Neutral Citation [2012] IEHC 182

THE HIGH COURT

[2010 No. 11606 P]

BETWEEN

PALACEANNE MANAGEMENT LIMITED

PLAINTIFFS

AND

ALLIED IRISH BANKS PLC

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 4th May, 2012

1. Introduction

1.1 This is yet another case where the difficulties encountered by both parties stem from the collapse of the property market. The plaintiff ("Palaceanne") is a company set up to act as a management company in relation to a small development of apartments at Palace Anne Mills, Murragh, Enniskeane in Cork ("the Development"). In circumstances to which it will be necessary to refer in more detail, Palaceanne now owns the common areas associated with that Development. The developer was a Ms. Gail Coles. Ms. Coles granted a mortgage over part of the apartment block, which had not been sold ("the Secured Property"), to the defendant ("AIB"). To be precise, the mortgage in favour of AIB related to the unsold apartments and not to any of the common areas.

1.2 To be more precise, the arrangement entered into with the respective purchasers of the sold apartments was that two separate contracts were entered into. These were a contract for the grant of a lease from Ms. Coles in which Palaceanne joined together with a construction contract with a company called Enniskeane Developments Ltd. Such arrangements are not untypical of the sort of contractual agreements entered into for the purchase of newly developed properties, whether houses or apartments.

1.3 Problems were encountered in relation to the structure of the Development which led the purchasers who had completed sales to sue Enniskeane Developments Ltd. and Ms. Coles for damages. That action was not defended and substantial damages were awarded in favour of the individual owners. No monies have been paid by the defendants to meet that damages claim and, on the basis of my understanding of the matter from the solicitors who acted on behalf of the purchasers, it is not expected (despite strenuous efforts) that it will be possible to recover significant funds despite the presence of the relevant judgment. At the time when the proceedings to which I have referred were before the court (The High Court Record No. 2007 1637 P between *Catherine Crowley Kennedy & Ors* plaintiffs and *Enniskeane Developments Ltd & Ors* defendants) all bar two of the apartments in this small development had been sold. The plaintiffs in the earlier proceedings were, therefore, owners of the relevant sold apartments.

1.4 The underlying reason why the damages claim was brought was that significant works needed to be done to remedy structural and other problems with the Development. Subsequent to obtaining judgment, two further measures were applied for and ordered by the court. First, a receiver was appointed over the properties remaining in the ownership of Ms. Coles with the intent that those properties might be sold and the net proceeds used in partial discharge of the judgment already obtained. Second, an order was made providing for the conveyance by Ms. Coles to Palaceanne, in its capacity as the management company, of the freehold interest in the Development. It will be necessary to return to that conveyance in due course. However, when the receiver investigated the possibility of selling the remaining two apartments for the purposes of paying some of the damages which remained outstanding, it transpired that AIB held a mortgage over those properties. It was accepted by the receiver (as it had to be) that AIB's security over the properties ranked in priority (being, amongst other things, first in time) to any claim which the plaintiffs in the earlier proceedings might have been able to pursue, through the receiver, in relation to the recovery of damages.

1.5 It follows that, at least in general terms, AIB's security has priority over the two unsold apartments, Palaceanne owns the freehold with the shareholders in Palaceanne being the purchasers of the apartments which had been sold. Obviously, in the light of current conditions in the property market, it would be very difficult to sell the apartments in question even if there were no difficulties associated with them whether in relation to their structure or title. In addition, the owners of the occupied apartments, through Palaceanne, are anxious to engage in the remedial works which are necessary to put the apartments into the state in which they should be. It is against that background that a dispute has arisen between Palaceanne and AIB as to the precise legal entitlements of both parties. I will set out the position of both parties in due course. However, before so doing it is necessary to say a little about both the typical method by which apartment or other multi-unit developments are legally structured and a little more detail about certain aspects of the series of transactions that led to the dispute with which I now have to deal. I, therefore, turn first to multi-unit developments.

2. Multi-unit Developments

2.1 Since it became fashionable to construct developments in a way where both access and services did not come directly onto each individual property from the public roadway, lawyers have had to grapple with how to put an enforceable and workable legal structure in place to reflect the interaction between the properties concerned. While such problems have the potential to apply equally to developments of estates of houses where the roadways and services would not, at least for a period of time, be taken in charge, the problem was at its most acute in respect of apartments.

2.2 The normal model put in place was the one adopted in this case. A developer (typically a corporate entity but sometimes, and actually in this case, an individual) set up a scheme whereby a management company (such as Palaceanne) would be established. As each successive apartment was sold and in accordance with the terms of the contract of sale, a long lease would be entered into by the developer in favour of the purchaser and the purchaser would become a shareholder in the management company. While the sale of units was ongoing, the developer remained the owner of any common areas and remained under obligations typically set out in the lease to allow for the provision of various services. In one sense it might be said that the obligations of the developer were twofold.

2.3 First, as the owner of the common areas, the developer had to permit the passage of services (including in that context

roadways) over its lands as a result of appropriate easements included in the respective leases. However, the typical management company scheme also provided for the payment of a management charge to be levied on each of the apartment owners; that money being designed to go to the upkeep of the property as a whole and in particular the common areas. The precise terms of the obligation to upkeep and the levying of a management charge remained a matter for the specific documentation in each individual case. However, of particular importance to the issues with which I am concerned, it is important to note that the developer typically undertook an obligation to ensure that an appropriate level of upkeep as specified in the respective leases was maintained for the development as a whole but would only have been able to recoup a management charge from the owners of those apartments which had already been sold. Such was the arrangement in this case. In substance, therefore, the developer had an obligation, until the development had been fully sold, to make up any shortfall in the costs of upkeep attributable to those apartments which had not been sold.

