

**THE HIGH COURT  
COMMERCIAL COURT**

**2008 8310 P**

**BETWEEN**

**ROBBIE COLLINS AND JULIE ANN COLLINS**

**PLAINTIFFS**

**AND**

**GARY DUFFY AND JOE CALLAN**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of June, 2009**

1. The plaintiffs are husband and wife and engaged in property development. The defendants are property developers.
2. By an agreement in writing made on 12th September, 2007, the plaintiffs agreed to sell and the defendants agreed to purchase the lands comprised in folio 8328 of the Register of Freeholders, County Dublin, in consideration of €6.3 million ("the Contract"). The defendants paid to the plaintiffs a non-refundable deposit of €630,000 pursuant to the Contract. The Contract provided a closing date of 30th July, 2008. The defendants obtained planning permission for eighteen houses on 1st August, 2008. In the summer of 2008, the plaintiffs and the defendants agreed to a six-week extension and a new completion date of 12th September, 2008.
3. The defendants failed to complete the contract on 12th September, 2008. By letter of 16th September, 2008, the solicitors for the defendants indicated that their clients had now arranged for a survey of the property and that a preliminary report had been provided, indicating that there was a discrepancy between the Property Registration Authority map for folio 8328, County Dublin, and the actual boundaries on the ground. They indicated that they were seeking a map clearly indicating the extent of the discrepancy and that they were uncertain as to the "full extent or relevance of the discrepancy". They indicated that they hoped a map would be prepared prior to the end of the week and would send it for comments. No such map was sent.
4. There was further correspondence in the second half of September, including an allegation made on behalf of the plaintiffs that one of the defendants had indicated that he did not intend completing the purchase of the property. Specific performance proceedings were threatened and a plenary summons issued on 9th October, 2008, claiming specific performance of the Contract, damages, and other ancillary reliefs.
5. At the end of the hearing, the plaintiffs, through their counsel, indicated that they were opting to pursue a claim for damages *in lieu* of specific performance and not seeking an order for specific performance of the Contract. The defendants each gave evidence of their current inability to raise finance to complete the Contract. It is common case that the plaintiffs are only entitled to damages *in lieu* of specific performance if they establish an entitlement to an order for specific performance of the Contract.
6. The defendants admit the Contract and raise no issue as to its validity. They defend the claim for specific performance on three grounds.
  - (i) The Contract was contingent upon the plaintiffs ensuring that the first named plaintiff and/or his associates purchased from a company owned by the defendants, Pecan Investments Limited, two units to be built by it at the development to be known as Metro Point Business Park, Kettles Lane, Swords, County Dublin, for a total price of €2,266,800.00 plus VAT.
  - (ii) The plaintiffs did not serve a completion notice pursuant to condition 40 of the general conditions of sale and in the absence of same are not entitled to maintain proceedings for specific performance.
  - (iii) The plaintiffs were not ready, willing and able to complete the sale of the property at the time of the issue of the plenary summons by reason of the alleged discrepancy in relation to the western boundary of the site and an issue as to whether or not the stream along the western boundary forms part of the property the subject matter of the sale.

**Kettles Lane Property**

7. It is not in dispute that at the end of 2006 or early 2007, the first named plaintiff and his business partner, Niall Doyle, put a booking deposit on two units being developed by the defendants' company, Pecan Investments Limited, at Metro Point Business Park, Kettles Lane, Swords, County Dublin. It is further agreed that ultimately the plaintiff and Mr. Doyle determined not to proceed with the proposed purchase by reason of a potential increased stamp duty liability on the transactions and that the booking deposits were returned. I have concluded, on the oral evidence of the first named plaintiff, Mr. Michael Greene (the auctioneer and valuer for the plaintiffs) and the defendants, and find as a fact that there was not even an oral agreement making the purchase by the defendants of the property in folio 8328, County Dublin, pursuant to the Contract, contingent on the purchase of the two units at Kettles Lane, Swords, County Dublin.

8. Irrespective of the existence of any oral agreement, condition 5 of the special conditions of the Contract provides, "it is hereby further agreed that this document contains the entire terms and conditions of the agreement between the parties hereto ...." I am satisfied that the Contract does contain the entire terms and conditions of the agreement between the parties in relation to the sale and purchase of the lands in folio 8328, County Dublin, and was not contingent on any purchase by the first named plaintiff of units at Kettles Lane, Swords, County Dublin.

#### **Completion notice**

9. The defendants contend that time was not of the essence in respect of the Closing Date and accordingly, in the absence of the service of a completion notice pursuant to condition 40 of the general conditions of sale, the plaintiffs were not entitled to commence proceedings for specific performance and obtain an order for specific performance of the Contract. They rely, in particular, upon general condition 40(d) which provides:

"Save where time is of the essence in respect of the Closing Date, the following provisions shall apply:

(a) . . .

