Neutral Citation No. [2013] NICh 9 | *Ref:* **DEE8787**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/05/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

WILLIAM MARCUS McCLURE and
LINDA ELIZABETH DEMPSTER McCLURE

Plaintiffs

v

CRF DEVELOPMENTS LTD, A COMPANY IN ADMINISTRATION

Defendant

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DEENY J

[1] By Memorandum of Sale of 12 February 2007 the plaintiffs contracted to sell and the defendant contracted to purchase premises situated at 67, 68 and 69 The Promenade, Portstewart, County Londonderry. The premises were part of a former hotel known as the Montague Arms.

[2] The negotiations of the plaintiffs had been with Colin Richard Fletcher, who was subsequently disqualified by undertaking from serving as a company director in respect of his conduct as a director of the defendant. He nominated the company as the purchaser. It has since gone into administration but after the sale was completed. The joint administrators, Mr Brian Murphy and Mr Michael Jennings, consented to the grant of leave to the plaintiffs to bring and continue these proceedings against the company in administration.

[3] The Memorandum of Sale records the agreed price as £4,000,000 with a deposit of £100,000 to be paid on 19 February 2007. The balance was to be paid in accordance with special condition 4, included in the contract which was otherwise, apart from five special conditions, governed by the general conditions of sale of the Law Society of Northern Ireland, 3rd Edition 2nd Revision.

[4] What the parties agreed was that £3,000,000 (inclusive of the deposit) would be paid on completion on 30 March 2007. The balance of £1,000,000 was to be paid

within 12 months of the purchaser obtaining full planning permission for his proposed development involving commercial premises on the ground floor with apartments above. However, the parties agreed to a backstop date whereby the sum of £1,000,000 should be paid to the plaintiff vendors in any event by 31 December 2008.

[5] Special condition 4 of the contract also provided that the "purchaser shall not demolish or commence demolishment (sic) of the property until the said balance of £1M is firstly paid by the purchaser to the vendor …"

[6] It was further provided by special condition 3 that the vendors could purchase a first floor flat facing the promenade from the purchaser after construction in consideration of the vendor paying to the purchaser £1,000. Apparently this was intended for Mr McClure's father who was then resident in the property.

[7] In the event the transaction was effected and completed by an indenture assigning the leasehold interest of the plaintiffs to the defendant company and made on 15 June 2007. Neither of the special conditions was incorporated in that Deed of Assignment.

[8] It is not necessary to go into the full history of the matter thereafter. Suffice it to say that the defendant company did not pay the balance of £1,000,000 to the plaintiffs. The new premises as envisaged have not been constructed and therefore the plaintiffs have not been able to acquire the flat which it was agreed they could purchase under special condition 3. The company went into administration on 26 March 2010 with an estimated deficiency in excess of £12,000,000. The principal creditor was its lender, the Ulster Bank.

[9] The defendants retained as a conveyancing expert for these proceedings Professor JCW Wylie, the author of the leading text books on Irish Conveyancing Law and Irish Land Law. The plaintiffs retained Mr NCF Faris, an experienced conveyancing solicitor in this jurisdiction who, for some 10 years, has acted as an expert witness in court and conveyancing advisor to other solicitors. The court has had the benefit of their reports and supplementary reports. In addition Mr Faris gave evidence at the hearing of this matter.

[10] One issue that was raised in those reports was the doctrine of merger. As pointed out above the two special conditions were not expressly dealt with in the Indenture of Assignment. Both conveyancing experts and, by the commencement of the hearing, both parties agreed, however, that the two special conditions nevertheless survived, a view with which I agree. However, they survive only as claims <u>in contract</u> against the defendant company. Given the highly insolvent state of the company and the priority enjoyed by its principal lender, if enjoyed is the

right word, this is of little consolation to the plaintiffs. It is clear that neither condition bites on the title nor gives the plaintiffs any hold on the premises themselves.

[11] Mr Faris raised in his report the possibility of a plea of estoppel by the plaintiffs but this had not been pleaded and was not pursued or put forward at trial by counsel for the plaintiffs.

[12] The issue that was left for adjudication by the court at hearing on 25 and 26 February was this. Had the vendors a lien over the property itself for the balance of unpaid purchase money or had they relinquished that?

[13] As a matter of law an unpaid vendor generally has such a lien. If he has parted with possession he still has an equitable lien on the land i.e. an equitable charge which entitles him to apply to the court for an order for sale of the land and discharge of his debt out of the proceeds of sale. See Wylie, Irish Conveyancing Law, 3rd Edition 12.15; Wylie Irish Land Law paragraph 12.16.

[14] Furthermore it is agreed between the parties that if the plaintiffs enjoyed such a lien it would have priority over the registered charge of the Ulster Bank to which I will turn in a moment. In his learned and helpful skeleton argument Mr David Dunlop, counsel for the defendant, also helpfully acknowledged that this would be so even though the plaintiffs' lien here had not been registered pursuant to Section 870 of the Companies Act 2006. (Nor had it been registered in the Land Registry of Northern Ireland where the assignment had been registered pursuant to compulsory first registration, the land having previously been unregistered.) The authority justifying that concession is to be found in the judgment of Brightman J in London and Cheshire Insurance Ltd v Laplagrene Property Ltd [1971] Ch 499 citing, at page 514, Harman LJ in Capital Finance Company Ltd v Stokes [1969] 1 Ch. 261, 278, C.A.

