

COMMANE

THE HIGH COURT

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1982 No. 66 Sp

BETWEEN/

MARTIN A. COMMANE

Plaintiff

and

JOHANNA WALSH

Defendant



Judgment of O'Hanlon J. delivered the 2nd May, 1983.

By a Memorandum of Agreement in the standard form for Sale by Private Treaty made available by the Incorporated Law Society of Ireland, the Plaintiff agreed to purchase from the Defendant for the sum of £66,000 three parcels of land situate at Burnchurch, Co. Tipperary, as described in Paragraphs 1, 2 and 3 of the Particulars in the said Agreement.

The acreage of each parcel was given in the descriptive particulars and the three parcels added together comprised approximately 51a.3r. but the final sentence in the section marked "Particulars" read as follows:-
"The total acreage being sold under this contract is believed to contain 54.2 acres statute measure or thereabouts."

This obvious discrepancy went unnoticed at the time of the execution of the Agreement and gave rise to some difficulty at a later stage.

The date of the Agreement was the 3rd April, 1981, and the Closing Date was given as the 1st May, 1981. Time was not expressed to be of the essence of the contract in relation to the named date for closing. Clause 28 of the Agreement provided as follows:-

"28. Save where the Special Conditions provide that time shall be of the essence of the Contract in respect of the closing date the following provisions shall apply:-

- (1) If the sale be not completed on or before the closing date, either party may on that date or at any time thereafter (unless the Contract shall first have been rescinded or become void) give to the other party notice in writing to complete the sale in accordance with this condition, but such notice shall be effective only if the party giving it shall then either be able, ready and willing to complete the sale or is not so ready by reason of the default or misconduct of the other party.
- (2) Upon service of such notice the party upon whom it has been served shall complete the sale within twenty eight days after the date of such service (excluding the day of service) and in respect of such period time shall be of the essence of the contract (but without prejudice to any intermediate right of rescission by either party).
- (3) If the Purchaser does not comply with such notice within the said period (or within any extension thereof which the Vendor may permit) he shall be deemed to have failed to comply with these Conditions in a material respect and the provisions of Clause 29

hereof shall apply accordingly.

- (4) If the Vendor does not comply with such an effective notice within the said period (or within any extension thereof which the Purchaser may permit) then the Purchaser may elect either to enforce against the Vendor, without further notice, such rights and remedies as may be available to the Purchaser at law or in equity or (without prejudice to any right of the Purchaser to damages) to give notice in writing to the Vendor forthwith to repay to the Purchaser his deposit and any money paid on account of the purchase price. If the Purchaser serves such a notice and the Vendor makes such payment, the Purchaser shall no longer be entitled to specific performance of the Contract and shall return forthwith all documents in his possession belonging to the Vendor and (at the Vendor's expense) procure the cancellation discharge or release of any entry relating to the Contract in any register.
- (5) The party serving a notice under this condition may at the request of or with the consent of the other party extend the term of the notice for one or more specified further periods of time and in that case the term of the notice shall be deemed to expire on the last day of such extended period or periods and the notice shall operate as though such extended period had been specified in this

Condition in lieu of twenty eighty days and time shall

be of the essence in relation to such extended period."

The Vendor was selling in her capacity as personal representative of Patrick Reidy deceased. Two of the parcels of land, comprising in all 48a.0r.25p., were registered on Folio 40033 of the Register, Co. Tipperary, and the third parcel of land comprising 3.234a., was registered on Folio 13155, Co. Tipperary. The Special Conditions stated that, "No requisition or objection shall be raised as to the accuracy of the area in sale and Purchaser shall deem to have inspected the property prior to completion of the Contract."

The Agreement, duly executed by the Purchaser, was returned to the Vendor's solicitors, accompanied by deposit of £16,500, by letter dated the 8th April, 1981, but the copy contract document completed by the Vendor was not sent to the Purchaser's Solicitors until the 5th May, 1981, which was later in time than the official date fixed for the closing of the sale by the terms of the Agreement. In the letter enclosing same, the Vendor's solicitors referred to the fact that Mary Reidy deceased was the registered owner of the lands in Folio 13155, she having died in 1929, and that they were taking steps to have the title rectified with regard to this plot of ground. This evoked a reply from the Purchaser's solicitors, dated 7th May, 1981, enclosing Requisitions on Title, and referring to the delay which was

