

CELLULOSE

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THE HIGH COURT
1982 No. 2508P

BETWEEN

CELLULOSE PROCESSORS LIMITED

Plaintiffs

and

FLYNN & O'FLAHERTY LIMITED

Defendants

JUDGMENT OF FINLAY J. delivered the 28th day of April 1986

This is a claim brought by the Plaintiffs by Plenary Summons claiming a sum of £18,065.25 alleged to be the balance of interest due and owing by the Defendants to the Plaintiffs arising out of the sale by the Plaintiffs to the Defendants of certain premises in the City of Dublin which were known as "The Moira Hotel". In the alternative the Plaintiffs claim the said sum as damages for breach of contract.

The action was heard before me in the High Court, without evidence, on an agreed Statement of Facts and on documents which were admitted into evidence by agreement

consisting of the Contract; Requisitions on Title and Repli. thereto; correspondence surrounding the Contract and documents of title associated with it.

Facts

The facts arising from the Agreement of the parties and from the documents may thus be summarised. The Agreeeme between the parties for the sale of the premises was signed on the 18th December 1981 and provided for a sale in consideration of a purchase price of £830,000; for a deposit of £83,000; and for an interest rate of 24.5 per cent per annum. The date for completion was 1st February 1982.

The premises being sold were in four separate lots, held under four separate titles, and these proceedings are concerned only with difficulties which occurred between the parties in closing the sale in respect of Lot 2. Lot 2 is described in the particulars as follows:

"14 Trinity Street held in fee simple and shown edged red on the attached map."

The general conditions of sale were those approved by the Incorporated Law Society of Ireland and the material ones

are as follows:

"Clause 8. The Vendor shall within ten days from the signing of the Memorandum deliver or send by post to the Purchaser or his Solicitor copies of the documents necessary to vouch the Title to be shown in accordance with these conditions and may also (but shall not be bound to) deliver an abstract of title."

Clause 9 read:

"The Purchaser shall within ten days after the delivery of the copy documents of title send to the Vendor's Solicitor a written statement of all his objections and requisitions (if any) on the Title..... In all respects time shall be deemed to be the essence of this condition."

Clause 12 provided:

"The Title to the property prior to the date of the instrument specified in the Special Conditions as the commencement of the Title whether or not such prior title appears or is referred to in any of the documents furnished shall not be investigated or enquired into nor shall any objection or requisition be made in respect thereof."

Clause 28 which dealt with completion notices reads as follows:

"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 with 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.

Clause 29 deals with the forfeiture of the deposit and re-sale.

The usual provision for completion and interest is

contained in Clause 4 and provides that the purchase shall be completed and the balance of the purchase money paid on the date specified in the Memorandum and if by reason of any default on the part of the Purchaser the purchase shall not be completed on or before that closing date the Purchaser shall pay interest to the Vendor at the rate specified in the Memorandum. The Contract as originally submitted by the Vendor's Solicitor to the Purchaser's Solicitor contained at Clause 2 the following relevant Special Condition:

"The leasehold title to Lot 2 shall commence with the Lease dated 1st of December 1926, Patrick Butler to Denis O'Brien, referred to in the First Schedule and which shall be deduced therefrom. The Purchaser shall accept that the said Lease merged in the freehold reversion and became extinguished when the freehold interest was purchased by the Conveyance dated the 2nd July 1980, Rosario Investments Limited to Trinity Hotels Limited. The said Conveyance was made pursuant to Order of the Court and the Vendor has no prior documents of title and none shall be called for or requisitioned by the Purchaser."

As a result of negotiations between the parties

before the Contract was signed there was added to the Special Conditions a Condition No. 9 dealing with Lot 2 which was in the following terms:

"The Vendor shall, however, furnish a statutory declaration setting out the grounds on which it was believed that the fee simple interest was in fact vested in Rosario Investments Limited and shall furnish the evidence which was offered to the County Registrar and Dublin Circuit Court to establish that fact."

