Neutral Citation [2013] IEHC 107

THE HIGH COURT

[2008 No. 2759 P.]

BETWEEN

JOSEPH CORCORAN AND KATHERINE CORCORAN

PLAINTIFFS

AND

EASSDA IRELAND LIMITED AND ALISTAIR JACKSON

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy delivered the 6th day of March 2013

1. Issue before the Court

The application to the court is on the basis of the implementation of a settlement agreement dated the 30th October, 2009, in relation to the compromise of a complex and protracted proceedings which, for the purpose of background, the court proposes to summarise insofar as it would appear to the court that these matters have, notwithstanding the terms of settlement, been the subject of applications to the court following the settlement agreement of the 13th October, 2009, relating to the vacating of a *lis pendens* on the entirety of the development other than in relation to No. 6 Glenair Manor, the subject of the contract of the sale of land and the billing contract dated the 4th August, 2005.

The first named plaintiff was granted an order of the court on the 22nd September, 2010, to allow the matter to be re-entered on the basis that the terms of the settlement were breached by the defendants.

2. Pleadings

2.1 By plenary summons dated the 8th April, 2008, the plaintiff claimed specific performance of a building agreement and contract for the sale of land in writing dated the 4th April, 2005, together with damages for breach of contract, misrepresentation, negligent misstatement and for trespass.

The plaintiffs had also sought a declaration that the boundaries of the property at No. 6 Glenair Manor, Delgany, in the Co. of Wicklow are in accordance with a fence erected between No. 5 and No. 6 and also sought an injunction restraining the defendants and each of them from interfering with the boundary fence to the property at No. 6, save for the purposes of completing the construction of same in its current location.

2.2 The statement of claim referred to the agreement of the 4th August, 2005, between the second named defendant of the one part and the plaintiffs of the other, whereby the second named defendant agreed to sell, and the plaintiffs agreed to buy, for the price of €500,000, part of the lands at Delgany known by the name of Stilebawn in the parish or union of Delgany, Barony of Newcastle, Co. Wicklow, being part of the property comprised in an indenture of conveyance dated the 14th September, 2000 between Patrick G. O'Hagan and Susan O'Hagan of the first and Alistair Jackson of the second part, more particularly outlined in red on the map attached to the contract of the 4th August, 2005.

A building agreement of the same date was made, between the first named defendant (although appearing under its former name Keygo Properties Limited) of the one part and the plaintiffs of the other part. The first named defendant agreed in consideration of €1.3 million to build, complete and deliver to the plaintiffs works consisting of the erection of a dwelling house and premises specified in the plans together with ancillary works and services as might to be necessary to render the dwelling house and premises reasonably habitable when completed within a period of 24 calendar months from the date of the building agreement (that is before the 4th August, 2007).

The plaintiffs were entitled to certain allowances, materials and fittings supplied.

Special condition 11 of the contract provided:

> "The layout plan furnished to the purchaser, which the site forms part has been produced to the purchaser and the purchaser shall be deemed to have full knowledge thereof. This is furnished for location purposes only. The actual boundaries for the site will be laid out by the vendor as soon as is practicable."

Under that special condition it was provided that the actual boundaries of the site would be laid out by the second named defendant as soon as was practicable. However, it is claimed that, to induce the plaintiffs into the contract, boundaries were shown on a plan as used in the application for planning permission and the second named defendant advised that the site would be as substantial as shown on that plan. On the 18th August, 2006, the boundary line was marked out accordingly. A fence was erected along the boundary line soon thereafter which was accepted by the plaintiffs. The position of the garage to be built for the plaintiffs was sited in reliance of that boundary and erected and completed in or about December 2006. Relying on the agreements and the marking out of the boundaries, the plaintiffs expended money in carrying out certain works, with the knowledge and permission of the defendants, including the installation of solar panels on the garage and the installation of a geo-thermal heating system in the garage and in the ground at the rear of the house at the cost of €22,160 plus VAT.

On or about the 30th August, 2007, after the 24 month period had elapsed, solicitors for the plaintiffs served a completion notice on the solicitors for the defendants, and thereby *inter alia*, time became of the essence.