(d) if the Purchaser shall not comply with such a notice within the said period (or within any extension thereof which the Vendor may agree) 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 refers to the right of a vendor to forfeit the deposit and resell the property.

10. Counsel for the defendants did not refer to any authority in support of the proposition that a vendor is obliged to serve a completion notice prior to commencing proceedings seeking an order for specific performance. The submission is contrary to the view expressed in Farrell, *'Irish Law of Specific Performance'* (Dublin, Butterworths, 1994) at para. 8.38, where it is stated, "[a] plaintiff seems to be entitled to sue for specific performance once the agreed completion date has passed without making time of the essence". Mr. Farrell refers, as authority for that statement, to an unreported decision of O'Caoimh P. of 18th May, 1973, *Sidebottom Limited v. Leonard*. In that decision, O'Caoimh P. stated:

"Now it has been argued that before a vendor can institute proceedings for specific performance of a contract when the time for completion has passed and the completion date has been not insisted upon by the vendor he must serve a notice making time of the essence. I know of no authority for this proposition. I accept that if the vendor wishes to enforce rights under the contract to forfeit the deposit he must make time of the essence and that in default of some notice it does not. Making time of the essence I think is a misdescription because time can never be made of the essence of a non-commercial contract unless the contract makes it such. I think this is the effect of Mr. Justice Harmon's decision. What the notice can do is give to the other party notice that his failure to complete within a reasonable time specified in the notice will be treated by the other party as a refusal on his part to carry out the contract and that is what normally is meant by making time of the essence in a contract such as this, but I don't think it is necessary there should be such a notice in the case of an action by a vendor, not to call off the contract and pocket the deposit, but merely to call upon the purchaser to do what he has engaged to do and I think the vendors are entitled to a decree for specific performance. On the whole I think it better not to say anything about title in the decree, just make a decree for specific performance."

11. Whilst the contract for sale, the subject matter of the above decision, probably included an earlier version of the Law Society general conditions, I am in agreement with O'Caoimh P. and do not consider that general condition 40 in any way alters the entitlement of a vendor to bring proceedings, certainly after a closing date, where a purchaser has indicated an unwillingness to complete as he was contracted to do. On the facts herein, I find, on the evidence, that the purchasers, through their solicitors in the correspondence between 16th September, 2008, and the date of issue of the summons, had made clear that they were then unwilling to complete the purchase.

#### **Alleged boundary discrepancy**

12. There is only a small difference in the evidence of the experts called by the plaintiffs and the defendants in relation to the alleged boundary discrepancy, as it was referred to, or perhaps more accurately, an uncertainty in relation to the boundary. The property comprised in folio 8328, County Dublin, is at present agricultural land with no difficulty identifying the precise boundaries on the ground in relation to the northern, eastern and southern perimeters. At the western perimeter, a stream runs along the entire length. The evidence is that on the ground, the eastern side of the stream is overgrown with thicket, hedgerows, bushes, etc. The stream is down a ravine of differing heights along the length of the perimeter. The Ordinance Survey maps indicate that the western boundary of folio 8328 is also the town land boundary. The Ordinance Survey map, from which the Property Registration Authority map is taken, identifies the western boundary as being "6' [or now 1.83m] FF". Mr. Bruffini, who gave evidence for the plaintiff, explains that this, on an Ordinance Survey map, means six feet from a fence. However, he also stated that in some instances there were no such fences, that what is being referred to is a hedgerow or similar.

13. Mr. Williams, a surveyor called by the defendants, gave evidence that on his reading of the Ordinance Survey maps and the Property Registration Authority map taken therefrom, including the above referred to explanation, the boundary line falls on the western side of the stream. Mr. Bruffini, by reason of the identification of the boundary at 6' from a fence and by reason of the fact that the stream, as a matter of probability, is not uniformly 6' wide along the length of the western boundary, stated that, in his view, the boundary line may fall at some points on the western side of the stream, but also if, for example, the stream were ten feet wide, it would fall in the stream. Also, that it depended on the distance of the stream from whatever is being referred to as the old fence or hedgerow. Mr. Williams also stated that there was evidence along the stream of some activity including cutting down of trees on the eastern edge of the stream by adjoining landowners.

14. I am satisfied, on the evidence of the surveyors, that as a matter of fact, it is not possible to identify precisely from the Property Registration Authority map where exactly the boundary falls in relation to the stream running along or

adjacent to the western perimeter of the property. Whilst there are indications that it may be at the western edge of the stream, that is not certain.

