

Specific performance – option agreement – option exercised – delay in completion - whether remedy barred by laches – interest on purchase moneys

**Neutral Citation no. [2002] NICH 12**

Ref: **GIRF3784**

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

Delivered: **24/10/2002**

**2001/1887**

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

---

**CHANCERY DIVISION**

---

**BETWEEN:**

**JAMES McIVOR**

**Plaintiff;**

**-and-**

**THE NORTHERN BANK EXECUTOR AND TRUSTEE  
COMPANY LIMITED**

**Defendant.**

---

**GIRVAN J**

[1] In this action the plaintiff seeks specific performance of an agreement made between himself and Nialla McDonald deceased (“the deceased”) relating to a site of land at Ailsa Road, Cultra. The deceased died on 25 October 1999 and the defendant is the executor of her will.

[2] The deceased and the plaintiff entered into an agreement which was described as an option agreement on 18 December 1987 (“the agreement”). The deceased as grantor granted the plaintiff an option to purchase the lands described in the agreement which were part of the very large garden attached to the deceased’s dwelling house called “Bullybanks” Ailsa Road, Cultra, for the sum of £30,000. Clause 2 of the agreement provided that the option

should not be exercised by the grantee before 6 April 1988 and should remain in force for a period of one month thereafter failing which it should become void and have no further effect. By clause 3 of the agreement in consideration of the option the plaintiff agreed to pay the deceased the sum of £10,000. That sum was duly paid. Under clause 4 it was provided that if the plaintiff exercised the option the deceased would grant to him a lease of the lands for the term of 10,000 years to commence from the date of the exercise of the option at a yearly rent of one penny if demanded and the lease was to be in the form attached to the agreement with such alterations, modifications and additions as should be agreed between the grantor and grantee. Clause 4(2)(a) to (c) set out certain provisions which the lease had to contain and by clause 4(3) of the agreement the plaintiff agreed at his own expense to remove or lop to a sufficient height to the satisfaction of the deceased all trees or foliage in that portion of the lands marked green on the map attached to agreement at that time obstructing the view of the defendant from her house and he agreed to prevent the same from growing to a size or height which would restrict such a view. It was also provided that the plaintiff would not build any buildings on the area marked green on the map which represented an area of approximately one half of the total site. The schedule to the agreement defined the lands the subject of the option agreement by reference to a map and included within the grant a right of way insofar as the deceased could grant the same over and along the lane or right of way coloured yellow on the map.

[3] The plaintiff contended and I accept on the evidence that although presented as and technically constituting an option the agreement was in reality in the nature of an agreement to sell the site for £40,000 with the purchase price being staggered over two financial years for tax purposes beneficial to the deceased but of no relevance to the plaintiff. This point is a relevant factor when considering the central issues in the case which turns on the question whether the plaintiff has lost his right to specifically enforce the contract because of delay and laches on his part. The reality is that the plaintiff has paid a significant part of the overall price of the site.

[4] Another aspect of the agreement which should be noted at this stage is that Clause 4(2) of the agreement envisaged that the parties might wish to negotiate modified or additional terms in relation to the lease. In the absence of agreed modifications or additions the lease terms attached to the option were to be the terms for completion.

[5] The plaintiff by letter dated 12 April 1988 exercised the option. It is common case that the option was validly exercised and that as a result of the exercise of the option the deceased and the plaintiff were in contract, the deceased being bound to grant the plaintiff a lease in accordance with the terms of the agreement subject to any modification or alteration thereto agreed by the parties. The contract did not contain a date for completion but

where a contract for sale does not spell out a date for completion it is an implied term of the contract that completion will be effected within a reasonable period. Since this contract envisaged the possibility that the parties should have the freedom to negotiate different lease terms it would be an implied term of the contract that the parties would have a reasonable period within which to negotiate and failing agreement of additional or different terms then completion would be effected in accordance with the terms of the agreed lease, completion to be effected within a reasonable period after it became clear that the parties could not negotiate further or additional terms.

[6] Initially the deceased appears to have been content with the arrangements she had entered into with the plaintiff and she contacted the plaintiff with a view to seeing if he would undertake work through his construction company building her new kennels and a cattery. It is clear that the deceased who was very attached to her dogs and cats was really interested in raising money for the purpose of building kennels and a cattery.

[7] In the spring the plaintiff ordered materials and organised labour for the proposed landscaping and fencing works that he had in mind for completion in April 1988 although he did not intend to build on the site for a number of years. The deceased began to increasingly complain about traffic along the right of way which ran along side her house in that it disturbed her animals and indeed she objected to workers and equipment going up and down the lane to the Clanbrassil Nursing Home which was located at the rear of her premises and belongs to another unconnected party.

[8] Between 12 and 18 April the defendant became increasingly critical of work being carried out by the plaintiff on the site and indeed she became abusive during the meetings. The matter came to a head on 18 April 1998 when she refused to allow labourers or equipment to pass along the right of way to the option site and she called the police in to stop them. In an effort to cool the situation the police suggested that Mr McIvor withdraw from the site, which he did, and allow legal representatives to sort the matter out. Everyone appreciated that the deceased was a difficult and eccentric woman who apparently had a drink problem and who had fallen out with many of her neighbours and her children.

