**Neutral Citation No. [2010] NICh 20** | *Ref:* **DEE8020**

*Judgment: approved by the Court for handing down* | *Delivered:* **21/12/10**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**FERNHILL PROPERTIES (NORTHERN IRELAND) LIMITED**

**Plaintiff;**

**-and-**

**PAUL MULGREW**

**Defendant.**

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**DEENY J**

[1] In this action Fernhill Properties (Northern Ireland) Limited have sued Paul Mulgrew. By the statement of claim endorsed on the writ of summons they contend that Mr Mulgrew had contracted to purchase from them apartment No. 4D at College Court Central, College Court, King Street, Belfast. The consideration for the Building Agreement and related Agreement for a Lease, dated 10 April 2007, was the sum of £186,000. The defendant on 16 April paid a deposit of £18,100 in addition to an earlier holding deposit of £500 making a total of 10% of the purchase price. The plaintiff proceeded to construct the block of apartments in question. On or about 10 July 2009 the solicitors for the plaintiff notified the defendant that the premises were complete and ready for occupation and fixed the date for completion. The defendant did not complete. The solicitors for the plaintiff, Messrs Worthingtons, on 21 August 2009, served a notice to complete, but again the defendant did not complete. The plaintiff subsequently issued a writ of summons bearing the date 3 February 2010 against the defendant. The first relief sought on foot of the statement of claim endorsed on the writ was specific performance. That is a remedy which is normal in regard to a breach of a contract for the sale of land. As I have observed before, there is a difference between a purchaser who wishes to insist on acquiring a particular property which he has agreed to buy and the vendor who is in effect merely seeking to be paid for what he has agreed to sell, in this case a newly

constructed apartment. But, nevertheless, vendors customarily have a right to seek specific performance.

[2] It is relevant to the point to which I will turn in a moment that the defendant in this case neither entered an appearance to that writ of summons as he was obliged to do by the Rules of the Court of Judicature nor did he enter a defence to the statement of claim endorsed upon the writ. The plaintiff's solicitors on 7 April 2010 brought an application to enter judgment in default of appearance pursuant to Order 13 Rule 7. The court has considerable experience of applications being made for summary judgment by way of specific performance where the plaintiff believes there is no defence to the action and that was the alternative set out in the plaintiff's summons of 7 April seeking such relief pursuant to Order 86 of the Rules of the Court of Judicature.

[3] The matter came before this court on 28 April 2010. There was an affidavit of service on the defendant. There was no appearance by him before the court although he was paged. The court considered the papers and granted the order for specific performance sought by the plaintiff on the same date. In the events the defendant has not met that order of the court of 28 April for specific performance of this contract by paying the monies due and completing and taking possession of the property. In such a situation the plaintiff has in effect two options. Firstly, if it thought that the failure to comply with the order was contumacious and that the defendant was in fact in a position to pay over the sums in question the plaintiff could ask the court for penal remedies for the defendant's breach of the order of the court. In the alternative, as here, the plaintiff brings a fresh summons inviting the court to discharge its earlier order of 28 April but to enter judgment for the plaintiff against the defendant and award damages for breach of contract. As discussed in McGregor on Damages 18th Edition Chapter 22-032 and following there was for a period of time uncertainty about the rights of a party whose order for specific performance had not been met. However those uncertainties were decisively resolved by the House of Lords in the case of Johnston v Agnew [1980] AC 367 and the profession and the courts have had the benefit of the authoritative judgment of Lord Wilberforce in that case on behalf of the House. There is no dispute that the plaintiff is entitled to that order now. Furthermore on foot of the judgment of Lord Wilberforce, which deals with damages, at page 401 he finds as follows:

> "In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors fault) should logically be fixed as the date on which damages should be assessed."

And he goes on to provide that the same date should be used for the purpose of limiting the respondent's right to interest and damages.

[4] I accept Mr Humphreys' submission that the appropriate time for assessing the loss is now. It is only now when the court vacates its earlier order for specific performance that it can properly be said that that remedy has been aborted. Therefore as part of this order I will vacate the earlier order for specific performance. I record that the defendant did not appear at first and was not represented.

