

THE HIGH COURT

COMMERCIAL

2008 8311 P

BETWEEN

MARLAN HOMES LIMITED

PLAINTIFF

AND

MARK WALSH AND GARY WEDICK

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 20th March, 2009

1. Introduction

1.1 These proceedings involve a dispute between the parties concerning an agreement which, in substance, contemplated the ultimate sale of lands at Kilmore Road, in Dublin City. While the commercial substance of the agreement between the parties is, as I have noted, one for the sale of the lands in question, the legal form of the agreement is somewhat more complex. It is out of that complexity that the dispute between the parties arises.

1.2 The plaintiff ("Marlan") seeks, in these proceedings, an order for specific performance of an agreement of the 23rd November, 2006, ("the November Agreement") made between Marlan and the defendants in respect of those lands. The defendants admit the existence of a contract of the 23rd November, 2006, in relation to the lands but, in their defence, question significant aspects of the interpretation placed by Marlan on that contract.

1.3 In that context an application was brought before this Court seeking to have two preliminary issues concerning the interpretation of the contract concerned determined by the court.

1.4 An order in that regard was made, and the trial of the preliminary issues came on for hearing before me. This judgment is directed towards those preliminary issues.

1.5 It is appropriate that I first set out, therefore, the issues which I have to try.

2. The Preliminary Issues

2.1 The issues required to be tried are as follows:-

A. Are the Defendants required to compel Dublin City Council to consent to a mortgage in respect of the lands owned by Dublin City Council comprising approximately 1,345 square metres situate at Kilmore Road, Artane in the City of Dublin; and

B. Having regard to the fact that the Defendants executed a limited recourse mortgage in favour of AIB plc in respect of Folios 929 and 35060F County Dublin, which same was expressly accepted by the plaintiff, its servants or agents, by letter dated the 14th June, 2007, from the plaintiffs then solicitors, Messrs. Callan & Co, are the Defendants required to execute a further limited recourse mortgage.

2.2 As is clear a true understanding of the issues which arise requires an analysis of the contractual obligations of the parties and, in particular, the obligations, if any, of the defendants in respect of the procurement of certain mortgage arrangements designed to enable funding for a construction project on the relevant premises to be progressed. For those reasons it is appropriate to turn, firstly, to the legal structure of the arrangements entered into between the parties.

3. The Legal Structure of the Agreements

3.1 The overall site consists of lands comprised in three different Land Registry Folios. Prior to the parties entering into the November Agreement, the defendants were already the registered owners of the lands comprised in two of the Folios concerned being Folios 929F and 35060F of the Register of Freeholders for County Dublin. However, the third portion of lands involved ("the Dublin City Council lands") was part of the lands comprised in Folio 4021 of the Register of Freeholders for County Dublin. In the latter part of 2006, the defendants were involved in significant negotiations with Dublin City Council for the purposes of acquiring an interest in those later lands. It would appear that on the 20th December, 2006, a formal agreement was entered into between the defendants and Dublin City Council ("the December Agreement") the substance of which entitled the defendants, provided that certain conditions were complied with, to receive from Dublin City Council a lease of the lands in question with the terms of the relevant lease being annexed to the agreement entered into between the defendants and Dublin City Council.

3.2 The December Agreement contemplated that the defendants could, prior to obtaining the relevant lease, enter onto the lands for the purpose of carrying out a development on same. Once the development was completed to a specified stage, the defendants were entitled to obtain the lease in question. These contemplated arrangements are reflected in the November Agreement in that recital A of that agreement states that the licensors (who in that context are the defendants) "are the persons entitled to be registered with the leasehold interest in part Folio 4021 County Dublin on foot of an agreement for lease dated [BLANK] day of [BLANK], 2006" (sic). The agreement was executed with blank dates as

shown. The reason for no date being inserted is, of course, because the relevant agreement had not yet been executed. However, it would appear that the parties entered into the November Agreement in contemplation that the agreement between the defendants and Dublin City Council would shortly be executed, and with knowledge of the terms of that agreement.

