Neutral Citation Number: [2007] IEHC 190

THE HIGH COURT

[2006 No. 2149P]

BETWEEN

ALVIN PRICE AND ELIZABETH LYNCH

PLAINTIFFS

AND

KEENAGHAN DEVELOPMENTS LIMITED

DEFENDANT

Judgment of Ms. Justice Clark delivered on the 1st day of May, 2007.

This case involves a motion brought by the defendant to strike out the plaintiffs' proceedings for specific performance for an alleged oral contract for the sale of land under O. 19, r. 28 of the Rules of the Superior Court.

1. The plaintiffs are a solicitor and personal assistant working in a large Dublin law firm. The defendant is a construction company engaged in the development of holiday homes on a lakeside setting at Acres Cove in Drumshambo, County Leitrim. The affidavits filed disclose that the plaintiffs spent several months in the early part of 2006 viewing this holiday home development in Drumshambo and were impressed in particular by a house in the course of construction which had views of the lake and which was being marketed by Brady Estates on behalf of the defendant for €499,000. The plaintiffs were unhappy about some of the layout of the house, in particular the location of the stairway and they enquired as to whether the building could be modified and whether they could introduce their own plans for internal modification.

2. They first had to establish through the estate agents whether the developer would consider any internal modifications. When the answer was positive they travelled to Drumshambo on the 4th May, 2006, and received the developer's detailed plans for their consideration. It has never been stated whether the couple drew their own plans or whether they were assisted by an architect or draftsman. On the 9th May, 2006, they sent their own modified plans to the estate agent for transmission to the developer. The receipt of the plans and visits to the property took place without any discussion as to what price the plaintiffs were prepared to pay nor were any details of a contract worked out. Far from any binding agreement to purchase, the plaintiffs made it clear at all times that they had an active interest in an alternative house in Cavan

3. On the 8th May, 2006, the plaintiffs wrote to the estate agents referring to the tricky and idiosyncratic layout of the house and commenting that:

> "our review of the detailed plans confirms our view that it is very difficult to tweak the design to get usable living areas and adequate bedroom accommodation. While there are plenty of changes one would like to make, I have marked the essential changes on the attached plans and hope that they are clear."

The letter went on to say;

> "As mentioned we want a 10 meter berth to use with this house" and "we would hope to negotiate a price and if the modifications and price can be agreed to move on quickly to sign the contract to enable the work to proceed as quickly as possible. The sale price which we would propose as a fair price for this house and the berth would be €450,000.
>
> I look forward to hearing from you as soon as possible.
>
> Kind regards,
>
> Yours sincerely
>
> Alvin Price"

4. The plaintiffs' accompanying plans sent with a letter dated the 8th May, 2006, included items of change described as "essential" and one item described as "desirable". This letter was followed up with a note addressed to Joe Brady, the principal of the auctioneering firm and sent by fax on the following day the 9th May, 2006. This note was in the following terms:

> "Joe,
>
> Please see attached letter and plans. We would be very much obliged if you could discuss the matter with the developer and revert to us as soon as possible as, if the developer does not think the proposed changes are feasible, we would like to move ahead with the purchase of another house we have seen in Cavan.
>
> Kind regards,
>
> Alvin

5. While the plans as modified were in the hands of the estate agents the plaintiffs were still at the stage of making offers and engaged in bargaining and moreover warned that they did not wish to waste time as they had alternative plans. It is therefore a matter of surprise that in their pleadings the plaintiffs state that a binding concluded agreement was reached on the 4th May, 2006, when the developer agreed to furnish them with detailed plans for the completion of the house and that this oral contract was evidenced by acts of part performance when they subsequently furnished their modified plans to the developer's estate agents.

6. The second plaintiff in her affidavit advances this case by stating that:

> " we were anxious not to go to the trouble of proposing changes to the plans and also, having gone to the trouble, to provide the developer with an enhanced plan which would improve the marketability of the property without some security that the trouble and effort would not be in vain"

She avers that

> "agreement was reached for the developer to suspend building operations for a period of three weeks from the 4th May and to provide the plaintiffs with plans of the building operation so that they could prepare their modifications and then

> negotiate a price for the modified plans or have the property constructed in accordance with the agreed plans at the pre existing price of €499,000. They would then sign contracts and pay a full deposit if they elected to purchase the property either with or without modifications."

She further averred that

> "in the event that we did not acquire the property, the Defendant would be free to market the property using any of our design modifications…."

This it was urged on me was the consideration for the oral contract.

7. The plaintiffs do not allege that they had reached a concluded agreement for the sale of the house at an agreed price but rather that agreement had been reached to give them an option to negotiate a number of alternatives and that these options formed the basis of a concluded contract. These assertions are not born out by the correspondence which demonstrates that no concluded contract of any kind had been achieved. This correspondence indicates that the plaintiffs were in no stronger a position than that of prospective bidders at a sale or auction who go to the trouble and expense of engaging a surveyor to examine the property but who have no assurance that such expenditure will secure the property. At the very highest the parties may have agreed to provide modified plans which would be considered with a view to entering further negotiations on final layout and price. The exhibited letters and emails indicate that the plans as modified by the plaintiffs were never actually considered by the developer.

