THE HIGH COURT

[2013 No. 9888 P]

BETWEEN

MICHAEL BEGLEY

PLAINTIFF

AND

DAMESFIELD LIMITED

AND

JOHN LALLY

AND

THE JOLLY M MANAGEMENT COMPANY LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 23rd day of March, 2018

1. The plaintiff seeks damages arising from the purchase of two berths numbered 56 and 57 at the Jolly Mariner Marina Village, Brick Island, Coosan Road, Athlone, County Westmeath. The Marina Village was part of a development of mixed residential, retail, and marina units developed by the first defendant on lands and waterways to which the second defendant had title. The third defendant is the management company of the development.

2. The berths are 12 metres in length and were intended for use as mooring spaces for cruiser vehicles of the type generally used on the River Shannon. The plaintiff owns a 11.5 metre cruiser and other small pleasure crafts, and claims that his vessels cannot access the marina berths on account of the presence of a large rock outcrop close to the pontoon bedrock.

3. The plaintiff's claim is for damages for breach of contract and for breach of the covenant for quiet enjoyment, arising from breach of the principle of non-derogation from grant and in nuisance. Whilst the plaintiff has sought an order that the waterway be made navigable for the purposes of accessing the berths and an order compelling the defendants to remove the rocks for that purpose, this objective is not capable of being achieved by any reasonable or possibly lawful means.

4. The action was fully defended.

The purchase

5. The berths were purchased by the plaintiff, Mr Begley, in conjunction with two apartments, numbers 47 and 49. No issue arose regarding the sale of the apartments.

6. By agreement in writing in the Law Society of Ireland standard combined contract for sale and building agreement (2001 edition) made on 14 October 2005, the second defendant, Mr Lally, agreed to sell, the first defendant agreed to build and Mr Begley (and his work colleague in the case of apartment 49) agreed to purchase the two apartments and marina berths as identified on the plan contained in the booklet of title. The total purchase price for the apartment and berth was €365,000 in the case of apartment 47 and berth 57, and €380,000 in the case of apartment 49 and berth 56.

7. The sale of the apartments closed without difficulty. The agreed apportionment of the purchase price was €40,000 in respect of each berth.

8. At the time the contracts were made, the development had not yet commenced and the purchase was made "off the plans". The contracts for sale included a standard special condition that the contractor was under no obligation to complete the development and reserved the right to alter the size, shape, and location of the development.

9. Mr. Begley was aware that the location of the berths could be varied in the course of construction.

10. The sale of the berths closed almost two years after the contract for sale and Mr. Begley accepts that he knew before he closed the sale of the presence of visible rocks close to the berths likely to cause difficulty in access and egress.

The title to the marina berths

11. The title to the area in which the marina berths were built is a lease made on 2 July 2003 between Waterways Ireland Limited as lessor and Aidan Kelly and Michael O'Sullivan as lessees by which part of the River Shannon measuring 1.813 hectares and edged purple on the map attached thereto was demised for the term of 900 years from 2 July 2003 at a nominal rent of €1.27 per annum. The lease was made in consideration of the payment of a fine of €82,532.98. Mr. Lally, took an assignment of the lease by deed of 11 February 2004.

12. The marina berth purchase lease was a sublease made on 20 September 2007 craved out of the Waterways Ireland lease for the term of 890 years from 1 January 2005, at a peppercorn rent.

13. Mr. Lally was the lessor, Damesfield joined in the lease as developer and for the purpose of the estate scheme, and the third defendant, the management company, joined on account of the management company agreement made on 3 June 2005 between Mr. Lally, the developer, and the management company, which inter alia provided for the assurance of the common areas and reversions on the leases of the apartments and berths to the management company in the normal way.

14. The marina purchase lease contained the standard covenants in an estate scheme and granted the easements rights and privileges contained in its third schedule. No express easement was granted over that part of the River Shannon to which Mr. Lally held the leasehold title, and express easements were granted over the pontoons, footpaths, steps, walkways, and other hard structures in the development.

