Neutral Citation Number: [2007] IEHC 89

THE HIGH COURT

2007 No. 966 P

BETWEEN

CLAYSTONE LIMITED, OLIVER BARRY AND NOELEEN BARRY

PLAINTIFFS

AND

EUGENE LARKIN, TWINLITE DEVELOPMENTS LIMITED AND DALUS DEVELOPMENTS LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 14th March, 2007

The applications

1. This judgment deals with two applications:

(1) The plaintiff's application on foot of a notice of motion dated 9th February, 2007 seeking an interlocutory injunction restraining the defendants from erecting on the lands known as Site No. 14 Redwood, Ratoath Road, Hollystown, Dublin 15 (the Site) any building or structure (or any part thereof) other than a detached dwelling house constructed in accordance with plans and drawings in respect of which planning permission has been granted by Fingal County Council under planning register reference No. S06A/0800 (the 2006 planning permission) pending further order of the court.

(2) The defendants' application on foot of a notice of motion dated 21st February, 2006 seeking alternatively:

(a) an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts, 1986 striking out the statement of claim herein on the grounds that it discloses no reasonable cause of action and/or on the grounds that the plaintiffs' claim is frivolous and/or vexatious; or

(b) an order pursuant to the inherent jurisdiction of the court striking out the proceedings herein on the grounds that the plaintiffs' claim is frivolous, vexatious and/or bound to fail.

The plaintiffs' case as pleaded

2. The primary relief claimed by the plaintiffs on the plenary summons, which issued on 9th February, 2007, is specific performance of an agreement made between the plaintiffs and the first defendant whereunder the first defendant agreed to have the second and third defendants' construct for the second and third plaintiffs a detached dwelling house on the Site in accordance with the plans and drawings in respect of the 2006 planning permission and to assure the Site with the completed dwelling house thereon to the second and third plaintiffs.

3. The statement of claim was delivered on 19th February, 2007. The facts set out in paras. 5 to 9 thereof, which are not in dispute, form the factual backdrop to the current dispute and disclose the following:

By a contract in writing dated 20th April, 2004 made between the first plaintiff and the first defendant (in trust) the first defendant agreed to purchase certain lands at Hollystown, Dublin, 15 comprising approximately six acres from the first plaintiff for the sum of €3.45 million. It is clear on the evidence that the lands in question included the Site.

That contract contained special condition 13, which provided as follows:

"The Purchaser agrees to sell to the Vendor or its nominees two completed four-bedroom dwelling houses in the proposed development by the Purchaser of the property in sale, for a consideration of €185,000 each, as soon as possible after receipt by the Purchaser of planning permission for the proposed development and after commencement of the site development works and this covenant shall be binding upon the Purchaser, its successors, administrators and assigns. The Purchaser shall enter into a Deed of Covenant with the Vendor in respect of the sale of the two dwelling houses in a form to be agreed by the Vendor prior to the completion of the sale herein. The Purchaser's solicitors shall furnish a draft Deed of Covenant prior to completion for approval herein to the Vendor's solicitors."

The purchase was completed on 11th November, 2004 when the purchase monies were paid and the lands (including the Site) were assured to the first defendant.

For the purposes of special condition 13, the first plaintiff nominated the second and third plaintiffs as the parties to whom the houses were to be sold. On 11th November, 2004 the Deed of Covenant contemplated by the special condition was executed by both the first defendant and the second and third plaintiffs. On the same date a second Deed of Covenant was entered into by the same parties in relation to the building of a further detached dwelling house.

It was agreed that once a layout plan was available showing the purchased lands divided into sites, the second and third plaintiffs would be entitled to choose two of the sites upon which the detached dwelling houses were to be built and the third site would be chosen by the first defendant.

