Neutral Citation Number: [2006] IEHC 144

THE HIGH COURT

[2005 No. 469 P]

BETWEEN

SHIRLEY FITZSIMONS

PLAINTIFF

AND
VALUE HOMES LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 12th day of May, 2006

Introduction
1.1 This action concerns a contract for the building and sale of what is known as affordable housing. The proceedings have had an unusual procedural history and it is necessary, in that context, to refer to the fact that the defendants ("Value Homes") were in significant default in filing their defence. The plaintiff ("Ms. Fitzsimons") brought a motion for judgment which came before O'Donovan J. on 4th July, 2005. By consent the court ordered a two week extension of time. The defendant failed to comply with the obligation to file a defence within that extended time and the matter came before the court again on 24th October, 2005, when Butler J. made an order in the following terms:-

> "IT IS ORDERED AND ADJUDGED that the Plaintiff to recover against the Defendant such amount as the Court may assess in respect of the Plaintiff's claim herein for damages on the cost of suit and taxation such cost to include the costs of this Motion and of the assessment and that such assessment be had before a Judge without a jury and be set down for a hearing accordingly."

1.2 Value Homes brought an application seeking an order setting aside that judgment together with an order extending the time for delivery of a defence. That matter came before me on 13th March, 2006. At that stage I came to the view that the level of default in pleading on the part of the defendant was such that it would not be appropriate to set aside the judgment and I therefore confirmed same for reasons which I expressed in more detail in an *ex tempore* judgment on that day.

1.3 However, a further difficulty became apparent by virtue of the fact that the order of Butler J. (the operative part of which I have set out in full above) provided simply for an assessment of damages whereas Ms. Fitzsimons had originally sought and wished to pursue a claim for specific performance. In those circumstances I indicated that I would be prepared to hear an application on behalf of Ms. Fitzsimons for an order for specific performance. Having declined Value Homes the opportunity to put in a defence, the role played by Value Homes at the hearing of the application for specific performance was, necessarily, limited. However, without objection on the part of Ms. Fitzsimons, counsel for Value Homes was permitted to cross examine Ms. Fitzsimons for the purposes of clarifying any issues of fact and was also permitted to make submissions.

2. The Role of Value Homes in the Application
2.1 Having regard to the fact that specific performance is an equitable remedy and having regard to the fact that an order of specific performance should only be made by the court in circumstances where it is appropriate, in all the circumstances of the case, to make such an order, it seemed to me that the above course of action was appropriate. While the absence of a defence would not, in my view, permit a defendant to raise controversy as to the facts, there is no reason in principle why a defendant should not be able to clarify the facts. In relation to this case there does not appear to have been any significant controversy on the facts in any event. Furthermore, where it is appropriate for the court to make an order only where the factual and legal basis for same has been established it is also, it seems to me, permissible to permit the defendant to draw to the courts attention any aspect of the case made on behalf of the plaintiff which, it might be argued, reveals circumstances, whether legal, factual, or a mixture of both, which ought lead the court either to refuse the relief or to make an order other than that sought.

2.2 The hearing, therefore, proceeded on the above basis with participation by counsel on behalf of Value Homes in the manner which I have outlined.

3. The Facts
3.1 The facts are relatively straight forward. Value Homes had originally been set up to build affordable housing for persons primarily working in Dublin Airport or companies based there. Value Homes has an association with a Credit Union operating within a similar base. Value Homes entered into a contract to build and sell a property known as apartment number 77, Geraldstown Woods at Santry Avenue in Co. Dublin in favour of Ms. Fitzsimons. That apartment was, as its number implies, one of a significant number of apartments under construction as part of the affordable homes project. The original purchase price was IR £111,350 which when converted into Euro was €141,385.34. Condition 6 of the building agreement provided for the possibility of an increase in the price in certain circumstances by an amount not exceeding Ir£1,000. It is accepted that those eventualities occurred and thus the original price was increased to €142,655.07 (being the original price together with the Euro equivalent of Ir£1,000). There is thus no doubt that the starting position for a consideration of the issues which now arise is that there was contractual relations between Value Homes and Ms. Fitzsimons whereby Value Homes had agreed to build the relevant apartment and to convey same to Ms. Fitzsimons on foot of a long lease for the sum of €142,655.07. In that context Ms. Fitzsimons paid the agreed deposit of IR £10,000 or €12,697.38.

