THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 272

Finlay Geoghegan J.
Peart J.
Edwards J.
Appeal No. 2015/144

BETWEEN

GLOBE ENTERTAINMENT LIMITED AND SEAN DOYLE

PLAINTIFFS/APPELLANTS

AND

PUB POOL LIMITED, TOM KAVANAGH AND

ULSTER BANK IRELAND LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT delivered by Ms. Justice Finlay Geoghegan on the 12th day of October 2016

1. This appeal raises once again the essential proofs to obtain an order for specific performance of an alleged contract for the sale of land.

2. The appeal is against a High Court order of the 25th February, 2015 (Costello J.) made pursuant to a written judgment delivered on the 24th February, 2015: 2015 IEHC 115. For the reasons set out in that judgment, the trial judge dismissed the plaintiffs' claim for specific performance of an alleged contract for the sale of premises known as the Globe and Rí–Rá nightclub, 11 South Great Georges Street, Dublin 2 ("the Premises") and consequential claims.

3. The appellants, Globe Entertainment Limited ("Globe") and Sean Doyle ("Mr. Doyle") claim there was an enforceable contract with the defendants for the sale of the Premises to Globe and a compromise of the personal liabilities of Mr. Doyle to the third named defendant ("the Bank"). The person or persons with whom the contract is alleged to have been made is in dispute. The note of memorandum relied upon to satisfy s. 51 of the Land and Conveyancing Law Reform Act 2009, is a chain of emails leading to and ending with a letter dated the 3rd April, 2014, from the Bank to Mr. Doyle and signed on its behalf by a Mr. Roche.

Background Facts

4. The background facts and facts pertaining to the negotiations which led to the alleged concluded contract and the chain of emails and letter are fully set out in the High Court judgment. I do not propose again repeating in full, but insofar as relevant to the issues on appeal may be summarised as follows.

5. The first named defendant, the Pub Pool Limited ("Pub Pool") purchased the Premises in 2007 with the assistance of finance from the Bank and mortgaged the Premises to the Bank. Pub Pool was a company within the Thomas Read Pub Group of which Mr. Doyle was a shareholder. The Thomas Read Pub Group went through an unsuccessful examinership and in March 2009, the Bank appointed the second named defendant as Receiver over, *inter alia*, the Premises.

6. Mr. Doyle has worked in the pub business all his adult life. The Receiver put the Premises up for sale in 2009. Mr. Doyle was interested in purchasing, but had significant personal financial liabilities including liabilities both personal and pursuant to a guarantee to the Bank. Ultimately in December 2009, agreement was reached whereby the Bank issued a facility letter to Mr. Doyle to finance the acquisition of the Premises and provide for the settlement of his obligations to the Bank. On the 4th December, 2009, Pub Pool acting by the Receiver, entered into a contract in writing ("the 2009 contract") to sell the Premises to Mr. Doyle in trust for Globe for a sum of €5.6 million. Completion of the sale was conditional upon the Receiver obtaining the prior written consent of the landlord of part of the Premises, a Mr. Conlon, to the assignment of the sublease to Globe.

7. The Receiver and Mr. Doyle then entered into an agency agreement whereby the Receiver employed a management company of Mr. Doyle to run the pub business in the Premises pending completion of the sale. The Receiver remained the licence holder of the Premises.

8. Through 2010 and 2011 the landlord refused to grant consent. Ultimately the Receiver issued proceedings on behalf of Pub Pool seeking a declaration that the landlord's consent was being unreasonably withheld.

9. In the meantime Mr. Doyle's personal finances reached what the trial judge termed 'a crisis' in May 2010. The facility letter of the 1st December, 2009, had lapsed in January 2010 and ultimately in August 2010, the Bank refused funding to purchase the Premises from the Receiver.

10. The Receiver instructed CBRE to market the Premises again and Mr. Doyle was informed of this in October 2010. Whilst there does not appear to have been any formal termination of the 2009 Agreement, Mr. Doyle made no objection to the efforts to sell the Premises in the autumn of 2012.

