Neutral Citation: [2016] IEHC 365

THE HIGH COURT

[2005 No. 317 P.]

BETWEEN

DECLAN O'DWYER AND JULIA JONES – O'DWYER

PLAINTIFFS

AND

ROBIN BOYD AND ANDREW DILLON

DEFENDANTS

JUDGMENT delivered by Mr. Justice Michael White on the 24th day of June, 2016

1. This matter comes before the court in complicated proceedings. The defendants issued a motion on 10th November, 2014, originally returnable for 24th November, 2014, seeking an order directing the release of €75,000 retained by the second defendant in accordance with paragraph 4 of the order of the High Court of 28th April, 2008, plus any interest accruing thereon to the first defendant, or in the alternative, an order discharging that paragraph.

2. The plaintiffs issued a counter motion on 6th January, 2015, returnable for 12th January, 2015, seeking an order that the defendants repay to the plaintiffs with applicable interest, the sum of €38,156 deposit paid on 21st August, 1998 on a contract for the sale of land and arbitrators fees of €19,949, together with interest.

3. The original proceedings were commenced by plenary summons on 31st January, 2005, and heard over 6 days on 31st January, 1st, 7th, 8th 9th and 16th February 2006. Finnegan P. delivered a written judgment on 17th May 2006. The order was perfected on 22nd May, 2006. The Plaintiffs appealed part of the order relating to the second defendant. The Defendants were given leave to file a late appeal. Both appeals were heard on 28th and 29th January 2008, by The Supreme Court and judgment delivered on 4th March, 2008. The order was perfected on 5th March 2008. Part of that order, stated

> "That the parties do have liberty to apply in the High Court to vacate the registration of a lis pendens herein and with regard to any ancillary matters."

4. The defendants and plaintiffs issued motions in this court seeking certain reliefs.

5. On 28th April 2008 Hanna J granted a number of reliefs, and directed as follows

> "That upon completion of the sale of the said property the sum of €75,000 be retained by the second named defendant in an interest bearing account pending the resolution of the claim made by the Plaintiffs in respect of the said deposit and arbitration costs".

6. The plaintiffs did not progress any claim either by way of these or any new proceedings. When the defendants issued the motion of 10th November, 2014, the plaintiffs reactivated their claim.

7. The motions came before O'Malley J. on 5th June, 2015, who directed that the motions do stand, refused but ordered that the action be adjourned for plenary hearing, and adjourned the matter to the non-jury list for mention on Wednesday, 29th July, 2015, and ultimately a date was fixed for the plenary hearing. Points of claim were delivered by the plaintiffs on 3rd July, 2015, and points of defence were delivered by the defendants in August 2015. The matter was at hearing before this Court on 3rd and 4th March, 2016, and judgment was reserved.

8. There are a number of issues arising from the pleadings. The defendants have submitted that this Court does not have jurisdiction in these proceedings to hear and dispose of the claim by the plaintiffs for the return of a deposit and payment of arbitration fees as this claim should have been pursued by way of separate proceedings, and is now statute barred as the plaintiffs had six years from the date of the Supreme Court order of 5th March, 2008, to commence proceedings and had not done so.

9. The Plaintiffs have submitted that they are entitled to have their claim for the return of a deposit and arbitration fees dealt with under these proceedings as the Supreme Court gave liberty to apply to the High Court with regard to any ancillary matters. They have also submitted that the effect of the order of Hanna J. on 28th April, 2008, was that their claim could not be progressed until after the completion of the sale of the property in dispute to third parties and that the defendants failed to notify them of this sale and that they were also restricted by reason of Para. 3 of the order of 28th April, 2008, which stated:-

> "That the plaintiffs and each of them and all persons having notice of the making of this order be restrained from instituting, maintaining or otherwise prosecuting any proceedings against the defendants, asserting any interest or claim to the said property save without the prior leave of this Honourable Court."

History of Dispute and Litigation

10. The plaintiffs on 21st August, 1998, entered into a contract for sale to purchase a dwelling house, offices, farmyard, garden and other lands containing in total 27 acres at Killuragh Glen, Fermoy, Co. Cork. The purchase price was IR£300,500 (€381,560), a deposit of £30,050 (€38,156) was paid. The contract was in accordance with the Law Society standard conditions of sale and the closing date was set at 30th November, 1998. A map was furnished to the plaintiffs.

11. Shortly before closing of the sale, the first defendant's then solicitors contacted the purchaser solicitors about difficulty with an inaccurate map. The first defendant could not convey lands upon which a slurry tank was constructed. The first defendant wished to

amend the map to exclude the lands from the sale, but this was not acceptable to the plaintiffs.

