

THE HIGH COURT

[2005] No 1657P

MOUNT KENNETT INVESTMENT COMPANY

PLAINTIFF

AND

PATRICK O'MEARA & OTHERS

DEFENDANTS

Judgment delivered by Mr. Justice T.C. Smyth on 21st November, 2007

1. This is a purchaser's action. It arises from an agreement in writing dated 28th January 2005 made between the Defendants and one Tom Pollard (In Trust) for and on behalf of the Plaintiff. The agreed purchase price was €3,900,000 in respect of which €195,000 was paid as a deposit. The closing date for the sale was 30th March 2005. The property in sale is known locally in Clonmel, County Kilkenny as "The Show Ground"; the property being sold excluded the property known as the Dog Track - which adjoins or is continuous to The Show Ground - which had for some years earlier been transferred to Bord na gCon.

2. The contract was based on the General Conditions of Sale (2001 Edition) of the Incorporated Law Society of Ireland and was subject to a number of Special Conditions, of which numbers 5, 6 and 10 were central to this case. These provide as follows: -

5. The property was subject to leases of 1st July 1931, 3rd October 1941 and 1st July 1944 between Clonmel Horse Show & Agricultural Society Ltd of the One Part and Thomas A. Morris & Ors of the Other Part. The Lessees under the said Leases have long since vacated the property in sale. No surrender was ever completed by the parties. The terms devised under the Leases aforesaid have now expired. A declaration along these lines from Clonmel Horse Show & Agricultural Society Limited will be furnished if requested on closing. The Purchaser shall not require Surrender in respect of the said Leases.

6. The Purchaser is referred to Lease made 2nd August 1988 in favour of Clonmel Leisure Group Limited. The Lessees in respect of this Lease have vacated and surrendered the property. On or before the closing the vendors shall furnish a Surrender duly executed in respect of the said Leases.

8. (If) 'the sale to the Vendors herein has not closed no objection or requisition shall be raised by reason of the fact that the Vendors have not completed the sale to them or are not registered owners.

10. Notwithstanding the title document schedule and the documents therein the vendor shall deduce fee simple title without burdens or restrictive covenants to the subject property on or before closing."

3. The evidence establishes that condition 10, which appears in manuscript form in the contract, was inserted at the behest of the Plaintiff with the consent of the Defendant Mr. Tobin (who is not only a Defendant but also the solicitor for the Defendants in the action and also is a controlling shareholder in Clonmel Leisure Group Limited) prior to the signing of the contract.

4. Clonmel Leisure Group Limited was a private limited liability company of which the three Defendants are shareholders, it came to have, through an arrangement with a Mr. Buckley, an interest in purchasing The Show Ground from the Clonmel Horse Show & Agricultural Society Limited ("the Society") which it is common case was a registered charity, and as such required the consent of the Commissioners of Charitable Donations & Bequests for Ireland ("the Commissioners") to dispose of its asset(s). The contract between Mr. Buckley and the Society was expressly made subject to the consent of the Commissioners.

5. The parties hereto have signed the contract of 28th January 2005, the Plaintiff's solicitors on 31st January sought documentation specifically in relation to special conditions 5 and 6 of the contract and title deduction pursuant to special condition. The response of the Defendants' solicitor - (the Defendant Mr. Tobin) - of 8th March 2005 was:

"We are not in a position to furnish the documentation, particularly in relation to Special Condition 5, 6 and 10."

6. It is common case that what was in sale was development land, and by 11th March the Plaintiff was at an advance stage of finalising a planning application, and negotiating with intended anchor tenants - this incidental matter was not proven in evidence but the letter of 11th March 2005 alluding to it was not disputed during the hearing by the Defendants. More pertinently, the Plaintiff's solicitor in that letter stated:

"Our client wishes to complete the sale on the closing date specified in the Contract. Under general condition 7 your client is obliged to furnish the documents referred to in the Documentation Schedule to the Contract. We don't understand as to why you would not be in a position to furnish these or those in Special Conditions 5, 6 and to the Contract as you must have been in possession of same when the contract was drafted."