[9] It was Mr McIvor's evidence that on 19 April a meeting took place at the offices of Mr Perrot and Mr McCall who was acting for Mrs McDonald with the plaintiff being present. There was discussion about postponing completion of the agreement. Mr McIvor said that Mr Call informed him that the agreement was valid for 21 years, Mr McCall apparently misunderstanding the law relating to perpetuities in this context. It was Mr McIvor's case that the parties came to an understanding that the agreement would not be enforced for 15 years. There was confusion in

Mr McIvor's pleadings as to when the agreement in relation to the 15 years was reached, the statement of claim alleging that it was on 21 April but the particulars served in the course of the pleadings referring to an agreement reached on 19 April. In his evidence in court the plaintiff's said that there was a meeting on 21 April when the 15 year arrangement was confirmed. His understanding of the position was that an arrangement had been entered in to that he would not enforce the agreement for 15 years unless the deceased died in the meantime, but that if the parties could come to an agreement for earlier completion he would complete. It was the plaintiff's case that he relied on this arrangement in that he did not issue proceedings to enforce the completion of the contract. He indicated in his evidence that the motivation behind that decision was that he did not want to sue an elderly neighbour of the standing of the deceased. His evidence was that he never intended to abandon the contract and I am satisfied on the evidence that he never formed that intention. An analysis of the correspondence which thereafter passed between the various solicitors acting for Mrs McDonald and the plaintiff showed that he was consistently maintaining the position that he had a good contract. He wanted to negotiate further and additional terms but he was intending to rely on his contractual rights in due course if agreement could not be reached.

[10] Mr Shaw QC in his cross-examination did demonstrate that the relatively simplistic explanation of the understanding allegedly reached in April 1988 did not fit neatly into the evidence and the pleaded case. The evidence and the pleadings did not appear to conform with the diary entries of the plaintiff in relation to his understanding of the outcome of the discussions and in the correspondence which was written the plaintiff did not assert or rely on any form of contractual arrangement entered into in April to vary or modify the option agreement or to extend time in relation to completion. Mr Shaw in cross-examination appeared not to challenge the plaintiff's honesty as a witness but rather his recollection and interpretation of events in 1988. Mr McIvor's diary entry for 25 May 1988 noted that he had a "good long term option and will wait a number of years either (a) when the deceased agrees (b) when (she) dies or (c) within 21 years; been suggested she cannot survive beyond 15 years." This diary entry shows the plaintiff's belief, induced by Mr McCall that he had a right to enforce the agreement for up to 21 years and it shows the genesis of the idea of 15 years as a relevant period. The understanding noted in that diary entry is different from the case as pleaded but it is still a material matter in relation to the issue of delay and laches (*infra*).

[11] The true question is whether in all the circumstances the plaintiff has lost his right to enforce the contract which admittedly came into existence when the contract was signed and the option exercised. The question is whether the passage of time before the plaintiff's attempt to enforce the contract was such that in equity the plaintiff should be deprived of his right to

rely on and enforce the contract. As pointed out in Jones and Goodhart on Specific Performance at page 109 delay alone is not the only element in relation to laches. To amount to laches the delay must be sufficient to be evidence of the abandonment of the contract with the plaintiff or it must be coupled with some other factor which makes it unjust to the defendant to order specific performance. The position was stated in Lindsay Petroleum Company v Hurd (1874) LR 5 PC 221 at 239 to 240 per Sir Barnes Peacock thus:

“Now the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case if an argument against relief which otherwise would be just is founded upon mere delay that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantial equitable. Two circumstances, always important in such case, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

It is further pointed out in Jones and Goodhart (op. cit) that in the case of specific performance although the court will normally refuse to order specific performance of an executory contract after the limitation period for claiming damages for breach of contract has expired a considerably shorter delay on occasion may lead to refusal of specific performance but conversely in the case of a partly executed contract specific performance may be ordered well beyond the period of limitation. Delay will be disregarded if the parties are negotiating with each other over the problems which have arisen even if one party is formally given notice that he regards the contract is terminated. The burden of proving that circumstances exist which would justify the refusal of specific performance lies on the party resisting it.

[12] In Lazard Brothers & Co Ltd v Fairfield Properties Co (Mayfair) Ltd (1977) Sol. Jo. 793 Megarry VC, after referring to the old authorities, stated that whatever might have been the position over a century ago the approach

today is different. If between the plaintiff and the defendant it was just that the plaintiff should obtain the remedy the court ought not to withhold it merely because the plaintiff had been guilty of delay. There was no ground on which delay could properly be said to be a bar to a degree of specific performance in that particular case. The Vice Chancellor thus indicated that the current state of the law requires a balancing exercise in relation to the justice of the case.

[13] Having regard to all the circumstances of the case and carrying out the balancing exercise now called for I conclude that the plaintiff is entitled to rely on his contractual rights to enforce the contract at this stage even though many years have past since the option was exercised. The circumstances are not such as to make it equitable or just to deprive him of the remedy of specific performance.