4. It is not in issue that the Site was one of the two sites chosen by the second and third plaintiffs under the first Deed of Covenant of 11th November, 2004. It is an essential element of the plaintiffs' case that the reason the Site was chosen was because it backed onto the residential property of the second and third plaintiffs, affording them an opportunity to enlarge the Site thereby rendering it likely that planning permission could be obtained for a larger house than was authorised by the planning permission which had been obtained by the defendants under planning register reference No. 505A/747 (the 2005 planning permission). It is also an essential part of the plaintiffs' case that the second and third plaintiffs' objective was to acquire a larger house which would be a suitable residence for their son, Ciaran Barry, his wife, Rose Barry, and their two young children. This is pleaded.

5. The core elements of the plaintiffs' case are to be found in paras. 11 and 13 of the statement of claim. In para. 11 it is pleaded

that in October, 2005 the possibility of enlarging the Site and obtaining planning permission for a larger dwelling house was discussed between the second plaintiff and the first defendant. It is alleged that it was agreed between them that an application would be made by the second defendant for planning permission for a larger house in accordance with plans and drawings which would be prepared in consultation between the defendants' architects and Ciaran Barry. It is further alleged that it was agreed that in the event of a suitable planning permission being obtained the defendants would implement the same, the cost of €185,000 being increased *pro rata* by reference to the increase in the floor area of the house.

6. The planning application which led to the July planning permission was submitted to the planning authority by the defendants' architects, John F. O'Connor & Associates, in the name of the second defendant. The 2006 planning permission issued on foot of a notification of decision to grant permission dated 25th July, 2006 for a change of house type from a two-storey, four-bed detached house with recreation room in the attic area (total 189.27 sq. mtrs.) to a two-storey, four-bed detached house with study and bedroom in attic area and with a sun room to the side (total 296 sq. mtrs.). It is clear on the evidence that the planning fees and the architect's fees in connection with the application for the revised permission were discharged by Ciaran Barry.

7. In para. 13 the plaintiffs allege that, having obtained the July, 2006 planning permission, all necessary changes in and revision of specifications were discussed and agreed between Ciaran Barry and Michael Larkin, who is a son of the first defendant and a director of the corporate defendants, on diverse dates from the second half of August up to 11th December, 2006.

8. Before considering what the defendants have to say about the allegations contained in paras. 11 and 13 of their defence, it is useful to record how the dispute between the parties which gives rise to these proceedings has come about. Towards the end of October, 2006 the defendants commenced implementing the 2006 planning permission on the Site and laid the foundations for the larger house permitted under that planning permission. However, a dispute arose between the parties in January of this year. The nub of the dispute was that the defendants asserted that they were not contractually bound to build the larger house in accordance with the 2006 planning permission on the Site and they embarked on the development of the Site in accordance with the 2005 planning permission. The evidence adduced on the application for an interlocutory injunction discloses a serious conflict between the plaintiffs and the defendants as to what motivated that *volte face*. The plaintiffs' evidence, in essence, is that it was retaliation by the defendants on account of actions, including the initiation of proceedings in this Court and the registration of a *lis pendens*, by the plaintiffs in relation to other issues concerning the development at Redwood estate, relations between the second plaintiff and the first defendant having deteriorated at the end of December, 2006. The defendants' position is that it had nothing to do with that; that the defendants were frustrated by the delay and procrastination on the part of Ciaran Barry and Rose Barry in finalising the negotiations in relation to the specification for the larger house, negotiations which the defendants contend never reached the stage of a concluded agreement.

