place at the office of the vendor's solicitor when that solicitor has *"received the balance of the purchase price"*. The balance of the purchase price would remain outstanding on 25th July, 2008 to the tune of €4,000,000.

In response, the plaintiffs call attention to special conditions 1 and 2 of the contract. Special condition 1 provides as

follows:-

> *"Save were the context otherwise requires or implies or the text hereof expresses to the contrary, the definitions and provisions as to interpretation set forth in the within General Conditions shall be applied for the purpose of these Special Conditions."*

Special condition No. 2 provides:-

> *"The said General Conditions shall:-*
>
> *(a) apply to the sale in so far as the same are not hereby altered or varied, and these Special Conditions shall prevail in case of any conflict between them and the General Conditions.*
>
> *(b) be read and construed without regard to any amendment therein, unless such amendment shall be referred to specifically in these Special Conditions."*

Special condition No. 3 expressly incorporates the 2001 Edition of the Law Society of Ireland General Conditions of Sale into the contract subject to the proviso that if there is any conflict between the special conditions and the general conditions, the special conditions shall prevail.

The plaintiffs point out that the closing date shown on the face of the contract is unequivocally 25th July, 2008. Insofar as general condition 24(a) speaks of the sale being completed and the balance of the purchase price paid by the purchaser on or before the closing date, it is modified by the provisions of special condition No. 11. That special condition modifies the general condition to the extent that the whole of the purchase money is not required to be paid on the closing date but leaves a balance of €4,000,000 outstanding to be paid at a later date. This is, in effect, a concession being granted by the plaintiff to the defendants but does not absolve the defendants having to close the sale on 25th July, 2008 by the payment of the €12,100,000 then due.

Conclusions on Completion Notice
I have to interpret the contract so as to attempt to ascertain the intention of the parties to it.

In *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, Geoghegan J. quoted with approval, the observations of Lord Hoffman in *I.C.S. v. West Bromwich B.S.* [1998] 1 WR 896 in which that judge said as follows:-

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
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> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
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> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
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> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax;*
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> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:*
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> > *'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."*

In the present case, the court has been given little or no evidence beyond what I have reproduced in this judgment as to the matrix of facts surrounding the contract in suit. As I have already pointed out, none of the plaintiffs gave evidence and the only evidence for the defence came from the second defendant and almost exclusively dealt with the second point raised by way of defence i.e. the inappropriateness of specific performance as a remedy.

I have to attempt to ascertain the intention of the parties from the agreement that they have executed in the light of the previous history of their transactions.

On a fair and reasonable interpretation of the contract, I have come to the conclusion that the completion notice was a valid one. I so conclude for the following reasons:-

(1) The closing date of the contract was unequivocally specified as being 25th July, 2008.

(2) The fact that special conditions 10 and 11 did not require the entire of the purchase monies to be paid on 25th July, 2008 did not alter the closing date as specified.

(3) Special condition No. 11 required that the title documents be handed over on payment of the €12,100,000 on 25th July, 2008. Insofar as that may be said to be inconsistent with general conditions 24(a) or 24C(iv) then clearly the special condition takes precedence.

(4) The fact that €4,000,000 remained to be paid after 25th July, 2008 and did not fall due until the 25th September was in ease of the defendants and cannot now be utilised as an argument as suggesting that the closing date of the contract was that later date.

It follows that in my view the completion notice was properly served.

Even if I am wrong in the view that I have formed and the closing date was in fact 25th September, 2008 that would not preclude the plaintiffs from succeeding in their attempts to enforce the contract. I come to that conclusion having regard to the decision of Megarry J. (as he then was) in *Woods & Anor v. MacKenzie Hill Limited* [1975] 2 All E.R. 170). He said:-

> *"I do not for one moment think that the inclusion of express provisions for completion notices, as now contained in both the Law Society's conditions and the National Conditions of Sale, has the effect of excluding the contractual obligation to complete on the date fixed for completion, or within a reasonable time thereafter. In my judgment, such provisions add to the remedies available against a defaulting party without driving out the existing remedies, or altering the existing structure…I wholly reject any notion that the contractual completion date has lost its potency and that the service of a completion notice is now a prerequisite to the enforcement of any contract which contains provisions enabling such notices to be served."*

As these proceedings post date 25th September by a period in excess of a month, the plaintiffs are entitled to enforce the contract.

Specific Performance
The defendants contend that I ought not to grant a decree of specific performance. They refer to evidence given by the plaintiff's solicitor to the effect that the first defendant was considered to be a "*front*" for the second and third defendants at all times and therefore an order for specific performance as against him would be of no value.

