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

Delivered: 28/06/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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JOHN BANKS and LYNNE BANKS

Plaintiffs

-v-

MARTIN GEDDIS and JILL GEDDIS

Defendants

_____

WEATHERUP J

[1] The plaintiffs claim £45,000, being monies retained by the defendants further to the purchase of 40 Ashgrove Park, Moira from the plaintiffs for £200,000 on 1 September 2006. Mr Gibson appeared on behalf the plaintiffs and Mr Dunford for the defendants.

[2] By an Indenture of 31 July 1986 between Isaac Lyons Holdings Limited and the first purchasers, a Mr and Mrs Bibby, the purchasers acquired the premises as lessee for 10,000 years from 1 June 1986 at a rent of £35 per annum. The registered freehold estate was contained in Folio AN58 County Antrim. The leasehold estate was registered in Folio AN8175L County Antrim. By clause 2(3) the lessee had covenanted to expend within one year the sum of not less than £15,000 on the erection of a dwelling in accordance with the plans of the lessor but not further or otherwise to build. Thus there was a restrictive covenant against other than one dwelling on the site.

[3] The plaintiffs later acquired the premises and they in turn proposed to sell the premises to the defendants by memorandum of sale of 1 September 2006 for the sum of £200,000 to include fixtures and fittings with a completion date of 1 September

2006. Of particular importance are the special conditions which stated that the contract was signed "strictly subject to and conditional upon the following" and thereafter five conditions were set out. The fourth condition was that the plaintiffs as vendors would furnish original outline planning permission for an additional dwelling on the site. The fifth condition was that the plaintiffs as vendors would procure the freehold of the premises in the name of the purchaser and transfer the same to the purchaser. It is apparent that it was intended that another property would be built on the site.

[4] There were three provisos to the special conditions.

The first proviso was that if the vendor was unable to comply with the conditions at the date of completion the purchaser should retain the sum of £45,000 at the date of completion, such sum to be invested by the purchasers' solicitor on joint deposit receipt pending compliance, whereupon the sum would be paid to the vendor within ten days of the purchaser receiving the required documents, with interest accrued being paid to the purchaser.

The second proviso was that if the vendor was unable to comply with the special conditions within a period of six months from the date of completion then the retention monies plus interest accrued would be returned to the purchaser and the outstanding conditions of the contract would be null and void.

The third proviso was that a further six month period would be allowed for compliance upon production to the purchaser of evidence that (a) in respect of outline planning permission the same had been recommended for approval by DOE to Lisburn City Council and (b) in respect of the purchase of the freehold that an application had been made to the Lands Tribunal by the vendor.

[5] Outline planning permission was granted on 13 August 2007 and therefore special condition 4 was satisfied.

[6] The problem relates to special condition 5. There are two relevant legislative schemes. One is the Property (Northern Ireland) Order 1978 which deals with the extinguishment of restrictive covenants by the Lands Tribunal. The other is the Ground Rents Act (Northern Ireland) 2001 which deals with the redemption of ground rent by the Land Registry.

[7] The scheme of the 2001 Act is as follows –

> First of all, upon application, the Land Registry issues a certificate of redemption of ground rent under section 7(4) of the Act.
>
> Secondly, in leasehold properties, the effect of the certificate of redemption is to enlarge the leasehold estate into a fee simple, as provided for in section 13(2).

Thirdly, in the case of registered land, upon application in relation to a registered leasehold estate, the Land Registry will register a fee simple estate, as provided for under section 13(4).

Fourthly, specified covenants are saved, as provided by section 14(2).

Fifthly, the saved covenants include restrictions on building, as provided by section 16 (2)(g)(iv).

[8] The effect is that obtaining the certificate of redemption and enlarging the leasehold estate into a freehold estate nevertheless saves a restrictive covenant against building. An application is made to the Land Registry for a certificate of redemption and a further application is made for registration of the freehold estate. The procedure is set out in the Land Registration (NI) Rules 1994 as amended and prescribed forms are included in the appendices. Moir's Land Registration Manual (2nd ed.) at chapter 15 deals with Ground Rent Redemption. Precedent 15 H relates to an application to cancel a leasehold folio where the title to the leasehold estate is registered.

