

folio

Northern Ireland Conveyancing and Land Law Journal

Issue 1 / 2020

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Subscription rate: £60 (inc p&p)
per annum for 2 issues.

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MANAGING RISK IN THE RESIDENTIAL PROPERTY MARKET WHILE GOING INTO A LOCKDOWN AND EMERGING FROM ONE

Simon Murray, LLB, Solicitor

At the time of writing, lockdown was moving into a new phase but was not yet over. The property market was re-opening and business was re-activating. In this article, the author shares his personal perspective and experiences of conveyancing transactions during the first three months of lockdown.

On the run in to the recent Covid-19 lockdown, which commenced on 29th March 2020, I did feel that there were certain actions which we as a firm took, that were reminiscent to how conveyancing practices had to adapt and emerge rapidly in the midst of the 2007/2008 property crash. Firstly, you had to take a different approach to your sale and purchase transactions. For sales where the property had been agreed, you needed to immediately review the file to make sure everything was in hand, Property Certificates & Searches had been applied for, you had taken instructions to complete the Replies to Pre-Contract Enquiries. Also, you needed to stress with the Vendor that they should immediately get any additional documentation that would be required. This was to ensure that the Purchaser had no reason to delay in signing the Contract, in the hope that the Purchaser would proceed at the original agreed price.

For my purchasing transactions, I decided about a week before the lockdown commenced (and none of us then could have predicted how long that would last), that I would advise my clients that they should not and could not proceed with their proposed transaction. I prepared identical letters of advice to all my Purchaser clients. I explained clearly that for various major reasons they should not proceed to sign a Contract and should “park their offer” until we emerged from the lockdown. I felt there was a need to act quickly and decisively and give Purchaser clients information as to why they couldn’t proceed and also as to what they should be considering while the property market stalled. The reactions to these letters was that the vast majority of my clients agreed that they did not want to proceed with their purchase at present, and wanted to wait to see what happened. None of them withdrew their offers. A few could not initially comprehend why they could not proceed and with a lot of misinformation, particularly regarding the functionality of the Land Registry, they felt that they could push on and complete. This view changed radically once the Health Protection (Coronavirus, Restrictions) (NI) Regulations 2020 SR55 was introduced in Northern Ireland which essentially closed the property market for the most part. Three months after these regulations and legislation were amended and the property market was re-opened, all offers that were parked by our clients still remained and most, if not all, want to still proceed currently at the original agreed price. I found this really encouraging. There is currently a feeling that most people want to continue and complete what they had previously agreed to buy or sell.

¹ Murray Kelly Moore Solicitors

Everyone is unsure as to how long this will last for and this will be dependent on a number of factors, including a reduction in valuations of properties and redundancies.

The Estate Agents' reaction to my letters to our Purchaser clients advising them to park their offers was very different. They were initially extremely annoyed at the advice being given and I spoke to quite a few senior Estate Agents and explained clearly to them my rationale on giving this advice. Although this advice was given approximately a week before the lockdown, once it happened I believe the Agents understood then why the advice had been given. Most Estate Agents downed tools completely as soon the lockdown started and effectively ceased operations as the majority of the support staff were furloughed.

While some of my conveyancing colleagues continued to work remotely, my main task was to try and keep in touch with clients and reassure them that their transaction had only been paused. Despite what clients thought you still had to repeat that you could not convey a property during the lockdown as certain things were not fully functioning, namely the Land Registry, other authorities that dealt with Property Certificates & Searches, removal companies and Lenders. To attempt to push on with things regardless I felt was reckless, but certain legal firms did. Some firms in my opinion were acting contrary to the stay-at-home guidelines and the Covid19 legislation. These firms interpreted the legislation loosely to fit in with their clients or their own wishes. Others in my opinion clearly were in breach of the legislation in getting their clients to sign Contracts and completing transactions during the lockdown. Some of these actions were encouraged by those few Agents that were still operational. There clearly seemed to be confusion as to whether or not you could proceed with the transaction, particularly if the property was vacant. I felt that this wasn't relevant unless a Contract had already been entered into. Some firms felt that they could proceed and enter into a Contract simply because the property was vacant. I therefore found myself on a number of occasions having to advise Vendor clients where properties were vacant that technically if they proceeded with the transaction they were in breach of the legislation. Obviously, these clients wanted to complete their sales as they would be concerned that the property market may crash post lockdown. This was a most difficult and unusual situation I found myself in and I had to spend considerable time trying to resolve these issues during the lockdown.

Disaster planning

If a legal practice subscribes to Lexcel or any other Quality Management Standard, there is normally a section headed "disaster planning". This requires firms to consider, create and implement a disaster plan. Initially I always thought this was a strange concept and didn't take it too seriously as I never envisaged having to activate our disaster plan. I may have assumed it would only ever be useful if we had a fire in our premises or possibly a cyberattack, but never a pandemic. Still, aspects of that plan that we prepared were useful and put into immediate effect. Facilitating and arranging for remote access to your office is paramount. Your office needs to be able to monitor phone calls and emails to keep things moving. However, we had never tested our disaster plan and therefore I did experience a lot of technical issues during the first few weeks of the lockdown, including the breakdown of my new laptop and old photocopier, Wi-Fi issues and being unable to fully use our case management system. I think it is important going forward that you regularly check your disaster plan to see it is functioning and fit for purpose. This might include, for instance, controlled shutdowns of ICT systems and the testing of resilience and capabilities of remote working in terms of the firms' hardware and software.

I have always worked remotely for one afternoon a week and I am therefore used to it. I have done this for the last 4 or 5 years as I feel you always need to be completely disconnected from the office when you are undergoing the task of checking title or drafting a complicated document. I intend to continue this worthy practice and during it I will also be then testing my remote devices to make sure they are fully functioning.

I still can't believe how busy I was during the first three months of the lockdown. I feel I worked harder during those three months than at any other three months I can remember. The frustration was that I wasn't really achieving anything. The transactions where the client was already in a binding Contract prior to lockdown was a completely different challenge as the Contract had been created. In one particular transaction the time limit for the Mortgage Offer expired. We then had to get this extended and after it was extended my client was then furloughed. Thankfully we were able to jump through these hoops and I am hopeful we will be able to complete this transaction at the agreed delayed completion date.

I did have one sale where the client wanted to enforce a binding Contract although the Purchaser wasn't able to complete on the agreed completion date which was during lockdown. It took some time for me to persuade my client that this would not be in her best interests. Again, and with great difficulty, the client reluctantly agreed to delay the completion. I therefore avoided having to explain to this client the complexities and risks that would be involved in proceeding with a High Court action for breach of Contract. I suspect there will be litigation that arises in these cases if common sense is not adopted in re-negotiating a completion date or one party is simply unable to proceed with the transaction. Like the impact of the 2007/2008 property crash there will be transactions where one or other of the parties can't proceed because of either a Covid-19 incident or a drastic change in circumstances. Previously, back in the property crash, parties couldn't proceed because of the effect of the drastic drop in valuations and various Lenders withdrew Mortgage Offers. I really hope that valuations do not significantly drop. If they don't then the property market should stabilise.