likely to arise in relation to the property registered in Mary Reidy's name. They suggested apportioning the purchase money. They wrote again without receiving a reply, on the 20th May, 1981; 26th May, 1981, and 17th June, 1981, although it appears that the solicitors were in communication by telephone at some stage during that period. It is accepted by the Purchaser's solicitors that they did make an offer during the month of May, 1981, to close the sale in relation to the two larger lots registered on Folio 40033 and to leave over until later the closing of the sale in relation to the small parcel comprised in Folio 13155, the purchase money to be apportioned for this purpose and part of it to be retained on joint deposit until clear title could be given to the third parcel of land. This offer was not taken up at that time by the Vendor's solicitors and appears to have been left hanging in mid-air for some time afterwards.

By letter of the 15th July, 1981, the Purchaser's solicitors complained that the acreage which was being transferred did not amount to 54.2a. as represented by the Agreement for sale, and on the 21st August, 1981, the Vendor's solicitors replied, drawing attention to the Special Conditions in relation to area.

At some stage during the Summer the Purchaser entered on the land and saved a crop of hay which he cut and baled and put into barns on the land, so it would seem that at that stage he was still fully committed to the idea

of going through with the purchase of the lands in spite of the delay in completion which had already taken place. Ultimately, however, his patience ran out and on the 18th September, 1981, his solicitors wrote a letter invoking the provisions of Clause 28 of the Agreement for Sale and calling on the Vendor to complete the sale on or before the 19th October, 1981.

As the Vendor was unable to establish a clear registered title to the lands in Folio 13155 within the time specified, a further letter was written on the 20th October, 1981, requiring a return of the deposit and these proceedings are brought under the provisions of the Vendor and Purchaser Act, 1874, claiming a declaration that the Agreement for Sale has been validly rescinded, and for other ancillary relief.

The service of the 28-day notice did appear to galvanise the Vendor's Solicitors into action. They wrote a long letter on the 30th September, 1981, purporting to accept on behalf of the Vendor the offer previously made to complete the transfer of the major part of the property, to which title could be shown without any difficulty, and to postpone the transfer, and the payment of a small apportioned part of the purchase money, in respect of the small parcel in Folio 13155, until the Vendor could have herself registered on the title. This proposal was rejected by the Purchaser's solicitors by letter dated 1st October, 1981. On the 13th October, 1981, with the stipulated time for closing fast running out, the Vendor's solicitors again wrote to say

that the difficulties regarding title were well on the way to being cleared up, by the extraction of a grant of Letters of Administration to the estate of Mary Reidy deceased. The Purchaser's solicitors replied on the 14th October, 1981, as follows:

"Thank you for your letter of the 13th inst. We look forward to receiving copy of the Grant if and when it issues."

The Vendor and her solicitors might be forgiven for thinking that that terse communication indicated a change of heart on the part of the Purchaser and his solicitors, and that some further time was being allowed to remedy a flaw in the title which was at all times more technical than real, but the letter of the 20th October, 1981, was sufficient to dispel any illusions that might have been left by the earlier message.

Mr. Ryan for the Defendant contended that the Plaintiff had nailed his colours firmly to the mast provided by Clause 28 of the Agreement for Sale and that unless it could be shown that there had been full compliance with the requirements of that Clause, the claim could not succeed. I am by no means convinced that this contention is correct, although the Indorsement of Claim on the Special Summons refers expressly to the provisions of Clause 28. The claim is essentially one that the Agreement for Sale has been validly rescinded, and should, I think, be judged on this basis without

necessarily confining the Plaintiff to the strict rights conferred by Clause 28 of the Agreement, and excluding from consideration the general right of a vendor or purchaser to expect compliance with the terms of an agreement for the sale of land within a reasonable time.

In Woods and Others .v. Mackenzie Hill Ltd., (1975) 2 AER 170, a 28-day notice served on a purchaser was held to be defective and invalid as it purported to be given by only two out of three vendors. Megarry J. held that the service of a completion notice was not a prerequisite to the enforcement of a contract which included express provision for the service of such a notice, and the inclusion of such a provision did not exclude the contractual obligation to complete on the date fixed for completion or within a reasonable time thereafter.

