Neutral Citation: [2013] IEHC 464

THE HIGH COURT

[2009 No. 5391 P]

BETWEEN

PARK EAST SOUTH EAST CONSTRUCTION LIMITED

AND

M.P.T.J. (WATERFORD) DEVELOPMENTS LIMITED

PLAINTIFFS

AND

ANTHONY BENESCH AND EIMEAR BENESCH

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 25th day of October, 2013.

The proceedings in outline

1. These proceedings arise out of agreements entered into between the parties in connection with the sale to the defendants of two newly constructed industrial units in a development at Ballylynch, Carrick-on-Suir, County Tipperary, known as Park East Business Park (Park East). While documentary evidence of its title was not put before the Court, I am satisfied that in 2007 the second named plaintiff (the Vendor Company) was the beneficial owner of the fee simple or of a sufficiently long leasehold title to enable it to grant a nine hundred and ninety nine year lease to a purchaser of part of the lands on which Park East was being developed. The first named plaintiff (the Building Company) was responsible for the construction of the industrial units and all associated site works. From the time the development was proposed, probably in the second half of 2006, and at the time the planning application was being prepared and made and prospective purchasers of units first engaged with the Vendor Company and the Building Company, both companies were effectively controlled by Robert Fitzgerald (Mr. Fitzgerald), who is a partner in the accountancy firm, Fitzgerald Fleming, although the issued shares in both companies were actually owned by members of Mr. Fitzgerald's family.

2. The first named defendant (Mr. Benesch), who is a carpenter by trade, had been successful in developing a kitchen unit manufacturing business. He conducted his business through a limited company, Anthony Benesch Fitted Kitchens Limited (the Benesch Company). The Benesch Company and Mr. Benesch were clients of the Fitzgerald Fleming partnership. The second named defendant (Mrs. Benesch) is the wife of Mr. Benesch.

3. The agreements which are the subject of these proceedings are the following:

> (a) an agreement for sale the effective date of which, on the basis of the explanation set out later, was 20th December, 2007 (the Contract for Sale) expressed to be made between the Vendor Company, as vendor, and Mr. Benesch and Mrs. Benesch, as purchasers, for the sale of the sites of Unit 1 and Unit 2, Park East at the price of €26,700; and
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> (b) a building agreement, which was also dated 20th December, 2007 (the Building Agreement), expressed to be made between Mr. Benesch and Mrs. Benesch, as employer, and the Building Company, as contractor, for the building of Unit 1 and Unit 2 at a contract price of €303,300 together with VAT at 13.5%.

4. The primary relief originally sought by the plaintiffs in these proceedings was orders against both defendants for specific performance of the Contract for Sale and of the Building Agreement. However, it had been contested at the hearing that Mrs. Benesch had agreed to be a party to either the Contract for Sale or the Building Agreement. Eventually, on the afternoon of the third day of the trial, the Court was requested to make an order by consent striking out the proceedings against Mrs. Benesch. Subsequently, on the third day of the hearing, counsel for the plaintiffs made it clear that the relief the plaintiffs now seek is damages in lieu of specific performance, because the evidence was that the remaining defendant, Mr. Benesch, is not in a position to comply with orders for specific performance. Counsel for the plaintiffs made it clear that the plaintiffs wished to avoid a situation where, if orders for specific performance were made, the plaintiffs would have to return to Court and have them discharged and then seek damages in lieu of specific performance.

5. A fact which is of some relevance to the lines of defence advanced on behalf of Mr. Benesch is that by two Share Purchase Agreements dated 15th August, 2008, the Fitzgerald family shareholding in both the Vendor Company and the Building Company was sold to David Flynn Limited (the Flynn Company), which, in reality, was the construction company which built the units and the infrastructure on Park East, whereupon Mr. Fitzgerald's control over Park East ceased.

Park East and its development

6. As I understand the title position, the Vendor Company acquired the land the subject of Park East by purchase from South Tipperary County Council in or about 2006. Mr. Fitzgerald's objective was to develop eight, nine or ten industrial units on the site in respect of which he would have contractual commitments from purchasers before applying for planning permission. Ultimately, there were nine units in the development. Mr. Fitzgerald had purchasers for each of those units committed to purchasing before the application for planning permission was made.

7. Mr. Benesch committed to acquire 3,000 sq. ft. of accommodation within the development, which was to comprise two units. I am satisfied on the evidence that the planning application, when it was ultimately submitted, addressed his requirements and, despite his contention to the contrary, was suitable for his intended purposes. As will appear later, Mr. Benesch was committed contractually to the plaintiffs before the planning application was submitted to the planning authority.

8. That did not occur until 24th January, 2008. The application was successful. Following the issue of notice of intention to grant

planning permission on 14th March, 2008, an appeal was lodged to An Bord Pleanála. However, the appeal was disposed of expeditiously. The grant of planning permission for the development of nine units was issued on 2nd May, 2008. A commencement notice was served on behalf of the Building Company and was received by South Tipperary Fire Service on 24th July, 2008. The development commenced in August 2008, contemporaneously with the acquisition of the Vendor Company and the Building Company by the Flynn Company. The period of construction continued until January 2009. Brian McCarthy & Associates, Consulting Engineers, issued a certificate of practical completion in relation to the nine industrial units and the associated site works to the Flynn Company on 11th January, 2009.

9. Unfortunately, as counsel for the plaintiffs characterised it in opening the plaintiffs' case, the project became very much "a tale of boom and crash". As I understand the evidence, none of the purchases of the nine units was completed and all of the nine units remain unoccupied. Mr. Benesch's business has collapsed and he is now reliant on social welfare payments to support himself and his family.