12. The first defendant issued a completion notice on 7th January, 1999, declaring the contract revoked and the deposit forfeited if the sale was not completed within a period of 28 days.

13. The plaintiffs issued High Court specific performance proceedings on 4th February, 1999, [1999 No. 1144 P.] (The 1999 proceedings).

14. In November 1999, the plaintiffs took over the conduct of the proceedings personally.

15. On 3rd October, 2000, the High Court (O'Neill J.) made an order staying the proceedings and referring the matter to arbitration pursuant to clause 51 of the general conditions of sale. The plaintiffs appealed to the Supreme Court who upheld the order of the High Court on 4th July, 2002.

16. Mr. Walter Beatty of Vincent and Beatty Solicitors was appointed arbitrator. The arbitration commenced on 24th March, 2004, and following the arbitration hearing, the arbitrator issued his findings on 19th April, 2004. There are different interpretations of the arbitrator's decision.

17. Dispute about the map continued with the plaintiffs insisting that the original map be used for the conveyance, while the first defendant insisted that an amended map be used. There was a further dispute between the parties on the clearance from the property of broken asbestoses.

18. In November 2002, the first defendant changed solicitors, from Ronan Daly Jermyn to the second defendants firm Dillon Mullins. Subsequent to the arbitrator's findings and the dispute continuing over the map, the first defendant on 7th July, 2004, declared the original contract terminated, and the deposit forfeited and issued a motion on 12th July, 2004. The plaintiffs issued a motion for judgment in default of defence and the matter returned to the High Court.

19. Subsequently, on 28th and 30th July, 2004, the plaintiffs brought an injunction motion about the asbestos dispute which was adjourned to a vacation sitting on 11th August, 2004.

20. On 11th August, 2004, after protracted negotiations the parties compromised their dispute, which compromise ran into difficulty within a few days.

21. In the course of the settlement negotiations, the plaintiffs had insisted that the original map be used in the conveyance despite there being an agreed reduction in the original purchase price. The first defendant was not present on 11th August, 2004, as he resided in South Africa. Subsequently, the first defendant refused to sign the deed of conveyance of the property with the original map attached. In a letter of 19th August, 2004, the first defendant's solicitor, Dillon Mullen & Co. asserted that the agreement to use the original map was conditional upon the specific approval of the first defendant.

22. The letter stated:-

> "Counsel genuinely considered that in all the circumstances of the case including the opinion expressed by Mr. Justice Kelly that Mr. Boyd would accept and act on those advices. Mr. Boyd has carefully considered the matter and has declined to execute the deed in the form of the engrossed deed submitted to him, stating that on no account will he sign a defective deed purporting that he has title to something which he does not have title, as found and determined by the arbitrator, and in respect of which you are awarded an abatement of the purchase price, and in respect of which the arbitrator had held that you are 'not entitled to a conveyance of the slurry tank and the small portion as bona fide purchasers for value without notice'. If our client were now to execute a conveyance to you of those two areas then third party rights and interests in these areas might be adversely affected by such conveyance and thus the interest of Mr. Boyd himself."

On this basis, Mr. Boyd will not sign or execute the said engrossed deed, and close the sale on foot thereof. He is of course prepared to close immediately with a deed containing either the amendments already referred to or a correct map excluding the two areas referred to in the arbitrator's award."

23. Subsequently, the first defendant changed his mind and reluctantly agreed to execute a deed of conveyance on the basis of the original map attached to the contract of sale of 21st August, 1998.

24. The compromise settlement had also run into other difficulties about the issue of reserved costs, and the removal of three antique marble fireplaces from the property, in or around December 2004.

25. As already referred to on 31st January, 2005, the plaintiffs issued the present proceedings seeking an order for specific performance of the compromise of the original High Court proceedings [1999 No. 1144 P.]

26. The High Court by order of the 22nd May 2006 directed specific performance of the compromise agreement.

27. The Supreme Court on 5th March, 2008, ordered,

> "(i) that the appeal of the first Defendant is allowed;
>
> (ii) That so much of the said Order of the High Court as granted specific performances as set out in (a) (a) (i) and (c) thereof do stand discharged and in lieu thereof the Court doth refuse the Plaintiff's claim for an Order of Specific Performance;
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> (iii) that the appeal of the Plaintiffs and their Notice to Vary be dismissed, And the questions of costs having been adjourned and coming on for consideration on this day in the presence of Counsel for the first named Defendant, Counsel for the second named Defendant, and the Plaintiffs in person, And on hearing said respective Counsel and the Plaintiff's in person IT IS ORDERED that the High Court Order in relation to costs be set aside and in lieu thereof the Court make no Order as to costs and the Court make no orders as to costs of these appeals and the Notice to Vary and IT IS ORDERED that the parties do have liberty to apply in the High Court to vacate the registration of a Lis Pendens herein and with regard to any ancillary matters."

