Neutral Citation No. [2014] NICh 4 | *Ref:* **DEE8992**

Judgment: approved by the Court for handing down | *Delivered:* **17/02/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2009 No. 121554

FERNHILL PROPERTIES (NI) LIMITED

Plaintiff;

-and-

ROBERT SCULLION

Defendant.

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DEENY J

[1] On 4 June 2007 the plaintiff and the defendant entered into a building agreement and an agreement for a lease whereby the plaintiff agreed to build and completely finish an apartment at College Court Central, 14-20 College Court and 54-62 King Street, Belfast for the defendant. The defendant's apartment was to be a two-bedroomed apartment on the sixth floor entitled 6D. The parties further agreed that the defendant would receive a lease in consideration of the payment of the agreed contract price of £203,000.

[2] The defendant had paid a booking deposit to the plaintiff's agents, Halifax Estate Agents of £500 on 23 April 2007 and, via his solicitors, Hastings and Company of Ballymoney, paid the balance of a 10% deposit in the sum of £19,800 on 31 May 2007 i.e. actually before the contract was returned complete.

[3] The agreement between the parties appears to have been signed by the defendant purchasers on 31 May 2007 and accepted by the plaintiff on 4 June. The plaintiff is referred to as the builder in the agreement and Mr Scullion as the employer. At paragraph 1 we find the duty of the builder to:

> "build and completely finish in a good and workmanlike manner for the employer upon the site

> … mentioned in the Schedule to this agreement … an apartment … for the sum mentioned in the Schedule (hereinafter called "the Dwelling"…)."

[4] Paragraph 5 provides that the builder "shall erect and completely finish the dwelling and make the same fit for habitation and use (vacating the site and clearing away all scaffolding, unused materials and rubbish therefrom) on or before the date of completion mentioned in the Schedule and shall leave the whole of the Dwelling and the Site in a clean and tidy state." The Site is defined in the Schedule to the Agreement as "College Court Central Development, 14-20 College Court and 54-62 King Street, Belfast". I pause to say that argument at the hearing with regard to completion of the apartment tended to concentrate on the apartment itself but clearly lawful completion would have involved the other matters set out in this clause.

[5] Clause 7 of the agreement deals with Delay and Extension of Time.

> "If the building work is delayed by bad weather, industrial disputes, shortage of materials, or any other cause outside the builder's control, a reasonable extension of time to the completion date shall be allowed by the employer."

[6] The Schedule sets out the precise address described above and names at paragraph 4 the Completion Date as November 2008.

[7] The court had the benefit of helpful written and oral submissions from Mr Michael Humphreys QC, with whom Mr Wayne Atchison, and from Mr Keith Gibson for the defendant. I do not accept the argument of counsel for the defendant that this completion date points to the first of the month. Where no day is specified it seems to me that the builder is only holding himself to the last day of the month of November.

[8] Paragraph 7 of the Schedule provides a rate of 15% interest per annum (on unpaid balances) but Mr Humphreys accepts the decision of this court in Fernhill Properties (NI) Limited v Mulgrew [2010] NICh 20 establishing that that interest rate is not enforceable as it is a penalty.

[9] It is appropriate to point out two things which are not in the agreement. The agreement is not made subject to finance. Clauses 9, 10 and 12 of the agreement are, by clause 20, subject to time being of the essence but that is not stated to be the case as regards completion. It was common case that the delay here was not of such an extreme nature as to amount of itself to repudiation by the builder plaintiff. The defendant accepts that he needed to make time of the essence by a notice to complete and submits that he effectively did so. A number of issues were identified by counsel and addressed by the parties and the court in the course of the hearing.

[10] Was the delay, which undoubtedly did occur from November 2008 until July 2009 "outside the builder's control"? If so, the defendant said this was relevant to the court's assessment of the next issue although this was not accepted by plaintiff's counsel. Was the notice to complete of 17th April 2009 served on the plaintiff's solicitors by the purchaser's solicitor valid and effective? The key aspects of that issue include whether the 5 days' notice from service was a reasonable time and whether the defendant needed to be and, if so, in fact was ready, willing and able to complete on or shortly after that date. Was it sufficient for the notice to say that the purchaser was rescinding if the apartment was not complete or was he obliged to serve a separate notice or rescission after the failure to complete within the time specified in the notice to complete?

[11] In light of the evidence and submissions which I heard I formed a clear view on one aspect of the case. I propose to deal with it and reserve my position on the remaining matters confining my remarks, which will be obiter, to a few short comments.

[12] As this court has had to rule in several other judgments and as has become clear with hindsight the peak of the recent property boom in Northern Ireland was the middle of 2007. However, it was far from apparent that this was the case at the time. I accept the submission of counsel for the plaintiff here that it was apparent by late 2008. That is relevant to what has become the crucial issue here as to whether the purchaser defendant was "ready, willing and able to complete on or shortly after 17 April 2009".