15. The lease contained a number of covenants on the part of the lessee specific to marina and navigation use. There was a covenant to ensure that a competent person was on board when the vessel was occupied, whether it was underway or not, and a covenant to approach and leave the marina at a speed of not less than 5 knots. There were covenants regarding bilge water, and holding tanks. The lessor covenanted to kept the marina ramps, roadways, lights, and services in good condition, and to provide services and facilities for "running the marina" as the lessor should think fit, and no express covenant was made to keep place or maintain the surrounding waterways so that they remained navigable.

The management company
16. The management company agreement made on 3 June 2005 between Mr. Lally as vendor, Damesfield as developer, and the management company contained an agreement to sell to the management company for nominal consideration the reversions on the leases of the residential units and marina berths and the common areas, the sale to be effected 28 days after the completion of the sale of the last unit or in any event within 21 years from the date thereof. The management company agreement is in standard form and has not yet been completed. While it is not clear how many units remained unsold, it is clear that the management company has no entitlement under the management company agreement to call for the title to the reversion and the common areas, and although the management company has called for a transfer pursuant to the obligations contained in the Multi-Unit Development Act 2011, no assurance has yet been effected.

Factual matter: Are the berths useless?
17. The evidence of the plaintiff's expert Mr. Patrick Ginty of Tygro Consulting Engineers Limited is that the rock outcrop in many, albeit not all, conditions projects above the water surface and is situate approximately 27 metres from the end of the jetties. The rock is limestone bedrock. The water levels in the River Shannon vary considerably over a year depending on the amount of rainfall, outflow from Lough Rea, currents and other factors that influence those levels. Even at the typically high water level, access to the berths was likely to be obstructed by the rocks for all but vessels with a very shallow draft. The river is relatively fast flowing and the variable currents make it difficult to access or egress the berths even by an experienced mariner and even in high water conditions.

18. The evidence of the expert who gave evidence for the first and second defendants was that at some water levels there was sufficient water to access the berths.

19. However, I am persuaded by the evidence of the plaintiff's expert and by Mr. John Leffroy, a boat surveyor who lives locally and is familiar with the conditions on the River Shannon at the location, that the berths are compromised and not suitable for use by a craft of the type generally moored on a 12 metres berth, and that one would "be relying on luck" as Mr. Leffroy said, to access the berths without damaging the vessel. Limestone is very damaging to fiberglass and most boats of the type at issue are fiberglass and would be vulnerable to damage.

20. Mr. John Mc Grath of MMKDA engineers called on behalf of the first and second defendants agreed that the berths should not have been built at the location, and that they are "virtually unusable" for a cruiser. His evidence does not materially contest that of the plaintiff's experts.

21. I find that the berths purchased by the plaintiff are unsuitable for the type of boats for which the berths were intended, namely cruiser type boats with a draft of up to one metre. No argument was made that the berths could be useful for other kinds of vessels and, having regard to the use to which other berths in the marina complex are put, and to navigation uses on the River Shannon generally, as well as the fact that the berths were 12 metres in length, I consider that the berths are not suitable for use.

22. The evidence of the plaintiff's expert is that the navigation obstruction caused by the bedrock could be resolved by breaking or splitting the bedrock, but as the evidence evolved, it became clear that it would not be practically or commercially viable to undertake such work, and that planning permission or the permission of Waterways Ireland would not be likely to be granted. Further, the water supply for Athlone town is served by the Athlone Water Treatment Plant Inlet, and any proposed rock splitting activity is unlikely to be permitted having regard to its close vicinity and the probability that damage would be caused to the water supply by material dislodged during excavation.

23. For those reasons I accept, and this was conceded by the plaintiff's counsel in the course of the trial, that it would be pointless to make an order directed to the first and second defendants that they carry out works to improve the navigability of the river so as to permit reasonable access to the berths.

24. The plaintiff's first head of claim is that on account of the fact that the berths are not accessible the first and second defendants are in breach of an implied term in the contracts for sale that the berths would be capable of being accessed by cruiser type vessels. I turn now to consider the arguments and evidence.

