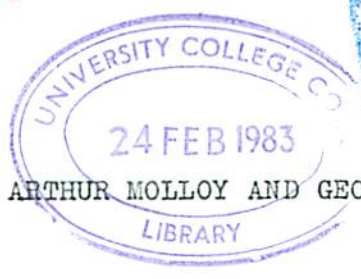


KEATING v B of I

Approved.

DOCUMENTS COLLECTION  
1981 No. 8823P

THE HIGH COURT



BETWEEN:

VALENTINE KEATING, ARTHUR MOLLOY AND GEORGE ROE

Plaintiffs

and

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND  
AND REGINALD A.C. BRENTLAND AND HEATHER R. KING

Defendants

JUDGMENT of Mr. Justice Barrington delivered the 30th day of July 1982

The issue to be decided in this case raises a net point on the interpretation of Condition No. 21 of the 1978 edition of the General Conditions of Sale of the Incorporated Law Society of Ireland.

The Plaintiffs are the purchasers named and the Defendants are the vendors named in a contract incorporating the general conditions referred to dated the 30th April 1981.

The contract was a contract for the sale of certain land by the Defendants to the Plaintiffs. The purchase price was £306,000. A deposit of £76,500 was paid. The sale was to have been

closed on the 28th May 1981 on which date the balance of the purchase money amounting to £229,500 was to be paid and interest at the rate of 20% per annum was to be payable in the event of default.

The Plaintiffs claim they entered into the said sale on the faith of certain representations made to them by the Defendants or their agents. These representations they claim were false and misleading and they allege fraud against the Defendants. They also claim that the representations, even if innocent, entitle them to relief under Condition No. 21 of the contract.

In their statement of claim the Plaintiffs claim damages for misrepresentation and also specific performance of the contract with £100,000 abatement of the purchase price to compensate for error omission or mis-statement in the representations and negotiations leading up to the sale.

The Defendants deny all allegations of misrepresentation, whether fraudulent or innocent, in the negotiations leading up to the sale and counterclaim for specific performance of the original agreement in accordance with its terms together with interest on the balance of the purchase money at the rate of 20% from the 20th May 1981.

The parties have agreed to go to arbitration on the question of whether Condition No. 21 applies in the circumstances of the present case and if so on what amount of compensation, if any, the Plaintiffs are entitled to.

The issue before me raises the question of whether the closing of the sale must await the outcome of the arbitration or whether the vendors can force a closing of the sale against the purchasers' will prior to the outcome of the arbitration.

The case put forward on behalf of the vendors is that, both parties having in their pleadings sought specific performance of the contract, the contract should now be closed and that the question of whether there was any misrepresentation on the part of the vendors and if so, whether the purchasers are entitled to any compensation in respect of it, should be decided later.

The purchasers agree that they have sought specific performance of the contract but they say they have sought it with an abatement - which they measure at some £100,000 - in the amount of the purchase price. They say they cannot be forced to close until they know what the balance of the purchase price will be. They say that they cannot be forced

to part with their money on the basis that they will get it back if successful in the arbitration proceedings.

On the 2nd October 1981 the vendors' solicitors wrote to the purchasers' solicitors a letter in which they suggested that the sale should be closed and that any disputed amounts claimed for compensation or for interest should be placed in joint deposit to await the outcome of the arbitration proceedings.

The Plaintiffs object to the suggestion of placing moneys on joint deposit because they say this would involve them, the Plaintiffs, in parting with the possession of very large sums of money which would be tied up pending the outcome of the arbitration proceedings. They say that, prior to closing the sale, they are entitled to know the amount of the claimed abatement in the purchase price and what the balance of the purchase money actually payable is.

In these circumstances it is necessary for the Court to decide what the formal rights of the parties are under Condition No. 21 in the events which have happened.

The issues which I have to decide are raised by three questions scheduled to the Order of Miss Justice Carroll in these proceedings

dated the 9th November 1981. The questions are as follows:-

(a) Whether, if the Plaintiffs in this action are successful in making a claim for compensation under Condition No. 21 of the agreement dated the 30th day of April 1981 between the Plaintiffs and the Defendants in this action, they are entitled to receive a sum which may be awarded by way of compensation by way of an abatement of the purchase price under the said agreement.

(b) Whether the vendors are entitled to insist upon the closing of the sale before determination of the dispute as to whether the said Plaintiffs are entitled to compensation under and in accordance with Clause 21 of the said agreement.

(c) If the answer to (b) is in the negative, whether the vendors are entitled to insist upon the closing of the sale prior to the determination of the said dispute on the vendors agreeing to hold on joint deposit pending the outcome of the said dispute the amount claimed by the said Plaintiffs by way of compensation.

Clause 21 of the General Conditions is headed "Measurements

Misdescription and Compensation" and reads as follows:-

"21 1 Measurements and quantities, if substantially correctly stated, shall not be the subject of compensation for any errors therein nor shall compensation be payable in respect of any mistake or discrepancy in any sale plan furnished for the purpose of identity, but where an incorrect statement, error or omission, whether as to measurement, quantities or otherwise, materially affects the description of the property nothing herein shall prevent the payment or allowance of compensation under sub-clause 2 of this condition.

2. Subject as aforesaid, any error, omission or misstatement in the particulars or these conditions or in the course of any representations or negotiations leading up to the sale shall not annul the sale or entitle the purchaser to be discharged from his purchase but shall entitle the purchaser or the vendor (as the case may require) to compensation in respect thereof. If any dispute shall arise as to the applicability of this sub-clause or the

"amount of compensation, it shall be settled by arbitration by a sole arbitrator to be appointed, in default of agreement, by the President for the time being of the Incorporated Law Society of Ireland, and the Arbitration Act, 1954, shall apply accordingly.

