Neutral Citation no. [2007] NICh 1 | *Ref:* **DEEF5777**

Judgment: approved by the Court for handing down | *Delivered:* **12/03/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BUBBLE INNS LIMITED

Plaintiff;

-and--

BEANNCHOR LIMITED

Defendant.

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DEENY J

[1] The plaintiff in this action seeks specific performance of an oral agreement made, it contends, in or about October 2005 between the plaintiff and the defendant whereby the plaintiff agreed to purchase and the defendant agreed to sell the properties at 701-707 Lisburn Road, Belfast, for the sum of £5,125,000.00. The plaintiff acknowledges that there is no note or memorandum in writing under the Statute of Frauds (Ireland) 1690 but seeks to rely on the doctrine of part performance to render this agreement actionable. In the alternative the plaintiff claims damages for breach of contract.

[2] The defendant has brought an application before the court for an order vacating the registration of a pending action by the plaintiff in the Registry of Deeds, with regard to the premises at 703-707 Lisburn Road. In the alternative it seeks an order requiring the plaintiff to give a cross undertaking in damages to the defendant and also to the trustees of a pension fund linked to Mr William Adams Wolsey namely Fairmont Trustees Services Limited, William Adams Wolsey himself and his former wife, Linda Georgina Wolsey. At one stage various points were made about the fact that they were non-parties. However Mr Orr QC who appeared with Mr Michael Copeland for the plaintiff adduced a letter written in January from his solicitors saying that they intended to join the trustees to the pension fund as parties to the action. He said they would formally apply to do so. Mr Michael Humphreys who appeared for the defendant company, acknowledged that such an application

would be difficult to resist. For the purposes of the judgment therefore I will anticipate that the trustees are or are about to become defendants in the action. Their importance on a factual basis lies in the grant of 999 year leases of 703-707 Lisburn Road in 1999 and 2001 by Beannchor Limited to the trustees and thus, predating the alleged agreement to sell to the plaintiff company. Therefore in effect the trustees of the pension fund, of which Mr Wolsey and Mrs Wolsey are both beneficiaries, are the beneficial owners of the property in dispute with the first defendant having only a nominal reversionary interest of no real value. However the plaintiff was aware of this at the time of the alleged oral agreement of 2005. The negotiations were with Mr Wolsey and he purported to speak on behalf of not only the company but the pension fund of which he was both a trustee and beneficiary. On a related topic, it was said from the Bar that the plaintiff company was only incorporated on 11 November 2005 i.e. after the alleged agreement. But Mr Orr relied, in answer to that, on the potential validity of pre-incorporation contracts, which suffices for these purposes.

[3] There were two main thrusts to the argument of Mr Humphreys. Firstly he submitted that in the absence of a note or memorandum the plaintiff's case was a hopelessly weak one. It had not bought 701 at an overvalue. While he did not allege that the action was brought in bad faith he contended that on the authorities the court had the power and ought to vacate the registration of the pending action as it was unreasonable to persist with it. He relied on the judgment of Megarry J in Northern Development (Holdings) Limited v UDT Securities [1997] 1 All ER 747. On this point I note that Mr Orr relied on the authority of Flynn v Buckley [1980] IR 423, a decision of the Supreme Court in Dublin as authority for the proposition that a lis pendens should only be vacated where the action was not being pursued in good faith. While giving due recognition to the decision of the Supreme Court, particularly in an issue of land law where there is much in common between the jurisdictions in this island, I am not disposed to follow it on this occasion. The decision of Megarry J was not cited to the court. His views, which had been presaged in earlier decisions of his, have met with approval in other English cases and it seems to me to reflect the prevailing line of authority.

[4] There is an additional reason for holding that the power of the court goes beyond an assessment of good faith only. This application relates to unregistered land where registration of pending actions is covered by the Registration of Deeds Act (NI) 1970 and in particular Section 3. Neither that Act nor the Regulations made under it expressly address an application of this kind. The defendant therefore relies on the inherent jurisdiction of the court. If the land, however, was registered land this situation would be covered by the Land Registration Rules 1994, SR 424 made under the Land Registration Act 1970. Rule 91 gives an express power to the court to direct cancellation of the registration of a pending action. The power is a wide one and not confined to the issue of good faith. It seems to me that it would be

inequitable for the court to be able to exercise a wide discretion to vacate a lis pendens regarding land because it was registered but to be severely restricted in that jurisdiction in a case where the land was unregistered. One can see no valid purpose that could have been within Parliament's intention to arrive at such an outcome. Or as Megarry J put it in Northern Development Holdings op. cit at page 750J:

> "Why should Parliament wish to protect a registration relating to hopeless or vexatious proceedings merely because they are being prosecuted in good faith? Bona fides and reasonableness are far from being the same thing, and sometimes the most unreasonable of men are the most honest and sincere in their unreason."

