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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **14/10/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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FERNHEATH DEVELOPMENT LIMITED

-v-

DAVID MALONE
And
KELLY ANN FLYNN MALONE

_____

DEENY J

[1] In this action Fernheath Development Limited sue David Malone and Kelly Ann Flynn Malone in respect of a transaction for the purchase of property. On 22 March 2010 the plaintiff obtained judgment in default against Mrs Malone and an order was then made for specific performance against her. It seems that at some point she became estranged from the first defendant, her husband David Malone. He appears today with Mr Power of counsel acting on his behalf. Mr Good appeared for the plaintiff. I have had the benefit of ample skeleton arguments from both counsel and oral submissions here today.

[2] The plaintiff's case is a straightforward one. It entered into an agreement of 14 June 2007 with the defendants. By this agreement the plaintiff agreed to build the premises at Throne View, Whitewell Road, Newtownabbey, County Antrim. The defendants agreed to buy one of those, namely apartment No. 48 and they entered into an agreement to do so and there is no dispute that they did so. Nor is there any dispute that the agreement contained the following terms. Paragraph 4 reads:

> "The employer agrees to pay by bank draft the deposit as set out in the first schedule at the time of signing by him of this agreement and authorises the release of such deposit to the contractor upon signing of this agreement by the relevant parties. The balance contract price shall be paid on the date fixed for

completion as provided in the first schedule. On payment of the balance of the contract price which shall be by bank draft the employer will be given possession of the residence and the Assurance.

5. In the event of the employer making default in the payment by bank draft of any of the monies payable hereunder after the same shall have become due the contractor shall be at liberty to charge interest at the rate of 6% above the minimum lending rate as fixed from time to time by the Northern Bank Limited on any overdue payments until the same are paid. Notwithstanding the foregoing stipulation however and without prejudice thereto if the employer fails or neglects to pay all or any monies due hereunder in the manner provided in Clause 4 hereof within three days from the date same is due the deposit shall be considered as liquidated damages and as such shall be forfeited to the contractor who shall be at liberty to retain the site and the residence erected thereon and",

and that is an important word in this clause I observe,

" and to resell the same either by public auction or private contract and at such time or place and subject to such conditions and in such manner as the contractor shall think fit and the deficiency in price (if any) which may happen on such resale and all expenses attending the same shall immediately after such sale be made good by the employer and in case of non-payment the whole or such part of the said deficiency and expenses as shall not be paid shall also be recoverable by the contractors as and for liquidated damages. Any increase in price in a resale shall belong to the contractor.

6. If by the completion date (as detailed in the first schedule or such later date for completion as provided for by Clause 7) the contractor has completed the residence in accordance with this agreement and the sale is not completed on the said completion date the contractor may on said date or at any time thereafter give to the employer notice in writing to complete this transaction. Upon service of an effective notice pursuant to clause it shall be an

express term of this agreement that the employer shall complete the transaction within seven working days after the service of the notice (excluding the date of service) and in respect of such period time shall be of the essence.

If the employer does not comply with the terms of an effective notice served by the contractor under this clause then the contractor may rescind this agreement and:

(a) The employer shall forthwith on the expiry of that notice or within such period as the contractor may allow return all papers in his possession belonging to the contractor and at his own expense subject to the rights of an illegal mortgagee execute a proper surrender re-assignment or reconveyance as the case may be to the contractor of the site upon which the residents are situate, and

(b) Without prejudice to any other rights or remedies available to him at law or in equity the contractor may forfeit and retain for their own benefit the deposit paid by the employer."

[3] It is not disputed that the defendants paid a deposit of £16,200 being 10% of the contract price.

[4] The contractor, the plaintiff herein, went ahead and built the apartments and it had a completion date for purchase of 8 August 2008. No issue was taken as to that and the plaintiff served a notice to complete pursuant to Clause 6 of the agreement i.e. because the defendants had not completed by paying the balance purchase money; they served such a notice on 11 September 2008. The time allowed under that notice to complete concluded on 24 September but the balance monies were not paid. The plaintiff then issued a writ of summons on 21 November 2008.

[5] The matter then lay somewhat fallow for some time with an entry of an appearance for the first defendant on 4 September 2009 but nothing seems to have been done in the interim. Following that the plaintiff issued a summons pursuant to Order 86 of the Rules of the Court of Judicature seeking an order for specific performance of the agreement of 14 June 2007. That came before this court and on foot of the practice which I had adopted in dealing with these cases the defendants were directed to furnish a replying affidavit if they were contending that they were unable to meet an order for