11. In 2013 a number of third party potential purchasers emerged, offers made and contracts issued, but no contract entered into between the Receiver and any potential purchaser. In 2013 Mr. Doyle also had been negotiating to resolve his liabilities to other banks and having done this approached Mr. Roche of the Bank and had some initial meetings in 2013.

12. In January 2014, the landlord consented to the sale of the Premises to Mr. Doyle or his nominated company. The Bank had indicated it was unwilling to fund the proposed purchase by Mr. Doyle or Globe. Mr. Doyle then approached the Bank, indicating that he had some alternative sources of funding for the project.

13. It was against those background facts which are not in dispute that the facts of what took place between the 5th February, 2014, and the 3rd April, 2014 and the judge's findings of fact, inferences drawn and conclusions reached must be considered.

Findings of fact

14. A meeting was held on the 5th February, 2014, chaired by the Receiver at which, *inter alia*, Mr. Roche on behalf of the Bank and Mr. Doyle were present. The trial judge has set out in her judgment at paras. 20 to 23 the evidence given in relation to that meeting and made certain findings of fact, some of which were challenged on appeal. The findings are based in part on contemporaneous notes and in part on the oral evidence. In accordance with the well established principles in *Hay v. O'Grady* [1992] 1 IR 210. I have concluded there was credible evidence, recorded by the trial judge in her judgment to support her findings and they should not be interfered with by this Court. Those findings were:-

> (i) Mr. Doyle was informed at that meeting that the Receiver and not the Bank was selling the Premises.
>
> (ii) The Bank's involvement was to agree the sale price (for the purpose of releasing its charge) and negotiate settlement of Mr. Doyle's personal liabilities to it. This was explained by reason of the necessity of Mr. Doyle reaching settlement with the Bank for the purpose of obtaining funding from a third party lender.
>
> (iii) The meeting was on a "without prejudice" basis. The parties understanding of what that meant is elsewhere recorded.
>
> (iv) Any agreement was subject to proof of funding by Mr. Doyle and subject to contract.

15. At the meeting of the 5th February, it appears that Mr. Doyle made an offer of €2.125 million to purchase the Premises together with €100,000 to discharge his personal debts. Following discussion between the Receiver and Mr. Roche (in Mr. Doyle's absence) he was informed that the Receiver and the Bank required a sum of €2.4 million with the split to be agreed and that Mr. Doyle (who remained in possession and running the business) was to underwrite any trading losses from the Premises until the date of closing. Mr. Doyle to provide a sworn statement of affairs to the Bank confirming settlement of his liabilities with the Bank of Scotland (Ireland Limited) and to revert to the Bank with the final offer within a week.

16. There then commenced the written exchanges upon which some reliance is placed. The first of these was from Mr. Doyle to Mr. Roche on the 12th February. The trial judge noted it was headed "Without Prejudice" and Mr. Doyle's evidence that his use of the phrase meant that "it was subject to a deal". The trial judge made a finding which again cannot be interfered with that "the negotiations on all sides were on a 'without prejudice' basis".

17. There were then conversations between Mr. Doyle and Mr. Roche on the 31st March and the 1st April, 2014. The trial judge records certain of the evidence in relation thereto and relevant contemporary notes at paras. 28 to 32 inclusive. The trial judge then concluded at para. 33:

> "I have already accepted the evidence of the Receiver, Mr. Roche and Ms. Byrne that on 5th February, 2014, it was made clear to Mr. Doyle that the Receiver would be selling the Premises. I do not accept that the evidence outlined above leads to the conclusion that Ulster Bank was to sell the Premises and not the Receiver. Mr. Doyle's contemporary notes show that the split of €2.295 million and €5,000 was not agreed on 31st March, 2014, though Mr. Doyle gave evidence that this was the case. Mr. Doyle's evidence in his witness statement and in his contemporaneous notes was that there was no agreement as of 1st April, 2014 that the sale of the Premises would close on 31st May, 2014. On the contrary Mr. Roche looked for it and Mr. Doyle did not agree."