I therefore conclude that the proper course is to assess the reasonableness of the registration of the charge and not just the good faith of the Plaintiff's proceedings. Clearly if they are not brought in good faith they are unlikely to be reasonable.

[5] In support of his contention that the plaintiff's case was hopelessly weak Mr Humphreys relied on a dictum of Andrews LJ in Lowry v Reid [1927] NI 142, at 154, with regard to the doctrine of part performance relied on by the plaintiff. I quote:

> "Its underlying principle is, that the Court will not allow a statute which was passed to prevent fraud to be made itself an instrument of fraud. In other words, the court disregards the absence of that formality which the statute requires when insistence upon it would render it a means of effecting, instead of a means of averting, fraud. The question in each case is, whether the plaintiff has an equity arising from part performance which is so affixed on the conscience of the defendant that it would amount to a fraud on his part to take advantage of the fact that the contract is not in writing."

I consider that Mr Orr dealt with these submissions effectively, for this application at least. He pointed out that the conscience of the defendant was affected here in that it was the conscience of Mr Wolsey, controlling director of the first defendant and trustee and beneficiary of the pension fund. If the plaintiff is right he knew that he had entered into an agreement which covered all the properties between 701 and 707 Lisburn Road. The parties had completed the sale of a public house known as Ta Tu bar and restaurant at 701 Lisburn Road in the sum of £3,125,000.00. That was an act of part

performance because the plaintiff company would not have paid that for the bar unless they were also getting the other properties. They hope to add another floor to the premises at 701 Lisburn Road. It would be very difficult to do this if they did not own the adjoining properties, as they say they had agreed with Mr Wolsey. In support of that contention, Mr Orr referred to some correspondence between the solicitors where the solicitors for the plaintiff were asking for a contract for the sale of the other lands on foot of their client's oral agreement. At no point in the correspondence is the fact of that oral agreement disputed by the solicitors for the defendants. The height to which they go is to say, at a late stage, that their client (ie Mr Wolsey) did not consider that there was any "binding agreement". This would be consistent with him taking the point that there was no note or memorandum in writing. It does seem inconsistent with any contention that he had not made an agreement at all. Indeed the first contract furnished to the plaintiff with regard to 701 actually refers to the other properties although the relevant lines are then stroked out. No affidavit has been served from Mr Wolsey, nor from the solicitor with carriage of the conveyance(s).

[6] Mr Orr relied on a judgment of Barron J in Mackie v Wilde [1998] 2 IR 578, a further decision of the Supreme Court in Dublin. In his submission, which I find persuasive, at least at this stage, his case falls within the requirements for part performance set out therein. (It will be recalled that legislative changes in England have altered the position there.) I therefore find that the plaintiff's action here is being pursued both in good faith and reasonably in the circumstances. To put it another way they have an arguable case, although whether or not it succeeds is likely to depend both on oral evidence from the parties to the alleged oral agreement and, perhaps, to evidence from other parties relating to the inter-connection or inter-dependence of the premises. I say nothing further on that point.

[7] The application of Mr Humphreys does not end there. He has adduced documentation to the court which shows that a third party had agreed to purchase the premises at 703-707 Lisburn Road in the sum of £2,850,000.00. This contrasts with the figure contended for by Mr Harry Diamond of the plaintiff company as the sale price ie. £2m. Correspondence then shows that the solicitors for this purchaser were unwilling to proceed in the light of the registration of the pending action unless, at least, there was a significant reduction in price. Mr Humphreys therefore contended that this was a substantial interference with the defendants (in reality the pension funds) peaceful enjoyment of the property. I will return to that in a moment. He submitted that there was a very real prospect here that the plaintiff would lose its action and the defendant would have lost money because they could not dispose of the premises as a result of the existence of the lis pendens. He adduced correspondence from his clients' accountants indicating a series of investment opportunities which had existed if the sale at £2,850,000.00 had gone through but which had now disappeared. I find this a little speculative.

However, I observe, that although the property market in Northern Ireland, as both counsel said, has risen sharply in recent years it is always possible that it will turn down again. In that event the defendant might find that the third party was no longer willing to pay the price currently available. For either of these reasons I am persuaded that Mr Humphreys is right that there is a real risk of loss to the defendant here and that there is a real interference with the peaceful enjoyment of the property by the first defendant and the trustees of the pension fund.

