Neutral Citation Number: [2006] IEHC 157

THE HIGH COURT

2005 NO. 317P

BETWEEN

DECLAN O'DWYER

AND

JULIA JONES – O'DWYER

PLAINTIFFS

AND

ROBIN BOYD AND ANDREW DILLON

DEFENDANTS

Judgment of Finnegan P. delivered on the 17th day of May 2006.

The Plaintiffs are personal litigants. The Statement of Claim runs to some 45 paragraphs and 25 pages. Many issues are raised not all of which are justiciable and the first task to be undertaken is to identify those issues which are properly before the Court for resolution.

By an Agreement for Sale in writing dated the 21st August 1998 in the Law Society of Ireland standard form 1995 Edition the first named Defendant agreed to sell and the Plaintiffs agreed to purchase premises known as Killuragh Glen near Mallow, Co. Cork on some 27 acres at a purchase price of IR£300,500. The map attached to the conveyance of the premises to the first named Defendant contained an error in that it included in the lands conveyed a large slurry tank and a small portion of ground which error was repeated in the Agreement for Sale. The Plaintiffs issued proceedings in the High Court against the first named Defendant Record No. 1999 No. 1144P seeking inter alia specific performance of the Agreement for Sale with abatement of the purchase price on account of the error in the Agreement for Sale and some other matters. Those proceedings were stayed pursuant to the provisions of general conditions 21, 33 and 51 of the Agreement for Sale the issue of an abatement of the purchase price being referred to arbitration.

The Arbitration

As many of the issues raised by the Plaintiffs in this action overlap with those in the arbitration it is necessary to detail the outcome of the arbitration in terms of the award, claims in respect of which no award was made and claims not within the reference. Details of the claims in respect of which an award was made and in respect of which no award was made and claims not within the reference are as follows -

(i) Award €

Slurry tank 18,000
Land on which slurry tank situated 250
Small portion of land 150
Glasshouse 2,500
Shed 1,100
Damage to flat roof and chimney cowl in
main house and repair of blocked pipes and
Gutters and recent holes in slate roof 2,000

Re-painting and re-decoration of interior 20,000

Miscellaneous items

Television aerial
Two large trees
Clean up of marble fireplaces

Repairs to doors and walls
Missing wc cistern top
Repairs to four broken windows
Alarm and security lights
Replacement of locks
Gate locks
Internal fittings mirrors etc
Reinstatement of landscaping and
driveway 9,010

Total award: €53,010

(ii) Claims in respect of which no award was made

Drainpipe
Carpets and curtains
Removal of asbestos
Separation of water and electrical services and investigation
Treatment of weeds and driveway
Creeper

(iii) Claims held not to be within the reference

Loss of rent
Stress

With regard to costs the award provided that the arbitrator's fees together with VAT should be paid equally by the Claimant and the Respondents. No award was made in respect of costs.

Following on this the action Record No. 1999 No. 1144P was reactivated and on the 11th August 2004 the same was compromised. At that time an issue had arisen which becomes relevant to the matters which concern me in the present proceedings. Notwithstanding that the Plaintiffs were compensated in relation to the slurry tank and the small portion of land they were insisting that the same should be conveyed to them by the first named Defendant and that he should convey the same as beneficial owner. On advice the first named Defendant was unwilling to execute a conveyance in that form. In the course of the hearing before Mr. Justice Kelly on that date Counsel on behalf of the first named Defendant agreed that the conveyance should be in the form sought by the Plaintiffs

