Neutral Citation: [2015] IEHC 552

THE HIGH COURT

COMMERCIAL

[2014 No. 4010 P]

BETWEEN

JOHN REYNOLDS

PLAINTIFF

AND

ALTOMORAVIA HOLDINGS LIMITED, THOMAS ANDERSON, IAN REDMOND, COLIN DOLAN AND MICHAEL ORMOND (No. 2)

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 29th day of July, 2015

Introduction

1. On 30th June, 2015 I gave my first judgment in relation to the matters raised in these proceedings. I then adjourned the matter for a further hearing on any damages claim which might arise. The parties subsequently made submissions about the damages issue and this judgment deals with the issue of damages.

2. The plaintiff submits that he is entitled to damages under a number of different headings. In summary, the plaintiff claims the following as heads of damages:

1. The security deposit (€185,000).

2. Damages for arrears of rent from 20th September, 2012 to 27th March, 2014 – (in the sum of €595,000).

3. Damages for arrears of rent from 26th March, 2014 to 21st July, 2015 – (in the sum of €690,000).

4. Service charge payments – (in the sum of €10,597.79 approximately).

5. Insurance since 26th March, 2014 – (in the sum of €56,698.00 approximately).

6. Rates – (in the sum of €112,407.53 approximately).

Is the plaintiff entitled to damages for breach of contract as a matter of principle?

3. In my first judgment I held for the plaintiff, and held that the defendants were not entitled to an order for specific performance of the said agreement/court order. I also held that the plaintiff was entitled to damages for breach of contract, a declaration that the defendants were in breach of contract and in breach of the court order and rescission of the agreement.

4. At para. 160 of my decision I stated:

> *"Therefore, I am of the view that the plaintiff is entitled to a declaration that the defendants are in breach of contract and in breach of a court order, damages for breach of contract, and rescission of the agreement on the grounds of the defendants' bad faith, unscrupulous behaviour and abuse of process."*

5. Counsel for the defendants however submitted, as a preliminary point, that the plaintiff had no entitlement to a claim for damages. He submitted (i) that the plaintiff had claimed rescission of the contract in these proceedings; (ii) that it was a general principle of law, that if an order for rescission was made, then the contract was void ab initio, and (iii) the plaintiff is therefore not entitled to any claim for damages for breach of contract because the contract is void *ab initio.*

6. However in my view, this argument is unsustainable for a number of reasons.

7. The first point to note is that the term "rescission" is often used in a number of different ways. This is best illustrated by the following statements of principle in *The Law of Rescission* (2nd ed., 2014, O'Sullivan et al) para. 1.01:

> *"The term 'rescission' is often and confusingly used to describe two quite different ways in which a contract may be brought to an end. One form of 'rescission' is found on a defect in the formation of the contract, arising by reason of fraud, duress, undue influence or other invalidating cause. The defect affects consent and entitles one of the parties to extinguish the agreement as from the beginning or* ***ab initio.*** *But a contract may also be brought to an end by reason of the other party's later non- performance or defective performance, or because it has become frustrated: the contract was properly formed, but then not carried out in accordance with its terms. When a contract is 'rescinded' for breach or frustration in this way it is terminated only in respect of future rights and obligations or* ***de futuro****."*

8. The learned authors also continue at paragraph 1.08 to say as follows:

> *"In England this distinction was fully elaborated only in the second half of the twentieth century. Misconceptions that culminated in the decision in Horsler v. Zorro prompted some of the clearest extra-judicial explanations of the nature and basis of the distinctions. Eventually the law was definitively restated in Johnson v. Agnew. The divide between termination* ***ab initio*** *and* ***de futuro*** *is also recognised in Canada, Singapore and Malaysia.*
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> *…..*
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> *It is now accepted that it is the character of the event that confers the right to terminate which is of decisive importance in explaining the entitlement to termination ab initio and de futuro. In the case of termination ab initio there*

is a defect in the formation of the contract whereas termination de futuro involves a later defective performance or impossibility of performance. Hence it is said the contract in the former case can be undone from the start whereas in the latter it can only be truncated for the future."

