Neutral Citation Number: [2009] IEHC 191

THE HIGH COURT

2004 7031 P

BETWEEN

BRENDAN HANNON, MARTIN RYAN, DECLAN CUSACK AND JOHN MEANEY

PLAINTIFFS

AND

BQ INVESTMENTS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 24th day of April 2009.

Factual background

The plaintiffs sue in their capacity as trustees of Thomond Football Club (the Club). In that capacity they entered into an agreement for sale, which bears the date 22nd December, 1998 (the Agreement for Sale), and was made between them, as vendors, and Paul O'Brien, a solicitor acting in trust, as purchaser, which has turned out to be a very contentious transaction. The Agreement for Sale related to part of the lands comprised in Folio 24105F of the Register of Freeholders, County Limerick, as depicted on the map annexed thereto and outlined in red and marked with the letter "B", which was stated to measure in area circa 8.76 acres (the sold lands). The purchase price was £330,000. Under the special conditions it was provided that the sale was subject to the purchaser obtaining acceptable planning permission within "the relevant period", as defined. There were special conditions in relation to the proposed development, what constituted an acceptable planning permission and the definition of "the relevant period". Nothing much turns on those special conditions, because an acceptable planning permission was granted by An Bord Pleanála on 17th October, 2000 for the development of the sold lands as a student housing development of 238 apartments.

Under the heading "Exceptions and Reservations" in the special conditions it was provided that there would be granted to the plaintiffs a right of way to access the remaining part of their lands comprised on Folio 24105F (the retained lands) by the purchaser, and that the right of way would be marked on the Land Registry map for approval by the plaintiffs and that the purchaser would assent to same. There followed four special conditions, special conditions 8, 9, 10 and 11. In special condition 8 the purchaser agreed to provide "two suitable rugby playing pitches, levelled, top soiled and ready for seeding" on the retained lands, the suitability of the pitches to be agreed with an independent engineer. Special condition 9 provided that the purchaser would re-locate the existing flood lighting and ESB sub-station to the site of one of the new playing pitches to be decided upon by the plaintiffs.

The dispute which is the subject of these proceedings arises out of special condition 10, which provided as follows:

> "There will be reserved in favour of the [plaintiffs] for the use of the football pitches and the clubhouse a right of way over the roadway having a width of six metres with a footpath on both sides and appropriate public lighting with the location of the said right of way to be decided upon by the Purchaser who will consult with the [plaintiffs] on the Planning Application with regard to the location of the said right of way."

No issue arises in these proceedings on special condition 11, under which a wayleave to connect into the services to be installed by the purchaser on the sold lands was to be granted by the purchaser to the plaintiffs.

The date of 22nd December, 1998, which appeared on the Agreement for Sale, was inserted by Mr. O'Brien when, having executed it in trust, he returned it to D.J. O'Malley & Co., the plaintiffs' solicitors. The Agreement for Sale as executed by the plaintiffs was returned by D. J. O'Malley & Co., to the purchaser's solicitors on 25th March, 1999. Accordingly, 25th March, 1999 was the operative date of the Agreement for Sale. In the interim period between the execution of the Agreement for Sale by Mr. O'Brien and its execution by the plaintiffs, there was correspondence between the solicitors for the parties in relation to a number of issues, one of which related to the location of the right of way. What emerges from a letter of 28th January, 1999 from the purchaser's solicitors to the plaintiffs' solicitors is that the purchaser could not identify the exact location of the right of way at that stage. However, a special condition in the terms of special condition 10 was suggested by the purchaser's solicitor. It may be, and the evidence is not clear on this point, that special condition 10 was inserted in consequence of that letter. In any event, nothing turns on when it was inserted, because it is common case that both sides were bound by special condition 10. The dispute between the parties relates to what it means.

The purchaser's planning permission having issued on 17th October, 2000, the sale was due to be closed within four weeks of that date. However, a difficulty arose in that the purchaser needed additional land to provide an attenuation pond. That difficulty was ultimately resolved when the plaintiffs agreed to make available to the purchaser an additional two acres of land subject to the payment of an additional sum at a price pro-rata to the price in the Agreement for Sale. As I understand the position, the additional land, was separately transferred by the plaintiffs to the defendant subsequent to the completion of the sale of the sold lands.