[8] He therefore argued that the court should require the plaintiff to give an undertaking to the court that in the event of their not succeeding in the action against the defendant and the defendant suffering loss as a result the court may order the plaintiff to compensate the defendant for that loss, if it is fair and equitable to do so. He stated that no authority exists for this proposition. But he relied on Article 1 of the First Protocol of the European Convention on Human Rights which is now part of our domestic law. I will return to that shortly.

[9] In fact, judicial research indicates that there are a number of relevant authorities where the matter has been considered by eminent judges. In Clearbrook Property Holdings Limited v Verrier [1973] 3 All ER 614 Templeman J was dealing with an action where the plaintiffs were seeking specific performance of a contract. The defendant moved for an order that cautions registered against the property in favour of the plaintiffs should cease to have effect and be cancelled on the ground that there was no arguable point to go to trial. At page 617 the judge said, having reviewed the factual and legal position:

> "In the present circumstances I am unwilling to make it impossible for the plaintiffs to succeed in an action for specific performance on the present material. I am also unwilling that the defendant should be put to loss by reason of the actions of the plaintiffs without being able to recover from them.
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> In these circumstances it appears to me that I have jurisdiction to do this: I can make an order vacating the register. As soon as that order is made the plaintiffs, having now before me an application in an action where they are asking for specific performance, can apply immediately for an interlocutory injunction pending trial, restraining the defendant from selling, letting or dealing with the property in any way inconsistent with the plaintiff's claim for specific performance. The defendant is willing to submit to such an injunction as soon as it is asked. There will be

> no need for anybody to go away and draft a notice of motion. It is entirely a matter for the plaintiffs. If they ask for such an injunction the defendant will submit to it. The consequence will be that if the injunction is made there will be a cross undertaking in damages by the plaintiffs. So if at the end of the day it appears that the plaintiffs are not entitled to specific performance then the defendant will be able to claim damages under the Cross undertaking. …… It seems to me that that course will both preserve the plaintiff's right to specific performance and the defendant's right to damages if in the event the plaintiffs fail in the action. I see no reason why I should not adopt that course, whether it be behaving robustly or not, and that is the course I propose to take."

In Norman v Hardy [1974] 1 All ER 1170 at 1176 Goulding J cited this passage "with very great respect" but without expressing any view on the rightness of the decision itself. The case was considered by the Court of Appeal on England in Tiverton Estates Limited v Wearwell Limited [1974] 1 All ER 209. Lord Denning MR at page 219 cites Clearbrook in this way.

> "In some circumstances it would not be right to vacate the caution. For example, if the cautioner had a substantial point in his favour and it would be unfair to him to vacate it. The court might then try to protect both sides by telling the cautioner: 'You may keep the caution on the register if you undertake to pay the owner any damages caused by its presence if it is afterwards held that it was wrongly entered. But, if you are not ready to give such an undertaking, then the caution must be vacated.' An alternative would be to do what Templeman J did in Clearbrook Property Holdings Limited v Verrier. But in the present case I would not do any of those things because it is plain to my mind that there was no enforceable contract. The register should be rectified by cancelling the caution."

In Price Brothers (Somerford) Limited v J Kelly Holmes (Stoke on Trent) Limited and Others [1975] 3 All ER 369 at 374 a separate Court of Appeal certainly upheld their right to vacate a caution if on the facts of the case it ought not to be in the register, as an exercise of the court's discretion. They were a little more cautious about the decision of Templeman J. But two distinguished judges cited the decision in successive reports in [1990] 2 All ER. In Blue Town Investments page 897 Sir Nicholas Browne-Wilkinson V-C

expressly applied the decision. His decision was criticised by the then Hoffman J in Oxy Electric Limited v Zainuddin page 903 at pages 905, 906. But his distinguishing of Clearbrook does not carry the implication of disapproval of its ratio, in appropriate circumstances, it seems to me.

[10] I conclude therefore that the power to vacate the charge but grant an injunction subject to a cross undertaking does exist. In so concluding I take into account s.3 of the Human Rights Act 1998. I am less confident that, as Lord Denning suggested, the inherent jurisdiction of the court extends to making the continuance of the registration subject to a cross undertaking. Given that the former power, at least, exists should one exercise it here? Girvan J in Pardo Investments Limited et alia v MFI Properties Limited (30 June 1997, unreported) drew attention to the fact that a lis pendens may well be a significantly more attractive protection to a plaintiff than obtaining an injunction with the obligation to give a cross undertaking. He did not go further. But since then the European Convention has become part of our domestic law. Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of in international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions of penalties."

