THE COURT OF APPEAL

CIVIL

[approved]
[2024 No 129]
Neutral Citation No: [2024] IECA 277

Costello P.

Allen J.

O'Moore J.

BETWEEN

PHOENIX ROCK ENTERPRISES T/A FRANK PRATT & SONS

APPELLANT

AND

GEORGE HUGHES

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 20th day of November 2024

1. This is an appeal against a decision of the High Court, refusing the appellant an injunction prohibiting the respondent from entering into a tender process to sell or market the property situate at Clondoogan, Summerhill, County Meath, as described in Folio MH7440, and a further injunction restraining the respondent from selling or marketing the property until further orders. The appellant says it entered into an oral agreement with the respondent to purchase the land in April 2023, and, while there exists no note or memorandum which would satisfy the requirements of s.51 of the Land and Conveyancing Law Reform Act 2009, it has an arguable case that by reason of acts of part performance, at trial, it would obtain an order for specific performance of the agreement to sell the land. It submits that the respondent has acted unconscionably in his dealings with the appellant,

such that it would be entitled to equitable relief; that the balance of convenience is in favour of granting the injunction, and that damages would not be an adequate remedy as it would be deprived of an interest in property, were the land to be sold to a third party prior to trial.

Background

2. The facts may be briefly summarised. The land comprised in Folio MH7440 comprises approximately 27 acres and largely comprises farmland and a farmhouse (though part of it was licensed to a third party as a quarry). Sand and gravel are present on the land. The folio shows that James Hughes of Clondoogan, Summerhill, County Meath is the full owner. He died on 26 June 1996, and by his last Will and Testament, he bequeathed the lands to his neighbours, the respondent, the respondent's wife, and their four children in equal shares. While a grant of Probate was extracted on 6 October 2000, the land was not transferred into the names of the six members of the Hughes family until 5 May 2023. The appellant says that prior to receipt of the respondent's replying affidavit, sworn in these proceedings on 7 June 2023, it was unaware of the fact that the lands were beneficially owned by the six members of the Hughes family. It believed, and it says it was wrongly led to believe, that the respondent was the sole owner of the lands.

3. The appellant describes itself as being engaged in the sand and gravel business and was interested in exploiting the sand and gravel on the lands. It negotiated with the respondent between 2015 and 2017 to acquire an interest, either of part of the lands or all of the lands and whether by lease, and latterly, by purchase. Throughout the negotiations, both parties were represented by solicitors. The correspondence between the solicitors emanating from both sides expressly stated that no contract should be deemed to come into existence until such time as contracts had been signed by both parties, a deposit paid, and

the contracts duly exchanged. For example, on 4 August 2017, the appellant's solicitors wrote to the respondent's solicitors, stating:

> "*PLEASE NOTE that we have no authority either to (sic) express or implied to bind our clients to a Contract and that no Contract shall be deemed to be in existence until such a time as Contracts have been exchanged by both parties, deposit paid and one part of the Contract duly exchanged (sic). Please further note that this letter is not intended to be a note or memorandum in writing for the purposes of satisfying the Statute of Frauds, as amended by Section 51 of the Land and Conveyancing Law Reform Act, 2009*."

It is accepted by both parties that the correspondence covered the exchanges and actions of the parties until the appellant's solicitor's last letter of 21 September 2017, when they wrote, stating that there were no further developments in the matter. That letter was headed 'Subject to Contract/Contract Denied' and stated:

> "*PLEASE NOTE that we have no authority either to (sic) express or implied to bind our clients to a Contract and that no Contract shall be deemed to be in existence until such a time as Contracts have been exchanged by both parties, deposit paid and one part of the Contract duly exchanged*."

4. While there is some dispute as to the degree of contact between the parties thereafter, it is not necessary to explore this in detail. Senior counsel for the appellant accepted that his client's case is that a contract was concluded in April 2023, which the respondent then purported to resile from, so that what went before was of little relevance and could not be relied upon by his client.

