

THE HIGH COURT

RECORD NO. 2002 9541 P

BETWEEN

MARY QUINN AND MICHAEL QUINN
AND
SEAMUS GREALLY AND BRENDAN LIDDY

PLAINTIFFS

DEFENDANTS

Judgment of Mr. Justice Roderick Murphy dated the 12th day of May, 2006.

1. Pleadings

1.1 By plenary summons dated 9th July, 2002 the plaintiffs, who are wife and husband, sought specific performance of a written agreement dated 5th December, 2001, entered into between the first named plaintiff on the one part and the defendant on the other, provided for, *inter alia*, the exchange of the plaintiff's dwelling for a new dwelling in consideration of the withdrawal of objections to the defendant's application for planning permission. In the alternative, the plaintiff sought damages for breach of the said agreement, together with costs of the proceedings.

1.2 The plaintiff, in the original proceedings, had claimed, against the defendant's solicitor, Mr. Brendan Liddy, damages for breach of a personal indemnity provided by the solicitor to the first named plaintiff dated 10th December, 2001 together with the costs of these proceedings. Notice of discontinuance of this claim was served on 3rd March, 2003. However, vestiges of this claim still remain in the pleadings.

An entry of appearance was made on 13th February, 2003.

1.3 The statement of claim delivered 22nd December, 2004 stated that the plaintiff was a married lady and was the legal and beneficial owner of her current property and premises. No reference was made to the second named plaintiff.

The statement refers to the defendants' application for planning permission reference number PLO1/418 in respect of a development known as Clonbalt Woods situate in Farneyhoogan, Longford in the name of S. L. Properties; an objection by or on behalf of the plaintiff lodged on the 28th August, 2001; permission and an appeal dated 11th September 2001 and the memorandum of agreement dated 5th December 2001 whereby the plaintiff withdrew her appeal.

The agreement was summarised in that the defendant agreed to provide a sum of €47,139 including VAT to the plaintiff to permit the plaintiff to purchase the site in her own name or in such name as she might choose at the development at Clonbalt Woods. The defendant provided a deposit in the sum of €4,190. The balance was to be provided on or before 1st March, 2002.

The defendant was to cause to be erected on the said site a specific house and was to pay the plaintiff a sum of €15,872 in respect of items for which an allowance and like account had been designated.

It was agreed between the parties that the building agreement should provide that the consideration in respect of the construction should be €101,579, to include VAT, to be completed on or before 1st October, 2002.

In addition, the defendant was to pay the plaintiff the sum of €25,395 for any inconvenience caused to her, €1,270 to be paid upon execution and the balance of €24,125 to be paid on 1st October, in default of which the defendant should pay in accordance with the agreement at interest rate of 15% per annum.

The plaintiff pleaded that she had been able and willing to complete and fulfil her obligations at all material times and transfer her current property and premises to the defendant unencumbered and with vacant possession and not to make any further objection to the planning application.

It was pleaded that, in breach of the terms and conditions of the agreement, the defendant had failed, refused and/or neglected to comply with his contractual obligations and to date had only discharged the sum of €4,190 to the plaintiff in accordance with the agreement. The plaintiff had withdrawn her appeal.

The plaintiff claimed for an order for specific performance of the agreement dated 5th December, 2001 or, in the alternative, damage for breach of agreement together with interest and costs and, continued with claim against the defendant for the sum of €42,949 together with interest thereon and the costs of the proceedings.

1.4 By a defence dated that on 27th April, 2005 the defendant admitted the agreement; denied that the first named plaintiff had been willing to complete and fulfil her obligations; stated that the monies required to be paid by or on behalf of the defendant in respect of the purchase of the site had been paid but that the first named plaintiff had not purchased nor attempted to purchase the site in the manner required by the agreement or at all. Until that obligation were fulfilled the defendant's obligations were not required to be met. The plaintiff was not entitled to an order for specific performance.