By letter of the 10th November 1981 the Solicitors for the Vendors sent to the Solicitors for the Purchasers all the documents of title referred to in the First Schedule of the Contract and copies of two planning permissions referred to in Special Condition No. 8. These would, I am satisfied, have been the documents of title which would be necessary to vouch the Title shown in accordance with the Contract as originally drafted and in particular with regard to Lot 2 in accordance with Special Condition No. 2. Subsequent to that letter and to the perusal on behalf of the Purchaser of those documents a correspondence ensued with regard to the position concerning the conveyance of the

premises in Lot 2 from Rosario Investments Limited to Trinity Hotels Limited by order of the Circuit Court in 1980 and it was as a result of that correspondence that the additional Special Condition No. 9 was added to the Contract before it was executed.

The Contract executed by the Purchaser was sent to the Solicitor for the Vendor, enclosed with a letter of the 18th December and the reply to that letter was on the 13th January 1982 and was as follows:

"With reference to your letter of the 18th December we are in the process of having the Contract executed, but it had been held up due to the Christmas Vacation, bad weather and so forth. As the closing date is not too far away, we would be obliged if you could let us have your Requisitions on Title and Draft Deed for approval."

Subsequently it would appear that a telephone conversation between the respective Solicitors took place on the 19th January as a result of which the Solicitors for the Vendors sent to the Solicitors for the Purchaser a copy of the Order of the County Registrar referred to in Special Condition 9, together with copies of four

documents referred to in the Schedule to that Order.

Those documents did not arrive and further copies of the same documents were apparently delivered with a letter dated the 25th January 1982. The documents referred to in the Schedule to the County Registrar's Order of the 4th October 1979 consisted of the notice of the applicant's intention to acquire the fee simple; an Affidavit of Francis O'Carroll and exhibits therein referred to; an Affidavit of Brian O'Carroll and an Affidavit of William D mond and exhibits therein referred to. This constituted the evidence offered to the County Registrar to establish the fact that the fee simple interest was in fact vested in Rosario Investments Limited, which is referred to in Special Condition 9. There was exhibited at paragraph 5 of the Affidavit of Francis G. O'Carroll, which was the important part of that evidence, what he believed to be a true copy of an Indenture of Conveyance made on the 26th February 1975 between Irish Life Assurance Company Limited and Rosario Investments Limited, conveying the premises to Rosario Investments Limited in fee simple subject to and

with the benefit of a Lease. With the documents sent to the Purchaser on the 25th January there was enclosed an attested copy Memorial of that Conveyance.

On the 1st February 1982 the Vendor's Solicitors claimed that the Purchasers were in default as they had not closed the sale on that date, being the date specified in the Contract and purported to make time of the essence of the Contract and called upon the Purchasers to complete the sale within twenty-eight days. That letter was crossed by a letter from the Solicitors for the Purchasers in which they appeared to be showing some satisfaction with the further material furnished but specifically requesting a copy of the Conveyance of the 26th February 1975 referred to in Francis G. O'Carroll's Affidavit.

Further correspondence then took place and, in effect, the Vendors were taking up the attitude that all the necessary documents of title had already been long since delivered to vouch the Title and that the Purchasers were in default and were not entitled to any further documents. In particular, the Purchasers complained about the failure

of the Vendors to deliver a copy of the Deed of 1975.

Eventually proceedings were instituted and an agreement was reached between the parties that the sale should be closed without prejudice to a claim made by the Vendors for interest. In fact the purchase money was put on deposit some time before the actual closing of the sale and the interest thus earned was paid to the Vendor.

Requisitions on Title were delivered by the Purchasers to the Vendor on the 4th March 1982 and replied to on the following day but the argument concerning the documents surrounding Lot No. 2 and the application to the County Registrar and Circuit Court still continued between the parties.

The sale was eventually closed on the 19th March of 1982 and these proceedings had at that time already been instituted.