18. Of importance to the issues on appeal is the recording of the evidence that there was no agreement as of the 1st April, 2014, that the sale of the premises would close on the 31st May, 2014. Whilst the trial judge has noted that there was no agreement on the split of €2.295 million and €5,000 on the 31st March, 2014, it does appear that there was evidence that that split was agreed between Mr. Roche and Mr. Doyle on the 1st April, 2014. Of that same telephone conversation of the 1st April, the trial judge records Mr. Doyle's contemporaneous note as recording "he [Mr. Roche] said to confirm agreement and dates in writing to him so he can get the ball rolling". That request appears to have given rise to an email written by Mr. Dolan, accountant for Mr. Doyle to Mr. Roche with a subject entitled "Sean Doyle Revised Globe Offer" with a text which was headed "Without Prejudice" and provided as follows:-

"Dear Graham,

> Further to our discussions regarding the Globe Purchase we wish to confirm the following:
>
> > We revise our offer of €2,300,000 for the purchase of The Globe and Rí-Rá and settlement of all personal liabilities to Ulster Bank split as €2,295,000 for the Globe Purchase and €5,000 in settlement of all personal liabilities of Sean Doyle to Ulster Bank. This is to include full and final settlement of Sean Doyle's personal unsecured facility No. 5000004828 and any other Personal Guarantee Liability due to Ulster Bank.
>
> The above offer is subject to the below.
>
> > 1. All amounts owing to Sean Doyle Management Services Limited for the management of the Globe for Kavanagh Fennell are paid in full two weeks after closing and no discount to be requested by Kavanagh or Ulster Bank.
> >
> > 2. We require a letter from either Kavanagh Fennell or Ulster stating that the purchase price agreed for The Globe is €2,295,000 with no mention of the personal settlement. We require this immediately in order to progress with organising finance.
> >
> > 3. We require a letter stating that all the personal liabilities of Sean Doyle are settled for €5,000.
> >
> > 4. We require 6 weeks to provide proof of funding and signing of contract from date of receipt of the letter outlined in No. 2 above. The reason we are requesting 6 weeks is that the Easter Break will undoubtedly cause delays.
> >
> > 5. We require 4 weeks to close after signing of contracts.

6. The purchasing entity will be Globe Entertainments Limited c/o Sean Ogs Hotel Kilmuckridge, Gorey, Co. Wexford. This is subject to change at the request of our funder.

7. The offer is made subject to us getting an assignment of the RiRa (sic) lease from Gerry Conlon. Once we get the letter as outlined in No.2 we will progress with getting the assignment.

8. Solicitor Rory Deane and Company, Solicitors, Temple House, 8 Templeshannon, Enniscorthy, Co. Wexford.

Regards

John Dolan"

19. The email was not copied by Mr. Dolan to the Receiver, consent having been obtained by the Bank it was sent to the Receiver. Thereafter there were exchanges between the Bank and the Receiver set out in the High Court judgment. The Bank required a recommendation from the Receiver of acceptance of the offer. On the 2nd April, the Receiver emailed Mr. Roche in relation to the Premises as follows:-

"We are in receipt of an offer from Sean Doyle in the amount of 2.295m for the above asset subject to certain conditions to be agreed between the parties. We recommend acceptance of this offer.

Please revert with approval for same.

Regards,

Tom."

Mr. Roche responded that afternoon:-

"Hi Tom

I refer to your email below and recent discussion and formally confirm that the bank has consented to the sale at €2.295m subject to a close by 31.05.14. Regards

Graham."

20. There was a further letter written on behalf of the Receiver to the Bank that day and then on the 3rd April, Mr. Roche of the Bank wrote a letter to Mr. Doyle as follows:-

"Re: Sale of 'The Globe/ RíRá'

Dear Sean,

Following receipt of a recommendation from the Receiver, I confirm that Ulster Bank Ireland Limited has consented to the proposed sale of the Globe/ RíRá to Globe Entertainments Limited for €2,295,000 subject to the sale closing by 31st May 2014.

