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Judgment: approved by the Court for handing down | *Delivered:* **15/09/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

JANE HOLLWAY AND PAUL HOLLWAY

-v-

SARCON (No 177) LIMITED

_____

DEENY J

[1] The plaintiffs are a married couple. The defendant is a limited company which, in 2007, was proposing to build an apartment block to be known as James Clow, The Granary Building at Princes Dock Street, Belfast. It had retained Gilbert Ash as the main contractor to the development which was to be administered by White Ink Architects on behalf of the defendants with Messrs White Young and Green acting as civil and structural engineers.

[2] The defendant invited the public to agree to buy the apartments which were to be built. On foot of that potential purchasers were asked to sign and complete two documents, one of which will require detailed scrutiny. One was an agreement for lease where the defendant was described as the vendor and the purchaser was so described with regard to taking a lease of the premises i.e. an apartment in the building. The other agreement which is at the heart of these proceedings was a building agreement in which the defendant is described as the Developer and the potential purchaser of the apartment is described as the Employer.

[3] The plaintiffs herein on or about 14 June 2007 entered into the agreements referred to committing themselves to purchasing apartment No 65 on level 7 of the building.

[4] By clause 2 of the agreement the plaintiff confirmed vacant possession of "the site" to the developer and its contractor until "the key has been handed over by the developer or his lawfully authorised agent."

[5] Clause 6 of the building agreement dealt with the Completion Date and reads as follows:-

> "Subject to clause 8 below the Developer shall procure that its contractor shall erect and completely finish the said Apartment and make same fit for habitation and use on the date of completion mentioned in paragraph 6 at the Schedule or such earlier date notified by the Developer or the Developer's solicitor on no less than 20 working days notice to the Employer or the Employer's solicitor."

[6] The date of completion provided at paragraph 6 of the Schedule was 31 May 2009. The contract price was £245,000. The plaintiffs paid a 10% deposit of £24,500.

[7] In the events the defendant claims that its contractor encountered a number of difficulties with regard to the completion of the building. These are set out to some degree both in the defence and counterclaim and in an affidavit of Michael Johnston of 23 June 2010 which was received in the course of the hearing. There were difficulties with the foundations for two adjoining former licensed premises. Specialist contractors had to be retained to take special measures in regard to these matters. It is contended in the pleadings that the works were also regularly affected by inclement weather and that a supplier of sanitary ware went into administration in or around April 2009 causing further delay. Because of that the defendant's agents, Messrs B T W Cairns, and their solicitors, Messrs Carson McDowell, wrote, the latter to the plaintiff's solicitors Messrs Arthur Cox on 6 February 2009 in a short letter to this effect –

> "Please note that your client will now have been informed by Messrs B T W Cairns that completion of this apartment is anticipated for October/November 2009. We will write to you further once an exact date for hand over of this apartment is confirmed."

[8] On 22 May 2009, that is about 9 days before the completion date Messrs Arthur Cox wrote to Carson and McDowell referring to the two earlier letters of 6 and 5 February –

> "Our clients have instructed us to inform you that they do not agree to completion being deferred and they expressly reserve their rights and remedies

> under the building agreement and agreement for lease."

Arthur Cox wrote further on 1 June 2009 purporting to rescind the building agreement on the part of their clients because the Developer had not completed on 31 May 2009 and time was of the essence of the agreement pursuant to clause 23 thereof.

[9] On 8 June Carson & McDowell wrote to Arthur Cox saying that the plaintiffs –

> "..do not have the right to rescind. For the avoidance of all doubt, the building agreement and agreement for lease remain in place between our respective clients and our client shall enforce each and every provision of same."

