



**THE COURT OF APPEAL  
CIVIL**

**Neutral Citation Number: [2020] IECA 3**

**Record Number: 2019/213**

**Edwards J.  
Costello J.  
Noonan J.**

**BETWEEN/**

**BRIAN LEGGETT**

**PLAINTIFF/RESPONDENT**

**- AND -**

**GAVIN CROWLEY**

**DEFENDANT/APPELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 22nd day of January 2020**

1. This is an appeal against the Order for specific performance of a contract for the sale of land known as Newbarn, Kilsallaghan, County Dublin, being the property comprised in Folio 49441F of the Register of Freeholders County Dublin ("the property"), for €460,000 by O'Connor J. on 10 April 2019 following a written judgment delivered on 27 March 2019, [2019] IEHC 182.

**Background**

2. The appellant purchased the property in 2002 and on 31 October 2002 he was registered as the full owner of the property. He constructed a dwelling house on the lands where he resides with his partner and his father. The appellant was a builder and he provided the property as security in the form of a first legal charge for two loan facilities advanced to him by Bank of Scotland (Ireland) Limited ("BOSI") in May 2006 and March 2008. On 13 July 2006, BOSI was registered as the owner of the charge on the folio.
3. Along with many others in the last decade, the appellant experienced significant financial difficulties and he defaulted in his obligations under the loan facilities. On 4 October 2012 solicitors for BOSI demanded repayment of the outstanding loans in the sum of €997,482.02. Subsequently, on 11 December 2012 they demanded possession of the property.
4. On 20 December 2012 the appellant's solicitors, Eamonn Greene & Company ("Greenes"), advised BOSI that the property was for sale following discussions the appellant had with the bank where he indicated that he would sell the property and use the proceeds of sale to pay down his outstanding indebtedness.
5. The respondent was anxious to purchase a home for his family. He viewed the property on two occasions in October 2013 and made an offer to purchase the property for the sum of €475,000 to the appellant's auctioneer. The auctioneer accepted the respondent's

offer on behalf of the appellant. The purchase price was subsequently reduced by agreement to €460,000.

6. By letter dated 18 February 2014, Bank of Scotland plc ("BOS") (with whom BOSI had merged in a cross-border merger) informed Greenes that the appellant must provide cleared funds in the sum of €445,887.20 to BOS before it would release the charge on the folio.
7. A contract for sale was executed by the appellant in the presence of his solicitor on or about 24/25 February 2014, whereby he agreed to sell the property to the respondent for €460,000. Greenes forwarded the executed contract to the respondent's then solicitors on 25 February 2014, together with a copy of the letter of BOS dated 18 February 2014. The closing date fixed by the contract was 4 March 2014.
8. In replies to requisitions on title, the appellant said that there was no litigation pending or threatened in relation to the property, no other person had any direct or indirect interest in the property and there was no boundary dispute in relation to the property. At the hearing the appellant claimed that there was a dispute regarding the boundary; there was outstanding litigation regarding the boundary dispute and the appellant asserted that his father, with whom he resided, had an interest in the property by reason of financial assistance he received from his father when he purchased the property. He did not clarify whether this interest was a charge securing a loan to the appellant or an equitable interest reflective of the father's contribution to the purchase of the property.
9. The appellant failed to complete the sale and the respondent instituted proceedings seeking specific performance of the contract on 20 June 2014.

#### **The defence of the appellant**

10. Initially, the appellant maintained that he did not execute the contract for sale. Prior to the conclusion of the trial, that assertion was withdrawn. Secondly, he said that the court should not order specific performance as the contract was illegal and, therefore, unenforceable. He asserted that the appellant and the respondent agreed that the respondent would pay €525,000 for the property, €460,000 of which would be recorded as the purchase price in the contract for sale and the balance of €65,000 would be paid by the respondent directly to the appellant in the form of an "under the table" cash payment, thereby under-declaring the stamp duty payable on the transaction. Thirdly, it was argued that there was a boundary dispute in relation to the property. The appellant asserted that the house was, in fact, partially erected on the lands of an adjoining owner in respect of which there were outstanding proceedings. It was not possible, in the circumstances, to order specific performance of the contract as the court could not extinguish a third party interest in the land. Finally, it was said that the appellant, his partner and his father would each suffer hardship by virtue of losing the home in which they resided. In addition, the appellant's father would suffer hardship because he would not receive compensation for sums he provided to the appellant to assist in the purchase of the lands and in the construction of the house in 2002.