Law Society's General Conditions of Sale

I am currently involved in the review of the General Conditions of Sale, which has been ongoing for some time and was hopefully nearing its conclusion at the start of March 2020. During lockdown the Conveyancing & Property Committee did a sterling job in releasing various Conveyancing E-nformers to the profession, attempting to advise solicitors as to what to do as the crisis unfolded and the property market suddenly shut down. As things have now started to improve and the market is opening up, they started to consider whether or not they should furnish a set of Covid-19 Special Conditions to cover circumstances where the Covid-19 incident occurred during a transaction. Initially I was opposed to this as I am an advocate of only using Special Conditions to cover actual "special issues" that arise during a particular transaction and not to have a fixed set of Special Conditions for every sale and purchase, but I was very much in the minority. Once the argument was put to me, that if we don't have a template set of Covid-19 Special Conditions, then in every transaction we have to try and negotiate with each solicitor on their individual firms Special Conditions case by case I was then convinced a template was needed. The thought of negotiating case by case on each transaction was unthinkable. This would be torturous, unworkable and impractical.

The Law Society Conveyancing & Property Committee have just issued their proposed set of Covid-19 Special Conditions and these were launched at the same time as the restrictions on conveyancing were lifted in Northern Ireland. They have yet to be tested but I suspect they will be widely used. They are, I believe better to be incorporated into a Contract than not. They allow a delay on completion if any particular Covid-19 incident unexpectedly arises.

It also does not mean that the Contract comes to an end in these circumstances and the parties are to try and proceed as best they can once the incident has been resolved if possible. This situation is not perfect but it is better than nothing. It encourages a goodwill attitude to be adopted between the parties.

I do feel optimistic at the present time in the first week of the re-opening of the property market. There is an enthusiasm to buy and sell and long may this continue. It is impossible to predict what will happen to the property market in the next 6 to 12 months, but I think in the first 3 months of lockdown we have all learned a lot in how to cope in these challenging circumstances. We need to realise the solicitor cannot do everything. There are third parties that also need to be fully remotely operational. If not then the risk escalates. If not, then the risk escalates. There could be a prejudicial entry on a Search, such as a Bankruptcy Notice, Statutory Charge entry or Order Charging Land that is discovered shortly after completion. Alternatively, there may be a Planning or Building Control issue appearing on the local or regional Property Certificate. However, the biggest risk is when the Land Registry is not fully functional and in these circumstances I do not think the property market can effectively operate. If there is a second lockdown, then I think we would all be more prepared for the same and hopefully both the solicitors' practices and all third parties involved in the conveyancing process will be able to operate much more efficiently remotely.

THE COMPLEX OUT-WORKINGS OF PROMISSORY ESTOPPEL

Ruth Craig, LLB¹

The case of *Graham v Graham and Another* [2020] NICh 7 concerns a sad break down in family relationships and unfulfilled expectations but provides practitioners with a useful example of all the different elements which may be relevant in deciding whether a claimant has made out a case of proprietary estoppel and, if so, the extent of any relief due to him in respect of his claim.

This case arises out of the increasingly fraught relationship between the plaintiff, a Mr Ernest Graham, now in his early nineties, and his son Matthew, a man in his mid-forties, who is the first named defendant. The second named defendant was Matthew's wife Karen. Ernest is the owner of a farm in County Fermanagh. In the early part of the last decade this comprised several different areas of farm land amounting to almost 300 acres, as well as a farm house and outbuildings on one of the principal holdings ("The Graan"). The whole farm was valued at approximately £3 M.

Much of the farm had been purchased by Ernest's father in the 1930s and Ernest farmed the lands for his whole working life. In the early 1990s Matthew began to farm with his father, having left school after he completed his GCSEs and then studied at Greenmount Agricultural College for three years. On their marriage, Matthew and Karen moved into the farm house at The Graan in 2000 and Ernest and his wife (Matthew's mother) moved into a retirement bungalow nearby.

It was accepted by both parties that Ernest had very much wanted Matthew to continue the family tradition of farming the lands and that Matthew had been promised the farm. There was some dispute about the terms of this promise but the Judge, Lady Justice McBride found that Ernest's promise was on the basis that Matthew would be given the farm because he would continue to actively farm the lands.

Soon after Matthew returned to the farm Ernest gave him the dairy herd and the milk quota; Matthew kept the income from this herd. Matthew then bought more milk quota and built a new shed for the herd; this was financed by a grant and by a loan from the Ulster Bank guaranteed by Ernest. In the early 2000s the parties built a new milking parlour and renovations were carried out to the farmhouse, where Matthew and Karen were now living. These were again financed by means of a loan from the Ulster Bank.

In 2005 another farm in the area, Nixon Hall Estate, came on the market; this amounted to 292 acres of land. This was purchased in the name of Nixon Hall Estate Ltd of which Matthew and Karen were the only directors and shareholders. The purchase price was £1.35 M and

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this was financed by another loan from the Ulster Bank which also provided Matthew with an overdraft of £850,000 to cover his existing loans with the bank, the costs of purchasing more stock and quota, the cost of building works, and legal costs.

So, by this stage the total amount of indebtedness to the Ulster Bank was £2,245,000; this was secured in part by a personal guarantee from Ernest and his wife (who was the joint owner of the original farm) in the sum of £1.2 M.

In 2007 Matthew refinanced his debt with the Northern Bank. His company obtained £1.6 M. Matthew was granted an overdraft facility of £1 M which was secured on the Nixon Hall lands, other lands which had been bequeathed to Matthew by his uncle, and by a guarantee of £1 M from Ernest and his wife.

In 2008 Matthew bought milking robots for £50,000 but these were never installed.

The company sold Nixon Hall in 2010 for £1.75 M; the loan of £1.6 M from Northern bank was repaid but £1 M was still owed to the bank.

In 2011 the Ulster Bank provided a further overdraft facility of £422,000 - the facility letter bore the signatures of Ernest and his wife but Ernest denied that he had signed this letter. The matter was reported to the police and a police officer gave evidence that an expert had advised that the signatures were forgeries and that both Matthew and Karen had "no comment" when interviewed about this. The file is currently with the PPS. There are ongoing proceedings against Ernest in respect of monies owed to the bank in respect of monies advance in accordance with the facility letter.

In 2012 Matthew was granted planning permission for an anaerobic digester on his father's lands.

