Approved

No redactions needed

THE COURT OF APPEAL (CIVIL)

Neutral Citation Number [2020] IECA 354

Court of Appeal Record No. 2019/343

High Court 2017/7745P

Haughton J.

Murray J.

Collins J.

BETWEEN

MARY EGAN and PAUL BARRON

Plaintiffs/Respondents

AND

NOEL THOMAS RICHARD HEATLEY

Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins

delivered on 14 December 2020

1. I agree with the judgment of Murray J and with the Order that he proposes.

2. I wish to add some brief observations of my own on the damages issue. For that purpose, I gratefully adopt the summary of the background facts and procedural history set out in Murray J's judgment.

The Plaintiffs' Claim

3. The only claim for damages made by the Plaintiffs here was for *"damages in lieu of or in addition to specific performance".* That claim was made pursuant to section 2 of the Chancery Amendment Act 1858, more commonly referred to as Lord Cairns' Act. That Act was repealed by the Statute Law Revision and Civil Procedure Act 1883 but there appear to be conflicting views as to whether the repeal extended to Ireland. [1] For present purposes, that issue is of no practical significance. It is also unnecessary to consider whether the Court of Chancery had power to award damages prior to the enactment of section 2.

[1] Buckley et al, *Specific Performance in Ireland* (2012) states that section 2 was repealed in 1883 but adds that the jurisdiction conferred by remained exercisable by virtue of a saver in the repealing statute: see para 10.16 and footnote 42. That statement is cited with apparent approval by Laffoy J in *McGrath v Stewart* [2016] IESC 52; [2016] 2 IR 704. *A contra* is the speech of Viscount Finlay in *Leeds Industrial Co-Operative Society Limited v Slack* [1924] AC 851, at 863 where he states that the repeal of Lord Cairns' Act did not extend to Ireland.

4. The Plaintiffs could have claimed common law damages for breach of contract (jurisdiction to award such damages in an action for specific performance having been conferred by the Judicature Acts)[2] but they did not do so.

5. There are a number of possible reasons why the Plaintiffs took that approach. Damages under section 2 are potentially more advantageous to claimants than damages at common law in a number of respects. One potential advantage is the date by reference to which damages are assessed. In general, damages for breach of contract at law are assessed by reference to the date of breach whereas, under section 2, damages are usually (though not always) assessed by reference to the date of the hearing or the date of judgment: see per Laffoy J for the Supreme Court in *McGrath v Stewart* [2016] IESC 52; [2016] 2 IR 704. at paragraph 37, citing that Court's earlier decision in *Duffy v Ridley Properties* [2008] 4 IR 282. Another potential advantage under section 2 is the availability of damages for injury that is merely threatened: *Leeds Industrial Co-Operative Society Limited v Slack.* Section 2 damages may be awarded where there is no cause of action at law: *Price v Strange* [1978] Ch 337. It seems likely that the Plaintiffs considered that the assessment of damages under section 2 would be more favourable for them.[3] But, whatever the reason, the fact is that they elected to claim section 2 damages only.

[2] Buckley et al, *op cit,* at para 10.16.

[3] And in his closing submissions, counsel for the Plaintiffs sought damages by reference to the date of his clients' election, expressly relying on *Duffy v Ridley Properties.*

6. Of course, an order for specific performance was also sought in the Statement of Claim. However, on the opening of the case, the Judge was told the Plaintiffs did not wish to proceed with the purchase:

> *"So, we're not asking the Court at this stage to award a specific performance (sic), but to award us with damages in lieu of specific performance based on the cost and expense that my clients suffered as a result of this."*[4]

7. Again, it is reasonable to suppose that the Plaintiffs elected for damages *in lieu* rather than specific performance because they perceived that a remedy in damages would be more advantageous. In any event, consequent on that election, the sole remedy sought by the Plaintiffs at trial was section 2 damages. That remedy was not imposed on the Plaintiffs by a court exercising its discretion under section 2. It was chosen by them.

Section 2 of Lord Cairns' Act

8. Section 2 is in the following terms:

> ***"****In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be*

[4] Day 1 (21 May 2019), page 3.

lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the Court shall direct" (my emphasis)

9. The textbooks speak with one voice in characterising section 2 damages as "*equitable damages*" and emphasising the discretionary nature of the jurisdiction to award such damages.[5] Numerous statements to such effect are to be found in the authorities.