Documented interaction between solicitors for the plaintiffs and the solicitors for Mr. Benesch

10. In September 2007, Kinsella Heffernan Foskin (KHF) were the solicitors acting for the Vendor Company and the Building Company and Derivan Sexton & Company (DS) were the solicitors acting for Mr. Benesch. By letter dated 5th September, 2007 KHF furnished the Contract for Sale and the Building Agreement in duplicate to DS. The letter was headed "Subject to Contract/Contract Denied" and the final paragraph in the letter stated as follows:

> ". . . unless expressly stated to the contrary we have no authority to bind our clients in any manner or form and no contract or agreement shall be deemed to be in existence between our respective clients unless and until formal contracts have been executed and exchanged and agreed deposits paid".

The deposits aggregated €10,000. A matter which was the subject of some controversy at the hearing was that in the penultimate paragraph of that letter it was stated that the full amount of VAT on the entire considerations would be payable on the exchange of the agreements, but, if the purchaser wished to make any special arrangement in relation to the payment of VAT, he should contact the Vendor Company and the Building Company directly. In fact, Fitzgerald Fleming procured the registration of a partnership comprising Mr. Benesch and Mrs. Benesch for tax purposes. The Revenue Commissioners gave notice of registration on 6th September, 2007. The objective of procuring that registration was to ensure that, provided Unit 1 and Unit 2 were put to commercial use, in due course the purchasers could recoup the VAT. The primary emphasis at the hearing on this aspect of the transaction was to establish contractual liability on the part of Mrs. Benesch, which is no longer part of the case.

11. Following receipt of the letter of 5th September, 2007, DS raised a query in relation to maps attached to the contract for sale and that was responded to by KHF and the response was implicitly accepted by DS. By letter dated 26th October, 2007, DS sent KHF the Contract for Sale in duplicate, the Building Agreement in duplicate and a cheque for €10,000 in respect of the agreed deposit. Both agreements were executed by Mr. Benesch, but not by Mrs. Benesch. Up to this point all correspondence between the solicitors was headed "Subject to Contract/Contract Denied". The next letter was dated 20th December, 2007 and it was from KHF to DS and it merely stated:

> "I enclose contracts signed on behalf of the vendor and the contractor."

That letter was not headed "Subject to Contract/Contract Denied".

12. As regards the Contract for Sale, the front page referred to the Law Society's then General Conditions of Sale (2001 Edition). Apart from the front page, it consisted of five pages: the usual Memorandum of Agreement on the first page; Particulars and Tenure, Documents Schedule and Searches on the second page; Special Conditions on the third and fourth pages; and a Plan of the estate and the units on the fifth page. Although the General Conditions of Sale were not actually attached, it is clear beyond doubt that the Contract for Sale incorporated the General Conditions of Sale, because Clause 2 of the Special Conditions provided that they should apply insofar as they were not altered or varied by the Special Conditions. I would have reached that conclusion even if there was not evidence before the Court of a solicitor, Mr. Peter Cusack of KHF, to the effect that the prevailing practice among solicitors at the time was of not attaching prints of the General Conditions of Sale. A fact to which counsel for Mr. Benesch sought to attach some significance was that, while the part of the Contract for Sale sent to DS on 20th December, 2007 was executed by Sandra Gough, the wife of Mr. Fitzgerald and a director of the Vendor Company, whose signature was witnessed by Pamela Burke, on behalf of the Vendor Company, Sandra Gough had not actually signed the counterpart thereof retained by KHF. I consider that that omission is wholly irrelevant and that the Vendor Company was bound and the Contract for Sale came into existence when the letter of 20th December, 2007 and enclosures was sent by KHF to DS. The part of the Contract for Sale which was returned to DS with the letter of 20th December, 2007, unlike the counterpart which was retained by KHF, did not show the date thereof at its commencement as being 20th December, 2007. That omission, in my view, is also of no consequence. It is quite clear that the effective date of the Contract for Sale was intended by the Vendor Company and its solicitors to be the 20th December, 2007 and DS accepted that without demur.

13. As regards the Building Agreement, the part thereof returned by KHF to DS was not actually executed on behalf of the Building Company, whereas the counterpart which was retained by KHF was executed by Wayne Fitzgerald, a director of the Building Company, on behalf of the Building Company and his signature was witnessed. Once again, in my view, the omission in the execution of the part of the Building Agreement which was sent to DS is irrelevant. It is quite clear that the Building Company was bound by the Building Agreement when it was returned by its solicitors to DS with the letter of 20th December, 2007. The exchange referred to in the letter of 5th September, 2007 was effected by DS sending both parts of both contracts executed by Mr. Benesch together with the deposit with their letter of 26th October, 2007 and by KHF retaining the deposit and returning one part of each contract to DS with the letter of 20th December, 2007 and unequivocally, as solicitors for the Vendor Company and the Building Company, indicating that the contracts had been signed on behalf of the vendor and the contractor. No issue was ever raised by DS in relation to the omission of signatures on behalf of the Building Company on the executed document returned to it. It is clear from the subsequent correspondence that it was accepted by DS that the Contract for Sale and the Building Agreement had come into existence on 20th December, 2007. That, in my view, is what had happened.

14. In relation to the format and contents of the Building Agreement, it was described on the front page as Building Agreement (2001 Edition) issued jointly by the Law Society and the Construction Industry Federation. Apart from the front page it contained only two pages, which set out the principal terms of the agreement. There was not attached to it the General Conditions, but it was clearly intended that the General Conditions should apply. For instance, it was stated in Clause 1 that the building of the works would be carried out in accordance with conditions 1 – 17, with the only variation being that Condition 6(a), the price variation clause, was deemed to be deleted. That was an obvious reference to the General Conditions, notwithstanding the absence of the word "General", because the 2001 Edition of the General Conditions contained seventeen clauses and Clause 6(a) dealt with price variation.

Accordingly, I find that the General Conditions, subject to the variation agreed to, were incorporated by reference in the Building Agreement.