Implied term of navigability
25. The plaintiff's claim against the first and second defendants is that there is to be implied in the contracts for sale and the purchase leases, and necessary to give business efficacy to the contracts, and a common intention of the parties, that the berths would be accessible and suitable for the type of vessel that they were built to accommodate.

26. Reliance is placed on the leading case of The Moorcock [1889] 14 PD 64, which also concerned the navigability of a river. The owners of the vessel contracted a space at a wharf in order to unload and store cargoes. The vessel went aground and the owner of the vessel sued for damages. The decisions of Lord Esher M.R. and Bowen L.J. remain a starting point for a consideration of when terms are to be implied into a contract. Lord Esher considered that "honest business" could not be carried on unless the owner of the wharf:

> "… had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? .... it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what concern the bottom is, and then either have it made reasonable fit for the purpose, or inform the persons with whom they have contracted that it is not so".

27. Bowen L.J. considered the matter by reference to an implied warranty founded on the "presumed intention of the parties, and upon reason". He explained the principles as follows:

> "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within

> the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is rising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have".

28. The so called "business efficacy test" has been the subject of much judicial consideration and in the also often quoted decision in *Shirlaw v. Southern Foundries (1926) Limited* [1939] 2 KB 206, the test was formulated as the "officious bystander" test which operates to imply a term by posing the question that if such a bystander asked the parties whether a term was agreed by them, they would both say "oh, of course".

29. The first and second defendants deny the existence of any implied term and rely on the doctrine of *caveat emptor* by which a vendor of land is not liable in respect of any physical defects in the property sold.

30. The doctrine of caveat emptor is long established. In *Southwark London Borough Council v Tanner & Others* [2001] 1 AC 1, at 11, in the context of a leasehold purchase, Lord Hoffmann coined the phrase "caveat lessee":

> "In the grant of a tenancy it is fundamental to the common understanding of the parties, objectively determined, that the landlord gives no implied warranty as to the condition or fitness of the premises. Caveat lessee".

31. The plaintiff says that the defect by which access to the berths was impossible was not reasonably identifiable at the time of the contracts as the marina had not yet been built and relies on para. 4.09 of Wylie and Woods, *Irish Conveyancing Law*, 3rd ed.:

> "There is one situation where precautions such as commissioning a survey will not protect a purchaser from the damages of the *caveat emptor* principle. This is where the property being purchased included a building which is not yet erected or works not yet completed i.e. the transaction involves a building contract whereunder the vendor undertakes to erect a building or to execute other works on the lands in question. The point is that no amount of inspection of the land up to the date of the contract will protect the purchaser against defects in the building or works completed after the contract is entered into".

32. Para. 4.11 goes on to say that a builder who contracts to build a house "is subject to an *implied* warranty as to the condition of the property being built". A warranty is not readily to be implied where the contract is one to purchase a premises already completed:

> "The general common law rule applicable to a builder is that, where he agrees to sell a plot of land and to build a house on it, or simply agrees to build a house on a plot already owned by the other party to the building agreement, he impliedly warrants that the house when built will be reasonably fit for human habitation".

33. Davitt P. considered this to be the law in *Brown v. Norton* [1954] IR 34, at 52, where he said:

> "…there should be implied a warranty that the house in each case would be completed and when completed would be reasonably fit for immediate occupation".

34. The plaintiff argues by analogy that an agreement to build a berth would carry an implied warranty that the berth itself would be reasonably accessible by the type of vessel which was reasonably expected to use it as a berth.

35. While these principles correctly state the law, and while it is the case that a contract for the sale of land does not in general carry a condition that the land or buildings are fit for purpose, a distinction can be found between the terms in such contract and those to be implied into a contract to build.

36. In the present case the contract for sale and the building agreement are to be read as carrying an implication on the part of the vendor and the developer that the berths would be accessible, and such accessibility is no more than what the parties would have agreed had they been asked at the time of the contract whether they intended such to be agreed between them.