2.4 Under the typical scheme (and again the case here) what was contemplated was that the common areas together with the freehold reversion of the leases would be transferred to the management company when all of the apartments had been sold so that the obligations formerly resting on the developer then passed to the management company. To that intent it was typical (and the case here) that the management company joined in each lease. Thereafter it was for the owners, in their capacity as shareholders in the management company, to make decisions as to the level of upkeep and expenditure consistent with the mutual obligations to which they had committed under the respective leases by virtue of which they held their individual apartments and the constitutional documents of the management company itself.

2.5 There were perceived to be difficulties in relation to such multi-unit developments at least some of which are addressed in the Multi-Units Developments Act 2011, which was, in the main, commenced on the 1st April, 2011. However, it was not argued that that legislation provided any assistance in relation to the issues which arise in this case although it should be noted that s. 5 might have required the transfer of the common areas of the Development to Palaceanne even if the court order referred to earlier had not been made. Whatever may have been the problems of the previous system it can, perhaps, be said that it at least worked generally in a satisfactory manner in many cases when, as anticipated, all of the units were sold. Part of the problem which emerges in this case is that all of the units were not sold so that I am faced with a situation where it is not now anticipated that all of the units will be sold for quite some time. In fact, coupled with the existence of the security in favour of AIB, the fact that, in circumstances to which I will shortly turn, the common areas and reversionary interests have, prior to the sale of the last apartment, been conveyed to Palaceanne, gives rise to the difficulty as to the interlocking rights and obligations of Palaceanne on the one hand and AIB on the other hand which is at the core of these proceedings. While much of the history of the events which lead to those difficulties is uncontroversial and does not require detailed explanation, there are some aspects of that history which are material to the issues which l have to decide and to which I now turn.

3. The History of Events

3.1 First, it is necessary to say something more about the security obtained by AIB from Ms. Coles. The relevant mortgage in question is dated the 20th May, 2005, and is made between Ms. Coles and AIB ("the Mortgage"). Under the Mortgage, Ms. Coles demised unto AIB the Secured Property for a term of 10,000 years subject to a proviso for redemption. Ms. Coles also declared that she would stand possessed of the nominal freehold reversion in trust for AIB and authorised AIB to appoint a new trustee in respect of any such reversion subject, of course, to the right of redemption. It follows that AIB became entitled to a 10,000 year lease and also obtained the right to secure that the freehold be transferred from Ms. Coles subject to Ms. Coles' entitlement to have the entire interest returned to her in the event that the monies secured by the Mortgage by way of demise were fully discharged. In the circumstances that have transpired, it seems highly unlikely that those monies will be discharged and it follows that, in the ordinary way, it is likely that AIB will wish to be able to enforce the security by in effect procuring that the two remaining unsold units can be transferred to any purchaser by means of a lease in the same form as the leases already in existence in relation to the sold apartments.

3.2 Two other provisions of the Mortgage are of some relevance. A schedule sets out the mortgaged property which is described as being:-

> "Firstly, ALL THAT AND THOSE apartments number 1, 4, 5, 6 and 7, Palaceanne Mill, Murragh, Enniskeane in the County of Cork
>
> And secondly,
>
> ALL THAT the property at Murragh, Enniskeane in the County of Cork more particularly delineated and described on the map attached hereto and thereon edged in red."
>
> All of those lands were said to be held in fee simple.

The lands marked red were not, in fact, the common areas of the Development but rather an adjacent site ("the Site"). It will be necessary to tum to the relative position of the parties in respect of the Site in due course. Thus, so far as the Development is concerned, the Mortgage extends only to specified apartments and not to the common areas. Obviously the Mortgage over some of the specified apartments was released on the sale of the apartments in question so that only two of the apartments remain subject to the mortgage.

3.3 The second feature of the Mortgage is that Clause 7(c) places the obligation of repair (and also an obligation of completing any partially constructed buildings) on the mortgagor. While entirely understandable given that the lease is simply a device for creating a mortgage, that provision does create what would, in other circumstances, be a rather unusual situation where the entire repairing obligation rests on the fee simple holding lessor rather than on the lessee.

3.4 The next fact of some relevance to the issues is to note that, at the time when the mortgage by way of demise to AIB was entered into, the estate scheme was already in place. Some of the apartments had already been sold, thus leading to the situation where not all of the apartments were included in the mortgage. This is not a case, therefore, where a developer bought lands and mortgaged them to a bank at a time when, whatever might have been anticipated as being a likely scheme of development, no set of arrangements for the implementation of an estate scheme were in place. While there may be some debate as to the precise legal consequences of this fact, it seems clear that AIB must have been on notice of the existence of the estate scheme at the time when the Mortgage was entered into.

3.5 Some further details of the legal form by which the estate scheme was put into effect are worth noting at this stage. I was provided with a typical booklet of title which would have been used as part of the conveyancing process on the sale of individual apartments to the respective purchasers. That booklet of title included an agreement of the 16'h December, 2003, which is described in the index as an "Agreement for Sale of Reversionary Interest to Palaceanne Management Company". The agreement in question is

between Ms. Coles and Palaceanne and it makes provision for Palaceanne taking over responsibility for the management of the common areas together with the liability of Ms. Coles for the performance of the covenants obligations and agreements on the part of the lessor in the respective leases (a draft of such lease being annexed as Appendix A to the agreement). In consideration of those provisions and of the sum of €1.00, Ms. Coles agreed that she would convey to Palaceanne what is described as the common areas in fee simple. The term "common areas" is defined in Recital 2 of the deed in a relatively imprecise way but amongst the documents of title supplied to the various purchasers was a draft deed by virtue of which the freehold of the property was to be conveyed to Palaceanne in due course. A map is annexed to that draft deed which makes it clear that what was intended was a transfer of the entire interest of Ms. Coles in the Development (but excluding the Site). Thus, what seems to have been contemplated (although the 2003 agreement between Ms. Coles and Palaceanne is perhaps ambiguous on this point) is that Palaceanne would become the owner of the common areas and would also become the freehold owner of the reversionary interest in the leases of the individual apartments. The provisions of the respective leases entered into, having regard to Palaceanne joining as a party precisely because it was to take over the obligations of the lessor, seems to confirm that position.