15. Neither the Contract for Sale nor the Building Agreement was expressed to be conditional on Mr. Benesch obtaining loan approval or being in a position to draw down finance to complete the acquisition. Although the evidence of the solicitor in DS at the time, who was dealing with the transaction and who testified, did not cover this point, I am satisfied that the evidence establishes that prior to the execution by Mr. Benesch of the two contracts he had received loan sanction from Bank of Ireland for two loans, one to be secured on a residential property which he already owned, and the other, a commercial loan, to be secured on Unit 1 and Unit 2. Mr. Fitzgerald acknowledged that he had organised the finance for purchasers of the units in Park East, including Mr. Benesch, all of whom were clients of Fitzgerald Fleming. Subsequently, by e-mail dated 11th April, 2008, an official of Bank of Ireland informed an accountant in Fitzgerald Fleming that certain named individuals had "been approved funding to help fund purchases of commercial units at Ballylynch" and Mr. Benesch and Mrs. Benesch were named as having been approved funding. The deposit of €10,000 which accompanied the letter of 26th October, 2007 from DS to KHF was drawn down from the finance sanctioned by Bank of Ireland.

16. Following the change of ownership of the shareholding in the Vendor Company and the Building Company, McMahon O'Brien Downes (MOD) wrote to DS on 17th September, 2008 advising that they now acted for the Vendor Company and the Building Company in connection with the sale to Mr. Benesch of Unit 1 and Unit 2.

17. The next item of correspondence was a letter of 17th December, 2008 from MOD to DS stating that construction of Unit 1 and Unit 2 would be completed in early January and that the properties would "be available for inspection and snag lists on the week commencing 12th January, 2009". By a further letter dated 13th January, 2009, McMahon & O'Brien(MO), who succeeded MOD as solicitors for the Vendor Company and the Building Company, informed DS that Unit 1 and Unit 2 were then completed. DS was requested to furnish Mr. Benesch's address and lending institution "for the purpose of the block insurance policy". In response, by letter dated 19th January, 2009, DS informed MO that their clients (Mrs. Benesch being named as one of the purchasers at the time) were unable at the time to draw down the loan funds necessary to allow them to purchase Unit 1 and Unit 2 and had instructed DS to advise MO that they were no longer in a position to complete the purchase. As counsel for the plaintiffs emphasised, no other explanation for failure to complete was proffered on behalf of Mr. Benesch until the defence and counterclaim was delivered in these proceedings. The immediate response of MO, by letter of 22nd January, 2009, was that there were binding and unconditional contracts in place and that, unless they received confirmation that Mr. Benesch would proceed to complete in the normal manner, "an action for specific performance and/or damages" would be initiated. There was no response from DS.

18. Eventually, on 4th March, 2009, MO, as solicitors for the Vendor Company, served notice to complete under Condition 40 of the General Conditions of Sale in the Contract for Sale and notice pursuant to Condition 4(d) of the General Conditions in the Building Agreement on DS, as solicitors for Mr. Benesch. Those notices were effectively ignored by Mr. Benesch and his solicitors. Nothing happened prior to the initiation of these proceedings by plenary summons on 12th June, 2009 save that Treacy & Mullins, the solicitors on record for Mr. Benesch in these proceedings, commenced acting for him in early April 2009.

The pleadings

19. In the statement of claim delivered on 9th July, 2009, the plaintiffs pleaded the Contract for Sale and the Building Agreement, the service of the completion notice under General Condition 40 of the General Conditions of Sale being part of the Contract for Sale and the notice under Condition 4(d) of the General Conditions being part of the Building Agreement, the failure of the defendants to complete and that the plaintiffs had at all material times been ready, willing and able to complete and perform their outstanding obligations under both contracts. As I have already indicated, the plaintiffs sought orders for specific performance of both contracts. While they did not specifically claim damages in lieu of specific performance, counsel for Mr. Benesch did not object to the submission by counsel for the plaintiffs referred to earlier that, if the plaintiffs established their case, the relief the Court should grant is damages in lieu of specific performance.

20. A defence and counterclaim was delivered on behalf of the defendants on 26th November, 2009. In the defence, there was a general traverse of everything pleaded in the statement of claim and the following matters which are still of relevance were specifically pleaded:

> (a) It was denied that the Building Agreement was duly completed on 18th February, 2009, and that the closing date for the purposes of the Building Agreement was fourteen days thereafter. Further, it was asserted that the "purported" notice of 4th March, 2009 did not constitute a proper notice within the relevant clause of the Building Agreement and that there was no General Condition 4(d) in the Building Agreement and, accordingly, time was not made of the essence.
>
> (b) If planning permission had been obtained on 2nd May, 2008, it was denied that it was "in a form satisfactory to the vendor for the development of an industrial complex . . ." and the plaintiffs were put on strict proof that it was otherwise.
>
> (c) The completion notice "purportedly" served on 4th March, 2009 was bad for want of proper form and was invalid.
>
> (d) By reason of the matters aforesaid there had been a repudiation by the plaintiffs of the contracts, which were at an end.
>
> (e) The nature of the agreements had been fundamentally altered consequent upon unforeseen circumstances, namely, the global economic downturn, so that the agreement had been frustrated and/or performance rendered impossible.

It was also pleaded that, as the Building Agreement had not been signed on behalf of the Building Company, it was not enforceable as against Mr. Benesch by want of mutuality. I have already found that the absence of a signature on one part of the Building Agreement was immaterial. The suggestion of lack of mutuality is utterly misconceived, both factually and in principle.

