THE HIGH COURT

[2020] IEHC 604

[Record No. 2018/1079 P]

BETWEEN

DANIEL MCATEER AND AINE MCATEER

PLAINTIFFS

AND

LAURENCE BLAKE, DENISE BLAKE, AIDAN BLAKE AND RACHEL BLAKE

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 30th day of October, 2020

1. By notice of motion issued dated the 8th day of July, 2019 the defendants seek the following reliefs: -

   (a) An order pursuant to RSC O. 19, r. 28 and/or the inherent jurisdiction of the court dismissing the plaintiffs' proceedings on the grounds that they disclose no reasonable cause of action and/or are frivolous or vexatious and/or are an abuse of the process of this Honourable Court;

   (b) Further or in the alternative, an order pursuant to RSC O. 19, r. 27 striking out the plaintiffs' proceedings insofar as they allege defamation on the grounds that they are unnecessary, scandalous or prejudicial; and

   (c) An order pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009 ("the 2009 Act") and/or pursuant to the inherent jurisdiction of the court vacating the *lis pendens* registered herein in the Central Office on the 4th day of April, 2018 on the grounds that the within proceedings are not being prosecuted *bona fide* and/or that there has been an unreasonable delay in prosecuting the said proceedings.

2. This case is not assisted, from the perspective of the court seeking to distil the facts and issues of this case that, at various times, whilst the parties did retain solicitors they also conducted private open negotiations between themselves as well as through their respective solicitors. This has also led to certain contradictions and anomalies.

3. The affidavit grounding the motion is that of Laurence Blake sworn on the 8th day of July, 2019. He avers that he, together with his wife, was the owner of lands comprised in folio DL36918F and that those lands are now held by the third and fourth named defendant. The folio discloses the registration of the third and fourth named defendants as owners on the 30th day of July, 2015 and the registration of a *lis pendens* on the 18th day of April, 2018.

4. The first named defendant accepts that over the course of a period between September, 2017 and February, 2018, he was involved in negotiations with the first named plaintiff for the sale of the lands. He avers that these negotiations ultimately proved fruitless.

5. As well as an affidavit sworn in these proceedings, there is also reference to an affidavit filed by the first named plaintiff, in response to a motion for judgment on the grounds of

failure to deliver a statement of claim. The contents of this affidavit are of some utility as they detail the issues between the parties (irrelevant to the issue of the filing of a statement of claim) but, whilst it is not sworn in respect of this application, it is referred to, relied upon and I have had regard to it.

6. This matter initially came before the court on the 19th day of June, 2020 and, somewhat unusually, the matter was then adjourned to afford the parties time to see if they could resolve their differences. The matter was again made returnable before the court on the 17th day of July, 2020. At the outset, the plaintiffs sought a further adjournment on the basis that: -

   (a) written submissions had been received by the defendants and there had not been time to deal with them and no advance notice was given; and

   (b) that an additional affidavit had been served and that there had been no time to file the replying affidavit (although one was available before the Court).

7. The application for an adjournment was rejected on both grounds and leave was given for the final affidavit to be received and filed in court.

8. The plaintiffs resist this motion and seek that these proceedings proceed to a full plenary hearing.

9. Within the statement of claim the plaintiffs seek an order of specific performance "for an option to purchase the property, associated lands and future property if and when it becomes available". There are also reliefs seeking damages for breach of contract, defamation (not pleaded within the plenary summons) and various other consequential orders and reliefs. The specific pleadings also require some scrutiny.

10. At paragraph 3 the case is pleaded as follows;

> 'Between September, 2017 and December, 2017, the first named plaintiff negotiated with the first named defendant, a commercial agreement/option to acquire property……. The cardinal terms were as follows: -
>
> (a) The plaintiff would pay to the defendants an amount of money (£20,000 sterling) which was in effect a good faith payment in exchange for the option to acquire the property;
> (b) Once the boundaries were defined of the resulting property interests, the plaintiff would pay a further amount of monies on good faith; and
> (c) Once certain milestones had been reached, the plaintiffs would be given the opportunity to acquire the property outright and, furthermore, that they would be granted an option to acquire further lands from the defendant in the event that the defendants wish to sell or refuse their planning consent'.

