THE SUPREME COURT

[Appeal No: 374/11]

McKechnie J.
Clarke J.
Dunne J.

Between/

Desmond Murtagh Construction Limited (in Receivership) and Patrick Murtagh, Susan Watters together with the personal representatives of Desmond Murtagh (deceased)

Plaintiffs/Respondents

and

Brendan Hannan, Oliver Malone, Sean McGuigan and John Olwell

Defendants/Appellants

Judgment of Mr. Justice Clarke delivered the 31st July, 2014.

1. Introduction
1.1 This case concerns a series of property contracts entered into between the parties and the question of whether they should now be enforced. A detailed history of the factual circumstances which gave rise to the series of contracts which lie at the heart of these proceedings is set out in the judgment of McKechnie J. It is not, therefore, necessary to repeat same here.

1.2 In brief summary, a series of conveyancing and building contracts were entered into between the parties as a result of which it was ultimately agreed that the defendants/appellants ("the Purchasers") would, by separate sets of contracts, acquire a significant number of units in a development promoted by the plaintiffs/respondents (collectively, unless the context otherwise requires. "the Murtaghs"). The sale of some of the units completed. However, at a certain stage the Purchasers declined to complete the sale of the remaining units and alleged that they were entitled to take that action and, indeed, to have those remaining contracts rescinded, because, it was said, of a failure on the part of the Murtaghs to ensure that conditions attached to the planning permission, which authorised the development in question, had been complied with.

1.3 The series of issues which arose on this appeal are, again, fully set out in the judgment of McKechnie J. For the reasons which I will address in this judgment I agree with the conclusion reached by McKechnie J. to the effect that the appeals should be dismissed. I also agree with McKechnie J. on much of his reasoning. However, my primary purpose in writing this, largely concurring, judgment is to indicate a number of relatively minor points of divergence which do not, in my view, affect the overall result of the case. I should start by indicating the reasons why I agree with McKechnie J. as to his conclusions in relation to the proper construction of the set of contracts which govern the relationship between the parties to this appeal.

2. The Interpretation of the Contracts
2.1 As pointed out by McKechnie J., the issues which arise under this heading are as to the proper interpretation of the relevant contracts as a whole in the light, in particular, of general condition 36 and the special conditions (specifically special condition 2 which provides that the special conditions are to prevail in the case of conflict and special condition 10). These provisions apply in respect of the separate contractual arrangements relating to each individual unit. I agree with the views expressed by McKechnie J. that special condition 10 is clear and applicable. It provides that the Murtaghs may furnish an engineer's certificate of compliance with planning permission and building regulations and that "no objection, query or requisition raised regarding same shall be admitted and general condition 36 is to be thereby varied".

2.2 I also agree with the conclusions reached by McKechnie J. concerning special condition 22(a), which requires the Purchasers to accept replies to objections and requisitions as contained in the booklet of title, and as to the meaning of requisition 27(2)(e), as contained in that booklet, which specifies a draft form in which the relevant engineer's certificate concerning compliance with planning and building regulation is to be furnished.

2.3 I, therefore, agree that, prima facie, the Purchasers were bound to accept a completed and executed certificate in that agreed form as conclusive evidence of compliance with planning and building regulation. I would just add one further observation. As is clear from the detailed analysis of the factual history of the arrangements between the parties in this case, those arrangements were, at least to a significant extent, as to their legal form if not their underlying commercial substance, driven by tax considerations. There is nothing, of course, wrong with that. Persons are entitled to order their affairs, within the law, in a way which minimises their exposure to tax. Indeed, even the original structure of the arrangements which were put in place when a single sale of all the units was contemplated, in the shape of separate contractual arrangements for the sale of the land, on the one hand, and a building contract in respect of construction, may well have been perceived to have brought tax advantages in respect of a saving of stamp duty. Likewise, for the reasons identified by McKechnie J., the decision to change from a single set of contracts in respect of all of the properties together to individual sets of contracts in respect of each individual unit, appears to have been driven by tax considerations.