I trust you find the above in order and should you have any further queries please contact jenny.byrne@ulsterbankcm.com.

Yours sincerely

Graham Roche

Director RCRI

cc Tom Kavanagh, Receiver and Manager, The Pub Pool Ltd".

21. That letter was initially sent by email to Mr. Doyle by Ms. Byrne of the Bank and the email responded to by Mr. Doyle on the same day stating:-

"Jenny/Graham

Thanks for that, can you also fwd other letter confirming the €5k.

Regards

Sean Doyle".

22. The claim made by the plaintiffs and rejected by the trial judge was that there was a binding enforceable contract for the sale of the premises with both the Bank and the Receiver (and a compromise of the personal liabilities of Mr. Doyle to the Bank) from this point onwards. It was contended that there was both a concluded agreement and that the emails and letter constituted the note of memorandum signed by "the Vendor" or "the Vendor's authorised agent". It is not in dispute that the only signed document is the letter of the 3rd April, 2014, signed by Mr. Roche on behalf of the Bank.

New Offer

23. On the 9th April the Receiver was contacted and made a new offer for the purchase of the Premises by a Mr. Greg Kavanagh. The Receiver took legal advice. The Receiver made further contact with Mr. Kavanagh and following negotiations Mr. Kavanagh signed a contract for the purchase of the premises for the sum of €2.7 million and paid a deposit of €400,000 on the 16th April 2014. The closing date for the sale was the 17th May, 2014. The Receiver signed the contract on the 17th April. There is a dispute about a communication between Mr. Doyle and the Receiver on the 23rd April, 2014. This is not relevant to the issues which require to be

determined on this appeal.

24. The trial judge dismissed the plaintiffs claim for a number of reasons. In her judgment she addressed a series of issues. The first was a factual issue as to which person was intended to be the Vendor of the Premises to Mr. Doyle. At para. 54 she concluded and held as a fact that "at all material times, the Vendor of the Premises was the Receiver".

25. The trial judge further found and held as a fact that Mr. Roche (and by implication the Bank) was not acting as the agent of the Receiver including when he wrote confirming that the Bank had consented to the sale at €2.295 million subject to a closing by the 31st May, 2014.

26. The trial judge found that the plaintiffs, in the reliefs sought in the statement of claim had failed to specify against which defendant they were seeking an order for specific performance and further that in the course of the hearing counsel on their behalf had not identified against which defendant they were seeking an order for specific performance. She then determined at para. 55 that on that basis alone the claim must be dismissed. Nevertheless she continued to consider and determine a number of other issues.

27. The first of such issues was whether or not the plaintiffs had established that they had a concluded agreement for the purchase of the Premises. The trial judge decided that as on her findings of fact the intended Vendor was to be the Receiver; that hence any such agreement must be with the Receiver and concluded that there was no evidence of any agreement between the plaintiffs and the Receiver for the sale and purchase of the Premises. She also decided that as there was no evidence to establish that the Bank intended to act as Vendor that there cannot have been any concluded agreement between the Bank and the plaintiffs for the sale of the Premises.

28. She, nevertheless considered whether there was a note or memorandum to satisfy s. 51 of the 2009 Act and decided there was not as there was no agreement on a material term of the contract namely the closing date. She further concluded that the offer of the 1st April 2014, set out in the letter from Mr. Dolan was in substance subject to the exchange of a formal written contract that the term "without prejudice" as used by Mr. Doyle and Mr. Dolan had the effect of preventing an enforceable agreement coming into effect. In relation to proof of funding, she decided that the intention was that proof of funding was a pre condition to entering into a binding contract as distinct from a condition precedent to performance of a concluded contract.

The appeal

29. The plaintiffs advanced fifteen grounds of appeal in the notice of appeal. In their written submissions, they dealt with the grounds of appeal under six broad headings. They further refined these submissions at the oral hearing.