[5] The position therefore is the vendor here sets out in the affidavit of its solicitor Catherine McKeague of 9 November 2010 its claim for damages. The original sum was £186,000. The defendant is entitled to credit for the deposit which he now loses, of £18,600. But he is not liable to pay the whole of the remaining amount but rather the loss of the bargain suffered by the plaintiff. The plaintiff has very properly obtained a valuation from Messrs Colleys and that values the apartment in the current market at £115,000 so the net loss therefore is £52,400.

[6] They then set out in detail some costs which they contend are wasted as a result of the breach of contract by the defendant for completion of the sale of the apartment. They are as follows. The abortive legal costs on the contract which he did not complete are £209.90. There is the portion of buildings insurance which the plaintiff has continued to pay since the date of breach and that comes to a sum of £113.04. There is the portion of the service charge for security and janitorial costs which the plaintiff has continued to pay from the date of the original breach in the sum of £546.36. It seems to me that those items are all recoverable in as much as if the defendant had honoured his contract the legal costs would not have been aborted and the other two costs would have been met by him. Furthermore the plaintiff claims as a head of damage the fee which it paid to the estate agents in the sum of £1,604.25. That is now a loss because it too is wasted. I observe the alternative claim might be for the cost to the plaintiff of now marketing the property. There is authority as I have indicated in the earlier case of Fernheath Development Limited v Malone & Malone [2010] NI Ch 4 for the proposition that the sale of the property is the best way of assessing the loss to the plaintiff but it is not the only way. So I am persuaded that that is also a proper matter for the plaintiff to recover.

[7] Furthermore the defendant should have paid the balance purchase price over at the date for completion and he has failed to do that and the plaintiff has lost interest on that as a result. ( The plaintiff makes no further claim for loss of the use of the money). The plaintiff here seeks the interest pursuant to clause 9 of the building agreement for lease dated 10 April 2007 or, in the alternative, pursuant to Section 33A of the Judicature Act (NI) 1978. It claims the interest to run in the period from 27 July 2009 i.e. first

completion, to 25 November 2010, in the sum of £33,502.93. That substantial sum is arrived at because the interest rate to be found at clause 9 is at 15% per annum. I raised a concern about that at the conclusion of the first day of hearing, with Mr Humphreys. I adjourned the matter to give the plaintiff, and indeed the absent defendant, an opportunity for any further evidence and submissions upon it. The plaintiff's solicitor, Miss Catherine McKeague, helpfully furnished a further affidavit with a download from the Bank of England website of changes in the base bank rate from 1694 until the present date. Whilst base rate at the present time is a mere 0.5% at the time the contract was entered into on 10 April 2007 base rate stood at 5.25%. The base rate rose to a peak of 5.75% from 5 July to 6 December 2007 before falling fairly rapidly to its present level. I will turn to the law on this topic in a moment but I had allowed the plaintiff an opportunity to establish that this rate of interest was justified as a genuine pre-estimate of its loss by reason of some exceptionally high rate of interest which it was paying to its lenders in connection with this development. However, I did not make it obligatory for the plaintiff to do so. Miss McKeague deals with this at paragraph 3 and 4 of her affidavit as follows:-

> "3. I confirm that the borrowing of the plaintiff to construct the development at College Court Central has not been fully discharged.
>
> 4. I also confirm that while the plaintiff was paying interest at a commercial rate on the borrowed money, it wishes to preserve the confidentiality of same."

Mr Mulgrew attended on the second day of hearing. His tale was the sad and familiar one of someone who bought in good faith and optimism but is now unable to raise mortgage finance at the level required to honour the contract. A lower offer by him was refused by the plaintiff. He was unable to help on the legal issues at stake. Understandably therefore he made no application for discovery of the plaintiff's funding arrangements. I reserve my position on that topic in the circumstances.

[8] The issue before the court is whether the rate of interest, agreed between the parties, amounts to a penalty or in the alternative is a sum in liquidated damages that should be enforced by the court. The leading authority on the topic of a penalty is the decision of the House of Lords in Dunlop Pneumatic Tyre Co Limited v. New Garage and Motor Co Limited [1915] AC 79. Lord Dunedin at pages 86 and 87 sets out various propositions which he deduces from the decisions of the courts which rank as authoritative.

