Neutral Citation Number: [2009] IEHC 59

THE HIGH COURT

2008 2 SP

IN THE MATTER OF SECTION 9 OF THE VENDOR AND PURCHASER ACT 1874

SPECIAL SUMMONS

BETWEEN/

THOMAS LYNCH

PLAINTIFF

AND

DESMOND DUFFY AND PAURIC DUFFY

DEFENDANTS

Judgment of Mr. Justice Roderick Murphy delivered the 12th day of February, 2009.

1. Background

Agreement
By memorandum of agreement made 4th April, 2007, between the plaintiff as vendor and the defendants as purchasers. It was agreed that the vendor would sell and the purchasers purchase two lots of land in the townland of Lisnasaran, Cootehill, Co. Cavan, being lands comprised in folios 5895F and 19786 of the register of Co. Cavan and of the leasehold interest in part of the property formerly known as the Cootehill Workhouse. The purchase price was €4,000,000.00. A deposit of €400,000.00 was paid on the date of the agreement. Payment was made in two instalments: €50,000.00 on 23/8/2006 and the balance of €350,000.00 early in 2007. According to special condition 5 the contract was, accordingly, binding on the vendor.

The special conditions also provided that the agreement superseded all previous agreements and that the purchaser bought with full knowledge of the property. The purchaser was obliged to purchase lot 2 regardless as to whether the vendor, who was to use his best endeavours, bought out the fee simple interest.

The special condition in regard to planning permission is central to the issue between the parties.

The contract was subject to the issue of planning permission for the construction of private residential dwelling houses of the subject property.

The purchaser was to apply for such planning permission by 26th February, 2007, (notwithstanding the agreement being made five weeks previously on 4th April, 2007). The condition, however, stated that the purchaser should apply by that earlier date "following the exchange of this contract and time shall be of the essence in that regard. The application shall be lodged on foot of plans and specifications agreed between the parties prior to the exchange hereof".

The memorandum had, according to the evidence, been drafted in autumn 2006. Indeed the executed memorandum of agreement has 2007 handwritten over the typed 2006.

The provision in the special conditions that the memorandum of agreement supersede all prior agreements, arrangements and understandings between the parties and that it constitutes the entire agreement between the parties relating to the subject matter thereof does not allow the court to take into account the drafting date which, in any event, cannot bind the parties until the contract was signed by the vendor pursuant to special condition 5.

The resolution of the illogicality of a prior date is resolved by the deletion of the words "by the 26th February, 2007" which, accordingly, requires the purchaser to apply for planning permission following the exchange of the contract.

Special condition 10 at the third paragraph requires the purchaser to use all reasonable endeavours to ensure that the application for planning permission be successful and that planning permission be obtained as soon as possible. The issue then becomes whether the purchaser did, in fact, use all reasonable endeavours in that regard.

The 6th paragraph of the special condition 10 provided that where the planning authority were to issue a decision to refuse permission and that no appeal against the decision was made within the statutory period or An Bord Pleanála decided to refuse such permission then the contract would be at an end. A further provision required that the appeal should first be approved in writing by the vendor who could not unreasonably withhold or delay such approval. But the purchaser should not appeal any decision of the planning authority to grant permission or any conditions attaching to any such decision.

Paragraph 9 of the Special Condition 10 provided that, in the event that no permission had issued by 30th June following, then the purchaser should be liable to pay interest to the vendor on the balance of the purchase moneys at a rate of 5% per annum up to the completion date. In the event that planning permission did not issue by 31st October, 2007, then either party may at any time thereafter by service of notice in writing terminate the contract and time should be of the essence in that regard. In the event that the termination of the agreement pursuant to the special condition regarding the planning authority or An Bord Pleanála refusing permission or that planning permission did not issue by 31st October, 2007, the purchaser should be refunded his deposit without deduction and without interest, costs or compensation.

Finally, special condition 10 provided that the closing date should be the date, 21 days after the issue of the grant of permission.