The Plaintiff's Claim
(i) Against the second named Defendant
The second named Defendant is a solicitor and held and acted under Power of Attorney from the first named Defendant. The Plaintiffs seek to have the second named Defendant made liable for the defaults of the first named Defendant. An Attorney is an agent appointed by deed and subject to that is in the same position as any other agent. The general principle is that the contract of an agent is the contract of the principle and prima facie the Agent is not liable on the agreement: **Montgomerie v UK Mutual SS Assurance Limited (1891) 1QB 370**. Nothing has been urged upon me to take the second named Defendant outside this general principle. The Plaintiffs however take exception to a number of letters written and verbal communications made by the second named Defendant. In relation to the former they claim that a letter dated 7th March 2005 with enclosures is defamatory. The second named defendant objects that the claim for defamation is not correctly pleaded. I am satisfied that this is so. I am in any event satisfied that nothing in the letter or the enclosures is capable of bearing a defamatory meaning. This claim fails. In paragraph 29 of the Statement of Claim the Plaintiffs plead that the Defendants falsely and maliciously asserted to third parties including the Gardai that the first named Defendant was entitled to the property. At the relevant times the first named Defendant remained the legal owner of the property. This claim also fails. Finally when the premises the subject of the agreement for sale were the subject matter of a robbery in January 2005 the Plaintiffs took possession of pieces of marble fireplaces which had been damaged and notified the Defendants that they were safeguarding the same and claiming a lien over them. The second named Defendant it is alleged misdescribed these valuable pieces in the first named Defendants insurance claim and that this is defamatory of the Plaintiffs. Further the second named Defendant wrote to the Gardai at Fermoy on the 16th February 2005 a letter which the Plaintiffs claim to be defamatory of them. The relevant passage in the letter would appear to be the following –

"Secondly, we wish to report the fact that people called Declan and Julie O'Dwyer, who have long ago contracted to purchase this house called for an inspection of the damage in early January. To our dismay Mr & Mrs O'Dwyer without our permission or authority have taken a large number of pieces of marble which formed parts of the damaged fireplaces, and which were lying around the ground inside the house. They also relieved Mrs Canavin, the housekeeper, of a particularly significant carved piece of marble which formed part of the fireplace in the drawing room of the house. We have demanded that the O'Dwyers return or restore the marble to the property and they have refused. They have informed us that they are keeping the pieces of marble in safekeeping. Would you please note that this property belongs to Mr. Boyd. Mr. Boyd is the owner of Killuragh Glen. The O'Dwyers have taken it without permission. In our view quite simply that is theft.

Mr & Mrs O'Dwyer live at 26 Leeson Park, Dublin 6. Would you please arrange for your colleagues who operate in that area to arrange to call to the house to investigate this matter. On behalf of our client, Mr. Boyd, we are instructing you to prosecute this matter on behalf of our client. If you wish to receive a statement, such statement can be taken at your station in Kinsale. At any rate, will you let us know what you require in order for you to investigate this business and recover the missing articles. You may as well note at this point that this is not simply something which can be assigned to "civil remedy". The property has been wrongfully taken from the house. On behalf of our client we have demanded its return and this has been refused. There is no denial that it has been taken. Mr & Mrs O'Dwyer seem to be under some impression that they are entitled to take it. This does not lessen the offence. They may be misguided."

There can be no dispute as to the law here. The marble pieces in question were then and remain the property of the first named Defendant who retained until completion the legal estate in the premises and the right to possession thereof, including the fixtures therein and which includes the fireplaces, as against the Plaintiffs. The Plaintiffs' beneficial interest does not carry with it a right to possession of the premises or fixtures nor does it carry a right to a lien. While the Plaintiffs may have been well motivated in securing the same once demand for the return was made and refused the Plaintiffs were in wrongful possession of the same. On the evidence at the hearing I am satisfied that the letter is factually correct and could not be defamatory.

Having regard to the foregoing the Plaintiffs' claim against the second named Defendant fails in its entirety.

(ii) Against the first named Defendant
My next task is to consider the Statement of Claim in detail and abstract from the prolix and discursive narrative in the same the claims which the Plaintiffs make and then to deal with each in turn in the light of the evidence, which again was prolix and discursive, whether or not each of these claims has been established.

The most important issue between the parties arises in the following circumstances. On the 11th August 2004 the action between the parties Record No. 1991 No. 1144P was compromised. The compromise was not reduced to writing but the first named Defendant raises no issue on the Statute of Frauds. There is disagreement between the parties as to the terms of the compromise as to costs. The first named Defendant pleads the terms of the compromise as to costs as follows –

(i) Such orders for costs as existed would be honoured.

