Neutral Citation No. [2015] NICh 9

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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**13/05/2015**

2009 No. 144354

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

FERNHILL PROPERTIES (NI) LTD

Plaintiff;

and

HENRY McCAMBRIDGE and ANN McCAMBRIDGE

Defendants.

MR JUSTICE DEENY

[1] The plaintiff company is 95% owned by a member of the family of the late Sean P Graham. His bookmaking firm had a shop with its headquarter offices at King Street, Belfast. Just before the height of the recent property and development boom in Northern Ireland they decided to develop the site by the erection of a block of apartments to be known as College Court Central. It sought purchasers for any, or all, of these 117 apartments to be built 'off the plans'. The solicitors for the defendants were instructed to and did return a building agreement and agreement for lease prepared by the plaintiff's solicitors on 30 March 2007. They enclosed a deposit in the sum of £18,500.

[2] In the event the defendants refused to complete in due course and the plaintiff[1] issued proceedings. They relied on the building agreement and agreement for lease regarding apartment number 3M of College Court Central, 14-20 College Court and 54/62 King Street, Belfast. The total purchase price was £190,000. A booking deposit of £500 had been paid prior to the deposit of £18,500. The proceedings have had a long evolution. These defendants are one of a group of six defendants represented by S G Murphy & Co, Solicitors. By a representative court order of 24 September 2013 this case operates as a test case for these six cases. The court has already dealt with a number of proceedings relating to this and other Fernhill developments.

[1] This company was put into administration after the hearing of the action but the administrator is desirous of having the judgment of the court.

[3] Mr Wayne Aitcheson appeared for the plaintiff and Mr John Coyle for the defendants. The court had the benefit of written and oral submissions from counsel, all of which I have taken into account, even if not expressly referred to.

[4] In the course of case management and following certain other related decisions of the courts a number of the issues in contention have fallen away. On the defendant's part, having taken advice, they no longer include in their counterclaim allegations that there was no valid planning permission or that there was a defect in the title that the plaintiff's provided regarding balconies.

[5] The defendant consistently argued that there was culpable delay on the part of the plaintiff in completing the block of flats including the apartment in question. This was starkly defended until the service by the defendants of a report of Mr Thomas Bar FRICS. He found that while there were some factors which were outside of the control of the plaintiff these did not in fact impact on the 88 week building programme. The delay which did occur in respect of that was within the control of the plaintiff company. Thereafter the plaintiff amended its pleadings and accepted that it was guilty of delay. In the same amended pleadings it abandoned a claim for specific performance of the contract. It said this was because it hoped to sell 3M and other flats in the block. It then contended that any delay on its part sounded only in damages but that in fact there was no evidence that the defendant had suffered loss and damage as a result of the culpable delay on the part of the plaintiff. Counsel for the defendants had to accept that he was not in a position to adduce evidence of prejudice to his client in the period to completion in 2009 and that so far as these defendants were concerned, Mr and Mrs McCambridge, they had suffered no loss in that regard. He reserved his position in regard to other purchasers insofar as their circumstances differed.

[6] Following the abandonment by the plaintiff of any claim for specific performance on 20 February 2015 its claim was solely for damages for the defendant's breach of contract in failing to complete with interest thereon pursuant to the agreement and Section 33A of the Judicature Act (NI) 1978.

[7] The defendants amended amended defence and counterclaim of 4 February 2015 has, in the iteration of events, largely ceased to be in contention. Either matters are not in dispute or they are no longer relied on by the defendants.

[8] The case remaining is to be found at paragraphs 13D, 13E and 13F of that said amended amended defence and counterclaim. The defendants also still seek the return of the deposit. I set out these paragraphs in full.

> "13D The Plaintiff has further sold two floors of the entire building into social housing, to the Clanmil [sic] Housing Association and this has led to a profusion of social problems, noise and criminality

within the development. This is a complete alteration from the apartment block which the defendant had entered into and entered into a contract with the plaintiff to purchase. The apartment and the College Court development had been advertised in the plaintiff's brochure as:

College Court Central has been designed to provide a haven of tranquillity from one's busy life in the city
giving when work and play is over you can retire to your own apartment in a quiet part of the city[sic];
the concept, design and layout of the individual apartments has been undertaken in such a way as to maximise the use of space to ensure they reflect the quality and design of the 21st century.
From the impressive tiled foyer when [sic, where]the use of light and materials ensure a bright warm welcome to the building, to all the common areas where the concept is continued to give a feeling of space and tranquillity.
This atmosphere is reflected by the landscaped area with its seating in the courtyard.
The individual apartment designs enjoy a specification in keeping with equality of the environment [sic]: development.

13E The corridors and walkways were to be glassed and sheltered to give protection from the elements, but this is not as built by the plaintiff and external corridors are now open to the elements.