In 2013 the relationship between Ernest and Matthew began to break down when the Northern bank issued proceedings against Ernest and his wife for £1 M under their guarantee; this was because Matthew had failed to make repayments; the Bank had already repossessed Matthew's own lands. Ernest stated that he only became aware of the Northern Bank's claim at the point it issued proceedings. At this point Ernest, who was very distressed, informed some of his eight daughters about the situation and this led to a meeting with his solicitor accompanied by these daughters and Matthew. This meeting did not go well. Matthew wanted to re-finance his loan with the Bank of Ireland and to install the digester as a means of creating extra income (it seems that Matthew had also hoped to sell building sites and, at one point to sell part of his father's lands to a quarry company). The rest of the family present at the meeting did not accept that Matthew's proposals were sensible and Matthew left the meeting.

In the end Ernest sold some of his lands and sold his holiday home in Rosstown to one of his daughters (who made significant personal sacrifices to purchase this house); this raised £1 M to repay the Northern bank.

By this time the relationship between father and son had deteriorated dramatically. Matthew wrote to his father stating that the latter had, "...had his day...", that he should hand over the lands to him and that he should not have capitulated to the bank.

Matthew did not attend his mother's funeral.

Ernest was now concerned that Matthew was no longer farming the lands. He was shocked by the run down state of the farm (which led to fines from the Department of Agriculture); Matthew failed to restock after he received compensation for his herd which had to be put down following an outbreak of TB; and employees from a consultancy firm approached him to sign over the farm to allow the digester to be installed. This upset him very much.

By this stage Ernest had concluded that Matthew did not intend to farm the lands and he was concerned that Matthew's plans could endanger the continued existence of the farm. Ernest was also dependant on the farm for his own income.

Ernest's solicitor wrote to Matthew instructing him to stop farming some specific parts of the lands so that Ernest could let these out. Ernest then realised that Matthew was not actively farming any of the lands but had let the remaining lands to other farmers. Ernest informed Matthew that he did not have the right to do this and that if Matthew was not going to farm the lands himself, Ernest would let the whole farm and receive the income from these lettings. Matthew obstructed this by spreading slurry on the lands; this led to Ernest seeking injunctive relief.

In the current proceedings (commenced in 2017) the plaintiff sought damages for trespass, a declaration that he was the sole owner of the lands and an injunction restraining Matthew from interfering or trespassing on his lands.

Matthew counterclaimed that he had an equitable interest in the lands by reason of the operation of the doctrine of proprietary estoppel and sought a declaration that the lands vested in him absolutely together with damages and injunctive relief.

Lady Justice McBride found that Ernest both explicitly and impliedly promised Matthew that he would inherit the farm and that Ernest's actions from when Matthew was at school and throughout the years until their relationship began to deteriorate reinforced this promise. Until relatively recently, Ernest's will left the whole farm to Matthew (although his current will divides his property equally between all of his children).

However, the learned Judge found that this promise was always conditional Matthew actively farming the lands and doing so in a competent and business-like fashion so that there would be a farm to pass on to the next generation.

Her Ladyship set out the relevant legal principles in respect of the doctrine of proprietary estoppel as summarised by Lewison LJ in the case of *Davies & Anor v Davies* [2016] EWCA Civ 463 at para [38] (emphasis added):

*"i. Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, **it would be unconscionable for a promise not to be kept either wholly or in part**: Thorner v Major [2009] UKHL 18, [2009] 1 WLR 776, [2009] 3 All ER 945 at [57] and [101].*

*ii. The ingredients necessary to raise an equity are (a) **an assurance of sufficient clarity** (b) **reliance by the Claimant** on that assurance and (c) **detriment to the Claimant in consequence of his reasonable reliance**: Thorner v Major at [29].*

iii. However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance;

reliance and detriment are often intertwined, and whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood: Gillett v Holt [2001] Ch 210, [2000] 2 All ER 289 at 225.

*iv. **Detriment need not consist of the expenditure of money** or other quantifiable financial detriment, **so long as it is something substantial**. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* [2010] PC3 at [38].*

*v. **There must be a sufficient causal link between the assurance relied on and the detriment asserted**. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.*

*vi. **Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result**: *Jennings v Rice* [2002] EWCA Civ 159.*

*vii. In deciding how to satisfy any equity **the court must weigh the detriment suffered by the Claimant in reliance on the Defendant's assurances against any countervailing benefits** he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].*

*viii. Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular **there must be a proportionality between the remedy and the detriment which is its purpose to avoid**: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].*

*ix. In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However, the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a 'portable palm tree': *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*)."*

Her Ladyship emphasised that the motivating force behind the doctrine is disapproval of unconscionable behaviour. In deciding whether proprietary estoppel is established the court considers the three elements of representation, reliance and detriment but it does so, "in the round" to decide whether in all the circumstances of the case, it would be unconscionable for the person making the promise to resile from that promise.

Similarly, in deciding on what, if any, relief is appropriate, the aim of the court is to avoid an unconscionable outcome; it has to exercise a broad judicial discretion to make such orders as are necessary to achieve a just result. This discretion must be exercised on a principled basis. In *Davies* (para [39]) Lewison stated:

"There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the Claimant's expectation unless it would be disproportionate

to do so. The other takes the view that essential aim of the discretion is to ensure that the Claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different...Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim: Robertson: [2008] Conv 295. Fortunately, I do not think that we are required to resolve this controversy on this appeal."

In Madam Justice McBride's view the court should not simply either grant the expectation or compensate for detrimental reliance; either of these approaches could lead to an unfair outcome. The aim of the court is to make orders which will produce a just and fair result. In some cases, where there is a clear expectation and the conditions for granting it have been fulfilled then only granting that expectation will produce a fair result. In other cases the expectation may be uncertain or it may be out of all proportion to the detriment suffered or the conditions for the expectation have not have been met; in these circumstances, compensation may produce a fair outcome. However, in most cases, what is fair will be somewhere in the middle between expectation and detriment.

Her Ladyship decided that, in exercising her discretion she should take the following factors into account (para [18]):

- a. What was promised or what was the expectation?
- b. What conditions were attached to the promise?
- c. Were the conditions fulfilled in full or in part or to what extent were they fulfilled?
- d. What detriment has the Claimant suffered – past, present and future?
- e. Have circumstances changed for the promisor or the Claimant since the time of the promise which would have an effect on what is now a just outcome – See *Uglow v Uglow* [2004] EWCA Civ 987?
- f. What benefits has the Claimant obtained as the result of his or her reliance on the promise?
- g. Has there been any misconduct by the Claimant or any oppressive conduct or misconduct by the promisor?
- h. Is there a need for a clean break?
- i. Are there any tax implications with regard to the proposed terms of relief?
- j. Are there others who have a claim on the estate?"

Each case is fact-specific but the overarching requirement is to achieve a fair outcome (to avoid an unconscionable outcome).

Having decided that Ernest had promised to give Matthew the farm but that this promise was conditional on Matthew actually farming the land in a competent manner, her Ladyship

went on to consider whether Matthew had suffered any detriment. The Judge decided that Matthew had not suffered any financial detriment: he had received free accommodation and an income from the farm and all of his expenditures on the farm had been financed by loans which were rolled into the Northern Bank loan repaid by his father.

