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Judgment: approved by the Court for handing down | *Delivered:* **20/3/09**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

T P STEVENSON LIMITED

and

T G ROBINSON CONSTRUCTION LIMITED

DEENY J

[1] In or about 1995 the principal shareholders in the companies which are the parties to this action purchased a substantial area of land adjoining what is now the Caw Roundabout on the Waterside, Londonderry. It was their hope that the then agricultural land would be given permission at some stage for housing and thereby increase in value. Following various discussions, and apparently at the behest of their bankers, it was agreed that the lands should be partitioned between them. An agreement was arrived at after a lengthy meeting, with their accountants present, on 23 April 2001 in the offices of the then solicitors to both, Messrs Babington and Croasdaile. The parties thereby agreed to split and divide the lands and this was subsequently done by three conveyances of 20, 29 and 29 June 2001.

[2] The matter comes before the court in relation to clauses 4 and 6 of that said agreement of 23 April 2001. While the partition of the lands had sought to divide the area as equally as possible between the two parties, this could not be done precisely and it was agreed that there should be an equalisation process, set out in this agreement. Part of this process involved the second owner, that is the defendant, pursuant to clause 6, purchasing from the first owner a portion of land shaded red on the map attached which was part of the plaintiff's lands at area 1. This was to be purchased at a valuation at the same time as the valuation under clause 4.

[3] I set out clause 4 in full:

> "4. Within 28 days of the granting of Outline Planning Permission as aforesaid or within 18 months from the date hereof (whichever is the earlier) the First Owner and Second Owner shall request the President for the time being of the Royal Institute of Chartered Surveyors, Northern Ireland Branch, to nominate and appoint a member of the RICS to value their respective areas of land taking account of the Outline Planning Permission and all other matters as to the person so appointed appears relevant but disregarding any works which may have been carried out on site and the person so appointed shall act as an expert and in so far as there is a discrepancy as between the valuation as between the First Owner's and the Second Owner's lands then the Company whose lands have the higher valuation shall pay the Company whose lands have a lower valuation one half of the difference such sum to be paid within 28 days from the completion of the valuation and interest will run on said sum at the rate of 6% above the UK Clearing Bank Base Lending Rate as fixed from time to time by the Bank of England from the elapse of the said 28 day period and the parties hereto agree that they shall be bound by the aforesaid valuation and to be responsible for the Valuers costs and expenses in equal shares."

[4] In the events which have happened no outline planning permission has yet been obtained for these lands. The plaintiff alleges that the defendant has delayed in this regard. The defendant alleges delay on the part of the plaintiff. Regrettably, although the matter had been pleaded between the parties, proper discovery had not been made by either at the time this matter came to trial in respect of those aspects of the dispute. Counsel said that part of the reason for that was that a considerable amount of relevant correspondence had been written "Without Prejudice". This had not been set out in the way it ought to have been in the parties' lists of documents nor indeed set out at all. As there are allegations against not only the parties but the professional persons acting for one of them it was not proper to proceed with the matter without full discovery being granted. This was all the more regrettable as a considerable period of time had elapsed. The case had been in the list before but had to be taken out because the principal shareholder of the defendant suffered bereavement. In the circumstances the court at this time and this judgment are concerned only with the issue of the plaintiff's claim for specific performance of clause 4 and clause 6 of the agreement.

[5] The solicitors for both parties wrote on 18 October 2002 to the present defendant at the request of the present plaintiff pointing out their obligations under clause 4 of the agreement and asking them to join in the request to the president of the Northern Ireland branch of the Royal Institute of Chartered Surveyors to appoint one of its members to carry out the necessary valuations. The defendant then consulted Messrs Mills Selig, solicitors, who replied by letter of 23 October 2002. They said that their client felt that he had the less valuable part of the lands, for reasons briefly outlined, but nevertheless did not want to have the lands valued as, in essence, he thought that premature without the outline planning permission. That has continued to be the position of the defendant since then.