3.3 Likewise, the second schedule to the November Agreement, which provides for title, refers both to an agreement for lease between Dublin City Council and the defendants, again undated, and a draft lease.

3.4 It would appear, therefore, that while the November Agreement was drafted on the assumption that the arrangements contemplated between Dublin City Council and the defendants would have been formalised prior to its execution, it was nonetheless executed (without amendment) notwithstanding the fact that the agreement between the defendants and Dublin City Council, while at an advanced stage of finalisation, had not been formally executed. It is also clear that the November Agreement makes express reference to the contemplated arrangements between Dublin City Council and the defendants in the manner which I have already noted.

3.5 It was against that background that the November Agreement was entered into.

3.6 On that basis it is appropriate to turn to the November Agreement itself. The agreement is a so called building license agreement, which provides for a license entitling the purchasers (in this case Marlan) to enter into possession of the property in question for the purposes of constructing a development on it. The agreement further provides, in Clause 4(c), that the defendants, as vendors, will, after the payment of certain monies, ultimately execute an assurance of the property concerned, or a relevant portion of it, to persons nominated by Marlan. The intent of the agreement was that Marlan would, therefore, as a result of the building license, be able to go onto the lands in question and construct the apartment development in respect of which planning permission had already been obtained. When an individual apartment was sold, Marlan would be entitled to require that the legal interest in that apartment be transferred by the defendants directly to the purchaser. The commercial substance of such arrangements is that the land is, in practical terms, sold. However, the legal form of such arrangements leaves the ownership of the land in question in the hands of the vendor, until such time as construction has been completed and a relevant unit sold on to a third party. The legal title is, therefore, transferred directly from the vendor to the ultimate purchaser of the built unit. The advantage of such arrangements, from the perspective of the parties thereto, is that stamp duty only falls to be paid once rather than the twice which would arise if there were an outright sale of the development site to a purchaser, followed by a second sale of the developed units on to third parties. In substance there is a saving of the stamp duty which would otherwise be paid on the purchase price of the development land. That is a saving in favour of the purchaser who does not have to bear the stamp duty concerned. The saving may, of course, on the facts of any individual case, also inure, at least in part, to the benefit of the vendor who may be able to secure a better price by agreeing to enter into an arrangement structured in that way, because the purchaser may be willing to pay more in the light of the fact that he will not be exposed to a charge to stamp duty.

3.7 Be that as it may, the parties chose to structure the arrangement between them in that way, doubtless for good reason. However, the legal rights and obligations of the parties must necessarily be governed by the legal form into which they chose to put their arrangements.

3.8 However, the key issue with which I am concerned in relation to these preliminary issues concerns the rights and obligations of the parties in relation to potential mortgages over the lands in question. There are provisions contained in both the November Agreement and the December Agreement concerning mortgage entitlement. I, therefore, turn to the relevant mortgage clauses.

4. The Mortgage Clauses

4.1 The November building license agreement provides at, clause 6(c), as follows:-

"The licensor shall at the request of the licensee execute a Mortgage/Charge limited in recourse to the subject lands in a form which is acceptable to the licensor in favour of any bank or lending institution providing loan facilities to the licensee to enable the licensee to fund the works on the subject lands or any part thereof and the payment of the sums covenant to be paid by the licensee to the several parties under this agreement."

4.2 It is that clause which is at the heart of the dispute between the parties. A number of aspects of the clause in question need to be noted. Firstly, there is reference to the sums covenanted to be paid by the licensee under the agreement. The commercial substance of the arrangement was that almost all of what might loosely be termed the purchase price was to be paid up front. I say loosely because, while the commercial substance of the arrangement was that the sum concerned was the purchase price (or almost all of it), in form the sum was described by the parties as a license fee to enable the licensee to go on to the property for the purposes of constructing the development and also to have the entitlement to nominate individual purchasers as being entitled to receive an assurance of the built units to such purchasers. Clause 6(c), therefore, contemplates a mortgage being entered into by the defendants to secure borrowings which Marlan would make, both to enable Marlan to pay the consideration for the license agreement and to pay the costs of developing the site in accordance with the planning permission in place. Secondly, it is important to note that the obligation of the licensor relates to "the subject lands". This is a term to which it will be necessary to return in due course.