It was pleaded that in breach of the agreement, each of the defendants failed to carry out the works within a period of 24 months from the 4th August, 2005; purported in or about March 2008 to move the boundary, which had been in existence since the 18th August, 2006, and provide part of the plaintiffs site to the neighbouring site, No. 5, on the grounds that they had issued proceedings against the defendants. It was also stated that the garage was being demolished and moved. Until the plaintiffs obtained

interlocutory relief, some demolition works had commenced. The defendants sought to resile from the agreed allowances in the building contract, which included agreed variations, and failed to complete the contract of sale.

2.3 By defence dated the 27th November, 2008. The contract of the 4th August, 2005, was omitted, but in the events that happened, no map was attached to the said contract.

In or about August 2006, the defendants laid out the boundaries to the site to be transferred to the plaintiff in accordance with special condition 11 as outlined in red on an annexed map.

The building agreement of the 4th August, 2005, between the first named defendant and the plaintiffs was admitted. It was pleaded that the period of 24 calendar months from the date of the contract was not of the essence of the building contract.

The completion date was the earlier date in which the plaintiffs should agree in writing when the works had been completed or the date upon which the plaintiff should receive from the first named defendant notice in writing that the works had been completed. It was denied that the provisions of the completion date were subject to the overriding complication to complete the works within 24 months.

It was further denied that the plaintiffs were induced into the contract of sale and/or the building contract by the production of the map referred. Alternatively if such a map were provided it was not relied upon by the plaintiffs who subsequently, with the benefit of legal advice, signed the written contract for sale and accepted the terms thereof, including the terms of special conditions 4, 5 and 11.

It was accepted that in or about August 2006, the boundary lines between the premises in sale and the neighbouring premises, No. 5, were marked out on the ground by Willow Court Homes Limited, the subcontractor of the defendants. It was also accepted that the garage was erected and completed in or about December 2006. By then the plaintiffs had expended money in carrying out certain works as outlined previously, but it was denied that the said works were carried out or that any monies were expended on the basis of representations made by the defendants or in reliance on the laying out of the boundary in August 2006.

Further, or in the alternative, insofar as an error was made in connection with the laying out of the boundary on the ground in August 2006, the same was at all material times obvious to the plaintiffs, who were not entitled to rely on the said boundary. Further, in or about late May 2007, the plaintiffs agreed, or alternatively sought to agree, retention of the said boundary with the purchasers of the neighbouring lands known as No. 5 by ceding to them a portion of their own site in consideration. In relation to proceedings between the neighbours *Brian O'Flanagan and Paula Fitzpatrick, plaintiffs, and Alistair Jackson, defendant*, (7256P/2007) the plaintiffs sought to retain the portion of the boundary in dispute. The plaintiffs had constructed a garage upon the disputed land and, in reliance upon the agreement with Mr. O'Flanagan and Ms. Fitzpatrick, proceeded to install geo thermal equipment therein.

The first and second named defendants had entered into a building agreement on a contract for sale in respect of the neighbouring lands known as No. 5 prior in time and under similar terms to the contracts with the plaintiffs. The neighbours had disputed the correctness of the boundaries laid out on the ground in August 2006. The defendants were not privy to any agreement between the plaintiffs and the neighbours at No. 5.

It was denied that the defendants were estopped from denying the boundary line that was laid out in August 2006. Alternatively if so estopped, the plaintiffs are confined to the remedy of damages and are not entitled to the other reliefs sought. It was further denied that the plaintiffs were entitled to serve completion notice on the 3rd August, 2007. It was accepted by the defendants that the works as defined in the building contract were not carried out within a period of 24 calendar months from the 4th August 2005, but it was denied that this was due to the actions, omissions, defaults or breach of contract between the defendants or either of them, but was occasioned by the actions and/or defaults of the plaintiffs. The other breaches of contract were denied.

The defence dealt specifically with the materials supplied by the plaintiffs and the completion of the exterior finish of the house.

The first named defendant had not altered the boundary line and, in the circumstances, there had been no breach of contract as alleged or at all. It was denied that the plaintiffs suffered loss and damage. They had failed to mitigate their loss. The defendant was ready willing and able to complete the conveyance. Any discrepancy between the boundary line and the lands described in the statement of claim and the boundary lines which the second named defendant is in a position to convey to the plaintiffs is minor in nature. It does not give rise to any right of recission by either of the plaintiffs.