However, her Ladyship found that Matthew had suffered a substantial non-monetary detriment. As a result of the promise, Matthew left school after his GCSEs and went to Greenmount College. He had passed his 11 plus examination and attended a good grammar school. If he had not been promised the farm he could have made more of his studies and gone on to third level education leading to another profession. His decision to become a farmer was a life-changing decision with far-reaching consequences which determined his career, where he and his family would live and how they would spend their time and money.

In light of this her Ladyship had considered the factors set out above to decide whether it was unconscionable for Ernest to change his will to divide the farm equally between his eight children rather than leaving it to Matthew.

The Judge found that Matthew had fulfilled the promise to farm the land for a period of 21 years. After the purchase of Nixon Hall the level of debt brought challenge and, rather than tightening his belt, Matthew continued to live a luxurious lifestyle; instead of dealing with the debt, he increased his borrowings; and instead of farming he sought to deal with the debt by getting involved in non-farming activities such as the sale of building sites and the bio digester. He kept and spent the compensation for his herd and later sold off farm machinery; he later rented out lands and farm buildings. By 2014, Matthew had decided that he was not going to farm and allowed the farm to fall into disrepair. Her Ladyship found that after 21 years Matthew believed that he had an entitlement to the farm and could do as he pleased with it and that he considered himself to be a "gentleman farmer". His failure to deal with the debt meant that the whole farm could have been lost, leaving nothing to pass on to the next generation. Without the sacrifice of Ernest and Matthew's sister who bought the holiday home, Matthew would have tried to borrow more and more until there would have been no equity left in the farm and it would have had to be sold. It was only Ernest's actions which ultimately prevented the whole farm being lost by Matthew's recklessness and mismanagement.

Her Ladyship also found that Matthew enjoyed free accommodation and a good income from the farm but that this was in lieu of wages for his work. The debt of £1 M was in part to fund works on the farm but most of the debt accrued because of Matthew's recklessness and luxurious lifestyle. For this reason she found that Matthew had had the benefit of the £1 M as well as the proceeds of the machinery, single farm payments and the TB compensation money. However, these monies largely relate to income to which he would have been entitled because of his work as a farmer.

In terms of detriment, Matthew lost the opportunity to purchase his own home and to have another career along with the income that career would have generated.

The judge considered that Matthew had behaved very badly towards his elderly father and had caused him much stress and upset; further he had failed to make contact with his father, had sent him a hurtful letter and had pressurised him to install the bio digester. He displayed no insight into the pain he had caused.

Her Ladyship made no finding as to the allegation of the forged signature as the court had not heard evidence on this but she did find that there had been litigation misconduct by Matthew because he had not provide discovery of financial documentation until after an accountant acting for Ernest had been engaged to provide a report and had given evidence to the court.

The moral claims to Ernest's estate of Matthew's seven sisters should also be taken into account, especially as one of these sisters is now caring for her father and she helped to pay off the debt.

Taking all of these factors into account the Judge found that it was unconscionable for Ernest to renege on his promise and that it would not be adequate compensation to leave Matthew one eighth share of his farm.

However Matthew's breach of the condition satisfied her Ladyship that this was not a case where equity demanded that the expectation (to receive to whole farm) should be satisfied. Although Matthew had suffered detriment he had obtained the benefit of income and rent free accommodation as well as almost £1 M which was paid off by his father.

Considering all the circumstances, including the need to make a clean break, her Ladyship made an order giving Matthew the farm house and out buildings at the Graan together with 48 acres of land. This equated to approximately £0.5 M. For the avoidance of doubt she stated that it was her view that Matthew had no further claim on Ernest's estate and that the latter was free to leave his remaining estate as he wished.

The award to Matthew was greater than a Calderbank offer of £150,000 made by Ernest. However, as her Ladyship had found that there had been litigation misconduct by Matthew she made no order as to costs.

The learned judge stayed the order for 28 days to allow the parties, if they wished to agree a different method by which Matthew would receive money/lands equating to £500,000.

FREEHOLD FLATS IN NORTHERN IRELAND
AND
THE INSTRUCTIONS IN THE NORTHERN IRELAND VERSION
OF THE LENDERS' HANDBOOK

Neil Faris¹

In this article the author examines whether there can be good and marketable title to flats in Northern Ireland held under freehold title. since this question is currently looming for residential conveyancing solicitors in Northern Ireland². The author suggests that the answer should be a clear 'yes', but will require a revision of attitude by the majority of institutional lenders in their standard instructions to solicitors in Northern Ireland.

The first point to be made, of course, is that residential conveyancing solicitors would recognise the conveyancing of flats as one of the most difficult areas of practice. As they well know, scrupulous attention must be given to the definitions of all elements of the flat and of the building of which it forms part, the easements for support, access and user of common areas and the cross covenants required to ensure maintenance, repair and provision of services. These problems must be addressed and successfully solved whether the title is leasehold or freehold. This article examines how these matters may be addressed and successfully solved in the case where the title is freehold.

Of course, there are further important questions relating to other categories of freehold conveyancing such as 'flying freeholds'. There is also a particular conveyancing niggle in respect of maisonettes. It is intended to examine these in a further article in a subsequent *Folio*, but for now the concentration is on freehold flats as such.

It is suggested that, as a practical matter, the starting point must be the attitude of institutional lenders to the acceptability of flats held in freehold as security for any loan. Of course, as residential conveyancing solicitors know, the ultimate 'guide' on title questions for institutional lenders is the document known as the 'Lenders' Handbook' ('the Handbook³').

They recognise also that it is important to consider the influence of the Handbook in every transaction: even where a purchaser has the full cash price and does not need to rely on borrowing, that purchaser has to be advised that any proposed sale of the flat at a subsequent date might fall apart if the freehold nature of the title to the flat is not to the satisfaction of an

¹ I gratefully acknowledge the assistance of Maurice J McIvor, Solicitor, with whom I have discussed the difficult issues dealt with here and he has kindly considered and commented on a draft of this article, but I alone am responsible

² See *Hickland v McKeone* [2018] NIQB 81 and article thereon by Ruth Craig in the previous issue of *Folio* 2019 2 *Folio* 23

³ Initially published by the Council of Mortgage Lenders, now the UK Finance Lenders' Handbook for Conveyancers.

institutional lender who is otherwise prepared to lend on the security of the flat to enable the purchaser to proceed.

The Handbook was issued by the Council of Mortgage Lenders ('CML'), and is now integrated into a new trade association known as UK Finance ("UKF"). The UKF is a trade association of institutional lenders⁴ who lend on property in the United Kingdom residential property market and they have, so far as possible, standardised in the Handbook their instructions on what is acceptable title and on the other aspects of residential conveyancing transactions.