At paragraph 4:

> "At all material times the plaintiffs acted in good faith in relation to what they believed to be an effective commercial agreement that satisfied the commercial aspirations of both the defendants and the plaintiffs."

At paragraph 6:

> "Despite having been repeatedly assured that the payments were intended to be refundable, solicitors acting for the defendants issued contract documentation that explicitly referred to payments being non-refundable. Further documentation was issued by the said solicitors following negotiations but again there was an attempted instance that the monies paid were non-refundable. No funds were returned."

At paragraph 8:

> Despite having negotiated and granted the option to purchase, and having taken a substantial payment upfront, and having tried to extract further substantial funds from the plaintiffs and then having tried to alter a fundamental terms of the commercial arrangement, the first named defendant (nor any of the defendants) made any arrangement to repay the funds to the plaintiffs'.

11. Whilst the statement of claim very clearly takes issue with the failure to return the £20,000 deposit, it is difficult to discern how an allegation of a concluded contract is advanced on the pleadings. No application has been made to amend this pleading which, in my view, taken at its height, pleads an alleged negotiating position between the parties, not a concluded contract. Paragraph 12 pleads that insufficient information has been made available to the plaintiff to enable certain aspects of the overall transaction to proceed. Whether it is an option agreement or any other type of arrangement, the terms of the contract between the parties must be clear in order to ground an action in specific performance in respect of any contract for the sale of land.

12. Finally paragraph 14 pleads;

> "Despite the efforts of the plaintiffs in good faith to assist the defendants, the first named defendant abused that relationship of trust by attempting to resile from the agreement that had been made with the plaintiffs on behalf of the defendants by refusing to provide information, an attempt to alter fundamental terms of the agreement whilst at the same time extracting substantial funds from the plaintiffs."

13. Usually, within the statement of claim, no reference or pleading is made in respect of any contract of sale pursuant to an option agreement or otherwise. This is notwithstanding that such a contract is within the papers.

14. The contract in question was forwarded (under the usual disclaimer of 'subject to contract / contract denied') from the plaintiffs' solicitors, Downey Property Solicitors at Strand Road Derry, to Lanigan Clarke solicitors, in Letterkenny on the 19th of December 2017. It

also contained what is now the standard phraseology to evidence a denial of the existence of a binding contract for the sale of land between the parties, as follows;

> "'this is not a note of memorandum for the purposes of section 51 of the Land and Conveyancing Law Reform Act 2009 and no contract shall be deemed to come into existence until such time as signed contracts have been exchanged and a valuable deposit received".

15. That contract appears to have crossed with a letter from Lanigan Clarke Solicitors from the 20th day of December 2017 seeking a copy of the contract – it contains the same disclaimer as that of the purchasers' solicitor. From the same solicitor there is a letter dated the 21st day of February 2018 (referencing a letter of the 11th day of January which I have not seen) confirming their clients are not proceeding and confirming that the initial deposit of £20,000 will be returned. Again, it contains the usual disclaimer.

16. Whilst denying the existence of a binding contract the deposit was not returned. If the defendants contend, as they do, and their solicitor confirms within correspondence that there is no concluded contract and the deposit will be returned I am puzzled as to why this has not occurred long before counsel's confirmation in court that it would.

17. In respect of the contract itself, clause 11 deals with planning permission of adjoining lands. It is asserted that this is the exercise of the option agreement represented by the first call of the plaintiffs on, the 3.5 acres. Clause 12 of the special conditions states as follows: -

> "It has been agreed between the parties hereto that the closing date shall be Friday, 21 December 2018 or earlier by mutual agreement. It is further agreed that the following deposit shall be paid by the purchaser in the manner hereinafter appearing. In the event that the closing balance of €755,000 is not received in the vendor solicitor's offices account by close of business on Friday, 21 December 2018, it is hereby agreed that the said deposits totalling €115,000 once paid are non-refundable;
>
> (a) €20,000 which sum has already been discharged by the purchaser directly to the vendor;
> (b) €95,000 to be discharged to Lanigan Clarke Solicitors on the execution hereof."

18. It is accepted that the sum of £20,000 (discharged by a company of the purchaser and not drawn on any purchasers account) was furnished directly to the vendors and I understand continues to be retained by them.