In the event that the plaintiffs are entitled to an order to specific performance, notwithstanding the earlier contract in favour of Mr. O'Flanagan and Ms. Fitzpatrick, the defendant was ready to complete the conveyance. Provided that such works were undertaken by the first named defendant, the defendants had no further liability to the plaintiffs.

2.4 A notice for particulars was raised on the 9th December, 2008, and replied to on the 13th May, 2009, by the defendants. By way of reply it was stated that the "error" in the laying out of the boundary resulted from the fact that the boundary was measured on the ground from the wrong side of the site. The error was obvious to the plaintiffs.

3. Settlement

By terms of settlement dated the 13th October, 2009, made between the parties, it was agreed to complete the building agreement and the contract of sale of the 4th August, 2005, with all of the general and special conditions of the contracts to remain binding save insofar as they were not amended by the settlement.

The contract price was amended to €400,000. The second named defendant acknowledged receipt of a deposit of €50,000 leaving €350,000 to pay in relation to the contract for sale.

The price for the building contract was amended to €1,090,000 and the first defendant acknowledged receipt of a deposit of €135,000, leaving a balance to pay of €955,000 inclusive of VAT. The closing date under clause 28 of the contract for sale and clause A(iii) of the building agreement was amended to be 28 days after the issue by an independent architect of a certificate that all works (including all snagging and all major or minor defects if any) had been completed within a period of six months to the satisfaction of the independent architect. The certificate was to be final and binding on all parties.

At para. 5 of the Terms of Settlement it was provided that:

> "The parties agree to appoint an independent architect to be agreed by the solicitors in fourteen days or else as

> nominated by the President of RIAI as an independent architect to rule on the completion of the works. The defendant shall pay the costs of the independent architect and the following is agreed in relation to the said appointment."

There followed five items, including plans, planning documents, amendments to plans, four reports of Michael O'Neill (to which the architect was to have regard, but was not bound by them) and a three page schedule of agreed additional works or clarifications including submissions of the party's professional advisers. Before issuing his certificate it was agreed that (the architect) should have regard to the advisors' comments on snagging.

4. Independent Architect's Certificate
Denis Handy Dip.Arch., FRIAI, MIDI was retained by the receiver, Mr. Peter Stapleton of Lisney, who had been appointed by NAMA on the 8th February, 2012.

Mr. Handy was instructed to inspect No. 6 in order to issue a certificate of completion, only if the snagging items identified in an inspection of the 29th October, 2010 had been completed and if fittings removed since that date had been replaced.

On the basis of visual inspection on the 18th May, 2012, Mr Handy confirmed in his Certificate of Completion dated the 19th May 2012, at para. 4, that the above items of work had then been completed.

He further confirmed that, as far as could be ascertained, the electrical and mechanical services were functioning satisfactorily at the time of the inspection. In his opinion the work in constructing the house had achieved Practical Completion.

He referred to previous reports on the property and to items having been omitted from the snag list that were understood to be awaiting completion by the purchaser but were yet to be finished, including some floor finishes and the related final fixing of some skirting board, some fittings in the master bedroom en suite and the completion of the kitchen.

He noted that the house had been near completion but unoccupied for approximately two and a half years. Some movement, hair cracks and shrinkage might therefore reasonably be expected when the heating system was switched on for habitable purposes.

He said that the certificate was issued solely for the purpose of providing evidence of completion and only for the works referred to. It was not a report on the condition or structure of the building. For the purposes of the inspection no opening up was carried out. The inspection was therefore superficial only and took no account of works which were covered up, inaccessible or otherwise obscured from view. "Visual inspection" means the inspection of the works referred to as existed on the inspection date.

The certificate did not in any way warrant, represent or take into account any of the following matters: planning permission or building regulation compliance; matters in respect of private rights or obligations; matters of financial contribution and bonds, and, development of the property which might occur after the inspection date.

An issue had arisen in relation to a previous letter dated the 7th May, 2010, from the first named plaintiff to Mr. Handy. It stated that the parties had agreed to appoint and the defendants had agreed to pay an independent architect, and that certain matters were agreed in relation to the appointment, which included certification of the completion of all contract works, but these were not included in the clarification list.