7. No response was forthcoming and on 4th April 2005 the Plaintiff served a Completion Notice on the Defendants' solicitor. The Defendants were in no doubt that the Plaintiff would pursue the contract through litigation if the Completion Notice was not complied, for a draft Plenary Summons and draft Statement of Claim accompanied the letter of 4th April 2005.

8. Issue was joined when the Defendants' solicitor by letter dated 20th May 2005 (inter alia) stated:

"We refer to the above matter and we would refer in particular to contract dated 28th day of January 2005. We take this opportunity to again remind you, as I did during the course of our telephone conversations, that we are not in a position to proceed with this sale as the Charitable Commissioners have not granted their consent to the purchase by our clients of the lands in question. On the presentation of the contracts in this matter to your goodself you inserted a special condition making the contract subject to devolution of a fee simple title, namely special condition number ten. By reason of the fact that the Charitable Commissioners have refused their consent, we are not in a position to satisfy that condition and the contract is therefore at an end. There is no question of any liability in respect of non performance resting on your clients in this matter."

9. It goes on as follows:

"In short this is quite simply a case of a contract being conditioned in respect of a particular issue that condition not being satisfied then in such an event the contract is at an end. If you wish to have this issue adjudicated by the High Court that is a matter entirely for yourself, but we would respectfully suggest that it is totally unnecessary being an

abuse of process and a generation of costs which would ultimately be borne by your clients."

10. The Defendants from that date, contended that what was in suit was a conditional contract and it was only at the end of the first day's hearing that it was properly conceded by counsel for the Defendants that such plea was being abandoned. In my judgment on the documentation it was unsustainable. At another part of the case the suggestion was clearly made against the Plaintiff on the instructions of the Defendants solicitor that the Plaintiff had not paid the full deposit and/or that it had been received back from the Defendants. On the Plaintiffs seeking to have further evidence called to rebut this baseless suggestion, which the Defendants knew or ought to have known was untrue, it was withdrawn on the third day of the hearing.

11. The Plaintiffs case was that the grant or refusal of consent by the Commissioners to either the Defendants contract to purchase or, the better, to facilitate the Defendants to complete the contract in suit to sell was not its concern. Furthermore the contract of 28th January 2005 to sell to the Plaintiff was not made subject to the consent of the Commissioners and accordingly there was an absolute obligation on the Defendants to deduce title before the closing date to enable the sale to be completed in accordance with the contract.

12. In the course of the judgment in *Duffy -v- Ridley Properties Limited & Anor* (The High Court, 7th July, Unreported, Finlay Geoghegan J.) It is stated as follows:

"The remedy of specific performance is discretionary. As John Farrell SC in the Irish Law of Specific Performance puts it at p 223: 'The relief may be withheld as an exercise of that discretion even where a Plaintiff proves a valid contract and no particular defence or ground for refusal is established.'"

"However in the case of a contract for the sale of land the normal rule is for the court to grant specific performance and there is an onus on a defendant once the Plaintiff proves a valid contract to establish a ground or grounds upon which relief should be refused."

13. It is accepted by the Defendants that the contract was a valid contract and that they had the onus of displacing the entitlement, in such circumstances, of the Plaintiff to an entitlement to a decree of specific performance. It was on this basis that the case proceeded. However, Mr. Michael McMahon S.C. for the Defendants signaled in advance that the evidence to be led would inform the Court as to: -

a) The belief the Defendants had of obtaining the consent of the Commissioners to their own contract to purchase.

b) The knowledge of the Plaintiff that the consent of the Commissioners was necessary to both the Defendants contract to purchase and the second or 'sell on' contract of 28th January 2005 AND that such knowledge is a material consideration as to whether the Plaintiff should be given the relief of specific performance or not, because of: (i) frustration, or (ii) the impossibility of specific performance.