9. Again the learned authors state at para. 1.20:

> *"A contract terminated by one party for the other's breach or repudiation, or terminated automatically by reason of frustrating events is terminated de futuro or for the future. The prospective nature of termination de futuro means that although obligations that would have fallen due after the date of termination are extinguished, thus discharging the party from the need to perform them, rights and obligations that have unconditionally accrued prior to termination remain enforceable. Unpaid deposits and certain kinds of instalment payments are the most common examples."*

10. Again at para. 1.22 the learned authors state:

> *"Rights to contractual damages survive termination for breach or frustration. Both parties remain liable to pay damages for any prior breaches and where the contract is terminated for breach the defaulting party is also obliged to pay damages to compensate for the other party's loss of the bargain."*

11. Moreover this matter was clarified by the judgment of Lord Wilberforce (giving the unanimous decision of the House of Lords) in *Johnson & Anor. v Agnew* 1980 AC 367. Lord Wilberforce stated that there was a distinction between (i) cases where there was a rescission *ab initio* (which might arise for example in cases of misrepresentation, fraud, nuisance or lack of consent) and (ii) cases where, although parties might in fact refer to a situation as "rescinding" the contract, it is, in fact, and in law, a case where there has been a repudiatory breach of contract and the parties (or the courts) have declared the contract to be at an end. In the latter case, where the contract is at an end, that does not bring about "rescission ab initio". The contract has come into existence, it subsists for a period of time, there is a breach, and the contract is put to an end. In such a case, a party can indeed claim for damages for breach of contract.

12. Lord Wilberforce stated:

> *"My Lords, this appeal arises in a vendors' action for specific performance of a contract for the sale of land, the appellant being the purchaser and the vendors respondents. The factual situation is commonplace, indeed routine. An owner of land contracts to sell it to a purchaser; the purchaser fails to complete the contract; the vendor goes to the court and obtains an order that the contract be specifically performed; the purchaser still does not complete; the vendor goes back to the court and asks for the order for specific performance to be dissolved, for the contract to be terminated or "rescinded," and for an order for damages. One would think that the law as to so typical a set of facts would be both simple and clear. It is no credit to our law that it is neither. Learned judges in the Chancery Division and in the Court of Appeal have had great difficulty in formulating a rule and have been obliged to reach differing conclusions. That this is so is due partly to the mystification which has been allowed to characterise contracts for the sale of land. as contrasted with other contracts, partly to an accumulated debris of decisions and text book pronouncements which has brought semantic confusion and misunderstandings into an area capable of being governed by principle. I hope that this may be an opportunity for a little simplification."*

13. Lord Wilberforce then set out the facts in that case in some detail and then continued at p. 392:

> *"In this situation it is possible to state at least some uncontroversial propositions of law.*
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> *First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.*
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> *Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.*
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> *Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.*
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> *At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio." I need only quote one passage to establish these propositions.*
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> *In Heyman v. Darwins Ltd. [1942] A.C. 356 Lord Porter said, at p. 399:*
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> > *"To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."*

See also Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch.D. 339 , 365, per Bowen L.J.; Mayson v. Clouet [1924] A.C. 980 , 985, per Lord Dunedin and Lep Air Services Ltd. v. Rolloswin Investments Ltd. [1973] A.C. 331 , 345, per Lord Reid, 350, per Lord Diplock. I can see no reason, and no logical reason has ever been given, why any different result should follow as regards contracts for the sale of land, but a doctrine to this effect has infiltrated into that part of the law with unfortunate results. I shall return to this point when considering Henty v. Schroder (1879) 12 Ch.D. 666 and cases which have followed it down to Barber v. Wolfe [1945] Ch. 187 and Horsler v. Zorro [1975] Ch. 302 .

Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Sir Wilfrid Greene M.R. in Austins of East Ham Ltd. v. Macey [1941] Ch. 338 , 341 in a passage which deals both with this point and with that next following. It repays quotation in full.

> *"The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by the aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance."*

Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in Austins of East Ham Ltd. v. Macey [1941] Ch. 338 (and see Singh (Sudagar) v. Nazeer [1979] Ch. 474 , 480, per Megarry V.-C.) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry V.-C. puts it [1979] Ch. 474 , 480, 790, that he is refusing to complete.

These propositions being, as I think they are, uncontrovertible, there only remains the question whether, if the vendor takes the latter course, i.e., of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?" If, as is clear, the vendor is entitled, after, and notwithstanding that an order for specific performance has been made, if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser's repudiation and to declare the contract to be terminated, why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?" (Emphasis added).

14. Lord Wilberforce then considered in detail the history of various authorities against these propositions and continued as follows on p. 396.

> *"This is however the first time that this House has had to consider the right of an innocent party to a contract for the sale of land to damages on the contract being put an end to by accepted repudiation, and I think that we have the duty to take a fresh look. I should certainly be reluctant to invite your Lordships to endorse a line of authority so weak and unconvincing in principle. Fortunately there is support for a more attractive and logical approach from another bastion of the common law whose courts have adopted a more robust attitude. I quote first from a judgment of Dixon J. in McDonald v. Dennys Lascelles Ltd. (1933) 48 C.L.R. 457 which with typical clarity sets out the principle - this, be it observed, in a case concerned with a contract for the sale of land. Dixon J. says, at pp. 476-477:*
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> *"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."*

15. Later in his judgment, referring to *McKenna v Richey* [1950] VLR 360, Lord Wilberforce continued:

> *"My Lords, I am happy to follow the latter case. In my opinion Henty v. Schroder, 12 Ch.D. 666 , cannot stand against the powerful tide of logical objection and judicial reasoning. It should no longer be regarded as of authority: the cases following it should be overruled.*
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> *In particular Barber v. Wolfe [1945] Ch. 187 and Horsler v. Zorro [1975] Ch. 302 cannot stand so far as they are based on the theory of "rescission ab initio" which has no application to the termination of a contract on accepted repudiation." (Emphasis added).*

16. I turn now to apply these principles to the facts of this case. In my first judgment I held that there was a contract between the parties (which had been made the subject of a court order on 5th March, 2014), that the defendants had breached that contract and that their actions constituted a significant breach of the contract such as to entitle the plaintiff to regard the agreement as at an end. The effect of this means that the contract did come into existence but that it was breached by the defendants. This therefore entitles the plaintiff to damages for breach of contract according to the normal principles and also to a declaration that the contract is terminated, as at the date of judgment, or that it is rescinded from that date onwards.

17. There is another consideration on the facts of this case. In this case the agreement was, in fact, made an order of the court.

Thus, the effect of an order of rescission *ab initio* would, in effect, be to also set aside the court order of 5th March, 2014. In my view it is not necessary to do this. The order of the court still stands. It records the agreement between the parties entered into on 5th March, 2014. The plaintiff has operated this contract; the defendant has breached the contract. Therefore the plaintiff is entitled to damages for breach of that contract and a declaration that, as at the date of judgment, the contract has come to an end by virtue of the defendants' conduct. In my view this is the appropriate order to make in this case.

Damages for abuse of process

18. Even if I were wrong on any of the above analysis, it is clear that the plaintiff also has a right to damages in tort.

19. As is stated in *The Law of Rescission* (2nd ed., 2014, O' Sullivan et al.):

> *"A right to rescind is independent of, and cumulative with, any right the claimant may also have to damages in tort. This is so even where both rights arise out of the same factual circumstances. In such a case, for example in a case of deceit, the claimant may claim rescission, or damages, or both. The claimant may sue for damages even if he affirms the contract or if rescission is otherwise barred."*

20. In the present case the plaintiff has sued for damages for abuse of process and I have concluded that the actions of the defendants' did indeed amount to an abuse of process. In those circumstances the plaintiff is entitled to damages for the loss and damage which he has suffered, which have been caused by the defendants' abuse of process.