This is not an agreement for which specific performance could be obtained.

8. The principles involved in specific performance as considered in Farrell, *Irish Law of Specific Performance*, restate the legal principle that the courts do not enforce agreements which are personal in their nature. Specific performance is an equitable remedy and is thus very much dependent on the particular facts of each case and to the application of long established legal principles.

9. There can be no specific performance in the absence of a concluded agreement and it makes no difference whether the concluded agreement is a parole agreement or one reduced to writing. While the doctrine of part performance is a defence evolved over an extended period to mitigate the rigours of the requirements of the Statute of Frauds in circumstances where it would be unconscionable and a breach of good faith for the defendant to rely on the terms of the statute to prevent performance of a contract, it was never intended to aid an incomplete oral agreement. The defence requires at an absolute minimum, the existence of a concluded oral agreement together with acts by the plaintiff which indicate an intention to perform a concluded agreement and behaviour on the part of the defendant which is consistent with such a concluded contract; see *Mackie v. Wilde* [1998] 2 IR 578. If therefore the parties are not yet *ad idem* on the essentials of a contract for the sale of land being the price, property, parties and other particulars such as the closing date, then there is no concluded agreement and the doctrine of part performance is irrelevant. Simple and obvious as these principles are, they appear to have been ignored in the commencement and prosecution of these proceedings.

10. The factual position is that on the day following the exchange of correspondence being the 10th May, 2006, a purchaser for the house for the full price of €499,000 without any berth included entered into negotiations with the construction company. The plaintiffs were given an opportunity to meet the price offered or to improve on the offer but declined. On Friday 11th May, 2006, the house was sold to that purchaser.

11. In the intervening period being the 9th and 11th May, 2006, the second plaintiff sent two emails to Mr. Brady furnishing their contact numbers and saying:

> Joe,
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> I don't appear to have received your email following our telephone conversation yesterday and wonder whether you have heard back from the developer in relation to our proposed modifications as our view on value largely turns on whether or not those modifications are possible. We are under pressure to make a final decision in relation to the Cavan house but have bought some extra time by agreeing to let them have our final decision by Wednesday next so from our point of view time is very much of the essence.
>
> Kind regards,
>
> Liz

12. This correspondence tends to confirm that the plaintiffs were prospective purchasers in the early stages of negotiations and who did not consider themselves bound to complete a purchase. While they were without doubt disappointed when they saw that their negotiations were going no further and at the lost time and expense incurred in chasing their dream, they were not prepared to match or exceed the price offered by the third party. On the 13th May, 2006, the first plaintiff who is a solicitor wrote to the estate agents in the following terms ……

> "While there is no point in crying over spilt milk, we would ask in the circumstances that if the proposed sale of the house does not proceed for any reason we be given first refusal on it and as and when a further house or houses facing the water are to be built that we be advised and given an opportunity to purchase. In this regard, could you please enquire of the developer what are the general intentions in regard to the two large and one possible smaller site which remain. We would have a preference for a larger one as the design of No. 12 rather than the price was the main issue."

13. A few days later however the disappointed tone had hardened into an allegation for the first time that the developer and their agents had no right to sell the property to another party. In a letter written by another solicitor in the same firm it was stated that;

> "as a concluded oral contract existed where clear and precise terms were proposed by you and accepted by our clients under which our clients would be entitled to elect during the stipulated three week period to acquire the property at the asking price with the agreed modifications and such further modifications as the developer might agree ."

No reference was made to the letter of the 8th May, 2006, where an offer for €450,000 was made provided the price included a ten meter berth.

This allegation was repeated in the pleadings and subsequent affidavits A plenary summons was issued on May 19th, 2006, and a *lis*

pendens was registered against the property on 7th, June 2006.

14. Following issue of the proceedings, the defendants notified the plaintiffs' solicitor that if the proceedings were not withdrawn an application would be brought to strike out those proceedings on the basis that they were unsustainable. Subsequently the existence of the contract was fully denied and the Statute of Frauds was pleaded. It was pleaded in reply that the furnishing of the plans to the estate agents on May 4th, 2006, was a sufficient act of part performance to satisfy the requirements of the Statute of Frauds.

15. On these facts, the defendant developer seeks to have the *lis pendens* vacated in order that the sale to the third party can be completed and he asks that the proceedings for specific performance be struck out as an abuse of process because the plaintiffs' action has no reasonable chance of success.

16. It is well established that the court has the power to strike out proceedings in appropriate cases. The power is fully set in O.19, r. 28 of the Rules of the Superior Courts but is confined to pleadings which on their face disclose no reasonable cause of action. It is equally well established that the court has inherent jurisdiction to strike out proceedings. This jurisdiction is exercised where it is clear that the action pleaded has no reasonable prospect of success.