9. The defendants' defence was delivered on 28th February, 2007. Apropos of what is pleaded in para. 11 of the statement of claim, the defendants deny that it was agreed that they would implement a planning permission other than the 2005 planning permission. They assert that, if there was such an agreement as alleged in para. 11, it is unenforceable by reason of non-compliance with s. 2 of the Statute of Frauds (Ireland) 1695. *Apropos* of the allegations made in para. 13 of the statement of claim, the defendants deny the existence of any agreement regarding changes in and/or revisions of specifications between Ciaran Barry and Michael Larkin or any other person acting by the defendants. Further, they assert that, if there was any such agreement reached, it is unenforceable by reason of non-compliance with the Statute of Frauds. The defendants admit that they are required to erect a house on the Site which has a floor area of not less than 1,900 sq. ft. They deny that the commencement of the development of the Site was done in accordance with the 2006 planning permission. For present purposes, there is uncontradicted evidence before the court in the form of an affidavit sworn by Mark Foran, Consulting Engineer, on 9th February, 2007 that the foundation measurements are consistent with the larger house permitted under the 2006 planning permission, but the block work being constructed on the foundations is for the smaller house permitted by the 2005 planning permission. Indeed, the affidavit of the first defendant sworn on 15th February, 2007 effectively corroborates that evidence.

The defendants' application to strike out

10. I consider it logical to consider the defendants' application first, notwithstanding that the plaintiffs' application was first in time.

11. Order 19, rule 28 provides that the court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action and in such case, or in the case of the action being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed as may be just.

12. Apart from the jurisdiction available under O. 19, r. 28 it is well established that the court has an inherent jurisdiction to stay proceedings. This jurisdiction was explained in the following passage from the judgment of Costello J., as he then was, in *Barry v. Buckley* [1981] I.R. 306 (at p. 308):

> "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: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of 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 …"

13. Costello J. went on to state that the jurisdiction should be exercised sparingly and only in clear cases.

14. The inherent jurisdiction was considered by the Supreme Court in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425. McCarthy J., with whom the other two judges of the Supreme Court agreed, stated as follows at p. 428:

> "In *Barry v. Buckley* [1981] I.R. 306 Costello J. held that the High Court has inherent jurisdiction in an appropriate case to dismiss an action on the basis that, on admitted facts, it cannot succeed. Counsel for the plaintiff has not challenged that decision or the ratio underlying it. The jurisdiction is different from that directly arising from the Rules … where a statement of claim discloses no cause of action or the proceedings constitute an abuse of process of the court, where, pursuant to section 27, sub-section (5) of the Judicature Act (Ireland) 1877, the court may grant a stay so far as may be necessary for the purpose of justice. In *Barry v. Buckley* Costello J. referred to the notes on that sub-section set out in Wylie on the Judicature Acts. Since the matter has not been debated, I express no view upon the decision in *Barry v. Buckley* save to comment that applying the underlying logic, a defendant may be denied the right to defend an action in a plenary hearing if the facts are clear and it is shown that the defence is unsustainable. This appears to have been the net effect in the decision in the High Court (Dixon J.) in *Dolan v. Neligan* (1959) reported in its second phase in [1967] I.R. 247. By way of qualification of the jurisdiction to dismiss an action at the statement of claim stage, I incline to the view

that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.

Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.

Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour. The procedure is peculiarly appropriate to actions for the enforcement of contracts, since it is likely that the subject matter of the contract would, but for the existence of the action, be the focus of another contract."

15. In relation to the last comment in that passage, while the usefulness of a procedure which unblocks a wrongful restraint on contracting, for example, by initiating proceedings for specific performance which cannot succeed and registering a *lis pendens*, cannot be gainsaid, no such consideration is at play here because it is common case that the defendants are bound to develop the Site for the plaintiffs and assure it to them or their nominee. What is at issue from the plaintiffs' perspective is the house type to be constructed by the defendants. The only real issue from the defendants' perspective could be the price they are paid for the construction of the larger house.

16. The court's inherent jurisdiction to strike out was considered more recently by the Supreme Court in *Supermac's Ireland v. Katesan (Naas) Limited* [2000] 4 I.R. 273 where the court returned to the theme of the imponderability at pleading stage of what the discovery process and the trial process may ultimately turn up. In his judgment, Hardiman J. stated at p. 277:

"There was no dispute between the parties as to the legal principles to be applied in considering this motion. These have been extensively set out in the judgment of the learned trial judge and I need only say that I agree with what she says. The position is aptly summarised in *Lac Minerals v. Chevron Corporation* [1995] 1 I.L.R.M. 161 as follows:

'The judge acceding to an application to dismiss must be confident that no matter what may arise on discovery or at the trial of the action the course of the action will be resolved in a manner fatal to the plaintiff's contention.'