That sale was completed on 21st December, 2000. By a transfer of that date (the Transfer), the plaintiffs, in consideration of £330,000, transferred the lands described in the first schedule, being part of the lands comprised in Folio 24105F outlined in red on the map annexed thereto (which, for present purposes, I am assuming equated to the sold lands, although the area differs somewhat from the area referred to in the Agreement for Sale) to BQ Investments Limited in fee simple. I am also assuming that BQ Investments Limited subsequently became an unlimited company and corresponds to the defendant. There was excepted and reserved out of the transfer of the sold lands unto the plaintiffs

the "Excepted Easements" as defined, which included the following:

> "A right of way over the roads and footpaths now laid or at any time within the Perpetuity Period laid on in or under the Sold Land going to and from the Retained Lands or any part therof along the way coloured pink on the Plan."

I note that it was stated in a letter of 21st November, 2000 from the purchaser's solicitors to the plaintiffs' solicitors that special conditions 10 and 11 had been dealt with in the third schedule to the draft deed of transfer which accompanied the letter. The third schedule to the executed transfer is a verbatim transposition of that draft.

After the closing of the sale, the plaintiffs were allowed to remain in possession of the sold land. As I understand it, the intention was that they would remain in possession until the defendant fulfilled its obligations under special conditions 8 and 9 of the Agreement for Sale. In mid-2002 the defendant decided that it wanted possession of the sold lands. Circuit Court proceedings were instituted. Those proceedings were eventually compromised in October 2002 on the basis that the defendant paid an agreed sum of €126,974 as compensation for "buying out" special conditions 8 and 9. It had been the defendant's contention that planning permission could not be obtained to enable the defendant to fulfil its obligations under special conditions 8 and 9. As I understand it, the result of the compromise was that the defendant obtained possession of the sold lands, which it sold on to a third party. Eventually, the sold lands were developed as a student village.

There followed a lull in the hostilities between the plaintiffs and the defendant until October 2003, when, in a letter of 14th October, 2003 to the purchaser's solicitors, the plaintiffs' solicitors raised the issue of special condition 10 in the Agreement for Sale, contending that the right of way in favour of the plaintiffs was to be a "constructed roadway" having a width of 6 metres and a footpath on both sides, with appropriate public lighting located thereon. The plaintiffs' solicitors sought confirmation that the defendant would honour the contract, which, as regards compliance with special condition 10, it was asserted, required the construction of a roadway. Despite a reminder, no reply was forthcoming.

These proceedings were initiated by a plenary summons which issued on 17th May, 2004.

The case as pleaded and the response to it
As the defendant attached great weight to the case as pleaded, it is necessary to outline the relevant aspects of the pleadings in greater detail than is usually necessary.

Plenary summons/statement of claim
The primary reliefs sought by the plaintiff in the plenary summons and in the statement of claim, which was delivered on 10th March, 2005, were mandatory injunctions compelling the defendant -

> (1) to provide, for the benefit of the plaintiffs, a right of way over part of Folio 24105F of the Register of Freeholders, County Limerick, which apparently was outlined in red on the map annexed to the statement of claim and coloured yellow thereon; and
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> (2) to so construct the right of way as to make it consist of a roadway having a width of 6 metres, with a footpath on both sides and appropriate lighting for the proper use thereof.

The plaintiff also sought damages in addition to, or in lieu of, specific performance and/or injunctive relief.

There is no dispute between the parties as to the location of the right of way and the area on which the plaintiffs say the road should be constructed. It is the area between the points marked A and B on drawing no. G045 – 01A prepared by Dennany Reidy Associates, Consulting Civil and Structural Engineers, which was put in evidence. As I understand the position, that area corresponds with the area over which the right of way was reserved in the Transfer. There is a notation on the map on the Transfer that it was a "10m wide right of way". I will refer to this area as the "right of way strip".