21. There was a specific plea in the defence in the following terms:

> ". . . at all relevant times the prime mover and instigator behind the development scheme was Robert Fitzgerald Accountant of Carrick On Suir, Director and Shareholder in the [Building Company] who was also [Mr. Benesch's] accountant. At all relevant times he acted as agent for the plaintiffs with the express implied or ostensible authority. It was on the faith of representations by him to [Mr. Benesch] that planning permission was in order, that they could use part of the premises for themselves, that he would organise tenants for them for the balance and would also organise loan finance with appropriate accounts that he entered the said contract. Contrary to the said representations the planning permission is not suitable, he did not arrange tenants, he sold his shares in the plaintiffs to another individual, has resigned as director and has failed to arrange funds to finance the purchase. At all relevant times the first named plaintiff

(sic) relied on the advice and assurances of the said Robert Fitzgerald. In the premises and by reason of the matters aforesaid the plaintiff is not entitled to specific performance."

There was a further plea that, if, which was denied, Mr. Benesch entered into the agreements pleaded in the statement of claim –

". . . it was a condition thereof that the said Robert Fitzgerald would secure loan finance by way of mortgage in order to comply with his obligations under the said Agreements. This has not transpired. Accordingly, the Defendant cannot, through no fault on his part, comply with his alleged obligations under the said Agreements, which performance has been rendered impossible."

22. In the counterclaim a declaration was sought that the Contract for Sale and the Building Agreement were at an end and that Mr. Benesch was entitled to repayment of his deposit. Damages for misrepresentation and damages for breach of contract were also sought. There is no allegation of misrepresentation against the plaintiffs in the counterclaim. What is alleged is that Mr. Fitzgerald, as agent for the plaintiffs, represented that certain actions would be taken by him on behalf of the plaintiffs, for instance, that he would organise loan finance, and that those actions were not performed. No proper basis of a claim for damages for misrepresentation has been pleaded in the defence and counterclaim.

23. The plaintiffs' reply and defence to counterclaim was delivered on 2nd February, 2010 and contained a complete joinder of issue. In relation to the plea in the defence which I have quoted at para. 21 above, it was pleaded by the plaintiffs as follows:

". . . insofar as the Defendants have a claim for negligence, breach of contract or breach of duty against the said Robert Fitzgerald, Accountant, the Plaintiffs are strangers to any such claim and await the joinder of any (sic) Robert Fitzgerald as a third party hereto. Any such claim does not disentitle the Plaintiffs to specific performance of the contracts between the Plaintiffs and the Defendants."

Further, it was denied that the securing of loan finance by Robert Fitzgerald was a condition of the agreements. Mr. Benesch never sought to join Mr. Fitzgerald as a third party to the proceedings.

Issue on liability

24. Some matters were raised on behalf of Mr. Benesch on the evidence and in legal submissions which, in my view, were not grounded on the pleadings. Notwithstanding that, in order to address all of the matters which were raised and responded to on behalf of the plaintiffs, I propose to deal with the question of liability under the following headings:

(a) the Contract for Sale and title issues;

(b) the completion notice;

(c) representations allegedly made and conditions allegedly agreed to by Mr. Fitzgerald; and

(d) impossibility of performance by Mr. Benesch.

The Contract for Sale and title issues

25. In his closing submissions, counsel for Mr. Benesch raised an issue as to the particulars in the Contract for Sale, in which the property in sale was described as follows:

". . . the lands and premises as is delineated and surrounded by a red verge line and marked No. 1 & 2 on the map or plan annexed hereto being part of the property comprised in Folio 8216F and 1759F of the register, County Tipperary . . .."

It was contended that the property in sale was not capable of sufficient identification as to location or title because –

(a) the map on the Contract for Sale gives no indication of the location of the property and is not surrounded by a red verge line, and

(b) the title actually being sold appears to have been a long lease from South Tipperary County Council but this is not specifically mentioned in the particulars.

Neither of the foregoing contentions stands up to scrutiny.

26. First, the map annexed to the Contract for Sale was described as "preliminary contract map" for proposed new industrial units at Ballylynch and it was a drawing of the proposed site layout. It was drawn to scale and indeed the area in square metres and in square feet of each of the nine units was given in a table on the map. Nobody could be under any misapprehension as to the extent or location of Unit 1 and Unit 2. As has been outlined earlier, DS implicitly accepted the response to a query which had been raised in relation to the map before the contracts were executed by Mr. Benesch.

27. Secondly, while the title has not been produced to the Court, it is reasonable to infer that the title of the Vendor Company was a freehold registered title of which the Vendor Company was the registered owner or entitled to be registered as owner, or, alternatively, a long leasehold title of which the Vendor Company was registered as owner or entitled to be registered as owner. In the Special Conditions it was provided that the Vendor Company would hand over "a Transfer substantially in the form of the specimen draft lease furnished herewith". It is clear from the documentation put before the Court that the intention was that each purchaser of a unit in Park East would get a long lease, in fact a nine hundred and ninety nine year lease, of his unit, and that the common areas would become vested in a management company. A management company, Ballylynch Management Company Limited, a company limited by guarantee not having a share capital, was subsequently incorporated on 15th January, 2009, which I am satisfied was intended to take on, and could have, taken on the function of management company of Park East. There is no evidence that DS, on behalf of Mr. Benesch, ever complained in relation to the title on offer to Unit 1 and Unit 2, nor was the issue of title raised in the defence. The points made on behalf of Mr. Benesch in relation to the title and scheme of disposal, in my view, are totally devoid of substance.

28. In general, having carefully considered all of the documentation put before the Court and the evidence, I have come to the conclusion that in March 2009 and at present the plaintiffs are in a position to give Mr. Benesch what he bargained for as regards the

construction of the units, the title thereto, the scheme of disposal in relation to Park East and compliance with planning permission. Put another way, I am satisfied that the plaintiffs were able to fulfil their end of the bargain and to complete the sale in March 2009 and that that remains the position.

The completion notices

29. In his closing submissions, counsel for Mr. Benesch also raised issues as to the adequacy of the completion notices, as had been done in the defence.