3.6 The completion date is stated to be on the expiration of 28 days from the date of the execution of the last of the assurances of the units in the estate or at the expiration of 28 days from the service of a notice by Ms. Coles. Ms. Coles undertook an obligation to procure the maintenance of the common areas in a proper state of repair up to the completion date. It follows that what was in place, from the latter part of 2003, and, therefore, well in advance of the Mortgage between Ms. Coles and AIB, was an estate scheme which contemplated that the freehold interest in the entire Development (but excluding the Site) was ultimately to be conveyed to Palaceanne in that manner.

3.7 In addition, it needs to be noted that the mortgage deed makes no express provision for any easements in favour of AIB in its capacity as lessee/mortgagee. There is an issue between the parties, to which I will turn in due course, as to whether any implied easements or easements of necessity can be said to exist.

3.8 It is next necessary to say something briefly about the proceedings which led to Palaceanne becoming the owners of the common areas. The first order made in the proceedings was on the 14th April, 2008, when judgment in default of appearance was given against each of the defendants. Thereafter the matter came on for assessment of damages, in accordance with the order of the 14th April, 2008, on the 9th June, 2008. It appears from the order made on the occasion in question that damages were awarded to the plaintiffs against the defendants jointly and severally in the sum of €1,514,462.91 while the owners of each separate apartment (in some cases relevant apartments were owned jointly by two of the plaintiffs) received additional damages in the sum of €100,000.00 in respect of each apartment. In passing it should be noted that the court order is incorrect in describing the sum of just over €1.5m as general damages and the sum of €100,000.00 in respect of each apartment as special damages. The order should specify the damages the other way round and I will direct that the order be corrected in that regard. However, nothing turns on that description at this stage.

3.9 Of more relevance to the issues which now arise is that the same order of the 9th June, 2008, directed that, in default of payment within 14 days of the making of the order, Ms. Angela McCarthy, Solicitor, be appointed as receiver over the assets of the defendants at Palaceanne Mills with power to sell same to satisfy the judgment. As the monies were not paid within those 14 days and have not since been paid, the receivership has come into effect although, for reasons which are not relevant to this case, Ms. McCarthy has been replaced by a new receiver.

3.10 In addition, the order provides that the second named defendant (being Ms. Coles) "do transfer the common areas of the development known as Palaceanne Mills, Murragh, Enniskeane, County of Cork to Palaceanne Management Ltd in accordance with the contract entitled 'The Memorandum of Agreement' made on the 16th day of December, 2003, between Gayle Coles and Palaceanne Management Ltd". The order further provided that the principal registrar of the High Court might execute any relevant conveyance on behalf of Ms. Coles in the event of a default. Such a default did in fact occur and the transfer was, in fact, executed by Mr. O'Neill in due course.

3.11 Three aspects of the transfer of the lands to Palaceanne need to be noted. First, the transfer as ultimately put in place included all of the lands which were specified in the map attached to the draft deed contained in the title documents to which reference has been made. It follows that what was transferred was the fee simple interest in the entirety of the Development (but excluding the Site) so that the fee simple interest of the entire estate (including the reversionary interest in the leases of the apartments sold and the reversionary interest in the two unsold apartments which remain the subject of the mortgage by demise to AIB) is now vested in Palaceanne.

3.12 Second, that transfer occurred at a time which was earlier than the time that might have been anticipated had the arrangements set out in the estate scheme been fully complied with. In the ordinary way, and on the facts of this case, the transfer of the common areas to the management company is specified to occur when the last apartment has been sold. As two of the apartments have not been sold the time for compliance with the obligation to transfer the common areas had not, strictly speaking, arisen when the order to which I have referred was made. It does need to be recorded that I was persuaded by counsel that, in the circumstances then prevailing, it was appropriate to make such an order notwithstanding that fact. The relevant factors taken into account were that Ms. Coles was in significant breach of her contractual obligations generally and had left the various plaintiffs in a situation where they had a seriously defective building (the cost of remediation being in excess of €1.5m) and where Ms. Coles was not complying with her obligation to ensure that the building was remediated and further, was in breach of her obligation to maintain the Development (including the common areas) pending completion of the transfer to Palaceanne. Against that background I was satisfied that there was an implied entitlement to accelerate the acquisition of the lands to enable the purchasers to put the building right and ensure proper upkeep and maintenance in circumstances where the person on whom the primary obligation so to do lay was in default.

3.13 Third, as pointed out earlier, the mortgage by demise in favour of AIB did not include the common areas at all. Therefore, Ms. Coles had an unencumbered title to those common areas which she had contracted to transfer, in fee simple, to Palaceanne. The transfer executed by Mr. O'Neill on behalf of Ms. Coles, on foot of court order, to Palaceanne therefore conveys an unencumbered fee simple title to Palaceanne. Obviously any such conveyance remains subject to such easements as might have existed over the common areas. However, as will become clear, there is a controversy between the parties as to the position in respect of any such easements so far as the unsold apartments are concerned.