In the statement of claim, having recited the Agreement for Sale, it was asserted in paragraph 4 thereof as follows:

> "It was an express and/or implied term of the said agreement and the Defendant represented to the Plaintiffs and/or warranted that it would construct a roadway with adjoining footpaths and adequate lighting on the said lands, to allow the Plaintiffs access to the remainder of their lands, not sold to the Defendant. The Plaintiffs were also granted a right of way over the said lands purchased by the Defendant."

The plaintiffs then pleaded a breach of the Agreement for Sale, in that the defendant would "not construct or pay for the construction of the said roadway for the benefit of the plaintiffs, thus frustrating the use of the plaintiffs' right of way".

Notice for particulars/replies
At the hearing the defendant's focus was on two aspects of its request for particulars in its notice for particulars dated 17th August, 2005. Those aspects were addressed in paras. 8 and 16.

In para. 8 the defendant raised the following query:

> "Please clarify whether the Plaintiffs accept that the right of way to which reference is made in the Statement of Claim is a right of way to facilitate use of the football pitches and clubhouse. Please also clarify whether the Plaintiffs are alleging that the football pitches and clubhouse in question exist. In the event that the Plaintiffs confirm that the football pitches and clubhouse in question do not exist, the Plaintiffs are requested to clarify on what basis they seek to have the Defendant construct the roadway when the purpose or object of the right of way does not yet exist."

In their replies dated 4th October, 2005, the plaintiffs dealt with that query as follows:

> "The use being made of the right of way is not a matter for the defendant. The defendant contracted to provide a roadway and footpaths and lighting and it has not done so. As a result, the plaintiffs are unable to use their lands as they wish and they are unable to develop facilities thereon."

The defendant was not happy with that response and, in a notice for further and better particulars of 30th August, 2006, which post-dated the delivery of the defendant's defence, it apprised the plaintiffs of that and repeated the query in its entirety. The plaintiffs' ultimate response in replies, apparently dated 23rd February, 2007, was to the following effect:

> "The plaintiffs wish to develop their lands and they are unable to do so as there is no proper access provided thereto even though the defendant covenanted to so provide. The plaintiffs simply allege that the roadway has not been provided. They have no need, and have not alleged anything further, and this request is an attempt to prompt them to do so, and this is fundamentally improper."

The query raised by the defendant in para. 16 of the notice for particulars was to require the plaintiffs to identify with particularity the use or uses which the plaintiffs intended to make of the right of way and, if the plaintiffs were alleging that the use or uses related to use of the lands for playing pitches together with the provision of a clubhouse facility, full and detailed particulars were sought of the planning permission upon which the plaintiffs were relying in support of such use of the lands. The plaintiffs' response in their replies of 4th October, 2005 was that the plaintiffs' plans for the future development of the lands were not relevant; the plaintiffs were unable to access their lands by means of a proper roadway, footpaths and lighting as they would like to and any "enhanced uses as they may plan for the future" were not relevant, save that their plans had been impeded by the defendant's breach of agreement.

The defendant did not agree that the particulars sought were irrelevant and repeated the para. 16 query in their notice of 30th August, 2006. The plaintiffs' response in their replies of 23rd February, 2007 was as follows:

> "The Plaintiff's plans for future development of its lands and future use is not relevant herein. The fact is that the Defendant agreed to provide a proper roadway, footpaths and lighting and it has not done so. The enhanced uses that the Plaintiffs may plan for the future are not relevant herein, save that their plans have been impeded by the Defendant's breach of agreement … and thus have caused damage to the Plaintiffs. If special damage is capable of being computed herein, upon expert advice, then the Plaintiffs will give details of such special damage and any necessary details of specific plans being thwarted."

Between the replies to the notice for particulars and the raising of the notice for further and better particulars, on 22nd December, 2005, the Club had obtained planning permission from Limerick County Council. The planning permission, which was granted on foot of an application of 21st March, 2005, authorised the construction of a sports pavilion, incorporating changing rooms, weight room, meeting rooms, stores, entrance, roadway parking and ancillary site works on the retained lands.