19. No other sums were discharged in accordance with the special conditions above.

20. Both during and indeed after this exchange of solicitor's correspondence there are emails between the parties themselves and the plenary summons then issued on the 7th day of February 2018, with the statement of claim some 16 months later.

21. I had been invited by counsel for the plaintiffs to consider that the assertion of 'subject to contract / contract denied etc.' could be overlooked or disregarded because the parties had themselves reached an accommodation in advance of or without the necessity for such a description. You cannot, it is argued, utilise the heading 'subject to contract/contract denied' when there is already a contract concluded between the parties.

22. It is of course noteworthy that both sets of solicitors, throughout their correspondence at this time, used the identical standard terminology as to the existence or otherwise of a binding contract between the parties. If there was a previous agreement arrived at between the parties then that agreement would have been referenced in correspondence between the solicitors without the use of the terminology 'subject to contract / contract denied'. If there was a binding contract between the parties why was the plaintiffs' solicitor denying its existence by the utilisation of the disclaimer throughout its correspondence?

23. Within the plenary summons it is pleaded that the documentation comprising the contract in fact comprises five separate documents dated the 24th of September 2017, the 5th of November 2017, the 26th day of November 2017, the 15th of December 2017 and the 18th of December 2017 respectively, which I assume is the documentation referenced or referred to in para. 3 of the statement of claim. Notwithstanding that it is the pleading within the statement of claim to which I must have regard I have also considered each of these documents and again see nothing that constitutes a concluded contract as opposed to positions being taken within the negotiation process.

24. My attention was drawn in particular to the document dated the 24th of September 2017 – it is headed 'subject to contract'. It sets out what appears to be certain terms and confirms, amongst other matters, that "the contract will be subject only to 'good title'". It appears to be signed by the two plaintiffs and the first and second named defendant and not to have been drafted by either parties' respective solicitors. The documents in my view constitute a negotiation between parties. In my view it is clear that subsequent documentation seeks to refine the terms of that negotiation.

25. No particulars were sought by the defendants in respect of this statement of claim. The defence filed on the 15th day of July, 2019; at para. 7, there is an explicit denial that the first named defendant negotiated a commercial agreement or option to acquire the property. They deny that there is or was any concluded finalised or enforceable agreement or contract. The payment of the £20,000 is denied as having been paid as a good faith payment in exchange for an option to acquire the property. It is pleaded that the payment was made by a private company called PCI Properties Limited and, within the affidavit, a copy of the cheque is exhibited. I am not entirely sure what turns upon this. The defendants received £20,000 and accepted it some two years ago. If they had issues with the manner in which, or the entity on which, the cheque was raised, they could have done so before now.

26. Essentially, the defence denies any concluded finalised or enforceable agreement or contract. The matters with regard to the "deposit" or payment of £20,000 is set out

above. There is an express denial that any note or memorandum exists pursuant to the terms of s. 51 of the Land and Conveyancing Law Reform Act, 2009 ('the 2009 Act') and that any interest in property, legal or beneficial (s. 52 of the 2009 Act), has passed to the plaintiffs. It is further denied that the plaintiffs were ready, willing and able to complete the purchase.

27. At times throughout the correspondence both parties (who knew each other over a number of years) were anxious to 'do a deal' without the intervention of solicitors. The first named plaintiff believes that, in principal, there was such a deal, that he was in funds and that by some artifice or back peddling on the part of the defendants they are now seeking to resile from that understanding. The defendant (through the first named defendant) was also anxious to conclude a deal but ultimately did not agree with the terms or was unwilling to conclude upon the terms the first named plaintiff understood had already been agreed.

28. The plaintiffs contend that, by virtue of the allegation of an oral agreement, this matter will require to be remitted to a full plenary hearing. In other words, to allow this matter to proceed, in order that evidence relating to the precise terms of the contract might be adduced and, indeed, whether specific performance is available.

29. Without wishing to be unfair to any party, it is, in my view clear that the plaintiffs approach this application with some measure of reluctance, hoping that time would again persuade the parties to set aside their present differences.

30. The terms of the contract contended for by the plaintiffs have been difficult to discern within the statement of claim. There was no application before the court to seek any amendment of the pleading. In my view, the claim now advanced as to the terms and indeed where the existence of the precise terms of this contract are to be found is significantly at variance to the matters pleaded within the statement of claim. As set out above in my view that pleading does not disclose the existence of a binding agreement.