2.4 The point which does need to be noted, however, is that parties who choose, quite legitimately and for the purposes of saving tax, to structure the legal form of their commercial arrangements in a particular way must accept the consequences of their contracts being in the form which the achievement of whatever tax advantage may be perceived to be present has dictated. There have certainly been cases where, for example, in the case of the sale of newly built property by means of a separate contract for the sale of the site coupled with a building contract, the agreements signed have not reflected reality because the property had already been constructed by the time the relevant contracts were entered into. In any event the parties here, having chosen the particular form of contractual arrangements ultimately settled on, must accept whatever consequences flow from having agreed to put the commercial substance of their agreement into that legal form.

2.5 In any event, having concluded that the High Court was correct, for the reasons identified in the judgment of McKechnie J., to hold that special condition 10 meant what it said, it then follows that it is necessary to consider the other reasons why, in the event

of such a finding, the Purchasers say that they are not obliged to complete the sale on planning grounds (notwithstanding a certificate in the agreed form being proffered) and are, indeed, entitled, it is said, to rescission I, therefore, turn to those issues.

3. Why the Purchasers say they are not bound by the Certificate

3.1 The principal basis put forward by the Purchasers for suggesting that, in the circumstances of this case, special condition 10 (even if interpreted in the way which the Murtaghs suggest) does not entitle the Murtaghs to an order enforcing the contracts and does not preclude them from seeking rescission, is to rely on the principles stated between paras. 5.008 and 5.011 of *Emmett and Farand* on *Title* (2010 Ed.) to the effect that a condition which is either misleading or assumes a state of facts which the vendor knows to be untrue, can be disregarded.

3.2 While I agree with the conclusions reached by McKechnie J. as to the applicability of the principles identified in the relevant passages from *Emmett and Farand* in Irish law, I remain unconvinced that those principles are of any relevance to this case. The Purchasers were not required to assume a state of facts which the Murtaghs knew to be untrue. Rather, the Purchasers were required to accept that, on closing, a certificate in the appropriate agreed form would conclusively establish, at least so far as the relations between the Purchasers and the Murtaghs were concerned, that planning and building requirements had been met. The condition was not, therefore, concerned with events which existed at the time when the contracts were entered into. The condition was concerned with events as they might be at the time when the contracts would close. At that latter time an appropriate certificate in the agreed form would have to be produced. If the Murtaghs were unable to procure that an appropriate professional person would give the relevant certificate in the agreed form then the sale could not close.

3.3 Even to the extent that it might be said that the Murtaghs knew, at the time of entering into the relevant contracts, that there might be a problem with the planning permission (and in particular condition 33 of same to which I will shortly turn) there was no necessary reason why that problem could not have been solved by the time any relevant sale came to be closed and thus a certificate of compliance executed. Likewise, if there really were a remaining problem at that stage, it was not necessarily the case that a relevant certificate could be procured.

3.4 For those reasons I am not satisfied that the issue concerning the applicability of the principles identified in *Emmett and Farand* in this jurisdiction truly arise on the facts of this case. It likewise follows that the question of whether those principles, if they do form part of Irish law, apply also to planning matters, in addition to matters of what might be described as "pure" title, does not arise in this case.

3.5 Such issues might well, in my view, have arisen had the contract, for example, required the Purchasers to accept that a sewer of 300mm had been constructed when, to the knowledge of the vendor, a sewer of only (say) 250mm was in fact in place.

3.6 In my view the finding that special condition 10 does, as it were, what it says on the tin, and thus represents an agreement by the Purchasers to accept, on closing, a certificate in the agreed form, coupled with a finding that such an agreement could not amount to the type captured by the principles identified in *Emmett and Farand*, is sufficient to dispose of the case. For those reasons I would agree with the ultimate conclusion which McKechnie J. suggests, although coming to that conclusion by a slightly different route. In that context I should also express my agreement with the analysis of McKechnie J. as to why the order made by the trial judge was appropriate. Before concluding, there are two further matters on which I wish to make some brief observations. The first concerns pre-commencement planning conditions.