In addition the letter referred to the list of items outstanding and to compliance with the building and planning regulations. In relation to the latter the letter stated:-

> "Mr. Handy is required to certify that the house complies with both building and planning regulations. The list of non compliant items produced to the court by my architect and the engineers have been supplied to you. It is my assertion that the entire list of items identified are required to be remedied in order for the house to comply with both building and planning regulations. I am sure that the defendant in this case will have a different view and this is the primary reason why you are appointed.
>
> Despite several requests, I have not been supplied with any detail of what, if any, compliance items being remedied. It is therefore up to you to identify which items have not been remedied and to decide in your professional opinion whether the outstanding items identified in the reports are in fact breaches of compliance or not. I specifically wish to draw your attention to the fire regulations and in particular to the need to fit hoods on all of the down lighters to meet the requirements of these regulations, as I believe that this issue has not been addressed."

5. By notice of motion of the 19th August, 2010, Mr. Corcoran sought an order for the implementation of the terms of settlement of the 13th October, 2009.

By further notice of motion of the 4th November, 2010, the defendants sought to have lis pendens over the entire development other than No. 6.

Points of claim were delivered on the 25th November, 2010, and responded to by the defendants on the 1st February, 2011.

By a third notice of motion the plaintiff sought an amendment to the points of claim. Five further affidavits were filed.

6. Evidence of the Independent Architect
6.1 Mr. Handy, in evidence to the court referred to Mr. Corcoran's letter and referred to lists of non compliant items produced to the court by his architects and engineers and supplied to Mr. Handy. Mr. Handy said that he was not to be bound by them. Mr. Handy said that while the request by Mr. Corcoran to decide whether the outstanding items identified in the reports were in fact breaches of compliance or not might have been reasonable to ask but that he, Mr. Handy, was not in a position to do so, as he had made quite clear. Mr. Handy carried out an additional inspection on the 22nd March, 2010, and on the 29th October, 2010 and produced an updated snag list on the 17th January, 2011.

Previous to that, on the 23rd August, 2010, he had written to Mr. Corcoran thanking him for the information in his email. Mr. Handy said he was in a difficult position, having been instructed through Coughlan White O'Toole, the solicitors for the defendants, which was the process accepted by the parties at the time they agreed to commission an independent architect. He said that he indicated in his communication to Mr. Corcoran that he had no detailed information on the settlement regarding his role, other than the general one of "prepare a snag list and carry out a final inspection".

By letter of the 9th November, 2009, Bank of Ireland said that (without disclosing the amount) it had agreed to finance the completion of the contract, but were not parties to the dispute.

6.2 Mr. Corcoran, in person maintained that the independent architect changed his terms of reference and that his certificate could not, accordingly, be binding. His certificate did not comply with the parties' terms of reference to investigate major and minor snags.

Mr. Corcoran maintained that the bank letter issued did not provide for funding of all works which were to have been completed within six, and not thirty, months. All items were not completed at the time of certification. The defendants were grossly insolvent. In March 2012, a receiver was appointed over the first named defendant and, on the 4th May, 2012, the second named defendant applied for bankruptcy.

Mr. Corcoran said that he put the house on the market as the defendants were in breach of the settlement agreement. He maintained that if the defendants were sure of their position they would have issued notification to close the sale within 28 days.

He sought reliefs that the contract be specifically performed for the sum of €700,000 less the cost to bring it up to builder's specification at €97,000 together with costs.

The motion to enforce the settlement of the 19th August, 2010, was grounded on the affidavit sworn on the 20th September, 2010, which referred to the terms of the settlement being that the bank provided a letter within ten days to cover the cost of completing all of the works, that an independent architect be appointed to certify that the works were completed and that the works be completed within six months.

Mr. Corcoran gave a history of the case. The Glenair Manor site had been abandoned since early 2008. Only one property sale was closed during the summer of 2008. Work stopped on two unfinished houses and two nearly finished houses in 2006.

In relation to No. 6, the subject matter of the proceedings, work did not start until the 25th January, 2010, more than three months into the six month period permitted under the settlement.

He said that the bank letter of the 9th November, 2009, was not in accordance with the terms of the settlement. He referred to ensuing correspondence.

He believed that the defendants had attempted to pervert the function of the independent architect. The instructions issued by the independent architect were not in compliance with the terms of settlement. Mr. Corcoran said that he had been informed that he could not communicate with the independent architect. He referred to an email from Mr. Handy, the independent architect, on the 23rd August, 2010, saying that he believed that his role was to "prepare a snag list and carry out a final inspection". Mr. Corcoran said that the fundamental misunderstanding of Mr. Handy's function was compounded by the failure of the defendants' solicitors to supply a copy of the settlement to Mr. Handy. He had supplied a copy of the settlement terms to Mr. Handy.