3.2 It should also be noted that clause 2 of the original building agreement provided for completion within a period of 18 months from the date of the agreement. The agreement would, therefore, have been due for completion in February, 2003.

3.3 It would appear that difficulties were encountered by Value Homes in being in a position to complete the development contemplated at the prices with which it had contracted with the various purchasers. In those circumstances there would appear to have been an attempt to renegotiate the contract.

3.4 In evidence in chief Ms. Fitzsimons accepted that she signed a document in the early part of 2003 which had the effect of agreeing that the contract price should be varied by the provision of an increase in the sum of €20,000 to make a new total of €162,655.07 and further agreeing that the completion date was to be extended to 13th November 2003.

("The variation agreement").

Ms. Fitzsimons indicated that it was her understanding that the reason why the renegotiation was sought on behalf of Value Homes was because of the financial difficulties encountered to which I have referred. Subject to a number of issues raised on her behalf by

counsel it seems to me that such an arrangement is, in principle, binding and valid. If, as appears to be the case, the company was not in a position to complete the development then serious consequences could, potentially, have arisen for Ms. Fitzsimons. As noted above she had paid a deposit. In the event that the company became insolvent it would, of course, be the case that the company would be in breach of its contractual obligations to her including, depending on the course of action she decided to adopt, an obligation to repay the deposit. The practicalities of the situation were such that it might well have been the case that she would not have been able to recover all, or indeed any, of the sum that might theoretically be due and owing to her. In those circumstances it seems to me that the variation offered provided a potential advantage to Ms. Fitzsimons in the sense that she agreed to pay an increased price as a *quid pro quo* for ensuring that the development would be completed. However, in that context it seems to me that significant regard also has to be had to the fact that in the variation agreement Value Homes committed itself to a completion in November, 2003.

4. Is the Variation Agreement Binding and was it Breached?
4.1 A number of points were raised by counsel on behalf of Ms. Fitzsimons to suggest that the signed document did not alter the legal relations between the parties.

4.2 Firstly attention is drawn to the fact that the witness to the signature of Ms. Fitzsimons would not appear to have been present at the time when Ms. Fitzsimons signed. However, the purpose of a witness to a signature is simply to prevent disputes arising as to whether a document has, in fact, been signed by the person concerned. Ms. Fitzsimons accepts that she signed the document and, indeed, that she did so having taken advice from the solicitor then acting for her. It does not seem to me that any failing in relation to the proper witnessing of her signature is, therefore, relevant.

4.3 Secondly attention is drawn to the fact that Value Homes does not appear to have executed the document. Again it does not seem to me that that materially effects the relations between the parties. These proceedings were commenced because Value Homes sought to place reliance upon the document. In such circumstances Value Homes are, necessarily, estopped from denying the validity of the document including those obligations as to completion placed upon it by clause 3 of the variation agreement.

4.4 In all the circumstances of the case it does not appear to me that any of the matters raised go to the validity of the variation agreement. If there is to be specific performance of the agreement then it seems to me that, in equity, Ms. Fitzsimons is entitled to specific performance but only on the basis of the contract as so varied.

4.5 However, the matter does not end there. The reality is that Value Homes failed to complete the building within the extended period of time agreed in the variation. It seems to me that Value Homes can not be seen to have it both ways. Part of the *quid pro quo* for the purchase price increase was a commitment on the part of Value Homes to complete by 13th November, 2003. This was not done. Instead Value Homes would appear to have sought a further variation which would, if agreed, have increased the purchase price to €180,162.96 and have extended the completion date to 25th June, 2004. There does not appear to be any suggestion that Ms. Fitzsimons ever agreed to that variation. However, the sought for further variation evidences the fact that Value Homes were in breach of their contractual obligations even in relation to the contract as originally varied in that the company was not in a position to complete at the varied sum and on the varied date.