30. In relation to the completion notice served under the Contract for Sale, it was provided in Condition 9 of the Special Conditions that the closing date should be one month after the grant of final planning permission referred to in Special Condition 8. Special Condition 8 provided that the Contract for Sale was subject to –

> "The granting of Planning Permission in a form satisfactory to the [Vendor Company] for the development of an industrial complex comprising 9 units including the property in sale with ancillary services and facilities. In the event that the Planning Permission has not been granted within 18 months of the date hereof either party may treat this agreement as at an end provided however that the deposit paid by the purchaser shall not be refundable."

In fact, as recorded earlier, Carrick-on-Suir Town Council granted planning permission on 2nd May, 2008. The planning permission was clearly acceptable to the Vendor Company as it was subsequently implemented. Accordingly, the closing date was 1st June, 2008. As I have already found, Condition 40 of the General Conditions of Sale was part of the Contract for Sale. The completion notice dated 4th March, 2009 referred to Condition 40 and it called on Mr. Benesch to complete the Contract for Sale in accordance with Condition 40. In my view, the Vendor Company was entitled to serve the completion notice on 4th March, 2009 and there was no defect in its format.

31. In the recitals in the Building Agreement the expression "Completion Date" was defined as being the earlier of:

> (a) the date upon which Mr. Benesch should agree in writing that "the Works" had been completed, or,
>
> (b) the date upon which Mr. Benesch should receive from the Building Company a notice in writing that "the Works" had been completed.

By letter dated 18th February, 2009, MO informed DS that the development as a whole was then fully completed and stated that the letter was a written notice of the Completion Date as per the Building Agreement. The recitals in the Building Agreement also defined the "Closing Date" as being the day fourteen days after the Completion Date. Condition 4(d) of the General Conditions made provision for the giving by the Building Company to Mr. Benesch of written notice of non-payment, in the event of the contract price not having been paid in accordance with those provisions. I am satisfied that the notice dated 4th March, 2009 given on behalf of the Building Company was a proper notice for the purposes of the Building Agreement.

32. It was also submitted by counsel for Mr. Benesch that the completion notices were not properly served because they were served "by DX", that is to say, through the medium of the Document Exchange. To obviate the necessity to call a witness on this point, counsel for the plaintiffs confirmed that MO delivered the notices to complete to DS via the DX and counsel for the defendants accepted that that was what happened. Assuming, as I do, that they were so served, that has no bearing on the issue the Court has to decide. The Court has to decide whether to award damages in lieu of specific performance should be made to the plaintiffs, the plaintiffs having elected to forgo the primary reliefs sought by them, namely, orders for specific performance. Service of a completion notice under Condition 40 of the General Conditions of Sale in the Contract for Sale or a notice under Condition 4(d) of the General Conditions in the Building Agreement is not a prerequisite to pursuing a claim for specific performance or damages in lieu. All that is necessary is that the Court be satisfied that the Vendor Company was ready, willing and able to complete the Contract for Sale and that the Building Company had complied with its obligations under the Building Agreement when the proceedings were instituted. The evidence establishes compliance with the requirements of both contracts. It is worth recalling that, just short of six months before the proceedings were initiated, DS, as solicitors for Mr. Benesch, informed the plaintiffs' solicitors that he was no longer in a position to complete the purchase. Despite the steps taken by the solicitors for the plaintiffs thereafter, Mr. Benesch did not indicate any willingness to complete the purchase. In those circumstances, it was appropriate for the plaintiffs to initiate the proceedings for specific performance when they did so.

33. The plea in the defence that there had been a repudiation by the plaintiffs of the contracts and that the contracts were at an end was elaborated on by counsel for Mr. Benesch in the written submissions. It was submitted that the notices to complete were bad for want of proper form and not served in the correct manner. It was further submitted that because the notices were defective there was a repudiation of the contracts by the plaintiffs and, as support for that proposition, Wylie's *Irish Conveyancing Law*, 3rd Ed., p. 379 was cited, although I have been unable to identify anything on that page which is of relevance to the argument advanced on behalf of Mr. Benesch. However, the issue of election as to the remedy being pursued where there has been a breach of a contract for sale of land (e.g. whether it is specific performance, or damages, or rescission) is addressed at para. 13.03 (p. 370), where the authors point out that at the very latest the claimant must elect at the hearing of the action, but they add that he may be held to have made his election at a much earlier stage, citing the decision of the Court of Appeal in Ireland in *Maconchy v. Clayton* [1898] 1 I.R. 291.

34. There is no doubt that a completion notice which does not reflect his intention may cause difficulty for a vendor. There is a helpful explanation of the risk involved in drafting a completion notice in Buckley, Conroy and O'Neill on *Specific Performance in Ireland* (at para. 6.27), where the authors state as follows:

> "Practitioners drafting completion notice should exercise caution lest a party be deemed to have prematurely elected as to his remedy. In *Flanagan and Tierney v. Forde* [the High Court, 6th March, 2009, Unreported], the completion notice served stated that the vendor 'will rescind the agreement, forfeit the deposit paid and resell the lands without prejudice to such further rights against the purchasers to which the vendor may be entitled'. Feeney J. deemed the phrase 'without prejudice to such further rights' could only be construed as meaning the remedies which persisted in circumstances of a rescission and forfeiture of the deposit. The vendor had clearly represented that he would treat himself as discharged from the contract and free to re-sell the lands. The remedy of specific performance was no longer available to him."

35. In this case, the notice to complete served on behalf of the Vendor Company on Mr. Benesch under General Condition 40 stated that, if Mr. Benesch failed to comply with it, he would be deemed by General Condition 40 "to have failed to comply in a material respect with the conditions of the Contract and the provisions of General Condition 28 and General Condition 41 shall apply accordingly". General Condition 28 was not material. General Condition 41 must be read in the context of General Condition 40.

Paragraph (d) of General Condition 40 provided that, if the purchaser should not comply with the completion notice, then –

> "he shall be deemed to have failed to comply with these Conditions in a material respect and the Vendor may enforce against the Purchaser, without further notice, such rights and remedies as may be available to the Vendor at law or in equity, or (without prejudice to such rights and remedies) may invoke and impose the provisions of Condition 41."