[9] In the present case the solicitors exchanged a copy of precedent 15 H. Paragraph 1 of the precedent states that the purchasers are entitled to be registered as owners, having acquired the fee simple in the land comprised in the lease described in the leasehold folio under the provisions of the Ground Rents Act (Northern Ireland) 2001.
Paragraph 4 states that the applicant is entitled to the estates comprised in the freehold and leasehold folios subject to the charges and encumbrances set out in the above-mentioned folios and to the following charges, covenants and encumbrances, requiring the applicant to specify the same and to identify the folio to which they relate.
Paragraph 5 declares that the charges, covenants and encumbrances affecting the lease (save for the rent reserved by the lease) be carried forward and charged against the estate comprised in the freehold folio.

[10] Thus in the present case of a leasehold estate of registered land the redemption of the ground rent enlarged the estate to a fee simple which remained subject to the restrictive covenant on building. To permit the development of an additional dwelling on the site it would have been necessary to extinguish the restrictive covenant in the Lands Tribunal or buy out the restrictive covenant from the lessor. Applying to the Land Registry to redeem the ground rent and to register a freehold estate would not be effective to remove the restrictive covenant.

[11] The sequence of events that actually unfurled is of interest and I refer briefly to some of the correspondence. First of all a letter from the plaintiffs' solicitors to the defendants' solicitors of 31 August 2007 enclosing a copy of the outline planning permission to satisfy special condition four just prior to the date for completion

stated - "Our client has finalised the purchase of the freehold estate, however to finalise the same we require from you the Land Certificate and Lease to extinguish the Leasehold folio estate. This will have to be made in your client's name and we would ask you to let us have precedent 15H copy enclosed duly executed by you." The reference to 'the purchase of the freehold estate' is clearly a reference to the freehold estate provided under the Ground Rents Act. The plaintiffs' solicitors supplied a copy of precedent 15H and the defendants' solicitors completed the same. As noted above this does not have the effect of extinguishing the restrictive covenant against building. When the solicitor stated that he had finalised the purchase of the freehold estate, he meant that he had engaged in the Ground Rents Act scheme. It may be that both solicitors thought that they were thereby removing the restrictive covenant.

[12] A letter from the Land Registry of 28 January 2008 enclosed the Certificate of Redemption. On 8 February 2008 there was an application to the Land Registry to extinguish the leasehold estate. On 18 February 2009 a letter from the Land Registry stated that the application had been completed and enclosed Land Certificate AN172751. A letter from the defendants' solicitors of 3 March 2009 stated that "…. from our perusal of the Land Certificate it appears that your client has bought out the covenant for Ground Rent only and has not bought out the restrictive covenant on the title which would prevent our client from making use of the Planning Permission as agreed. We enclose herewith copy of the Land Certificate and would refer you to Burden registered in Part III thereof…. This may of course be an error on behalf of the Land Registry and if so we would request that you seek to have the same rectified immediately." After one and a half years one side partially recognised that the process was on the wrong track.

[13] On 23 March 2009 the plaintiffs' solicitors wrote to the lessor, Isaac Lyons Holdings Limited, stating that they wished to purchase the restrictive covenant.

[14] On 27 May 2009 the defendants' solicitors wrote to the plaintiffs' solicitors to indicate that the time limit for compliance with the special conditions had expired and they proposed to pay out the sum of money on joint deposit. The defendants' solicitors had placed the money in an account with the Progressive Building Society in the name of the defendants solicitors on behalf of the client. By a joint deposit, it must have been intended that the money would be placed on the joint deposit of the respective solicitors. However, that is not what happened but the plaintiffs' solicitors did not object to the money being put on deposit in the name of the defendants' solicitors on behalf of the defendants. The inevitable happened when the solicitor who held the funds alleged a breach of the conditions, that is he was able to pay out the money to the clients because he had sole control of the account.