Mr. Corcoran said that during the hearing of the case on the 9th October, 2009, he had attempted to enter into evidence the fact that the first named defendant was in financial difficulties and technically insolvent due to monies loaned by it to two golf courses owned and controlled by the second named defendant who was unlikely to recover any of the funds. The defendants objected to this evidence, but omitted to disclose that Eassda Limited, the main operating company under the control of the second named defendant, was served with a petition to wind up the company by the UK Revenue and that on the 10th November, 2009, an administrator was appointed to that English company. He referred to a copy of the statement of affairs dated the 2nd February, 2010, referring to less than 2% of the amount owed to the English company being collectable. He also referred to some press articles regarding the appointment of a receiver to the two golf clubs. He said he wrote to the four directors of the first named defendant on the 7th July, 2010, saying that he believed that they had been fraudulently trading.

He referred to the failure of the defendants to complete the work within the six months agreed in the settlement. As a result he had no intention of committing further cash on top of the near €750,000 he had already committed to the house until he had it in his possession.

He said that the court order, directing the defendants to lodge their affidavit, was not complied with.

He referred to the independent architect inspecting the property on the 26th August, 2010, and he exhibited his report which he said clearly showed that the property was not finished.

Mr. Corcoran wished to have the case re-entered in order to attempt to protect the substantial investment which he made in the property. He submitted that he would be looking for an order for specific performance and for legal costs in the order of €190,000 to be taken off the price of the house along with costs of finishing the property and other damages.

The report referred to was the updated snag list prepared by Mr. Handy dated the 26th August, 2010, the date of his first inspection. That list said that items that had been reasonably resolved had been removed from the list. Mr. Handy had said that the house generally had been redecorated internally, but no information had been received on the type of paint used or the selection of colours. Some slight hair cracking at windows/wall joints and some small paint splashes were still visible, but there was significant general improvement in the decoration. There followed some 34 heading of internal and exterior snags over three pages.

7. Mr. Alistair Jackson evidence on affidavit

Mr. Jackson referred to the agreement between the solicitors whereby Mr. Corcoran would produce a copy of his own approval within ten weeks from the date of settlement. That had never been produced. He said that No. 6 Glenair Manor was ready and had been for some time.

He referred to Mr. Corcoran's insistence on the house being completed in "Ferron and Ball" paints which was not part of the original specification. Mr. Corcoran had agreed to supply the paint but it was never furnished. Mr. Jackson said that the defendants purchased the relevant paint and completed the house as required. Several other matters were to be supplied by Mr. Corcoran. He submitted that these were never supplied and that it became obvious to the defendants that Mr. Corcoran had no intention of supplying the matters as agreed.

He referred to the settlement agreement to the 30th October, 2009, regarding the issue of the independent architect certificate.

Under that settlement, agreed between the two legal teams, neither the plaintiff nor the defendant could liaise with the independent

architect. Only the solicitors would do so. Despite that, Mr. Corcoran had continually contacted the independent architect and furnished him with documents, without copying same to the defendants' solicitor.

Mr. Jackson said that the only party delaying the completion of the house was Mr. Corcoran by not supplying the materials as agreed and then not complying with the settlement in place. The independent architect had produced his final snag list, although Mr. Corcoran never availed of the opportunity to inspect the dwelling prior to the independent architect furnishing that final list.

He said that the updated snag list dated the 26th August, 2010, was to be completed in full by the 28th September, 2010.

8. Grainne White, a partner in the firm of Coughlan White O'Toole solicitors for the defendants referred to a *lis pendens* being registered on behalf of the plaintiffs on the 15th September, 2008, against the entirety of the development known as Glenair relating to a boundary dispute, *inter alia*, the defendants had brought an injunction application, *inter alia*, to stop the plaintiffs moving the boundary. The matter had been substantially agreed between the parties subsequently and it was no longer an issue.

As a result of the registration of the *lis pendens* no other house could be sold. He contacted the solicitors who had obtained the *lis pendens*.