The defendant admitted the liability in the amount of €42,949 and asserted that the said sum was paid on his behalf on or about the 2nd November, 2004 to the first named plaintiff in trust for the purchase by her of a site in accordance with the terms of the agreement. In the event that the plaintiff did not wish to purchase the site, the defendant required the said sum to be repaid and sought an order accordingly. The defendant also sought an order that the agreement of 5th December, 2001 was frustrated and that no obligation on either party survived.

2. Solicitor's Indemnity

2.1 The second named defendant in the original proceedings (discontinued nine months after the issue of the plenary summons) was at all material times the solicitor acting on behalf of the defendant. Pursuant to the negotiations between the parties which resulted in the settlement dated 5th December, 2001, at the behest of the solicitor on behalf of the plaintiff, Mr. Liddy agreed to grant a personal indemnity to the plaintiff which indemnity was particularised by letter dated the 10th December, 2001 to the plaintiff solicitor. That letter provided as follows:

Re: Our client/SLProperties

Your clients/Mary Quinn and Ors.

Lands at Farneyhoogan, Longford.

Dear Sirs,

I refer to the agreement between Seamus Greally and Mary Quinn providing for the purchase of a house by or for Mrs. Quinn of Clonbalt, Longford.

I note your confirmation that the agreed purchase price is £33,000 plus VAT @ 12½% giving a total of £37,125. A deposit of £3,300 has already been paid by my client to you leaving a balance due of £33,825. The liability to pay the balance is that of Seamus Greally and the agreement between Mr. Greally and Mrs. Quinn provides that he should furnish the balance on or before the 1st March, 2002.

I indemnify Mrs. Mary Quinn in respect of the liability to pay the balance of £33,825 to the developer of the property at Clonbalt provided however that this indemnity should not have any effect until after 1st March, 2002.

This indemnity is conditional upon your client having already withdrawn the appeal which she has made to An Bord Pleanála against the decision to grant planning permission to S.L. Properties under planning reference number PLO1/418.

For the avoidance of doubt it is hereby confirmed that this indemnity is the personal indemnity of the undersigned and is not given by or on behalf of Hughes & Liddy, Solicitors

2.2 Protracted correspondence arose in relation to the failure of the defendant to honour the agreement on or before 1st March, 2002.

The plaintiff's solicitor, Mr. Thomas Madden, wrote on 22nd February, and 4th March, 2002. On 8th March, the defendant's solicitor wrote saying that his client was hopeful of being able to resolve the outstanding issue shortly; that he had a valuable development at Castledermot, Co. Kildare in respect of which he had planning permission subject to certain conditions and which he was obliged to appeal to An Bord Pleanála. The plaintiff's solicitor, having consulted his clients said that they were not happy to wait and on 8th April, 2002 stated:

"Our clients are increasingly concerned in relation to the failure to Mr. Greally to honour the agreement and in those circumstances we shall have no option but to call on your indemnity.

Unless we receive the balance to purchase the site within seven days ... we shall have no option but to institute legal proceedings. This is a regrettable situation particularly as this indemnity is your personal indemnity, however I am under extreme pressure from my client to ensure that the agreement in its totality is honoured."

Three days later Mr. Liddy wrote saying he was taking instructions and was making arrangements with Ulster Bank for financial facilities to allow him to provide funds to Mrs. Quinn on foot of his indemnity and he hoped that this would be in position within the following two weeks.

2.3 There was no correspondence for the next three months. On 15th July 2002 the plaintiff's solicitor wrote for the attention of Brendan Liddy, *in the matter of Mary and Michael Quinn v. Greally and Liddy* saying that:

"It is with very considerable regret that I have been obliged to institute proceedings against you.

Could you please indicate if your authority to accept service of High Court writ on behalf of Mr. Greally. In the alternative we will have to have it served personally."