[14] The plaintiff had partially performed the contract having paid a quarter of the purchase price. As I have already indicated it would be artificial to regard the payment of £10,000 as merely an option fee, the true nature of this contract being that it was a staggered contract for the sale of the property the payment being staggered for the financial benefit of the deceased. The cases do show that where a party has performed or partially performed his side of the contract that it is a relevant factor in his favour on the issue of delay. To deprive the plaintiff of his remedy would be to leave the estate of the deceased with the benefit of the £10,000 paid in 1988.

[15] I am satisfied on the evidence that the deceased herself recognised the continued existence of the option and that she was morally bound by it. This is evidenced about what she told her solicitor when she was drawing up her will in the latter days of her life.

[16] The plaintiff continuously acted on the basis and asserted that the agreement was enforceable. While he was trying to negotiate additional or modified terms he did not say anything or do anything to indicate that he had abandoned the contract that existed between the parties. While he was trying to negotiate additional terms on modified terms in relation to the contract (and the contract envisaged that such negotiations could take place between the parties albeit against the background of an enforceable agreement) I do not read those negotiations as pointing to the conclusion that he had abandoned the fall back position that existed on foot of the contract that either side could enforce against the other in the event of further or additional terms not being agreed.

[17] While the arrangements and discussions between the plaintiff and Mrs McDonald were not as clear cut or as precise as the plaintiff now recalls them to have been I do accept that Mrs McDonald did lead the plaintiff to believe that he could postpone completion for a substantial period indicating

that she did not care what happened to the land after her death and she recognised that after her death she would get the land. This is also confirmed by the view she expressed to her solicitor. Mr McCall who was the agent for the deceased did state and lead Mr McIvor to believe that the contract was good for 21 years. Mr McIvor did not issue proceedings against the deceased being reluctant to get involved in litigation against this elderly and very eccentric woman and he acted in my view from entirely honourable and justifiable motives. I am satisfied that he was led to believe by or on behalf of the deceased that he would eventually get the land and he did not interfere with the land in the meantime relying on that understanding. I am satisfied that while he has now persuaded himself that he had an agreement with Mrs McDonald that he would not enforce the agreement for 15 years he was led to believe (and on this there was really no dispute) that there was a long stop of 21 years as a result of Mr Call's advice and in his evidence he did refer to that as being a factor which weighed with him. As noted it is supported by the diary entry.

[18] In my view it would have been unconscionable and inequitable for Mrs McDonald in her life time to rely on the defence of laches, Mr McIvor at all times having acted honourably in dealing with a situation which was entirely the making of Mrs McDonald herself who initially was enthusiastic about the agreement but as soon as she got the necessary money for her project blew hot and cold in relation to the matter and very quickly became entirely obstructive. It was the deceased who caused the difficulties, who kept changing her mind, made life difficult for Mr McIvor and who frustrated him at every turn, all the time retaining the benefit of the sum of £10,000. To be fair to the deceased from what she told her solicitor she did recognise that Mr McIvor was likely to get the land after her death.

[19] The logic of the defendant's position is that the plaintiff should be treated as losing the benefit of the contract (and with it the £10,000) because he did not issue proceedings against an elderly and eccentric woman who had indicated every intention to irrationally defend any proceedings issued against her and who in the event of the contract being enforced against her showed every likelihood of resisting the use of the right of way, thereby in all probability necessitating the institution of a further set of proceedings.

[20] While equity rightly penalises the party who sleeps on his rights and the statutes of limitation provide litigants with protection against claims which have lapsed by a passage of time, in equity every case where laches is pleaded must be considered in the context of its own particular and peculiar circumstances. The circumstances of this case are very peculiar to the parties and I consider that to deprive the plaintiff of his contractual right would be unjust and inequitable.

[21] In these circumstances I am accordingly satisfied that the plaintiff has made out a case for specific performance of the contract and the defendant has failed to persuade me that it has made out a case for depriving the plaintiff of his remedy by virtue of the doctrine of laches. The question arises as to whether in completing the contract the plaintiff should pay interest on the outstanding sum of £30,000. On one view the deceased as vendor was guilty of wilful default in bringing about a situation where she refused to complete the contract and thereby led to a situation whereby she deprived herself of the use of the £30,000 that she would have received earlier if she had completed on time. The common law position seems to be that a vendor is entitled to interest on the balance purchase monies unless he or she is in wilful default. The circumstances of this case are somewhat special in that the defendant, as he was entitled to under the contract was seeking over a period of time to negotiate further and additional terms in relation to the completion. In addition he who seeks equity must do equity. The plaintiff himself has had the benefit of retaining the sum of £30,000 which he could have lodged in court, which he could have sought to put in joint deposit receipt or which he could have invested pending completion of the contract. The deceased as vendor of course had the benefit and use of the land as a result of the delay in completion and normally would have to account for a rent for use and occupation of the property pending completion. I consider that the just and equitable way of dealing with the matter is to direct the plaintiff to pay a net 5% per annum on the balance figure of £30,000 from April 1988 to date. I shall hear counsel on the calculation of the full interest figure and hear counsel on the issue of costs.