13F The development as built and developed is quite the opposite of this and the sale of substantial portions into social housing has entirely changed the character of what was sold and the contract which the plaintiff now seeks to enforce."

[9] This pleading, combined with the written and oral arguments of counsel, was really therefore arguing that the combination of failing to build as promised and then selling a considerable number of apartments for social housing together amounted to repudiatory breach. In the alternative Mr Coyle ingeniously argued that the plaintiff owed a fiduciary duty as a trustee to the defendant and that it was in breach of that duty for the same reasons.

[10] I heard evidence on 9, 10 and 11 March relating to these issues.

[11] Although in theory still open for contention I should mention one further issue which was not in fact pursued at the trial. The defendant's solicitors had served a Notice to Complete on the plaintiff at a time when they were not in a position to do so. In accordance with the general conditions of sale of the Law Society of Northern Ireland they gave 5 days' notice to the plaintiff to complete the apartment. However, I held in Fernhill Properties (NI) Ltd v Scullion [2014] NICh. 4 that 5 days was not a sufficient period of notice in such circumstances. As the Court of Appeal had held a party serving such a notice in the circumstances of a block under construction it must allow a reasonable time. Fitzpatrick & McIlwaine v Sarcon (1977) Ltd [2012] NICA 58. Counsel for the defendant was therefore right not to seek to pursue this point further.

[12] I should say that I took the opportunity to visit the block of apartments and inspect the same. The plaintiff called Mr Gareth Graham, its then Managing Director. He acknowledged the sale of some properties to Oaklee Housing Association. He also acknowledged that they were in talks with another housing association to sell a further 42 apartments. He gave evidence of his dealings with Oaklee with regard to a small minority of cases where there was anti-social behaviour. He pointed out that this was largely external to the block of flats. There had been a tragic death of a young man falling from a balcony but that was in a separate block of flats, not this one. He employs somebody to supervise the flats and visits each week. Access is by key or a fob subject to the security man buzzing someone in. He rejected the contention that the character of the building had been changed by the incursion of tenants through the Oaklee Housing Association. The plaintiff company have been left with many unsold apartments and still had many unsold apartments and they were only trying to mitigate their loss after these defendants and other defendants failed to complete and no other buyers were forthcoming. There was some dispute as to whether the decision to make the concession about delay and give up the claim for specific performance was related to the report of Mr Barr or to the negotiations with the South Ulster Housing Association but it does not seem to me that a lot turns on that. It may well be multifactorial. He was cross-examined about the allegations that the physical nature of the building did not accord with what was promised in the brochure. He robustly denied that. He denied, contrary to paragraph 13E of the amended amended defence and counterclaim, that the plaintiff had promised in any way to glaze the corridors and walkways. It was part of the design of the building, consistent with its fire strategy, that there should be open walkways.

[13] Mr Brian George Lavery, FRCIS, was also called. He disputed that the fact that some of the apartments in the Block were let as social housing materially affected the valuation of the property. Private landlords would expect 50% of the tenants in the city centre areas to be on housing benefits as these tenants would be. I have taken into account the matters on which he was cross-examined including the evidence of anti-social behaviour which the defendants sought to link with the Oaklee Housing tenants. I found him a reputable and convincing witness.

[14] The defendants called in response Mr Hugh McCormick MRICS. He too was a reputable and helpful witness. The presence of social housing in an apartment block depended very much on the location. He described an occasion in Sydenham where sales to social housing caused others to withdraw. But it then transpired that the Housing Association bought all the apartments from the developer for the same price so no loss was caused. Two thirds social housing in this block would have a more than negligible negative impact on value he thought but he could not say to what extent.

[15] Sergeant Sharon Cromie, of Musgrave Street PSNI station, had great experience in the city centre. She knew this area at King Street/Castle Street before the Oaklee Housing Association tenants arrived and it was already known to police at that time. While she has looked for drugs in that block of apartments that would be true of other places also. She had gone to court for Oaklee on several occasions when they sought to evict tenants who had been guilty of anti-social behaviour. She was taken through statistics about the incidents of crime and anti-social behaviour in that particular part of Belfast. On the analysis of that it did not appear that this apartment block had a higher than average incidence of criminal offences.

[16] The plaintiff also called its caretaker, Mr Patrick Gray. The occupants of the apartment block were a mixture of private and social housing with some vacancies. His dealings with the police had been limited though he would always co-operate with them if requested.

[17] Mr Henry McCambridge gave evidence himself. He suggested that he would not have bought if he had known that one quarter or two thirds of the apartment block was to go to social housing. He himself had bought and sold property over the years. He was in funds to purchase the property. He complained of the open walkways in the apartment as completed but accepted that no-one had told him that these would be glazed. He had looked at the brochure which looked lovely but he had not taken advice on the precise meaning of the indications in the architectural plan which, it is accepted, did indicate open walkways.