Defence
The defendant's defence was delivered on 2nd October, 2006. In it, the defendant denied that it has acted in breach of the Agreement for Sale or in breach of the Transfer. The opening two lines of special condition 10 were quoted, with emphasis being added to the words "for the use of the football pitches and the clubhouse". It was then pleaded, and this is the core element of the defendant's defence to these proceedings, as follows:

> "As the plaintiffs have neither pitches nor a clubhouse, which would benefit from the construction of a roadway on the right of way, the defendant cannot be in breach of the Agreement. For the avoidance of doubt, the defendant has reserved out of the sold lands a right of way, which the plaintiffs are at liberty to enjoy. The Defendant will construct the roadway when and if the plaintiffs have a clubhouse and pitches, which can benefit from same."

My understanding of the reference to the defendant having reserved out of the sold lands a right of way is that, when the defendant sold on to a third party the sold lands on which the student village has now been constructed, it reserved thereout the capacity to implement special condition 10 of the contract. No documentary evidence to support that understanding was adduced. In any event, as a matter of title, the sale on had to have been subject to the right of way reserved out of the Transfer.

Reply
Finally, in their reply delivered on 29th July, 2008, the plaintiffs joined issue with the defendant's assertion that its contractual obligations relating to the construction of a roadway are dependent on the plaintiffs "having a clubhouse and pitches presently in existence or … Planning Permission for same". Further, the existence of the plaintiffs' planning permission, of which formal notice had been given to the defendant's solicitors on 21st April, 2009, was pleaded.

Summary of the case as pleaded
There are a number of matters to which the pleadings do not advert at all. There is no reliance by the plaintiffs on the reservation in the Transfer of a right of way in favour of the plaintiffs over the right of way strip. There is no mention of the "buying out" of special conditions 8 and 9 of the Agreement for Sale. At the hearing, neither side attached any significance to the fact that special conditions 8 and 9, under which the purchaser had assumed liability to provide two pitches and re-locate flood lighting and the ESB sub-station, but not to provide a clubhouse, ceased to be operative in October 2002, in the context of identifying the extent of the defendant's liability under special condition 10. Nor was any significance attached by either side to the fact that special condition 10 merely referred to the reservation of a right of way over a roadway of the specification set out, but did not expressly provide for on whom responsibility for constructing the roadway lay, although, as the right of way strip was located on the sold lands, it may be reasonable to infer that it was intended to lie on the purchaser's principal, the defendant.

The respective positions adopted by the parties simplified the Court's task considerably, in that the dispute between the

parties was reduced to a single issue, namely, when, as a matter of construction of special condition 10, the contractual liability of the defendant to build the road, which liability the defendant admitted, arose or will arise. The respective positions of the parties on that single issue raised the following questions: whether it does not arise until there is a clubhouse and pitches on the retained lands, as the defendant submitted; or whether it arose on the completion of the purchase of the sold lands as a freestanding obligation regardless of how the retained lands were being, or were capable of being, used, as the plaintiffs contended.

In his closing submissions, counsel for the defendant submitted, with justification, that the case had mutated at the hearing beyond the case as pleaded, in that the plaintiffs adduced evidence with a view to establishing that there were pitches on the retained lands and club facilities which fulfilled the use requirement in special condition 10, insofar as there was a requirement. The evidence adduced by the plaintiffs also sought to establish an alternative scenario: that upgraded facilities which would meet that use requirement could be provided reasonably quickly. Counsel for the defendant argued that, on the issue of whether there were pitches and a clubhouse on the retained lands, the crucial date was May 2004 when these proceedings were instituted on the basis that the plaintiff was asserting that the defendant was then contractually bound to construct the road.