[6] The position of Mr Brian Kennedy QC who appeared for the plaintiff was initially that the date of valuation under Clause 4 and Clause 6 would be the date when the valuer ought to have been appointed if the defendant had complied with the terms of the agreement i.e. October/November 2002. However, when this was queried by the court, he was unable to point to any particular clause or phrase in the agreement which pointed to that interpretation; nor was Mr A J S Maxwell, who appeared for the defendant, in a position to do so in the course of his submissions. It seems to me that if specific performance is to be given of this clause that there is no point in conducting an historical valuation, which the parties would jointly have to pay for, relating back to October 2002. Nor is there anything in the agreement to require that strained and impracticable choice of date. It seems to me that the date of valuation should be the date fixed by the duly appointed valuer and should be within a reasonable time of him receiving and considering the relevant documents necessary to allow him to make a valuation following his appointment.

[7] Mr Kennedy QC was happy to adopt that interpretation both under clause 4 and clause 6.

[8] Mr Maxwell outlined the concerns of the defendant about this valuation but it has to be said that, in part, these related to the misapprehension that the valuation would be taking place on a historic basis relating back to 2002. There is apparently an agreed concept master plan relating to the development of the lands of the plaintiff and the defendant and some adjoining lands owned by McCloskey and O'Kane Limited. Counsel submitted, as his client's former solicitors contended, that it was his client who would become entitled to the equalising payment upon the valuation. But nevertheless they did not want the valuation until the matter was completed. The present position is that following lengthy negotiations with the Planning Service, and at least one reminder from that body to spur on the defendant, an indication has been given that following a document from a firm of planning consultants to be submitted within the next two to three weeks, the Planning Service would make a decision which would be likely to

be a recommendation of the grant of planning permission for some 900 houses on these lands. The matter would then go before the local authority to ascertain their views. However, following that, he submitted, without dispute from Mr Kennedy, planning permission would not actually issue until the completion of an Article 40 agreement dealing with the overall development of these lands including the necessary roads, sewers, etc. He submitted on the authority of *Glynn v. Margetson* [1893] AC 351 that the court should strike out that part of clause 4 which called for a valuation when there was no outline planning permission as it was inconsistent with the main purpose of the agreement. I reject that submission. I note that Lord Herschell in that case expressly commented on the fact that he was dealing with a contract which was a printed form. Furthermore the main purpose of the agreement here is to equalise the adjustment which had, in effect, been forced on the parties by their bankers. I do not see why a fall back position of evaluation if there was no planning permission is in truth inconsistent with that main purpose.

[9] His further submission was that as specific performance was a discretionary remedy it should be refused by the court here on the basis that it would be futile. That argument had strength if one took the erroneous view that the valuation would be on an historic 2002 basis but it is a very different matter if the valuation is on the state of affairs existing this year when the valuer has received the necessary information. It is true that it is quite likely that the Article 40 will not be concluded by the time the valuer carries out his valuation, as an expert. I consider it conceivable that a valuer as an expert could decline to value until the conclusion of that agreement. It seems more likely to me that he could make a professional valuation of the lands in the light of the indication from the Planning Service as to the number of houses to be constructed. If however he finds it impossible to make a valuation without the conclusion of the Article 40 agreement he is at liberty to reserve his valuation until that is completed. But if he were to do so, at least he would be prepared and in a position to complete this transaction as soon as the Article 40 agreement is concluded. If the defendant's submissions were accepted this matter which has already dragged on for many years would be left unresolved with the possible need for a further hearing after the conclusion of the Article 40 agreement.

[10] I observe that whenever a valuation is taken of these lands the valuer will have to take into account all relevant considerations at that time. As is a matter of current notoriety the value of lands can fluctuate sharply. The valuer must take reasonable care to give his honest and professional valuation on the date which he has fixed when he has the necessary information.

[11] Mr Maxwell's argument is further weakened by the express language of the clause which clearly does give a fallback position to both parties in default of planning permission. Indeed one notes the opening words of

clause 4 are: "Within 28 days of the granting of outline planning permission….". At such a time the whole out working of the development would not necessarily be known. It is an outline permission which is being sought, albeit with considerable detail, as is presently required The fact of the matter here is that the parties did commit themselves to a valuation process and while valuations may fluctuate there is no justification for endlessly postponing a process to which the parties mutually agreed.

[12] The plaintiff considers that this equalisation valuation would assist him in making a separate sale of his lands. The defendant disputes that but it does not seem to me that that is something the plaintiff has to prove. It is something that may be so and which he considers to be so and has caused him to persist with these proceedings.