4.3 In any event, so far as the two portions of the site which were already owned by the defendants were concerned, no difficulty arose under this heading. It is clear that the defendants were obliged to enter into a mortgage to support borrowings by Marlan in accordance with clause 6(c) in respect of the lands of which the defendants were the registered owners.

4.4 Indeed, as will become clear, the defendants did in fact agree to enter into such a mortgage in favour of a lender with whom Marlan had entered into loan agreements.

4.5 The difficulty, however, arose in respect of the obligations of the parties in respect of the third portion of the land which was, as I have noted, not owned by the defendants but rather was land in respect of which the defendants had certain entitlements under the December Agreement. As already noted that agreement, while not executed at the time of the November Agreement, was nonetheless at an advanced form of finalisation so that the parties would have

understood the terms on which the agreement was likely to be (and in fact, was) entered into.

4.6 The December Agreement itself did also contemplate the possibility that the defendants might need to enter into a mortgage over its future interest in the Dublin City Council lands, as an aid to financing construction. In that context, clause 14 of the December Agreement provided as follows:-

"The Agreement is an Agreement for Lease and shall not operate as a Lease and shall not be transferable save in the case of a Financial Institution which has entered into a Mortgage with the Proposed Lessee, details of which Mortgage will be provided to the Council in writing and must have been entered into specifically for the purposes of financing the Proposed Lessee to enable it to undertake the Approved Development on the Site the subject matter of this Agreement."

4.7 A number of matters need to be noted about that clause. Firstly, the clause appears to be confined to finance for the development itself rather than finance needed to support the "purchase". The December Agreement provided for a significant initial capital payment by the defendants to Dublin City Council, but it seems clear that the mortgage contemplated by clause 14 could not be used to help fund that payment but rather was confined to development costs.

4.8 Secondly, and perhaps of even greater importance, what appears to be contemplated is that the defendants could assign the benefit of the agreement for the purposes of allowing a mortgagee to take the benefit of the agreement as part of the relevant mortgage security. In other words, it does not appear to have been contemplated that the defendants would be entitled to procure that Dublin City Council enter into a mortgage over the lands themselves. Rather, Dublin City Council were required to allow an assignment of the benefit of the agreement for a lease so as to enable the benefit of that agreement itself to be mortgaged.

4.9 There are, therefore, real differences between the nature of the mortgage arrangements contracted to be entered into as and between the defendants and Dublin City Council, on the one hand, and as and between the defendants and Marlan on the other hand. It is those distinctions which are at the heart of the disputes which give rise to the preliminary issues which I have to determine.

4.10 In that context it is appropriate to turn to the respective arguments of the parties concerning the proper interpretation of the November Agreement having regard, to whatever extent that it may be appropriate and permissible, to the terms of the December Agreement. I, therefore, turn to the arguments of the parties.

5. The Arguments of the Parties

5.1 The argument of Marlan can be put fairly simply. Marlan draws attention to the terms of clause 6(c) of the November Agreement and the reference in that clause to the obligation on the defendants to "execute a Mortgage/Charge limited in recourse to the subject lands". In the definition section of the November Agreement the term "the subject lands" is defined as meaning "the lands more particularly described in recital A of this Agreement". Recital A has already been set out at para. 3.2 above. It is clear that recital A makes reference not only to the two Folios in respect of which the defendants were already the registered owners, but also to the lands in respect of which the defendants were due to become leasehold owners on foot of what ultimately became the December Agreement, that is the Dublin City Council lands.

5.2 On that basis Marlan argues that the term "subject lands" comprises all three parts of the development site. On that basis it is argued that clause 6(c) is clear in its intent, and obliges the defendants to procure that Marlan should be entitled, both for the purposes of "purchase" and development costs, to obtain a mortgage over all three sets of lands.