3.14 Finally, it is important to record that matters between the parties came to a head when AIB brought Circuit Court proceedings against Ms. Coles seeking possession of the two remaining apartments which were the subject of the Mortgage. I should note that it would appear that a usual form of release of mortgage had been obtained from AIB to permit the sale of each subsequent apartment

to go ahead unencumbered by AIB's interest as mortgagee. It would seem from the limited conveyancing papers made available to me that, at least in the case of a sale of an apartment which occurred after the Mortgage was put in place, there is a reference to an undertaking on the part of the vendor's solicitor to produce an appropriate form of release and discharge of AIB's interest as mortgagee. AIB's claim to possession in the Circuit Court arose after my order appointing a receiver was in place. While the receiver ultimately acknowledged that AIB's interest as mortgagee had priority over any entitlement which the receiver might have enjoyed, so far as the unsold apartments themselves were concerned, the issue of whether AIB, in its capacity as mortgagee, could have any entitlement over the common areas (including an easement of access to the two apartments concerned) became a matter of controversy between the parties leading ultimately to these proceedings. Against the background of those facts it is necessary to give a brief outline of the procedural history and the issues which now fall for determination.

4. Procedural History and Issues

4.1 As soon as the proceedings were issued, and having regard to the fact that I had already been dealing with other aspects of the issues arising in respect of the Development, the parties requested that these proceedings be case managed so as to lead to an early trial. Having discussed the matter with counsel on both sides it was agreed that the parties would endeavour to produce a statement of facts and also agree on the issues of law which required to be determined arising from those facts.

4.2 The parties reached agreement on both of those matters so that the case was able to go to trial without any further formal pleading on the basis that the facts were as agreed and that the issues which required to be determined were those specified by the parties. The issues as specified were as follows:-

> "1. What is the status of the Bank? Is the Bank to be treated as a Mortgagee in possession?
>
> 2. If the answer is in the affirmative what consequences flow in respect of their rights and liabilities in relation to the common areas?
>
> 3. Do the Bank have any entitlement to the use of any rights over the common areas and if so the source of such rights and the nature and extent thereof?
>
> 4. Are the Bank entitled to be admitted to the Management Company as members thereof and if so the terms upon which they should be so admitted?
>
> 5. Is the vacant site, the subject matter of the Charge, part of the estate' as defined in the documents relating to the apartment scheme? If not does the site have any right of access over or entitlement to the use of any facilities within the common areas and if so the source of such entitlements?
>
> 6. Is the indenture of the 22nd of January 2009 (executed pursuant to the High Court Order of the 9th of June 2008) subject to rectification and is so the terms of any such rectification?
>
> 7. Is the Bank obliged to make such contribution as may be thought just and fitting in respect of expenditure carried out by the Plaintiffs in the repair and maintenance of the apartments for the benefit of the Bank and the Purchaser from them and if so the manner in which such contribution should be quantified?" [*sic*].

4.3 Thereafter written submissions were filed on both sides and the case came on for hearing. It is fair to say that the case evolved somewhat from the issues specified in the written statement of issues already cited. First, it was accepted that AIB was not currently a mortgagee in possession. Second, it was accepted that the (vacant) Site, which is the subject matter of the Mortgage in favour of AIB, was not part of "the estate" as defined in the documents relating to the apartment scheme. It was accepted that a right of way of necessity existed over the common areas so as to give access to that site. No greater entitlement to any easement was asserted on behalf of AIB as attaching to the Site.

4.4 In substance, therefore, the position in respect of the Site no longer remained in dispute between the parties. It is agreed that AIB holds a mortgage over that site which ranks in priority to any entitlement of the receiver appointed by the court to sell the lands in order to discharge the judgment debt against Ms. Coles. It is also agreed that the lands in question enjoy no other easements over the common areas or otherwise in respect of the lands on which the apartments have been built, beyond the right of way of necessity to which reference has been made.

4.5 Third, AIB did not ultimately assert that it had any entitlement, as such, to be admitted as a member of Palaceanne. However, AIB accepted that, in the event that it wished to sell the two apartments over which it holds a mortgage, it could only do so by entering into a lease in favour of the purchaser in the same fashion as was contemplated would be entered into by Ms. Coles, thus binding in any purchaser to the estate scheme. However, it was asserted on behalf of AIB that, unless and until any sale of those two apartments was effected, it had no obligation to join the management company itself or meet any obligations to the management company and that, therefore, unless and until the apartments were sold no obligation existed on the part of AIB or, by definition, any purchaser from AIB, to contribute to the management charge.

4.6 In addition, the parties differed as to whether AIB had, in its capacity as a mortgagee by demise, any entitlement to a any form of easement over the common areas. It was asserted on behalf of AIB that the two apartments which were held by AIB as lessee/mortgagee enjoyed a right of way of necessity to gain access to those apartments and also enjoyed any other easements over either the common areas or the other apartments which might actually have been enjoyed at the time when the lease, giving effect to the mortgage, was created, placing reliance on the so called rule in *Wheeldon v. Burrows* [1879] 12 Ch. D. 31. On the other hand Palaceanne argued that, in the circumstances of this case and in the context of the pre-existing estate scheme, AIB could not assert any current entitlement beyond its position as mortgagee/lessee to either a right of way of necessity or any other easement whether arising under Wheeldon v. Burrows or otherwise. There was thus a significant dispute between the parties in relation to two aspects of the current position. On Palaceanne's side it was said that AIB had no current entitlements beyond its position as mortgagee/lessee unless same arose under the estate scheme in which case AIB would have an entitlement to all of the easements contemplated by that scheme but would also have an obligation to make appropriate contributions by way of management charge to the upkeep of the development. As I understood it, the position adopted on behalf of Palaceanne was to put forward as a principal argument an assertion that AIB was bound into the estate scheme in that way but to argue that, as a fallback, if I was not satisfied that AIB was bound into the estate scheme in that way, no rights of any sort could be enjoyed by AIB beyond its simple entitlement as a mortgagee over the two unsold apartments.