10. Obviously, an important element of the discretion thus conferred by section 2 relates to the decision not to grant specific performance (or, as the case may be, an injunction) and to award damages instead. However, there is nothing on the face of the section to suggest that such decision, once made, exhausts the discretion of the court. On the contrary, the clear language of the section appears to be inconsistent with any such

[5] See, by way of example, *Halsbury's Laws of England* (5th ed), Vol 29 (2019) para 613, footnote 2 ("*the jurisdiction was always discretionary, depending on the circumstances of the case*" & para 614 and footnote 13 ("*Equitable damages are always in the discretion of the court. Their award is also subject to any equitable defences which may be raised by the defendant" "such as delay, mistake, acquiescence and unconscionable conduct*"); Spry, *Equitable Remedies* (9th ed; 2013) at page 669 ("*.. the grant of equitable damages is just as much a discretionary matter as the grant of specific performance or of an injunction; and whether relief should be refused depends on the precise discretionary considerations that arise*."); *Snell's Equity* (34th ed; 2020) at para 2-058 (section 2 *"conferred on the Court of Chancery a discretionary power .. to award damages to the injured party*") and to the same effect Wylie et al, *Irish Conveyancing Law* (4th ed; 2019) at para 16.56 (section 2 *"gave the Court of Chancery a discretionary power to award damages either in addition to or in substitution for specific performance"*).

limitation. At no point are section 2 damages available as a matter of right; they are available if, and only if, the court "s*hall think fit*" to award them.

11. Section 2 was considered by the Supreme Court in *McGrath v Stewart* [2016] IESC 52; [2016] 2 IR 704. There, the High Court had held the plaintiffs were not entitled to decrees of specific performance by reason of *laches* but had proceeded to award damages *in lieu* pursuant to section 2. On appeal, the Supreme Court set aside those awards.

12. In summarising her conclusions at paragraph 40 of her judgment (with which judgment O' Donnell and O' Malley JJ agreed) Laffoy J. expressed the view that the Judge did not have jurisdiction to award damages *in lieu* of specific performance. However, I do not think that that accurately characterises the judge's actual holding. At paragraph 37, Laffoy J expressly held that, because the contracts at issue were contracts for the sale of land, the High Court had jurisdiction to entertain an application for specific performance. She went on:

> *"Accordingly, by virtue of s.2, the Court had jurisdiction to award damages in lieu of specific performance, if it was appropriate for the Court to think it fit that it should do so. In a situation where the Court has determined that laches on the part of the plaintiff purchaser, as here, should operate as a bar to entitlement to an order for specific performance, it is difficult to see how the Court could think it fit to award damages in lieu of specific performance."*

13. Laffoy J concluded that, having refused to make an order for specific performance because it would be inequitable to do so on grounds of *laches*, the High Court judge *"should also, for the same reason, have refused to award damages in lieu of specific performance."*

14. As I read the Laffoy J's analysis and conclusion, she was of the view that, while the High Court had jurisdiction to award damages under section 2, it should have refused to do so because, in light of its finding of *laches*, it could not properly have concluded that it was "*fit"* to award damages. Awarding damages to the plaintiffs would, in the circumstances, have been just as inequitable as granting specific performance. Putting it another way, while the High Court had jurisdiction to award damages *in lieu*, that jurisdiction was discretionary and, in the circumstances, that discretion could only properly be exercised one way.

15. Earlier in her judgment, Laffoy J observed that *laches* would not have been a bar to a claim for common law damages for breach of contract: see at para 34, citing *Meagher v Dublin City Council* [2013] IEHC 474. However, damages for breach of contract had not been claimed by the plaintiffs. There is no suggestion in her judgment that the fact that it might have been open to the plaintiffs to claim common law damages ought to have had any effect on the court's approach to damages *in lieu*. In other words, the *laches* of the plaintiffs was not to be overlooked or excused on the basis that, if only they had framed their claim as a claim for damages in law, *laches* would not have operated as a bar to such a claim.

16. Ms Egan argues that damages in lieu of specific performance is not "*an equitable remedy <u>in itself</u>*" (emphasis in the original) but is, rather, "*a statutory remedy based on the Chancery (Amendment) Act 1858*." It is not clear to me quite what is meant by the suggestion that an award of damages *in lieu* is not an equitable remedy "*in itself*". As for the argument that the power to award damages *in lieu* is a *"statutory remedy*" that is both obviously correct and, for present purposes, uninstructive. Characterising damages *in lieu* as a "*statutory remedy*" tells us nothing about how the power to award such damages should operate.