37. However, the contracts did not close for two years, and in that time the plaintiff accepts that he attended on site and inspected the apartments for the purpose of snagging when they were near completion. He also accepted that he visited the berths and that the rocks were apparent on a visual inspection. He thought the rocks were merely rubble, and anecdotally in the Athlone area it was believed that the nearby Connoy's Island, now a nature reserve, was built from rubble from the construction of the North Western Railway in the 1860's. Whether the plaintiff thought that the visible rocks were rubble which could with more or less difficulty be removed, or were bedrock which could not be removed without major works, appears to me not to be material.

38. The plaintiff accepted in cross examination that at the date of closing the berths were not navigable, and that he was aware of this.

39. I consider that the plaintiff must be taken to have accepted the lease of the berths in the knowledge that navigation into the berths would at best be difficult. There was no impediment to the plaintiff making any inquiries or inspections, or even raising objections on title at the stage when the marina was constructed, the berths were in place and the sale to him had not closed. I consider that the plaintiff must be held to have taken the berths in the condition in which they were in at the time of the closing of the sale. For these reasons the plaintiff cannot succeed in an argument that there was implied into the leases or the agreements for lease a term that the waterways would be navigable. The principle of *caveat emptor/caveat lessee* applies.

Implied easement of access and egress

40. The plaintiff argues that there is to be implied as a matter of law into the leases of the berths an easement of access and egress. The first and second defendants argue that the express documents of purchase preclude such claim.

41. Special condition 19(g) of the contract for sale provided for the form of the purchase lease and that the purchaser should not be entitled to call for a lease in any other form or containing any other or different reservations, easements or conditions, and that the purchaser agreed to be deemed thereby "to have full knowledge of the contents thereof and the nature and extent of the rights and obligations affecting the marina berth".

42. It is argued therefore by the defendants that no easement can be implied into the lease, and that the express terms contain all agreed reservations, easements and conditions.

43. I consider that special condition 19(g) does no more than prevent an individual purchaser of a marina berth from seeking a lease different in form from that granted to other purchasers. The estate scheme requires that the owners have similar or broadly similar purchase deeds: *Elliston v Reacher* [1908] 2 Ch 374. The argument from special condition 19(g) does not provide an answer to the claim of the plaintiff as it does not in its terms exclude a claim by a purchaser to the benefit of other easements which might be implied as a matter of law or deriving from the common intention of the parties.

44. However, general conditions 15 and 16 of the contract for sale expressly deemed the purchaser to be on notice of the actual state and condition of the sold lands. I am satisfied also on the evidence that the plaintiff had ample opportunity to inspect the berths and the access and accepted in evidence that he was aware of the presence of some impediment to navigation before he closed the sale.

45. The claim under this head cannot succeed for this reason.

Easement to be implied from necessity
46. The plaintiff also relies on the argument that there exists an implied right of access over the adjoining waterways by way of easement of necessity.

47. Reliance is placed on the judgment of Kinlen J. in *Dwyer Nolan Developments Ltd. v. Kingscroft Developments Ltd*. [1998] IEHC 125, [1999] 1 ILRM 141, where an easement was claimed by the owner of a retained property over a property he had sold. That case concerned the implication of a reserved easement, not a granted easement, and does not seem to me to offer much assistance.

48. The second defendant, Mr. Lally, is the owner of the long 900-year lease term in the waterways, which he holds under the lease of 2 July 2003 and the supplemental deed of rectification made on 8 September 2005. The recognition that there exists as easement of necessity over the waterways in the title of Mr. Lally is to be implied into the two purchase leases, notwithstanding that no express grant was made.

49. The difficulty that the plaintiff faces is that a declaration that there exists such a right does not resolve the practical question of how the access is to be enjoyed.

50. The law is well established that the owner of the servient tenement does not owe an obligation to the dominant owner to keep the way in repair. The principle is succinctly stated in *Gale on Easements*, 20th ed., at para. 13.01, where the authors state the proposition as follows:

> "Because the owner of an easement is not in any sense in possession of the servient tenant, his action for inference with his easement cannot be in trespass since that is a cause of action that can only be maintained by a person in possession. His only remedies are abatement or an action for nuisance".