21. These acts of abuse of process had the effect that the plaintiff was unable to obtain rents, rates or service charges from the defendants, from the date on which the lease should have been completed, until the date of judgment. In those circumstances, the actions of the defendant caused losses to the plaintiff which were entirely foreseeable (i.e. the loss of rents, rates and service charges on the building) whilst they engaged in their acts of abuse of process.

22. In those circumstances therefore, the plaintiff is entitled, in the alternative, to damages for abuse of process, which damage has been caused directly by the actions of the defendants. The measure of that loss and damage is set out later in my judgment.

Elements of the loss claimed by the plaintiff

(i) Whether the plaintiff is entitled to damages for any losses which he suffered before 5th March, 2014

23. In the first set of proceedings, the defendants in these proceedings issued proceedings, as plaintiffs, against Mr. Reynolds (as defendant) seeking specific performance of the agreement for lease dated 20th September, 2012. These proceedings were compromised by agreement between the parties and were made an order of the court. The within proceedings started when Mr Reynolds issued proceedings against the defendants, seeking specific performance of the agreement of 5th March 2014, damages for breach of that contract or, in the alternative, rescission of the contract and damages.

24. The defendants filed a full defence and also claimed specific performance of this agreement of 5th March, 2014.

25. Therefore the issue at all times in this case was the agreement entered into between the parties on 5th March, 2014 which was also made the subject of a court order.

26. In those circumstances therefore, I do not believe that it would be correct as a matter of principle, or as a matter of law, to consider any damages which the plaintiff may have suffered, before the agreement of 5th March, 2014. Even if the plaintiff had suffered any damage in respect of the period before 5th March, 2014, any such claim was, in effect, compromised by virtue of the agreement he entered into on 5th March, 2014.

27. In those circumstances, I would disallow any claim which the plaintiff is seeking to make for any damages which he may have suffered prior to 5th March, 2014.

(ii) The Security Deposit

28. The plaintiff claims the sum of €185,000 as damages for the security deposit. However, the defendants submitted that the security deposit, which was to be paid by the defendant, would of course have been refundable at the end of the lease. Given that the plaintiff is entitled to a declaration for damages for breach of contract, the defendants submit that the security deposit could not form part of the damages claim. I agree with this submission. A plaintiff cannot seek, as a head of damages, the loss of a security deposit when that deposit would have to be refunded to the lessee in due course.

(iii) The Rent Free Period

29. I also note that the plaintiff has claimed damages for the full arrears of rent from March, 2014 to the date of judgment - even though part of the agreement agreed between the parties, was that the defendants would have an eighteen and a half week rent free period. In my view, the plaintiff is not entitled to receive a figure reflecting the rent due for that eighteen and a half week period, when no rent was due under the contract. If a court were to order such damages then that would be an unexpected and unjustifiable windfall for the plaintiff.

(iv) Rent, Rates, Service Charge and Insurance

30. However the plaintiff is entitled to a damages figure which reflects the loss of rent which he suffered by virtue of the defendants' failure to complete the contract from 26th March, 2014 until 21st July, 2015 (excluding the eighteen and a half week rent free period).

31. Likewise the plaintiff is entitled to a sum representing a sum equivalent to the service charge payable on the premises from 26th March, 2014 until 21st July, 2015.

32. I am also of the view that the plaintiff is entitled to recover a figure equivalent to the relevant insurance and rates which were paid, or payable from, 26th March, 2014 until 21st July, 2015.

Conclusion

33. I would therefore conclude that the plaintiff is entitled to damages for breach of contract for the above amounts.