31. The reliefs sought pursuant to RSC O. 19, r. 28 require an examination of the pleadings as identified by Clarke J. (as he then was) in *Moylist Construction Ltd v. Doheny* [2016] 2 I.R. 283 ('*Moylist*'). Invoking the inherent jurisdiction of the court permits that court to also consider other matters as detailed in *Barry v Buckley* [1981] I.R. 306.

32. In *Keohane v. Hynes & Anor*. [2014] IESC 66, Clarke J. (as he then was) quoted from his own judgment of *Moylist* in the following terms: -

> "6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and

obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

33. Whilst in principle the ability of a court to examine the documentation is clear, in my view, the matter is further complicated on the specific facts of this case in that the documentation itself is in many instances contradictory and incapable of, what might be described as a unified analysis.

34. The existence of a concluded contract is of particular importance in any action for specific performance for the sale of land or, in this case, for the specific performance of an alleged option agreement for the sale of land. The law is clear that, as an absolute minimum, there must be certain basic pre-requisites; a valid contract for consideration and compliance with s. 51(1) of the 2009 Act. There may be some good reason why equity will not insist upon strict compliance with these criteria (which does not appear on the facts of this case).

35. Finnegan P. in *Cosmoline Trading Limited v. Burke & Son Limited & Anor*. [2006] IEHC 38 confirmed the position as follows: -

> "In order to obtain specific performance a party must first of all establish a contract and without this there can be no specific performance. In this case I am satisfied that there were negotiations but that the same never resulted in an entire and completed contract. Where there is no contract part performance does not arise… where there was no consensus on material and essential terms there cannot be a contract."

36. In my view that is the position in this case. It is difficult to discern any single document setting out the terms of a contract where all of the terms have been agreed. Even a cursory examination of the correspondence shows that the terms and conditions were still in a process of negotiation. The existence of a valid contract (being a contract for an option agreement on the plaintiff's place) is again not concluded by virtue of the parties' solicitors both using the well-recognised formula for the assertion that, on the basis of the correspondence between them, there is no concluded contract of sale.

37. I understand and accept that I must take the plaintiffs' case at its height in respect of any application seeking the dismissal of proceedings. However, on the plaintiffs' own case and, in part, within the affidavit evidence, there are certainly ongoing serious negotiations

between the parties. That much is clear. What is completely unclear is the nature and, indeed, existence of a binding contract between the parties. Certainly, the existence of an oral contract (which is identified by the plaintiffs as a possible means perhaps of ensuring a plenary hearing) must, in and of itself, be evidenced by way of a written agreement and that latter portion is simply absent on the facts of this case.

38. In my view, the criteria and circumstances of the contract set out by counsel for the plaintiffs is at significant variance with that which is pleaded. I appreciate that there may be some degree of latitude permitted with regard to a pleading that cannot quote from and deal with every item of correspondence (and there is a myriad of items of correspondence in this matter because, at various points, the parties considered that they should also negotiate between themselves as well as between their respective solicitors).

Defamation

39. Paragraph 9 of the statement of claim is as follows: -

> "On or around 1 July 2018, the first named plaintiff was informed that that the first named defendant had been making defamatory comments about him in the local business community. The first named plaintiff, a professional accountant and businessman, was concerned and distressed by this…"

40. The defendants complain (and in any event at its height the defamation claim is against the first named defendant only although this is not delineated within the statement of claim) was never raised within the plenary summons. They also quote the learned authors Delaney and McGrath's test on civil procedure (4th ed.) at paras. 5-22-5.30 to the effect that whilst the statement of claim will permit amendments to a pleading already before the court that a new and different ground of claim cannot be advanced in such circumstances.

41. Even dealing with this pleading without reference to it not being pleaded within the statement of claim, I am also far from satisfied that the matter has been pleaded with any degree of appropriate specificity. The affidavits record certain comments that the first named plaintiff believes were directed against him by the first named defendant and believes that the damages for defamation are sought in such circumstances. In my view, the matters within the statement of claim fall well below even a stateable cause of action. When questioned, counsel for the plaintiffs very fairly said that he did not wish to make any submissions in respect of the matter and I fully accept his position. No basis for a claim in defamation has been advanced and, accordingly, this portion of the statement of claim is struck out in its entirety.