The evidence in the case was that there were delays in applying for planning permission. A planning application was made, initially, in July, 2007 and recorded on 1st August, 2007, accompanied by the requisite cheque to the planning authority. This cheque was not honoured and, accordingly, there was no valid application. On 28th August, 2007, the planning authority notified the defendants that if the appropriate fee was not paid with three days, the application would be rejected. (The defendants were on holiday at this time). On 13th September, 200, the planning authority wrote to the defendants agents to this effect and the application was returned to the defendants for the non-payment of fee. A new planning application was made on 24th October, 2007, which was one week before the date provided in special condition 10, paragraph 9, which would allow either party to serve a notice in writing terminating the contract.

On 26th October, 2007, the defendants wrote to the plaintiff saying that planning permission would not issue and requested the return of the deposit. The terms of that letter were as follows:-

> "please note that my client's application for planning permission has not issued in relation to the above property and it is not anticipated the same will issue on or before 31st October. As per the terms of the contract my clients hereby notify you that they will not be proceeding with the purchase of the property and you might kindly therefore arrange for their deposit to be refunded in early course."

Leaving aside the issue of whether this was a notice in writing terminating the contract (the word is not used) it is clear that such right could only arise after 31st October, 2007.

The defendant's solicitors wrote, following some correspondence which was not exhibited, some three weeks later on 15th November, 2007. That letter referred to the defendants planning application being lodged in July, 2007, though not validated by the planning office until 1st August, 2007. It referred to it being "quite a complicated planning application that necessitated employing specific engineers, archaeologists and architects." It pointed out that they had worked on putting together the planning application from the start of the current year, even before the contract was signed and having spent approximately €190,000.00 on getting the application together. The letter referred to the clients being on holidays for two weeks and that it was therefore October before the planning application was resubmitted on 24th October, 2007, including a copy draft in the sum of €6,763.00.

The letter further stated that the clients had acted in a most reasonable manner and without any undue delay. Having spent a lot of money on the planning application it would not make sense for them to deliberately delay the process especially where they were liable to pay interest of 5% from 30th June, 2007, until closing. Reference was made to the letter of 26th October, which stated:-

> "my clients do not now wish to proceed to purchase the property and I therefore request you to return my clients deposit in the sum of €400,000.00 by return as per the terms of the contract."

The letter does not formally notify the termination of the contract in those terms. In referring to the letter of 26th October, the vendor's solicitor would seem to rely on that as notification to terminate.

A further letter from the defendant's solicitors dated 18th December, 2007, alleged that it was the vendor who frustrated the application in the first instance in that he was seeking unrealistic sums to facilitate the original entrance and the plans then to be redrawn with a new entrance within the site. The letter first states that the defendants were fully aware of the fact that the time limits on the contract were very strict and did all they could to ensure that the papers were lodged and all matters dealt with as soon as reasonably possible and called upon the plaintiff's solicitor to return the defendant's deposit. Otherwise they would have to apply to the court to seek redress and interest on the moneys held since the date that they were entitled to the return of same.

2. Issues arising
The court is asked to provide an answer to the following three questions:-

> (a) Are the defendants in breach of special condition number 10, paragraph 3 of the contract for sale made between the parties on 4th April, 2007?
>
> That condition provides that the purchaser *"shall use all reasonable endeavours to ensure that the application for planning permission is successful and that planning permission is obtained as soon as possible"*.
>
> (b) In the event that the answer to the previous question is in the affirmative, are the defendants thereby precluded from relying on the right of termination provided for by special condition 10, paragraph 9 of the contract for sale which provides that in the event that planning permission does not issue by 31st October, 2007, then either party may at any time thereafter by service of notice in writing terminate this contract, and time shall be of the essence in that regard.
>
> (c) In the event that the answer to the previous question is in the affirmative, is the plaintiff entitled to rely on the provisions of general condition 41 of the contract for sale to forfeit the deposit and resell the property.

3. Evidence of plaintiff
Mr. Thomas Lynch said that in March, 2007, the defendants came to his house requesting the removal of a ditch on his property adjoining the property the subject matter of the contract. He refused to sign some piece of paper that they had. A figure of €180,000.00 had been mentioned to his brother who is not an owner. He refused at any price. He would not give them a sight line as they needed privacy. He said from that time onwards there was not cooperation. He did not know why his solicitor wrote to the defendants on 7th March, asking if they wanted a sight line.

