Neutral Citation No.: [2008] NICh 13 | *Ref:* **McC7268**

Judgment: approved by the Court for handing down | *Delivered:* **02/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2007 No 130698

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BETWEEN:

LOUGHLIN MAGINN

Plaintiff;

And

HENRY CROSSEY

Defendant.

_____

McCLOSKEY J

I INTRODUCTION

[1] This is an application by the Plaintiff for an order for specific performance of an agreement for the sale and purchase of property, pursuant to Order 86 of the Rules of the Supreme Court. While the Chancery Master was previously seized of this matter and purported to make an order in favour of the Plaintiff, on 29 April 2008, the application has been heard by me on the consensual basis that no final or perfected order was made. Accordingly, on 17 September 2008, in hearing this application I did so exercising an original, not appellate, jurisdiction.

[2] By this application the Plaintiff moves for specific performance of an alleged agreement for the sale and purchase of property at 30 Wolf Island Terrace, Derrymacash, Craigavon ("*the subject property*"). The application was

argued before me exclusively on the basis of affidavit evidence. Affidavits were sworn by the Plaintiff, the Defendant and certain others.

II THE PLAINTIFF'S CASE

[3] The Plaintiff's case is founded on a written memorandum of sale, which contains the following particulars:

(a) The subject property is identified as the "*property in sale*", being further described as "*the entirety of the lands and premises comprised in Folio AR 96145, County Armagh*".

(b) The purchase price is specified to be £50,000, with a deposit of £10,000, leaving a balance of £40,000.

(c) The date for completion is stated to be 19 January 2007.

(d) The vendor is identified as the Defendant having his address at the subject property.

(e) The purchaser is identified as the Plaintiff, having an address at 58 Ballynery North Road, Portadown.

(f) It is stated that the vendor sells in the capacity of beneficial owner.

[4] The memorandum of sale is signed by the Plaintiff, as purchaser. His signature is dated 29 November 2005 and is duly attested. Similarly, the memorandum is signed by the Defendant as vendor. His signature is dated 9 December 2005 and is also attested. The memorandum is accompanied by the Law Society General Conditions of Sale (Third Edition, Second Revision), together with a separate page entitled "Special Conditions". This page is apparently signed by the Plaintiff and the signature was evidently witnessed. There are three special conditions. The first and third are unremarkable. The second records:

> "*Upon acceptance of this offer to purchase the vendor shall register a charge on the property in the form annexed. The purchaser shall be responsible for the Land Registry fees incidental thereto*".

There is no "*form*" annexed to the copy memorandum of sale and accompanying documents exhibited to the Plaintiff's main affidavit.

[5] In his only affidavit, the Plaintiff avers that the sale of the subject property was initiated by Deirdre McKee, whom he describes as the Defendant's "*partner*". It is suggested that Ms McKee had cleaned the Plaintiff's house for some years. According to the Plaintiff, she represented to him that the Defendant and she were in debt and, in particular, unable to pay the mortgage on her home at 27 The Brambles, Derrymacash, where she and the Defendant resided. The Plaintiff further avers that the subject property had been the Defendant's family home and, having been recently purchased by him from the Northern Ireland Housing Executive, was proposed for sale by Ms McKee. The Plaintiff asserts that the purchase price of £60,000 was agreed on the basis of the Defendant's representation that the adjoining house had been sold for this amount. The Plaintiff was aware that the sale could not be completed until January 2007, because of the restrictive terms on which the Defendant had acquired the subject property.

[6] The Defendant's solicitors were Messrs Campbell and Haughey and the Plaintiff avers that he tendered a cheque in the amount of £10,000 to them. The documentary exhibits include such a cheque, dated 29 November 2005, apparently signed by the Plaintiff and drawn on the account of "Kee Builders Limited". This payment is not in dispute. The Plaintiff further avers that he insured the subject property in respect of the periods January 2007 to January 2008 and January 2008 to January 2009. This is borne out by copies of the relevant insurance certificates, which specify an annual premium of some £165.00. The Plaintiff also claims that he registered a charge on the subject property in the Land Registry *"following a covenant being signed by Mr Crossey"*. [I observe that this does not tally with the second of the special conditions].