4.6 I am mindful of the fact that at or about the time when these proceedings were commenced, Value Homes did offer to complete at the price as originally varied. However by that time, that is to say the earlier part of 2005, Value Homes was well in excess of a year beyond the extended completion date to which it had committed in the variation agreement. In those circumstances it does not appear to me that it was open to Value Homes to comply with its contractual obligations by a completion, at a very belated date, of the original contract as varied in relation to price but without having regard to the fact that it was in breach of its obligations (under the variation agreement upon which it, itself, relied to justify the increased price) to complete at a much earlier date.

4.7 While time was not expressed as being of the essence of the original completion period it seems to me that the only reasonable inference to draw from the variation agreement is to the effect that Value Homes entered into a binding commitment to complete and deliver the property within the extended completion period and that it was, necessarily, in breach of contract by failing so to do.

5. Is Specific Performance Available?
5.1 Counsel for Value Homes also drew attention to the fact (which appears to be common case) that Ms. Fitzsimons did not cause to be served a completion notice in accordance with the terms of the standard form contract used by the parties in this case. If a party not guilty of delay wishes to seek specific performance against a delaying party it seems to me that the innocent party can apply as soon as the delay occurs because it is settled that the remedy of specific performance (unlike many other remedies relating to failure to perform contracts in respect of land) does not depend on a breach of contract but upon the equitable duty to perform the contract *Marks v. Lilley* (1959) 1 WLR 749 at 753 (per Vaisey J.).

5.2 Therefore it seems to me that Ms. Fitzsimons is, in principle, entitled to specific performance. There is ample evidence to support her contention that she is ready and willing to close the sale. However for the reasons indicated above it does not seem to me that it would be equitable to permit her to obtain a decree of specific performance at a purchase price other than one that reflected the variation agreement. However, again for the reasons set out above, it seems to me that the variation agreement must be reflected in full and that while, on the one hand, there was an agreement that the purchase price should be increased by €20,000 there was also a clear commitment on the part of Value Homes to complete by November 2003. It is now some 30 months later and it must inevitably be the case that Ms. Fitzsimons has suffered loss by reason of the failure of Value Homes to complete within the extended time frame provided for in the variation agreement. In those circumstances it seems to me that it would equally be inequitable for Value Homes to insist on obtaining the aspect of the variation agreement favourable to them (that is to say the uplift in the purchase price) without also making provision for the losses suffered by Ms. Fitzsimons by virtue of the failure of Value Homes to comply with its part of the bargain contained in the variation agreement. In those circumstances it seems to me that the uplift agreed must be abated by the extent of any losses suffered by Ms. Fitzsimons.

6. Conclusions
6.1 I would therefore propose putting the matter in for a further brief hearing in early course for the purposes of ascertaining those losses. Value Homes will be entitled to play the same role in respect of that assessment hearing as was played in respect of the hearing leading to this judgment (the details of which I have outlined above).

6.2 Finally it should be noted that while the losses attributable to failure to close will, undoubtedly, have increased from the time of the commencement of these proceedings, I am satisfied that Value Homes was, as of that time, in breach of its obligations by insisting on a closure with the uplift of €20,000 in the purchase price and without offering any abatement in respect of its failure to complete by November 2003.

6.3 Subject, therefore, to the calculation of the amount of the abatement, as of the date of assessment, I would propose making a decree of specific performance in a sum calculated having regard to that abatement.

6.4 For the avoidance of doubt I should also indicate that the original contract would have entitled Ms. Fitzsimons to possession of an entirely new apartment with entirely new white goods. There is evidence of some form of occupation of the apartment, the nature of which does not seem to me to be material. It should be emphasised that the obligation of Value Homes is to put the apartment into a state equivalent to a new apartment and, in particular, to ensure that the apartment is equipped with appropriate new white goods prior to the closing of the sale on foot of the decree of specific performance which, I have indicated, I intend to make.