### **Judgment of the High Court**

11. As noted above, the appellant did not maintain his argument that he did not execute the contract for sale. The trial judge rejected the allegation that the respondent had agreed to pay part of the consideration as an “under the table” cash payment. He, therefore, rejected the argument that the contract was illegal and, therefore, unenforceable. This finding has not been appealed.
12. An adjoining landowner had taken proceedings for trespass on 27 July 2004 against the appellant (“the trespass proceedings”). The trespass proceedings came on for hearing on 20 June 2006 and were adjourned generally. No further steps had been taken in the trespass proceedings, though a notice of intention to proceed was served in 2012. Furthermore, the appellant’s then solicitor, Mr. Greene, gave evidence that the requisitions on title were completed in accordance with the appellant’s instructions. It will be recalled he specifically confirmed that there was no litigation pending or threatened in relation to the property, and there was no boundary dispute in relation to the property.
13. The respondent gave evidence that he only became aware of a possible boundary dispute in November 2017 when the appellant was represented by a different firm of solicitors. The court accepted this evidence. In light of these facts, the trial judge concluded that there was no evidence of a continuing dispute in relation to the boundary or the alleged trespass by the appellant on the lands of his neighbours. The trial judge noted that “[t]he plaintiff is aware of this risk and accepts the disclosure for the closing of the sale.” He, therefore, rejected the argument that specific performance could not be ordered on the grounds of alleged impossibility.
14. The appellant had further referred to the “unascertained position” of Start Mortgages, the successor in title of BOS. The trial judge held that Start Mortgages would not be entitled to resile from the position of BOS communicated in the letter of 18 February 2014, and thus, would be required to release its security over the property upon payment of a sum of €445,887.20 (being the net proceeds of sale). The trial judge held that the appellant was not entitled to rely on a possibility that Start Mortgages might not accept the net proceeds of sale as a reason to withhold an order of specific performance when he had not adduced any evidence that Start Mortgages would not release his security upon receipt of the net proceeds of sale under the contract.
15. The trial judge also rejected the appellant’s argument that he should not be ordered to specifically perform the contract on grounds of hardship. The appellant argued that an order for specific performance would cause him hardship due to the loss of his family home. In addition, the appellant claimed that his father made a contribution of €50,000 to the appellant for the home. As his father also lives in the property, an order of specific performance would result in his father losing his home and receiving no compensation for his contribution of €50,000 to the property.
16. The trial judge made no findings of fact with regard to the claimed hardship on the part of the appellant, his partner and his father. He accepted that the appellant was assisted

financially by his father but he made no finding that the appellant's father had any interest in the property, or on the extent of the financial assistance.

17. The trial judge said that the appellant entered into the contract willingly and in an effort to deal with his liabilities with BOS. The height of his case was that the appellant was prepared to sell his home in 2014. He raised no issue at the time that the sale of his home would cause either the appellant, his partner or his father hardship due to the loss of the family home. The trial judge held that the hardship asserted must be external to the contract in order to preclude performance of the contract. As this was not so, he rejected that argument. He, therefore, made an order that the appellant specifically perform the contract for the sale of the property and declined to order the payment of damages in lieu of specific performance.