A week later Mr. Liddy confirmed that his firm had authority to accept service on behalf of Mr. Greally. He said that Mr. Madden, the plaintiff's solicitor, had previously indicated that he might have to call on the indemnity but noted that he had not called on foot of the indemnity. If it was so proposed then liability would be honoured forthwith. Mr. Madden was asked to confirm the position. However Mr. Madden by letter of 30th July, enclosed the original plenary summons, (2002, and 9541P) including Mr. Liddy as the defendant. Two days later Mr. Liddy expressed his reaction as follows:

"I am absolutely aghast that you would institute proceedings against me personally.

I have never, at any time, failed to honour the indemnity which I gave in this matter. In your letter 8th April, 2002 you indicated that you might, in the circumstances where Mr. Greally would fail to honour his agreement, have to call on my indemnity. You did not, at that time, call on my indemnity nor have you done so since.

I wrote to you on 11th April 2002 informing you that in anticipation of you calling on my indemnity I was making arrangements with Ulster Bank for financial facilities. I sent you a fax on 23rd July, 2002 asking if your client was calling upon me on foot of my indemnity and on advising that if so, it would be honoured. I did not receive response to that fax. I am ready willing and able to honour the indemnity which I gave you and I will do so immediately I am called upon so to do.

I will allow your clients one opportunity to file notice of discontinuance of this claim against me personally without penalising your clients as to costs. If this opportunity is not taken forthwith I will enter an appearance to the summons and a defence on the grounds that my indemnity was never called upon and if I am forced to do this I will pursue your clients for any costs incurred. I will also, and I say this with some regret, take counsel's advice as to whether or not I can take proceedings against you personally for having blackened my name. I require your client's immediate response."

2.4 Mr. Liddy was called on to honour his indemnity on 13th August, 2002 on the basis that it was quite clear that the indemnity had been called in given that Mr. Liddy had been in the process of making financial arrangements. Mr. Liddy requested that the amount be confirmed and the monies would be utilised solely for the purpose of acquiring the site. He asked for evidence that plaintiffs had been called upon to complete the purchase and requested a copy of the closing statement on the basis that the indemnity extended only

to financing the purchase of the site and did not underwrite any other element of the agreement between the clients. In reply it was stated that the cost of the site was £37,125 less the deposit of £3,300 paid and it was stated that the funds would be ascribed towards the cost of purchasing/acquiring the site and, later, stated that the monies would not be used for any other purpose. A copy of the deed from the Clonbalt Wood developers to their clients would be forwarded as soon as it was stamped immediately after closure.

2.5 On 28th January, 2003 it was stated that the proceedings would be continued as against Mr. Greally only and it was confirmed that no costs would be sought by Mr. Liddy.

Mr. Liddy, on 3rd April, 2003 wrote that he felt that the money was sought from him in April, 2002 under false pretences given that the monies were only sought by solicitors on behalf of the developer in February, 2003, ten months after it was sought when they were not required.

Further correspondence ensued with the plaintiff's solicitor serving a copy of the completion notice and advising that urgent work needed to be carried out on the plaintiff's own dwelling house. On 14th May, 2003 the plaintiff's solicitors notified Mr. Liddy that he was in breach of the indemnity and enclosed a copy of the plenary summons which was denied, with the request to have copies of the building agreement in respect of the site so as to satisfy that a liability had arisen under the indemnity. On 2nd November, 2004 Mr. Liddy forwarded a cheque in the sum of €42,948.89 in respect of the indemnity. This was duly acknowledged and a revised statement of claim was delivered on 22nd December, 2004.

On 28th February, 2005 the defendant's solicitors wrote to say that the money had, at that point in time, been paid to the plaintiff and that the defendant was ready, willing and able to commence the construction and asked for confirmation of the site and asked for the purchase deed to be forwarded to be held in escrow.