17. Both parties agreed that such power to strike out proceedings exists and that it should only be exercised in clear cases where the court is convinced that the plaintiff's claim must fail. Both parties referred me to the decision of Costello J. in *Barry v. Buckley* [1981] IR 306 and to other agreed decisions on the issue of striking out actions. Each party laid different emphasis on the same judgments: *Sun Fat Chan v. Osseous Ltd*. [1992] 1 IR 425; *Supermacs Ireland Ltd. v. Katesan(Naas)Ltd*. [2000] 4 IR 273; *Jodifern Ltd. v. Fitzgerald* [2000] 3 IR 321.

18. The plaintiffs argued through their counsel that the action should be allowed to proceed as even an apparently weak or innovative case should be permitted to proceed to trial provided that the pleadings revealed some recognised remedy and as an action for specific performance was a real remedy, the proceedings could not be considered vexatious, frivolous or a breach of process and the defendant's motion should therefore be refused.

The defendant urged on me that to allow the plaintiffs to proceed on their meritorious claim which would ultimately fail was in effect permitting them to freeze the sale of the lands for an unconscionable period. This is a feature of actions for specific performance well recognised in the many decisions opened to me and in particular the case of *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425 As the late McCarthy J. said in that case when reviewing the authorities in relation to the inherent power of the court to strike out proceedings at p. 429 :

> "The procedure is peculiarly appropriate to actions for the enforcement of contracts, since it likely that the subject matter of the contract would, but for the existence of the action, be the focus of another contract".

This and other cases warn that whereas a court has such a jurisdiction it is one to be used cautiously.

19. In the case of *Barry v. Buckley* [1981] IR 306 Costello J. said that

> "A disappointed purchaser, by instituting proceedings for specific performance and by registering a lis pendens against the land which he alleges he has purchased, can effectively prevent a re-sale of the lands for a considerable time—perhaps extending over several years. Obviously substantial injustice could thereby result, both to the owner of the land and to a subsequent innocent purchaser. In suitable cases, the Courts should be able to provide a speedy means for determining the issues between the vendor and the first purchaser. It seems to me that such a means is to hand. A vendor who is sued by a purchaser for specific performance may bring a motion (which is heard on affidavit) to stay or to strike out the proceedings, and for an order directing the lis pendens to be vacated. In clear cases the Court can so order: its jurisdiction arises in two ways……

He then describes Order 19 procedures and goes on to state at p. 308 of the judgment:

> "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case…. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per *Buckley L.J. in Goodson v. Grierson* [1908] 1 K.B. 761 at p. 765.
>
> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant. Having done so, the Court can also order that the lis pendens be vacated."

In that case Costello J. made his decision on the basis of agreed facts whereas the facts are disputed in this case. In particular it is disputed that the developer had agreed with the plaintiffs to allow them an exclusive three week moratorium on negotiations with any other parties for the sale of No. 12 Acres Cove. However an examination of the agreed correspondence from the plaintiffs demonstrates no dispute on critical facts. The dispute arises from the meaning attributed by the plaintiffs to the negotiations and discussions between them and the developer's agents.

20. The essential elements of a concluded contract are absent on the letters and emails generated by the plaintiffs and it is clear that they did not at any stage consider themselves bound to purchase the property at Drumshambo during the period when they were awaiting the developer's response to their proposed variations to the internal layout of the house. The price was not agreed, the feasibility of the new layout was not agreed, the inclusion or otherwise of a berth was not agreed. The fact that the plaintiffs were also interested in another property was referred to twice while the negotiations were proceeding. If the plaintiffs believed themselves bound by a concluded contract to purchase the house in Drumshambo, they would not have referred to their option to purchase a house in Cavan.

21. In the circumstances I am satisfied that any court faced with the same correspondence would have no difficulty in finding that there was no concluded agreement at all.

22. It was agreed by both parties that there was urgency in the case as tax benefits under a rural development scheme to either purchaser would expire on the 31st December, 2006.

23. In view of the urgency in the matter and in the knowledge that the prospect of an early hearing was not possible, I notified the parties on the 20th December, 2006, that I had concluded that the plaintiffs' proceedings have no reasonable chance of succeeding and made an order striking out the proceedings and vacating the *lis pendens* registered against Folio LM5481.

24. Thus the clear authority opened to me by both parties is *Supermacs Ireland Ltd. v. Katesan(Naas)Ltd*. [2000] 4 IR 273. That authority indicates that when a court is asked to lock out a plaintiff from arguing his case, it must be vigilant to ensure that both parties have an opportunity to advance or rebut the application. If there is an arguable case or where the pleadings can be remedied by or dismissed, or judgment to be entered accordingly, as may be just. However where as in this case, an examination of the facts contained in the affidavits reveals that the plaintiffs has no chance of success although the pleadings advance a known and recognised remedy, the court should grasp the nettle and strike down such unmeritorious proceedings. I therefore order that the proceedings be struck out and the *lis pendens* vacated.