The Asserted Contract

5. The appellant asserts that during a telephone call on 11 April 2023 with the appellant's Mr. Ivan Pratt, the respondent offered to sell the land to the appellant "*for the*

sum of €1.2 million subject to planning permission"**.** In Mr. Pratt's second affidavit, sworn on 6 July 2023, Mr. Pratt addressed what was meant by the phrase "*subject to planning permission*". He averred:

> "*I say that the [respondent] is aware the 11th April 2023 agreement by the [respondent] to sell the lands to the [appellant] was subject to planning permission and the [respondent] knows what that involves and the [respondent] is aware the [appellant] knows what planning permission involves as we previously discussed it."*

6. Mr. Pratt is inconsistent in his evidence as to whether the contract was entered into on 11 April 2023, or whether there was a "*binding offer*", or simply an offer, made on 11 April 2023, which the appellant subsequently accepted by a letter written on its behalf by its solicitors on 20 April 2023. The letter was addressed to the respondent (not his solicitor) and was sent by registered post. It is appropriate to quote the letter in full:

> "*Re: Our Client: Ivan Pratt*
>
> *Property at MH7440, Clondoogan Summerhill Vo* [sic] *Meath*
>
> *Dear Mr Hughes,*
>
> *We are instructed by our above-named client in respect of the purchase by our client of the lands at Clondoogan, Summerhill, Co Meath from you.*
>
> *Our clients wishes to accept your recent offer of 11 April 2023, whereby our client will pay €1.2 million to you for the freehold estate in the lands subject to planning permission and good clear marketable title.*
>
> *Our clients have accordingly arranged a planning consultant to apply for the requisite planning permission and our client has funds in place and is ready, willing and able to complete the said purchase via this office.*

We look forward to receiving the relevant contract documentation within 10 days of the date of this letter."

I shall return to the details of the letter later in this judgment.

7. It is accepted that the letter was received by the respondent on 24 April 2023. On 25 April 2023, Mr. Pratt and the respondent spoke on the telephone. The respondent said (on his case, reiterated, but for the purposes of this judgment, I will set out the appellant's case at its height) that he was going to sell the lands by tender, and thereafter, denied that he had agreed to sell the lands to the appellant on the terms set out in the letter of 20 April 2023. The dispute between the parties quickly escalated.

8. The appellant issued a Plenary Summons on 4 May 2023. The General Indorsement of Claim claims:

"1. A Declaration that the [respondent] is estopped from denying the [appellant] has a beneficial interest in the property situate at Clondoogan, Summerhill, Co. Meath, as described in Folio MH7440.

2. An Injunction prohibiting the [respondent] from entering into a tender process to sell or market the property described in paragraph 1 herein.

3. A Declaration that the [respondent] is estopped form (sic) negotiating the sale of the property described in paragraph 1) herein, whether directly or indirectly, with any company, person or entity other than the [appellant].

4. An Injunction to restrain the [respondent] from selling or marketing the property described in paragraph 1 herein to any other company, person or entity other than the [appellant].

5. All necessary accounts and enquiries.

6. Damages for loss of opportunity.

7. Damages for loss of bargain.

8. Damages for breach of contract.

9. Further and if necessary, an Order granting the [appellant] specific performance of the contract between the [appellant] and the [respondent] to sell the property described in paragraph 1 herein to the [appellant].''

Also, on 4 May 2023, the appellant sought short service of a Notice of Motion seeking interlocutory injunctions in terms of paras. 1 and 2 of the General Indorsement of Claim.

9. On 3 July 2023, the appellant delivered a Statement of Claim. The plea in relation to the asserted contract is as follows:

"*18. Subsequently, by telephone call, on or about 11th April 2023 the [respondent] called Ivan Pratt and offered to sell the Property for €1,200,000.00 subject to planning permission.*

19. By letter dated 20 April 2023 the solicitors for the [appellant] accepted the [respondent]'s aforementioned offer of 11 April 2023. The letter states:

> *'Our clients wishes to accept your recent offer of 11 April 2023 whereby our client will pay €1.2 million to you for the freehold estate in the lands subject to planning permission and good clear marketable title.*
>
> *Our clients have accordingly arranged a planning consultant to apply for the requisite planning permission and our clients has (*sic*) funds in place and is ready, willing and able to complete the said purchase via this office.*
>
> *We look forward to receiving the relevant contract documentation within 10 days of the date of this letter'.*

20. By way of telephone call, on or about 25th April 2023 the [respondent] called Ivan Pratt and told him that he had changed his mind. The [respondent] stated that rather than sell the Property to the [appellant] directly and honour the

contract for sale on the Property he had made with the [appellant] on 11 April 2023 and which said offer was accepted by the [appellant] on 20 April 2023, the [respondent] instead said that he was going to put the Property up for tender."

The reliefs sought in the Statement of Claim did not quite reproduce those in the Plenary Summons. The primary relief now sought was specific performance of an alleged exclusive dealing agreement and specific performance of the contract for the sale of the lands in April 2023.