3. Nothing herein shall, however -

(i) entitle the vendor to require the purchaser to accept or entitle the purchaser to require the vendor to convey (with or without compensation) property which differs substantially from the property agreed to be sold, whether in quantity, quality, tenure or otherwise, if the purchaser or the vendor (as the case may be) will be prejudiced by reason of such difference, or

(ii) affect the right of the purchaser to rescind or repudiate the contract where compensation for a claim attributable to material error, omission or mis-statement cannot be reasonably assessed."

The Defendants suggest that the practical business way of dealing

with the difficulty which has arisen is to close the sale now, leaving the moneys in dispute on joint deposit to await the outcome of the arbitration. They suggest that the purchasers have a duty to co-operate in closing the sale on this basis and they refer to the judgment of Mr. Justice Costello in Northern Bank Limited and others .v. John B. Duffy Irish Law Reports Monthly Volume 1 No. 9 1981 at page 308.

The purchasers submit that it is not fair to ask them to put up the whole of the purchase money when the property they are obtaining may be worth very considerably less than the property they bargained for. They submit that Condition No. 21 of the General Conditions is to be read in the light of the law concerning compensation and abatement of purchase money for misdescription as that law has been traditionally understood. The term "abatement" they submit has traditionally meant a reduction in the purchase price ascertained prior to closing and compensation was merely the amount by which the purchase price was abated. Of course, it might be possible for the parties, by means of a supplementary agreement, to agree to put the disputed portion of the purchase price on joint deposit pending a resolution of the respective rights of the parties. But if one of the



parties did not agree to do this he could not be forced to do it.

In the present case it was not convenient for the purchasers to raise a sum of approximately £100,000 just for the purposes of leaving it lying on joint deposit pending the outcome of an arbitration and they were entitled to rely upon their rights under the original contract. Condition No. 21 sub-clause 3 paragraph 1 indicated that the draughtman assumed that the amount of compensation would have been ascertained prior to conveyance. This was clear from the statement that nothing in the clause was to entitle the vendor to require the purchaser to accept, or to entitle the purchaser to require the vendor to convey, "(with or without compensation)" property which differed substantially from the property agreed to be sold if the purchaser or the vendor (as the case might be) would be prejudiced by reason of such difference.

Counsel for the Plaintiffs submits that Condition No. 21 must be read in the light of the traditional practice of the Courts of Equity in deducting any compensation payable to the purchaser from the purchase price prior to closing. He referred to Emmet on Title 17th Edition page 121; Seton on Decrees 1912 Edition page 2190;

Wylie's Irish Conveyancing Law, 1978 Edition page 221 paragraph 6.68;

Connor .v. Potts 1897 1 Irish Reports page 534; Cordingley .v.

Cheeseborough Law Journal 1862 Volume 31 Chancery N.S. page 616 and

Grant .v. Dawkins and others 1973 3 All England Reports page 897.

For instance in Connor .v. Potts (1897) 1 Irish Reports page 534 where there was a shortfall of some 67 acres out of a possible 442 acres the Vice Chancellor in granting the purchaser a decree for specific performance with compensation said (at page 539):-

"On the whole case I am of opinion that the Plaintiff is entitled to judgment for the specific performance of the contract as to the portion of Knockcairn to which the Defendant can show title, being 249 acres, and the entire of Fourscore 126 acres 2 roods 10 perches, and that he is entitled to compensation for the 67 acres deficiency of the acreage of Knockcairn, at the rate of £12/10s per acre to be deducted from his purchase money of £5,500."

So likewise in the modern English case of Grant v. Dawkins and others (1973 3 All England Reports page 897) where one of the issues discussed was the historical controversy as to the power of the Court of Equity to grant damages Ross, J. quoted the comment of Lord Eldon in Todd .v. Gee

(1810) 17 Vesey 273 at page 277, 278 to the following effect:-

"As to the merits, I should be inclined to support the whole course of previous authority against Denton .v. Stewart (1786 1 Cox's Equity Cases page 258); not being aware, that this Court would give relief in the shape of damages; which is very different from giving compensation out of the purchase money."

It appears to me that if the Plaintiffs are entitled to compensation at all they are entitled to it out of the purchase money and that they cannot be forced to close until such time as the amount of compensation, if any, and therefore the amount of the balance of the purchase price has been ascertained. There may be many cases in which the sensible thing would be to leave the sum in dispute on joint deposit and to close the sale pending the resolution of the dispute. But it appears to me that it is one thing for the parties to make a supplementary agreement, however convenient and sensible, and quite another for one of the parties to be forced by the Court to close a sale before the issue of whether he is or is not entitled to compensation under the original contract has been determined. It appears to me that the law is on the side of the

Plaintiffs in the present case.

One further point is of importance. The Plaintiffs have made an allegation of fraud in the present case. This is a serious allegation which has not been withdrawn. The Defendants deny the allegation and if it turns out that the allegation is not well founded serious consequences for the Plaintiffs may ensue. But until such time as the truth or otherwise of the allegation has been determined I do not think it would be proper to force the Plaintiffs to close the sale.

I, accordingly, would answer the three questions as follows:-

Question No. 1	Answer: Yes
Question No. 2	Answer: No
Question No. 3	Answer: No

*Done By*  
22/10/82