There are versions of the Handbook for each jurisdiction in the United Kingdom and in this article we are, of course, concerned only with the Northern Ireland version of the Handbook. It is issued online, so in every case the conveyancer should check online to be assured that access is to the most up to date version.⁵

The Handbook is in two parts. Part 1 contains the 'standing instructions' agreed by all the UKF lenders who lend into the Northern Ireland residential property. Part 2 contains the specific instructions that any UKF lender wishes to stipulate in regard to any provision in Part 1.

Thus, any residential conveyancing solicitor in Northern Ireland, acting for a lender to secure any loan on a Northern Ireland residential property⁶, must observe firstly all the general instructions in Part 1 of the Handbook but also secondly the specific instructions in Part 2 that the particular UKF lender stipulates must be followed.

All of this, of course, says nothing new to solicitor readers who practise in residential conveyancing in Northern Ireland, but the detail is set out so that other readers may comprehend what is involved when a residential conveyancing solicitor, acting for a UKF lender (and for the borrower⁷), is faced by a freehold title to a flat which the borrower wishes to purchase.

Thus, the first port of call for the solicitor is the instructions in Part 1 of the Handbook.

Section 5 deals with 'Title' and section 5.5 sets out the position of UKF lenders on 'Flying freeholds, freehold flats and other freehold arrangements'.

It is obviously important for the solicitor to read section 5.5 in detail and so it is set out in the Annex for ease of reference.

Note in particular:

- If the property is a freehold flat the conveyancer must check with the lender to see if it will be acceptable as security;
- If the lender is prepared to accept such title the conveyancer must report that the title is a freehold flat or flying freehold;

⁴ It has since 1 July 2017 been integrated into a new trade association known as 'UK Finance'.

⁵ This article is correct at time of writing

⁶ Of course, it will be generally known that in Northern Ireland it is still permissible for a solicitor to act for the borrower/purchaser in a residential property conveyancing transaction as well as for the (institutional) lender – but that does not detract from the solicitor's obligation to faithfully follow and perform the lender's instructions in accordance with the Handbook and any other instructions which may be specified in the letter of instructions from the lender to the solicitor

⁷ See footnote 4, above

- The property must have all necessary rights of support, protection and entry for repair as well as a scheme of enforceable covenants that are also such that subsequent buyers are required to enter into covenants in similar form (emphasis added);
- the conveyancer must certify that the title is good and marketable; and
- in the case of flying freeholds the conveyancer must send a plan of the property clearly showing the part affected by the flying freehold;

On its face, then, section 5.5 in Part 1 does not impose a bar on lending in Northern Ireland where the property to secure the loan is a freehold flat.

Note, however, the specific requirement (underlined for emphasis) that there must be

“ . . . a scheme of enforceable covenants that are also such that subsequent buyers are required to enter into covenants in similar form.”

Most residential conveyancing solicitors would rightly recoil with dismay at this requirement as adding a new level of complication to the transaction, not to mention the need to check that each other flat owner is similarly bound by this provision.

But for practical purposes, queries about any such ‘scheme of enforceable covenants’ become moot (in the case of most of the lenders) when one looks at the UKF lenders’ specific instructions in regard to lending on freehold flats as set out in Part 2 of the Handbook.

One can gain access to all the UKF lenders Part 2 instructions through the UKF website⁸ which helpfully sets out the relevant Section 5 questions and lists the answers of all the UKF lenders.

In answer to question 5.5.1 (b) ‘Do you lend on freehold flats?’

- 39 lenders simply state ‘No’;
- 3 lenders advise that further enquiry should be made to them;
- 11 seem prepared to lend in special circumstances; and
- Only 2: Royal Bank of Scotland and Ulster Bank, say ‘Yes’ provided the loan is less than 90% of the valuation

From these responses it is clear that the market of lenders (at least in the form of the UKF lenders, and apart from Royal Bank of Scotland and Ulster Bank) effectively says ‘No’ to lending on freehold flats in Northern Ireland

But is that an informed view based on the specific provisions of Northern Ireland property law?

It is suggested that there may be a mistaken assumption in the Handbook and in most of the Lenders’ Part 2 Instructions that Northern Ireland follows English law on the question of the running of covenants in respect of the freeholds.

This is not the case. The correct position under Northern Ireland law may be explained as follows⁹:

⁸ See footnote 3: accessed 20 March 2020

⁹ See also Ruth Craig’s article in the previous issue of Folio which sets this out

A support covenant by the subjacent owner with the flying freehold owner is a covenant that is registerable in the Land Registry of Northern Ireland as a 'Schedule 6 burden'¹⁰.

But there is still the question of whether such support covenant (of a positive nature) 'runs with the land' so as to be enforceable by and between successors in title?

The answer to this is contained in Article 34 of the Property (Northern Ireland) Order 1997. Article 34(4) contains a list of freehold covenants enforceable by the owner for the time being of the land benefited by the covenant against the owner for the time being of the land burdened by it. The list includes as sub para (b):

- (b) covenants to do . . . works on . . . the land of the covenantor for the benefit of land of the covenantee . . .

Thus, such support covenant runs with the land when it is entered into by the owner of the subjacent flat. It is registerable as a burden on the Folio of the subjacent flat for the benefit of the freehold flat. As such it is enforceable by the registered owner for the time-being of the freehold flat against the registered owner for the time-being of the subjacent flat even after the title has passed from the original owners and there is no necessity for the original owners or their successors in title to enter into any further covenants for that purpose.

Of course, the most straightforward way to deal with the various issues in the purchase of a flat is to proceed by way of a long lease of the flat and this is the general practice of residential conveyancing solicitors across Northern Ireland.

But that in no respects precludes a conveyance of a freehold flat or a flying freehold flat providing good and marketable title in Northern Ireland.

As pointed out in the opening of this article, the relevant covenants in the deed of course must be carefully drafted with due regard to the particular structure in which the flats are contained, with necessary, clear definitions and with conveyancing mapping to identify all necessary detail. But, and as also pointed out previously, this applies with equal force as necessary requirements in regard to leasehold flats, as to any cases where the conveyancing is freehold.

Thus, it is respectfully suggested that:

- In clause 5.5.2.2.the words:

“that are also such that subsequent buyers are required to enter into covenants in identical form:

should be deleted, as there is no requirement under Northern Ireland law for subsequent buyers to enter into covenants in identical form; and

- the Law Society of Northern Ireland should use its good offices with UK Finance to encourage that CML lenders who currently say 'No' to lending on freehold flats in Northern Ireland should consider amendment to their 'Part 2' instructions to permit

¹⁰ The Land Registration Act (Northern Ireland) 1970

flats with freehold title being accepted as good and marketable title, so long of course that the other requirements for all flat conveyancing are duly met.

It is also suggested that attention to these matters will remove an unnecessary difficulty for flat purchasers of freehold flats and relieve them from any presumption that in principle the title to freehold flats in Northern Ireland is not 'good and marketable'.

It remains to consider 'flying freeholds' and other freehold arrangements. In addition, as already indicated, different questions and difficulties may arise in regard to maisonettes. It is hoped that these can be deal with in a further article in a subsequent issue of *Folio*.