[10] Some further correspondence between the solicitors followed, ultimately, by a writ of summons dated 1 December 2009. Following a statement of claim dated 9 March 2010 the plaintiffs caused a summons to be issued on 22 April 2010 seeking summary judgment against the defendant company pursuant to Order 14. Mr Nicholas Hanna QC appeared with Miss Jacqueline Simpson for the plaintiffs at the hearing of the order 14 summons and before me. Mr Mark Horner QC appeared with Mr Michael Humphries for the defendant. Although the submissions were separated the matter was heard over the same days as Clear Homes v. Sarcon (No 177) Limited. Further to the submissions of Mr Horner I apprehended that because this was an Order 14 case rather than one based on a preliminary question, drafted in a particular way, on agreed facts, as in the Clear Homes case, that a different outcome might arise. In the event that is not the case.

[11] The court must address the contract as a whole in seeking to properly interpret it. Clause 6 I have set out above.

[12] As the preliminary question indicates the most important clauses were 6, 8 and 23 of the contract. However in accordance with normal principles the court must address the contract as a whole in seeking to properly interpret it. Clause 6 I have set out above. Clause 8 reads as follows –

> "DELAY AND EXTENSION OF TIME
>
> If the building work is delayed by bad weather, industrial disputes, shortage of labour or difficulties in obtaining materials, or any other cause outside the developer's or the developer's contractor's control a

reasonable extension of time for completion shall be allowed by the employer."

[13] Clause 9 dealt with the deposit and completion monies. The defendant relied on Clause 10 in support of its case –

> "INTEREST
>
> 10. If the Employer shall fail to pay any part of the Deposit on the date of this Agreement and/or any of the balance of the Contract Price within three working days of notice to the Employer or his solicitor that the same is due the Employer shall pay interest at the interest rate as set out in paragraph 7 of the Schedule from the date or dates on which same became payable until the date of payment."
>
> That rate was 4% above base rate.

[14] Mr Horner QC also laid considerable stress on Clause 11 which dealt with Rescission. That read as follows –

> "If by the completion date (as detailed in paragraph 6 of the Schedule or such later date for completion as provided for by Clause 8 above) the developer has completed the apartment in accordance with this agreement and the sale is not completed on the said completion date the Developer may on said date or any time thereafter give to the Employer notice in writing to complete this transaction. Upon service of an effective notice pursuant to this clause it shall be an express term of the Agreement that the Employer shall complete the transaction within five working days after the service of the notice (excluding the date of service) and in respect of such period time shall be of the essence. If the Employer does not comply with the terms of an effective notice served by the Developer under this clause then the Developer may rescind this agreement and:
>
> (a) the Employer shall forthwith on the expiry of that notice, within such further period as the developer may allow, return all papers in his possession belonging to the Developer and at his own expense subject to the right of any legal mortgagee execute a proper surrender,

reassignment or re-conveyance as the case may be to the Developer of the site upon which the dwelling is situate; and

(b) without prejudice to any other rights or remedies available to him at law or in equity the Developer may forfeit and retain for his own benefit the deposit paid by the employer pursuant to clause 9 above."

[15] Clause 19 provided for mediation and arbitration but neither party had proceeded in that way.

[16] The plaintiffs relied in their pleadings and in argument on Clause 23 entitled TIME –

> "In relation to the time limits specified in this agreement time shall be deemed to be of the essence."

[17] The court had the benefit of helpful and able written and oral argument from the counsel named above. I have refreshed my memory of those helpful arguments and have taken them into account even if all are not expressly referred to in this judgment. I have also taken into account the submissions of Mr Stewart Beattie QC who appeared with Mr Colmer for Clear Homes.

[18] Counsel drew the court's attention to the canons of construction and the approach to be adopted by a court in interpreting contracts to be found in Chitty on Contracts and Lewison on the Interpretation of Contracts. I bear in mind the admirable summary of Lord Bingham of Cornhill in BCCI v Ali [2001] 1 A.C. 251.

> "To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

Nor do I overlook the judgment of Lord Hoffman in ICS Ltd v West Bromwich Building Society [1998] 1All ER 98 at 114 ff.