2.6 The proposed development had not proceeded. It was proposed, in conformity with the agreement reached with other objectors, that the defendant would pay 50% of the amount of IR£20,000 for inconvenience together with costs due to the plaintiff. When the house in Clonbalt was completed the plaintiff was to transfer her current dwelling house unencumbered to the defendant with a deed of transfer to be held in escrow until finalisation.

The plaintiffs' solicitor replied that the proposal fell short of what was initially agreed and that there was no mention of costs and indication of what time frame would be involved. The defendant was given three weeks within which to file a defence with costs to the plaintiff on 23rd March, 2005.

On 20th April, 2006 the plaintiff's solicitor enclosed quantity surveyor's estimate in the sum of €209,282 together with two builders' quotations. The first was in the sum of €205,000 including allowances to the total value of €13,000. The second was a quotation in the sum of €212,000 including VAT.

3. The decision of the court

This dispute has arisen out of the delays by the defendant to complete the agreement of 5th December, 2001 within the time scale agreed. This arose because of the financial constraints of the defendant arising out of what appeared to be an over extension of building development projects.

The plaintiff, in part performance of the agreement, had withdrawn her objection to the defendant's development.

The plaintiff's solicitor had negotiated a personal letter of indemnity dated 10th December, 2001 from Mr. Brendan Liddy of Hughes & Liddy, solicitors for the defendant, which was to arise after 1st March, 2002 whereby the first named plaintiff was indemnified in respect of the liability to pay the balance of £33,825 to the developer of the property at Clonbalt, a deposit of £3,300 having already been paid by the defendant to the plaintiff.

It was recited in that letter that the liability to pay the balance was that of Seamus Greally, the defendant, and that the agreement between Mr. Greally and Mrs. Quinn provided that he should furnish the balance on or before 1st March, 2002.

As can be seen from the above, two liabilities arose:

1. the liability of the defendant to pay the balance to the first named plaintiff on or before 1st March, 2002, and
2. the liability of Mr. Brendan Liddy to indemnify the first named plaintiff in respect of (her) liability to pay the balance to the developer of the property in Clonbalt.

. In the agreement of 5th December, 2001, the defendant was referred to as the developer (of the site at Farneyhoogan). The reference, in the letter of indemnity, to the developer is the developer of the dwelling house which was to be built for the plaintiff at Clonbalt, Farneyhoogan. The statement of claim, at para. 4 thereof, refers to the planning application, objected to by the plaintiff as a development known as Clonbalt Woods, situate at Farneyhoogan in the county of Longford. This may, understandably, have led to confusion in the interpretation of the letter of indemnity.

While the liability of the defendant arose on or before 1st March, 2002, it is clear that the second liability, indemnified by Mr. Liddy, arose after 1st March, 2002. Moreover, it did not arise following the failure of the defendant to honour the agreement (for this would be to confuse the two liabilities) but when the first named plaintiff had an obligation to pay the balance to the developer of the property of Clonbalt.

This confusion regarding the separate liabilities seems to have led to a misunderstanding between the plaintiff's solicitor and that of the defendant, Mr. Liddy, who had indemnified the first named plaintiff..

Some correspondence passed between the solicitors. Mr. Liddy then agreed to arrange facilities from the Ulster Bank. This also appeared to have led to an understanding on the plaintiff's solicitor's part that the indemnity arose on the failure of the defendant to pay the balance of the sum agreed to the plaintiff. While the application of the defendant to pay the balance was linked to the purchase of a site in her own name or in such name as she might choose as the development known as Clonbalt, it is clear, and the court does so find, that the liability of Mr. Liddy arose only where the plaintiff had a liability to pay the balance to the developer.

While positions between the parties' solicitors hardened to the extent of the plaintiff suing Mr. Liddy on his indemnity before the liability of the plaintiff to the developer at Clonbalt had arisen, the discontinuance of that element of the litigation on 3rd March, 2003

and the payment by Mr. Liddy personally of a cheque in the sum of €42,948 on 2nd November, 2004 allowed matters to proceed from stalemate.