The Plaintiffs and Defendants subsequently issued motions in the High Court which culminated in the orders of Hanna J on 28th April 2008.

28. Before I deal with the substantive issues, there are a number of matters that have to be clarified by the court.

Arbitration Decision of 19th April, 2004
29. In their written submission on legal issues, the plaintiffs at para. 5.18 state:-

> "The arbitration resulted in no change to the boundary map, but Mr. Dillon/Mr. Body unilaterally produced a new boundary map (with reduced land area) in the weeks after the arbitration and Mr. Dillon called on the O'Dwyers to complete the sale with this changed map (even though the arbitrator had said he could not order any changes to the boundary). The new map gifted the slurry tank and other areas along the boundary to the neighbouring farm. The O'Dwyers refused to complete with any map other than the contract map."

30. The arbitrator in his award stated:-

> "The subject property on the map included three portions of land which were or may not have been in the vendor's possession as follows:-
>
> (a) The slurry tank (marked in yellow on the map attached to the claimant's point of claim);
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> (b) a small portion of land on the other side of the wall and tree boundary approximately two thirds of the way from the road situated on Mr. O'Grady's field which is close by the avenue leading to the main residence of the subject property (the small portion);
>
> (c) The passage way running southwards from point B on the map (the passage way)."

The respondents withdrew the claim in respect of the passageway during the Arbitration on 29th March, 2004.

The respondents' claimed as bona fide purchasers for value without notice that the claimant must convey the slurry tank and the small portion and part of the passage way to them because the passageway is no longer in issue, there is no necessity for me to arbitrate in relation to it.

In considering the respondents' claim that the claimant must convey the slurry tank and small portion to them because they claim that they are entitled to such conveyance because they are bona fide purchasers for value without notice I have taken into account the evidence of the Claimant and I have considered the various legal arguments which have been addressed in relation to this matter.

The arbitrator went on to state:-

> "It is evident to me that since 1977, the slurry tank has been owned by the O'Gradys. Michelle Lee who conveyed the subject property, which included the slurry tank, to the claimant by deed of conveyance dated 30th January, 1990 and who subsequently conveyed the same slurry tank to Sean and Daniel O'Grady by deed of conveyance dated 12th July, 1991, could not give an equitable title to that which she did not have. The same principle applies to the claimant, the legal maxim *nemo dat quod non habet* applies."

31. Further, on in his determination, he stated:-

> "I, therefore, hold that the respondents' claim to the transfer of the slurry tank to them as *bona fide* purchasers for value without notice fails. I also hold that the claim in relation to the transfer of them to the small portion also fails."

32. The arbitrator went on to consider a number of matters and awarded a total abatement of the original purchase price of €47,000.

33. The plaintiffs rely on a finding as follows:-

> "This Award shall not fix any boundaries because this is not necessary and because I do not believe that I would have the power to do this in relation to adjoining owners."

34. The only logical conclusion from the arbitrator's determination is that to complete the sale, an amended map excluding the slurry tank and the small portion of land should have been attached to the deed of conveyance to the plaintiffs. The plaintiffs are incorrect in their assertion, which they have never resiled from that the conveyance to them with the abatement of the purchase price should have included these disputed areas of land.

The allegation of dominant ownership against the Second Defendant.
35. The plaintiffs are incorrect in their assertion that the second defendant had any form of ownership of the property, the subject matter of this dispute. He was acting under a power of attorney from the first defendant who resided in South Africa.

Any arrangement about legal fees between the second and first defendant was a matter for them and not the business of the plaintiffs.

Rescission or Repudiation.
36. The plaintiffs have also asserted that the effect of the Supreme Court judgment and order was that the compromise agreement of 11th August, 2004, was rescinded. That is inaccurate. The Supreme Court held that the Plaintiffs had repudiated the compromise agreement.