> " 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima

facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzqierdo y Castaneda [1905] AC 6.

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of breach (Public Works Commission v. Hills [1906] AC 368; Webster v. Bosanquet [1912] AC 394.)

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank case above).

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (Kemble v. Farren 6 Bing 141). This though one of the most ancient instances is truly a corollary to the last test. Whether it has its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could not recover further

> damages for non timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable – a subject which much exercised Jessel MR in Wallace v. Smyth 21 Ch T243 – is probably more interesting than material.
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> (c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in Lord Elphinstone v. Monkland Iron and Coal Co 11 App CAS 332)."

[9] There is an interesting discussion of the topic in McGregor on Damages (18th Edition) at 13-013 ff. The learned editors draw attention to a dictum of Colman J in Lordsvale Finance plc v. Bank of Zambia [1996] QB 752 to the effect that:-

> "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach."

This dictum was quoted with approval by Manse L.J. in Cine Bes v. United International Pictures [2003] EWCA Civ 1669 and by the Court of Appeal in Murray v. Leisure Play plc [2005] IRLR 946, CA.

[10] As that citation indicates that latter judgment, reversing a decision by Stanley Burnton J that a provision in a contract of employment would amount to a penalty, is in the employment context which Buxton LJ thought did not fit easily with the traditional learning as to penalty clauses.

[11] I take from these authorities that the dictum of Colman J quoted above correctly draws from the binding decision of the House of Lords in Dunlop that the sum provided under the contract which may be a penalty does not necessarily have to be "extravagant and unconscionable". Clearly it is a penalty if that is the case. The decision for the court as the authorities show is a question of construction of the contract at the time it was made to ascertain whether this was a genuine pre-estimate of damage which would be suffered by the innocent party in the event of default by the other party rather than

being a sum amounting to a penalty to deter the other party from breaking a contract. In approaching the issue as to whether the sum concerned is a genuine pre-estimate of damage the court acknowledges that the parties may agree that at the upper end of a range of possible loss for the innocent party. If it is outside such a range then it cannot be a genuine pre-estimate of loss and damage.

[12] On the submissions before me neither McGregor on Damages nor Chitty on Contracts (30th Edition) seem to expressly say that the fixing of a rate of interest can amount to a penalty. On first principles I can see no reason why it should not be subject to the same principles of law. Happily authority is found for that view in Taiwan Scott Company Limited v. The Master Golf Company Limited [2009] EWCA Civ 685.

[13] Mr Humphries drew this authority to the court's attention with particular reference to the concluding paragraphs. The trial judge declined to award the contractual rate of interest as set out in the agreement in the amount of 15% (as here) because he said it was:-

> "an unreasonably high rate, and more inclined towards a penalty that a genuine estimate for loss."

As Longmore L.J. said in delivering the judgment of the Court of Appeal it was either a penalty or it was not. He went on:-

> "It does not seem to me that a contractual rate of 15% was in any way exorbitant in July 2001. It was a rate agreed by two commercial concerns in the economic circumstances of the time that should not lightly be set aside."

Their Lordships therefore awarded interest at that rate. Very interestingly the base rate in July 2001 was also 5.25%. The authority therefore is clearly one on which the plaintiff is anxious to rely.

[14] A decision of the Court of Appeal in England while not binding on me is of strongly persuasive authority. Indeed in the past the Court of Appeal in Northern Ireland has been reluctant to depart from decisions of that court even where they doubted them, preferring to leave the matter to resolution by the House of Lords. See Beaufort Developments (NI) Limited v. Gilbert Ash (NI) Limited [1997] NI 142 at 155 per Carswell LCJ. It is a matter for my colleagues in the present Court of Appeal to form their own view as to the approach today. It is conceivable that the constitutional devolution of justice to Northern Ireland might be used as an argument that that is a less appropriate approach than in the past.

[15] Fortunately it does not seem to me necessary to do justice here to fly in the face of the view of Longmore L.J. which I feel can be safely distinguished. First of all as he points out the rate in that case was agreed by two commercial concerns. It related to the importation of goods from China. This is a very different factual matrix from the one with which I have to deal. Secondly, I very respectfully observe that the judge's view as to whether the contractual rate was "exorbitant" is not the appropriate test. It may be that as the appeal only touched on the issue of interest as a very secondary matter that the authorities on this point were not opened to the court.

