

NOLAN (P) LTD

127

THE HIGH COURT

1984 No. 279SP

IN THE MATTER OF SECTION 9 OF THE VENDOR AND PURCHASER
ACT 1874

AND IN THE MATTER OF A CONTRACT DATED THE 17TH OF DECEMBER,
1982 MADE BETWEEN WILLIAM J. O'MEARA OF THE ONE PART AND
SEAN NOLAN FOR PEADAR NOLAN LIMITED OF THE OTHER PART FOR
THE SALE OF CERTAIN LANDS AT DELGANY AND KILLINCARRIG,
CO. WICKLOW.

BETWEEN:

PEADAR NOLAN LIMITED

PLAINTIFF

AND

WILLIAM J. O'MEARA

DEFENDANT

Judgment of Miss Justice Carroll delivered the 2nd day of
October, 1985.

This Summons under Section 9 of the Vendor and Purchaser Act 1874 raises four questions in relation to the contract for sale dated the 17th of December, 1982 made between William J. O'Meara the Defendant as vendor and Sean Nolan. There is a dispute whether Sean Nolan contracted as purchaser or in trust for the Plaintiff. This question has not yet been resolved and is not in issue in these proceedings. I shall refer to the Defendant as the vendor and the Plaintiff as the purchaser.

By contract dated the 17th of December, 1982 the vendor agreed to sell for £250,000 part of the lands of Delgany and Killincarrig, Barony of Rathdown, County Wicklow, edged red on the map annexed thereto marked "A". Part of the property comprised registered land and the remainder was unregistered.

The relevant part of the particulars in the contract is as follows:-

"Tenure. The property is held by the vendor as to part thereof in fee simple and part thereof under Land Registry Folio 4345F Register of Freeholders County Wicklow as hereunder more particularly set forth:-

(1) Unregistered Title:

The property is held in conjunction with other premises under indenture of conveyance dated the 31st day of January, 1967 made between Eleanor Florence Hardy of the one part and the vendor of the other part subject to indenture of fee farm grant made the 28th day of April, 1879, the Right Honourable William Earl of Meath of the one part and Richard Baker Keoghoe Smyth of the other part subject to the yearly fee farm rent of £208.6s.0d (£208.30) thereby reserved and to the further rents and duties therein mentioned and to the covenants and conditions therein contained but indemnified against payment of the said rent by other premises comprised in the said fee farm grant."

Paragraph (2) deals with the registered title and paragraph (3) deals with rights of way.

The contract provided for the payment of a deposit of ten per cent, namely £25,000.

The contract is unusual in that the sale was to be closed in two phrases as provided by Clause 6 of the special conditions as follows:-

"(a) The closing date shall be ten weeks after receipt of the revised planning permission for which application was lodged on the 12th of November, 1982 but shall

not be later than the 31st of March 1983 and in this connection time will be deemed to be of the essence of the contract. In the event of the sale not being closed on or prior to the 31st of March 1983 and if the purchaser shall desire and request an extension of the time for closing and the vendor shall be willing to grant an extension it will only be on the basis of interest at the rate of twenty per cent being payable by the purchaser from the 31st of March to the date of actual completion.

- (b) On closing the purchaser shall pay to the vendor a further sum of forty five per cent of the purchase money and the purchaser shall be entitled to receive from the vendor a conveyance of circa six acres of the property being sold which shall represent approximately one half of the total lands in sale which shall be sufficient to erect houses on one half of the number of sites provided for in the planning permission granted and this area shall be the area closest to the roadway on the north eastern side of the property. In addition a suitable wayleave shall be granted to the purchaser over the remaining lands on map "A" retained by the vendor to enable drains, sewers, pipes etc., to be erected to service the lands already conveyed as above. The purchaser shall be entitled to enter into possession of that part of the property thereby conveyed on executing a deed of conveyance in favour of the vendor which shall provide that in the event of the purchaser failing to pay to the vendor on or before a date which shall be on or before the expiration of nine months from

the date of granting of the revised planning permission (hereinafter referred to as the deferred payment date) the vendor will be entitled to rights of way and connections with such roads and services as may be available on the part of the property which has already been conveyed to the purchaser and which has been developed by the purchaser.