51. In the leading Irish text on easements, Bland, *Easements*, 3rd ed., the author considers at para 1-53 that as a general principle the servient owner of land does not have an obligation under common law to repair the subject matter of the easement and notes *Dunne v. Malloy & Willow* [1976-77] ILRM 266. Mr. Bland rather tantalisingly says there is no "high authority" for this proposition, but that it has gathered force from the momentum of successive writers.

52. It seems to me that the proposition stated by Bland is correct and the owner of a servient tenement must permit the dominant owner access to the servient lands to improve, construct or rectify the way, but has no obligation to do anything to the servient lands to improve the quality of access.

53. Whether that proposition extends to a wider proposition that the servient owner who sells the dominant land has an obligation to carry out works to make the way passable, and not merely to improve it or remove obstacles which were not present, at the time of the grant, is a more difficult proposition. It does not require to be answered in the present case because Mr. Begley closed the sale of the two berths when he knew of the existence of the rocks he must be said to have taken the berths with the benefit of the easement of access and egress over the waterway as it was then physically configured. It could not be said that the obstruction was latent. A further consideration of the legal principles must be left to another case.

54. For these reasons, I consider that the plaintiff has not made out a case that there has been a breach of any of his rights as dominant owner of the easement of access over the waterway in the title of Mr. Lally.

55. The plaintiff also claims against the first and second defendant in nuisance arising from the obstruction on the way.

Action in nuisance
56. It is argued that the plaintiff has a claim in nuisance arising from the creation or maintenance of an obstruction on the way, either that the obstruction is a nuisance or that the first and second defendants have failed to take steps to abate a nuisance. The statement of *Gale on Easements* quoted above might assist were it not for the fact that, generally speaking, actionable nuisance requires a plaintiff to show an act or omission on the part of the defendant. The first and second defendants rely on para 20.01 of Clerk and Lindsell, *On Torts*, 22nd ed.:

> "Nuisance as an act or omission which is an interference with, disturbance of or an annoyance to a party in exercise or enjoyment of (a) A right belonging to him as a member of the public or (b) His ownership or occupation of land or of some other easement or profit or other right used and enjoyed in connection with the land, where it is a private nuisance. The right is conferred by the law of nuisance arise by virtue of the general common law and are therefore not dependent for there coming into existence on the terms of any conveyance of the land in question."

57. To establish nuisance, the plaintiff would have to establish what has been called an "unreasonable interference" with the exercise of his rights at para. 24.01 of McMahon and Binchy, *Law of Torts*, 4th ed.

58. The plaintiff has not shown that the first and second defendants have interfered with his right by any act or omission. The rocks were in position at the time the plaintiff closed the sale and no act or omission of the first and second defendants has occurred from which damage has been suffered.

Derogation from grant
59. The general principle that a lessor or grantor may not derogate from grant is well established.

60. Professor Wylie in paras. 14.12 and 14.13 of his *Irish Landlord and Tenant Law*,3rd ed., refers to the judgment of the Court of Appeal for England and Wales in *Chartered Trust v. Davies* [1997] 2 EGLR 83, where the landlord of a small shopping mall was held to be in derogation by allowing other tenants to cause a nuisance affecting the plaintiff tenant's business. The Court held that the landlord had failed to manage the mall properly by not enforcing regulations governing the use of the common areas and trading by tenants and had failed to enforce the covenants by those tenants not to cause a nuisance or annoyance.

61. Until recently, one of the leading Irish cases on the principles of non-derogation from grant was the judgment of Barron J. in *Connell v. O'Malley* (HC, 28th July 1983), where a vendor was by injunction prohibited from restricting an access route to land sold on the bases that doing so would be a derogation from grant. Barron J. cited with approval the dicta of Cotton L.J. in Birmingham, *Dudley and District Banking Co. v. Ross* [1888] 38 Ch D 295:

> "For instance, where one man grants to another a house then *prima facie* he cannot interfere with that which he has granted… namely the house, and enjoyment of the house. That obligation arises I repeat, not from any interpretation of the conveyance, but from the duty which is posed on the grantor in consequence of the relation which he had taken upon himself towards the grantee".