(ii) All other costs would be borne by each side back to back.

The Plaintiffs deny that it was so agreed. Paragraph 9. of the Statement of Claim pleads as follows –

"The settlement agreement of 11th August 2004 excluded any accommodation on costs because the parties had reached no consensus regarding legal costs, but only about the balance of the purchase price to be paid for the property and the wording of the deed of conveyance. The Plaintiffs made a proposal in relation to certain costs, but the Defendants did not accept or address this proposal and Miss Juliette Lynch of Dillon Mullins & Company representing the first named Defendant said on the 11th August 2004 to the Plaintiffs that she had no authority to make an arrangement on costs and the matter of costs was left to one side and separate from the agreement. There was no discussion whatever of reserved costs."

The dispute between the parties centres on reserved costs and developed as follows –

On the 12th August 2004 the Plaintiffs sent to the first named Defendants solicitor a fax which contained the following –

"On the matter of costs, we would like to make a proposal to you to save both sides further time, trouble, correspondence and expense:

You have had costs awarded for one hearing (which have been taxed), and we have had costs awarded for several motions (ours and yours) which were at hearing on the 19th and again on the 26th July (with Doyle Court Reporters reporting for us on those days) (we attach a copy of one of the two Orders made 26th July – the other is still to be perfected). On these we propose to you that for the convenience of both sides we simply let these awarded costs items balance against each other, so as to avoid the need for further correspondence on these items."

The fax was sent at 17.43. At 17.46 the first named Defendant's solicitor sent a fax to the Plaintiffs. On the evidence I am satisfied that this was not in response to the Plaintiffs fax but was independent of the same and that it is coincidental that both faxes were sent almost contemporaneously. The fax makes no mention of the terms of the compromise as to costs. At 18.03 the Plaintiffs sent a fax acknowledging receipt of the fax of 17.46 and agreeing with its contents. On the 13th August 2004 the first named Defendant's solicitors sent a fax and in this dealt with the issue of costs in the following terms –

"The costs awarded to both parties for various court appearances and motions shall stand as they were agreed in our settlement terms on 11th August with Mr. George Brady SC. I have no authority to vary the settlement terms at this stage."

On the 16th August the Plaintiffs responded and their comment in relation to costs in the same was as follows –

"Please let us know in due course if you agree with our proposal re each sides costs etc."

The Plaintiffs wrote again to the first named Defendant's solicitors on the 20th August and made no mention of costs. Further correspondence of the 19th August 2004, 23rd August 2004, 24th August 2004 made no mention of costs.

On the 20th August 2004 the first named Defendant's solicitors sent to the Plaintiffs a certificate of taxation in respect of costs awarded against the Plaintiffs on the 14th October 2003 and indicated that unless payment was received within seven days execution would be pursued. The Plaintiffs responded to this by issuing a motion which came on for hearing on the 25th August 2004. Among the reliefs sought were orders granting to the Plaintiffs costs which had been reserved in relation to an application for leave to serve out of the jurisdiction on the first named Defendant. No order was made on that day. The matter resumed on the 18th October 2004 when the Plaintiffs renewed their application that they be awarded the costs of the application for service out of the jurisdiction and they were awarded those costs.

The first matter for me to determine in these circumstances is whether on the 11th August 2004 there was any agreement on costs and if so the terms agreed. I have the evidence of George Brady SC and Juliette Lynch the solicitor who attended him on that occasion. The Plaintiffs evidence is that there was no agreement on costs. Ms Lynch is adamant that there was. She prepared a memorandum of the matters which occurred on the 11th August and in this records the following –

"All orders as to costs will stand".

