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THE HIGH COURT

BETWEEN:-

ANOM ENGINEERING LIMITED

Plaintiffs

and

PATRICK J. THORNTON,
FRANCIS X THORNTON,
KEVIN O'GORMAN

Defendants

Judgment of Mr. Justice Costello

Delivered the 1st day of February, 1983

The defendants are the owners of some valuable land just off the Naas dual carriageway in the Clondalkin area of County Dublin. Mr. Patrick Thornton on behalf of himself and his co-defendants negotiated the sale of an acre of it to the plaintiff company in the year 1978. There seems to be little doubt but that a concluded oral bargain was arrived at and the real dispute in the case is whether the agreement is legally enforceable. I will begin this judgment by indicating what the oral agreement was and how it was reached and will later turn to see how it was affected by the correspondence which took place between the parties solicitors. Their preliminary meeting took place in January 1978 in the plaintiff company's Blackhorse Avenue premises and at that meeting Mr. Thornton told Mr. O'Callaghan and Mr. Greene (the two directors of the plaintiff company) that he was looking for £25,000 for the acre of land which the plaintiff company required. Not long after the parties met again, this time on the site. The defendants were proposing to develop portion of the lands themselves and Mr. Thornton indicated in a general way the portion of a field which the plaintiff company could purchase for the light engineering factory they intended to develop. Mr. O'Callaghan and Mr. Greene agreed on the price which Mr. Thornton had suggested and they shook hands on the deal. But the site was land-locked and apart from the question of access there was the problem

of sewage and surface water disposal from it and the supply of water and power to it. These matters were discussed between the parties, as was the question of the plaintiffs' chances of obtaining full planning permission for the factory they had in mind. At the first site meeting a preliminary discussion took place about sewage disposal and Mr. Thornton made the suggestion that disposal into a multi user septic tank on lands he was retaining might be possible. Access to the plaintiffs' site by means of a road way which Mr. Thornton would put in was also mentioned. At the next meeting between Mr. Hogan, the defendants' architect, and the plaintiffs' directors which took place in the Aisling Hotel, Dublin, the exact position of the plaintiffs' acre was agreed by reference to maps which Mr. Hogan had brought along with him. Later a second site meeting took place between Mr. Greene and Mr. Thornton. The question of water and power supply to the site was discussed and agreement was reached as to the point on the lands the defendants were retaining at which a water connection could be made. It wasata point B on the map annexed to the written contract which the defendants solicitors had prepared. The point at which the plaintiffs could make a connection to the electricity supply (it was at a three phase E.S.B. installation on a small unit on the lands which the defendants were retaining) was also agreed. The exact date of this meeting has not been established but it would

appear to have been in the month of June, 1978. The last meeting of significance again took place on the site. It was on the 8th August, 1978 and it was attended by the plaintiffs' architect, Mr. Jordan, and by Mr. Thornton. Power and water supply to the site were again discussed and no problem arose in relation to them the arrangements previously made being apparently confirmed. Mr. Jordan was mainly concerned about sewage and surface water disposal. His clients had previously accepted that they would build a septic tank on their lands, (the idea of a connection to a multi user tank on the defendants lands having been dropped) and a septic tank which would include a soak pit was agreed to be put on the lands by the plaintiffs. It was also agreed that clean effluent from this unit would be discharged into a water course on the defendants lands and storm water would also be disposed of in a similar way. It is clear that the parties at these various meetings reached agreement as to

(a) the lands to be sold
(b) its price
(c) how access was to be effected
(d) the point at which power and water connections were to be made and
(e) how clean effluent and storm water was to be discharged

Evidence of a rather tentative nature was given in an attempt to show that some sort of understanding was in addition reached that the access road was to be built within six months of the execution of the contract but I am satisfied that no such agreement was reached between the parties.

The defendants have not really challenged the existence of a concluded oral agreement and have not suggested that it was in any way conditional or was subject to contract. However on the 2nd October, 1978 the defendants intimated that they did not intend to go on with the sale and in reply to the plaintiffs present claim for specific performance make the case that the oral agreement is unenforceable, mainly because it has not been evidenced in writing as required by the Statute of Frauds.