4.7 While AIB accepted that it could not sell the two unsold apartments without binding in the purchaser to the estate scheme, AIB did not accept that any liabilities to make a contribution to the management funding by means of a management charge could be

retrospective save, perhaps, that it was tentatively accepted that there might be an obligation to make a contribution towards what were described as capital type expenditures by which I understood counsel to mean that there might be an obligation in respect of monies required to be spent for major repairs and renovations but not in respect of monies required for the ordinary day to day running and maintenance of the Development.

4.8 As can be seen the issues which arose were, therefore, legal issues arising out of the application of the law to the somewhat unusual facts of this case. Before going on to discuss those legal issues it is necessary to mention one further aspect of the procedural history. As will become clear from the legal discussion, one of the questions raised on behalf of Palaceanne placed reliance on *Halsall v. Brizell* [1957] 1 Ch. 169. Under that heading it was argued that a party is not entitled to obtain the benefit of provisions of a deed while escaping from obligations that arise under the same deed even though the relevant obligations might not, of themselves, be enforceable in stand alone proceedings. I think it is fair to say that the argument under that heading developed significantly as a result of a constructive discussion between counsel and the court during the hearing. Counsel for AIB, in the light of the development of the argument, quite reasonably indicated that she might wish, if l was concerned that Palaceanne's position under that heading might be correct, to have the opportunity to make further submissions. Having reflected on the matter it did seem to me that Palaceanne had raised a significant question under that heading and the case was, therefore, listed for a further brief hearing which was preceded by additional written submissions directed towards the case as it had evolved.

4.9 1t seems to me that the issues which I now need to address are, therefore, the following:-

> (a) Whether, as Palaceanne asserts, AIB, in its capacity as mortgagee by demise and, therefore, a lessee, has any or all of the obligations which arise under the estate scheme and in particular an obligation to contribute, in like manner to the owners of the sold apartments, an appropriate proportion of the costs of maintenance and upkeep attributable to the two unsold apartments;
>
> (b) In the event that AIB has no such obligation (and is not, thus, found to be bound in to the estate scheme), whether AIB enjoys any rights or entitlements in respect of the common areas or the other apartments such as a way of necessity or other easement or quasi easements; and
>
> (c) Whether either AIB (in accordance with Palaceanne's position on question (a) above) or purchasers from AIB by means of a lease in like form to the leases already entered into in respect of the sold apartments, can have any obligation to reimburse the management company in respect of expenditure incurred prior to the execution of such leases in relation to the as yet unsold apartments and, if so, to what extent.

Against that background I now turn to a discussion on the law.

5. The Law

5.1 Some basic propositions can, I think, be taken as having been accepted by both sides and to form the backdrop against which the issues which arise need to be discussed. First, in the ordinary way, restrictive covenants do not run against new owners of freehold land. Restrictive covenants will, ordinarily, be enforceable by the parties to the contract or deed concerned. The problem emerges when the party, on whom the burden of complying with the restriction lies, sells the property. In those circumstances the question which arises is as to whether the burden "runs with the land" so that it remains enforceable against the new owner. Certain covenants might be said, whether under the terms of the relevant deed or from the context of the situation giving rise to the covenant, to be for the benefit of certain specified lands. In those circumstances the law may recognise that the burden of the covenant remains enforceable in favour of the owner of the lands for whose benefit the covenant was created. However, no such issues arise on the facts of this case.

5.2 The other significant exception to the general rule that the burden of a restrictive covenant does not run with the land arises in respect of so called "estate schemes".

5.3 The first major recognition of the existence of an estate scheme as an exception to the general rule is to be found in *Elliston v. Reacher* [1908]2 Ch. 374. As noted by J.C.W. Wiley, *Irish Land Law* (4th Ed. 2010 Bloomsbury Professional), the underlying philosophy behind cases such as *Elliston v. Reacher* was stated by Lord McNaughton in *Spicer v. Martin* (1888) 14 App. Cas. 12, at 25, as deriving from the fact that:-

> "[...] community of interest necessarily [...] requires and imports reciprocity of obligation".

Thus, as Wiley points out, each purchaser buys his plot on the same basis as all the other purchasers of plots on the same estate so that each purchaser and his successors in title can sue and be sued by all or any of the other purchasers and their successors.

5.4 The prerequisites for an estate scheme are identified by Wiley, at para. 19.39, in the following terms:-

> "(i) the [parties] must have derived title from a common vendor, eg, the building developer;
>
> (ii) the common vendor must have originally laid out the estate in plots subject to common restrictions, either consistent only with some general scheme of development or intended to be enforceable under such a scheme;
>
> (iii) the common vendor must have intended the restrictions to be for the benefit of all plots sold;
>
> (iv) the [parties] must have purchased their plots on the basis that the restrictions would benefit the other plots; [and]
>
> (v) the area covered by the scheme must be clearly defined."

5.5 It seems clear that, at the level of principle, the conditions for an estate scheme, so far as the facts are concerned, are established in this case. There was a clear intent that there would be mutual rights and obligations in respect of a clearly defined area. It does, however, have to be noted that the intent in this case was not that each of the purchasers would acquire freehold title but rather that each of the purchasers would acquire a long lease. In addition, it does need to be kept in mind that the principles applicable to estate schemes are not of themselves necessary for the purposes of ensuring that easements, such as rights of way or the right of passage of services, can be effectively availed of in the context of multi-unit developments. Easements do, of course, run with the land both as to the benefit of the easement concerned and the burden thereof. One of the main difficulties, to which the estate scheme structure was directed, was the enforceability of the obligation to contribute financially to maintenance and upkeep in accordance with the terms of whatever management arrangements were put in place. An obligation to pay for maintenance and

upkeep generally is not, of course, an easement, the burden of which would run with the land. It follows that an obligation to meet a proportion of the costs of general maintenance and upkeep is only enforceable against a successor in title of freehold land if that obligation runs with the land.