However, the statement of claim delivered on 22nd December, 2004 claimed that the defendant was in breach of the terms and conditions of the agreement in that he had failed, refused and/or neglected to comply with his contractual obligations did not reflect that payment. The plaintiff claimed an order for specific performance of the agreement on 5th December, 2001 and in the alternative, damages for breach of agreement as against what was termed the first named defendant and, as a vestige of the claim against Mr. Liddy, as indemnifier, though termed as against the defendant, for the sum of IR£33,825. The defence dated 27th April, 2005, not surprisingly, denied that this was due and owing.

On 10th March, 2005 the defendant's solicitor advised that their client was ready, willing and able to commence construction of the dwelling house on the site at Clonbalt, subject to an offer of 50% of the agreed payment which took into account the fact that the inconvenience which the plaintiffs had feared by reason of the proposed development did not come to pass. The entitlement to costs were acknowledged.

It seems clear to the court that, at this stage, an attempt was made to resolve the issues between the parties. The development at Farnelyhoogan had not taken place and neither had the payments made by or on behalf of the developer been made on the time agreed. The claim was for a specific performance of the agreement which, even after these delays was the principal claim of the plaintiffs. While there was evidence given in relation to the valuation of the plaintiff's premises as on the date of the agreement and at present it is clear, despite the somewhat differences in increase in value given by valuers in evidence that the consideration for the proposed new house was not significantly different.

What was being sought, of course, was the re-negotiation of the contract and it was clear that the plaintiffs did not wish to re-negotiate. Indeed, given the failure to comply, it is understandable that the plaintiffs had lost faith in the defendant and, from the correspondence, seemed reluctant to have the defendant or his agents construct the house at Clonbalt.

The plaintiff's solicitor had negotiated an important concession with regard to having their nominated engineer supervise the building of the premises at Clonbalt and, to this extent, were in a position to ensure that it complied with the agreed type of dwelling house. However, what was not agreed was the time scale other than an assurance that, while the deed of transfer of the plaintiff's house might be completed and held in escrow, that vacant possession would not be required until the house at Clonbalt had been completed.

The court has also to take into account the anxiety caused to the plaintiffs in respect of the proposed development to which they objected, their age and circumstances, and the necessity of doing essential repairs to their existing house which, given the agreement, they had postponed.

The equitable principles regarding specific performance are summarised by Farrell, *Irish Law of Specific Performance* at 9.35 which states as follows:

"If a court applying equitable principles is truly to act as a court of conscience it must consider the conduct of the parties with particular regard to whether it is unjust or unfair and it must consider the consequences and the justice of these consequences from both sides' point of view. Every agreement ought to be certain, fair and just in all its parts and, if any of those ingredients is wanting, the court will not decree specific performance. The court will not assist unfair dealings or allow a party to profit by his own bad faith. If the court were of opinion that the circumstances in which a contract was made were unfair, and if they were in any way oppressive, if there was any advantage taken by one party of another, then the court may refuse to grant specific performance."

It seems to me that the agreement was certain, fair and just in all its parts. It does not seem to me that the defendant was acting in bad faith or in an oppressive manner but, due to the circumstances of over-trading, was unable to comply. However, due to the indemnity provided by his solicitor in respect of the liability of the plaintiff to pay the balance to the developer, that payment was appropriately made when that liability was decreed to have arisen. Indeed, at all material times, Mr. Liddy had indicated that he would honour that indemnity.

In the circumstances the court will order specific performance, notwithstanding that the dates in the agreement have not been complied with and will make an order in terms of para. 2 with the substitution for the sentence: "the building agreement shall provide that the consideration in respect of the construction shall be £80,000 to include VAT and to have a completion date of 1st October, 2001" to read "the completion date shall be 1st October, 2006 or such date to be agreed between the parties and that the same date should be substituted in paragraph 4 and paragraph 5".

The court will hear counsel as to the wording of the Order of the Court.