[7] An affidavit was sworn and filed on the Plaintiff's behalf by one Patrick Owens, who describes himself as the owner of a house and 5 acres of land at Boconnell Lane, Lurgan. He is also the proprietor of a public house frequented by the Defendant and a bookmaker. He claims that he permitted the Defendant to occupy his property at Boconnell Lane around late 2005 and early 2006. He suggests that this arrangement was made on the Plaintiff's initiative. He recounts that the Plaintiff subsequently tendered two separate cheques of £200 to him, which the deponent initially did not comprehend. It is averred that the Plaintiff subsequently explained that he was paying the Defendant's rent in this way. According to Mr Owens, rent had not been mentioned previously. Mr Owens further deposes to a conversation with the Defendant in March 2006 in the public house, when the Defendant allegedly offered him £10,000 if Mr Owens would "*allow him to have his day in the house*", clearly aware that Mr Owens was its owner. Mr Owens declined to do so. He claims that he learned soon afterwards that the Defendant and Ms McKee were selling the property at 27 The Brambles, with an asking price of £185,000. He had not previously known that they were house owners and, based on this understanding, he had allowed them to "*stay*" at Boconnell Lane.

Consequently, he asked them to leave his property within four or five weeks and they did so.

[8] In a further affidavit filed on behalf of the Plaintiff, Joseph Fitzpatrick, who describes himself as the resident of a house adjoining the subject property, avers that the latter has been uninhabited for some 10 years. He further suggests that the Defendant visits the subject property once or twice weekly. He describes the subject property as poorly maintained.

[9] In November and December 2005 there was an exchange of correspondence between the parties' respective solicitors. By letter dated 30 November 2005, the Plaintiff's solicitors wrote, "*subject to contract*", enclosing their client's offer of purchase, a draft charge and his cheque in the amount of £10,000 "*in respect of the deposit*". It is evident from the letters exchanged on 7 December 2005 that the Plaintiff's own cheque was substituted by a cheque signed by his solicitors, sent on the undertakings of the Defendant's solicitors to furnish an accepted contract, to comply with the contractual terms and "*to have your client executed* [sic] *the enclosed Transfer pending completion*", adding that the transferee could potentially be a limited company nominated by the Plaintiff, rather than the Plaintiff himself. The letter dated 7 December 2005 from the Defendant's solicitors recorded that their client was "*anxious to have this matter resolved as quickly as ever possible*". By letter dated 12 December 2005, they forwarded to the Plaintiff's solicitors copies of the accepted contract, the "*executed deed*", the original Certificate of Charge and the original Land Certificate. According to this letter, the charge on the subject property was to be relinquished following completion. Under cover of a further letter dated 2 January 2006, the Defendant's solicitors furnished the Land Registry map.

[10] A period of dormancy, which had a duration of approximately one year, then ensued. It was ended by a letter dated 18 January 2007 from the Defendant's solicitors to the Plaintiff's solicitors in the following terms:

> "*Dear Sirs*
>
> *RE: L MAGINN -from- CROSSEY*
> *30 WOLF ISLAND TERRACE,*
> *DERRYMACASH, LURGAN*
>
> *We refer to Mr Campbell's telephone conversation with you this morning. Entirely without prejudice we have now looked to our file of papers and we note that we paid the money to Northern Ireland Housing Executive of £21,200-00 on the 16 January 2004 but subsequently on the 21 January 2004 we paid a sum of £192-00 which would have been in respect of rent outstanding at the time. We are therefore concerned that the discount clause may be*

operative only from the 22 January 2004 if Northern Ireland Housing Executive did not bank our cheque.