[15] The plaintiffs' solicitors letter of 24 November 2009 indicated that they were taking a two track approach. One track was to write to Isaac Lyons Holdings Ltd to offer to purchase the reversionary interest. Mr Dunford referred to the inconsistency with the letter of 31 August 2007 where the plaintiffs stated that they

had purchased the freehold. In the earlier letter the solicitors were referring to buying out the ground rent and in the later letter they are referring to buying out the restrictive covenant. The second track was an application to the Lands Tribunals in the defendants' names. The defendants secured the removal of the restrictive covenant by paying £5,000. The defendants retain the balance of £40,000.

[16] Neil Faris was engaged as a joint conveyancing expert. His report expressed an opinion as to the meaning of the contract to a conveyancing solicitor. That opinion was that the parties intended that there should be further development on the site, which required both planning permission and the removal of the restrictive covenant. Special conditions 4 and 5 sought to achieve that outcome by requiring planning permission and the acquisition of the freehold. The latter requirement in effect concerned the removal of the restrictive covenant against building on the site.

[17] The contract was clearly intended to require the acquisition of the freehold in order to remove the restrictive covenant against building on the site. The third proviso referred to the option of achieving this by application to the Lands Tribunal, being the forum for achieving the removal of restrictive covenants under the Property (NI) Order 1978. The parties then proceeded erroneously to the Land Registry under the Ground Rents Act. By such process the leasehold estate was converted to "freehold" but this was not sufficient to comply with special condition 5 as it did not achieve the removal of the restrictive covenant against building.

[18] The plaintiffs claim the £40,000 retained by the defendants, the claim being based on condition 5 having been fulfilled, albeit by the defendants buying out the restrictive covenant, so that the plaintiffs contend that the balance purchase price falls to be released. The defendants contend that time was of the essence for the performance of the requirements or alternatively that there had to be compliance with the requirements within a reasonable time and that the plaintiffs were in default so that they were not entitled to recovery of the money retained.

[19] In relation to time being of the essence the general position is that, with contracts for the sale of land, time is not of the essence for the completion of the transaction or for performance of an obligation arising under the agreement, such as the removal of the restrictive covenant - see Wylie's Irish Conveyancing Law (3rd ed.) from paragraph 13.12.

[20] The parties may make time of the essence expressly by stating so, or by stating that time must be exactly complied with or by stating that the obligation in relation to time is to be treated as a condition or that a breach creates a right to terminate performance. The defendants contend that the time for the performance of the special conditions was made expressly of the essence by the use of the introductory words "strictly subject to and conditional upon". I do not accept that the words quoted, which refer to all five of the special conditions, can be said to make the conditions strictly subject to the times specified and cannot be interpreted as making time of the essence in respect of the obligations. Further the wording

does not render what follows 'conditions' of the contract in the sense that they go to the root of the contract. I am satisfied that the wording did not expressly make time of the essence.

[21] Further time may be made of the essence by implication and that may arise, for example, because the subject matter of the contract is such that it is implicit that performance was intended within a specified time, as with the sale of a business as a going concern. Generally this is not the case in residential properties. In Smith v Hamilton [1951] Ch 174 Harman J stated at page 179 that it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling house with vacant possession, relied on in Wylie's discussion of time being of the essence by implication at paragraph 13.16. There is nothing special in the present circumstances that would make time of the essence by implication.

[22] A notice may be served that purports to make time of the essence. A party has the option of issuing a notice to complete under the Law Society conditions making time of the essence of the contract. The Law Society notice to complete would not have applied to the performance of the special conditions but no form of notice was given in the present case which purported to make time of the essence in respect of special condition 5. Neither expressly nor by implication was time of the essence of the contract in the present case.

[23] Even when time is not of the essence, the party who has the obligation must not engage in unreasonable delay and if there were to be unreasonable delay it may amount to repudiation if the consequences are sufficiently serious. As I find that time was not of the essence in the present case, Mr Dunford contends in the alternative that there has been a failure to complete within a reasonable time. I do not consider that to be this case. I do not consider that while there was delay that delay was sufficiently unreasonable so as to amount to repudiation.