The effect of Order of Hanna J.
37. The plaintiffs have also submitted that the effect of the order of Hanna J. of 28th April, 2008, was that the plaintiffs could not continue with their action or commence a separate action until the sale of the property was completed to another party. That is incorrect. The purpose of withholding the sum of €75,000 to be held by the second defendant was because the first defendant resided in South Africa. The order did not restrict the plaintiffs from immediately proceeding with any action they wished in respect of the deposit and arbitrator's fees. The plaintiffs have also submitted that the effect of this order was to restrict them in taking proceedings, but it is clear from the order that the plaintiffs were restricted from instituting or otherwise prosecuting proceedings

asserting any interest or claim to the said property without prior leave of the Court. The plaintiffs were entitled to sue for the return of their deposit and the arbitration fees and they did not have any necessity to assert title to the property to make that claim.

Motion of 2nd November 2015 of Plaintiffs.
38. Subsequent to the close of pleadings, the plaintiffs issued another motion dated 2nd November, 2015, returnable for 2nd February, 2016, again seeking repayment with interest of the deposit of €38,156 and €19,949 arbitrator's fees.

39. In addition, they sought orders and directions in respect of a costs order obtained by the defendants against the plaintiffs on 27th November, 2012.

40. The claim for the return of the deposit and arbitrators fees replicates the claim in their previous motion.

41. However, para. 2 relates to separate proceedings issued by the first defendant by way of special summons 7th June, 2012 [2012 No. 323] seeking a declaration that the judgment mortgage registered on 3rd April, 2010, by the plaintiffs has been satisfied.

42. These proceedings were finalised by order of the High Court of 27th November, 2012, when the court granted a declaration that the judgment mortgage had been satisfied and ordered that costs be granted against the defendants in those proceedings, the plaintiffs in the present proceedings.

43. This Court does not have jurisdiction to deal with this matter as these are separate proceedings. The submission by the plaintiffs in these proceedings that the application to discharge the judgment mortgage should have been made in the course of these proceedings by way of ancillary order is a matter that should have been raised in the proceedings [2012 No. 323].

The Court's Jurisdiction and the Statute of Limitations
44. The defendants' submissions that the claim by the plaintiffs for the return of the deposit and arbitrator's fees is statute barred are entwined with the court's jurisdiction to deal with this matter.

45. The plaintiffs assert in para. 8 of their written legal submissions that their claim is not statute barred as under the Supreme Court order of liberty to apply, this remains a claim in being and they assert that O'Malley J. confirmed this at the hearing of 5th June, 2015.

46. The defendants submit that the compromise agreement of 11th August, 2004, finalised the original High Court proceedings [1999 No. 1144 P.], and that any claim arising from those proceedings is spent.

47. Although it has not been opened directly to the court by either party, the court considers it appropriate to examine the concepts of "liberty to apply" and "liberty to re-enter"

48. This matter is reviewed in Delaney and McGrath, Civil Procedure in the Superior Courts Third edition at paras 19-18, 24-25, 24-26 and 24-27 which state,

> "19-18. more complex terms of settlement may also be incorporated into a consent order provided that the terms agreed do not go beyond the jurisdiction of the court. So, an order may be made by consent requiring the parties to take various steps that they have agreed to take in a settlement agreement or, alternatively, may record undertakings given by a party to do or to refrain from doing certain acts. This form of order is frequently adopted where injunctive or declaratory relief is sought in proceedings. Again, the advantage of this course of action is that the order is immediately enforceable in the proceedings without the necessity for fresh proceedings. Where an order in this form is made, it is common to include liberty to apply to one or more parties meaning that it is open to them to apply to the court to clarify the extent or application of the order. The inclusion of "liberty to apply" in a consent order does not, however, entitle a party to re-commence the prosecution of the proceedings as is the case where liberty to re-enter is reserved. By way of contrast, where the phrase "liberty to re-enter" is used, a party may seek to re-litigate the claims originally made in the proceedings unless they have been brought to a conclusion by a court approved settlement. This distinction between "liberty to apply" and "liberty to re-enter" is, thus, very important because it is only in the case of the latter that continued prosecution of the underlying proceedings is possible.
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> 24-25 An order will frequently include liberty for the parties to apply. The meaning of the phrase "liberty to apply" was considered by McCracken J in *Donegal County Council v Ballantine.* [1998] IEHC 203 He referred to the following explanation in Halsbury's Laws of England. 4th Ed Volume 26 at para. 554
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> "The circumstances or the nature of a judgment or order often render necessary subsequent applications to the Court for assistance in working out the rights declared. All orders of the Court carry with them inherent liberty to apply to the Court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgement the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the Court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the Court touching their interest in a summary way without again setting the case down. It does not enable the Court to deal with matters which do not arise in the course of working out the judgment or to vary the terms of the order except possibly on proof of change of circumstances…"
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> 24-26 Therefore, as McCracken J observed, "liberty to apply" allows the parties to come back to court and clarify the extent or application of an order made. It does not, however, entitle a party to re-commence the prosecution of the proceedings. Such provision is often made in orders containing injunctive relief or other orders requiring a person to take specified steps.
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> 24-27 In some instances, the parties may reach agreement with regard to the disposition of a motion or the compromise of proceedings but reserve their position to allow the motion or proceedings to be reactivated by consenting to an order adjourning the motion or proceedings generally with liberty to re-enter. Alternatively, such an order may be made by a court in respect of a motion where the judge considers it to be premature or redundant but recognising that it may be necessary to resuscitate it at a later point. Where liberty to re-enter is granted, a party may seek to re-litigate the claims originally made in the proceedings unless they have been brought to a conclusion by a court approved settlement