This clearly is a very difficult hurdle for the defendants to clear."

17. In his judgment in the *Supermac's* case Geoghegan J. emphasised the importance of the following passage from the judgment of Barron J. in the Supreme Court in *Jodifern Limited v. Fitzgerald* [2003] 3 I.R. 321:

"Every case depends upon its own facts. For this reason, the nature of the evidence which should be considered upon the hearing of an application to strike out a claim is not really capable of definition. One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how a claim can be treated as being an abuse of process of the court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue.

Where the plaintiff's claim is based upon a document as in the present case then clearly the document should be before the court upon an application of this nature. If that document clearly does not establish the case being made by the plaintiff then a defendant may well succeed. On the other hand, if it does, it is hard to see how a defendant can dispute this *prima facie* construction of a document without calling evidence and having a trial of that question."

18. Geoghegan J. pointed out that, although the issue in the *Jodifern* case seems to have been abuse of the process of the court, the same principles would equally apply to an issue as to whether there was or was not a reasonable cause of action.

19. The case made by the defendants that the plaintiffs' claim is bound to fail mirrored their defence, in that it advanced two propositions: that there is no concluded agreement between the parties on the lines which the plaintiff seeks to have specifically performed; and, even if there is, it is unenforceable for non-compliance with the Statute of Frauds.

20. In making the case that the plaintiffs' claim is unsustainable the defendants referred to the defendants' contractual obligations under the Deed of Covenant, under which the first defendant undertook to construct two detached dwelling houses, one of which it is acknowledged is to be constructed on the Site and to have a floor area of not less than 1,900 sq. ft. Counsel for the defendants emphasised the provision in the Deed of Covenant in relation to the plans, specification, finish and fit out of the dwelling houses agreed to be constructed which was in the following terms:

"The house plans and specification, finish and fit out for each such dwelling house shall be at least to the standard specification for houses of a comparable size which are to be erected on the Property in the course of its development as a residential estate."

21. The defendants argued that there was no concluded agreement varying those terms which had been expressly agreed in writing, for a number of reasons.

22. First, they submitted that neither Ciaran Barry nor Michael Larkin were parties to the original agreement and, therefore, they could not vary the terms of the original agreement. I find this argument to be wholly without merit. It is quite clear from the plaintiffs' case as pleaded that the involvement of Ciaran Barry in relation to the house to be constructed on the Site was with the authority of the plaintiffs and by express agreement between the second plaintiff and the first defendant. Further, the necessary implication from the plaintiffs' case as pleaded is that Michael Larkin was acting on behalf of the first defendant and on behalf of the corporate defendants. The evidence put before the court on these applications, rather than suggesting that Michael Larkin did not have authority to bind the defendants, suggests the contrary.

23. Secondly, the defendants submitted that there was no agreement as to the varied specification for the larger house and that there was no agreement in relation to the price to be paid to the defendants for construction of that house having regard to the varied specification, finish and fit out. The defendants pointed to features of the evidence on this application which they contended

show that the parties had never reached the stage where the price payable for the larger house with the varied specification, finish and fit out had been calculated or agreed.