[24] I find that time was not of the essence for the plaintiffs to perform the obligation. If time had been of the essence the issue of waiver by the defendants arises. Wylie at paragraph 13.25 states that the parties may waive time limits either expressly or impliedly so that time thereafter ceases to be of the essence. The plaintiffs amended the pleadings to refer to the conduct of the defendants in correspondence after the twelve month period had expired, which was relied on by the plaintiffs as indicating that the defendants were not seeking to rely on the time limit after the time had expired. The defendants contended that the correspondence could not amount to waiver on the basis that their actions were said to be based on assurances that the plaintiffs had acquired the freehold. However I do not accept that the plaintiffs were actually stating that they had acquired the removal of the restrictive covenant but rather that they had acquired the extinguishment of the ground rent. Both solicitors were referring to the ground rent issue and the defendants were not proceeding on the basis that the plaintiffs had acquired the freehold so as to remove the restrictive covenant. This would not have amounted to a waiver.

[25] The defendants' solicitors paid the money retained to the defendants in the circumstances outlined and the plaintiffs rely on that action as a breach of obligation. The obligation was to place the money retained on joint deposit. The money was deposited in the Progressive Building Society for the defendants. This was not a joint deposit as intended in that it was not placed in the names of the respective solicitors. The plaintiffs' solicitors could have established what the deposit arrangements were and they either failed to do so or, having found out, did not require compliance by the defendants' solicitors. I am satisfied that the payment out by the defendants' solicitors is not in itself a ground on which the plaintiffs can maintain a claim for the payment of the money.

[26] The defendants are not entitled to effect a forfeiture of the remaining £40,000. There was not such unreasonable delay as entitled the defendants to treat the failure of the plaintiffs as repudiation and to effect forfeiture. In the event the defendants secured the release of the restrictive covenant through their own actions rather than those of the plaintiffs. I am satisfied that the plaintiffs are entitled to recover the £40,000, the basis for its retention by the defendants having ceased to exist before the defendants became entitled to effect forfeiture. Accordingly the plaintiffs will have judgment for £40,000.

[27] The issue of costs arises. Normally costs follow the event. The circumstances in which this case arose are the not uncommon situation that a purchaser wishes to buy a property and to secure the removal of a restrictive covenant against further building on the site. The plaintiffs and the defendants have become embroiled in these High Court proceedings as a result of the actions of the respective solicitors in dealing with the matter in the manner that they did. The solicitors who had conduct of the transaction are the solicitors on record for the parties in the action.

[28] Order 62 Rule 11 provides for the personal liability of solicitors for costs as follows -

> "(1) Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may -
>
> (a) order -
>
> (i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or

(ii) the solicitor personally to indemnify such other parties against costs payable by them; and

(iii) the costs as between the solicitor and his client to be disallowed; or

(b) direct the Taxing Master to enquire into the matter and report to the Court, and upon receiving such a report the Court may make such order under sub-paragraph (a) as it thinks fit.

(4) Subject to paragraph (5), before an order may be made under paragraph 1(a) of this rule the Court shall give the solicitor a reasonable opportunity to appear and show cause why an order should not be made."

[29] Neither the plaintiffs nor the defendants should pay any costs for these proceedings. The plaintiffs' solicitors and the defendants' solicitors should bear the costs. Under paragraph 1(a)(i) there is provision for a solicitor to pay the costs of the other party. One way of achieving this would be that the solicitors do not submit bills of costs. The other is that if they do the plaintiffs' solicitor shall pay the defendants' costs and the defendants' solicitors shall pay the plaintiffs' costs. Solicitor and client costs to the plaintiffs and the defendants are disallowed. Payments made by the plaintiffs or the defendants to their solicitors should be reimbursed Outlays, fees, experts' costs and fees for Counsel are to be shared by the plaintiffs' solicitors and the defendants' solicitors. This is subject to Rule 11(4) which provides that the solicitors should be given a reasonable opportunity to appear and show cause why an order should not be made. I have outlined the kind of order that I am minded to make and I afford the plaintiffs' solicitors and the defendants' solicitors the opportunity to appear and show cause why this order should not be made.