49. Liberty to apply does not entitle the parties to re-litigate matters. However, unfortunately there is ambiguity in the orders of the High Court of 28th April, 2008 and 5th June, 2015, when a plenary hearing was directed, the effect of which was to re-litigate.

50. This Court thus accepts that the Plaintiffs claim is still alive in these proceedings and the statute of limitations does not apply, but the jurisdiction of the court to deal with the deposit and arbitrators fees is still an issue.

51. The first defendant forfeited the deposit in accordance with the original contract of sale of 21st August, 1998, which was not completed. The plaintiffs also refused to comply with the determination of the arbitrator, insisting on a conveyance of portions of the property which the arbitrator had decided the first defendant had neither legal or equitable title to convey.

52. The plenary summons of 31st January, 2005, makes no claim in the alternative for return of the deposit. The 1999 proceedings are spent. This Court, therefore, has no jurisdiction to make an order returning the deposit or arbitrators fees to the plaintiffs.

53. However, the court would also like to comment on the merits of this matter. The plaintiffs in their submissions to this Court made a number of serious allegations about the conduct of both defendants and considered themselves victims and innocent themselves of any wrongdoing. I respectfully disagree. It was manifestly clear that there was an error in the map furnished to the plaintiffs by Ronan Daly Jermyn subsequent to the signature of the original contracts in August 1998. The plaintiffs refused to sanction any amended map and insisted on a transfer of property to them that the first defendant was not entitled to convey nor were the purchasers entitled to receive. That property was in the ownership of the O'Grady family.

54. A very experienced solicitor who acted as arbitrator in his determination of 19th April, 2004, without any ambiguity found that to be the situation.

55. Despite this, the plaintiffs subsequent to the arbitrator's determination still insisted on a conveyance of the property in accordance with the defective map.

56. They still insisted on the transfer of this property when the matter was compromised on 11th August, 2004. The sentiments expressed on behalf of the first defendant set out in the letter of 19th August, 2004, from Dillon Mullen & Co. to the plaintiffs which I have already recited in this judgment are the sentiments of this Court. It was irresponsible and irrational for the plaintiffs to insist on this error being compounded by seeking a conveyance of these disputed parcels of property when in the compromise of 11th August, 2004, they had received a substantial abatement.

57. It is the finding of both the High Court and the Supreme Court in the present proceedings that the plaintiffs then proceeded to repudiate the compromise by subsequently seeking an order for costs.

58. This matter has gone on for eighteen years and I consider that the plaintiffs are primarily to blame for this state of affairs.

59. The Supreme Court has determined that the plaintiffs repudiated the compromise of 11th August, 2004. If this case had been pleaded properly by the plaintiffs, the first defendant would have been entitled to counterclaim for damages for that repudiation.

60. The plaintiffs have also been guilty of unconscionable delay from 28th April, 2008, to 6th January, 2015, a period of six years and eight months.

61. The first defendant incurred huge costs and expense in respect of two separate High Court actions which also culminated in appeals to the Supreme Court, and also an arbitration hearing. He was able to finally sell his property in 2010, twelve years after the initial contract for sale in August 1998.

62. The second defendant has been incorrectly joined in these proceedings and had his reputation traduced unfairly.

63. In those circumstances, even if I had jurisdiction it would be unconscionable to return any sum of money to the plaintiffs from the €75,000 withheld from the sale of the property.

64. I grant an order directing the release of the sum of €75,000 retained by the second defendant in accordance with para. 4 of the order of the High Court of 28th April, 2008, together with any interest accruing to the first defendant, and refuse the reliefs sought by the Plaintiffs.