#### **The appeal**

18. The appellant appealed the decision of the High Court on the grounds that performance of the contract is impossible by virtue of the boundary dispute that exists in relation to the property and/or that specific performance should be refused because of the alleged hardship which the appellant, his partner and his father would suffer if the contract was to be completed.
19. At the hearing of the appeal, counsel for the appellant said that the sole issue in the case was whether damages should be awarded in lieu of specific performance.
20. The appellant argued that the trial judge erred in ordering specific performance of the contract because this would entail extinguishing the interest of the neighbouring landowner in the lands or compelling the neighbouring landowner to concur in the conveyance. This argument is misconceived. It is open to a purchaser to elect to take whatever title the vendor has to give. This is set out in Wiley and Woods, *Irish Conveyancing Law* (4th ed., Bloomsbury Professional, 2019) at p. 632 where the authors state: -

*"One of the primary objects of a decree of specific performance of a contract for the sale of land is that the purchaser should become the owner of the land to the extent agreed in the contract. Clearly this will not be the result if the vendor has a bad title and so is unable to transfer the title he undertook to transfer by his agreement with the purchaser.....However, as in the case of misdescription, the purchaser may elect to take whatever title the vendor has to give..."*

There is no suggestion that the vendor conveys that which he does not have and, thereby, extinguishes the interests of a third party in the land. Nor is there any suggestion that a third party is required to "concur in the conveyance" in order to ensure that the purchaser obtains the title that a vendor undertook to transfer by his agreement with the purchaser. It is merely that the purchaser may get less than he bargained for. The trial judge clearly understood this. At para. 56 of the judgment, he does not purport to extinguish any alleged interest of the neighbouring landowner. Rather, regarding the possible alleged trespass, the appellant is required to give the respondent the best title to

the property which the appellant can, on the basis that the respondent is "aware of this risk and accepts the disclosure for the closing of the sale." In my judgement, there was no error on the part of the trial judge in this regard and thus, this ground of appeal must fail.

21. The Supreme Court accepted in *Lavin v. Walsh* [1964] I.R. 87, at p.105, that the court has power to refuse an order for specific performance on the grounds of hardship. To do so is "quite unusual and exceptional". In *Patel v. Ali* [1984] CH 283, Goulding J. stated 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."*

I accept that this statement reflects the law in this jurisdiction.

22. In *Roberts v. O'Neill* [1983] I.R. 47, at p.56, McCarthy J. speaking for the Supreme Court stated:-

*"Hardship is permitted to defeat specific performance where an existing hardship was not known at the relevant time, being the date of the contract."*

23. The claim of hardship was never pleaded or articulated in advance of the trial. It is not clear upon which basis the appellant was permitted to raise this argument in the High Court. The High Court made no findings of fact which would support any plea of hardship. Insofar as the case was based upon the economic pressures which obliged the appellant to sell his family home in order to meet his pressing financial commitments, this cannot suffice to justify the exercise of the court's exceptional power to withhold granting an order of specific performance in a case in which it is otherwise appropriate to grant such relief. Such a proposition would fundamentally undermine contractual certainty and would leave purchasers in an unclear position of never knowing whether they, in fact, had concluded enforceable contracts for the sale of land.
24. No specific facts as regards the hardship that may be suffered by the appellant's partner are asserted, other than the obvious fact that the sale involves the sale of the property in which the appellant and his partner currently reside which I have held is not sufficient to justify the withholding of an order of specific performance. There is no finding that they will have nowhere to live, and it seems this case was not made on his behalf.
25. The appellant argued on appeal that he was compelled to sell the family home by reason of his indebtedness and that the trial judge ought to have refused to order specific performance on grounds of hardship based on this fact. The trial judge did not err in this regard. He held as a fact that the appellant entered into the contract willingly. That finding is binding on this court and no basis for overturning it was advanced. Even if a

purchaser were constrained by the need to repay debts to sell his family home, that alone could not be a sufficient answer to a claim for specific performance. Therefore, there is no factual basis to support the argument on behalf of the appellant and his partner.

