[2020] IEHC 498

THE HIGH COURT

[2016 No. 544 S]

BETWEEN

IRISH LIFE ASSURANCE PLC

PLAINTIFF

AND

OLEMA CONSULTANTS

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 28th day of July, 2020

1. By contract dated 27th August, 2015, the plaintiff agreed to sell to the defendant the property at 72-74 Harcourt Street, Dublin 2, now the Iveagh Garden Hotel, for €18.15 million, less a deposit of €1.815 million. The contract provided a closing date of six weeks, with an interest rate of 10% in default. The document schedule setting out documents of title referenced the folio and file plan DN99062F.

2. On 29th September, 2015, a matter of days before the closing date, the Property Registration Authority furnished an amended digital map of the property to the plaintiff. This was sent by email to the defendant on 2nd October, 2015.

3. The defendant then sought a declaration of identity to ascertain that the property was within the boundaries of the amended file plan. By letter of 8th October, 2015, the plaintiff replied relying on special condition 6, to the effect that the purchaser shall be deemed to have satisfied itself as to the identity and location of the property from the title furnished. The defendant's interpretation of that special condition is that that related to the file plan as available on the date of signature of the contract (hence furnishing amended title documents at a later date meant that the defendant was entitled to raise issues as to the identity and location of the property).

4. A completion notice was served on 14th October, 2015 and the transaction was completed on 11th November, 2015.

5. General condition 25(a) of the contract for sale provides that interest is payable on completion effected late "*by reason of any default on the part of the Purchaser*."

6. On 24th November, 2015 the plaintiff issued a letter of demand for €121,729.32 interest. It issued a further demand for the same amount under s. 570 of the Companies Act 2014 on 11th January, 2016. The plaintiff then decided that it had under-calculated the interest and issued a letter demanding €152,161.56 on 9th March, 2016.

7. The summary summons issued on 24th March, 2016 and a motion for summary judgment was filed on 17th May, 2019. I am now dealing with that motion and have received helpful submissions from Mr. Steven B. Byrne B.L. for the plaintiff and Mr. Angus Buttanshaw B.L. for the defendant.

The test for summary judgment

8. There is no particularly stark disagreement between the parties as to the test as set out in previous caselaw. Nonetheless, quite a number of authorities were relied on including *Banque de Paris et des Pays-Bas (Suisse) S.A. v. de Naray* [1984] 1 Lloyd's Rep 21; *First National Commercial Bank Plc. v. Anglin* [1996] IESC 1, [1996] 1 I.R. 75; *Aer Rianta c.p.t. v. Ryanair Ltd. (No 1*) [2001] 4 I.R. 607; *Harrisrange Ltd. v. Duncan* [2002] IEHC 14, [2003] 4 I.R. 1; *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203; and *Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22 (Unreported, Supreme Court, Denham J. (Hardiman and Finnegan JJ. concurring), 22nd April, 2010).

9. I endeavoured to summarise the relevant criteria in *Havbell DAC v. Harris* [2020] IEHC 147, [2020] 2 JIC 2110 (Unreported, High Court, 21st February, 2020), at para. 20:

   (i). the plaintiff's claim must be sufficiently pleaded and particularised;

   (ii). the plaintiff must adduce evidence establishing a *prima facie* case;

   (iii). if so, the court must inquire whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence; and

   (iv). if so, the defendant must show that this goes beyond mere assertion and is supported by evidence.

10. The defendant has essentially advanced three defences. Firstly, that it was not in default because the last-minute change in the file plan was due to an act of the Property Registration Authority rather than its own default. Secondly, that the 10% interest rate is penal; and thirdly, an issue in relation to the computation of interest. It seems appropriate to focus firstly on the penal interest rate defence.

Defence that a 10% interest rate is penal

11. A very useful statement of the test in relation to penal clauses is set out in Treitel, *The Law of Contract*, 13th ed. (London, Sweet & Maxwell, 2011), at para. 20.131, with all of the eloquence and explanatory force of that most helpful of textbooks. That statement has been cited with approval in *Durkan New Homes v. The Minister for the Environment Heritage & Local Government* [2012] IEHC 265, [2014] 2 I.R. 440 and in *Sheehan v. Breccia* [2018] IECA 286, *per* Finlay Geoghegan J. (Peart and Hogan JJ. concurring), at para. 43, a case where a surcharge rate of interest of 4% was held penal. The authors of Treitel say that "'*A clause is penal if it provides for "a payment of money stipulated as* in terrorem *of the offending party", or, as it has been put more recently, if the contractual function of the clause is "deterrent rather than compensatory". If, on the other hand, the clause is a "genuine" attempt by the parties to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. This is so even though the stipulated sum is not precisely equivalent to the injured party's loss* …"