24. The plaintiffs' answer to the defendants' contention that the plaintiffs could not get a decree of specific performance in the absence of an express agreement on the quantum of the increased price was that there was a mechanism for the determination of the price and that the court could specifically enforce the agreement by giving effect to that mechanism. In this regard the plaintiffs referred the court to the decision of the House of Lords in *Sudbrook Trading Estate Limited v. Eggleton & Ors*. [1982] 3 All E.R. 1. That case concerned the enforcement of a lessee's option to purchase the freehold reversion at a price to be agreed by two valuers, one to be nominated by the lessor and the other by the lessee, and, in default of agreement, by an umpire to be appointed by the valuers, a minimum purchase price being specified. When the option was exercised, the lessor refused to appoint a valuer, so the purchase price could not be ascertained. The House of Lords held that, where the machinery by which the value of property was to be ascertained was subsidiary and non-essential to the main part of an agreement for the sale and purchase of property at a fair and reasonable price, the court could, if the machinery for ascertaining the value broke down, substitute other machinery to ascertain the price in order to ensure that the agreement was carried out. The plaintiffs relied in particular on the following passage from the speech of Lord Fraser at p. 10:

> "In the present case the machinery provided for in the clause has broken down because the lessors have declined to appoint their valuer. In that sense the breakdown has been caused by their fault, in failing to implement an implied obligation to co-operate in making the machinery work. The case might be distinguishable in that respect from cases where the breakdown has occurred for some cause outside the control of either party, such as the death of an umpire, or his failure to complete the valuation by a stipulated date. But I do not rely on any such distinction. I prefer to rest my decision on the general principle that, where machinery is not essential, if it breaks down for any reason the court will substitute its own machinery."

24. Applying that principle to this case, the plaintiffs contended that the parties agreed the machinery whereby the price of the larger house was to be ascertained: the price of €185,000 was to be increased pro rata by reference to the increase in the floor area of the house. As regards the varied specification and fit out, the evidence adduced by the plaintiffs was that the plaintiffs' requirements were made known to the defendants. The final tranche of documents setting out the plaintiffs' requirements had been furnished on 11th December, 2006 and there had been no complaint that the documentation was inadequate or late. While the defendants' evidence was that no agreement was reached on the varied specification or price, that particular averment, contained in an affidavit sworn by Ciaran Barry on 22nd February, 2007, was not contradicted. In the same affidavit Ciaran Barry deposed to a conversation he had with the electrical contractor in relation to the electrical layout proposed by the plaintiffs and to the fact that the electrical contractor had referred to the job being an "at cost" job on the defendants' instructions. The plaintiffs' case on this application, as I understand it, was that the pricing mechanism in relation to the varied specification is based on cost. The ascertainment of the price payable to the defendants for the construction work can be objectively ascertained it was urged. Counsel for the defendants correctly submitted that the plaintiffs have not pleaded an agreement that variations over the standard specification would be priced on a cost basis. However, the dictum of McCarthy J. in the *Sun Fat Chan* case in relation to the possibility of amending a statement of claim is pertinent to that argument.

25. The question for the court at this juncture is whether it can be predicted with confidence that the plaintiffs will fail to establish a concluded agreement to construct a dwelling house on the Site in accordance with the 2006 planning permission and the plaintiffs' requirements as set out in the documentation furnished to the defendants at a price which can be ascertained by reference to what the parties have agreed. I am satisfied that it cannot.

26. The defendants also made the case that the plaintiffs' claim is bound to fail because the agreement they seek to specifically enforce, which they say is an agreement for the sale of lands, is not in writing and it is not evidenced by any note or memorandum signed by the defendants or an agent of the defendants sufficient to satisfy s. 2 of the Statute of Frauds. Counsel for the defendants submitted, citing the judgment of Kenny J. in *McQuaid v. Lynam* [1965] I.R. 564 as authority, that where the parties to an agreement for the sale of land intend their agreement to find expression in a written document, the subsequent oral variation of the contract is not effective unless it is evidenced by a memorandum or note in writing signed by the party to the charged therewith or some person authorised by him. As I have already stated, the position here is that the defendants accept that they are contractually bound by virtue of the Deed of Covenant to assure the Site, having erected a house thereon in accordance with the 2005 planning permission, to the second and third plaintiffs or their nominee. As I have already stated, the variation of the terms of the Deed of Covenant which the plaintiffs assert was agreed related to house type, although, of course, that has implications for the price the second and third plaintiffs or their nominees should pay.