30. Central to their appeal was the submission that the trial judge had erred in deciding that the failure of the plaintiffs to identify the person against whom the order for specific performance was sought justified dismissal of their claim. Further independently of the submission that the trial judge had erred in her finding that the Receiver was the proposed Vendor of the property and that the Bank was not acting as the agent of the Receiver in the negotiations conducted by Mr. Roche, they submitted that it was sufficient for them to establish an enforceable agreement with the Bank for the sale of the Premises having regard to the relationship between the Bank, the Receiver and Pub Pool. They submitted that the plaintiffs had established a concluded agreement with the Bank (and the Receiver for which it was acting as agent) and a note or memorandum sufficient to satisfy s. 9 of the 2009 Act.

31. The respondents relied upon the judgment; they submitted that the findings of fact should not be interfered with in accordance with the principles in Hay v. Grady and *inter alia* that the plaintiffs had not established a concluded agreement for the sale and purchase of the Premises with any party and that there was no note or memorandum sufficient to satisfy s. 51 of the 2009 Act.

Conclusions

32. As already stated, the appellants, in my view, have failed to establish that the findings of fact made by the trial judge were not supported by credible evidence. She did have evidence, to which she refers in her judgment to support the findings of fact made by her that, at all material times, the intended Vendor of the Premises was the Receiver, acting of course as agent for Pub Pool in accordance with the terms of the deed of mortgage and that Mr. Doyle was aware of this. That was the position in relation to the 2009 Agreement. I am further satisfied that there was evidence to support the finding of the trial judge that Mr. Roche in his negotiations with Mr. Doyle was not acting as agent for the Receiver. It follows from this that her finding that the Bank did not act as agent for the Receiver should be upheld.

33. However, in my view, neither of these findings of fact is determinative of the plaintiffs claim or this appeal. The more difficult question is whether the trial judge was correct in deciding that the plaintiffs were obliged in the statement of claim to identify the particular defendant against whom the order for specific performance was sought and also whether she was correct in deciding that it followed from the fact that it was intended that the Receiver (as agent for Pub Pool) be the Vendor of the Premises that the plaintiffs had to establish the existence of an enforceable agreement with the Receiver, as distinct from the Bank to obtain an order for specific performance.

34. The plaintiffs had pleaded in the Statement of Claim that the alleged agreement was with "the defendants". The plaintiffs in submission relied upon para. 8.13 of Farrell: *Irish Law of Specific Performance* (Dublin, 1994) Butterworths where it is stated:-

> ". . .The fact that land may be vested in a third party is not a bar to a claim for specific performance if that party can be compelled to convey . . . when a person agrees to do something which he can himself do, or has the means of procuring others to do, the court requires him to do it or get it done unless the circumstances of the case make it highly unreasonable to do so."

The authority cited for this latter statement is *Costigan v. Hastler* (1804) 2 Schoales & Lefroy 160 at 166.

35. The primary submission on behalf of the plaintiff was that the relationship between the Bank, as mortgagee of Pub Pool and appointer of the Receiver is such that it could require the Receiver as agent of Pub Pool to convey the property to Globe. Alternatively it was submitted that the Bank could have gone into possession and conveyed as mortgagee.

36. The resolution of the above questions only becomes relevant if the plaintiffs are correct in their submission that the trial judge erred in deciding that there was no concluded agreement between the plaintiffs and the Bank for the sale of the Premises or no note or memorandum of that agreement sufficient to satisfy s. 51 of the 2009 Act. I propose therefore setting out my conclusions on those issues firstly.