Up to now I have been examining the parties activities. It is now time to see what their solicitors were doing. On the 13th March, the company's solicitor wrote asking for a sight of the title in relation to the proposed sale and on the 8th May the defendants solicitor sent a draft contract and copy documents of title. It is accepted by the defendants Counsel that the solicitor's letter and the accompanying draft can be connected and together constitute a memorandum to satisfy the Statute of Frauds of the agreement that up to then had been reached (the authority of the defendants solicitor to sign the letter not being questioned.) It is however claimed that subsequent events now preclude the plaintiffs from relying on the draft contract as the memorandum which the Statute requires. Mr. Butler on the defendants behalf has submitted that the agreements relating to

(a) the power and water services and
(b) the discharge into the defendants water course

were made after the 8th May, 1978; that these are material terms of the contract of sale and are not included in the memorandum of the 8th May nor in any other memorandum signed by the defendants or on their behalf; so the draft contract cannot be relied on by the plaintiffs as a sufficient memorandum to satisfy the Statute. It is urged by him that a memorandum which merely states the property, price and parties as the memorandum of the 8th May stated will be sufficient if and only if no other provisions have been agreed and I was referred to Fawcett Contract and Conveyance Third Edition, page 47 to support this proposition.

The general principle of law which I must now consider is well settled. The memorandum of the agreement which is called for by the Statute must contain all the essential terms which the parties have agreed. What is or is not an essential term may be a matter of considerable debate. In Tweddell .v. Henderson (1975)1 Weekly Law Reports 1496, the judgment is an indication of how a Court may regard some terms of a contract as essential to the contract for sale, for example terms of the payment of the purchase price by instalments, and other terms as mainly incidental to the contract, for example, terms relating to details of the construction of the building to be built on the land. The test to be applied is a subjective one and the Court is required to consider those terms as

essential to the contract which was so regarded by the parties themselves. (See Barrett .v. Costello 107 Irish Law Times and Solicitors Journal page 239).

In the present case all the terms of the parties bargain were contained in the draft contract of the 8th May with the exception:

(a) of the agreement relating to the discharge of clean effluent and storm water into the defendants water course and

(b) those relating to the supply of water and power

It seems to me that what I must decide in this case is;

1. Whether these were material terms of the agreement for sale and if so whether or not they were evidencedin writing in accordance with the Statute and

2. Whether they were collateral to the agreement for sale and if so outside the Statute.

As to (a) I am satisfied that this was a term of the agreement for sale and a material term of it as the whole purpose of the sale could not have been effected without this term. But I am satisfied that there is a memorandum of it to be found in the correspondence between the parties solicitors. Referring to Mr. Jordan's meeting with Mr. Thornton on the 8th August, 1978 the plaintiffs solicitor wrote stating "we understand that agreement has been reached between the parties whereby effluent from a septic tank to be located on our clients site will be discharged through a water course on your clients property and that our client will have access to water supply and electricity" to which there was a reply on the 29th August in a letter signed by the defendants solicitor which

stated: "in reply to yours of the 17th inst. our clients have instructed us to inform you that they are agreeable to putting a drain from the end of their site along the proposed roadway together with any surface water there might be to the river." Mr. Jordan expressed the opinion, which was not contradicted, that this letter was a confirmation of the 8th August agreement and so, taken in conjunction with the draft contract sent on the 8th May, constitutes in my judgment a sufficient memorandum of the term I am now discussing.

There is, unfortunately from the plaintiffs point of view no document signed by Mr. Thornton or his solicitor which evidenced the parties agreement relating to the plaintiffs rights in regard to power and water supplies. I was in considerable doubt for some time as to whether this agreement should properly be regarded as merely collateral to the main agreement for sale and thus outside the Statute or whether it should be treated as a term and an essential term of the agreement for sale, in which event it needed to be evidenced in writing. But I have eventually concluded that the agreement must be regarded as part and parcel of the bargain for sale of the land and a material and essential part of the bargain. As there is no memorandum evidencing this term of the parties agreement does this mean that the plaintiffs claim for specific performance must fail?.

Mr. O'Driscoll on the plaintiffs behalf put forward two alternative contentions. The first is that Mr. Thornton in evidence gave three reasons for not completing the sale none of which related to the amendments in the draft contract which was forwarded to his solicitors on the 12th September, 1978; that in the absence of objection by him he must be taken as having acquiesced in their inclusion in the contract; that amendments to a contract for sale need not be signed by a party to be charged on it; that accordingly the draft contract sent on the 8th May which was signed by the defendants agents (as amended by the draft contract sent on the 12th September) can be relied on as a memorandum to satisfy the Statute. Whilst I agree that Mr. Thornton gave three reasons for resiling from his oral agreement all unconnected with the amended draft contract and whilst I suspect there may have been a fourth unspecified reason having to do with an improved offer for the land from another party I do not think that Mr. Thornton can be said to have impliedly agreed to the plaintiffs sollicitors amendments. He said he was not going through with the sale but by so doing certainly did not imply any acceptance of the draft sent by the plaintiffs solicitor. This part of the plaintiffs case therefore fails.