17. When one looks at the language of section 2 – and Ms Egan's submissions conspicuously fail to engage with its language – and has regard to its purpose of conferring on the Chancery courts a power to award damages in lieu of granting an equitable remedy such as a decree of specific performance, section 2 can, in my view, only be understood as conferring on those courts a flexible and discretionary power to award damages intended to operate in a manner analogous to their established equitable jurisdiction. I share Murray J's view that such is the irresistible inference that arises from consideration of the section.

18. It follows, in my view, that the grounds for refusing equitable relief applicable to the granting of a decree for specific performance or an injunction or other equitable remedy, apply also to an award of damages under section 2.

19. It may frequently be the case that an equitable ground that bars the grant of specific performance will apply equally to a claim for damages *in lieu. McGrath v Stewart* was

such a case. But I see no reason in principle why a ground may apply to one but not the other or why, for instance, if a claim for damages *in lieu* is tainted by unclean hands, the discretion of the court should not be engaged.

20. The principal argument made by Ms Egan in this context appears to be that she *"did not seek to rely upon any fake documents in claiming the primary relief of Specific Performance of the contract*". However, the plaintiffs did not seek specific performance at trial. The "*primary relief"* – indeed the sole relief – actually sought by them from the High Court was section 2 damages *in lieu*. The issue, therefore, is whether the manner in which that claim for damages was advanced by the plaintiffs ought to affect the granting of that relief.

21. Whether, in the event that the plaintiffs had maintained their claim for specific performance, those documents would have been put into evidence and, if so, whether they would have affected the High Court's approach to the grant or refusal of specific performance is, in my opinion, *nihil ad rem*. Such considerations do not, in my view, constrain or exclude the discretion of the Court in terms of refusing an award of damages under section 2 where – as here – false claims for damages have been advanced on the basis of false documentation.

Clean Hands

22. Murray J has analysed the authorities in detail in his judgment. The principle that (s)he who comes to equity must do so with clean hands is, of course well-established. It is

also clear from the authorities that there must be a close connection between the wrongful conduct and the remedy at issue. As it was colourfully put by Lord Scott in *Grobelaar v News Group Newspapers* [2002] UKHL 40; [2002] 4 All ER 732, the "*grime on the hands must, of course, be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he would ordinarily entitled*." (at para 90). Whether there is such a sufficiently close connection requires a close factual inquiry in every case.

23. The authorities considered by Murray J make it clear that the presentation of fabricated evidence may be regarded as conduct warranting the refusal of equitable relief. *Fiona Trust v Prisalov* [2008] EWHC 1748 (Comm) usefully summarises the position:

> *'These authorities are examples of cases in which the court regarded attempts to mislead the courts as presenting good grounds for refusing equitable relief, and show that this is so not only where the purpose is to create a false case but where it is to bolster the truth with fabricated evidence: see Gonthier v Orange Contract Scaffolding Ltd especially at para 36. Further, as is clear from J Willis & Son v Willis, such misconduct can deprive a party of equitable relief notwithstanding the trickery was detected and therefore not pursued to the trial of the claim. However, in all these cases the misconduct was by way of deception in the course of litigation directed to securing equitable relief…'*

The Evidence here

24. Murray J has described in detail the documents relied on by the plaintiffs before the High Court. As noted by the Judge at para 81 of his Judgment, "*the fake QTF documents accounted for nearly €70,000, more than half of the total claim for damages."* (my emphasis). The QTF documents were also described by the Judge as "*obviously home-made*". The documents included an invoice from Mr Barron to Ms Egan for professional fees which did not relate to any actual liability and which "*had been made up long after the event*" and another invoice – relating to "*glazing units"* said to have been supplied by SK Windows – which, unaccountably, gave a former residence of the plaintiffs as the address of SK Windows. That was indeed, as Mr Barron himself accepted, "*beyond strange"*.

25. In any event, the net position is that a substantial claim for damages was advanced by the plaintiffs which, to a very significant extent, was false and which relied on "*fake documents"* put into evidence by the plaintiffs.

The Judgment of the High Court

26. The Judge accepted that *"the court has the same discretion in dealing with a claim for damages in lieu of specific performance as it has in dealing with a claim for the primary remedy."* He also accepted that, in the exercise of that discretion, he could properly *"take account of facts and conduct that were not pleaded but which emerged in the course of the trial."* [6] However, the Judge ultimately concluded that:

[6] At para 79.