5.6 However, as and between the separate purchasers in this case, where the mechanism adopted for selling the various units is to create a long lease, the obligation, as and between the purchasers and their successors in title on the one hand and the original developer and its successor, the management company when it takes over ownership of the common areas, on the other hand, is not a problem for the obligation to pay the management charge arises under the lease and is not, therefore, a burden applying to freehold land.

5.7 Therefore, if the scheme contemplated in this case had come to its normal fruition by the granting of leases in respect of each of the apartments, coupled with the transfer of the common areas and the freehold reversions on the leases to the management company, the question of covenants running with freehold land would be unlikely to have arisen for the management company itself was bound in to the arrangements from the beginning and each of the purchasers and their successors in title would hold their respective apartments under a lease whose terms would provide for the rights and obligations concerned including the obligation to pay the management charge.

5.8 The problem in this case arises because of the position of AIB who holds, in a sense, two separate interests in the two unsold apartments. The first is as a lessee under a 10,000 year lease by way of mortgage which lease is not, for obvious enough reasons, in like form to the leases granted to all of the other purchasers. In addition, AIB may be beneficially entitled to the freehold (a point to which I will return) and may be entitled to have the freehold transferred to it or its purchaser nominee. The difficult issue which arises in this case stems from that unusual relationship between the parties.

5.9 A further complication can be seen to arise by a consideration of the respective documents of title of Palaceanne and AIB in this case. The deed executed by the Principal Registrar of the High Court, as already referred to, transfers the fee simple interest of Ms. Coles to Palaceanne by reference to an area edged red on a map annexed to the deed in question. It is clear, as already pointed out, that the area thus transferred is the entire area of the Development (although it excludes the separate Site). However, for present purposes it is important to note that Palaceanne is, therefore, the owner of the freehold reversion of the apartments which have been mortgaged to AIB. Where that leaves AIB in relation to selling the apartments is a matter of some complexity. I should say that, as this issue was not raised in the proceedings and was not the subject of any debate in argument before me, it does not seem to me to be appropriate to express any views on the position other than to identify the problem. Obviously what was contemplated in the arrangements between Ms. Coles and AIB was that Ms. Coles would execute a lease in favour of a purchaser in return for a release by AIB of the Mortgage in respect of the apartment sold. Presumably some agreed proportion (or perhaps all) of the purchase money would be paid to AIB on that basis.

5.10 In the event of default, AIB had the benefit of the declaration by Ms. Coles that she held the legal interest in the fee simple on trust for AIB so that AIB would have been able to ensure that a lease, in like form to the leases in respect of the already sold apartments, could be granted to a purchaser who would then be bound in to the estate scheme, both as to its benefits and its obligations. Given that Ms. Coles had acknowledged herself to be a trustee of AIB and had, indeed, given AIB the power to appoint a new trustee, it follows that AIB would ordinarily have it within its power to procure that such a lease be granted.

5.11 As might have been envisaged at the time of entering into her arrangements with AIB, Ms. Coles would remain the freehold owner unless and until all apartments were sold when she would have been obliged to transfer the fee simple in the entire Development to Palaceanne (including, of course. the reversionary freehold interest in the leases of the by then all sold apartments). The problem that now arises stems from the fact that Ms. Coles' freehold interest has been transferred to Palaceanne so that, not only does Palaceanne own the fee simple of the common areas together with the fee simple reversionary interest in the leases of the apartments already sold, but also the fee simple reversionary interest in the two apartments which are the subject of the mortgage by demise to AIB. There is a question as to the mechanism by which AIB might be able to put in place a lease in favour of a purchaser because of that complication. On the one hand it might be argued that the transfer of the freehold interest in those two apartments to Palaceanne (as a result of the relevant court order) must be taken to be subject to the trust previously declared by Ms. Coles in favour of AIB. On the other hand it might be argued that, because AIB was on notice of the obligation of Ms. Coles to transfer the freehold reversion in those apartments to Palaceanne (admittedly at a stage when all apartments had been sold) AIB might be taken to have acquired its interest as mortgagee by demise subject to Palaceanne's entitlements. As already pointed out there was no argument on this point and, other than noting the difficulty, it does not seem to me to be appropriate to say anything more about it.

5.12 Against that background it is necessary to analyse the position of AIB. AIB took its mortgage with notice of the existence of the estate scheme. AIB was, therefore, aware of the obligations entered into by Ms. Coles in favour of the various purchasers. However, at present AIB is simply a mortgagee by demise of the two individual apartments which remain unsold. The question of the current status of AIB in respect of those apartments is dependent on whether any of the undoubted obligations which Ms. Coles had in respect of general maintenance and upkeep could have passed to AIB as a result of the mortgage by demise or whether any of those arrangements could continue to subsist in the light of the fact that Palaceanne now owns the freehold.

5.13 It does not seem to me that AIB can have any current obligation either to join the management company or to comply with the obligations undertaken by Ms. Coles in her capacity as freehold owner and lessor in respect of the leases relating to the apartments that have been sold. AIB is not the freehold owner. It is not a direct successor in title to Ms. Coles as such. There is nothing in the Mortgage to suggest that AIB is taking on any of the obligations of Ms. Coles, indeed the Mortgage understandably points in entirely the opposite direction. I am not, therefore, satisfied that AIB has any current obligations in respect of the Development. The underlying rationale for the law in respect of estate schemes is, as has already been pointed out, the need to give effect to mutually beneficial and interlocking rights and obligations. Whether there is any basis for some minor extension of the qualifying criteria identified in the case law already cited might be a matter of further debate. However, to extend those concepts to creating a situation where an entity, such as AIB, which merely holds two apartments on foot of a different type of lease with very different terms and in circumstances where the lease is simply a device by which a mortgage is put in place, would be to ignore the underlying rationale. Put in simple terms, AIB is simply a mortgagee and not a purchaser of an apartment. It holds its interest in the two unsold apartments both as a matter of substance and as a matter of legal form in a very different way to that in which the owners of the apartments hold their interests in the sold apartments. I cannot identify any legal mechanism whereby the obligations of Ms. Coles in respect of the unsold apartments could be said to have passed to AlB in those circumstances.