[13] Two important matters remain. The defendant urges the court to refuse specific performance on the ground of delay on the part of the plaintiff. Although the plaintiff had the right to seek proceedings very soon after the defendant's solicitor's letter of 23 October 2002 no writ was in fact issued until 15 April 2005, some 2 ½ years later. The plaintiff's factual reply to that point is that the parties were in lengthy, without prejudice, negotiations for a long period of time before, and indeed after proceedings were issued. These nearly came to fruition on several occasions but ultimately were not resolved. This is not disputed by counsel for the defendant and indeed there is some reference to it in the various reviews before the court.

[14] Jones and Goodhart: Specific Performance, 1996, at page 109 deal with laches –

> "Delay alone is not the only element in laches. To amount to laches the delay must be sufficient to be evidence of the abandonment of the contract by the plaintiff or it must be coupled with some other factor which makes it unjust to the defendant to order specific performance.
>
> > "Now the doctrine of laches in Courts of Equity is not an arbitrary or a 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 the 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 substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the delay, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as it relates to the remedy. *Lindsay Petroleum Company v. Hurd* [1874] LR 5 PC 221 at 239-240, per Sir Barnes Peacock, cited with approval in *Erlanger v. New Sombrero Phosphate Company* [1878] 3 App Cases 1218 at 1279 per Lord Blackburn and in *Nwakobi v. Nzekwu* [1964] 1 WLR 1019 at 1025.""

[15] Wylie, Irish Conveyancing Law, Third Edition, deals with laches at 13.51 and refers to certain further authorities there. I note this statement –

> "It must also be emphasised that for laches to succeed as a defence the circumstances must be such as to render it inequitable to grant specific performance."

[16] I note further the decision of Megarry V.C. in *Lazard Brothers and Company Limited v. Fairfield Property Company (Mayfair) Limited* [1978] Conv 184 where he granted specific performance saying that it was not a prize to be awarded to the zealous and that delay on its own was not a good ground to refuse the remedy. In the light of those statements of the law I conclude that it would not be inequitable to grant the plaintiff a remedy in specific performance here. In doing so I do not rule on his allegation that the defendant was guilty of delay nor on the contrary allegation. The defendant has not been prejudiced by the delay, rather the reverse, as the valuation will now be at a time when matters are more nearly complete than would have been the case shortly after 2002. I must also point out that laches was not actually pleaded in either the defence or the amended defence in this action.

[17] I am therefore satisfied that the plaintiff is entitled to specific performance here not only of clause 4 but also of clause 6 of the agreement. It reads:

> "The Second Owner agrees with the First Owner to purchase that portion of area 1 shaded red on the map attached hereto at a price or value which is to be determined by the valuer referred to at paragraph 4 above and said valuation shall be carried out at the same time as the valuation at paragraph 4 and for the avoidance of doubt the valuer is to allocate a specific value to said lands and the completion date for said purchase shall be four weeks from the valuation of the lands and the General Conditions of Sale Law Society of Northern Ireland (Third Edition Revised) shall apply to said sale and it is further agreed that the valuers costs and expenses in carrying out the valuation required by this paragraph shall be borne equally by the First Owner and the Second Owner."

[18] It can be seen that this clause militates against the suggestion that the valuation should be an historic one relating back to 2002. That could lead to real unfairness, to either party, because the valuation of the lands then might be radically different to their current valuation.

[19] I therefore grant the plaintiff an order for specific performance of the terms of clause 4 and clause 6 of the agreement of 23 April 2001. The defendant shall write within 7 days to the President of the Northern Ireland Branch of the Royal Institute of Chartered Surveyors, as shall the plaintiff, requesting him or her to nominate and appoint a member of the RICS to value the respective lands in accordance with clause 4 and in accordance with clause 6. As indicated above the parties are ordered to furnish the valuer appointed by the President with any documents or information they consider relevant in the circumstances. The mechanism for this should be the preparation of a file by the plaintiff's solicitors within 3 weeks of this order. The index thereof should be sent to the defendant's solicitors who may then add any additional documents which they feel should be sent to the valuer. The appointed valuer shall be at liberty to request any further documents or information which he or she considers necessary to arrive at a professional valuation as an expert. Having received the documents the valuer shall fix a date within a reasonable time which shall be his date of valuation of the lands in question. The clauses deal with the consequences following those valuations and if necessary I will deal with those in an order of the court. The plaintiff's counsel should provide a draft order within 2 days of the delivery of this judgment.