(c) On or before the expiration of the period of nine months from the 31st of March, 1983 the purchaser shall pay to the vendor a further sum representing forty five per cent of the balance of the purchase money and thereupon the purchaser shall be entitled to be furnished by the vendor with the conveyance of that part of the land in sale which shall not have been already conveyed to the purchaser on the closing date."

The special conditions relating to the unregistered title provide as follows:

- Clause 2 (1) The title shall commence with the said deed of conveyance dated the 31st of January, 1967 and shall be deduced therefrom. Without prejudice the purchaser on closing shall be handed copies of the following documents:-
- (a) Certified copy of a certified copy/fee farm grant dated the 28th of April, 1879, Right Honourable Earl of Meath of the one part and Richard Baker Keoghoe Smyth of the other part.
 - (b) Certified copy of a certified copy/corvey dated the 17th of April, 1931, Caroline Smyth and others to Patrick Condon.

(c) Certified copy of a certified copy/conveyance dated the 30th of April, 1946, Patrick Condron to William Hastings Hardy.

(d) Copy plain copy/Will and Probate, William Hastings Hardy deceased.

(e) Copy/assent 12th April, 1965, Eleanor Florence Hardy.

(f) Certified copy/conveyance dated the 31st of January, 1967, Eleanor Florence Hardy to vendor.

(2) The purchaser shall accept without objection requisition or enquiry the adequacy of the indemnity in respect of the payment of the fee farm rent contained in a certain indenture of conveyance dated the 17th of April, 1931.

(3) The purchaser shall accept without objection or requisition that all covenants and conditions in the fee farm grant contained are observed and complied with.

What neither the particulars nor the special conditions mentioned was that the premises were, together with the other premises comprised in the fee farm grant, subject to certain perpetual yearly rent charges of £50, £100 and £92.6s.2d and a rent charge of £4,000 which were created by the grantee under the fee farm grant, Richard Baker Keoghoe Smyth or by his successors in title. These are set out in detail in the conveyance of 1931. When the Smyth family sold in 1931 they sold portion of the premises comprised in the grant

to Patrick Condron and indemnified the premises sold by the other premises comprised in the fee farm grant. There was a covenant for indemnity and the moneys payable under the covenant were charged on the remainder of the lands comprised in the fee farm grant. There were approximately four hundred and four acres in the grant and approximately thirty nine acres were conveyed.

The correspondence discloses that by letter dated the 28th of January, 1983, the purchaser's Solicitors asked to have sight of the copy documents referred to in the special conditions at 2 (b), (c), (d) and (e). By letter dated the 1st February, 1983 the vendor's Solicitors enclosed without prejudice the documents (b) to (e) of the contract for sale. By letter dated the 3rd of February, 1983 the purchaser's Solicitors enclosed the requisitions on title and by letter dated the 4th February, 1983 the vendor's Solicitors returned one part of the requisitions on title which were replied to without prejudice. The balance of the purchase money on phase one of the transaction was enclosed in letter dated the 14th of February 1983 from the purchaser's Solicitors. The completion date for phase two was agreed as the 22nd of February, 1984.

On the 21st of February, 1984 the vendor's Solicitors wrote to say their client was ready to complete on the 22nd of that month giving notice that interest would accrue from the 22nd. On the 5th of March, 1984 the purchaser's Solicitors wrote enclosing requisitions on title in which they objected that there was no proof that the charges detailed in the conveyance of 1931 had ceased to affect the property.

The vendor refused to accept the objections and requisitions on title.

In fact the charges have been whittled down but have not totally disappeared. The existence of the charges are not a defect which goes to the vendor's ability to convey the fee simple. They affect his ability to convey free from encumbrances. The existence of a charge against which lands are indemnified, even where the indemnity is totally adequate, is nevertheless an encumbrance.

There is a duty on a vendor to disclose latent defects in title and in the ordinary way if a purchaser before completion discovers such defect he is entitled to raise an objection. The vendor can then either remove the objection or rescind the sale under the ordinary rescission clause in the contract.