5.14 It is appropriate to commence consideration of the next issue by noting that AlB accepts that it can only sell the remaining apartments by entering into a leasehold arrangement with a relevant purchaser in the same form as the leases already executed by Ms. Coles in favour of the other purchasers. The precise mechanism for so doing may be problematic for the reasons addressed earlier. However, if and when the apartments are sold, then the purchasers will have an obligation to meet the ongoing liabilities of

the management company, in accordance with the terms of the relevant arrangements, in the same manner as the existing purchasers. However, two problems need to be addressed. The first is as to whether AIB has currently any right of access to those apartments. The right of access contended for is a way of necessity.

5.15 A right of way of necessity is a long established legal concept which, although limited in scope, is designed to prevent a party from being landlocked at least in certain circumstances. In general terms a way of necessity arises when a landowner sells part of his land holding to a purchaser such that the purchased lands have no means of access other than through the retained lands. The way of necessity then arises but must be along a route chosen by the owner of the retained lands. The way of necessity does not ordinarily survive any alternative access becoming available to what might otherwise be the landlocked purchaser. The question which arises is as to whether a way of necessity could be said to arise where a property, which is part of a multi-unit development in respect of which an estate scheme is in the course of being implemented (and where that scheme would have provided for an express right of way) is the subject of a mortgage by demise outside the scope of the scheme and with no express grant of a right of way. Insofar as there is any authority on the point, it seems to me that the indications are that a way of necessity does not arise in such circumstances.

5.16 In *Halsall v. Brizell* the principal issue with which the court was concerned was whether the covenant to pay an appropriate proportion of the costs of keeping in good repair the roadways, sea wall, drains and sewers in respect of a common development was enforceable. Upjohn J., placing reliance on one sentence from *Elliston v. Reacher* where Lord Cozens-Hardy M.R. noted that a man who takes the benefit of a deed is bound by a condition contained in it, expressed the view that the defendants in *Halsall* could not be under any liability to pay their obligations if they did not desire to take the benefit of the deed. On the other hand if they wanted the benefit they must pay. In that context, Upjohn J. noted that the defendants could not have a right, apart from the deed, to use the roads of the park which led to their particular house. Upjohn J. went on to find that the defendants could not rely on any way of necessity because he held that, when the house was originally sold to the predecessors in title of the then current occupants, same was conveyed subject to a covenant to bear a proper proportion of the expenses in respect of the maintenance of the roads as a condition for being entitled to make use of those roads and other services. It might have been said that, even if the defendants did not wish to avail of their contractual entitlement to use the roads (because the price they would have had to have paid was to make a contribution) they could nonetheless have relied on a way of necessity for it seems inevitable that the defendants house would have been landlocked and would have been purchased from a developer who would have, at least at the material time, retained lands which could provide access. However, the existence of the estate scheme was taken to have, in effect, negated the right of way of necessity which might otherwise have arisen.

5.17 I appreciate that the situation is not exactly the same here. AIB did not acquire its interest in the two unsold apartments on foot of a deed providing for rights of way at all. However, AIB did acquire its entitlement at a time when it was on notice of the fact that the way in which rights of way in respect of those apartments was intended to be put in place over the relevant roadways was by means of an estate scheme. It seems to me that in those circumstances any right of way of necessity that might otherwise have arisen is negated. Likewise, it seems to me that any right that might have arisen under the rule in *Wheeldon v. Burrows* does not arise for similar reasons.

5.18 It seems to me to follow, at this stage, that while AIB has no obligation to make any current contribution to the proper expenses of Palaceanne, neither has it the benefit of any easements or rights of way in respect of the apartments over which it holds a mortgage. That is not to say that, if and when those apartments come to be sold, the relevant purchasers will not have, on foot of a lease in similar terms to each of the other purchasers, the same rights and obligations as apply to each of those other purchasers.

5.19 That leads to the second and final problem. If and when the apartments are sold and assuming that Palaceanne has incurred expenditure legitimately arising from its role as management company, in the intervening period, can any of the costs of such maintenance, upkeep, repairs and the like, which might be said to be attributable on a proportionate basis to the two unsold apartments, be visited either on AIB as the price of being allowed to buy into the estate scheme by granting leases to purchasers which would have that effect or on the lessees to whom AIB might sell the property?

5.20 The standard form lease used to date sets out the obligations of the lessee in its Sixth Schedule. In passing it should be noted that there may well be a practical difficulty arising from the fact that the way in which the costs of maintenance and upkeep are distributed is somewhat badly drafted as and between one lease and the next, but that is not an issue which it is necessary for me to address in this case. However, para.18 of the Sixth Schedule places an obligation on the lessee concerned to contribute to the costs and expenses incurred by the lessor in carrying out the maintenance and upkeep provisions of the Seventh Schedule. Clause 19(a) requires the lessee, on the 1st January in each year during the continuance of the lease, to pay an advance of the amount certified as being due or likely to become due in accordance with para. 14 of the Seventh Schedule. Thus the obligation of each lessee is specified by express reference to the certification process set out in the Seventh Schedule. Paragraph 14 of the Seventh Schedule, to which reference has been made, allows the lessor to serve a notice specifying the proportionate amount of the costs to be paid by each lessee. Paragraph 14 refers back to para. 12 which requires annual accounts of such expenditure to be made up to the 31st December in each year.