The Evidence

14. The Solicitor for the Society gave a general history of the site and verified that the first contract for sale of January 2001 to Mr. Buckley was for £2m. A deposit 11:41 was paid and the consent of the Commissioners obtained, but Mr. Buckley was unable to complete the transaction. A variety of negotiations followed or arose from the inabilities of Mr. Buckley which led to the dog track being sold to Bord na gCon, and on 31st January 2002 the balance of the Society's property, ie the north field was sold to Mr. Tobin (In Trust) for £750,000 (€952,303) - that contract was made by special condition expressly subject to the consent of the Commissioners. A further condition provided that for the consideration of £1 the purchaser would procure the surrender of the leasehold interest of Clonmel Leisure Group Limited in the property the subject of the contract for sale to Bord na gCon; and further that in the event of the rezoning of the property by April 2003 that the purchase price would be increased by an additional £100,000.

15. In short this evidence established that -

(a) the consent of the Commissioners was available on 21st February 2001 to a sale to Mr. Buckley of the totality of the dog track and north field (the subject of the contract in suit) as it was then zoned for £2m in the terms of the contract between the Society and Mr. Buckley;

(b) the consent of the Commissioners was required in respect of the sale to the Defendants by the Society and it was available at a price which the Commissioners considered reflected a net benefit to the Society at full market value (if such) (of which the Plaintiff knew nothing at the time) and same existed between the Commissioners and the parties to the First contract - the ultimate position of the Commissioners was expressed in a letter from them to the Society dated 16th March 2005 -

"That since the Commissioners approved the sale of the property on 20th August 2002 for €952,303 with the proviso that should rezoning be granted within 12 months of the date of the closing or within two years from the date of the contract, the purchase price to increase to €1,199,902.00, factors have emerged which cast doubt on the adequacy of the consideration agreed. In the circumstances the Commissioners cannot agree to the sale."

16. Matters did not improve over time for the Commissioners by letter dated 1st March 2005 to the Society's Solicitors (inter alia) stated as follows:-

"The Commissioners are deeply concerned about many aspects of this application. Unless they can be satisfied that the proposed sale of the property is for the full market value and for the benefit of the charity, their sanction will not be forthcoming."

17. Further, the view of the Commissioners came to be reiterated in their letter of 19th January 2007 as follows:-

"That the Commissioners are not satisfied, on the evidence furnished, that the net benefit accruing to the charity represents the full market value of the Lessor's interest."

18. In the course of his evidence Mr. Flynn, the Society's Solicitor, said that he,

"The Committee of the Society, and just about everybody elsewhere perhaps, except the Commissioners, were at a loss to understand where they were coming from."

19. While ignoring events post the application for consent I have no difficulty in understanding the Commissioners concerns which are clearly stated. If consent was available for the sale of the entire holding of the Society in February 2001, they might reasonably be concerned (even ignoring any question of confusion over the differences in market price per acre) that with re-zoning and in a national rising market that the property in suit could pass through the hands of speculators in a relatively short period of time (some of whom added no value) each of whom would make a handsome profit but in whole or part at least at the expense of the charity. The consent of the Commissioners to the sale of the dog track was in August 2002 forthcoming at existing use value plus what Mr. Flynn referred to as:

"The inducement payment that was made by the Davis Road Greyhound Stadium Group, all of which secured the Commissioners consent by December 2002."

20. I am satisfied and find as a fact that if the Defendants has been prepared to accept a lesser element of profit on 'the sell on contract' to the Plaintiff the consent of the Commissioners was as a matter of probability available in respect of the contract between the Society and the Defendants.

21. In my judgment it is clear that the Commissioners were concerned that the Society should not only receive full market value (which includes the hope or potential of the property). I do not discern from the correspondence that the Commissioners expected a purely philanthropic purchaser to exist, but they repeated their view that the Society should be the net beneficiary of the sale of property. They could scarcely permit with impunity the selling on of the Society's property within short intervals by speculative investors, each making appreciable profits.