In this case the rescission clause in the general condition provides as follows:-

Clause 10. "If the purchaser shall make and insist on any objection or requisition as to title, the assurance to him or any other matter relating to or incidental to this sale, which the vendor shall be, on the ground of unreasonable delay or expense, or other reasonable ground, unable or unwilling to remove or comply with, the vendor shall be at liberty (notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with the same) by giving to the purchaser or his Solicitor not less than seven days notice in writing to rescind

the sale. In that case unless the objection or requisition in question shall in the meantime have been withdrawn, the sale at the expiration of such notice shall be rescinded and the purchaser shall thereupon be entitled to a return of his deposit, but without interest, costs or compensation, on his returning to the vendor all documents and papers in his possession belonging to or furnished by the vendor relating to the sale, and procuring the cancellation, discharge or release of any entry relating to the contract in the Land Registry or the Registry of Deeds. The purchaser shall accept the sum so returned in full satisfaction of all claims, whether for interest, costs, damages or otherwise."

The Plaintiffs have applied to the Court in respect of the following questions.

- (1) Is the interest of the Defendant/vendor in the lands in sale freed and discharged from the charges specified in an indenture of conveyance dated the 17th of April, 1931 made between Caroline Jane Smyth and others of the first, second and third parts and Patrick Condon of the fourth part?
- (2) Was the Plaintiff/purchaser out of time for raising objections and requisitions on title herein?
- (3) Is the Defendant/vendor obliged to reply to the objections

and requisitions on title raised by or on behalf of the Plaintiff/purchaser herein?

- (4) Has the Defendant/vendor furnished title in accordance with a contract for sale dated the 17th of December, 1982 herein?

Section 9 of the Vendor and Purchaser Act 1874 provides as follows:-

"A vendor or purchaser of real or leasehold estate in England, or their representatives respectively may at any time or times and from time to time apply in a summary way to a Judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland or their representatives respectively may in like manner and for the same purpose apply to a Judge of the Court of Chancery in Ireland and the Judge shall make such order upon the application as to him shall appear just and shall order how and by whom all or any of the costs of and incident to the application should be borne and paid."

There does not appear to be any case law dealing with the respective rights of a vendor or purchaser in a case where half the property has been conveyed with no objection being raised.

In this case the property was inadequately described in the particulars in that they did not disclose the existence of charges even though the property was indemnified against those charges. But the purchaser in fact received the earlier title documents disclosing the existence of those charges before furnishing requisitions for the first time and raised no objection.

To say that the property was inadequately described does not mean that the title is bad. The vendor is entitled in fee simple subject to the charges but indemnified therefrom.

The following factors appear to me to be relevant:

1. There is one contract to be closed in two phases, not two contracts.
2. The title to the unregistered portion is common to both moieties to be conveyed.
3. The contract calls for one set of requisitions. (The first set of requisitions which were furnished were answered without prejudice on the grounds that they were received out of time but nothing turns on this).
4. The purchaser in fact had the conveyance of 1931 disclosing the existence of the charges not just prior to closing the sale of the first moiety but prior to sending the requisitions.
5. The vendor is unable to rely on the rescission clause in the contract.

Approved
4-10-85

Wells Cavel

is in accordance with the contract does not arise.

vendor and accordingly the question of whether the title

The purchaser has accepted the title furnished by the

The answer to question 4 is -

of objections and requisitions on title raised by the purchaser.

The vendor is not obliged to reply to the second set

The answer to question 3 is -

requisitions on title.

was not entitled to furnish a second set of objections and

answered without prejudice by the vendor. The purchaser

title which were furnished on the 3rd March, 1983 and were

The contract called for one set of requisitions on

The answer to question 2 is as follows:

in the fee farm grant not conveyed by the said conveyance.

against the same by the residue of the property comprised

1931 as have not become merged or extinguished, indemnified

charges mentioned in the conveyance dated the 17th April,

The interest of the vendor is subject to such of the

The answer to question 1 is as follows:

entitled to raise objections in respect of the second moiety.

the title offered by the vendor and in my opinion is not

the sale in respect of the first moiety the purchaser accepted

require the acts appearing thereon to be explained. By closing

of the contract. He could of course carry out searches and

a second set of requisitions in respect of the second phase

In my opinion the purchaser was not entitled to furnish

CREMER

1984 No 696sp

THE HIGH COURT

138

IN THE MATTER OF:-

THE ARBITRATION ACTS, 1954-1980

PETER CREMER GmbH AND COMPANY

APPLICANTS

and

CO-OPERATIVE MOLASSES TRADERS LIMITED

RESPONDENTS

Judgment of Mr. Justice Costello delivered the 25th day of
February, 1985.

Mary P. Donoghue
Registrar