[18] He was really surprised that Mr Graham did sell the apartments for social housing. He acknowledged that he may have misread the architect's indications as his own son who was an architect, and apparently in court, had explained to him that day.

Conclusions

[19] I shall deal first with the allegation that the plaintiff was in repudiatory breach of the contract because the building was not constructed as promised in the brochure. I reject this submission on behalf of the defendant. The first and fatal bar

to such a claim is the clause printed on the back of the brochure under the name of the selling agents:

> "These particulars do not constitute any part of an offer or contract. None of the statements contained in these particulars are to be relied on as statements or representations of fact and intending purchasers must satisfy themselves by inspection or otherwise correctness of each of the statements contained in these particulars. Configurations of kitchens, bathrooms and wardrobes etc may be subject to alteration from those illustrated without prior notification. Purchasers should satisfy themselves as to the current specification at the time of booking. The vendor does not make or give, and neither the Selling Agent, nor any person in their employment, has the authority to make or give any representation a warranty whatever in relation to any property. Artist's impressions and photographs are for illustration only. Plans are not to scale and all the dimensions are approximate."

[20] For completeness it seems to me that, in any event, the matters set out in paragraph 13D of the amended amended defence and counterclaim are not of the nature of contractual terms or warranties but are a mere puff. Any slight differences from the brochure in the build out would not constitute repudiatory or fundamental breach.

[21] The matters set out at 13E i.e. that the corridors and walkways were to be glazed and sheltered might be something that could constitute a contractual term or warranty. However, no such undertaking is in fact to be found in the brochure. If Mr Hutchinson got a contrary impression from the Consarc Design Group plan at the back that was an error on his part. The plan does not say that there would be glazing of the walkways and the architect's plan indicates that the upper parts were indeed to be open above a legal height. I therefore reject that aspect of the defendant's claim also.

[22] I have carefully taken into account Mr Coyle's submissions on the other aspect of the case. I have considered his references to Chitty on Contracts, Volume 1 31st Edition Chapter 24; Wylie Irish Conveyancing Law 3rd Edition; Thompson v Guy [1844] 7 Ir LR 6 at 15; Peilow v O'Carroll [1972] 106 1LTR 29; Buckley & Others, Specific Performance in Ireland, 2012 and O'Donnell Company Ltd v Truck and Machinery Sales [1998] 4 Ir 191.

[23] Mr Coyle faced the difficulty that he could not point to a covenant or clause in the contract by which the plaintiff undertook to only sell apartments in this block to private purchasers and investors and not to housing associations.

[24] That ought to be the end of the matter but Mr Coyle came up with the ingenious argument that the plaintiff was under a fiduciary duty to the defendants not to make such a fundamental alteration in the character of the property. Pausing there for a moment the plaintiff was entitled to mitigate its loss after the defendant's breach of contract. That is so even though it no longer seeks specific performance of the contract but only damages. But that is dealing with the property itself. I cannot see how any conceivable duties on the part of the vendor as indicated in the cases in Buckley could ground a proposition that the vendor was inhibited from dealing as he wished with other properties he owned. Nor should the court impose such a duty on him which would be in breach of common law principles and his rights under the European Convention on Human Rights.

[25] If, for the sake of argument, one accepted counsel's submission that a vendor might be under a fiduciary duty to the purchaser, the very height of such a duty would be confined to the property that they contracted to sell and buy. Again I cannot see how this proposition can inhibit the plaintiff from dealing as it wishes with the rest of its property. The defendants were not buying a share in a condominium where they had rights of ownership, as opposed to rights of way, over the rest of the property. I make it clear in any event that the argument is a very novel one with very slender authority but it fails on this basis in any event. It would be contrary to the general principle that the courts will not impose other duties on parties who are bound together by contract. It would be entirely inappropriate to imply such a term in this contract. Scally v SHSSB [1991] 4 All ER 563, H.L.

[26] For completeness, if I was wrong on that it does not seem to me, having heard the witnesses and assessed them and visited the property, that the sale of other apartments, even if ultimately the great majority of apartments, to a properly regulated housing association amounted to a fundamental or a repudiatory breach. It may well be, as the defendants contended, that there was a somewhat higher instance of anti-social behaviour than if there had been private purchasers. But the vendor here had the right and, in one sense, for the directors, the duty, to mitigate its loss and in the absence of previous purchasers willing to complete and new purchasers willing to buy it was entitled to sell to Oakley, and indeed to South Ulster Housing Association if it wishes to do so. Such sales are not wholly alien to this inner city location.

[27] I will give the parties an opportunity to reflect on this judgment and seek to agree damages and costs. If they are unable to do so the matter can be returned to me for adjudication on costs and to the Master on damages. The plaintiff is entitled to such damages as are assessed on inquiry. The defendant's counterclaim fails.