15. In relation to the legal issues, it is common case between the parties that by reason of s. 85 of the Registration of Title Act, 1964 (as substituted by s. 62 of the Registration of Deeds and Title Act, 2006), the Property Registration Authority map is not conclusive as to the boundaries or extent of the land comprised in folio 8328. There, however, agreement ends.

16. The plaintiffs submit that they agreed to sell all the lands comprised in folio 8328, County Dublin, and are under no obligation to identify on the ground the precise boundaries of the property being sold, having regard, in particular, to condition 14 of the general conditions. They also submit, having regard to special condition 4, that it is a matter for the defendants to satisfy themselves as to the exact location of the western boundary on the ground. The plaintiffs further submit that they were, on 12th September, 2008, and at the date of issue of the plenary summons, ready, willing and able to complete the sale.

17. The defendants submit that there was, at least since 16th September, 2008, a genuine issue raised in relation to a possible discrepancy concerning the western boundary and that the plaintiffs are obliged to resolve this matter prior to being entitled to require the defendants to complete the sale. They also contend that the plaintiffs were not ready, willing and able to complete the Contract, as they were not in a position to give vacant possession of the entire of the lands in folio 8328 by reason of evidence of use or occupation by the adjoining landowners of an area on the eastern edge of the stream.

18. The plaintiffs also sought to rely on the fact that the defendants did not have finance in place to complete the Contract in September, 2008. On the evidence, I find as a fact, that the defendants did not have finance in place to complete the Contract in September 2008. Nevertheless, such finding is not relevant to the issues as to whether the plaintiffs were entitled to require the defendants to complete the Contract in September, 2008, and were themselves ready, willing and able to do so.

19. The Contract describes the property in sale as:

"All that and those the lands and premises situate at Killsallaghan, Rolestown, County Dublin, being all the property comprises (sic) in Folio 8328 of the register of Freeholders, County Dublin, held in fee simple".

20. The document schedule contains folio 8328, County Dublin, and file plan 8328, County Dublin. There is no map attached to the Contract. General condition 14 provides:

"The Purchaser shall accept such evidence of identify as may be gathered from the descriptions in the documents of title plus (if circumstances require) a statutory declaration to be made by a competent person, at the Purchaser's expense, that the Subject Property has been held and enjoyed for at least twelve years in accordance with the title shown. The Vendor shall be obliged to furnish such information as is in his possession relative to the identify and extent of the Subject Property, but shall not be required to define exact boundaries, fences, ditches, hedges or walls or to specify which (if any) of the same are of a party nature, nor shall the Vendor be required to identify parts of the Subject Property held under different titles."

21. As already indicated, the only documents of title are the folio and file plan. The latter is not conclusive as to boundaries. There was no statutory declaration such as referred to in condition 14. It is not suggested that the plaintiffs had any other information in their possession relative to the identity or extent of the property. I am satisfied that in accordance with the express terms of condition 14, which forms part of the Contract and therefore the terms under which the defendants agreed to purchase the property, the plaintiffs are not required to define exact boundaries. In the light of this conclusion, it is unnecessary for me to consider the plaintiffs' reliance on special condition 4.

22. I am also satisfied that the plaintiffs were ready, willing and able to complete the Contract on 12th September, 2008, and all material dates thereafter, up to and including the date of issue of the plenary summons. The admissible minimal evidence of work done by adjoining landowners on the eastern side of the stream does not, in my view, preclude a finding that the plaintiffs were able to deliver vacant possession of the property comprised in folio 8328, County Dublin. Even that evidence results from a survey in December 2008. Further, whilst evidence was sought to be given by the defendants of claims made by adjoining landowners in November 2008, those persons were not called. There is no admissible evidence of any such claim.

23. The solicitor for the defendants gave evidence of difficulties which he envisaged in the development of the property if the defendants were required to complete the purchase without precise identification of the western boundary on the ground. That may be so. However, the defendants entered into the Contract with the benefit of legal advice and are bound by its terms. Having regard to condition 14 of the general conditions to which they agreed, they are not entitled to require the plaintiffs to identify the boundary before being obliged to complete.

24. Accordingly, I am satisfied that the plaintiffs, if they had pursued a claim for same, would have been entitled to an order for specific performance of the Contract. As they have opted for damages *in lieu* of specific performance and having regard to the evidence of the defendants as to their present financial circumstances I consider I should exercise my discretion to award damages must determine the appropriate amount.