Condition 41(a) provided that if the purchasers should –

> "fail in any material respect to comply with any of the Conditions, the Vendor (without prejudice to any rights or remedies available to him at law or in equity) shall be entitled to forfeit the deposit . . . AND the Vendor shall be at liberty . . . to resell the Subject Property . . .."

Unlike the terminology used in the notice to complete in *Flanagan and Tierney v. Forde*, the notice to complete dated 4th March, 2009 did not contain an unequivocal statement that, in the event of non-compliance, the Vendor Company would rescind, forfeit the deposit and re-sell. All it said was that General Condition 41 would apply, which would have been the case even if it was not expressly stated. Accordingly, I do not think that, on the wording of the notice of 4th March, 2009, the Vendor Company could be regarded as having prematurely elected to avail of the remedy of rescission and to be precluded from pursuing a claim for specific performance or damages in lieu.

36. The notice to complete served on behalf of the Building Company stated that it was made pursuant to General Condition 4(d) and that the failure to pay, at the election of the Building Company, would be deemed to be a repudiation of the Building Agreement and the Building Company would thereafter be free to deal with the property in accordance with the Building Agreement. In other words, the notice merely pointed to the entitlement of the Building Company under General Condition 4(d) to elect to treat Mr. Benesch as having repudiated the Building Agreement.

37. In general, I am satisfied that there was nothing in the interaction between the plaintiffs' solicitors and the solicitors for Mr. Benesch at any time up to the commencement of these proceedings which could be construed as, or deemed to be, a repudiation of the Contract for Sale or the Building Agreement. The objective of these proceedings from the outset was to procure the specific enforcement of both contracts.

Representations allegedly made and conditions allegedly agreed to by Mr. Fitzgerald

38. It is necessary to comment that Mr. Benesch is obviously not an articulate person and the situation was compounded by the fact that he obviously found testifying to be stressful. Moreover, his evidence strayed beyond what was pleaded in the defence in relation to Mr. Fitzgerald's involvement, so that Mr. Fitzgerald had to be recalled on the third day of the hearing to address allegations, some of which were very serious, which had not been put to him in cross-examination. Furthermore, Mr. Benesch made derogatory comments about the solicitor in DS who was advising him in relation to the transaction, which I surmise came "out of the blue", because they were not put to the solicitor who had been called by the plaintiffs as a witness. All those matters raise questions as to the reliability of Mr. Benesch as a witness and the veracity of his evidence.

39. Although it was not specifically pleaded as a defence, Mr. Benesch repeatedly stated in his evidence that Mr. Fitzgerald had told him before the contracts were executed by him that, if he signed the contracts, he could "walk away" any time he liked. Mr. Benesch further testified that when, at the start of 2008, he told Mr. Fitzgerald that he was under financial pressure and there was no possibility that he could proceed with the contract, Mr. Fitzgerald told him not to worry about the contract and that he could walk away from it at any time. Mr. Benesch asserted that he signed the contracts under the pretence that at any time he was guaranteed that he could walk away from the contracts. He testified that he was duped by a cleverer man, and that he was "codded" by Mr. Fitzgerald. When the evidence of Mr. Benesch that he was told that he could walk away from the transaction at any time was put to Mr. Fitzgerald, he described it as "absolutely a load of rubbish" and "totally untrue".

40. Mr. Fitzgerald emphasised that he advised Mr. Benesch that he should have independent legal advice in relation to the transaction. I am satisfied that Mr. Benesch was independently advised by DS. In fact, when the transaction for the acquisition by Mr. Benesch of Unit 1 and Unit 2 which was negotiated between Mr. Fitzgerald and Mr. Benesch came to be formalised, each side was represented by different solicitors. That Mr. Fitzgerald, whom I accept was the prime mover at the time, being in control of the Vendor Company and the Building Company, would have retained solicitors to act for the plaintiffs and to present the Contract for Sale and the Building Agreement to the solicitors acting for Mr. Benesch against the background of Mr. Fitzgerald having told Mr. Benesch that he could "walk away" at any time is wholly implausible. Therefore, I find as a fact that it was not represented by Mr. Fitzgerald, on behalf of the plaintiffs to Mr. Benesch that Mr. Benesch could withdraw from the transaction at any time. For completeness, it is appropriate to observe that this Court has no function in this case in assessing the propriety or otherwise of the involvement of Mr. Fitzgerald of Fitzgerald Fleming in the transaction between a client of the firm and companies controlled by Mr. Fitzgerald to the extent which he was involved in relation to taxation matters, raising finance and suchlike.

41. There was also an evidential conflict between Mr. Benesch and Mr. Fitzgerald as to what transpired between them in December 2008. The evidence of Mr. Benesch was that Mr. Fitzgerald telephoned him and told him that the units were complete and that Mr. Flynn would be looking for his money soon. His evidence was that it was on that occasion that he first heard that Mr. Fitzgerald had sold his interest in Park East to the Flynn Company. Mr. Benesch testified that Mr. Fitzgerald told him not to worry about it, that he could "sort all the finance" for Mr. Benesch. The background to that interchange from the perspective of Mr. Benesch was that the loan sanctions which Bank of Ireland had issued had expired sometime earlier and that Mr. Benesch was of the view that he would not be able to raise finance at that stage because of the financial state of his business.

42. Mr. Fitzgerald's version of what happened at the end of 2008 was that Mr. Benesch approached him as he was leaving his office and told him that he wanted to "sell the units on" and he queried whether Mr. Fitzgerald could help him. Mr. Fitzgerald approached certain clients and a property developer, but he "had no luck". He told Mr. Benesch that nobody was interested in the units and that he needed to proceed with the contract. Mr. Fitzgerald's evidence was that Mr. Benesch's response was that he was not going to proceed.