[19] Plaintiff's counsel cited a passage from Chitty on Contracts 30th Edition, volume 1, para 21-015 with regard to the effect of a time of the essence clause –

> "In determining the consequence of a stipulation that time is to be "of the essence" of an obligation it is vital to distinguish between the case where both parties agree that time is to be of the essence of the contract and the case where, following a breach of a non essential term of the contract, the innocent party serves a notice on the other party stating that time is to be of the essence. In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" with the consequences that a failure to perform by the stipulated time will entitle the innocent party to –
>
> (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and
>
> (b) claim damages from the contract breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for the loss of the whole transaction").

[20] The importance of the issue whether time was of the essence for the developer to complete here lies in its consequence in law as foreshadowed in the correspondence. If the parties expressly made time of the essence before completion as a condition of the contract then any breach of such condition is treated as going to the root of the contract e.g. Mustill LJ in Lombard North Central plc v. Butterworth [1986] 1 QB 527, at 535 following. This would be so "without regard to the magnitude of the breach." Indeed the Privy Council declined to exercise any discretion when a party was a mere 10 minutes late in completing the contract where time was of the essence: Union Eagle Ltd v Golden Achievement Ltd [1997] 2 All ER 215. Therefore the purchaser could treat the contract as repudiated as the developer was in breach of the completion date, subject to Clause 8, if time was of the essence.

[21] The principal submissions of the plaintiffs here and in the other case are very simple. Clause 23 makes time of the essence with regard to any time limits. The completion date constitutes a time limit therefore time is of the essence.

[22] In addition they rely on the proposition still referred to by lawyers by the concluding words of the Latin maxim 'verba cartarum fortius accipuntur contra proferentem' (Bacon's Maxims Three). A deed or other instrument shall be construed more strongly against the grantor or maker thereof. It is clear that Sarcon was the maker here. The rule applies only in cases of ambiguity and where other rules of construction fail. London and Lancashire Insurance v. Bolands Limited [1924] AC 836, 848; Lindus v. Melrose [1858] 3 H&N 177, 182. I share the view of Eveleigh LJ in The Olympic Brilliance [1982] 2 Lloyds' Rep. 205, CA that the principle was "usually a rule of, if not last, very late resort." This was a view shared by the Court of Appeal in Macy v Quazi The Independent 13/1/1987 and by Auld LJ in Direct Travel Insurance v McGeown [2004] 1 All ER Comm 609. The proper approach is to seek to ascertain the intention of the parties from their contract in its context. If the court is left in a real state of uncertainty as to the correct interpretation due to ambiguity in the language then contra proferentem applies. As Lord Sumner said in London and Lancashire Fire Insurance Co Ltd [1924] AC 836 at 848 it –

> "is a principle which depends upon their being some ambiguity that is to say some choice of expression – by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one."

Sir John Pennycuick said in St Edmundsbury v Clark (No 2) [1975] 1 All ER 772, at 780, delivering the judgment of the Court of Appeal in England:

> ".. it is necessary to make clear that this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation. The presumption itself is not a factor to be taken into account in reaching the conclusion."

[23] The arguments that can be advanced on behalf of the alternative construction that time was not of the essence I summarise as follows. Firstly, time is not normally of the essence in building contracts. That would be not least in the construction of 135 apartments as here, where the Developer is dependent on a series of third parties including but by no means confined to those named in para. 1 hereof. As is said in Emden Construction Law at paragraph 621:

> "In the case of building contracts, time will not generally be of the essence in the absence of express words making it so . . ."

[24] It will be of the essence where the contract expressly so stipulates or where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence (but see Snell on Equity 15-37) or where a valid notice to complete has been given. Both the correspondence and the arguments of counsel make it clear we are only dealing with the first category here. I note that here the draftsman or the draftsperson of the contract did not expressly say that the time for completion would be of the essence. Indeed the wording of Clause 6 referring to "the date of completion mentioned at paragraph 6 in the Schedule" seems at odds with the importance the Plaintiffs place upon it.