37. The first issue in any claim for specific performance is whether there was a concluded agreement and this must be distinguished

from the requirement to prove the note or memorandum required by s. 51 of the 2009 Act. In *Supermacs Ireland Limited v. Katesan (Naas) Limited* [2000] 4 I.R. 273 Geoghegan J. at p. 288 drew attention to the correct approach set out with clarity by Henchy J. (with whom O'Higgins C.J. and Walsh J. concurred) in *Lynch v. O'Meara* (Unreported, Supreme Court, 8th May, 1975) at p. 4:-

> "In this court, counsel for the plaintiff contended that the first document and the second document should be read together and as such should be held to constitute the note or memorandum required by the Statute of Frauds. However, before one comes to the question of a note or memorandum it is necessary to see if an entire contract was concluded on Sunday the 24th October, for it is only in that event that the statutory note or memorandum would be required. If the negotiations between the parties had not ripened into the fullness of an entire contract, the plaintiff's claim for specific performance would fail, not for want of the statutory evidence necessary for the enforcement of a contract for the sale of lands, but simply in default of the existence of any such contract. There would be no contract to be specifically enforced."

38. Geoghegan J. then stated:-

> "I merely quote that passage because of its clarity as to the correct approach. There cannot be a concluded agreement unless everything intended to be covered by the agreement has been either expressly or impliedly agreed."

39. The respondents submitted that there was a lack of clarity in the submissions on the part of the plaintiffs as to whether they were contending that there was an oral agreement reached between Mr. Roche and Mr. Doyle in the telephone conversations of the 31st March and the 1st April, 2014, or whether the agreement comprised the letter of offer sent by Mr. Dolan on the 1st April, 2014 and allegedly accepted by Mr. Roche on behalf of the Bank in his letter of the 3rd April. It does not appear to be necessary to resolve this. The trial judge concluded at para. 60 of her judgment that there had been no agreement on the closing date for the proposed sale and that this was an essential requirement for a concluded agreement even between Mr. Doyle and Mr. Roche on behalf of the Bank. At the outset of para. 60 the trial judge stated "An essential condition in a binding contract for the sale of land is the closing date".

40. I accept the submission on behalf of the appellants that this categoric statement by the trial judge in relation to a closing date being "an essential condition" for a concluded agreement or binding contract is not correct. The true position is more nuanced.

41. The "entire contract" referred to by Henchy J. is one in which all the material terms have been agreed or as put by Geoghegan J. above "everything intended to be covered by the agreement has been either expressly or impliedly agreed". However what will constitute "all the material terms" varies depending on the relevant facts. As Farrell in *Irish Law of Specific Performance* points out at para. 3.09, the material terms may be very straightforward and simply the parties, the property and the price. However he then states at para. 3.10:-

> "Cases which come to court are rarely as simple as having only the parties, property and price as their material terms. Even if there appears to have been an uncomplicated contract with just agreement on parties, price and property careful examination of the facts may show that more was involved and the parties may have fallen short of complete agreement by reason of failure to agree on other material terms. The question what is material or essential must be considered, at any rate primarily, from the point of view of the parties themselves. The test to be applied is a subjective one and the court is required to consider terms as essential to a contract which were so regarded by the parties themselves."

42. Farrell specifically addresses the question of the materiality of a closing date at para. 3.15 and repeats that the test is subjective and the court will consider terms as essential to a contract which were so regarded by the parties themselves. He further observes that ". . . if the evidence shows that an agreed closing date is important to either party or to both that date is likely to be a material term".

43. The plaintiffs sought to submit that the absence of agreement on a closing date did not prevent a concluded agreement in reliance on the following passage from the judgment of Hardiman J. in *Supermacs Ireland Limited v. Katesan* where at p. 280 he stated:-

> "Counsel on behalf of the defendants also contended that the absence of agreement as to completion date was a fatal defect in the proposition that there was a concluded agreement. In relation to the Naas premises there was a statement on affidavit that completion was to be after vacant possession had been obtained; there was no reference to a completion date at all in relation to the other five properties. He further submitted that there was no evidence on the basis on which a completion date could be implied.
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> In *Boyle v. Lee* [1992] 1 I.R. 555, Egan J. at p. 593 stated that:-
>
> "It has long been established that where no time for performance is agreed the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case: *Simpson v. Hughes* (1896) 66 L.J. Ch. 143."
>
> This is a long standing and, to my knowledge, unchallenged statement of the law. Accordingly, it cannot be said with certainty that, if the other essentials of a concluded agreement are present, the plaintiffs' case is bound to fail by reason of the non-specification of a completion date."