[16] It is necessary for me to apply those authorities. The plaintiff herein is unable or unwilling to offer evidence that 15% was a genuine pre-estimate of its loss in the event of non completion, even in April 2007. It elects not to show that itself would have been exposed to interest charges even approaching that figure in the event of a breach by the purchaser. Mr Humphreys makes the valid point, albeit only from the Bar, not based on an affidavit, that this rate of interest was accepted by the purchasers generally here. I observe that the plaintiff's related company Fernheath Development Limited fixed a rate of interest at 6% in a similar term as dealt with in Fernheath Development Limited v. Malone op. cit. . I observe further that as has been said a number of times to this court in recent hearings a fever to purchase these apartments, even from the plans, overtook people in Northern Ireland particularly in 2006 and at least the first part of 2007. Whether some solicitors cautioned against agreeing to such a rate of interest and were overborne by their clients or simply overlooked the matter or thought the rate acceptable is not something on which I have evidence.

[17] The court has had to cope with the considerable body of litigation arising out of the property boom in Northern Ireland from 2005 to 2007 and the subsequent property crash. Inevitably in those circumstances the court has seen considerable evidence of interest rates being charged by lenders in connection with the purchase of property. For the rate of 15% here to be a genuine pre-estimate of loss it seems to me that the plaintiff, with a then base rate of 5.25% would have had to say that it was going to pay or was at a foreseeable risk of paying 9.75% above base for continuing borrowings in the event of non completion by the purchaser. They do not say that. I have not seen a rate of that nature in this court nor anything close to it. It may well be that a rate of 10% or even 12% might have been justified as such an estimate, bearing in mind that base rate might have been foreseen then as rising further which indeed it did, albeit only to a modest extent. It seems to me that the high and round figure of 15% was clearly, on the balance of probabilities, a penalty designed to deter a purchaser from defaulting on completion.

[18] In arriving at that conclusion I take into account both the judgment rate which continues to prevail in Northern Ireland at 8% and also the Late Payment of Commercial Debts (Rate of Interest) (No 3) Order 2002. I take into

account Mr Mulgrew's statement that he had no recollection of the rate of interest being discussed by his solicitor with him at the time of entering into the contract but it must be clearly understood that this is of limited relevance to a question of this kind. I also take into account the decisions in Munkenbeck and Marshall v Harold [2005] EWHC 356 and McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC).

[19] I decline to enforce the contractual rate of 15% per annum from the date of non completion on the basis that it is a penalty. (That does not mean that if a person elects to borrow money at that rate that they are not liable to repay it.) Although the point was not argued before me I propose to follow the dictum of Nicholls L.J. in Jobson v. Johnston [1989] 1 W.L.R. 1026 at 1040 to the effect that strictly speaking a penalty clause remains a term of the contract and is not struck out, but that, if the clause is sued upon, it will not be enforced by the court beyond the amount of the contracting party's loss. In assessing that, without being told what the plaintiff is in fact paying for any continued borrowing on this development, it is clearly right that I should take into account the fall in base rate at and from the date of the breach. I conclude that a fair measure of interest in the circumstances is 5% per annum. I therefore award the plaintiff the sum of £11,786.75 representing interest from 27 July 2009 until 21 December 2010. The judgment in total is for £66,660.30.

[20] The final issue is one of costs. The plaintiff here choose to elect to pursue the remedy of specific performance initially. If it had commenced such an application despite correspondence clearly making the case that the defendant was so impecunious that it would be impossible for him to meet such a decree, or if it persisted in such an application after an affidavit or Defence to like effect, it does not seem to me that it would be entitled to recover its costs when that remedy proved abortive and it sought the assistance of the court by way of a judgment in damages. In that case the plaintiff would have been liable for increasing the costs of the proceedings and it would be unfair to visit those on the defendant. In this case counsel points out that there was no indication at all from the defendant here that he was in that position at the time that they issued the proceedings for specific performance. I consider therefore that the plaintiff is entitled to its costs of this application.