Turning to consider the validity of the notice served in the present case, in the light of the provisions of Clause 28 of the Agreement for Sale, which is invoked in the notice itself, it is challenged under two headings by Mr. Ryan, as Counsel for the Defendant. In the first place it reiterates the claim which had previously been made on behalf of the Purchaser that his entitlement was to receive 54.2 acres. It does so in the following terms:-

"In addition our client contracted to buy 54.2 acres and the purchase price agreed was based on that acreage. Our client has instructed

us to insist that this is the acreage which he expects to purchase and which in fact must be handed over to him on any completion of the sale.

The Vendor was not in a position to transfer 54.2 acres, but only the somewhat smaller acreage referred to at the outset, and the Special Conditions in my opinion, precluded the Purchaser from relying in any way upon the small discrepancy which emerged between the stated total and the total which was offered by the Vendor. In addition, the Purchaser, by adding together the acreage of the three lots as described in the Agreement for Sale, would have arrived at the correct acreage which the Vendor was able and willing to transfer once the title to Folio 13155 had been regularised. Accordingly, I accept Mr. Ryan's submission that the notice was not a valid notice under Clause 28 of the Agreement since it was not served on behalf of a Purchaser who was then "able, ready and willing to complete the sale" in accordance with his own obligations under the Agreement for Sale.

The notice bore the second unusual feature that it purported to call upon the Vendor to complete the sale by the 19th October, 1981, but stated at the same time that, "In view of the fact that four months have passed since the closing date our client reserves his right to repudiate the contract in full, since the length of time that has passed is excessive in all of the circumstances... As stated above it should be noted that our client

reserves the right to repudiate the Agreement in full should you be in a position to comply with this notice on or before the expiry date."

In my opinion, a party seeking to invoke the provisions of Clause 28 of the Agreement for Sale must do so in a clear and unequivocal manner.

I consider that the terms of the notice given in the present case are not consistent with the form such notice should take in order to comply with the special procedure provided for by Clause 28, and on this ground also I hold that the notice was invalid for this purpose.

I feel, however, that I should also consider whether, leaving the special provisions of Clause 28 out of consideration altogether, the Agreement was validly rescinded because of unreasonable delay on the part of the Vendor in completing the transfer of the lands.

I have no hesitation in finding that the Vendor and her solicitors were extremely dilatory in the way the sale was dealt with between May and October, 1981, but the correspondence does not suggest that the delay was a source of great annoyance or upset to the Purchaser at the time. The offer was made in the month of May to close the sale in respect of the greater part of the lands, leaving over until later the transfer of the small parcel in Folio 13155, and this offer was never formally withdrawn until after the Vendor's solicitors had written on the 30th September, 1981, expressing the

Vendor's willingness to put through the sale in this manner. The offer when made remained open until it was withdrawn, or until it would be unreasonable to hold the Purchaser to it any longer because of the length of time which had elapsed without acceptance. What is a reasonable time is a question of fact depending on the circumstances of each particular case. (See, Ramsgate Hotel Co. v. Montefiore, (1866 LR 1 Ex.10th)).

In the present case, because of the rather casual approach adopted by both parties to the time for closing of the sale, and their early agreement that they would have to proceed on the basis of a good deal of delay in straightening out the title to Folio 13155, I would regard the offer to deal separately with this parcel of land as remaining open into the month of September, 1981, and I do not consider that the letter of the 19th September 1981, should be regarded as a revocation of the offer.

In this situation the Vendor was willing to comply with her obligations under the Agreement for Sale, as varied by the special terms later arranged about Folio 13155, within the time which the Purchaser sought to make of the essence of the contract. I think it very likely that the Purchaser would have consented to the sale going through on this basis had he not become involved in a dispute about the acreage, when he asserted a claim which he was unable to enforce.

Consequently, if the matter had to be determined under the general law as to delay on completion and the entitlement of a Purchaser in such circumstances to withdraw from his bargain, I would again hold that the contract had not been validly rescinded having regard to all the circumstances of the present case. The Plaintiff's claim accordingly stands refused.

Approved.

R. J. O'Hanlon.

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2/5/1983.

Counsel for the Plaintiff:- Declan Budd, SC (with him Rosario Boyle, BL)

instructed by Philip M. Joyce & Co.,

Solicitors.

Counsel for the Defendant:- Sean Ryan SC (with him BL)

instructed by Fitzgerald & Kelly, Solicitors.

Cases cited:-

Babacomp Ltd. v. Rightside Properties Ltd., (1974) 1 AER 142.

Guerin v. Heffernan, (1925) 1 IR 57.

Halsbury, Laws of England, 4th edn., Vol. 42, Par. 127.,