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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2010 No. 18640

TITANIC QUARTER LIMITED

-v-

NEIL ROWE

_____

DEENY J

[1] The plaintiff in this action was proposing to build an apartment block at the Abercorn Residential Complex, Titanic Quarter, Belfast. On 5 July 2007 the defendant entered into an agreement for a lease to purchase apartment 3-19 at the said complex in the sum of £264,500. He paid a contractual deposit of £26,450. Completion was to be 14 days after the service of the architect's certificate of practical completion, namely 8 September 2009. A notice to complete was served upon him but he did not complete.

[2] On 11 March 2010 the plaintiffs, following a writ and statement of claim, issued proceedings under Order 86 of the Rules of the Court of Judicature (NI) 1980, as amended, seeking summary judgment by way of specific performance of the agreement. In his defence the defendant did not deny that a valid contract subsisted between him and the plaintiff but pleaded that such an order for specific performance would be in vain, and that it would cause the defendant exceptional hardship.

[3] A significant number of such cases have come before the court in the last year. There was a considerable and rapid rise in the value of property, and residential property in particular, in Northern Ireland, as elsewhere, in the years leading up to and including, to some extent, 2007. This has been followed by a sharp descent in such prices. It has meant that whereas a few years ago purchasers were bringing applications for specific performance against vendors, who were unwilling to sell because the value of their property now exceeded the price agreed with the purchaser, now there is a

situation where vendors and developers such as this are seeking to enforce contracts for the sale of apartments which are now worth significantly less on the open market than the price agreed in the contract.

[4] This case was chosen as a test case as to whether the impecuniosity of the defendant constituted a defence to a claim for an order for specific performance under either of the grounds briefly set out above.

[5] It is right to record that the personal circumstances of defendants will vary almost infinitely in such circumstances. While to a degree this is a test case it must also be recognised as being based on the particular facts before the court. The following salient points are taken from the replying affidavit filed by the defendant to which objection was not taken by the plaintiff. In accordance with the Court's directions in these cases the Defendant was required to give a frank account of his financial position on affidavit. At the time that he entered into the agreement the plaintiff, who is a graduate in mechanical engineering, was employed in the construction industry at a salary of £31,000 per annum. He is a single man. He owned his own dwelling which at that time was valued at approximately £200,000 and subject to a mortgage in the sum of £87,149.54. It appeared therefore to him that he had an equity in excess of £100,000 and it was not unreasonable for him to bid for and agree to buy a somewhat more expensive apartment.

[6] However he expressly avers that the only contracts which the plaintiff developers would accept for these apartments were unconditional contracts. They would not accept a contract subject to finance. The defendant therefore was to a degree gambling on, or certainly relying on, his continued employment and the continued value of his existing dwelling in order to purchase the new flat.

[7] In the events by reason of the decline in the construction industry he was made redundant by his employer in September 2008. He has not been able to obtain other employment. He was unable to meet his mortgage as his only income now is approximately £280 per month in Job Seekers allowance. He therefore had to sell his home which he did in February 2010 for a lesser figure of £120,000 out of which he redeemed his mortgage and discharged other liabilities. He now lives with his parents.

[8] Mr Richard Coghlin, who appears for the defendant, submits that he was not a speculator but was a person who is a victim of the changing circumstances which have occurred (and of which the court warned in Bubble Inns Limited v Beannchor Limited [2007] NI Ch 1). Whether that is relevant to the exercise of the court's discretion I need not here determine.

[9] It was implicit in the able written arguments submitted by Mr Coghlin and by Mr Michael Humphries for the plaintiff and confirmed at the oral

hearing of this matter that in the light of his unemployed status, lack of assets and the current limited availability of credit from financial institutions it was in fact impossible for him to borrow a sufficient sum of money to complete at this time.

[10] As indicated above the defendant pleaded hardship as a defence to the remedy of specific performance. However at the hearing of the matter Mr Coghlin conceded that that was not something he could establish. There is clear authority for the proposition that what was described as ordinary cases of hardship would not amount to a defence to an application for specific performance. See Roberts v O'Neill (1983) IR 47; Nicholas v England (1958) NZLR 972 and Snell on Equity 31st Edition page 495ff. The remedy is customarily awarded, partly on the basis that damages are not an adequate remedy. This is something that is obvious when a purchaser is seeking to enforce a contract for the purchase of a particular house or piece of land. It is less obvious when a vendor is trying to obtain the money which a purchaser has agreed to pay. Patel v Ali [1984] Ch 283 is the exception which proves the rule with regard to hardship and specific performance. The first defendant there, with her husband, contracted to sell to the plaintiff with the second defendant and his wife who all lived in the house. The first defendant's husband was subsequently adjudicated bankrupt. She herself fell ill and while she was pregnant with her second child had to undergo an amputation of one leg. Her husband was in prison for two years and following his release she give birth to a third child. Therefore at the time of the application for specific performance she was the disabled mother of three young children with an unsatisfactory husband and she was suffering from cancer. In those circumstances Goulding J declined to exercise his discretion to make an order for specific performance, thus leaving her in her only home. However it is worth noting what he said at page 288 of the judgment:

> "The important and true principle, in my view, is that only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property. A person of full capacity who sells or buys a house takes the risk of hardship to himself and his dependents, whether arising from existing facts or unexpectedly supervening in the interval before completion. This is where, to my mind, a great importance attaches to the immense delay in the present case, not attributable to the defendant's conduct."