12. Professor Robert Clark has a similarly helpful passage in his excellent textbook, Clark, *Contract Law in Ireland,* 8th ed. (Dublin, Round Hall, 2016), p. 768, cited with approval in

Launceston Property Finance Ltd. v. Burke [2017] IESC 62, [2017] 2 I.R. 798 (see also *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company* [1915] AC 79; *Pat O'Donnell & Company Ltd. v. Truck and Machinery Sales Ltd*. [1998] 4 I.R. 191; and *ACC Bank Plc. v. Friends First Managed Pensions Funds Ltd*. [2012] IEHC 435 (Unreported, High Court, Finlay Geoghegan J., 26th October, 2012) where a 6% surcharge interest rate was held penal).

Does the doctrine of penalty clauses apply here?

13. The plaintiff argues that "*a clause which provides for a charge or fee which varies depending on the date of performance of contractual obligations does not amount to a penalty as a matter of law*" (submissions para. 34).

14. Reliance is placed on the judgment of Barron J. in *Pat O'Donnell & Co*., at p. 218. But there, Barron J. is making a totally different point about interest which is defined in the course of performance of a contract, not in the case of breach or default. As put eloquently by Mr. Buttanshaw in submissions (at para. 52), the payment of interest only arises under a normal contract for the sale of lands if the purchaser is in default, thus "*there are* no *circumstances in which interest is payable by the Purchaser in the course of the proper performance of the contract*". Therefore the doctrine of penalty clauses *does* apply to the payment of interest following default in the completion of purchase of land. Such an interpretation is not, as argued by the plaintiff, a breach of the requirement for commercially sensible construction: see *Mannai Investment Company Ltd. v. Eagle Star Life Assurance Company Ltd*. [1997] 3 All E.R. 352.

15. The plaintiff argues dramatically (submissions para. 37) that "*by the logic of the position of the Defendant, every interest clause contained within a contract for the sale of land is unenforceable as a matter of law*." This is our old friend the floodgates argument. But the defendant's position does not automatically have such a consequence. It only has the consequence that interest clauses arising from breach or default in the contract for the sale of land are subject to the doctrine of penalty clauses, and are enforceable as long as the interest stipulated does not fall foul of that doctrine.

16. It may be, as a matter of empirical generalisation, that interest rates set out in contracts for the sale of land are normally pitched at a penal level because it is thought that the deterrent advantages in practice outweigh the likely unenforceability of such clauses as a matter of law. That's as may be, but even if that is the case, the mere prevalence of a practice in a particular economic sector doesn't make enforceable as a matter of law that which would not otherwise be enforceable. Here, I conclude that there is a reasonable likelihood that the defence arising from the doctrine of penal clauses will be held to be available to the defendant.

If the doctrine of penal clauses applies here, is there a reasonable likelihood that the clause at issue is actually penal?

17. Mr. Brian McGill avers at para. 14 of the replying affidavit that "*a default interest rate of 10% in a contract made in 2015 with a purchase price of in excess of €18 million cannot be regarded as a reasonable pre-estimate of the loss which the vendor is likely to suffer if completion is delayed.*"

18. That just about gets over the bar of providing evidential support for the defence that the interest rate is at a penal level, although further detail would have been welcome. I am happy to take judicial notice of the position that a 10% interest rate in 2015 is way above commercial rates of interest, but if I am wrong in doing so, I nonetheless think that the defendant has done enough to provide evidence of this, albeit the absolute minimum level of evidence required. On that basis, there is a fair and reasonable prospect of contending that the 10% interest rate in this case is unenforceable as a penalty clause.

19. Under those circumstances it is not necessary to get into the question of the manner of the computation of the interest and on balance I don't think it is necessary to get into the defendant's first proposed defence either.

20. The court is not obliged to limit the defences available to a defendant if adjourning the matter to a plenary hearing. That is only an option - an option which I don't propose to take under these circumstances, primarily because the issues are likely to be clarified one way or another when we get the more full evidence that will be available at a plenary hearing in a way that would amount to a more satisfactory resolution than would be arrived at if I were to attempt to determine such issues for all time on the very limited materials I have here.

Order

21. Accordingly I will remit the action to a plenary hearing, on the basis of all defences that the defendant may wish to raise, and will direct the plaintiff to deliver a statement of claim within six weeks.