62. The doctrine of non-derogation from grant was recently considered by Barrett J. his judgment in *The Square Management Ltd v. Dunnes Stores Dublin Company* [2017] IEHC 146, and by the Court of Appeal in its judgment on the appeal [2017] IECA 256. Whelan J. expressly approved the reasoning and conclusions of Barrett J. and both Barrett and Whelan JJ. cited with approval the judgment of Laffoy J. in *Conneran v. Corbett* [2004] IEHC 389, and in particular a passage cited from para. 6.059 of Wylie, *Irish Land Law*, 3rd ed.:

> "As regards the rule that a man may not derogate from his grant, the philosophy here is that, when a man transfers his land to another person, knowing that it is going to be used for a particular purpose, he may not do anything which is going to defeat that purpose and thereby frustrate the intention of both parties when the transfer is made. Usually application of this principle creates property rights in favour of the grantee which take the form of restrictions enforceable against the grantor's land".

63. Barrett J. also considered the principles set forward by Neuberger J. giving judgment in the English High Court in *Platt v. London Underground Limited* [2001] 2 EGLR 121, and at para. 71, stated the following:

> "Between them *Conneran* and *Platt* offer abundant guidance to the court in seeking to determine whether there has been a derogation from grant in the context of the within proceedings. *Conneran* points the court in the direction of looking for "*a real and substantial interference with the express and implied rights acquired by the Plaintiffs under the leases*". Likewise, *Platt*, among the various principles it identifies (which point in the main to factual considerations that will differ from case to case) mentions, as a helpful test for identifying derogation, "*whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let…".* In essence, it seems to the court that what one is looking for when testing for derogation from grant is actual or likely deprivation of a grantee's reasonable enjoyment of its existing rights as grantee".

64. This statement of principle by Barrett J., quoted with approval by Whelan J. in her judgment, is helpful in showing that to establish a derogation of grant there has to be a "real and substantial interference with the expressed and implied rights acquired by the plaintiff under the leases", the phrase used by Laffoy J. in *Conneran v. Corbett*. In *Platt v. London Underground Limited*, Neuberger J. had also explained the test as requiring that a claimant show:

> "whether the act or omission has caused the demised premises to become unfit substantially less fit in the purpose for which they were let".

65. Whelan J. regarded it as essential that the alleged derogation is to be considered by reference to the factual matrix. In the present case the evidence points to the fact that at the date of the leases there was demise to Mr. Begley of the two berths which at that time were accessed to what is essentially or for relevant purposes an unnavigable channel.

66. Having regard to the analysis of Barrett J. and Whelan J., I consider that the doctrine of non-derogation from grant has application to the acts or omissions of a lessor after the demise which can be shown to render the demised lands unfit or less fit for the purpose for which they were let.

67. At the time of the leases the berths were not fit, but that fact did not arise from any new or additional act or omission by the lessor, but was present at the date of the closing of the sales. Thereafter, no derogation by the lessor from his grant has been shown.

Breach of the covenant for quiet enjoyment

68. The claim is also framed as a claim for breach of the covenant that the plaintiff would quietly enjoy the demised lands.

69. The covenant for quiet enjoyment was not express in the subject lease, but is implied by statute under s. 41 of the Deasy's Act.

70. The covenant for quiet enjoyment, insofar as it creates rights which might be differently construed from those deriving from the doctrine of non-derogation from grant, must also be seen as extending to interference after the grant of the lease. The covenant for quiet enjoyment is prospective in its operation as was considered by the House of Lords giving its judgment in *Southwark London Borough Council v Tanner* cited above.

71. I cannot agree with the proposition advanced by the plaintiff that the covenant for quiet enjoyment imports a positive obligation on the part of the lessor to clear the obstruction on the waterway. In my judgment in *O'Donnell v. Ryan & Others* [2017] IEHC 607, I rejected an argument that a claim arising from alleged defects in the quality and structure of a building even if established as a matter of fact could amount to a breach of covenant and considered that "the covenant does not import a positive duty to repair, but rather an obligation to reframe from actions which might interfere with possession, enjoyment of the subject matter of a demise, as understood at law".