Insofar as the second defendant is concerned it is said that the order should not be made against him because he is not in a position to perform the contract. He contends that at the time the contract was entered into, all parties were aware that finance was not immediately available. In this regard, I note that the contract is not conditional on finance being obtained.

The defendants also point out that the second defendant has sought to raise finance but could only do so in the sum of €12,000,000 through his construction company granting charges over a wide range of properties in addition to the property in sale and furthermore, by granting the lending institution a lien of a minimum of GB£3,000,000 held by his company called G. McGreevy Construction Limited with that bank.

The loan offer was put in evidence before me. It emanated from Bank of Ireland in Belfast and offered the third defendant €12,000,000 to assist in funding the purchase of the lands in suit. The offer replaced an earlier one for €14,200,000 dated 2nd December, 2008. The offer is indeed conditional upon charges being granted over a wide range of properties and also to the granting to the bank of a lien over GB£3,000,000 on deposit by G. McGreevy Construction Limited with that Bank. The second named defendant submits that he has shown a commitment to bear the burden of what his counsel has described as an onerous contract but is unable to raise sufficient funds to perform it. There is no evidence that he sought to obtain funds personally.

The plaintiffs contend that there is no basis upon which the court ought to refuse the equitable remedy of specific performance. They quote from the late Mr. John Farrell's book on *Specific Performance* and in particular para. 1.06 which states:-

> *"Specific performance is an equitable remedy and as such it is discretionary. It is well established that the discretion to grant specific performance should not be exercised if the contract is not equal and fair. Courts of equity have long applied the principle that specific performance should not be granted unless it appears that the party who seeks that particular relief has acted, not only fairly, but 'in a manner clear of all suspicion'. The jurisdiction to grant specific performance has been described as delicate and to be exercised with discretion and care. The relief may be withheld as an exercise of that discretion even when a plaintiff proves a valid contract and no specific defence of any of the types discussed later is established."*

The learned author quotes from the judgment of Finlay C.J. in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166 where he said:-

> *"Discretion to grant or refuse the relief will be exercised in a manner which is neither arbitrary nor capricious but which has regard to the essential fairness of the transaction involved."*

Later in the work at para. 9.01, Mr. Farrell states:-

> *"In ordinary cases where the remedy is available justice is better done by carrying out the contract then by awarding damages. The normal rule is for the court to grant specific performance of a contract for the sale of land and in such a case the onus is on the defendant of establishing a ground or grounds upon which the relief*

should be refused."

This approach has been followed and approved of by Smyth J. in *Mount Kennet Investments Limited v. O'Mara* [2007] IEHC 420 and by Finlay Geoghegan J. in *Duffy v. Ridley Properties Limited* which was affirmed on appeal at 2008 IESC 23.

Conclusions on Specific Performance
I find nothing in the evidence which suggests any conduct on the part of the plaintiffs which could be regarded as either unconscionable or unfair.

At the time the contract was entered into, the defendants, with their eyes open, committed unconditionally to the purchase even though they did not have funds available to them at that time. The hope was that they would become available. It was foolish in the extreme to enter into the contract in the absence of the funds or a binding commitment to provide them. The second defendant is man of considerable property and business experience as is clear from his evidence. He contends that he became involved in order to help his friend, the first named defendant. He accepts that the third defendant provided the €400,000 deposit which was paid. He was less forthcoming, however, when asked about who provided the funds to the first defendant to enable him to pay the €900,000 deposit on the first contract. His answer was that he *"might have given the first defendant the money but didn't know".* I find that unconvincing.

The second defendant is a very experienced businessman as was clear from the evidence concerning the trading and the accounts of the companies with which he is associated. It is little short of astonishing that he entered into the contract in suit concerning lands that he had never seen, never visited and seemed to know little about. But enter the contract he did. I cannot see any basis upon which specific performance should be refused.

Insofar as there is a suggestion by the defendants that it is impossible for them to complete the contract and that it is in someway frustrated thus enabling them to walk away from their liabilities, I am afraid I cannot agree. Where circumstances alleged to cause frustration have arisen from the act or default of one of the parties, it cannot rely upon the doctrine. The default here is exclusively that of the defendants. They foolishly entered into an unconditional contract without the necessary finance to complete it. They cannot now walk away from their bargain.

Conclusion
In my view, the plaintiffs are entitled to an order for specific performance as against the first and second named defendants. I direct specific performance of the contract within a period of 21 days from today's date. There will be liberty to apply.

Insofar as the third defendant is concerned, it is the guarantor of the fiscal obligations of the first and second defendants. If they fail to perform on foot of the order for specific performance, then the guarantee obligations of the third defendant will be triggered. It is not appropriate that I should grant a decree against it at this stage so as to afford the first and second defendants an opportunity to comply with the specific performance order which I now make.