10. There was an exchange of affidavits between the parties, and it is not necessary to refer to the evidence in detail, save the appellant's averments as regards the adequacy of damages. In his first affidavit, Mr. Pratt simply asserted that if the defendant sells the property, "*it is not sufficient to try and compensate the [appellant] particularly as the [appellant] believes it has an interest in the Property*". In his second affidavit, Mr. Pratt averred that the appellant enjoyed an equitable interest in the land, and it is simply stated, without elaboration, that damages would not be an adequate remedy for the appellant. No further case was made out as regards the inadequacy of damages as a remedy, despite the fact that the respondent, in his replying affidavit, expressly asserted that damages were an adequate remedy for the appellant, as it was a commercial enterprise, and its interest in the lands was to generate profits from the exploitation of the sand and gravel. As such, its interest was eminently compensable by an award of damages in the event that the injunction was refused, but the appellant succeeded at trial.

Discussion and Decision

Is there an arguable case for an order for specific performance of the alleged contract of April 2023?

11. The High Court judge delivered a carefully reasoned judgment over 43 pages where he considered all of the appellant's arguments and refused the reliefs sought. It is not

necessary to set out his findings in this judgment. I am satisfied that he was correct to do so. My judgment takes the appellant's case at its height and does not engage with the conflicting evidence of Mr. Pratt and the respondent as to what was said or occurred at various meetings or during various telephone calls. It is based on the appellant's own case, the submissions of its counsel, and the documents written and exhibited on its behalf.

12. It is established law that on an application (and an appeal from an application) for an injunction, the court must consider whether the plaintiff/appellant would obtain a permanent injunction after trial in the terms in which the interlocutory relief is sought. In this case, the injunctions sought are to restrain the respondent from entering into a tender process to sell or market the lands and/or to restrain him from selling or marketing the lands, generally. The primary relief sought in the Statement of Claim is:

> "*Specific performance of the contract concluded between the [appellant] and the [respondent] wherein on 11th April 2023 the [respondent] agreed to exclusively deal with the [appellant] in respect of the Property as set out in paragraph 3 hereof and agree to sell the Property to the [appellant] for the sum of €1.2million, subject to planning permission, the said offer being accepted on behalf of the [appellant] on 20th April 2023 but then repudiated by the [respondent] on 27th April 2023."*

It appears that this latter date is an error, as at para. 20 of the Statement of Claim, it is pleaded that the respondent had indicated on 25 April 2023 that he would not honour the contract.

13. It is accepted by the appellant that the respondent is not the owner of the lands: he is one of six tenants in common. The appellant has not sued the other co-owners. While it has threated to join them as parties to the proceedings for the purpose of obtaining an order for specific performance against them, 18 months after commencing this action it has failed to

do so. In the course of oral submissions, senior counsel for the appellant accepted that they were "*innocent*" parties in this saga, and implicitly, that the appellant had no case against them. Specifically, it was never suggested that they gave the respondent authority to conclude a contract on their behalf. In effect, the appellant is seeking an order for specific performance for the sale of the entire of the land against a party who is a one-sixth owner, while accepting that it has no case against the owners of the remaining five-sixths of the property.

14. In those circumstances, I cannot accept that at trial the appellant could obtain an order for specific performance against the respondent. He would be unable to transfer the land to the appellant unless the other co-owners joined in. I can see no basis upon which a court would order non-parties against whom no wrongdoing was alleged to convey their interests in those circumstances: in effect, it would amount to an order of compulsory purchase against the five individual co-owners of land in favour of the appellant. It follows, in my judgement, that the appellant has not made out an arguable case that it would obtain a permanent injunction at trial. Any such order would unjustifiably interfere with the property rights of the five individual co-owners who are not parties to these proceedings and whom the appellant accepts are "*innocent*" in the events the subject of these proceedings. As was said by O'Donnell J. in *Merck Sharpe & Dohme Corp. v. Clonmel Healthcare Ltd* [2020] 2 I.R. 1, at para. 65:

> *"(i) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction, seeking the same relief pending the trial could be granted."*

In my judgement, this alone suffices to dispose of this appeal.

15. Second, the contract between the appellant and the respondent (assuming that it will be established at trial) is, even on the appellant's case, unenforceable. The respondent is one of six co-owners. It follows that the respondent, alone, cannot sell the lands, and it was never suggested that he had the authority of the co-owners to sell their interests also. Accordingly, whatever remedy may be available to the appellant if it succeeds at trial, it cannot include an order for specific performance. It therefore cannot obtain an interlocutory injunction restraining the sale of the lands.