#### **Quantum of damages**

25. The damages to be awarded to the plaintiffs should be such as will put the plaintiffs in as good a position as if the Contract had been performed. There is no dispute that such is the principle. If the sale had been completed in accordance with the Contract, the plaintiffs would have received the balance of the purchase price of €5,670,000.00 on 12th September, 2008, or within a short period thereafter. They have not received this sum and by reason of the option taken at the end of the proceedings i.e. not to seek an order for specific performance they are, in effect, accepting the breach of contract by the defendants and now treating the Contract as discharged. The plaintiffs therefore retain the lands and must give credit for those lands at their current value against the gross loss of €5,670,000.00.

26. There is great difficulty in present market conditions in reaching a conclusion as to the probable current value of this property. Evidence was adduced on behalf of the plaintiffs from Mr. Greene and by the defendants from Mr. Duff, both valuers. Each valued the lands, having regard to potential development in accordance with the planning permission for eighteen houses obtained in August, 2008. Nevertheless, the evidence of Mr. Duff was that, at present, there is no market for the sale of a site such as these lands, or, indeed, for the sale of individual house sites if the property were to be laid out with roads and services and eighteen individual sites sold. Insofar as he placed a value on those individual sites, those values would only apply if the market picked up and finance becomes available. The evidence of Mr. Greene on this point was less explicit but nevertheless it was clear there was great uncertainty, in his view, of what is the current market value. He gave evidence of some recent sales of houses which he considered relevant to the prices used in his valuation. I am satisfied that both valuers genuinely attempted to assist the Court in a time of great uncertainty..

27. Mr. Greene approached the valuation of the site in two ways. First, if the property were fully developed and houses built in accordance with the planning permission obtained, for the detailed reasons given to the Court, including probable house prices and building costs, he formed a view that, taking into account a required contribution for social and affordable housing, the site has a current market value in the order of €1,884,000.00. In the context of a witness statement which had been delivered from Mr. Duff, he also considered a valuation upon a basis that approximately €300,000.00 would be spent to put services and roads on the lands and then eighteen individual sites sold off. On that basis, again with a contribution for social and affordable housing, he estimated the value of the entire site to be in the order of €2,102,000.00. There was some controversy in relation to VAT which if not applied, as he stated, might increase his value on this basis by a further €400,000.00 approximately.

28. Mr. Duff, on the other hand, expressed the view that if roads and services were put in the eighteen sites would then realise, on average, not less than €250,000.00 each and might even achieve €300,000.00. Taking into account the agreed sum of €300,000.00 for roads and services, and a social and affordable housing contribution in the order of €500,000.00, and using €250,000.00 this results in an estimated value of the site of €3.7 million. Nevertheless, as already stated Mr. Duff accepted that there is, at present, no market for the sale of this site at that price or the eighteen individual sites and an average of €250,000.00 each. Accordingly, this cannot be considered as a current market value but rather a potential value when the market picks up.

29. There was also evidence of a valuation of the site in 2005, before rezoning, at €1.8 million and, after rezoning, at €4.0 million. In Mr Greene's view, current land values are now lower than 2005 values. He expressed a view that they were closer to 2003 or 2004 values. Unfortunately, I have no evidence of the value of this property or a comparable site in 2003 or 2004.

30. On all the evidence given by the valuers, I have concluded that the value of the property in sale has reduced from the price agreed in the Contract by more than 50%. I have concluded that the evidence given by Mr. Greene in relation to a current market value (with his VAT treatment) is at the lower end of a probable current value but that Mr Duff's valuation is more significantly higher. I have determined that, in assessing the damages herein, the plaintiffs should give credit for the retention of the lands at a current value of €2.6 million. The balance due pursuant to the Contract was €5.670 million. This results in a net award of €3,070,000.00.

31. The remaining issue is that of interest. The plaintiffs claim interest pursuant to the Contract on the outstanding balance of €5,670,000.00. The rate of interest under the Contract is 8%. As damages are being awarded *in lieu* of specific performance, it appears to me that in accordance with the principle of putting the plaintiffs in the position they would have been if the Contract had been performed, and taking into account the fact that they now retain the property, interest should only be payable on the net amount of the award. If the Contract had been performed, completion should have taken place on 12th September, 2008, or within a short period thereafter. Having regard to condition 40 of the general conditions, and the fact that no completion notice was served, I have concluded that I should exercise the discretion given me by the Courts Act in relation to interest (also at 8%), to award the plaintiffs interest on the sum of €3,070,000.00 from the date of commencement of proceedings i.e. 9th October, 2008, pursuant to the Courts Act,(at the rate of 8%) until the date of judgment.

#### **Relief**

There will be judgment in favour of the plaintiffs against the defendants, jointly and severally, in the sum of €3,070,000.00, together with €175, 621.00 being my estimate of interest at 8% from 9th October, 2008, to the date of this judgment, giving a total of €3,245,621.00.