5.21 It does not seem to me, therefore, that the lease itself could contemplate an obligation to pay a contribution to the maintenance charge which went back before the year in which the lease was executed. It is difficult to see, therefore, how there could be circumstances where a party entering into a purchase of an apartment from AIB as mortgagee, by means of entering into a lease in the like form to the leases already entered into in respect of the sold apartments, could have an obligation to retrospectively pay a charge arising out of expenditure incurred in years which preceded the year in which the relevant lease was executed. It seems to me that the obligation to make up the difference to the management company, *i.e.* Palaceanne, for the as yet unsold apartments, is one which rested on Ms. Coles and could not be said to have passed to AIB as mortgagee. The fact that Ms. Coles may not be a mark for her obligations does not change that situation.

5.22 It seems to me to follow that day to day expenditure on ordinary upkeep and maintenance is a burden which must be taken on by the existing purchasers for the only claim that they can have in respect of the share of that expenditure attributable to the unsold apartments is one against Ms. Coles and not AIB. However, I have already touched on the possible problems which might arise in putting in place a mechanism for the grant of leases in respect of the two unsold apartments in the same terms as the leases already in place in respect of the sold apartments. I have also noted the acceptance, on behalf of AIB, that any sale of the unsold apartments can only be by such leases. The precise legal basis for that concession was not clarified at the hearing. If AIB has such an obligation it might arise because at least some of the obligations of Ms. Coles (who had an obligation to sell the remaining apartments by means of such leases) had passed to it or because AIB may wish to sell by means of such leases (a sale in any other form might give rise to insurmountable difficulties for any purchasers) and accepts that it cannot have the benefit of tying in the purchasers to the estate scheme except by executing such leases. There might, of course, be some other basis for AIB's position.

5.23 Whatever the reason may be, there seems to be an acceptance on the part of AIB of some obligation to tie in the sale of the remaining apartments to the estate scheme. In those circumstances, it seems to me to be premature to address the issue, which was only tangentially referred to in the course of argument, as to whether there may be any independent basis (that is to say a basis independent of the terms of the leases) on which liability for an appropriate contribution to the costs of structural repairs proportionate to the two unsold apartments may arise. It would seem to me that, at a minimum, in order for an assessment to be reached as to whether any such legal obligations might arise and if so against whom, a specific basis for the acceptance by AIB of an obligation to tie into the estate scheme would have to be determined and specific works would need to be proposed. I do not, therefore, express any view at this stage as to what the rights and obligations of the parties in relation to the cost of such structural works might be. The one thing that is clear, however, is that no obligation to contribute could arise prior to a sale for up to that point AIB is merely a mortgagee and there are, by definition, no lessees.

5.24 That overall situation seems to me to leave the parties in a difficult position. AIB's position derives from the fact that it holds a mortgage over two apartments which mortgage does not, in express terms, provide for any entitlements over the common areas and involves no express easements over those common areas. In addition, AIB took its interest in those apartments on full notice of the estate scheme then in the process of implementation and on full notice of the interlocking rights and obligations which had already arisen between the parties to that estate scheme. Likewise, the unsatisfactory position of Palaceanne stems, in principal part, from the fact that the main default is on the part of Ms. Coles both in terms of failure to meet the judgment already granted against her but also in respect of a continuing failure to meet the appropriate share of the costs of upkeep and maintenance attributable to the two as yet unsold apartments. That Palaceanne has a legitimate claim against Ms. Coles in that regard cannot be doubted. That, like so many people in current conditions, such a claim may be of little practical value is unfortunate. The fact that it is unfortunate is not a reason for imposing liability on AIB who is simply a mortgagee who holds the benefit of a mortgage by demise.

5.25 Given the unsatisfactory nature of the position of both parties it seems to me that this is a case which cries out for mediation. The parties are entitled to invite the court to determine their legal rights and obligations and to stand on those legal rights and obligations once so determined. It is the job of the court to resolve any questions that may be necessary to determine those legal rights and obligations. However, the position that may then be declared to be the case may not be satisfactory to either side. The court has no jurisdiction to bend either the law or the application of the law to the facts of the case to try and bring about a solution which might be sensible but which does not accord with the legal rights and obligations currently arising. However, a process of mediation gives the opportunity for the mediator to bring into play many questions or issues which, while not reflecting current legal rights and obligations, may afford a balanced and mutually beneficial solution to the problems encountered on both sides because of the unsatisfactory nature of the current rights and obligations.

6. Conclusions

6.1 For the reasons which I have sought to analyse, it seems to me that the current rights and obligations of the parties are as follows:-

A. AIB has no current obligation to contribute to the costs of the management company;

B. AIB has no right of way of necessity or other rights of way to gain access to the two apartments over which AIB holds a mortgage by demise. Likewise, AIB does not have the benefit of any other easements or quasi easements in respect of those properties;

C. When AIB comes to sell the two apartments it is obliged (as it accepts) only so to do by means of a lease in like form to that contracted to be executed by Ms. Coles in respect of those apartments and thus, in like form, to leases granted to the existing purchasers. How this can be put into effect is not absolutely clear; and

D. It is premature to answer any specific questions as to what capital expenditure, if any, carried out by Palaceanne prior to the execution of any leases in favour of purchasers from AIB, can give rise to an obligation to meet a share of such expenditure either by AIB or such subsequent purchasers save to note that no obligation to meet ordinary day to day expenditure arising prior to the calendar year in which such lease is executed can lie on either AIB or the purchaser concerned.

6.2 Recognising that that is an unsatisfactory solution from all points of view, the court feels that it cannot strongly enough emphasise the desirability of the parties engaging in mediation for the purposes of ascertaining whether there is a win win solution to those problems.

6.3 I will give the parties an opportunity to consider the terms of this judgment. The case will be put in for mention on Tuesday the 15th May next for the purposes of making appropriate orders and dealing with any issues arising such as costs. I would expect the parties to engage constructively in the meantime on the form of order which arises from this judgment.