16. Third, even if the respondent were the full owner, the contract alleged in the pleadings and on affidavit is incomplete and uncertain so that, in my judgment, there is no arguable case that there exists an enforceable agreement at all. The letter of 20 April 2023, and the averments of Mr. Pratt, state that the offer was "*subject to planning permission*". Even if it could be established, employing a text in context construction of the letter of 20 April 2023, that this referred to planning permission for a sand and gravel quarry, that would not suffice. A time limit in which planning permission must be obtained is essential: otherwise, the agreement is entirely open-ended. This was conceded by the appellant's senior counsel so this Court must determine the appeal on that basis, which precludes the possibility that at trial evidence to the contrary may be adduced. In effect, such a term in an alleged contract for the sale of land would amount to an option to purchase the lands at an indeterminate time in the future, not a concluded contract, as there would, in fact, be no obligation on the appellant to apply for planning permission at any particular point in time, or indeed, at all; while the respondent would remain bound and not free to dispose of the land elsewhere, or indeed, to exploit it himself. This underscores the fact that such a time limit is an absolutely critical term of any contract to sell the land. It is notable that in earlier negotiations, the time for obtaining planning permission was fixed. I am satisfied

that the failure to agree such a time limit is fatal to the existence of a concluded enforceable contract.

17. Fourth, the appellant's case is that it accepted the offer by its solicitor's letter of 20 April 2023. This was sent by registered post, and it is accepted that it was received on 24 April 2023. Thus, as a matter of law, on the appellant's case, it was only when its acceptance of the respondent's alleged offer was communicated to the respondent, that a contract could arise. The appellant accepts that there is no note or memorandum sufficient to satisfy the provisions of s.51 of the Act of 2009. Instead, it relies upon the doctrine of part performance. The law in relation to the doctrine of part performance was set out in some detail in the judgment of the High Court, and it was accepted by senior counsel for the appellant that it was correctly set out. In *Mackie v. Wilde (No. 2)* [1998] 2 I.R. 578, Barron J., speaking for the Supreme Court, considered the doctrine of part performance, and at p. 586-587 of the judgment, held as follows:

> "*The doctrine is based upon principles of equity. There are three things to be considered:-*
>
> *(1) The acts on the part of the plaintiff said to have been in part performance or (sic) of concluded agreement;*
>
> *(2) the involvement of the defendant with respect to such acts;*
>
> *(3) the oral agreement itself.*
>
> *It is obvious that these considerations only relate to a contract of a type which the courts will decree ought to be specifically performed. Each of the three elements is essential. In my view, it does not matter in which order they are considered. Ultimately <u>what is essential is that</u>:-*
>
> *(1) there was a concluded oral contract;*

(2) that the plaintiff acted in such a way that showed an intention to perform that contract;

(3) that the defendant induced such acts or stood by while they were being performed; and

(4) it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the Statute of Frauds to prevent performance of the contract."

He later stated:

"What is required is that the acts relied upon as being acts of part performance be such that on examination of the contract which has been found to have been concluded and to which they are alleged to refer show an intention to perform that contract. [Emphasis added]

18. In *Steadman v. Steadman* [1976] A.C. 536, at p. 558, Lord Simon stated:

"Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the Court would, if required, decree specific performance of the contract."

[Emphasis added]

19. It is thus clear that one of the essential requirements of the application of the doctrine is that one party to a concluded contract performs part of its obligations under the contract in question. The appellant pointed to actions predating the contract which were said to amount to acts of part performance of the contract yet to be concluded and which it sought to be specifically performed. In my judgement, this is both illogical and legally unsound.

No authority for this startling proposition was advanced and it is contrary to the judgment of the Supreme Court in *Mackie.* I have no hesitation in saying that the appellant has no arguable case on this point.

20. It follows, therefore, that the only acts of part performance which the appellant could, as a matter of law, rely upon on the facts of this case, are those acts it asserts it took to perform its obligations under the asserted contract between 24 April 2023 (when the registered letter notifying the respondent of the appellant's acceptance of his alleged offer to sell was received), and 25 April 2023, when the respondent informed Mr. Pratt that he was not going to sell the lands to the appellant, but he was going to sell them by tender. In response to questions from the court, senior counsel for the appellant confirmed that the sole act of part performance now relied upon by the appellant, was the engagement of an unidentified planning consultant. I am quite satisfied that on the facts of this case, this does not amount to an even stateable argument that the appellant part performed the alleged contract.