[11] In the light of Mr Coghlin's concession I do not propose to say anything more on this topic or whether a state of facts less extreme than those

in Patel v Ali might be sufficient to constitute a case of exceptional hardship. I reserve my position on that issue.

[12] Before turning to the defendant's second defence to this application it is important to note the hurdle which he has to surmount. Order 84 Rule 1(1) provides that the plaintiff "may, on the ground that the defendant has no defence to the action, apply to the court for judgment." In one sense the defendant here has no defence to the action; he is liable under the writ. His contention is that damages should be assessed rather than he be subject to an order for specific performance. In that regard it might be said that Order 86 Rule 3 assists him. It reads as follows:

> "Unless on the hearing of an application under Rule 1 either the court dismisses the application or the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the court may give judgment for the plaintiff in the action."

As the concluding words make clear the court has a discretion in the matter. The discretion extends to the defendant satisfying the court "that there is an issue or question in dispute which ought to be tried". It seems to me, and it was not disputed by counsel, that 'issue or question in dispute' would extend to the appropriate remedy available to a successful plaintiff. The remedy sought is part of and indeed the raison d'etre for an action at law.

[13] But this is an application for summary judgment. On general principles the defendant has only to show that he has an arguable case that he would succeed on this ground to defeat an application for summary judgment. As it has sometimes been put he must show that there is a triable issue. There is an analogy with the position of the court in dealing with an interlocutory injunction. Lord Diplock in American Cyanamid v Ethacon Limited [1975] AC 396 at 407 stated the position thus:

> "It is no function of the court at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which fall for argument and mature consideration. These are matters to be dealt with at the trial."

While it is more common in cases under Order 86 or Order 14 to see whether a defendant can establish an arguable defence on the facts to the substance of the action I conclude that the underlying principles extend to a defendant

who, on acknowledged facts, has an arguable case that those facts constitute an answer in law to the claim or remedy pursued by the plaintiff.

[14] I turn therefore to Mr Coghlin's second limb i.e. that an order for specific performance will now be in vain and should not therefore be granted. He submitted that while at law it is no defence to an action for damages that the contract has become impossible of performance through the defendant's own acts, in equity specific performance may be denied for that reason. Cf. Halsbury's Laws of England Specific Performance Volume 44(1)(Reissue) para. 892. He relied on Ferguson v Wilson (1866) LR 2 Ch. App. 77 as authority for the proposition that specific performance would not issue were it not possible for the defendant to comply with such a decree. In that case the shares the subject of the agreement had already been allotted to another party. He was also able to point to the decision of the Court of Appeal in England in North East Lincolnshire Borough Council v Millennium Park (Grimsby) Limited [2002] EWCA Civ 1719. Millennium Park were appealing against an order of Pumfrey J who had given a decree of specific performance of one aspect of a development agreement and ordered MPG on foot of that to construct a roundabout on a public highway that ran over the Council's land. I quote the judgment of Rix LJ, at par. 10, with which Arden and Thorpe LJJ agreed.

> "On this appeal, as before the judge, MPG have two essential defences on the basis of which it submits that the judge erred in granting specific performance. The first is that MPG has no assets of its own, is entirely dependent upon funding from elsewhere and, in the event, is entirely dependent upon its funding agreement with P and O. In circumstances where P and O is unwilling to advance any finance on the basis that it is not obliged to do so under its funding agreement, MPG is therefore unable to undertake any such works. This was a point which had already been advanced before the judge at the first hearing but which he found it unnecessary to deal with at that time."

Rix LJ went on at paragraph 14 as follows:

> "In my judgment, however, it does appear that the judge had failed sufficiently to bear in mind the only preliminary stage at which the argument before him was being addressed. The question was not in truth whether he was 'satisfied that this is a case of impossibility', to quote from the opening of the passage [in the judgment at first instance] which I

> have cited above. The question for him was whether he was satisfied that there was a real or reasonable prospect of success in a defence against the remedy of specific performance based on a case of impossibility."