ANNEX

Terms of Clause 5.5 of the UKF Handbook – Northern Ireland version¹¹

5.5 Flying freeholds, freehold flats and other freehold arrangements

5.5.1 If any part of the property comprises or is affected by a flying freehold or the property is a freehold flat, check part 2 to see if we will accept it as security.

5.5.2 If we are prepared to accept a title falling within 5.5.1:

5.5.2.1 (unless we tell you not to in **part 2**) you must report to us that the property is a freehold flat or flying freehold; and

5.5.2.2 the property must have all necessary rights of support, protection, and entry for repair as well as a scheme of enforceable covenants that are also such that subsequent buyers are required to enter into covenants in identical form; and

5.5.2.3 you must be able to certify that the title is good and marketable; and

5.5.2.4 in the case of flying freeholds, you must send us a plan of the property clearly showing the part affected by the flying freehold. If our requirements in 5.5.2.2 are not satisfied, indemnity insurance must be in place at completion (see paragraph 9).

5.5.3 Other freehold arrangements - unless we indicate to the contrary (see **part 2**), we have no objection to a security which comprises a building converted into not more than four flats where the borrower occupies one of those flats and the borrower or another flat owner also owns the freehold of the building and the other flats are subject to long leases.

5.5.3.1 If the borrower occupying one of the flats also owns the freehold, we will require our security to be:

- the freehold of the whole building subject to the long leases of the other flats; and
- any leasehold interest the borrower will have in the flat the borrower is to occupy.

5.5.3.2 If another flat owner owns the freehold of the building, the borrower must have a leasehold interest in the flat the borrower is to occupy and our security must be the borrower's leasehold interest in such flat.

5.5.3.3 The leases of all the flats should contain appropriate covenants by the tenant of each flat to contribute towards the repair, maintenance and insurance of the building. The leases should also grant and reserve all necessary rights and easements. They should not contain any unduly onerous obligations on the landlord.

5.5.4 Where the security will comprise:

5.5.4.1 one of a block of not more than four leasehold flats and the borrower will also own the freehold jointly with one or more of the other flat owners in the building; or

5.5.4.2 one of two leasehold flats in a building where the borrower also owns the freehold reversion of the other flat and the other leaseholder owns the freehold reversion in the borrower's flat; check part 2 to see if we will accept it as security and if so, what our requirements will be.

¹¹ Accessed on UK Finance website 30 July 2020 <https://lendershandbook.ukfinance.org.uk/lenders-handbook/>

THE FUTURE OF COMMERCIAL LEASES

Sarah Ewing, LLB¹

In this article the author considers the widespread economic turbulence and uncertainty caused by Covid-19 which has brought into sharp focus the suitability of commercial leases for both landlords and tenants. Sudden and profound market changes have always accelerated changes to the form of documents and commercial terms sought. The author explores lease provisions under most scrutiny going forward in these present times.

Prior to the current pandemic, the suitability of commercial leases was most recently demonstrated after the Primark fire in Belfast City Centre where tenants sought rent cesser in instances where access to their premises was not possible due to public highway closures because of damage to a building of which their premises did not form part.

Covid-19 has undoubtedly brought about an economic shift of an unparalleled scale, the effects of which are already being witnessed, by the parties themselves and their advisors. Tenants are already seeking to introduce innovative and more flexible terms into their commercial leases in order to protect their cash flow in the event of a further lockdown and to respond to operational challenges. Landlords and their funders are having to analyse and determine the impact of the new terms being sought on their own cash flow and the impact of these changes on the long-term value of their assets. The recent administration of shopping centre owner Intu demonstrates all too clearly the symbiotic relationship between landlords and tenants and how the future viability and sustainability of their respective businesses are inextricably linked.

Rent Payments

The maxim of “cash is king” has never been so true. Those occupiers with significant cash reserves or who have a strong online presence will weather the current economic storm better than those who do not. There has already been a clear move towards monthly rent payments and even monthly service charge payments rather than quarterly payments. There are even some cases of occupiers seeking to pay rent in arrears. These “concessions” are often agreed as personal concessions which will only benefit the current occupier and are typically being agreed in the form of side letters. More occupiers are also likely to request service charge caps, for example, by way of a pre-agreed fixed amount and/or comprehensive service charge exclusions as a way of further crystallising and managing their outgoings.

Turnover leases

A greater move towards turnover rents is also a likely market response to the trading uncertainty. Whilst this operating model has clear advantages for occupiers, they are less attractive for landlords who may be denied the certainty of a fixed income, particularly if the revenue derived from online sales is not well captured in the contractual arrangements. One of the few positives to come out of the pandemic seems to be a recognition that landlords and

¹ Shoosmiths (Northern Ireland) LLP

tenants must work together to maximise the value and profitability of their businesses and it may be that a turnover model may have a role to play in allowing landlords and tenants to share some of the risk and reward of operating from premises. “Good faith” clauses in leases and “open book” turnover provisions could become of increasing importance as landlords, in return for more flexibility, require a more transparent approach from the tenants.

Rent suspension/deferral

The imposed lockdown left many retailers scrambling to check if their leases allowed for rent and/or service charge suspension in these circumstances. In nearly all cases, they did not. Historically, rent suspension is typically limited to circumstances where the premises and/or access have been physically damaged by an insured risk such as fire or flooding. As such rent suspension triggered by legislative lockdown did not come within the lease terms. The concept of rent suspension in the event of “force majeure” is not a market nor well developed position in commercial leases. Occupiers have been left to agree rent free periods and/or rent deferrals with their landlords without the benefit of a contractual position to support these requests. Rent free periods and deferrals are now being negotiated in the event of future lockdowns and/or the imposition of other onerous social distancing measures, but it is difficult to get landlords comfortable with such concepts unless the risk can be backed off with insurance, as would be the case for physical damage by an insured risk.

Landlords and tenants are also seeking to agree the nature of mitigation measures to be put in place in order to minimise landlord service charge spend during any periods of enforced closure. Landlords will seek to be temporarily relieved from obligations to provide services where they are unable to do so because of a lockdown. A balance will need to be found to ensure there are no recoverability gaps for the landlord and that the services that continue to be provided offer good value for money for tenants.

Rent Review

Occupiers will also be resisting upwards-only rent reviews as a way of ensuring they are paying a “market rent”. Occupiers who operate businesses in the Republic of Ireland will be aware of the prohibition against upwards only rent reviews which now exists in that jurisdiction. This legislative change in the Republic of Ireland was brought in as part of a package of measures to ensure more market transparency with regards to the negotiation of rent and subsequent reviews. Only time will tell whether the market in Northern Ireland and GB moves in a similar direction.