21. In the first place, the appointment of a planning consultant was a matter for the appellant; but it was not an obligation under the contract *i.e.* in appointing a planning consultant, the appellant was not performing the contract for sale of the lands. Secondly, the evidence suggests that the planning consultant was appointed *before* the alleged contract was concluded, and thus, could not amount to an act of part performance. The appellant's solicitor's letter of 20 April 2023, states "[*o*]*ur clients <u>have</u> accordingly arranged a planning consultant to apply for the requisite Planning Permission …*" [Emphasis added]. Whenever the planning consultant was instructed, it was on or before 20 April 2023, and thus cannot have occurred in the narrow window between 24 and 25 April 2023. Therefore, even assuming that such was an obligation of the appellant under the contract, it cannot amount to an act of part performance of the contract.

22. Further, while not decisive, the Statement of Claim does not even plead a case in part performance.

23. Any one of these reasons leads to the conclusion that the appellant has no arguable case or fair question to be tried that it has an enforceable contract for the sale of land, and therefore, a property right in the land, which should be protected by an injunction pending trial. Taken cumulatively, they inexorably lead to the conclusion that the High Court was correct to refuse to grant an injunction in this case.

Other reasons to Refuse an Injunction

24. The balance of convenience clearly lies in refusing the injunction. As was pointed out by the High Court, if the relief was granted, it would impact upon the property rights of parties not before the court, and *de facto*, interfere with their ability to deal with their property. The appellant accepted that they are "*innocent*" in the events which occurred and relies solely on the alleged unconscionable behaviour of the respondent. In my judgement, this comes nowhere near tilting the balance of convenience in favour of granting, as opposed to refusing, the reliefs sought. Other remedies are possibly open to the appellant if it is established at trial that the respondent acted in an unconscionable manner. On the other hand, the five co-owners, who are not parties to these proceedings, do not benefit from the appellant's undertaking as to damages, and the appellant has not offered to extend that undertaking to them, in the event that an injunction were granted, and it was unsuccessful at trial. Thus, their property rights would be interfered with and they would not have the benefit of what has been described as the *quid pro quo* for the grant of an injunction, the undertaking as to damages.

25. In addition, it is very striking that the appellant has effectively made no case that damages would not be an adequate remedy but sought to rely solely on the fact that if the property is sold in the intervening period to a third party, it effectively would be deprived

of a property right. However, this does not engage with the fact that the property right arises from a disputed contract for the sale of lands, which it intended to exploit for commercial purposes as a sand and gravel quarry, and therefore, in respect of which damages would be both easily calculable and clearly would afford the appellant an adequate remedy in the circumstances.

26. I am, therefore, satisfied that damages would be an adequate remedy for the appellant and that the balance of convenience very strongly lies in refusing an injunction. So, even if the appellant had established an arguable case – which it has not – nonetheless, this is a case where an injunction should not be granted.

Conclusion

27. In my judgement, the appellant has not established an arguable case that a concluded contract for the sale of lands was entered into in April 2023. Five of the six co-owners are not party to the alleged agreement, nor are they party to the proceedings, and they do not benefit from the appellant's undertaking as to damages. The alleged contract is incomplete, in that an essential term, and one which was recognised by the parties to be essential *i.e.* the obtaining of planning permission, is uncertain because no time limit for the obtaining of planning permission was agreed. There is no note or memorandum which satisfies the requirements of s.51 of the Act of 2009. The appellant's attempt to rely on the doctrine of part performance does not amount to an arguable case, as there is no evidence of any act of part performance after the conclusion of the alleged contract, and the letter written by the appellant's solicitors purporting to accept the offer for the sale of the land makes clear that the act relied upon occurred before the contract arose.

28. The balance of convenience lies in favour of refusing the injunction because the grant of the injunction would impact unjustifiably on five of the six co-owners who are not

before the court and damages would be an adequate remedy for the appellant as no credible case to the contrary has been advanced on affidavit.

29. For these reasons, I would refuse the appeal and affirm the order of the High Court.

30. My preliminary view is that the respondent has been entirely successful on this appeal, and in the normal way, an order for costs should be granted in his favour. If the appellant wishes to contend otherwise, it should contact the Office of the Court of Appeal within ten days of the delivery of this judgment and request a short hearing on the question of the costs of the appeal.

31. In that event, the appellant should submit written submissions of no more than 1,000 words within ten days of the request for an oral hearing, to which the respondent should reply within ten days.

32. Allen and O'Moore JJ. have read this judgment in draft and have authorised me to indicate their approval with same.