George Brady SC in evidence was adamant and unshakable as to the terms agreed as to costs and his evidence was that the agreement was as pleaded in the first named Defendant's defence. I find support for Mr. Brady in the sequence of correspondence which I have mentioned and in particular the passage which I quote from the letter dated 13th August 2004 Dillon Mullins & Company to the Plaintiffs which clearly states that it was agreed that the costs orders should stand. In the sequence of correspondence which I have cited the Plaintiffs did not demurr from this very clear statement. It may be that the Plaintiffs sought to renegotiate the position with regard to reserved costs when they received the letter dated 20th August 2004 and the Certificate of Taxation of Costs due to the first named Defendant under the terms of settlement in the amount of €9,916.99 an amount considerably in excess of anything the Plaintiffs could hope to recover under the orders for the reserved costs of which they had the benefit but I do not so find. On the evidence I find that in relation to costs the terms of the settlement were as pleaded by the Defendant.

The next issue with which I have to deal is the effect on the settlement on the Plaintiffs applying for and receiving an order in their favour in respect of reserved costs. The first named Defendant claims that the Plaintiffs in so proceeding repudiated the settlement: as the original agreement for sale was replaced by the settlement the result, if there was indeed a repudiation, is that there is no longer an agreement for sale. In this regard it must be noted that not every breach of an agreement amounts to a repudiation so as to discharge the other party to the contract from performance of the same. The general rule is that if a party refuses to perform a contract giving therefor a wrong or inadequate reason or no reason at all he may yet justify his refusal if there are at the time facts in existence which would have provided a good reason even if he did not know of them at the time of his refusal: **The State Corporation of India Limited v Golodetz Limited (1988) 2 Llyods REP 182**.

Surprisingly, the Plaintiffs having raised the question of costs as an issue, on the 26th October 2004 the first named

Defendant's solicitors wrote to the Plaintiffs in relation to other matters which were in issue and indicating a willingness to complete but without at all mentioning the issue as to costs. The position is the same in relation to a letter of the 26th November 2004. In a letter dated 8th December 2004 the first named Defendant's solicitors wrote as follows –

"If it is that you now propose to rely on this Order (i.e. the Order granting the Plaintiffs the reserved costs) and to resile from your agreement made on 11th August please confirm. We do not accept that you were entitled to any costs pre July 2004 if we are to abide by the 11th August agreement. If you persist in demanding payment of the 1999 costs we shall regard that persistence and demand as a repudiation of the 11th August agreement. We therefore require to know, by return if it is that you are insisting on these costs being paid, as per Mr. Justice Kelly's Order or not. If you do insist then please say so immediately and we shall regard the agreement as being repudiated and at an end."

The Plaintiffs response to this was contained in a letter dated 10th September 2004 which so far as relevant states as follows –

"If you wish to make a straight forward proposal to us regarding our costs which is no more disadvantageous to us than the proposal we made to you in our letter of 12th August we will consider it. Otherwise, the costs will proceed as normal to taxation as ordered."

The first named Defendant's response to this was by letter dated 16th December 2004. I do not read this letter as an acceptance of the repudiation. A further letter of the 21st December 2004 again I do not regard as containing an acceptance of the repudiation. There were other outstanding issues between the parties. Much of the following correspondence was concerned with these. However on the 11th January 2005 in a letter to the Plaintiffs the first named Defendant's solicitors wrote –

"Yes, we are in a position to close the sale immediately provided that you withdraw your demand for the 1999 costs as ordered to you at your request by Mr. Justice Peter Kelly."

By reply dated 12th January 2005 the Plaintiffs reiterated their view of the agreement of 11th August 2004 in relation to costs and that they were not prepared to change their stance on this. These proceedings were issued by the Plaintiffs on the 31st January 2005. Up to that date there had been no acceptance by the first named Defendant of the alleged repudiation. Up to the date of the hearing while the Defendants had taxed the costs pursuant to the Order they did not demand payment of the same. As I have now determined that pursuant to the terms of settlement of the 11th August 2004 they were not entitled to recover those taxed costs there is no question that they will do so. Had the Defendants refused to complete the purchase solely on the basis of their claim for these costs that might well have amounted to a repudiation but this is not the case as there were many other issues not least the robbery with which I will deal hereafter which prevented completion. I am satisfied that in not making a demand on foot of the Certificate of Taxation and in not seeking to execute on foot of the same the Plaintiffs prevented their stance in relation to these costs from amounting to a repudiation of the settlement.