22. In the events by the date of the hearing the First of the contracts, ie that between the Society and Mr. Tobin (In Trust) (through which, notwithstanding the Vendors' had no title on 28th January 2005 still entitled them to maintain a claim for specific performance against the Plaintiff if it had defaulted in its obligations there under). In my judgment the corollary should also apply.

23. Parallel to the litigation and without prejudice to it arrangements were made to achieve an outcome that the Defendants would sell back to the Society the leasehold interests which they held and the Society would sell directly to the Plaintiff the freehold interest in the property.

24. As I say, and I repeat, the events by the date of the hearing brought about a situation where the contract between the Society and Mr. Tobin (In Trust) had been annulled - the date or circumstances were not vouchsafed to the Court or whether this was a deliberate action taken by Mr. Tobin and/or with his associates under which or whatever aegis to disable themselves of having an interest in the property in suit to 'sell on' to the Plaintiff. I am unaware and make no findings about facts of which I had no evidence. By the date of the hearing the Society had entered into a contract on 1st September 2006 for the property of the north field - The Show Ground to the Plaintiff for a sum of €6 million. At the same time there was a contract entered into between the Defendants and the Society for the sale of the lessees interest for a consideration of €3,200,000. Some time in January 2007 Mr. Flynn contacted the solicitors to the Commissioners as a result of which he understood that an additional €1 million might be sufficient to bring the Commissioners to consent to the sale to the Plaintiff, ie that the net benefit to the Society would be €3.8m.

25. I am satisfied and find as a fact on the evidence that the Plaintiff was prepared to make such financial adjustment by way of an additional payment of €500,000 but the Defendants were not prepared to reduce by €500,000 the payment to be received by them from Society for the lessees interest under the lease. Accordingly matters being unresolved the case proceeded in respect of the contract of 28th January 2005.

26. I am satisfied and find as a fact that these more recent arrangements were initiated without prejudice to the litigation and as an attempt by the Plaintiff to mitigate such damage as it may have suffered from the failure of the Defendant to conclude the sale of 25th January 2005.

27. In my judgment the fact that by the closing date fixed by the contract in suit the Defendants had not secured directly or through the Society the consent of the Commissioners did not discharge the contract but left the Defendants in breach of their obligations to close the sale. Furthermore I am satisfied and find as a fact there was not a frustration in fulfilling the Defendants obligations under the contract. Frustration invariably involves some subsequent supervening event not in the contemplation of the parties at the time of the making of the contract. It does not and cannot arise in the instant case because the issue of the necessity of the consent of the Commissioners was fully known at the time of the making of the contract, most particularly by Defendants but the Plaintiff was not so conditioned.

28. Likewise I am satisfied and find as a fact that on the evidence the defence of impossibility of performance is unsustainable. The evidence in this case is that the consent of the Commissioners was obtainable if and only if they were satisfied as to the amount or price the Charity (The Society) received and that is quite clear from their correspondence. If the Defendants had paid a sufficiently adequate price to the Society, even if did mean accepting some reduction in the element of profit to it on the 'sell on' contract to the Plaintiff, I believe on the evidence that the requisite consent would on the balance of probability on the evidence have been forthcoming. There is no credible evidence that the Defendants took any meaningful step to secure the consent. Quibbling about errors in the figures first put to the Commissioners was to miss the point completely because the Commissioners were dealing with matters of substance that clearly concerned them.

29. In the admirably reliable and concise textbook Farrell on Irish Law of Specific Performance (1994) at page 59, para [3.27] states as follows:

"While a Court of equity will not compel a person to do something which is impossible it will have little sympathy for someone whose own neglect default makes it impossible for him to perform his contract."

30. In my judgment the Plaintiff is entitled to a decree for specific performance.