As you are aware from your telephone conversation with Mr Campbell on Wednesday of this week our client is terribly dissatisfied with the way he was treated by your client in relation to an Agreement which your client had made with our client in relation to the provision by your client of alternative accommodation in exchange for our client entering into the Agreement in respect of the sale of the house at 30 Wolff Island Terrace to your client. We will have to take further instructions in the matter but at this stage if you furnish to us a cheque for £40,000-00 we do not intend to cash it until such time as we have had an opportunity of taking further instructions in the matter. Unfortunately our Mr Campbell is on holidays next week and as he dealt with the initial instructions from our client in relation to this matter and has taken the most recent instructions it would be prudent for our Mr Campbell to continue to deal with the matter. Please therefore note that any cheque received from you will not be encashed until our Mr Campbell can then deal with the issue upon his return on the 29 January and at that stage hopefully we will be in a position to take further instructions from Mr Crossey."

[11] Next, under cover of a letter dated 19 January 2007, the Plaintiff's solicitors forwarded to the Defendant's solicitors a cheque "*made payable in your favour in the sum of £40,000 in respect of the balance purchase monies herein*", subject to proposed undertakings by the Defendant's solicitors, including the execution of the Transfer and immediate vacant possession of the subject property. Subsequently, by letter dated 8 February 2007 to the Plaintiff's solicitors, the Defendant's solicitors stated:

"We refer to Mr Campbell's telephone conversation with you on Wednesday morning wherein we advised that our instructions were that our clients were not prepared to complete this matter and that we should immediately return to you the cheque for £40,000-00 dated the 19 January 2007 which we have now cashed. We therefore return herein the cheque for £40,000-00 and we will write to you more fully very shortly as to our client's reasons."

[The word "now" should, presumably, be "not"].

[12] There followed a letter of some significance, dated 9 February 2007, from the Defendant's solicitors to the Plaintiff's solicitors, in the following terms:

> *"We refer to our letter to you of 8 inst wherein we returned the cheque for £40,000-00.*
>
> *Our client has advised that upon signing the contract for sale, a copy of which was returned to you on the 12 December 2005, he did not advise us that a collateral agreement had been reached between our respective clients which was part and parcel of the agreement for the sale of the premises. That agreement was that, in consideration of our client agreeing to sell the premises upon the terms of the exchange of correspondence in November/December 2005, your client would provide our client and Deirdre McKee, his partner, with a house with a piece of land at a low weekly rent for the remainder of the lives of Mr Crossey and Ms McKee. Ms McKee was employed at that time by your client. The deal was therefore constructed, firstly, of the agreement of which both yourself and ourselves were aware and secondly, of the agreement that your client was to provide a house for rent. We are advised that at the time of this deal your client had already found the alternative accommodation for our client and Ms McKee at Boconnell Lane in Lurgan and at that stage our clients carried out certain works to those alternative premises. They actually spent a considerable amount of the £10,000-00 deposit which your client paid on repairing the premises in Boconnell Lane. They were advised by your client that the rent was to be £75-00 per week and they could live in the premises for the remainder of their lives. They did not think to tell our Mr Campbell of this aspect of the deal because they trusted your client and trusted that your client would honour his undertaking.*
>
> *We are instructed that the house in Boconnell Lane had been empty for approximately four years and that the house was completely uninhabitable. Our clients used the time in November and December to make it habitable and worked at it day and night. They paid rent to your client as your client advised that he owned the premises. However after living the premises for approximately 11 weeks they were told by another person, a Mr Paddy Owens, to leave the premises as something had come up. It was at that stage that they realised that the premises did not appear to belong to your client but appeared to belong to Mr Owens. They would never have considered moving into the premises and*