4. Pre-commencement Planning Conditions

4.1 Very many planning permissions nowadays contain conditions, in one form or another, which require an agreement on some matters of detail to be reached before development commences. Leaving over, on the grant of planning permission, matters of detail to later agreement is permissible provided that the matters so left over are truly ones of detail in accordance with the so called "Boland principles" (*Boland v. An Bórd Pleanála* [1996] 3 I.R. 435). But the issue here does not concern leaving over matters of detail to later agreement but rather compliance or otherwise with a condition which potentially requires that those matters are to be agreed prior to the commencement of development.

4.2 What condition 33 arguably required was, of course, that the details of the manner of the increase of the foul sewer from 150mm to 300mm were to be agreed "prior to the commencement of the development". It is true that the wording of condition 33 is not as strong as the wording which is sometimes found in planning conditions to like effect. All those with experience of reading planning permissions will be aware of conditions which state in express terms that no development is to commence until various matters of such detail have been agreed between the developer and the relevant local authority in its capacity as planning authority.

4.3 What condition 33 actually requires is that:-

> *"The applicant shall arrange a meeting with Cavan County Council prior to commencement of the development to agree the details and construction. This section of pipeline will be taken over by Cavan County Council after installation and testing".*

The reference to the "pipeline" is to an increased size of pipeline specified earlier in the condition. The condition clearly requires that a meeting be arranged prior to the commencement of development but it goes on to provide that that meeting be "to agree the details".

4.4 As McKechnie J. points out, in accordance with the principles identified in *XJS Investments Ltd v. Dublin County Council* [1986] I.R. 750, planning permissions are to be construed in the way in which an ordinary intelligent lay person would read them and not as a lawyer might. It seems to me that there is at least an arguable case to be made that an ordinary person would read special condition 33 as meaning that the commencement of the development could not occur until a meeting with the relevant county council had been arranged and the relevant details agreed.

4.5 McKechnie J. has fully set out the circumstances in which it came to pass that such an agreement was not, in fact, reached prior to the commencement of development or, indeed, up to the time when the issues in this case emerged. From a general perspective it might well be possible to describe the circumstances in which that eventuality came to pass as being "reasonable".

4.6 There is no doubt, on the basis of the findings of facts of the trial judge, that the Murtaghs were at all times willing to install the relevant sewer but ran into a problem because of a preference by Cavan County Council that a trunk water main, which the council intended to lay along the same stretch of road, would be installed at the same time. However, that trunk water main was delayed for funding reasons thus delaying the council's agreement to the new foul sewer. It would also appear that the council agreed to a temporary arrangement whereby the development could connect into the existing public services on the basis that the foul sewer in accordance with condition 33 would ultimately replace that arrangement.

4.7 However, the fact remains that a planning permission is a public law document establishing the rights and obligations not only of developers and local authorities but also of interested members of the public generally. Planning permissions also must be taken to mean what they say. A planning permission which is properly construed as requiring that an agreement on some particular point of detail is to be reached in advance of the commencement of development means just that. The development cannot lawfully be commenced until the relevant agreement is reached. If it is commenced prior to agreement, such a development is unauthorised. I cannot, therefore, agree that, in the absence of an appropriately determined variation of the planning permission, such a requirement can, in some way, be ignored. Had, of course, an appropriate variation to the relevant planning permission been obtained, which made express reference to the temporary arrangement agreed to, then the planning situation would have been entirely different. The fact that construction deadlines (again, it would appear, tax driven) might have made it difficult to achieve an appropriate variation in time or to bring proceedings designed to require the council's agreement, does not, in my view, affect the legal position.