specific performance by reason of impecuniosity or impossibility. They initially through their counsel seemed to indicate that that was not at issue but subsequently a replying affidavit was furnished by Mr David Malone on 6 January 2010. Counsel for the plaintiff then at the subsequent review hearing pointed out that he appeared to be earning £111,000 per year, which was hardly consistent with impecuniosity and a further affidavit was provided by Mr Malone on 20 January 2010 when he clarified that that was an income in the past and that his income was now significantly reduced, while his outgoings had been maintained. On foot of that the plaintiff took the view that it was unlikely to get an order of the court for specific performance and on 22 March before this court it was agreed to adjourn the Order 86 application and proceed on to a list of documents and to the trial of the action. It will be recalled that was the same date on which a judgment was obtained against the second defendant Mrs Malone. The matter was subsequently fixed for trial and came on for trial today before me. The plaintiff's position is a perfectly simple one. This is a straightforward contract. The plaintiff has the right to forfeit the deposit but also the right to recover damages, it contended, for the loss of its bargain and the helpful skeleton argument of Mr Good included a calculation to this effect. The contracted price of the property was £162,000, they gave credit paid for the deposit paid by Mr or possibly by Mrs Malone of £16,200. That left a sum of £145,800. Taking interest pursuant to Clause 5 from 8 August 2008 to 14 October 2010, that was another £22,892.60. They put forward the present value of the apartment at £79,500 leaving total damages due of £89,192.60. It seemed at first sight and on first hearing that that was agreed by the first defendant but subsequently in a response to a request from the court their position was clarified to the contrary and I will turn to that in due course. I clarified in this way that they were not agreeing damages. (But see below).

[6] I will pause then to deal with one matter which at one point in the hearing interested me. McGregor on Damages at 13.022(16th Ed.) says that in a case of Talley v Wolsey Neitch (1978) 30 Property and Compensation Reports 45 in the Court of Appeal where a contract for sale of land provided for liquidated damages on the buyer's failure to complete based on the amount of the loss accruing to the seller on a resale by him, it was there held that the seller was confined to this amount and could not claim further damages by way of interest in addition. The case in substance has not been opened to me. (I note the following statement at 13.016 0f the 17th Ed. of McGregor.
"These cases show that the claimant can neither claim unliquidated damages in addition to the liquidated damages which are designed to deal with the loss that has occurred nor elect to ignore the liquidated damages provision and sue only for unliquidated damages.")

[7] In the case before me of Fernheath there is an express provision in Clause 5 entitling the employer to interest. It seems to me that it would have been arguable otherwise that that was not in fact recoverable because the

measurement of damages is at today's date but I have no express authority for that. It may be that in Talley there was no express wording before the court and therefore I am minded to accept the claim put forward on behalf of the plaintiff ie. that they are entitled to the interest owing on the whole of the capital sum from the date of the original completion. But as the matter has not been fully argued before me I do not want to be taken as in any way establishing a precedent for any other cases, especially when the wording of the contract might be otherwise.

[8] The main thrust of the defendants' case here has concentrated on the language of Clause 5 inasmuch as the phrase liquidated damages is used and used twice and it has been Mr Power's contention that the only liquidated damages to which the plaintiff was entitled was the forfeiture of the deposit. He has industriously sought for authority to support this and has drawn a number of interesting cases to the attention of the court. One of them, perhaps the one most helpful to him, is a decision of Barnett J. in the High Court of the Supreme Court of Hong Kong on 15 July 1994, Dawson Enterprises Ltd v Talistream Ltd, which appears to be unreported. There was a clause which, it is fair to say, was not wholly dissimilar from this clause and perhaps I should read it for completeness. It is to be found at page 47 of the print out of the report I have, but I think that may not be the internal pagination. The clause there read:

> "If the purchaser shall fail to comply with any of the terms and conditions of the agreement the deposit money shall be absolutely forfeited as and for liquidated damages (and not as a penalty) to the vendor who may (without being obliged to tender an assignment to the purchaser) rescind the agreement and either retain the property the subject of the agreement or any part or parts thereof or resell the same either as a whole or in lots and either by public auction or by private contract or partly by the one and partly by the other and subject to such conditions and stipulations as to title or otherwise as the vendor may think fit. Any deficiency arising from such resale and all expenses attending the same or any attempt at resale shall be made good and paid by the purchaser as and for liquidated damages. And any increase in price realised by any such resale shall belong to the vendor. This clause shall not preclude or be deemed to preclude the vendor from taking other steps or remedies to enforce the vendor's rights under the agreement or otherwise. On the exercise of the vendor's right of rescission under the agreement the vendor shall have the right if the agreement should

> have been registered in Land Registry to register at the Land Registry an instrument to rescind the sale of the property. This clause shall not prevent the vendor recovering in addition to liquidated damages, damages representing interest paid or lost by reason of the purchaser's failure."

[9] Mr Power cries in aid the views of Mr Justice Barnett at the conclusion of this case where he finds this a confusing clause and he considered it a trap for the unwary and he considered that the deposit was not automatically enforceable for that reason but that the plaintiff would have to justify it as a genuine pre-estimate of loss. It is recalled that liquidated damages ought to be a genuine pre-estimate of loss, though there is authority for the position that they may sometimes be larger than the actual losses.