[25] It is clear that where no time is specified in a building contract to perform a work an agreement to complete within a reasonable time will generally be implied and a reasonable time for completion will be allowed. It would be open to the purchasers to argue that the date of completion achieved by the developer did not constitute such a reasonable time. According to the affidavit of Michael Johnston on behalf of the developer the delay was outside the control of the developer and its contractor but this is not a matter on which I rule in any way at this time. Nor do I suggest that a delay of 6 months in a contract with a duration of 2 years should be taken to be unreasonable. The point is that the purchaser is not left wholly without rights even if time is not of the essence.

[26] Next Mr Horner sought to argue that the words 'time limits' to be found in Clause 23 were not intended to cover completion. It seems to me that some support was given for his proposition by the bona fide dispute between him and Mr Hanna as to which clauses, Clauses 6 and 23 apart, did contain time limits. It was agreed that there were two time limits in Clause 11 of the building agreement as set out above but there was a dispute as to whether or not the dates referred to in Clauses 9 and 10 were or constituted time limits. In my view, linked to some degree to the point previously made, this point is of only slight assistance to a developer. I think in normal or conveyancing language the completion date might not be referred to as a time limit but it is certainly something that could be so construed or described. Mr Hanna pointed out the change in Clause 23 from the Law Society template deleting express reference to Clauses 10, 11 and 13 and asks the court to infer it thus means all time limits. But the word "all" is not used.

[27] Clause 10 of the agreement provides for interest to be paid by the Employer that is the purchaser if he fails to pay the balance of the monies owing within five working days of notice that they are due. Wylies Irish Conveyancing Law, paragraph 13.15, says –

> "Thus, it seems to be settled that inclusion of a provision for payment of interest in the event of delay

> raises a presumption that time is not of the essence, since it indicates that the parties anticipate a possible postponement of completion."

[28] The defendant places significant reliance on Clause 11 of the contract. As set out above it can be seen that it lays out an express procedure which the developer may choose to follow if the employer does not complete on the given date. He may serve a notice in writing giving the employer five working days in which to do so. If the employer does not comply the developer may rescind the agreement and retain the deposit, inter alia. Counsel for Sarcon submits that this Clause would be entirely otiose if in fact the parties had agreed that time would be of the essence. If that were the case as the plaintiffs contend the developer need serve no notice on the plaintiff but can proceed to treat the contract as discharged by the purchaser's breach and avail of his rights at law to retain the deposit and sue for damages, if he has suffered any.

[29] Mr Beattie QC and Mr Hanna QC argued that Clause 11 could be explained in two not inconsistent ways. Firstly, it was an example of the draftsman applying both belt and braces to the developer's position by spelling out his rights. Secondly, Mr Hanna argued that there was a risk to a party in the position of the developer if he failed to exercise his rights promptly after the repudiatory failure by the purchaser. He cited Ricks LJ in Stocznia Gdanaska SA v. Latvian Shipping Company and Others (No 2) [2002] EWCA Civ 889 to this effect –

> "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long there may come a time when the law will treat him as having affirmed."

I need not set out counsel's other helpful submissions in that regard in full but their point here was that Clause 11 clarified and protected the Developer's position.

[30] The points are valid but I remind myself that in accordance with the well known canons of construction I am seeking to ascertain the intention of the parties from the wording of their agreement set in its factual matrix. I am inclined to the view that the inclusion of this carefully drafted Clause does point to an intention on the part of the parties that time could be made of the essence in the way contemplated in Clause 11 but not otherwise.

[31] All three parties sought assistance from Clause 8 of the agreement in support of their point of view. However it seems to me that it can operate, in

whatever way it ought to, whether or not time is of the essence and I view it ultimately as neutral in this debate.

[32] One relevant matter identified by Lewison J. In his Interpretation of Contracts, 2007, para 2.07 is business common sense.

> "In addition to the words of the instrument, and the particular facts proved by evidence admitted in aid of construction, the court may also be assisted by a consideration of the commercial purpose of the contract, and in considering that purpose may rely upon its own experience of contracts of a similar character to that under examination."