> *spending, such an amount of money on the premises had the agreement not been made with your client as referred to above. Your client had stressed that this was a matter of trust between him and our clients. Without seeking any further legal advice our clients moved out of the premises and gave vacant possession to Mr Owens. They did bring the matter up with your client and complained vigorously about the way they had been treated. They advise that your client's response was that he couldn't be bothered standing and listening to their complaints.*
>
> *It is quite clearly the case that Mr Crossey was induced to sign the contract for the sale of 30 Wolff Island Terrace on the basis of an undertaking given by your client and that your client subsequently reneged on his agreement and thus rescinded the contract for his purchase of 30 Wolf Island Terrace. We have asked our clients to calculate the amount of money they expended on the Boconnell Lane property and it is intended that when those figures are available, entirely without prejudice, our clients will refund the balance of the £10,000-00 deposit not used on Boconnell Lane to your client and will insist upon your client vacating the Charge for £10,000-00 which is subject of a separate document as a Charge against 30 Wolf Island Terrace."*

[13] Subsequently, the Plaintiff's solicitors, by letters dated 13 February and 26 February 2007 respectively, gave notice requiring the Defendant to complete the sale of the subject property. On the Defendant's behalf, his solicitors declined to do so. These further letters from the Plaintiff's solicitors did not engage with the letter dated 9 February 2007 from the Defendant's solicitors.

[14] Much of the correspondence set out in paragraphs [10] to [13] above (with the notable exception of the letter dated 9 February 2007) was not exhibited to the parties' affidavits. Its existence became apparent only as the hearing progressed. I would observe that the letter of 18 January 2007 is of undeniable importance. One consequence of the late production of certain letters in this way is that they are not addressed in the body of the parties' affidavits. To highlight one notable example, the Defendant does not explain the impetus for and immediate context of the letter dated 18 January 2007 written by his solicitors. Moreover, there is no explanation of coded terms such as "*the discount clause*". Nor is there any explanation of the *timing* of the instructions provided by the Defendant to his solicitors from time to time or the need for his solicitors "*to take further instructions in the matter*" at this juncture.

III THE DEFENDANT'S CASE

[15] In his affidavit, the Defendant avers that in late 2005 he and his "*partner*" (presumably Ms McKee) were in debt, precipitating his decision to sell the subject property for £50,000 to the Plaintiff. There was to be a £10,000 deposit. Further, the Plaintiff "*. . . would also provide me with a house complete with a small piece of land for the rest of my life at a low weekly rent*". He claims that his subsequent occupation of the property at Boconnell Lane was in furtherance of this agreement. He avers that he carried out significant improvements to this property and was charged a weekly rental of £75, including rates. He asserts two separate payments of £325, on 16 December 2005 and 18 January 2006, by cheque, by Ms McKee to the Plaintiff. These payments are confirmed by the Halifax statements exhibited. He asserts that he sold the property at an under value, so as to acquire security of tenure. He admits to knowing that Mr Owens was the owner of the property at Boconnell Lane, while advancing a vague belief that the Plaintiff had some interest in this property. He claims to have made some complaint to the Plaintiff after his "ejection" from Boconnell Lane.

[16] An affidavit was also filed on the Defendant's behalf by Deirdre Crossey (nee McKee), who deposes that she married the Defendant on 21 July 2007, having previously been his "*partner*". Her affidavit sets out in considerable detail a series of conversations among the three protagonists or, on occasions, between two of them, beginning in October 2005. Some conversations, she claims, were by telephone. Others occurred at the Plaintiff's home, when she was cleaning it. Still others took place in the aforementioned public house. Her affidavit also details the two payments of £325, by cheque, to the Plaintiff and the rationale of these amounts. This is, by some measure, the most detailed of all the affidavits as regards the alleged agreement.