[10] Now I accept that this is of some assistance to Mr Power. It is not of course in any way binding upon me, but there are a number of reservations I have in any event. First of all it would appear to be in the context of a rising market that the deposit in itself was in excess of the actual loss suffered by the plaintiff developer who had indeed, if I have grasped it correctly, not suffered a loss but is in the submission of counsel there suffering an unjust enrichment or windfall as is said at page 48 of the judgment. So the learned judge was not addressing the particular situation before me where the market has fallen sharply and the plaintiff's loss greatly exceeds the deposit. So that is one aspect of it. But secondly it can be seen the wording is not exactly the same and though there is something of a tail wind in the clause which I have read out it is not as clear or stark as the provision at Clause 6B of the agreement here which reinforces the plaintiff's submissions under Clause 5 by expressly saying that the contractors right to forfeit and retain for his benefit the deposit is without prejudice to any other rights or remedies available to him at law or in equity. It is a matter of trite law that the damages for breach of contract arise from the loss which the plaintiff has suffered and authority, if it is wanted for that, is to be found in Lord Wilberforce's speech in Johnston and Agnew (1980) Appeal Cases 367 at 399 400 as to the measure of damages here. (I had, I confess, some reservation at one point as to whether perhaps there was some injustice in awarding the deposit and the deficiency in price. I think that is largely answered by the fact that of course credit is given in the calculation for the deposit.)

[11] Mr Power in his industry also threw up a decision of the Court of Final Appeal of the Hong Kong Special Administrative Region delivered on 25 February 2002 which does not appear to have a neutral citation and that was in the case called Polyset Limited v Panhandat Limited and he helpfully provided a copy of that. That was a court of five judges, three permanent judges and two non-permanent judges namely Mr Justice Linton, who I believe sits as a judge of the Court of Appeal in that jurisdiction and Lord

Millett and without going into it at undue length there is a repeated citation of high authority including Lord Browne-Wilkinson in Workers Trust and Merchant Bank Limited v Dojap Investments Limited (1993) AC 573 with regard to the laws on the nature of a deposit and I quote from him at page 578H:

> "Ever since the decision in **Howe** and Smith the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, it is in earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture."

And further authority is to be found from Lord Hailsham in Linggi Plantations Limited v Jaga Thesun (1972) 1 MLJ 89 at 94 set out at paragraph 39 of the judgment of the Hong Kong Final Court of Appeal. It is perhaps also right to quote Lord Woolf in a further decision of the Privy Council in Phillips Hong Kong Limited v The Attorney General of Hong Kong (1993) 1 HKLR 269 at 279, 280 to this effect:

> "Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of the contract, it will normally be insufficient to establish that a provision is objectionably **penal** to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than its actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision."

[12] It seems to me there can be no doubt that establishing a deficiency in price on sale by public auction or private contract is a legitimate and genuine way of establishing the measure loss. It may be that the draftsperson of this memorandum of agreement did not need to use the word liquidated damages but it does not seem to me that they have embarrassed their client's position by doing so. I accept the submission of Mr Good that there are two aspects of

liquidated damages here; one the deposit and two the deficiency in the price. I have taken into account the other submissions of Mr Power and his other citation of authority and I think I did not have opened to me Gigg v Ashley which I have not read at the time of delivering this judgment. But it seems to me that the wording of the contract is clear here and that the plaintiff is entitled to succeed as the language does not defeat him.

[13] I raised with counsel a number of points in the course of the hearing and one was what was the remedy to which the plaintiff was now entitled and as I have indicated above the defendant does not wish to agree a figure for damages and in those circumstances as I think Mr Good in his reply accepted, the plaintiff's right is on foot of Clause 5 to resell the same.

Mr Power: I take it that now I can see where Your Lordship is going. I have taken fresh instructions in relation to the matter so the damages is now agreed. I am sorry for interrupting Your Lordship.

Deeny J: Not at all. For the assistance of the profession I will have these remarks transcribed. But I will amend them in some suitable form to take into account the concession now made or take it into account. Suffice it to say that Mr Power now accepts therefore the figure of £89,192.60. Is that right on instructions?

Mr Power: Yes My Lord.

Deeny J: Yes. And if he had not done so it seems to me that, and for the assistance of the profession, the plaintiff's right under this particular contract certainly would have been to sell. The contract does provide that they will sell it "subject to such conditions and in such manner as the contractor should now think fit" and that obviously gives a considerable measure of discretion to the contractor. However, as I think again Mr Good sensibly accepts, they would have to do so in good faith and if that approach were being adopted they would not only have to disclose the name of the agent to the defendant but I am inclined to think too that the equitable rights of the defendant purchaser who has lost the contract would include being copied in to an appropriate extent in relation to any offers. The property would need to be advertised to the extent normal in the circumstances and a "For Sale" sign put up and a reasonable period of time would need to elapse. However those remarks are obiter by reason of the concession that has been made. Obviously the defendant thereby avoids the risk of the market continuing to fall further and increasing his liability and also avoids the costs involved in advertising and retaining an agent etc. So in those circumstances that would appear to complete the matter.

Mr Good: We would seek costs in the matter.

Deeny J: I don't think you can resist that argument.

Mr Power: No My Lord.

Deeny J: Costs to be taxed in default of agreement on the standard basis.

(Judgment was then entered for the Plaintiff against the first Defendant in the sum of £89,192.60 and costs.)