5.3 The argument put forward by the defendants seeks to link in the December Agreement as a means of construing the November Agreement. On that basis it is said that the parties clearly had in their contemplation, at the time of entering into the November Agreement, the fact that it was anticipated that what ultimately became the December Agreement would shortly be executed and that the parties were, further, aware of the terms of what was going to become the December Agreement. On that basis it is said that the parties could not be taken to have contemplated that the defendants would have any greater obligation in respect of the procurement of a facility to enter into a mortgage over the Dublin City Council lands beyond the entitlement which the defendants were going to secure in relation to obtaining such a mortgage entitlement by virtue of clause 14 of what became the December Agreement. Thus, it is argued, a proper construction of the November Agreement requires that it be construed having regard to the terms of the December Agreement, and on that basis it is said that the November Agreement should not be construed in a manner which implied that the defendants had undertaken any greater obligation in respect of facilitating a mortgage relevant to the Dublin City Council lands beyond the entitlement which the defendants (and, it is said Marlan Homes) contemplated would be available in respect of those lands, under what became the December Agreement.

5.4 Those are the competing constructions which the parties seek to place on the core provision of the November Agreement concerning mortgage entitlement.

5.5 It should also be noted that the second preliminary issue directed to be tried stems from a contention on the part of the defendants that any entitlement which Marlan might have had to require the defendants to facilitate mortgage arrangements was exhausted or spent when the defendants agreed to put in place a mortgage over the two Folios, in respect of which they were registered owners, in favour of AIB plc. In relation to this point it is argued by the defendants that clause 6(c) contemplates a single entitlement to have a mortgage put in place over the subject lands and does not entitle, as it were, Marlan to come back for a second bite of the cherry.

5.6 However, it seems to me that the first issue which logically should be addressed is the question concerning the proper construction of the entitlement of Marlan under clause 6(c) insofar as it relates to the Dublin City Council lands. Before turning to that question I should, briefly, touch on the legal principles applicable to the construction of commercial documents such as those with which I am concerned. I, therefore, turn to the law.

6. The Law

6.1 There was no significant dispute between the parties as to the applicable legal principles. The test was most

succinctly put by Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55, when he said:-

"In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the context itself and the surrounding circumstances."

6.2 I did not understand the parties to suggest that any different test should be applied.

6.3 In addition, I am satisfied that the appropriate starting point should be the text of the agreement itself. In *Ryanair Limited v. An Bord Pleanala* [2008] IEHC 1, I stated the following:-

"5.5 In addition, notwithstanding the recent evolution in the principles applicable to the construction of written agreements intended to have legal effect, to which I referred in *BNY Trust*, the starting point for any construction issue remains the text of the agreement itself. The reasons for this are obvious. The fifth principle identified by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR and approved by Geoghegan J., speaking for the Supreme Court, in *Analogue Devices v. Zurich Insurance* [2005] 2 ILRM 131, notes that the reason why words should be given their "natural and ordinary meaning" stems from the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. This is all the more so when the written form is agreed with the benefit of expert advice on all sides. The logic of this position is clear. Whatever may have been in the minds of parties as they approach an agreement, they choose to give effect to their agreement by putting it in writing in a specific form.

5.6 It would be to entirely and inappropriately devalue the written form into which parties have chosen to put their agreement, not to pay significant attention to the way in which the agreement is expressed in the document under consideration. It would, in my view, be to put the cart before the horse to start with a consideration of what the parties were trying to do and only then to apply one's mind to what they in fact did by entering into an agreement in the terms of the written document under consideration. Rather one should start with the document but using, as an aid to its construction, the context in which it was entered into by reference to any material background facts which would bear upon the way in which a reasonable and informed person would have interpreted the document in question."