The above issues are likely to be the most important to landlords and tenants, however significant scrutiny is also expected in relation to those lease provisions which have caused operational challenges during the pandemic

Keep Open

Whilst not simply an operational clause, keep open clauses have caused a lot of concern and confusion for occupiers. Sophisticated keep open clauses will include various scenarios whereby the obligation will not apply, such as the carve out, that it will not be enforced if to do so would cause a tenant to trade insolvently. Going forward, we expect to see caveats to keep open clauses whereby the obligation to open and trade will not apply if footfall drops below a certain level, particularly where premises are located within closed shopping centres, where PPE is not available and /or where stock levels are low because of disruption to the supply chain. These types of caveat however would not extend to a scenario whereby an occupier closes its premises slightly in advance of a lockdown in the knowledge that the

lockdown is imminent. We are aware of and have advised retail clients who did in fact close early in line with their own corporate social responsibility procedures and a desire to protect staff and customers.

Landlords would expect tenants to claim on their own business interruption policies if they can however and use some of that money at least to continue paying the landlord, so that all of the risk and rental losses do not fall on to the landlord.

Occupiers will also require greater flexibility with regards to their user and alterations clauses. Provisions will be sought whereby measures can be put in place quickly and without landlord's consent where alterations are required in order to meet legislative demands and to implement safeguarding measures.

Landlords however will no doubt re-focus on corporate and personal guarantors or other forms of security if they are expected to give tenants greater flexibility so that they are not caught with financial consequences if that particular trading entity falters.

Break Options

Even before the pandemic, break options were routinely negotiated by tenants as a way of creating certainty and as a negotiating tool with a landlord as part of future re-gears. Landlords often seek to impose conditions to the exercise of break rights such as an obligation on the tenant to deliver up vacant possession or even compliance with the tenant covenants in the lease. During an enforced lockdown the tenant may have no meaningful way of accessing their premises and/or may not have access to the necessary contractors in order to carry out certain works which could result in an important break right being successfully opposed by the landlord. It is likely that tenants will seek to increasingly negotiate unconditional rights to break or at least an express waiver of any conditions attaching to the break in the event that same arises during a lockdown period.

Yielding Up provisions

The above considerations also apply to a tenant's yielding up obligations. We anticipate that the timescales for yielding up obligations will need to be extended for a certain period after the ending of any lockdown period to allow the tenant an opportunity to comply with their obligations.

Notices

Another important issue for landlords and tenants to consider is the lease provisions for service of notices. An often-overlooked provision, it is important that a notice to serve a break right for example should allow for service by means other than by recorded delivery. During a period of lockdown, a recorded letter may not be delivered and thereby returned to the sender and a right to break thereby frustrated if the premises to which it was delivered was not occupied at the time of delivery. Parties should consider allowing for notices to be served by email during a lockdown period to enhance efficiency and visibility.

Conclusion

The profound challenges brought about by Covid-19 must also provide opportunities for enhanced collaboration between landlords and tenants. It is essential that the future form of commercial leases is not only fit for purpose but also enhances the businesses of all those involved in these contractual arrangements. This will take time as it will need buy-in from commercial lenders and sign-off from institutional investors. All parties have a part to play in coming up with long term solutions once these short-term negotiations are concluded.

SHUTDOWN, FRUSTRATION & PROPERTY CONTRACTS

Douglas Stevenson, BL

The purpose of this article is to consider the doctrine of frustration as it applies to property contracts in light of the Covid-19 outbreak and subsequent lockdown.

It is perhaps trite to say it, but the Covid-19 outbreak, and the Government's subsequent shutdown of large sections of the economy, has had a profound impact on the way in which we live our lives and the way in which business can be conducted. It seems that we will be living with its consequences, and perhaps ongoing regional restrictions, for a considerable period of time to come.

This fundamental change in circumstances means that many parties find that the obligations they assumed under contracts, or the benefits they expected to obtain from contracts, are not what they originally envisaged. These drastically changed circumstances, and parties' inability to meet their contractual obligations, raises the question of the potential frustration of those contracts.

A contract may be discharged on the grounds of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or which transforms the obligation to be performed thereunder into a radically different obligation from that envisaged at the point the contract was formed.¹ When the doctrine of frustration applies, the contract ends automatically; the frustrating event operates to 'kill' the contract and discharge the parties from further liability under it. The frustrating event must be something extraneous; a party cannot establish that a particular event is a frustrating event when that party has been the author of the event in question.²

The precise juristic basis for the doctrine of frustration remains a matter of debate; different cases have invoked different rationales for the doctrine. Latterly, the Courts have not sought to rely on any one rationale, saying that they all 'shade into each other'.³ Whilst the juristic basis may be unclear, what is clear is that the Courts are reluctant to find that a contract has been frustrated.⁴ Courts understandably want to see that parties are held to their contractual bargain, particularly where there is no suggestion of any fault on the party seeking to resist a claim for frustration. They do not want to allow the doctrine to be used by a party to escape what may be a bad bargain for that party.

A class of cases where the doctrine has been applied, and where the unforeseen event is perhaps most closely aligned to the current circumstances, are war-time frustration cases. In those cases, legislative intervention by Government which forbade certain activities was held

¹ Chitty on Contract- 33rd Edition - Chapter 23 Paragraph 23-001

² *Lauritzen AS v Wijnmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1

³ Per Lord Wilberforce in *National Carriers v Panalpina (Northern) Ltd* [1981] AC 675 at 693

⁴ In *The Super Servant Two op. cit.* Bingham LJ said frustration is not to be 'lightly invoked' but must be kept within 'very narrow limits and ought not to be extended'

to be a frustrating event. By way of example, in *Metropolitan Water Board v Dick Kerr & Co Ltd*,⁵ a contractor entered into a contract in 1914 to construct a reservoir by 1920. In 1916, and under the restrictions imposed by the Defence of the Realm Act 1914, the contractor was obliged to cease work. The House of Lords held that the contract was frustrated. The interruption was ‘*of such a character and duration that it vitally and fundamentally changed the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made*’. It is important to note that in *Metropolitan*, the frustrating event related directly to the substance of the contract itself - the legislation specifically prevented building work being carried out. Further, and importantly for the purposes of this article, the case did not concern a contract for the sale of land.

Turning then to consider the application of the doctrine to property contracts, as noted above, the Courts are generally reluctant to invoke the doctrine, but they are especially reluctant in the case of contracts concerning land. In the case of leases, for many years there was uncertainty as to whether the doctrine could ever apply to leases.⁶ In *National Carriers Ltd v Panalpina (Northern) Ltd*⁷ the House of Lords by a majority held that the doctrine could, in theory, apply to the leases but that it would ‘hardly ever’ be applied. In that case a road closure order made premises demised under a 10 year lease unusable for 20 months. That was held not to be a frustrating event.