43. Obviously with a view to corroborating Mr. Benesch's version of what happened, counsel for Mr. Benesch set out to prove that Mr. Fitzgerald had furnished falsified accounts in relation to the Benesch Company for the year ended 30th November, 2008 to Bank of Ireland, with the objective of persuading Bank of Ireland to advance a loan to Mr. Benesch to enable him to complete the purchase of Unit 1 and Unit 2. As a lot of Court time was taken up with this proposition, it is necessary to consider the four versions of the accounts for that period which were put before the Court in some detail.

44. First, there were bound Financial Accounts dated 8th January, 2009, which came to be referred to by the parties as the "Revenue

Accounts". These were sent out by letter dated 8th January, 2009 by Fitzgerald Fleming to Mr. Benesch. As was pointed out in the letter, those accounts showed a net loss of €16,167 for the year before bank interest and charges. Directors' remuneration was shown at €19,181. Mr. Benesch was asked to review the accounts. He was told that an appointment had been pre-booked for him at the office of Fitzgerald Fleming for the following Tuesday, 13th January, 2009. It would appear that those accounts were returned by Mr. Benesch to the office of Fitzgerald Fleming on the following day, 9th January, 2009, on which occasion Mr. Benesch told the member of staff who dealt with him that he wanted to see Mr. Wayne Fitzgerald, not Mr. Fitzgerald on 13th January, 2009. Mr. Wayne Fitzgerald, a nephew of Mr. Fitzgerald who was in charge of the taxation department of the firm, testified that the meeting had taken place, although the evidence of Mr. Benesch was that there was no such meeting. Somehow these so-called Revenue Accounts were filed with the Revenue Commissioners, together with a corporation tax return, on 12th January, 2009 and the Revenue Commissioners issued an assessment on foot thereof on 22nd January, 2009.

45. Secondly, new accounts were prepared by a staff member of Fitzgerald Fleming following the meeting on 13th January, 2009 between Mr. Benesch and Mr. Wayne Fitzgerald, which I am satisfied did take place. Those accounts, which I will call the "Revised Accounts" were send to Mr. Benesch accompanied by a letter dated 13th January, 2009 which referred to the meeting and that amendments had been made arising from the meeting. The effect of the amendments, as regards the year ended 30th November, 2008, was to show an operating profit of €29,832, rather than a loss, and to show directors' remuneration in the amount of €85,181. Mr. Benesch's interpretation of this, as I understand it, is that the directors' remuneration was deliberately inflated to assist Mr. Fitzgerald in looking for finance from Bank of Ireland to enable Mr. Benesch to complete the acquisition of the units in Park East. The evidence of Mr. Wayne Fitzgerald, which was based on notes he had taken at the meeting on 13th January, 2009 because he had no recollection of it, was that Mr. Benesch told him that the sales income as set out in the Revenue Accounts was incorrect and that debtors and work in progress were understated and also that cash drawings, which I understand to be the basis of the directors' remuneration, were understated. Mr. Wayne Fitzgerald's notes also envisaged a revised corporation tax computation. The notes also queried whether there should be disclosures to the Revenue Commissioners for previous years. Mr. Wayne Fitzgerald's position was that the issue which had to be addressed was whether Mr. Benesch needed to make voluntary disclosure to the Revenue Commissioners in relation to the tax returns whch had been submitted for previous years. The covering letter of 13th January, 2009 requested Mr. Benesch to review the revised accounts. It is common case that he did not communicate with Fitzgerald Fleming at all after 13th January, 2009.

46. Thirdly, Mr. Benesch put in evidence a photocopy of accounts for the year ended 30th November, 2008, which were dated 13th January, 2009 which he received from Bank of Ireland with an undated compliments slip sometime later in 2009, which he asserted Bank of Ireland had received from Fitzgerald Fleming. Mr. Fitzgerald's evidence was that the "correct" accounts for the year ended 30th November, 2008 were furnished by Fitzgerald Fleming to Bank of Ireland. There is no doubt that the accounts which Mr. Benesch testified he obtained from the Bank, which were referred to by the parties as the "Bank Accounts", were not correct accounts. There were discrepancies between the Bank Accounts and the Revised Accounts of 13th January, 2009. One discrepancy was that directors' remuneration for the previous year (the year ended 30th November, 2007) was increased from €44,355 to €85,000, which makes no sense. Apart from that, in some respects the figures in relation to both years did not, for want of a better expression, "add up". The evidence of Mr. Benesch was that the Bank Accounts came out of the office of Fitzgerald Fleming and he had nothing to do with them and, in particular, that he did not sign them, although signatures purporting to be the signatures of Mr. Benesch and Mrs. Benesch appeared on them. At the end of the accountant's report on page 5, a signature "Robert Fitzgerald" appears over the name Fitzgerald Fleming and the address of the firm. Mr. Fitzgerald, in his evidence, was adamant that the signature was not his signature. No official from Bank of Ireland was called and the only evidence as to the provenance of the so-called Bank Accounts was the evidence of Mr. Benesch. On the evidence, it is impossible to conclude that the Bank Accounts were furnished to Bank of Ireland by Fitzgerald Fleming and, indeed, it is impossible to form any view as to what was the source of the Bank Accounts. Accordingly, having considered the matter carefully, I find it impossible to make any finding as to whether the Bank Accounts were deliberately falsified and, if so, by whom, or for what purpose, or by whom they were furnished to Bank of Ireland.

47. Fourthly, Mr. Benesch ceased to be a client of Fitzgerald Fleming and changed to an alternative Bookkeeping and Accountancy Service run by Susan McCollum, who apparently in May 2009 filed accounts in the form of the Revenue Accounts, but omitting the last two pages, in the Companies Registration Office. Although the name of Fitzgerald Fleming and its address appeared at the end of the accountants' report on page 5, the accounts were not signed on behalf of Fitzgerald Fleming.