The effect of the foregoing is that subject to the other issues with which I must deal the Plaintiffs and the first named Defendant are obliged to complete the purchase in accordance with the compromise reached on the 11th August 2004 and in particular the term as to costs therein contained being the term as pleaded by the first named Defendant.

The next major issue arises out of the following. In or about the 20th or 21st December 2004 there was a break-in and robbery at the premises. Damage was done. Three marble fireplaces were destroyed. I am satisfied that the compromise was to the effect that the parties would complete the sale in accordance with the Agreement for Sale. The provisions of general condition 43 as to risk accordingly apply and pending completion the premises are at the vendor's risk. The Plaintiffs claim compensation in respect of the break-in and robbery. The issue before me therefore is that of compensation. The major item of damage relates to three marble fireplaces which were removed or damaged. In respect of fireplaces in the dining room and bedroom the Plaintiffs claim €24,800 plus VAT. The fireplace in the drawing room can be repaired at a cost of €10,500 plus VAT. The Plaintiffs accordingly claim the sum of €35,300 plus VAT. The first named Defendants witness in respect of these claims is Sarah L. Kenny. She values the fireplaces in the dining room and bedroom at €3,000 each and that in the drawing room at €12,000. She carried out her valuation on the basis of photographs. On the basis of evidence I am satisfied that she underestimated the quality of the fireplaces to some extent. The Plaintiffs evidence on the other hand in respect of the fireplaces in the dining room and bedroom is of the cost of replacing them with modern reproduction fireplaces. What I am concerned with in relation to these fireplaces is their value and not cost of replacement with modern reproductions. Doing the best I can on the evidence I propose awarding the sum of €15,000 inclusive of VAT in respect of these two fireplaces. In respect of the drawing room fireplace I propose awarding the amount of the estimate and VAT €12,705. I propose also to allow a sum in respect of the installation of replacement fireplaces in the amount of €5,000.

The removal of the fireplaces caused other damage and in addition to oral evidence I have photographs of the damage. Wardrobes were damaged: the wardrobes themselves would not appear to be of any particular merit or value but are modern louvre doors. Some replastering will be required. The rear door and door frame requires to be repaired. The front door requires to be repaired. I am satisfied that these items of the claim can be satisfied by an award of €3,500. The total award under this heading accordingly is €39,355

Next the Plaintiffs make a number of claims in respect of deterioration to the premises between the date of the award on the arbitration and the date of the hearing. Insofar as these relate to the condition of the grounds and driveway due to lack of maintenance the Plaintiffs have failed to satisfy me that any additional deterioration has taken place. They have already received in the arbitration an allowance in respect of these items sufficient to remedy the same. The situation in relation to redecoration is the same. The Plaintiffs have not established that any additional deterioration has occurred which would require an award to them of an amount in excess of that which they were awarded at the arbitration. The position is the same in relation to the creeper.

Ridge tiles have fallen from the roof of the main house between the 8th January and the 4th February 2005 and I consider the amount claimed in respect of this, €1,500 plus VAT, is reasonable. Under this heading I award the Plaintiffs the sum of €1,815.

The Plaintiffs' claim for their travel and subsistence for inspection of the damage to the property and for meeting on site with the investigating Gardai: I make no award under this heading. They claim photographic costs for circulation of photographs to the Gardai and to the Defendants' insurance brokers in relation to the claim in respect of the break-in: I see no reason for the Plaintiffs to have involved themselves in these matters and again I make no award under this heading. These items do not flow from any of the issues which arise in these proceedings. The Plaintiffs' claim for professional advice in relation to the fireplace valuations and quotations for building works: these items if recoverable at all would be recoverable as costs. As an item of special damages the Plaintiffs claim taxed costs in the amount of €6,639 but indicated at the hearing that they were prepared to forego the same: costs are determined in accordance with the agreement of the 11th August 2004 and no further Order is required by me in relation to the same save that I should record that the amount of reserved costs claimed by the Plaintiffs in respect of seeking leave to serve out of the jurisdiction having regard to my determination of the terms of the agreement of the 11th August 2004 are not recoverable.