He then applied to the court for the *lis pendens* to be vacated on the site other than the plaintiff's house. Mr. Corcoran emailed and confirming that he would not consent unless two conditions were met.

9. Counsel for the defendants submitted that the settlement did not provide for damages, that the delay was due to the plaintiff's not supplying the materials, restarting the litigation in August 2010, and that the plaintiff's were bound to complete on the terms of the settlement.

There was no evidence that the insolvency of the defendants had caused the delay. Rather because the plaintiffs had delayed, the defendants had sought to complete the contract.

The notice of motion was for the implementation of the settlement agreement. It was not now appropriate for the plaintiffs to drop the claim for specific performance.

10. In reply the plaintiff, Mr. Corcoran, said that the inspection took place in May 2012, without notification to the plaintiffs. He said he had not inspected the house, but that his expert inspected the house on the 19th May, 2012, when Mr. Handy was conducting his final inspection and the door was open. He said there were obvious defects.

11. Decision of the Court

11.1 The Law
In *Matthew Ascough v. Judge Francis TF Roe* (Unreported, High Court 21st May, 1982), Barron J. held that a settlement agreement reduced to writing and signed by the parties must be ascertained from the words used.

This referred to a settlement in relation to a right of way over lands which were the subject of a consent order whereby the defendant would transfer to the plaintiff his entire interest in and to a plot of land or carriageway to provide access into and out of the plaintiff's top field. Apart from a contribution towards costs by the parties were responsible for their own costs of conveyancing in respect of the transfer. The proceedings were struck out by consent with no orders to costs on the 17th November, 1980.

An engineer was to to mark the appropriate map. However, on the 19th December, 1980 the plaintiff, having become dissatisfied with the manner in which the settlement was being implemented, requested a re-entry of the civil bill.

Counsel for the plaintiff applied to the court to have the settlement set aside on the basis that its terms could not be implemented as the parties were not at one regarding the agreement.

Barron J. did not accept the submission that the settlement was conditional on the measurements being agreed, but this was not the kernel of the matter:-

> "The agreement was reduced to writing and signed by both parties. Its meaning must be ascertained from the words used. The document is, in my view, a concluded contract. This is borne out by the form of the order made on the 17th November, 1980 and the three subsequent letters to which I have referred."

Liberty to apply had been granted but this could not be interpreted as meaning that the arrangement made between the parties could be subject to review.

The order of the 17th November, 1980 disposed of the case and showed that the parties were content to rely on their rights as contained in the agreement. Once the case was disposed of, the respondent was *functus officio*.

The rights of the parties depended upon the intention of the parties as expressed in the words used. Whether or not the parties intended the construction of the agreement towards enforceability, or any other matter relating to it, to be controlled by the court depends on the terms of the contract itself and, insofar as any of these terms are embodied in a court order, by the terms of such order. If a problem arose as to the implementation of the consent, it was a matter for further agreement between the parties if possible, and, if not, for either party to take such legal steps as might be appropriate based on the rights as contained in the agreement.

Hollingsworth v. Humphrey, Court of Appeal (Unreported, 10th December, 1987), concerned a Tomlin order in relation to the interests in the family home, part of the purchase price of which had been paid out of joint savings of the wife and husband and they held the house upon a statutory trust for themselves as beneficial joint owners.

The parties eventually agreed to terms of compromise which was made by order of the court on the 17th October, 1978, whereby the court directed that all further proceedings in the section, except for the purpose of carrying the said terms of the court order be stayed, and for that purpose the parties were at liberty to apply.

The husband continued to live in the family home while the wife ceased to live in the house in 1973.

Fox L.J. stated as follows:-

> "The position, it seems to me, was that (Mrs. Hollingsworth) asserted a cause of action and gave that up in consideration of the provisions of the Tomlin order. Included in the provisions was an agreement that the action should be stayed except for the purposes of enforcement of the terms. If Mrs. Hollingsworth alleges a breach of the terms, and subsequent damage to her, it seems to me that her proper course is to sue for damages in a separate action. It will be for the court to decide in that action whether any loss which she may have suffered through delay, or any gain she would have made, is recoverable for Mr. Humphrey as damages for breach of contract, or otherwise; or whether such loss is the consequence of her own failure to enforce the terms of the compromise, or perhaps, even, because she made a worse bargain than she thought. However, that may be, I see no reason to interfere with the bargain between the parties by lifting the stay."