Mr. Lynch's evidence with regard to whether he had seen or approved the planning application was not clear. He said that no plans were brought by the defendants to him in June, 2007 but agreed that they came on a couple of occasions and that he told them to deal with his solicitor and other adviser whom he had engaged: with Mr. Crosby and Mr. Morgan. He said he had approved no plans. He admitted that there may have been 88 houses in respect of which planning permission was applied for but that Mr. Duffy did not have plans with him.

An application was made to adduce evidence from Mr. Duffy by way of direct examination notwithstanding that only a notice of cross examination was served. This was opposed by counsel on behalf of the plaintiff who said that the evidence was closed and no request had been made.

The application was not proceeded with and counsel for the plaintiff made submissions.

The case was a simple one in that the defendant undertook the obligation with regard to planning pursuant to para. 3 of special condition 10. Though the contract was not signed until 4th April, 2007, it had been returned signed by the defendants in January, 2007, at a time when the defendant did not have the money for the deposit.

The plans at the latest were ready in June, 2007, when the invoice in the sum of €190,000.00 was submitted by the defendant's advisers in respect of work that purported to have been done.

There was no explanation of why planning was not lodged at this stage. The letters from the plaintiffs solicitor pointing out that interest would run from the end of June, 2007, were not replied to. The first application received by the planning authority on 1st August, 2007, was not proceeded with as the cheque in relation to the fees was not honoured. It was not accepted that the holiday period indicated could explain the delay until 24th October, 2007, when planning was applied for together with draft payment.

The law in relation to the matter was clear. Any right that the defendant had was subject to an express obligation to make *bona fide* application. In making an application all formal requirements such as the payment of fees were necessary. The planning authority on 28th August, 2007, requested payment but the application was not properly before them until 24th October.

Counsel referred to Farrell on specific performance, para. 3.26, to *Costelloe v. K.N. Maharaj Krishna Properties (Ireland) Ltd* (High Court) 10th July, 1975 and to *Jolley v. Carroll* (2000) States Gazette.

Counsel on behalf of the defendants submitted that there was no evidence of default or undue delay. He agreed with counsel on behalf of the plaintiff regarding the obligation of the buyer under special condition 10 which provided that planning be applied for before 26th February, 2007, at a time when the contract was not signed by the vendor until 4th April. Paragraph 3 of clause 10 could not stand on its own, it was linked to paragraph 2.

The defendants on 31st January had given post dated cheques when the contract was signed by the defendants as purchasers. A bank draft was sent on 4th April.

Counsel for the defendants submitted that it was not in dispute that the defendant had paid €190,000.00 in respect of the planning application. In his affidavit of 9th April, 2008, Brian Morgan suggested in evidence the invoice for that sum had been paid.

He further submitted that while the contract could not have been terminated before 31st October, 2007, that the solicitor on behalf of the defendant had sent a letter of 15th November, 2007, purporting to terminate the contract.

It was the plaintiff's duty to prove the case on the balance of probabilities.

He submitted that the special condition required all reasonable endeavours and not best endeavours.

In reply, counsel on behalf of the plaintiff said that any delay was attributable to the defendant. There was no delay by the plaintiff. All the case law pointed to an implied obligation. There was an express obligation in the present case.

Moreover, the planning application was not doomed to failure: there was no evidence that it would not have been granted. Thus the court should not speculate on what the planning authority would or would not have done.

4. Decision of the court

Special condition 10, drafted in autumn of 2006, signed by the defendants as purchasers in January, 2007, envisaged application for planning permission being made before 26th February, 2007. The purchasers being unable to pay the deposit at the time of signing, signed post dated cheques and, eventually, gave a bank draft on 4th April, 2007, when the plaintiff, as vendor, executed this contract. Clearly, at that stage and due to the non payment of the deposit in relation to which there was a clear obligation under the special condition before the contract became effective, the purchaser was unable to apply for planning permission on or before 26th February, 2007.