The evidence
In relation to the user and condition of the right of way strip since its transfer to the defendant in 2000, the evidence was that it was used as a construction road in connection with the development of the student village on the sold lands. Currently, it is fenced off from the student village. It has been used by the Club for access to the sold lands. The evidence was that the road, as it is now, was put into place by the Club over a period of years and it was upgraded on a yearly basis. Currently it has a stone hardcore surface blinded with smaller aggregate. The surface is not suitable for a permanent roadway. It is susceptible to "wear and tear" and adverse weather conditions. There are potholes in it and it has become overgrown. It does not have lighting and, on the basis of the photographic evidence, it does not have footpaths. Members of the Club have had concerns about the safety of children using the road. It is considered dangerous and unfit for use in winter time. The evidence was that the Club has spent €67,833 in developing and maintaining the right of way strip over the years.

The evidence in relation to the user of the retained lands was that, after the Club had to vacate the sold lands, part of the retained lands was used for training purposes. In recent years two pitches have been created. The first to be created has been passed by the governing body of the sport, the Munster branch of the I.R.F.U., as suitable for matches. This occurred in either the summer of 2006 or 2007, the evidence being somewhat unclear on this point. The more recently created pitch is used for training purposes, not for playing matches, which I take to mean games against other club teams. Apart from the ESB sub-station, there is no building on the retained lands. There is currently what was variously described as a "wagon", a "container" and a "Portakabin" on the sold lands, which is used for storing gear. It has seating and is also used for changing purposes. However, there are no windows in it, for security reasons, and it is not serviced with electricity, running water or sewage. Until recently there was a second similar container on the retained lands. The evidence was that Portakabins specifically designed for sporting purposes, with showers, toilets and changing facilities, are readily available on the market.

Insofar as is necessary, I find on the facts that the two pitches on the sold lands are football pitches as envisaged in special condition 10. However, I find that the container which is now on the sold lands is not a clubhouse as envisaged in special condition 10.

While the Club has planning permission for the construction of a pavilion, the construction of the pavilion is part of a ten year plan into the future, the intention of the Club being to develop playing fields during the first five years. Therefore, aside from the crucial factor mentioned in the next paragraph, on the basis of the evidence of the Club's intentions, I find that it is improbable that the construction of the pavilion will take place until well after the first five years of the implementation of the plan, if it takes place then.

The most significant evidence to emerge at the hearing concerned the likely impact of the Limerick Regeneration Project on the Club's plans for the sold lands. The evidence was that a proposal to build a link road in the area has had a long history, with, until recently, a twenty year timeframe envisaged. However, it appears that, following the report of Mr. John Fitzgerald in April 2007, the plans of the Limerick Northside Regeneration Agency for the construction of a relief road, which will pass through the retained lands, have been front loaded. Since 2008 an Environmental Impact Assessment is being conducted and the compulsory acquisition process is in train, at any rate on an informal basis, which will involve the compulsory acquisition of some or all of the sold lands. While a compulsory purchase order has not been made, I find on the evidence that, as a matter of probability, the sold lands are unlikely ever to be developed in accordance with the planning permission which issued in 2005.

Contractual liability on the part of the defendant?
It was suggested by counsel for the plaintiffs in opening the case that the Court might decide the liability issue first, namely, whether a mandatory order should issue against the defendant compelling it to comply with special condition 10 and that the issue of damages be left over. I did not understand the defendant to demur from that position.

Counsel for the defendant referred the Court to the adoption by the Supreme Court in the judgment of Geoghegan J. in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274 (at p. 280) of the general principles enunciated by Lord Hoffman in his speech in *I.C.S. v. West Bromwich B.S.* [1998] 1 W.L.R. 896 and, in particular, the fifth principle which is as follows (at p. 913):

> "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:
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> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

It was submitted on behalf of the defendant that the words in special condition 10 are clear and that interpreting them on their plain ordinary meaning does not give rise to any difficulty. The roadway to be constructed by the defendant is to be

constructed "for use of the football pitches and the clubhouse". To give the special condition a meaning which would require construction of the roadway without the plaintiffs having provided themselves with pitches and a clubhouse would be to supply words in a contract which was negotiated between solicitors and is a commercial agreement.