[13] I find that having given 5 days to the plaintiff builder to complete, the defendant ought to have been ready, able and willing to complete at that time. Authority for that was drawn to the court's attention by Mr Gibson in his helpful skeleton argument. In Stickney v Keeble [1915] AC 386 at 404 one finds the following passage from the speech of Lord Atkinson citing with approval the decision of the Court of Appeal in Howe v Smith (1884) 27 Ch. D. 89:

> "Fry LJ alone amongst the learned Lords Justices dealt with the question whether under s. 25, sub-s. 7, of the Judicature Act 1873, the rule of law, as distinguished from the rule in equity, still prevails, and at p. 103 came to the conclusion that the effect of the sub-section is that a purchaser seeking damages need no longer prove his readiness and willingness to complete on the day named but may still if he can prove his readiness and willingness to complete within a reasonable time after that day. The same rule would, of course, apply to the case of a vendor suing for damages. If this decision be right, as I am inclined to think it is, the law laid down in Tilley v

> Thomas and in Noble v Edwards is to this extent modified."

See also 'Notices to Complete and Forfeiture of Deposits', a talk by Peter Crampin QC stating that the current law does require the server of the notice to be ready to complete on the day named in the notice, citing Judge Toulmin QC in Northstar Land v Brooks [2005] EWHC 1919 (Ch.) holding that the serving purchaser's solicitor must be in funds to complete on that day. In this case it matters not whether it is the day or a reasonable time thereafter.

[14] The purchaser defendant was certainly presented with very considerable delay on the part of the builder who was unable to complete in November 2008 as promised. However, his response to this was not to press for completion but through his solicitors, Messrs Hastings, to serve a notice of rescission on 22 December 2008. Such a notice was issued on behalf of a number of their clients including Mr and Mrs Scullion.

[15] The plaintiff did not accept this notice and continued with its works of construction. On 3 April 2009 Messrs Hastings served a further notice of rescission on the plaintiff based on their continued delay. It is not now contended by the defendant that either of these notices were effective in law.

[16] The notice to complete therefore of 17 April is a volte face on the part of the purchaser now claiming that he is ready, able and willing to complete. His willingness to do so must be doubted given that previous history. However, it goes further than that. Mr Scullion adduced a document from a lender offering to advance money towards him as a purchaser. But it was not a formal Letter of Offer that might be binding on a mortgagee. Furthermore it was to him and his wife. Nor, clearly, was the actual money in the hands of the purchaser's solicitor at the time the Notice was served nor at any later time. Furthermore Mr and Mrs Scullion had also agreed to buy another apartment 2E in the Block to which I will return in a moment.

[17] I had the benefit of hearing Mr Scullion give evidence and being cross-examined. The thrust of his evidence was that Apartment 6D was to be his home. He was anxious to remove from his parent's house where he and his own family were then living. When the plaintiff did not complete in time they gave up on that aspiration. However, he faces a very grave difficulty here in that the other Apartment 2E was in fact ready shortly afterwards and the Scullions did not complete on that.

[18] He might have argued that this was because 6D had a more agreeable aspect out towards the west of the city than 2E, which was not only lower down but facing north and into an internal courtyard. However, he did not make that case. He did not really have any good explanation for not completing on 2E.

[19] Furthermore, when questioned as to how he was going to bridge the gap between the amount available from the lender, if it was available, and the purchase price or prices he said that his parents would assist him with the various commitments into which he had entered. But the evidence for this was very vague and very thin.

[20] I have concluded in the light of his oral evidence and the documentary contemporary evidence that the defendant was not, in truth, ready, willing and able to complete on 24 April or indeed even shortly after that date. The inference I draw is that with the fall in property prices he and a number of other purchasers who were related to him repented of their contracts and wished to escape from them. One has some sympathy with them but they had entered into binding legal contracts with the plaintiff which is entitled to have the contracts enforced.

[21] I wish to reserve my position on the effect of the delay on the part of the builder in completing. I accept Mr Gibson's submission that it may well be relevant to the action subsequently taken by the defendant in an appropriate case. For the assistance of the profession it seems to me very doubtful if the builder can claim that it was all outside of its control pursuant to Clause 7 of the Agreement which would entitle it to an extension of time (subject to a point I will make in a moment). The real problem here was the initial conflict in the summer of 2007 in entering into binding legal contracts with purchasers to complete by November 2008 without having finalised a relationship with the persons who are actually going to build the structure for the plaintiff. They only agreed to do so at a date later than that already promised to the purchasers. Mr Humphreys intends to call technical evidence in the appropriate case or cases regarding delay but was not ready to do so in this case.

[22] I incline to the view that the 5 working days allowed by the defendant's solicitor here for completion was insufficient. That period is to be found in the General Conditions of the Law Society of Northern Ireland. But that reflects the normal position where the purchaser is acquiring a building already in place. The building should be there to be handed over by the vendor. The money should be there to be paid by the purchaser. A 5-day completion period in those circumstances is reasonable. However, a purchaser who chooses to buy off the plans is likely to have to give a longer period of notice. That will, of course, be related to the extent of delay on the part of the builder. The greater the delay on the part of the builder the more entitled to some resolution is or maybe the purchaser.

[23] Like the Court of Appeal in North Eastern Properties v Colman [2010] EWCA Civ. 277: [2010] 1 WLR 2715 I would not propose to rule on the point surprisingly, as Briggs J said at para. 78 therein, without authority, as to whether the server of a notice of this kind is obliged to serve a further notice of rescission once the notice period had expired. If it required to be decided it would be helpful to have evidence of the actual practice in this jurisdiction.

[24] I find for the Plaintiff. I shall hear counsel on the Plaintiff's up-to-date position on the relief sought and on the issue of costs in the light of the court's previous ruling of 5 September 2013.