[33] To a degree that underpins the point made at paragraph [29] above i.e. that in building contracts time is not normally of the essence for good reason. I would not lay undue stress upon it on it's own as it seems to me that the plaintiffs have successfully argued that the contract can be seen as workable even if completion was of the essence. However it is a factor which assists Sarcon as one does question why they would impose this burden on themselves unnecessarily. Clause 8 did not give them complete protection. It would not cover delay on their part or that of their contractor in commencing the works, for example. It would not be sensible to make time of the essence of completion here, especially if one was leaving open an interpretation that it was not of the essence for the purchasers.

[34] Having had the opportunity to reflect on this matter over the vacation it seems to me that the matter can be further tested in this way. What if we were not in a situation where the market has fallen but one where the market had risen? The court must construe the agreement to apply regardless of market conditions. If there was a rising market and a purchaser Employer through some oversight on his part or on the part of his solicitor or lender failed to complete on the specified day what would the situation be? The developer would wish to rescind the contract immediately because he could resell the apartment for a price in excess of that which he had agreed with the Employer. What if the matter came before the court in this context? In those circumstances the developer might wish to argue as the plaintiffs now do that Clause 23 did apply to completion and that time <u>was</u> of the essence. He would therefore say that the purchaser had no rights under the contract if the developer had immediately sent notice of acceptance of the repudiatory act by the purchaser. If the matter came before the court in that context the purchaser would point to Clauses 10 and 11 in particular. As indicated above Clause 10 in accordance with the quotation from Wylie would point to a contemplation that the purchaser was not subject to time being of the essence but would be charged interest while he or it was in delay in paying the purchase price. He would also point to Clause 11 as clearly showing and indicating what the

correct procedure was if an employer was late i.e. that the most likely reading of it was that a developer before treating the contract as repudiated for a breach of a condition would serve a five day notice to complete. It seems to me that if one looks at it in that way a court would be more likely to conclude that a developer would not succeed in depriving the employer of his deposit and his right to complete in the face of that wording of the contract. The court would conclude that the agreement did not make time of the essence in regard to completion and therefore the purchaser would not lose the benefit of his contract. Once one analyses in that way it then follows clearly that it could not have been the intention of the parties that the developer was under a duty to complete, time being of the essence, but the employer was not.

[35] In the light of all these factors I conclude that the preferable reading of the agreement is that the intention of the parties was that time would not be of the essence. I find that the reference to time limits in Clause 23 does not and was not intended to apply to the completion date. The document, which is apparently an adaption of a standard document furnished by the Law Society of Northern Ireland is not without its ambiguities. It may be that that is a matter the court should take into account in regard to costs. But it does not seem to me, having considered the matter, that the ambiguity is of a sufficiently evenly balanced nature to decide the matter by the application of the contra proferentem maxim. I feel able to form a clear view of the intention of the parties and do not therefore need to rely on the maxim.

[36] I therefore refuse the plaintiffs' application for summary judgment and give the defendant unconditional leave to defend the proceedings and continue with its counterclaim.

[37] In those circumstance it would be a mere obiter dictum on my part to rule on the effects of Clause 8. If my decision were otherwise I would have to reach a conclusion as to whether merely informing the purchasers of a delayed completion date could constitute a valid exercise of the developer's rights under Clause 8. I incline, I may say, to the view that that correspondence does not constitute a valid exercise of the right. It seems to me that some application, albeit informal, has to be made to the employer to "allow" the extension of time envisaged by Clause 8, but only for certain stated reasons. "Allow" here means permit and requires some exercise of will on the part of the Employer, in my provisional view, at least. But in the light of my finding above I make no concluded ruling on the operation of the clause.

[38] In his submissions Mr Hanna referred to the remarks of Carswell J in Re Savage's applications 1991 NI 103 at 107 to the effect that a judge in appropriate circumstances can reach a concluded view on a point of law at an Order 14 hearing. That is my position here. I am not concluding merely that Sarcon have an arguable case that their interpretation of the law is correct. My view is

that time is not of the essence regarding completion under this building agreement.