6.4 The starting point should, therefore, be the text agreed on by the parties but using, as indicated in *Ryanair*, as an aid to the proper construction of that text, the context in which the agreement containing the relevant text was entered into by reference to any material background facts which would bear on the way in which a reasonable and informed person would have interpreted the document in question.

6.5 I propose adopting that approach in respect of the text in this case. It is, therefore, appropriate to turn to the application of that test to the clause in question.

7. The Interpretation of Clause 6(c)

7.1 There is no doubt but that the parties chose to use the term "subject lands" in clause 6(c). The "subject lands" clearly includes the Dublin City Council lands as well as the lands which were already in the ownership of the defendants. It would, in my view, be to entirely devalue the text of clause 6(c) if that clause were to be interpreted as not extending any obligation in respect of mortgage facilitation to the Dublin City Council lands. To come to such a view would be to ignore entirely the fact that the parties chose to define the obligation contained in clause 6(c) by reference to the definition of the subject lands, which in turn referred to the lands specified in recital A, which in turn obviously include the Dublin City Council lands. Any construction on clause 6(c) which entirely excluded the defendants from an obligation in respect of the Dublin City Council lands would, in my view, require to ignore the clear wording of the clause and the other clauses to which it makes specific reference. It does not seem to me, therefore, that there could be any basis for suggesting that the only obligation placed on the defendants in respect of facilitating a mortgage related to the lands other than the Dublin City Council lands.

7.2 The further question which arises is, however, as to the nature of any entitlement which Marlan might have in relation to the Dublin City Council lands. Is it, as Marlan suggest, an entitlement to have a full mortgage over the lands in question or is it, as the defendants suggest in their back up argument, that no entitlement could exist beyond the right to obtain a mortgage over the interest of the defendants in those lands, being the interest of the defendants in the agreement for the lease?

7.3 It seems to me that on this point the defendants are correct. The way in which the Dublin City Council lands come into the equation at all is by the reference to those lands in recital A, which is incorporated into clause 6(c) through the medium of the definition of the term "subject lands". However, what is specifically referred to in recital A is the entitlement of the defendants to be registered on foot of an agreement for lease. Therefore, the very definition of the lands in respect of which the mortgage entitlement arises makes specific reference to the interest of the defendants being an entitlement to a lease.

7.4 While clause 6(c) could, undoubtedly, be clearer, it seems to me that the interpretation suggested as a fallback position on behalf of the defendants does not do any damage to the wording of the clause. On that basis I am satisfied that the proper construction of clause 6(c) obliges the defendants to make available a mortgage over the entirety of their interest in all of the subject lands. That means that the defendants are obliged to make available mortgage facilities in the ordinary sense over the lands in respect of which they are the registered freehold owners (presumably a registered charge if necessary), but are also obliged to enable their interest in the Dublin City Council lands (being their entitlement to receive a lease subject to the terms of that agreement) to be the subject of security in favour of Marlan's lenders.

7.5 Such an interpretation does give Marlan an entitlement to have some form of mortgage in relation to all of the subject lands, and thus does not do any violence to the definition of the term "subject lands" by reference to recital A. At the same time, such a construction does not oblige the defendants to procure a mortgage over an interest in the Dublin City Council lands which, by the very terms of recital A itself, the defendants do not purport to own.

7.6 However, it seems to me that the obligation on the defendants is to procure that a mortgage over their interest in the Dublin City Council lands (i.e. the agreement for a lease comprised by the December Agreement), be made available as security for Marlan whether Marlan's indebtedness sought to be secured relates to "purchase" or development costs. Clause 6(c) is clear in its terms. It entitles Marlan to a mortgage as security both for the license fee (in substance most of the purchase price) and development costs. The defendants agreed to this. It seems to me, in that context, that the question of whether the defendants have an entitlement to enforce such a mortgage as against Dublin City Council is neither here nor there. Parties frequently enter into agreements to deal with assets over which they do not have a sufficient interest, as of the time of contract, to complete the deal. Parties who enter into such agreements take the risk that they may be found in breach of contract if they are not, by the time when the relevant obligation under the contract arises, have an ability to make the asset concerned available. There is nothing unusual, therefore, in construing an agreement in a manner which imposes an obligation on one or other of the parties which it was not, as of the time of the agreement, in a position to comply with.