The major issue which arises between the parties on these facts is that it is contended by the Purchaser that the documents scheduled to the County Registrar's Order of 1979 surrounding the acquisition by Trinity Hotel Limited of the fee simple in Lot No. 2 were documents necessary to

vouch the title of that portion of the premises in accordance with the Conditions as eventually signed, including in particular Special Condition No. 9.

On behalf of the Plaintiff on the other hand it was contended that Special Condition No. 9 could not be construed as in any form a derogation from or amendment of Special Condition No. 2, but was in a sense a concession made to the Purchaser but that the Purchaser was still primarily bound to accept the Deed contained in the First Schedule and submitted to his Solicitors before even the Contract was signed, executed pursuant to the Orders of the Circuit Court in 1980 on behalf of Rosario Limited to Trinity Hotels Limited and was not entitled to have any document to vouch any prior title, including documents leading to the making of the Order for that Conveyance.

The importance of this issue is of course the consequential issue which I do not understand to be in dispute that if the Vendor was in fact in default by reason of a failure to deliver all the documents of title necessary to vouch the title as finally provided for in

the Condition, either at the time contained in Clause 8 which would have been ten days after the signing of the Agreement or at the time when the letter purporting to make time of the essence to the Contract was written, that then, it is contended by the Defendant, in reliance on In Re Todd and McFadden's Contract 1908 I.R., that the Vendor cannot hold the Purchaser to the time stipulated for the submission of Requisitions and the completion of the Contract.

As I understand the submissions made before me, there is no serious contest as to the correctness of the decision in Todd and McFadden's Contract and I, in any event, am satisfied to follow it, finding as I do that it receives express approval at paragraph 14.21 of Wylie, Irish Conveyancing Law.

Whilst a consideration of all the correspondence in this case, and I have only quoted some of the more material letters, does indicate that the Purchaser was, during the period between the end of January 1982 and the final closing of the sale in March 1982, seeking to investigate the prior title to the freehold interest in Lot No. 2, even over and

above the provisions of Special Condition 9, I am satisfied that once the Contract was executed, as it clearly was by the Vendor, containing Special Condition No. 9, that the documents associated with the application to the County Registrar and to the Circuit Court concerning the fee simple in these premises and in particular the Affidavit of Francis G. O'Carroll and the exhibits referred to in it became documents which were necessary to vouch the Title which was then being offered to the Purchaser.

It would appear to me that the Purchaser was entitled, having executed this Contract on the 18th December 1981 providing as it did upon execution for a completion date of the 1st February 1982 to assume that the Vendor would execute the Contract immediately upon its receipt from him, the Purchaser. The letter of the 13th January 1982, written on behalf of the Vendor, would indicate that that had not occurred but at no stage during the hearing of this action was any point taken on behalf of the Vendor in that context. The obligation on the Vendor, therefore, was to deliver to the Purchaser's Solicitor the documents

necessary to vouch the Title provided for in the Conditions of the Contract, within ten days of the 18th December of 1981. No document of title other than those originally delivered in November 1981, which were those contained in the First Schedule to the Contract, was delivered to the Purchaser before the 28th December 1981. In fact I am satisfied, though I do not think it is necessary so to decide in order to determine this action, that the Vendor did not fully comply with the obligation to deliver the documents of title necessary to vouch the Title eventually agreed upon with regard to Lot 2 until such time as there was supplied a copy of the Deed of 1975 made between the Irish Life Assurance Company Limited and Rosario Investments Company Limited. On the correspondence and documents before me, that does not appear to have occurred until shortly before the closing. In all these circumstances, I am satisfied that the Vendor was in default in a manner and to an extent which disentitled them from insisting upon the strict compliance by the Purchaser with the obligations as to time imposed on them in the Contract. I am further

satisfied that there was not any unreasonable delay outside of specified times which would render the Purchaser, according to general principles, liable for the payment of interest. I therefore dismiss this claim.

approved.
J. A. Friel

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