27. The plaintiffs' answer to the defendants' contention that, even if there was an agreement on the lines contended for by the plaintiffs, it is not enforceable for non-compliance with the Statute of Frauds had two strands. First, the plaintiffs submitted that what they are seeking to enforce is a building contract, not a contract for the sale of land, and that, accordingly, the Statute of Frauds does not apply. This argument was based on the proposition that the Site is in some way subject to a trust in favour of the second and third plaintiffs by combined operation of the contract for sale of 20th April, 2004, the assurance on foot thereof and the Deed of Covenant of 11th November, 2004. The second strand, which was more vigorously pursued by the plaintiffs was that, in any event, there were sufficient acts of part performance on the part of the plaintiffs to render the agreement which they allege exists enforceable. For instance, they asserted that Ciaran Barry's involvement in relation to the planning application which led to the 2006 planning permission, including discharging the relevant fees and costs, and the involvement of Ciaran Barry and Rose Barry in relation to finalising the specification and fit out for the larger house are sufficient acts of part performance to render the agreement they contend for enforceable. The defendants countered that argument by pointing to the fact that the plaintiffs have not pleaded part performance. In fact, the plaintiffs have pleaded neither compliance with the Statute of Frauds nor part performance in the statement of claim, presumably on the basis of their contention that what they are seeking to enforce is not a contract for the sale of land. It is open to the plaintiffs to join issue with the defendants' contention that the contract is unenforceable in their reply, which is due for delivery shortly, and to assert the existence of sufficient acts of part performance to render the agreement they contend for enforceable.

28. Apart from the pleading point, the defendants asserted that the plaintiffs' contention that they can answer a defence founded on the Statute of Frauds by reference to the doctrine of part performance is fundamentally misconceived. Counsel for the defendants cited two recent authorities on the doctrine of part performance. First, they referred to a passage from the judgment of Barron J. in the Supreme Court in *Mackie v. Wilde (No. 2)* [1998] 2 I.R. 578 at p. 586 in which the doctrine was explained as follows:

> "It must not be forgotten that ultimately the court is seeking to ensure that a defendant is not, in relying upon the Statute, breaking faith with the plaintiff, not solely by refusing to perform the oral contract, but in the manner contemplated from the passage from the judgment of Simon L.J.

The doctrine is based upon principles of equity. There are three things to be considered:-

(1) the acts on the part of the plaintiff said to have been in part performance or of [sic] concluded agreement;

(2) the involvement of the defendant with respect to such acts;

(3) the oral agreement itself.

It is obvious that these considerations only relate to a contract of a type which the courts will decree ought to be specifically performed. Each of the three elements is essential. In my view, it does not matter in which order they are considered. Ultimately what is essential is that:

(1) there was a concluded oral contract;

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

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

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

29. The reference to the judgment of Simon L.J. is a reference to his judgment in *Steadman v. Steadman* [1976] A.C. 536 and to the passage a p. 558 in which Lord Simon outlined the intervention of equity and the evolution of the doctrine of part performance so that the Statute of Frauds could not "be used as an engine of fraud."

30. The defendants also relied on a passage from the judgment of this Court (Finnegan P.) in *Cosmoline Trading Limited v. D.H. Burke & Son Limited & Anor.* [2006] I.E.H.C. 38 delivered on 8th February, 2006. Finnegan P. stated as follows:

> "In order to obtain specific performance a party must first of all establish a contract and without this there can be no specific performance. In this case I am satisfied that there were negotiations but that the same never resulted in an entire and completed contract. Where there is no contract part performance does not arise and if in reliance on an incomplete contract a party performs some or more of the matters on which agreement has indeed been reached that will not cause the negotiations which were otherwise incomplete to mature into a completed contract. Where as here there was no consensus on material and essential terms there cannot be a contract. See *Dore v. Stephenson* [High Court, 24th April, 1980, Kenny J.]."