7.7 While, therefore, for the reasons which I have sought to analyse, I am satisfied that the only entitlement which Marlan has in respect of the Dublin City Council lands, is to require the defendants to make the interest of the defendants under the December Agreement available as security, I am not satisfied that the other terms of the December Agreement are imported into the November Agreement where those terms are inconsistent with the clear wording of the November Agreement itself. It is, therefore, a matter for the defendants to seek to persuade Dublin City Council to allow security to be given over the interest of the defendants in the December Agreement so as to secure any loan in favour of Marlan which comes within the scope of what is contemplated by clause 6(c). I would, therefore, propose answering issue A to the effect that the defendants are required to seek to procure that Dublin City Council consent to a mortgage in respect of the interest of the defendants, on foot of the December Agreement, in the lands owned by Dublin City Council comprising approximately 1,345 square metres situate at Kilmore Road in the City of Dublin.

7.8 It is then necessary to pass to the second issue which arises.

8. Is the Mortgage Obligation Spent?

8.1 Under this heading the defendants argue that, having already given one mortgage in respect of the lands of which they are the registered owners, their obligations under clause 6(c) are spent or exhausted and they are under no continuing obligation to enter into any further mortgages. On that basis it is suggested that the defendants cannot now be required to procure that Dublin City Council agree to a mortgage, of any sort, in respect of the lands. I am not satisfied that such an argument reflects the proper construction to be placed on clause 6(c). While the clause does refer to "a" Mortgage/Charge, it does not seem to me that the use of the indefinite article was thereby intended to create a singular obligation on the part of the defendants. For example, could it really be said that it was in the parties contemplation that, if Marlan were to change its bankers, Marlan would have no entitlement to have a second replacement mortgage entered into in favour of its new lenders. To interpret clause 6(c) in way which would preclude a second mortgage from being entered into based solely on the use of the indefinite article, would seem to me to be an inappropriate approach to giving proper effect to the intentions of the parties. In the circumstances and I am not satisfied that the fact that a mortgage has already been entered into precludes Marlan from seeking that a subsequent mortgage be entered into, provided that that subsequent mortgage is within the terms contemplated by clause 6(c).

8.2 In those circumstances issue B should be answered to the effect that the defendants are required to execute a further limited recourse mortgage, notwithstanding the fact that the defendants have already executed such a mortgage in favour of AIB plc in respect of Folios 929F and 35060F County Dublin. It should, of course, be understood that the limited recourse mortgage which the defendants remain obliged to execute is one which is limited in scope by the answer to issue A.

9. Conclusions

9.1 It follows that the two preliminary issues directed to be tried should be resolved in the manner set out earlier in this judgment. For the avoidance of doubt I should, therefore, set out the obligations which I have found the defendants to have.

9.2 There is a continuing obligation on the defendants to procure that Marlan can obtain security over the Dublin City Council lands. The obligation of the defendants is to procure that Marlan have that security in respect of any type of borrowing that comes within the ambit of clause 6(c), and is not confined to the type of borrowing contemplated by clause 14 of the December Agreement. If that causes problems for the defendants in respect of their relationship with Dublin City Council, then that is a problem which stems from the fact that the defendants entered into an agreement with Marlan which was significantly different in scope from the agreement which the defendants entered into with Dublin City Council without seeking, in the text of the November Agreement with Marlan, to limit their obligations to Marlan by reference to their entitlements from the Dublin City Council. However, the obligation of the defendants does not extend beyond procuring that there be an assignment of their interest in the December Agreement so that any lending institution providing funding (within clause 6(c)) to Marlan can have security over that interest. The obligation of the defendants does not extend to procuring that there be a mortgage over the land itself.

9.3 I propose hearing counsel further as to the appropriate order as to costs that should be made.