[15] The vendor's lien, if it existed here,would be an equitable one only as a common law legal lien would be dependent on the vendor retaining possession of the land: Munster and Leinster Bank Limited v McGlashan [1937] IR 525. That is not the case here.

[16] The difficulty that the plaintiffs face here arises from their own efforts to protect themselves, combined with the Ulster Bank's desire to protect its interests as the lender funding this transaction. On 15 June 2007, the same date as the assignment, they entered into a mortgage by sub-demise of leasehold. This was made on 15 June 2007 between the present defendant company and the plaintiffs. The subject of the mortgage was the very sum of £1,000,000, a loan as it is put therein, they would now like to say is fixed by lien on this property with priority over the bank. However, on the same date the solicitors for the bank were careful to

require the plaintiffs to enter into a deed of priorities which clearly gives priority to the Ulster Bank Limited for its mortgage loan to the defendant to enable it to purchase the property from the plaintiffs; see Clause 3 and the Schedule to that deed.

[17] Furthermore, at Clause 19 of the Deed of Priorities one finds this.

> "Entire agreement.
>
> This Deed constitutes the entire agreement between the parties hereto in relation to all matters the subject matter hereof."

Those plain words must tell strongly against any suggestion now that the McClure's equitable lien continued to survive and be charged on the property upon which the Ulster Bank was lending money. The said Deed expressly defines the McClure debt as "the aggregate of all liabilities which now are or may at any time hereafter be due, owing or incurred by the company [CRF] to McClure not to exceed £1.000.000 together with interest thereon." That is, as I said, made clearly subject to all the liabilities of the company to the Ulster Bank. There was no reference to the flat or the demolition condition in these deeds. In correspondence the Bank declined to cap their priority at £3,000,000.

[18] It is, I find, settled law that a vendor in possession of an equitable lien can waive or abandon the same. See Saunders v Lesley (1814) 2 BA and B 509; Munster and Leinster Bank Limited, op. cit; Re Aluminium Shop Fronts Limited [1987] IR 419. In that last named case Murphy J at 423 expressly says:

> "It is well settled law (see Bank of Ireland Finance v Daly Limited [1978] IR 79) that where a vendor has stipulated for and obtained a legal charge in the property there can be no vendor's lien."

That decision in Bank of Ireland Finance, of McMahon J, cites the judgment, already referred to, of Harman LJ in Capital Finance Company Limited v Stokes and Another [1969] 1 Ch. 261, C.A. The relevant part of the headnote at page 263 reads as follows:

> "That although at the date of the contract an implied unpaid vendor's lien could be implied in the first defendant's favour in respect of one quarter of the purchase money, since the equitable mortgage created by the contract only covered three quarters of the purchase money, that lien was impliedly abandoned

> on completion, for on the happening of that event the first defendant obtained all that he bargained for, namely one quarter of the purchase money in cash and the balance by way of legal charge, which charge being a higher interest than the lien must have excluded it."

See Harman LJ at page 278E to 279E and Sachs LJ at page 280E-F.

[19] I have taken into account both the expert reports and the oral and written submissions of Mr John Coyle of counsel for the plaintiff. Mr Faris in evidence acknowledged that he could find no case in which a vendor's lien had survived after a charge.

[20] I observe that the charge sought by the plaintiffs and obtained on 15 June 2007, while now nugatory, may have been valuable if the transaction had proceeded in the way that the parties had hoped, i.e. by successful development of the lands. It is a very understandable step to have been sought by the plaintiffs but it is equally understandable that the main lender who was furnishing the greater part or perhaps all of these monies to the defendant for onward transmission to the plaintiffs would seek to protect its own interests in the way that is set out in the Deed of Priorities.
As a result of the Bank's lending the Plaintiffs achieved a substantial sum for their property, albeit not all they hoped or had contracted for.

[21] The plaintiffs' claim here was for "a declaration that those terms as hereinafter appearing of the Memorandum of Sale of 12th February 2007, between the plaintiffs and the defendant in respect of the sale and purchase of property known as The Montague Arms, The Promenade, Portstewart, remains subsisting and binding upon the title of the aforementioned premises namely:

> "4. Provided always that –
>
> (1) the Purchaser shall not demolish or commence demolishment of the property until the said balance of £1,000,000 is firstly paid by the purchaser to the vendor.""

By Amended Statement of Claim of 29January 2013 the Plaintiffs sought at (1A) "A Declaration that the Plaintiffs are entitled to a lien and equitable interest and charge for unpaid purchase monies in respect of the balance remaining due namely £1,000,000 together with interest…"

[22] I am entirely satisfied that by entering into the deeds of mortgage and priorities of 15 June 2007 the plaintiffs waived and abandoned any equitable vendor's lien in respect of that sum of money which they then had and substituted for it this charge which is second in priority to that of the Ulster Bank Limited. The plaintiffs are not therefore entitled to those declarations, on the plain wording of the deeds of 15 June 2007 and on the authorities. I shall hear counsel with regard to the additional relief sought in that amendment, at page 121 of the second version of the trial bundle, regarding the apartment. [His Lordship heard both counsel on 24 May and refused the remaining declaration sought.]