44. In *Supermacs* Hardiman J. was considering an appeal from a refusal by the High Court to dismiss the proceedings on a motion upon the grounds that they were bound to fail. The statement of principle cited in relation to an implied term and approved of by Hardiman J. applies where there is no express agreement on a closing date. The approach of Hardiman J. is not inconsistent with the principles set out in Farrell in relation to the question as to whether agreement on a closing date is or is not essential for the existence of a concluded agreement. The question as to whether a term is material and must be agreed in order that a concluded agreement has come into existence depends upon a subjective assessment of the facts with particular regard being had to what the parties themselves considered to be material terms requiring express agreement.

45. The concurring judgment of Geoghegan J. in *Supermacs* (the third judge Denham J. agreeing with both judgments) confirms this approach. In considering the position in relation to a deposit in that particular contract, Geoghegan J. in his analysis of what was decided by the majority judgments in *Boyle v. Lee* states at p. 286:-

> "Only the 'material terms' need be included in a note or memorandum for it to be sufficient but all the terms, whether they

be important or unimportant, must be agreed before there can be said to be a concluded agreement. It follows therefore that if the evidence is that there is going to be a deposit but that the amount of it is still to be negotiated, there cannot be a concluded agreement. . . . If the evidence establishes that two proposed parties to an agreement intended that their agreement should contain an express term relating to a deposit there cannot then be an implied term. . . .”

46. Applying all the above principles to the facts of this case, it is clear from the evidence recorded by the trial judge in relation to the conversations between Mr. Roche and Mr. Doyle on the 31st March and the 1st April, 2014, the letter from Mr. Dolan on behalf of Mr. Doyle of the 1st April, 2014 and the letter from Mr. Roche to Mr. Doyle of the 3rd April, 2014, that in relation to the proposed sale of the Premises, those parties intended that there be express agreement on the closing date. The evidence is that Mr. Doyle both in the oral exchanges and in the letter written by Mr. Dolan sought an initial period of six weeks for proof of funding and signing of contracts and four weeks thereafter for closing. It is common case that those periods would have meant a closing date of the 10th June, 2014. The Bank, by Mr. Roche in the oral exchanges and in the letter of the 3rd April, 2014, gave consent to the proposed sale of the Premises for €2,295,000.00 subject to the sale closing by the 31st May, 2014. On those facts, the trial judge was in my view correct in concluding that a concluded agreement for the sale of the Premises required express agreement on a closing date.

47. The plaintiffs in the High Court and in this Court also contended that the email sent by Mr. Doyle in response to the email enclosing the letter of the 3rd April, 2014, which stated “thanks for that, can you also fwd. the other letter confirming the €5k” constituted acceptance of the closing date of the 31st May, 2014. The judge rejected that contention and concluded that she could not construe this email as accepting the 31st May closing date and further observed that there was no evidence from Mr. Doyle or Mr. Dolan on his behalf ever confirming the acceptance of the closing date of the 31st May, 2014. I agree with the trial judge’s construction of the email and in the absence of any other evidence her conclusion that there was no agreement on a closing date which on the facts of this particular contract was an item identified by the parties as important and requiring agreement. This is not the situation of an agreement where the parties did not consider the closing date to be an important term requiring express agreement and where the principles in relation to the implied term that the parties would perform their parts of the contract within a reasonable period of time may apply. This was a contract in which the closing date was intended by the parties to be an express term and still remained to be agreed on 3rd April 2014.

48. It follows that the trial judge was correct in deciding on the facts of these proceedings that no concluded contract came into being between the Bank and Mr. Doyle for the sale of the Premises to him and Globe. Hence the plaintiffs cannot succeed in their claim for specific performance of the alleged contract for sale of the Premises and the appeal must be dismissed.

49. In those circumstances it is unnecessary for me to consider any of the further issues arising on the appeal.

Relief

50. The appeal will be dismissed.