The court finds that the impossibility to comply with this was known to the defendants and their advisers. Being a term which was impossible the court rules that that date is ineffective and should be deleted from the contract.

What is left is a clear obligation to use all reasonable endeavours to ensure that the application for planning permission was successful and that planning permission was obtained as soon as possible pursuant to para. 3 of special condition 10.

Notwithstanding that and, the delays attributable to the defendants, there was a delay of over five months before an effective planning application was made. Moreover this being made on 24th October, a week before the ultimate date agreed for the application at the end of that month it was clearly not practical that planning would issue.

This prompted solicitors on behalf of the defendants to write two days after the planning application was made on 26th October, 2007, demanding the return of the deposit.

It was not a formal notice to terminate because such right could not have arisen at that date and, moreover, it did not purport, in strict terms, to terminate the contract.

The subsequent letter of 15th November, 2007, was not a fresh letter attempting to terminate as it referred back to the letter of 26th and, moreover, did not strictly comply with nor use the term, notice to terminate.

The court has considered the evidence of the plaintiff in relation to the defendants requiring a site line or the removal of a ditch on lands outside the subject matter of the contract. This meeting took place some time in March after the defendants had signed the contract and, clearly, before the deposit was paid and the plaintiff had executed the contract on receipt of the deposit.

While Mr. Lynch's evidence in some regards was not all that clear in relation to his knowledge of the planning application, it is clear that he would not accede to the request and left it to his advisers. The court finds that the defendants did not raise the issue and, moreover, accepts the evidence of Mr Duffy that the matter did not take more than a week.

No reply was received from the plaintiff's solicitor's letters in June, 2007, regarding the interest on the outstanding balance due after the end of that month.

The court finds that the defendants did not comply with their obligations under the special conditions and can accordingly answer the first question in the special endorsement of claim as follows:-

> "(a) The defendants are in breach of special condition number 10(iii) of the contract for sale made between the parties hereto on 4th April, 2007."

The right of termination in para. 9 of special condition 10, apart from the 5% on the balance of purchase moneys after 30th June, 2007, allowed either party to terminate the contract by "service of notice in writing" in the event that planning permission did not issue by 31st October, 2007. Time was of the essence in that regard.

Compliance with this condition must necessarily be linked to the previous conditions regarding the obligation of the purchaser to use all reasonable endeavours and is fortified by the requirement that the purchaser should apply for planning permission following the exchange of the contract in respect of which time was also of the essence. Even with the deletion of the date of 26th February, 2007, it was clear that application should have been made after a reasonable time following the exchange of the contract on 4th April, 2007, which was signed on that date but returned to the defendant's solicitors on 16th April, 2007.

In any event, it is clear from the invoice from the defendant's agents that considerable work had been done, to the extent of €190,000.00 in relation to the planning application by June, 2007. While there is no evidence that this sum was paid, nor is it necessary for the court to decide on that issue, it is clear that the defendant's case is that very extensive work had been done by that date. No evidence was given as to why planning application was made later than the date on which that work had been done. The court does not have to decide on whether the application made towards the end of July and received by the planning authority on 1st August, 2007, complied with the obligation to use all reasonable endeavours to ensure that the application for planning permission was successful and that planning permission was obtained as soon as possible. There is no doubt that the application made on 24th October, being only one week prior to the deadline set out in contract, was lodged too late to comply with the obligation to use reasonable endeavours to obtain planning permission. Accordingly, the court can answer the second question as follows:-

> "(b) the defendants are precluded from relying on the right of termination provided for by special condition number 10(IX) of the contract for sale."

The general conditions of the 2001 edition of the Conditions of Sale of the Law Society of Ireland apply, save where the context otherwise requires or implies or the text thereof expresses to the contrary pursuant to the first special condition.

There is no special condition dealing with the forfeiting of the deposit in the re-sale of the property. Accordingly, general condition 41 of the contract for sale applies.

The court can, accordingly, answer the third, and ultimate, question posed in the special endorsement of claim as follows:-

> "(c) the plaintiff is entitled to rely on the provisions of general condition 41 of the contract for sale to forfeit the deposit and to re-sell the property."

The court will so order.