11.2 The Facts
It seems to the court that in the present case the parties had agreed to appoint an independent architect to deal with the matter of the completion of the contract and, indeed, not to interfere with his investigation. Moreover, communication was to take place through the respective solicitors.

The documents and submissions to be given to the independent architect were defined. There was no provision for any of the parties to supply documents or to communicate with the architect, nor was the terms of settlement to be given to him.

Moreover, given the extensive pleadings, referred to above, it is clear that the issues arising therefrom were compromised in terms of the settlement and that the independent architect would, in turn, certify completion. During this period the complex and protracted pleadings from the 8th April, 2008, to the 19th May, 2012, could be narrowed and resolved.

Given that position it seems that the solicitor for the defendants could not be faulted for not giving the terms of the settlement to Mr. Handy, as by virtue of para. 11 of the agreement the Terms of Settlement "shall remain confidential to the parties and to their professional advisers".

Mr. Handy had been appointed as the independent architect to issue a certificate of completion if the snagging items identified in the inspection of the 29th October, 2010, had been completed and also of fittings removed since that date had been replaced.

Mr. Handy had been appointed pursuant to the terms of the settlement and not otherwise.

The court is of the view that it was inappropriate for Mr. Corcoran to have written to Mr. Handy on the 7th May 2010.

The court is of the view that it is not, in the circumstances, appropriate that that letter nor, indeed, any further correspondence or snag lists be considered by the court. Such are not relevant and should be excluded.

Cross and Tapper on "*Evidence"* (12th Ed. OUP, 2010) at 64 states:-

> "The main general rule governing the entire subject is that all evidence that is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded."

It seems to this Court that following *Ascough and Hollingsworth*, that the instructions given by the solicitors on behalf of the parties through the solicitors for the defendants was what the settlement agreement provided. No issue was taken in relation to the defendants' solicitor instructing Mr. Handy on behalf of the receiver which was done, according to the evidence, as a matter of convenience and on notice to the plaintiffs.

The terms of Settlement provided that the defendants produce a letter from the Bank of Ireland "in a sum sufficient to cover all outstanding works and those monies will be released to cover the works. Letter to be produced within ten days".

The letter from Jim Hackett, Senior Business Manager, of the bank dated the 9th November, 2009, some four weeks later, stated with reference to the previous letter of the 6th November, that:

> "I can confirm that we are making available to Mr. Jackson sufficient funding to cover the cost of outstanding work on the property at No. 6 Glenair Manor."

The letter noted the cost of outstanding work agreed between Mr. Jackson and the main contractor, Willow Court, based on completion of work schedule set out by architects for both Mr. Jackson and the purchaser.

If the independent survey proposed in the agreement increases the requirement, any additional borrowing would be subject to bank approval.

The defendants' solicitors said that they sent that letter directly to Mr. Corcoran in excess of one year before their letter of the 10th December, 2010, notifying Mr. Corcoran that the house was ready and that the bank letter was no longer relevant. Mr. Corcoran had written in October 2010, to say that he was not happy with the bank letter.

The court is of the view there was no objection taken to the letter at the time it was sent and that no issue now arise in relation thereto.

It follows from the report of Mr. Handy dated the 19th May 2012, that there has been practical completion of the contract which determined the issues between the parties.

The pleadings are no longer relevant, given the settlement of the 13th October, 2009, witnessed by H.J. Rowantree solicitors on behalf of the plaintiffs and by Grainne White, solicitor on behalf of each of the defendants.

11.3 The court will, accordingly, grant specific performance of the settlement of the 13th October, 2009. The court is not satisfied that the terms of the settlement were breached by the defendants.

As already referred to, the court is of the view that it was inappropriate for Mr. Corcoran to have disclosed the terms of settlement

and to have written to the independent architect and that, in so doing, that he was in breach of the Terms of Settlement.

Moreover, he had certain obligations with regard to the three page schedule of additional works in relation to the selection and nomination of fittings within 21 days (para. 8 of the terms of settlement); the inspection prior to the issue of the independent architect's certificate and to the delays in relation to the furnishing of proof of loan approval.

This had the effect of further delaying the implementation of the settlement agreement.

The court will, accordingly, order the specific performance of the terms of settlement of the 13th October, 2009.