31. In my view, that authority has no relevance here. The plaintiffs have not relied on the doctrine of part performance with a view to shoring up an incomplete agreement. Their case was that there was a completed agreement. They invoked the equitable doctrine against the defendants' charge of non-enforceability because of non-compliance with the Statute of Frauds.

32. On the facts of this case, the defendants submitted that acts relied on by the plaintiffs do not constitute acts of part performance within the equitable doctrine. While I do not consider it either necessary, or even appropriate, to comment on each point they made in relation to the acts of part performance alleged by the plaintiffs, they are quite right in their submission that activities alleged on the part of the defendants cannot constitute part performance by the plaintiffs although, of course, those activities may be evidentially significant. They also submitted that steps alleged to have been taken by Ciaran Barry and Rose Barry, who are neither contracting parties nor plaintiffs, must be excluded from the analysis as to whether there has been part performance. For the reasons stated earlier, it will be obvious that I consider that argument to be unmeritorious. As regards the defendants' further submission that, on the evidence adduced by the plaintiffs, the negotiations on price and specification only started after the 2006 planning permission was granted, I do not read the evidence that way. In the affidavit sworn on 9th February, 2007 by the second plaintiff grounding the application for an interlocutory injunction, the second plaintiff averred that the pro rata increase on the price of €185,000 by reference to the increased floor area was made prior to any consultation by Ciaran Barry with the defendants' architects in relation to the planning application which led to the 2006 planning permission.

33. Aside from those specific comments, if the issue of the enforceability of the agreement contended for by the plaintiffs were ultimately to fall to be determined on the basis of whether there have been acts of part performance on the part of the plaintiffs in a manner which complies with the requirements stipulated by Barron J. in *Mackie v. Wilde*, the outcome would depend on the assessment of the evidence adduced at the trial. On the basis of the submissions advanced by the defendants, it cannot be confidently predicted that the plaintiffs are bound to fail because the agreement they seek to specifically enforce is not in writing or evidenced in writing so as to comply with the Statute of Frauds.

34. However, there was a further point which was addressed by the plaintiffs in the context of their application for an interlocutory injunction which bears on the defendants' application, namely, whether, if the agreement which the plaintiffs seek to specifically enforce is, as the plaintiffs contended, a building agreement rather than an agreement for the sale of land, it is of a type in respect of which a court would be prepared to grant specific performance. On this point, the plaintiffs referred the court to the decision of the Chancery Division of the English High Court (Farwell J.) in *Carpenters Estates Limited v. Davies* [1940] 1 All E.R. 13. In that case, the plaintiff had purchased building land from the defendant who, in the transfer, covenanted to make certain roads and sewers. The defendant was in breach of the covenant in relation to the sewers. The court held that the plaintiff would not be properly compensated for the defendant's breach of covenant by an award of damages and was entitled to a decree for specific performance of the covenant. In his judgment, Farwell J. quoted from the judgments of A.L. Smith M.R. and Romer L.J. in *Wolverhampton Corporation v. Emmons* [1901] 1 K.B. 515. The passage from the judgment of Romer L.J. which he quoted was in the following terms:

> "The question, which is not free from difficulty, is whether under the circumstances of this case, an order for specific performance should be made in favour of the plaintiffs. There is no doubt that as a general rule the court will not enforce specific performance of a building contract, but an exception from that rule has been recognised. It has, I think, for some time been held that, in order to bring himself within the exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, is defined by the contracts; that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract

by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done. …"

35. Farwell J. modified the third requirement, holding that it was sufficient that the defendant be in possession of the land on which the work is contracted to be done.

36. It seems to me that, having regard to the principles applied in that case, the plaintiffs have an arguable case that their agreement with the defendants is specifically enforceable.