In fact if one looks at that passage one sees that the Judge at first instance began as follows:

> "I do not doubt that in a case of actual impossibility of compliance the court will not make an order."

By implication the appellate court shared that view. His error was in trying to decide that at a summary stage. I consider this authority of strong support to the defendant here.

[15] I note that the Court of Appeal did not find it necessary to rule on the alternative submission of the defendant there ie. that damages would be an adequate remedy and therefore specific performance should not issue. In Mr Rowe's case damages may not be an adequate remedy at present for the reason already relied on i.e. that he has no money with which to pay them but that position could change by the time of trial or enforcement of any judgment. Furthermore the level of award may possibly be different at trial than if it were measured now.

[16] It is clear from the decisions in our courts that I have a wide discretion to refuse specific performance while not acting capriciously or arbitrarily. See Conlon v Murray [1958] NI 17, C.A.; Buckley v Quinn [1960] NI 98; McCrystal v O Kane [1986] NI 123.

[17] I note that the recent judgment of Kelly J in Murphy v Ryan (2009) IEHC 305, of relevance here given the common structure of land law on this island, while having some echoes of this situation, clearly establishes that he did not view the defendants there as in a position where it was impossible for them to complete the contract for purchase. Following the hearing of this matter and the drafting of this judgment the parties very properly drew to the attention of the court the judgment of Clarke J. in the High Court in Dublin in Aranbel Ltd. v Darcy and others, 9 July 2010, in which he refused specific performance to a plaintiff in a similar position to Titanic on the ground of impossibility of performance.

[18] Mr Humphries argued for the plaintiff that to allow the defendant to escape an Order 86 decree for specific performance on this ground would impose on a vendor such as his client the necessity to assess the financial worth of purchasers. He submitted that it might make it more difficult for first time buyers to purchase their dwellings as a result. I observe that in

cases where the contract for purchase is subject to finance this is exactly what vendors do. The matter is only completed when a lender has put the purchaser or his solicitor in funds to complete. Indeed a similar position exists with an unconditional contract which is to be performed close to the time of the signing of the contracts. It is only developers who are seeking unconditional commitments to the purchase of apartments which will not be constructed for several years who would be disadvantaged in the way that Mr Humphries envisages. Nevertheless this and his other arguments are entitled to consideration by the court. But it does not seem to me that they are of sufficient strength to conclude that the defendant has no arguable defence to a decree for specific performance on foot of Order 86.

[19] Johnson v Agnew [1979] 1 All ER 883 was a decision of the House of Lords by which it ruled that a plaintiff who had sought and failed to enforce a decree for specific performance was still at liberty thereafter to pursue a claim in damages. It may be that a plaintiff who chooses to proceed in that way may, depending on the particular facts, not recover his costs in full when he comes to pursue the defendant in damages having failed to enforce the decree for specific performance. It may be that a defendant in those circumstances may be entitled to credit for the costs it paid, or was liable to pay, to be deducted from the costs that would be otherwise be payable under the suit for damages. If the plaintiff, by its own election, pursues two different remedies in succession, it may be unjust to visit the defendant with the costs of the plaintiff having a second bite at the cherry.

[20] I respectfully agree with the dicta of Megarry VC in Tito v Wadell [1977] Ch 106; [1977] 3 All ER 129 at 311, 312:

> "It is old law that in specific performance cases 'the court will not make any order in vain': see New Brunswick and Canada Railway and Land Company Limited v Muggeridge ((1859) 4 Drew 686 at 699), per Kindersley V-C. The usual instances of cases of the courts refusing to make orders that would be useless are cases where the interest that will be obtained by the decree is a very short tenancy, or a partnership which could promptly be determined by the other party.
>
> I do not, however, think that the refusal of equity to make futile orders is limited to cases of transient interest. In this case I cannot see what utility there would be for anyone in providing that a small number of isolated plots should be replanted with coconut and other trees in the hollows beside the pinnacles. It is highly improbable that the coconuts

> would ever fruit, and the plots would be surrounded by other plots not replanted in this way which would make access difficult or impossible for the owner. It would be a sheer waste of time and money to do this; and I do not think that the court ever should, in its discretion make an order which it is convinced would be an order of futility and waste."

[21] As Lord MacDermott said in connection with the remedy of certiorari in R (McPherson) v Ministry of Education 1973 6 NIJB, the court should not make an order that will beat upon the air.

[22] I am satisfied that impossibility of performance is a ground in law for refusing the remedy of specific performance, whether approached on first principles or on the authorities. I am satisfied that the defendant, unemployed and without any significant asset, has, at the least, a clearly arguable case that it is impossible for him to perform this contract to purchase an apartment in the sum of £264,500 less the deposit of £26,450. I refuse the decree of specific performance sought by the vendor. The case will proceed to trial on the issue of damages.