Measures which fall short of deprivation but which substantially interfere with an individuals peaceful enjoyment of his or her possessions or property are capable of constituting control within the meaning of Protocol 1 Article 1 and therefore an interference with the right which has to be justified eg. planning controls: Pine Valley Developments Limited v Ireland (1991) 14 EHRR 319, ECtHR. It seems to me that the combination of the State's provision of a statutory procedure for the registration of a pending action combined with the natural caution of a purchaser or a lender in the face of such a registration together amounts to control within the meaning of Article 1 of the First Protocol. On the authorities that interference would appear to be justifiable only where it is lawful, in the public interest and deemed "necessary" by the State. There is statutory provision for the matter and I consider it therefore lawful. I consider it must be in the public interest that potential buyers of property are alerted by a system of registration of pending actions to legal proceedings which may mean that the apparent legal owner

of the property may not indeed enjoy a good title. This may bring an advantage in litigation to the plaintiff but that is not the essential purpose of it. The same result i.e. protecting a purchaser, is achieved if an injunction is in force restraining the defendant from selling, subject only to a deliberate flouting of the Order of the Court by the vendor, which is unlikely, and more unlikely as his solicitors would also be aware and would scarcely wish to act in contempt of court by facilitating such a sale, or by remaining silent if such a sale was being contemplated. The issue, in human rights terms, as is not infrequently the case, is therefore whether it is "necessary"? Or, whether necessity is established only if the party achieving the registration is, in the appropriate case, obliged to give a cross undertaking in damages. One could readily see that the necessity for the registration of a pending action would only exist in tandem with a cross undertaking if the plaintiff's action was a highly speculative one. It may be that the stronger the plaintiff's case the easier it is to justify the registration. Clearly a relevant factor in assessing the matter is whether the lis pendens is in fact interfering with the peaceful enjoyment of the property. If the property in question were a dwelling house in which the defendant is continuing to live, or a farm which he was continuing to farm, without any intention of selling the same, these issues would not really arise. If the plaintiff had a good arguable case but was impecunious and not in a position to offer a cross undertaking of any value it may still be right to uphold the registration. The courts have not ruled out, in the field of injunctive relief, granting injunctions where a plaintiff is not in a position to give a worthwhile cross undertaking. It is right to say that too ready a granting of such an application for vacation followed by an injunction with cross undertaking could lead to an unwelcome sub-species of litigation, where every defendant who has a lis pendens registered seeks to extract a cross undertaking from the plaintiff who has done so. But they would have to address the matters set out above. I would be firmly of the opinion that such applications would be entirely inappropriate in very many cases. The court would be mindful, for example, with regard to the impecunious plaintiff that that plaintiff would enjoy rights under Article 6 to a trial of their action. If they had an arguable case the caution might well be justified even if they were unable to provide a cross undertaking.

[11] Nor does the fact that it gives an advantage in litigation to the plaintiff or cause a disadvantage to the defendant necessarily mean that the registration of a pending action is unfair or unlawful. It is right to recognise that sometimes the mere bringing of proceedings against a defendant can have an adverse effect upon them. It is likely to lead to them incurring significant legal expenses which they may not recover even if successful eg. if the plaintiff is legally aided or otherwise a person of straw. Over and above legal costs the defendant will have to spend time and energy in defending the litigation and may undergo stress. It may well be that contentious litigation may distract a party from developing other opportunities which would otherwise be open to them. That is a fact of life. People have the right to

bring proceedings. Parliament has provided a right, as I have said, in the public interest, to register these charges.

[12] However this is a court of justice and a court of equity and the court should strive to do justice and equity wherever possible. It seems to me that it is more just and equitable that the plaintiff here applies for and is granted an injunction, if it so desires, subject to a cross undertaking in damages than that the registration of the pending action remains simpliciter, frustrating the sale of the property and causing a real risk that the defendants will suffer a loss for which they cannot be compensated even if they are successful in the substantive proceedings. The plaintiff here has an arguable case. It is entitled to try and preserve the status quo. The balance of convenience between the parties is met if a cross undertaking is given. The right to the injunction is reinforced by the statutory right to register the lis pendens. The defendant in this case has demonstrated to the satisfaction of the court that a bona fide contract exists for the sale of the property at a substantial profit and that it is being frustrated by the existence of the registration of the pending action. While the plaintiff's case is certainly an arguable one it could not be described as open and shut. Taking these factors together I would therefore propose to make an order vacating the registration of the pending action. I will delay that order for seven days to allow the plaintiff to consider its position. Having heard the matter argued before me I do not consider, like Templeman J, that any formal application for an injunction is necessary as the matters disclosed to the court allow the court to make that decision on the application of counsel. If, of course, the plaintiff is unwilling to give the cross undertaking the registration will be vacated. I consider, on these facts and in the exercise of my discretion that it would be unreasonable to continue the registration of the lis pendens if the plaintiff is unwilling to stand over it with a cross undertaking to the defendants.