In the case of contracts for the sale of land, Chitty goes as far as to state “*It is doubtful whether the doctrine of frustration could ever apply to a contract for the sale of land, though it has been suggested that it might if the frustrating event prevented the vendor from transferring any estate whatever to the purchaser*”.⁸ Two cases will illustrate the Courts’ approach. In *Hillingdon Estate Co v Stonefield Estates Ltd*⁹ a contract for the purchase of development land was held not to be frustrated notwithstanding that a compulsory purchase order was made in respect of the land in sale between the date of contract and completion. In *Amalgamated Investments & Property Co v John Walker & Sons*¹⁰ a contract was in place for the sale of property which had been marketed as being suitable for development and which the vendor was aware the purchaser intended to develop. The day after the contract was concluded, the property in question was listed as a building of special architectural interest. The listing severely restricted the development potential of the property in sale thereby reducing its value from £1.7m to £200k. Nevertheless the contract was held not to be frustrated.

It is therefore likely to be extremely difficult for a purchaser to argue that a contract for the purchase of a property has been frustrated. By way of example, in the case of a contract which is unconditional as to finance, a purchaser’s inability to obtain a mortgage offer at present, when he or she might have had good prospects of obtaining a mortgage offer prior to the shutdown, is highly unlikely to be regarded as a frustrating event. The fact that a party can no longer afford to complete, does not mean that it is physically or commercially impossible to fulfil the contract (a party with money could complete) nor does it transform the contractual obligations into something radically different.

⁵ [1918] 1 AC 119

⁶ In *Cricklewood Property and Investment Ltd v Leightons Investment Trust Ltd* [1945] AC 221 the House of Lords was evenly divided on whether it could apply to leases.

⁷ [1981] AC 675

⁸ *op. cit.* para 23-057 c.f. *Wong Li Yang v Chinachem Investment Co Ltd* [1980] 1 WLUK 406 where a landslide which caused a three year delay in the construction of apartments was held to be a frustrating event.

⁹ [1952] Ch 627

¹⁰ [1977] 1 WLR 164

More interesting questions arise where the shutdown has made certain contractual conditions impossible to satisfy. For example, it is not uncommon for a contract to be made subject to a Building Control completion certificate being provided by the developer/vendor. During lockdown, the Local Councils were not carrying out Building Control inspections and completion certificates could not be obtained. As detailed above, it is debatable whether frustration could ever apply to a contract for the sale of land, and therefore a temporary inability to obtain a building control certificate would not be regarded as a frustrating event. Where does that then leave a vendor who cannot meet a contractual condition through no fault of its own?

The answer to this may lie in the concept of a partial excuse for breach of contract. This is an underdeveloped doctrine, but the broad principle behind it is that the occurrence of some unforeseen and unforeseeable event may excuse, perhaps temporarily, the performance of a particular obligation without frustrating the whole contract.¹¹ For example, in *John Lewis Properties plc v Chelsea*¹² a tenant covenanted to redevelop premises, but was unable to do so in the manner envisaged as the premises in question were listed after the grant of the lease. The Court held that the listing, which had rendered the covenant incapable of performance, meant that the tenant was not in breach of covenant. However, the Court held that if the listing were removed, that the tenant would then be obliged to observe the covenant in question.

To apply this to the Building Control certificate example above, the doctrine may temporarily excuse the vendor from its failure to obtain the certificate. That is, the vendor would not be regarded as being in breach of contract. The more difficult question is the effect it may have where a purchaser is seeking to extricate itself from a contract and serves a notice to complete, hoping to rely on the lack of a completion certificate to prove a vendor is not ready willing and able to complete. It could be argued by a vendor that as the obligation to provide a completion certificate is suspended, then so too is the related obligation to complete, and that both obligations will be resuscitated when Building Control inspections recommence. Alternatively, the vendor might argue that it *is* ready willing and able to complete as it can meet the obligations it is obliged to meet *at that point in time*. Such arguments are not without difficulties, and much will depend on the wording of the clauses in individual contracts, but at the very least they should give a purchaser pause for thought.

The 2007-08 financial crisis gave rise to a spate of property cases. One imagines that the drastic change in economic circumstances caused by Covid-19 could well give rise to another run of property litigation. Despite how narrowly the doctrine of frustration has been drawn, there is every chance we will hear more of it and the concept of partial excuse in the months and years ahead.

¹¹ Chitty *op cit* at para 23-066

¹² (1994) 67 P&CR 120

CONVEYANCING IN THE TIME OF COVID

Michael Flanigan

My office officially re-opened on 22nd June, the same day that I am writing this. The ill-informed might think this is far too soon for me to make any considered, mature reflections on the Corona virus lockdown. They would be right.

The great Corona Virus lockdown of 2020 started on 23rd March 2020. After a few weeks of touting herd immunity, the government finally accepted that for the PR disaster it was and called in the lockdown. And there was silence. Well, almost. For a while a few estate agents kept making those phone calls and sending emails, telling clients about mythical completion dates just around the corner. These phone calls were the equivalent of the sounds that NASA pick up coming from deep space. Signals coming from stars that have already died. But eventually even they got the memo and the sounds from deep space stopped.

The Government advice for once was clear. If you were in a contract, don't complete; and if you are not in contract, don't enter into one. Any remaining doubts that business could be done were finally dispelled when all of the public agencies whose work supports the conveyancing industry switched off the lights and pulled their shutters down. And then there really was silence. No post, no emails, no phone calls, no clients. Maybe there was bird song on the Falls Road. I certainly hope there was but I don't know, because I wasn't near the place for about a month.

Soon after the lockdown announcement the government support measures kicked in. Defer vat, defer tax, no rates, repayment holidays, Law Society refunds! Why can't it be like this all the time? I have to be honest, (are you sure you want to do this? Ed.) proper lockdown wasn't too bad. Work in the garden, listen to birdsong, have a cup of proper coffee, plan lunch, more bird song, plan dinner. I fully appreciate that no-one was ever likely to walk outside and clap for me on a Thursday evening but as far as I was concerned, I did my bit to keep the NHS safe.

But then things did begin to move. Clients had apparently tired of the endless bird song and started spending more time researching on the internet. Suddenly I found clients ringing me with news that the Land Registry had changed its registration position ever so slightly. Clients started explaining the mechanics of the priority search and how, if carefully applied, it could free up their entire conveyancing chain. I assured them that the Land Registry was a frequent target for fake news stories and in essence that nothing had changed. When the Government revised their advice, not to move, I would be one of the first to know, with more than just a hint that no meeting of the COBRA committee was complete without me.

Gradually and without any encouragement from me, business somehow started coming in. Property certificates arrived followed by replies to PCE and fixtures and fittings lists. Faint sounds from distant estate agents started being picked up on the satellite dish. Eventually the tide of correspondence became too great. Reluctantly I put down my sun hat, trug and secateurs and went back in. Many commentators have suggested that the experience of the pandemic will change how we do business. I suspect it will. I had never tried to work from home before and now I can. I started to send and receive correspondence with "hope you are safe and well", I may keep that up. After all it is never an inappropriate question to ask, and it is hard to get too feisty a reply from a solicitor who then has to finish off their email with "all well here, thanks for asking."

TABLE OF CASES

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