Lis Pendens

42. There appears to be an initial confusion that two *lis pendens* might have been registered. In fact, it is accepted by all that only one has been registered.

43. The criteria for the removal of a *lis pendens*, pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 Act are two-fold;

(a) unreasonable delay in prosecuting the action – In my view this is not an appropriate ground on the facts of this case, although its prosecution could not be described as rapid.

(b) That the action is not being prosecuted *bona fide*. This criteria is not to suggest that the action is being maintained for an improper purpose but rather that there are grounds for the striking out of a proceeding. If the action is to be struck out on the basis of the reliefs sought within this defendants' motion, then in my view such a finding would constitute an action not being prosecuted *bona fide* for the purposes of this section.

44. The prejudice to the defendants is obviously in that they are not at large to dispose of his asset while the *lis pendens* remains. Having considered the litigation from its inception, I am not satisfied that the delay is such as to merit the removal of the *lis pendens* pursuant to this criteria.

45. Nevertheless, I am satisfied, pursuant to s. 123 (b) of the 2009 Act, that if it is found that the proceedings stand stuck out then the *lis pendens* must also be struck out likewise.

Observations and Conclusion

46. I have noted and accept the defendants' confirmation that the deposit is to be returned.

47. There was a suggestion in correspondence that the "legal route" should be avoided. That, of course, is the parties' prerogative but to do so in conjunction with solicitors' correspondence is, in my view, likely to create difficulties and it has. If parties wish to negotiate between themselves, with or without solicitors they choose to instruct, as I say that of course is a matter for them. But when specific legal reliefs are sought within pleadings accompanied by the registration of a *lis pendens* in respect of lands then certain legal considerations apply.

48. Contracts for the sale of land require certainty; not only so that the terms of the bargain can be properly understood by both parties but also if a court is required to enforce the terms of such a contract that they know, with clarity, its precise terms. Since at least the Statute of Frauds in 1695 and now evidenced within s. 51 of the 2009 Act, no action to enforce a contract can be brought in a case such as this seeking specific performance, without a written note or memorandum signed by 'the person against whom the action is brought' (in this case the defendant vendor). Of course, a note or memorandum required to satisfy s. 51 of the 2009 Act only becomes relevant if there is a concluded agreement in the first place. Put simply in this case no such contract or agreement exists and therefore the plaintiff cannot satisfy s. 51 of the 2009 Act.

49. The invitation by counsel for the plaintiff to permit this matter to go to plenary hearing whereby the precise terms of the agreement might be determined can, in my view, be seen as an attempt to possibly forge an agreement on the basis of oral evidence to in turn relate to some documentation that might then be invoked as the agreement. That is to reverse the process. The binding agreement is the starting point. Negotiations are just

that and not evidence of a concluded agreement. I can see no basis in respect of the pleadings, the contract for sale or any surrounding documentation (some of which is mutually contradictory) to conclude the existence of any binding contract such as would give rise to a stateable case in specific performance of an option agreement.

50. I accept that the dismissal of any proceedings should only be done sparingly but, on the basis of the matters evidenced before me and the written submissions furnished by the defendant, I can see no basis, based upon the oral submissions of both parties before the court and examination of the documentation presented, other than to grant the application sought by the defendants for the strike out of proceedings on the grounds that no contract had been concluded between the parties. Negotiations conducted in good faith certainly but no ultimate agreement.

51. Accordingly, given my decision that these proceedings stand struck out I direct that the *lis pendens* must be removed pursuant to s. 123 (b) of the 2009 Act, as in the absence of the maintenance of these proceedings there is no entitlement, on that basis, to maintain the registration of the *lis pendens*.

52. It follows that, in terms of the notice of motion, the court will grant orders in terms of paras. (a) in respect of the grounds sought pursuant to RSC O.19 r.28 and the inherent jurisdiction of the court, (b) on the basis that no proper cause of action is disclosed and (c) pursuant to s. 123 (b) of the Land and Conveyancing Law Reform Act, 2009.

53. I will hear the parties in respect of any additional orders that may be required including any as to costs.