The Plaintiffs claim general damages for distress and anxiety and loss of their own working time, the loss of the fireplaces, the nature of the correspondence which they received from the second named Respondent which they regard as hostile, offensive and threatening, unprofessional and provocative and for the delay in obtaining possession. While it is the case that a purchaser may recover damages where there has been delay on the part of the vendor (**Raineri v Miles 1979 3 All ER 763**) this is not the case here. Following on the arbitration the Plaintiffs insisted on a conveyance in a form which I am satisfied they were not entitled to: having been awarded compensation for the omission from the conveyance to them of certain lands they nonetheless insisted on receiving such a conveyance and also that such conveyance should be by the first named Defendant as beneficial owner. In an effort to procure completion the first named Defendant conceded this on the 11th August 2004. The concession was however wrongfully withdrawn for a short period but was reinstated by letter dated the 16th December 2004. The Plaintiffs failed to identify any recoverable item of general damages attributable to this period. Throughout this period the Plaintiffs were maintaining their entitlement to reserve costs to which they were not entitled and so were themselves equally at fault for the period of delay with which I am concerned that is from the 11th August to the 16th December 2004. In these circumstances I make no award of general damages. Throughout this period the Plaintiffs were maintaining their entitlement to reserved costs to which I have held they were not entitled.

In the arbitration the Plaintiffs claim the sum of €171,412 which was their calculation of the loss which they incurred by reason of the sale not completing on the contractual completion date: their intention I was told was to retain their existing residence and rent the same. This claim was held by the arbitrator not to be within the reference. For many reasons the claim is not maintainable. It was not made as a claim for special damages in the Statement of Claim. The original completion date was superseded by the agreement of the 11th August 2004 and the settlement entailed forgiveness in respect of all matters occurring prior to that date. Further the damage is too remote: it was never suggested in evidence that the first named Defendant was on notice of the Plaintiffs' intention in this regard.

The Agreement for Sale contained a special condition as follows –

"The purchaser shall be entitled to a letting (in the terms of the draft annexed hereto) of a cottage in the yard of the premises on sale from the date of execution until the completion of the sale at a rent of IR£50 per month."

When an attempt was made to steal ornamental gates leading to the property agreed to be sold the first named Defendant caused the gates to be removed and stored for safe keeping and replaced them with farm gates which were chained and locked. This impeded the Plaintiffs in gaining vehicular access to the cottage. From photographs and

evidence I am satisfied that they could have gained access by foot although not by vehicle for a relatively short period. In respect of this they are entitled to damages: see Landlord and Tenant Law Amendment Act Ireland 1860 section 41. I award the Plaintiffs the sum of €500 under this heading. I record that the first named Defendant acknowledges and accepts his obligation to re-hang the ornamental gates prior to completion and that he has confirmed in court that he will do so.

Accordingly on the Plaintiffs claim for damages I award the following sum –

€
Fireplaces 30,855

Installation of the same 5,000

Repairing damage caused by removal 3,500

Replacement of ridge tiles 1,815

Denial of access to cottage 500

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Total €41,670

I will hear the parties in relation to costs. My concern throughout this case was that the length of time consumed in dealing with the same was excessive caused largely by the manner in which the same was pleaded and conducted by the Plaintiffs. The Plaintiffs appeared personally and some consideration must be given to that circumstance. However the costs incurred to them by the extended time taken to deal with the case is minimal whereas the costs incurred by the Defendants each of whom were represented by solicitors and counsel must be very substantial indeed. In all the circumstances I wish to hear the parties in relation to the appropriate Order for costs to be made.

Finally I am anxious that this sale should be completed as quickly as possible and I will hear the parties as to any consequential Orders which should be made to facilitate this.