IV GOVERNING PRINCIPLES

[17] As appears from the commentary in the Supreme Court Practice 1999, Volume 1 (pages 1567-1568), there is a close association between applications under Order 86 and those made under Order 14 of the Rules of the Supreme Court. In an application for summary judgment of this nature, various well established tests and principles, all of them inter-related, have been devised. The onus rests on the Plaintiff to establish that there is no defence to his claim for specific performance. Summary judgment is appropriate where the court "*. . . is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the Defendant*", per Jessel MR in ***Anglo Italian Bank v.Wells*** [1878] 38 LT 197, at page 201. Similarly it has been stated that summary judgment is inappropriate where the court concludes that there is a triable issue between the parties. Another of the established tests is whether there is "*a fair probability of a defence*": ***Ward v. Plumbley*** [1890] 6 TLR 198. Further, it has been suggested that unconditional leave to defend should be granted where there

are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct. In such circumstances, the court should not attempt to make tentative assessments of the parties' respective prospects of success or the relative strengths of their respective cases: see the decision in ***Oskar*** [1984] 128 SJ 417.

[18] A convenient summary of the correct approach is found in Civil Proceedings, The Supreme Court (Valentine), paragraph 11.49:

> "*The Defendant need only raise a reasonable doubt about the Plaintiff's entitlement to judgment, assuming all facts in his favour, or that serious questions of fact or law are involved. Obviously an Order 14 hearing is rarely an appropriate forum for resolving issues of fact, but if the result of the action depends on an issue of pure law, even if complex or highly debateable, it should be fully investigated and determined under Order 14*".

I accept the submission on behalf of the Defendant that judgment under Order 86 should be refused where the Defendant raises a defence to which the court will pay some heed.

V THE PARTIES' ARGUMENTS

[19] I record my appreciation to counsel of the helpful skeleton arguments with which I was provided. It is unnecessary for me to rehearse these here. In summary, it was contended on behalf of the Plaintiff that there are substantial discrepancies between the Defendant's affidavit (on the one hand) and the letter dated 9 February 2007 from his solicitors (on the other). Discrepancies between the Defendant's affidavit and that of his spouse were also asserted. Further, the timing of the case made on behalf of the Defendant was highlighted. It was argued, in particular, that the "life tenancy" clause asserted by the Defendant was void for uncertainty and, hence, fatally flawed. Simultaneously, it was highlighted that the Plaintiff had no legal interest in the property at Boconnell Lane. The Plaintiff also advanced subsidiary arguments relating to part performance and waiver.

[20] The central argument advanced on behalf of the Defendant was founded on Section 2 of the Statute of Frauds (Ireland) 1695, which provides:

> "*. . . No action shall be brought whereby to charge . . . any person . . . upon any contract or sale of lands . . . or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be writing, and signed*

> *by the party to be charged therewith, or some other person thereunto by him lawfully authorised".*

Irish Conveyancing Law (Wylie, 3rd Edition) contains the following passage, at paragraph 6.18:

> "*As a result of centuries of case law on the subject, it has come to be recognised that the essential elements which must be included for the memorandum or note to be effective are what are sometimes referred to as the four p's, i.e. specification of the parties, the property, the price and any other essential provisions. This fourth category is something of a vague catch all requirement, the substance of which tends to fluctuate with each new decision. What seems clear is that the courts are prepared to adopt a flexible approach to its application in particular cases . . ."*

This passage further highlights that what is significant is that which the parties, rather than the court, considered essential or material to their agreement.

[21] The centrepiece of the Defendant's argument was that the memorandum of sale does not satisfy the Statute of Frauds as it omits an essential or material term viz a term reflecting the "life tenancy" arrangement asserted in his solicitors' letters and described loosely in paragraph 4 of his affidavit and in the affidavit of Mrs Crossey. Thus, it was argued, an order for specific performance would be inappropriate, bearing in mind the nature of the onus on the Plaintiff.