But it seems to me that Mr. O'Driscoll's second submission is a good

one. It is this. It is urged on the plaintiffs behalf that if I were to hold that no sufficient memorandum existed relating to the terms of:

(a) the water and power supply and/or
(b) the effluent and storm water discharge

that the plaintiffs were entitled to waive the benefit of those terms and were entitled to seek the specific performance of the contract as evidenced by the memorandum of the 8th May or any other memorandum contained in the correspondence. The principle of law to be applied on this aspect of the law of specific performance has been stated by Kenny J. as follows:

> "My view is that when parties conclude an oral contract which contains a term wholly for the benefit of one of them and there is a written memorandum which does not contain any reference to that term the party for whose benefit the term was inserted may waive it and sue successfully on the contract of which there is a memorandum. The note in writing for the purpose of the Statute of Frauds has to be of the contract sued on not the contract made and the plaintiff may waive a term which is wholly in his favour and which is not referred to in the memorandum. (See Barrett .v. Costello quoted in Wiley "Irish Conveyancing Law" paragraph 9.007 and also Tiernan Homes Limited .v. Fagan and Others Supreme Court (unreported) 23rd July 1981".

Applying the waiver principle to this case it seems to me that the express agreement relating to the right to connect at agreed points on the defendants land to obtain a supply of power and water was a stipulation in the agreement entirely for the benefit of the plaintiffs and that they can waive this express stipulation and obtain specific performance of the rest of the agreed terms because they were evidenced in writing in:

(a) the draft contract and
(b) the letter of the 29th August

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In reaching this conclusion I have not overlooked the submissions made by Mr. Butler on the defendants behalf. He urged that the plaintiffs cannot now rely on the letter of the 8th May and the draft contract sent with it as a memorandum under the Statute because the agreement to which these documents referred was the subject of a subsequent negotiation between the parties themselves and attempts by the plaintiffs solicitor to alter the agreement and add new and unagreed terms to it; that furthermore the deposit as required by the draft agreement was never paid. But it seems to me to be quite clear that what the parties did after the 8th May was to agree expressly further terms which had been left undecided before that date and by adding to their agreement they were confirming it and supplementing it and not abrogating it. It is true that in correspondence which he carried on on their behalf and in the draft contract which he sent back to the defendants solicitor in the month of September the plaintiffs solicitor tried to safeguard his clients position by suggesting that the written contract should incorporate terms which had not been orally agreed and which the defendants were perfectly entitled to reject. But in acting as he did the plaintiffs solicitor was in part acting under a bona fide misapprehension as to what the parties had agreed, (for example as to the disposal of sewage), and in part putting forward amendments, (for example in relation to the time limit

for the completion of the access road) which would assist his clients. The defendants were entitled to reject those suggested amendments which were contrary to the parties oral agreements but their submission by the plaintiffs solicitor did not justify the repudiation of the contract by the defendants or preclude the plaintiffs from relying on the parties' actual oral agreement and claim that it was evidenced by the memoranda to which I have referred. Neither does the failure to pay the deposit affect the plaintiffs rights. It seems to me that such a failure has no relevance to a situation in which (a) an oral agreement has been established and (b) the plaintiffs claim that the documents which made provision for its payment amounts to written evidence of part of what the parties had contracted.

In the result therefore the plaintiffs are entitled to an order for specific performance of the contract for sale. To avoid doubts I will declare that the plaintiffs are entitled to those rights in relation to the land which are contained in and referred to in the draft contract sent with the defendants solicitor's letter of the 8th May and contained in his letter of the 29th August, 1978. I should also make it clear that I am expressing no views as to the legal effect of the waiver by the plaintiffs of the express agreed terms relating to the power and water connection on the defendants lands. It may be that the problems arising from this waiver

will resolve themselves but if they do not it should be understood that I am expressing no views on the existence (if any) of any obligation on the defendants in relation to the supply to the site of water or power which may be implied by the parties' agreement or may arise by operation of law.