4.8 In passing I should comment that, if one were to take a very literal view, a failure to agree matters of detail in advance might lead to a development being permanently unauthorised for, strictly speaking, at least some of the development would have taken place at a time when it should not, in accordance with the terms of the permission, have been commenced. It might then be said that the development did not occur in substantial compliance with the relevant permission. However, and without finally deciding the point, for it does not directly arise in this case. I am inclined to the view that a subsequent agreement (after the commencement of development) could be taken either to cure the problem or to render it immaterial in substance so as to leave an otherwise compliant development as having been constructed in substantial conformity with the planning permission concerned.

4.9 However, on the facts of this case, the relevant matters of detail had not been agreed by the time the issues between the parties arose. Given that, for the reasons which I have already sought to analyse, it does not seem to me that this issue is decisive, I think it appropriate to refrain from expressing any concluded view on this aspect of the case. I am mindful of the fact that a certificate of compliance from an appropriately qualified professional was actually proffered. That professional was not a party to these proceedings. Issues might arise as to that certificate which could, at least on one view, affect the interests of any relevant individual involved. It would be wrong to express any concluded view on those issues in proceedings in which they were not a party unless reaching a conclusion on those issues was determinative of the case. However, it seems to me that there is at least an arguable case that a development which is subject to a planning condition which, properly construed, means that development should not commence until certain matters of detail are agreed, cannot, in the absence of such agreement, be said to have been completed or progressed in accordance with the relevant planning permission, at least for as long as the relevant matters of detail remain unagreed. That logically leads to the second matter of observation on which I wish to touch which concerns that aspect of the agreed form of certificate in this case which refers to such compliance as would be reasonable at the relevant stage of the development.

5. Reasonable at the Stage of the Development

5.1 As McKechnie J. points out, the critical phrase is to the effect that the planning permission must have been substantially complied with "insofar as it is reasonably possible at this stage of the development of such estate". It seems to me that the reason for the inclusion of such a phrase is obvious. In multi unit developments it will almost always be desired that some units would be capable of being sold before the development as a whole is completed. In such cases it will normally be the case that a single composite planning permission (perhaps with some amending further permissions) is obtained in respect of the entirety of the development. If some units are sold before the development as a whole is complete then there may well be aspects of the overall planning permission which will not, at that stage, have been fully complied with. Such a failure of full compliance will not, of course, at least in most cases, cause any problems for the entirety of a development can never take place in an instant. There will always be parts that are finished before others.

5.2 But can it be said on the facts of this case that the planning permission (and in particular condition 33) had been complied with insofar as reasonable at the relevant stage of the development. I am afraid I cannot agree that it can. As noted earlier, I have refrained from giving a definitive view (because it is not essential to the issues which, in my view, arise in this case and because it may, potentially, affect the rights of others not before the Court) on the question of whether, at the relevant time, there was a material failure to comply with the planning permission and in particular condition 33. But if there was such a failure, then it arose precisely because the planning permission would have required agreement on the foul sewer details to be reached before development commenced. In those circumstances I cannot agree that it could be said that there was compliance "insofar as reasonable at this stage" of the development of such estate, for the failure of compliance (if such it be) would relate to a matter which should have been done before the development commenced in the first place.

6. Conclusions

6.1 For the reasons which I have sought to analyse in this judgment I am, therefore, in agreement with McKechnie J. as to the proper interpretation of the relevant contracts and, in particular, the interaction of the general conditions with special condition 10. Like the trial judge I agree that special condition 10 means what it says and that the Purchasers, thereby, bound themselves to accept a certificate which, as a result of the equally binding replies to requisitions on title contained in the booklet of title, was to be in an agreed form.

6.2 Thereafter, I have reached the conclusion that the bases put forward by the Purchasers for suggesting that, even if the contract was to be construed in that way, they were nonetheless not bound to complete and entitled to rescission should be rejected but I have come to that view by a somewhat different route to that identified in the judgment of McKechnie J.

6.3 I would, nonetheless, agree with the conclusion reached in that judgment to the effect that the appeal must be dismissed.