26. As regards the claim that sale of the property would involve hardship to the appellant's father, it is to be noted that the appellant is registered as the sole owner of the folio. The appellant executed a first legal charge over the property in favour of BOSI which was not subject to any alleged interest of his father. No interest of his father was registered on the folio at the time the appellant entered into the contract. In replies to requisitions, he indicated that no other person had an interest in the property and the trial judge found, as a fact, that the respondent was not informed of any alleged interest of the appellant's father in the property. It is to be borne in mind that the trial judge did not find that the appellant's father had any interest in the property, he merely held that in 2002 he had provided financial assistance to the plaintiff. In the circumstances, in my judgment, the trial judge was correct to hold that the appellant had not made out a case of hardship in respect of his father either.
27. Furthermore, any hardship allegedly arising from the sale of the property was well known to the appellant at the time he entered into the contract and he did so willingly. He, therefore, cannot bring himself within the parameters of *Roberts v. O'Neill*.
28. The appellant's reliance on the decision in *Aranbel Ltd v. Darcy and Others* [2010] 3 I.R. 769 is misplaced. While Clarke J. observed that it was possible that the hardship jurisprudence might have some application in circumstances where a defendant purchaser could complete a contract for sale only by selling his family home or some other asset, that is the exact opposite of the position in this case. In these proceedings, the appellant is the vendor and, therefore, he always contemplated the sale of his family home when he entered into a contract for the sale of the property. Furthermore, he will obviously obtain a reduction of his liabilities when the proceeds of sale are used to repay a portion of these liabilities.
29. It is also important to bear in mind that the court has a discretion whether to award specific performance of a contract. Specific performance, and relief from specific performance, are equitable remedies and, therefore, equitable principles apply to the court's exercise of its discretion with regard to either relief. It is, accordingly, relevant to consider the actions of the appellant when assessing his argument that he should not be ordered to perform his contract on the grounds of hardship. The appellant provided a first legal charge over the property in favour of BOSI without apparent reference to any alleged trespass by him on the adjoining lands, or any interest of his father in the property. From October 2012, BOS was entitled to repossess the property on foot of the registered charge of BOSI. From 2012 until 2014, the appellant was willing to sell the property and provide the proceeds of sale to BOS in an effort to deal with his indebtedness to BOS. At the time of the execution of the contract for sale of the property, the appellant remained indebted to the BOS for a sum of approximately €1 million.

30. Finally, the conclusion of all of the arguments of the appellant was that the trial judge ought to have awarded the respondent damages in lieu of specific performance. This argument seems to me to be without merit. The appellant entered into a binding enforceable contract for the sale of the property. *Prima facie*, the respondent is entitled to that which he bargained for and, therefore, specific performance should follow. If damages in lieu are to be awarded there must be a reality to the disappointed purchaser recovering those damages, otherwise the purchaser receives no relief for the wrong done to him. The trial judge found, as a fact, that the appellant is in debt to Start Mortgages for approximately €1 million. There was no evidence regarding any other debts or assets of the appellant. The appellant adduced no evidence and the trial judge made no finding as to his ability to meet any award of damages. The argument that he could meet an award of damages out of the proceeds of sale of the property which exceeded the sum which BOS agreed to accept as a condition of releasing the charge is untenable and, in any event, is predicated upon the very thing the appellant allegedly seeks to avoid: the sale of the property. This is no more than a disguised argument that he wishes to obtain a better price for the sale of the property. I have no hesitation in rejecting this argument.
31. In my judgment, the trial judge was correct in holding that it was not appropriate to refuse to order specific performance of the contract on the asserted grounds of hardship, and so this second ground of appeal likewise fails.
32. In addition to these arguments which had been advanced in the High Court, counsel for the appellant raised arguments at the hearing of the appeal which had not been pleaded, were not raised in the High Court, and were not in the grounds of appeal. This is not permissible and no basis for departing from this central rule of procedure was suggested; therefore, those submissions are not addressed in this judgment.

### **Conclusion**

33. The fact that there may be a dormant boundary dispute affecting the property for sale does not mean that specific performance of the contract should not be ordered on the grounds of impossibility.
34. The appellant has not established as a matter of fact that the sale, by him, of his family home to the respondent would result in hardship such that a decree of specific performance of the contract should not be ordered. Similarly, no case was established that the appellant's father would suffer a hardship arising from the sale of the family home such that an award of specific performance of the contract should be refused.
35. The appellant has not established that the trial judge erred in law by making an order for specific performance of the contract of 25 February 2014, rather than awarding damages in lieu of specific performance.
36. Accordingly, I would refuse the appeal and affirm the order of the High Court.