VI CONCLUSIONS

[22] In ***Stinson v. Owens*** [1973] NIJB 1, Lord MacDermott stated, at page 15:

> "*My conclusion, therefore, is that a memorandum may satisfy the requirements of the Statute without mentioning every term that has been agreed between the parties, but that to be good it must mention all the terms which are* ***essential or material.*** *And I am further of the opinion that for the purposes of this requirement what is material or essential must be considered, at any rate primarily, from the point of view of the parties themselves."*
>
> [emphasis added]

[23] Thus there is clear authority in support of the Defendant's contention that, in principle, the court should not order specific performance of a memorandum of sale which omits a term that is (or terms which are) essential

or material. In the present case, the emphasis is on the Defendant's perspective, in this respect.

[24] I accept the Plaintiff's argument that an asserted contractual term which does not possess the necessary quality of certainty will not be given effect: see Chitty on Contracts, Volume 1, paragraph 2-136 (and following) and Wylie (op. cit.), paragraphs 13.46-13.47. It is correct that the "life tenancy" clause which has been advanced on the Defendant's behalf in this case is not framed, either in the correspondence or the relevant affidavits, in clean and concrete terms. However, both the correspondence and the affidavits are, necessarily, a reflection of a lay person's language. Moreover, I must take into account the relatively informal domestic and social settings in which the parties conducted their discussions and struck their bargain.

[25] It seems to me that the test which I should apply is whether this clause, in the terms framed by the Defendant, had the potential to be converted into, and expressed in, terms satisfying the legal requirement of certainty. I consider that the answer to this question should be affirmative, particularly in circumstances where there are so many factual disputes between the parties. The application of the relevant principles of contract and conveyancing law should be undertaken only where the court is satisfied about the underlying factual framework. In the present case, the true and complete factual framework is far from clear at this stage and will not emerge fully until trial. Thus I cannot condemn the suggested clause as inevitably and irredeemably unlawful.

[26] Moreover, it is a matter of some significance that the court is invited to grant summary judgment on the basis of affidavit evidence alone. This is, of course, the norm. However, I must take into account that, in the present case, there is substantial scope for exploration and exposition of the full factual matrix via the established media of *viva voce* evidence and cross-examination. I also take into account that there is no rejoinder by the Plaintiff to the affidavits filed on behalf of the Defendant, in particular that of Mrs Crossey. Furthermore, discovery of documents has not yet taken place and the documentary exhibits ultimately before the court emerged in a disparate and unsatisfactory fashion.

[27] In proceedings under Order 86, the moving party assumes a heavy onus. Rule 1(1) recites that an Order for specific performance may be granted only "*on the ground that the defendant has no defence to the action*". The Plaintiff, in my view, has not discharged the burden on him. I consider that the Defendant has raised a triable issue, to the effect that (adopting the words of Lord MacDermott) the memorandum of sale in the present case does not specify "*all the terms which are essential or material*". While there may be discrepancies and inconsistencies of the type highlighted by the Plaintiff, I consider it wrong to make any findings of fact about these matters at this stage. The various nooks

and crannies of the evidence before the court have not yet been fully probed or explored and it seems to me probable that the factual matrix before the court is incomplete. I do not have the degree of confidence required to justify the grant of the relief sought.

[28] Applying the same considerations as those set out in paragraphs [25] to [27] above, I decline to grant summary judgment on the basis of the plaintiff's subsidiary arguments relating to part performance and waiver.

[29] Accordingly, I refuse the Plaintiff's application. The parties will have an opportunity to address me on the question of costs.

[30] I would add <as a footnote> that the affidavit grounding the Plaintiff's application did not comply with the requirement that it contain an averment expressing the Plaintiff's belief that the Defendant has no defence to the claim for specific performance. This was not determinative, in the event. However, practitioners should be alert to this requirement, which is more than a technical formality. It is also essential that the motion set out the Rule and Order under which it is presented. Equally, it is elementary that all relevant documentary materials be exhibited to the parties' affidavits, with any appropriate commentary or explanation in the sworn averments. Finally, I record my gratitude to counsel for their compact and focused submissions.