It was submitted on behalf of the plaintiffs that the essence of the defendant's argument is that its contractual obligation is suspended until a pre-condition, the provision of the pitches and the clubhouse, is fulfilled. Special condition 10 does not use any of the expressions normally associated with the creation of a condition precedent, such as "subject to", "if", or "provided that". To interpret special condition 10 as suspending the defendant's obligation until there are pitches and a clubhouse on the sold lands necessitates implying additional words into the provision. It is not possible to give the provision the meaning for which the defendant contends by reading the words that are there, as the defendant asserted. Counsel for the plaintiffs submitted that the object of the words "for the use of the football pitches and the clubhouse" in special condition 10 was to limit the purpose for which the plaintiffs were to be entitled to use the road when constructed.

As a matter of the interpretation of special condition 10, in my view, the contractual liability of the defendant thereunder arose on the completion of the sale on 21st December, 2000. That liability, to the extent that it involved an easement over the right of way strip in favour of the plaintiffs, was complied with, in that the right of way was provided for in the third schedule to the Transfer and the defendant consented to its registration as a burden on the relevant folio (clause J of the Transfer). In the reservation in the Transfer, the exercise of the easement by the owners for the time being of the dominant tenement, the retained lands, was not expressly limited to the use of the dominant tenement as football pitches and a clubhouse, as one would have expected. However that is not an issue between the parties at this juncture.

To the extent that special condition 10 imposed an obligation on the defendant to construct a road, and it is admitted by the defendant that it did impose such an obligation, in my view, giving the words in the special condition their natural and ordinary meaning, they do not provide that the defendant's contractual liability to construct the road has not arisen yet because there is no clubhouse on the retained lands. The words "for the use of the football pitches and the clubhouse" in special condition 10 are expressly connected with the reservation of the right of way in favour of the plaintiffs, not with the construction of the road. Although not spelt out, the necessary implication is that the reservation is in favour of the plaintiffs and their successors as the owners for the time being, and for the benefit, of the retained lands. The dominant tenement is the retained lands and the exercise of the easement, which was created by the reservation in the Transfer, is, according to special condition 10, limited to the use of the retained lands as a sporting facility, not, say, as an abattoir or a nuclear power station or whatever. That interpretation fully accords with, and does not in any way flout, business common sense. To read special condition 10 as having the meaning urged by the defendant – that the roadway to be constructed is to be constructed "for use of the football pitches and clubhouse" – would involve re-writing it and, thereby, re-writing the parties' bargain.

Accordingly, on the basis of the defendant's admission that it is obliged to construct a roadway on the right of way strip, I find that, by not having done so, the defendant is in breach of contract.

The remedy?
Even when evidence of the advanced stage of the plans for the relief road which will affect the retained lands emerged at the hearing of the action, counsel for the plaintiffs still persisted in seeking the remedies claimed in the statement of claim. It was submitted that a compulsory purchase order affecting the retained lands might not be proceeded with or, alternatively, if it were, the level of compensation to which the plaintiffs would be entitled would be the greater if the retained lands were serviced by a roadway constructed in accordance with special condition 10.

What the plaintiffs are seeking, in effect, is specific performance of an agreement to build a road. They are seeking an equitable remedy, which is discretionary.

At the hearing, the parties did not address whether it is appropriate that a court should make such an order, given the traditional approach, which has been that contracts to build or repair should rarely be enforced by way of specific performance, particularly, as their uncertain nature would make it difficult for the court to determine whether any order made has been complied with, as is discussed in Delany on *Equity and the Law of Trusts in Ireland* (Thompson Round Hall, 4th ed.) at p. 636. Apart from the usual considerations which apply in determining whether to make such an order, in this case, on the basis of the finding I have made, that the probability is that the life of the retained lands as a sports facility is limited, the plaintiffs are asking the Court to order the carrying out of what in all probability will be a waste of resources and a futile exercise.

Having regard to the foregoing considerations, in my view, the more appropriate remedy for the plaintiffs for the breach of contract would be an award of damages. However, I propose postponing making a final decision on that point so as to afford the parties an opportunity to make further submissions on the appropriate remedy and to adduce any further evidence which they consider necessary.