"*the fake documents do not go to my discretion to award damages in lieu of specific performance. This case come before the court because Mr Heatley refused to complete the sale. Mr Heatley's refusal to complete predated, and had nothing to do with, the fake documents and I find that the plaintiffs' reliance on them does not disentitle them to the relief they seek."*[7]

Discussion and Conclusion

27. It is not entirely clear whether, in stating that "*the fake documents do not go to my discretion to award damages in lieu of specific performance"* the Judge meant that the plaintiffs' reliance on fake documents did not engage the court's discretion at all (because it had nothing to do with the refusal to complete that had prompted the proceedings) or whether he meant that he did not consider it appropriate to exercise that discretion so as to disentitle the Plaintiffs from an award of damages.

28. As will be evident from the discussion above, to the extent that the Judge intended to suggest that the Plaintiffs' reliance on *"fake documents"* did not, as a matter of principle, engage the court's discretion under section 2, I respectfully disagree. The fact that the documents were unconnected with the refusal to complete did not deprive the High Court of its discretion or oblige (or permit) it to award damages to the Plaintiffs without first addressing whether, in the circumstances, (in the words of Laffoy J in *McGrath v Stewart*) *"it was appropriate for the Court to think it fit that it should do so*". In my view, it simply does not follow that, because the fake documents did not go

[7] Para 83.

to the contract or the refusal to complete - and thus might not have been relevant to the court's decision whether or not to grant specific performance had the plaintiffs maintained their claim for such relief - the plaintiffs' reliance on such documents for the purposes of advancing the only claim actually being made by them was to be disregarded.

29. In my opinion, therefore, the fake documents deployed by the Plaintiffs did indeed go to the High Court's discretion to award, or refuse to award, damages pursuant to section 2. They did so directly and obviously. In my view, the fact that "*the documents were transparently fake"* and that the claim they purported to vouch "*was not sensible"* does not at all mitigate the wrongfulness of advancing a claim on the basis of such documents. Equally, the fact that "*Mr Barron came quietly*" – as it is put by the Judge – does not serve to excuse the presentation by him of a claim for substantial damages based on "*transparently fake*" documents.

30. In Ms Egan's written submissions, it is said that the conduct said to constitute a lack of clean hands here "*does not displace the legal rights in the contract for the sale of the land in question."* However, that misses the point. The only relief sought by the plaintiffs here was section 2 damages. Such damages are not available as a matter of legal right. Had the Plaintiffs sued for damages for breach of contract, the position may well have been different. However, no issue as to the Plaintiffs' entitlement to common law damages is before us on this appeal because the Plaintiffs did not make any claim for such damages. Accordingly, it would not be appropriate to express any view on

whether the plaintiffs' conduct here might have debarred them from recovering such damages.

31. The false documents here, and the false claims founded on those documents, were advanced in order to benefit the Plaintiffs. The evidence given by Mr Barron regarding the losses claimed by the plaintiffs was given on both his own behalf and on behalf of Ms Egan. It is not correct that Mr Barron did not have "*any hand act or part in the creation of false documentation*". The invoice presented for the recovery of professional frees purportedly payable by Ms Egan to him was created by him. But in any event the key fact is that Mr Barron, on his own behalf and on behalf of Ms Egan, relied on documents which he must have known were false to advance substantial and false claims for damages.

32. Insofar as the Judge exercised a discretion in favour of Ms Egan, clearly that discretionary judgment is one which, on appeal, this Court should give significant weight to and be slow to interfere with. However, it is not clear that this is what the Judge did. In any event, this is, in my view, a case where appropriate consideration of the facts and circumstances leads inevitably to the conclusion that it is not "*fit*" to make any award of damages to Ms Egan here.

33. While that outcome may appear to be harsh to Ms Egan, the circumstances here are such that the interests of justice require it. This is not a case where there was some minor exaggeration of loss. A very significant proportion of the claim advanced by the Plaintiffs here was bogus and was advanced on the basis of fabricated evidence. Simply

excising those elements of the claim, but permitting Ms Egan to recover for the remaining elements, albeit with a modest costs penalty, is not an adequate response to what occurred here in my view. That may have been the appropriate approach had the claim been for damages for breach of contract (though I no express no view on that question as it does not arise in the appeal) but the claim was for damages under section 2 and, in my view, the conduct of Ms Egan and Mr Barron disentitles them from any such relief in the circumstances here.

34. For these reasons, as well as the further reasons set out in the judgment of Murray J, I would allow the appeal and set aside the order of the High Court.