48. While the existence of four different sets of accounts for the Benesch Company for the year ending on 30th November, 2008 which cannot be reconciled is a cause for concern, the Court's only function in assessing the evidence in relation to the accounts in this case is to determine whether they corroborate in any way Mr. Benesch's contention that it was a condition of the contracts he entered into with the plaintiffs that Mr. Fitzgerald would secure loan finance by way of mortgage in order to enable him to comply with his contractual obligations to the plaintiffs. In my view, they do not. I find that the Contract for Sale and the Building Agreement were *ex facie* unconditional and Mr. Benesch has adduced no affidavit evidence to establish that they were conditional on Mr. Fitzgerald arranging finance to enable him to complete and Mr. Benesch has adduced no sufficient evidence to establish that they were conditional on Mr. Fitzgerald arranging finance to enable him to complete.

Impossibility of performance by Mr. Benesch

49. There is no doubt that it is impossible for Mr. Benesch to fulfil his contractual obligations under the Contract for Sale and the Building Agreement because he clearly is not in a position to raise finance to complete the transaction. Further, I find that, as a matter of probability, that was the position at least from the end of 2008. There are two aspects of that unfortunate situation which require to be addressed.

50. First, even if that circumstance was a consequence of "the global economic downturn", as pleaded on behalf of Mr. Benesch, as counsel for the plaintiffs submitted in reliance on the decision of the Supreme Court in *Neville & Sons v. Guardian Builders* [1995] 1 ILRM 1, that circumstance was not a supervening event such as would frustrate the contract. In the *Neville* case, Blayney J., in determining whether frustration had occurred, posed the following questions in his judgment (at p. 8):

> "Did an event supervene which so significantly changed the nature of the outstanding obligations of Guardian from what the parties could reasonably have contemplated at the time the licence agreement was entered into? Or was there by some supervening event some such fundamental change of circumstances that the court could say, 'this is not the bargain that these parties made and their bargain must be treated at an end'?"

In this case, an event did not supervene which so significantly changed the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the bargain they entered into. To answer the second question posed by Blayney J. on its application to the facts here: the bargain which the plaintiffs entered into with Mr. Benesch is the bargain they are seeking to enforce in these proceedings; and the bargain cannot be treated as at an end.

51. Secondly, the impossibility of performance by Mr. Benesch does, however, have a bearing on the remedy to which the plaintiffs are entitled. In the light of what transpired on the third day of the hearing, the Court was relieved from determining whether the appropriate remedy for the plaintiffs, if contractual liability is established on the part of Mr. Benesch, is damages in lieu of specific performance rather than orders for specific performance. Before the concession was made on behalf of the plaintiffs that the Court could award damages in lieu, counsel for the plaintiffs had argued that Mr. Benesch had not established "a true case of impossibility", in the sense outlined by the High Court (Clarke J.) in *Aranbel Limited v. Darcy* [2010] 3 I.R. 769, but I am treating that argument as abandoned, having regard to the concession. Nonetheless, I think it is useful to quote the following passage from the judgment of Clarke J. in the *Aranbel* case, where he stated (at para. 11):

> "It follows that, if it is obvious that there is no realistic possibility of the sale closing, a court should not, in the absence of highly unusual circumstances, order specific performance for in so doing nothing would be achieved. The ordering of specific performance will simply lead to a further hearing at which the order will be discharged and damages *in lieu* directed. Such would be a pointless exercise."

In this case, since the end of 2008, there has never been a realistic possibility of the sale closing. Nothing would be achieved by making orders for specific performance. Counsel for the plaintiffs ultimately prudently recognised that fact and requested the Court to make an order for damages in lieu.

Conclusions on liability and appropriate remedy

52. I am satisfied that Mr. Benesch is contractually liable to complete the Contract for Sale and the Building Agreement, which are still in existence and have not been terminated by repudiation, frustration or otherwise. Further, on the facts, I am satisfied that the performance of his contractual obligations by Mr. Benesch is impossible. Accordingly, the appropriate remedy for the plaintiffs is damages in lieu of specific performance.

53. Mr. Benesch has not established any entitlement to any relief on his counterclaim.

Measure of damages

54. The legal principles governing the measure of damages in lieu of specific performance has been the subject of more than usual judicial comment in this jurisdiction during the last five years, which is outlined in Buckley *et al.*, *op. cit.*, at para. 10.20 *et seq*. In line with the authorities referred to there, I am satisfied that the approach to be adopted in measuring the damages to which the plaintiffs, as vendors, are entitled in lieu of specific performance is the difference in value between the contract price and the value of the land at the date of the judgment, but with Mr. Benesch, as purchaser, being credited with the amount of the deposit which may be retained by the plaintiffs.

55. The only evidence adduced in relation to the current value of Unit 1 and Unit 2, Park East was the evidence of Desmond M. Purcell of the firm of Purcell Properties practising in Waterford. Mr. Purcell furnished a very comprehensive valuation report to the Court, which included comparisons of industrial units in Waterford City, County Waterford, East Cork and Tipperary. Mr. Purcell's opinion was that the current market value of Unit 1 is €22,500, whereas the current market value of Unit 2 is €22,995, the current value of both units aggregating €45,495. That opinion was not contradicted and I accept it.

56. Rounding the current market value up to €50,000, that is to say, €25,000 in respect of each unit, I measure the damages in lieu of specific performance for which Mr. Benesch is liable at €270,000 (being the contract prices of €26,700 and €303,300, aggregating €330,000, less the deposit of €10,000, and less the current market value of €50,000). It will be a matter for the plaintiffs to apportion the sum of €270,000 between them.

Orders

57. There will be an order awarding the plaintiffs the sum of €270,000 for damages in lieu of specific performance against Mr. Benesch on the plaintiffs' claim and judgment for that sum.

58. The counterclaim of Mr. Benesch will be struck out.