37. In summary, the defendants have demonstrated that these proceedings raise a fundamental conflict of fact on the question of the variation of the house type and the specification, finish and fitting out of the house and the price the defendants are to receive for the work and they also raise difficult issues of law, which will have to be resolved in the plaintiffs' favour if they are to succeed. However, these factors are not sufficient to allow the defendants succeed in their application. I have come to the conclusion that the defendants are not entitled to have the plaintiffs' proceedings struck out or dismissed at this juncture either under O. 19, r. 28 or under the court's inherent jurisdiction. As regards O. 19, r. 28, the defendants have not established that the statement of claim discloses no reasonable cause of action, nor has it been shown that the pleadings are frivolous or vexatious. In relation to the court's inherent jurisdiction, having regard to the pleadings and the evidence adduced, I am not satisfied that the defendants have cleared the difficult hurdle of establishing that the plaintiffs' case must fail.

The plaintiffs' application for an interlocutory injunction

38. The plaintiffs' application for an interlocutory injunction falls to be determined in accordance with the usual criteria: whether there is a fair *bona fide* question to be tried as between the parties; the adequacy of damages; and where the balance of convenience lies.

39. It is a corollary of the finding that the defendants have not established that the plaintiffs' claim must fail that there is a fair *bona fide* question for determination raised by the plaintiffs.

40. The plaintiffs' case is that only an order for specific performance compelling the construction of the larger house in accordance with the 2006 planning permission will provide them with an adequate remedy because of the location of the Site, the family arrangements between the second and third plaintiffs and Ciaran Barry and Rose Barry and the family circumstances of Ciaran Barry and Rose Barry. I consider that the plaintiffs have made out a case, on the peculiar circumstances of this case, that damages would not be an adequate remedy. Moreover, I consider that there is a high degree of probability that, if the proceedings were prosecuted by the plaintiffs to a successful conclusion without an interlocutory injunction having been sought, the only remedy the court would grant would be a decree for damages if construction of the smaller house on the Site were completed at the time the matter came to hearing. I think it highly unlikely that any court would order the demolition of a constructed dwelling house. The court was informed that the defendants are prepared to give an undertaking to the court to demolish the smaller house if the plaintiffs succeed in the action. Apart from the unnecessary waste which that would entail, planning permission would be necessary for the demolition of the house. Therefore, it could not be assumed that the defendants would be able to comply with the undertaking.

41. On the other hand, damages would be an adequate remedy if it were to transpire that the plaintiff is not entitled to specific performance as claimed. The first defendant, in his affidavit sworn on 15th February, 2007, has outlined the pecuniary loss which the defendants will incur if, because of the existence of an interlocutory injunction, they are prevented from completing the construction work on the Site and finalising the development of Redwood estate. It has not been suggested that the plaintiffs could not meet that loss if they were constrained to do so on foot of the undertaking as to damages which they must give the court as a precondition of being granted an interlocutory injunction.

42. Having regard to the factors which I have outlined in dealing with the question of the adequacy of damages, in my view, the balance of convenience lies in favour of granting the injunction.

General observations

43. I think it is appropriate when dealing with an application for an interlocutory injunction to apprise the parties of the court's function at this early stage in the litigation. As Lord Diplock pointed out in *American Cyanamid Company v. Ethicon Limited* [1975] 1 All E.R. 504 at p. 510, it is no part of the court's function at this stage to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial. The affidavits in this case have thrown up conflicts of evidence on crucial matters. The context in which the dispute between the parties has arisen and the nature of the remedy being pursued by the plaintiffs raises difficult issues of law, some of which have been considered in connection with the defendants' application but only to the extent necessary to form a view as to whether the plaintiffs' claim is hopeless. The purpose of the interlocutory injunction is to maintain the status quo pending the trial of the action and the resolution of the factual conflicts and the determination of the issues of law.

Orders

44. There will be an order on the defendants' motion dismissing. An interlocutory injunction in the terms sought will be granted on the plaintiffs' their application application, subject to the undertaking as to damages.