72. I accepted at para 82 that the covenant for quiet enjoyment regulated the conduct of a lessor during the tenancy and did not import a warranty as to the condition of the demised premises at the commencement of the term:

> "The essential argument of the first defendant is that the covenant for quiet enjoyment is the covenant enjoyed by a

tenant during his tenancy and I agree with that proposition. It is not a covenant which imports a warranty as to the suitability or condition of the premises at the time that the tenancy was created. Such a warranty is inconsistent with the principle of *caveat emptor*, and with the scheme of disposal".

73. The eleventh principle identified by Neuberger J. in his judgment in *Platt v. London Underground Limited* is one that must bear on the analysis:

> "When assessing what the parties to a contract actually or must have contemplated, one should focus upon facts known to both parties and statements and communications between them. A fact that could only have been known to one party could not, save in very unusual circumstances, be a legitimate part of the factual matrix. A thought locked away in the mind of the parties, or even perhaps of both parties, cannot normally be a relevant factor when assessing the parties' understanding. In English law, at any rate, contract is concerned with communication as well as mutuality".

74. I consider for these reasons that the plaintiff's claim that the lessor has been in breach of the implied covenant for quiet enjoyment must fail.

75. The plaintiff argues, however, that he closed the sales on foot of an agreement that the access be made navigable and I turn now to examine this argument.

Agreement to make navigable

76. The plaintiff gave evidence that before he closed the sales he was "assured" that the matter of poor accessibility would be resolved, and that he was told that it was the intention of the developer or the owner to "dredge" the river abutting the two berths he had purchased. He raised the matter in conversations and his evidence was not controverted. Having heard the evidence, it seems to me that "dredging", as that term is normally understood, would not have resolved the difficulty presented by the presence of bedrock in the area, but I consider that the word "dredging" was used by all of the parties in the early years after the development was completed as shorthand for the carrying out of works that would clear the waterway.

77. Mr. Begley's evidence of having been promised that the access would be improved might not be wholly credible if taken alone, especially as he is unclear regarding when and exactly by whom the promises were made, but subsequent actions by the first defendant and persons representing the second defendant after the sales closed bear out his evidence.

78. I heard evidence of the meetings of the management company, from Sean O'Connor, a representative of Galway Property Management, a service provider to the first defendant.

79. Kevin Burke and Cyril Hession from Lalco attended the inaugural AGM of the management company held on 15 September 2008. Lalco is a company owned or controlled, or at least partially controlled by the second defendant and although it does not appear to have any proprietary interest in any of the land or waterways, and was not the direct developer, it played a role in the engagement between Mr. Begley, Mr. Lally, and the developer in the years after Mr Begley closed the sales.

80. The proposal to carry out dredging works was explained at this inaugural meeting. The minutes of the AGM seem to me to show that all of the parties attending knew in some way that Lalco had a role in the development, albeit the exact role of Lalco is not clear. It is apparent, however, that Lalco had agreed to pay, or informally assumed responsibility for paying, service charges in respect of the unsold units up to the date those units were sold. It seems also that Galway Property Management was appointed by Lalco and not by Damesfield, as one would have expected, to service the development. In the minutes Lalco is treated as the developer.

81. The question of the "the proper dredging" of the river adjacent to the marina was raised at the meeting and Mr. Burke on behalf of Lalco stated that it was "the intention of Lalco to dredge the area in question and that they are in the process of duly submitting a planning application". Lalco also agreed to finish the unfinished slipway, and whilst that agreement is not relevant to the matters in question in the present case, it does show the extent to which Lalco was treated as or was held out as being the voice of the developer or the ultimate developer.

82. The fact that the "dredging" of the waterway arose at the very first meeting of the AMG in my view supports the evidence of Mr. Begley that he was given an assurance or promised that the waters around the berths purchased by him would be made navigable.

83. Concerns regarding the "proper dredging" were also raised at the next AMG on 10 August 2009 and again Mr. Burke stated that Lalco was in the process of submitting a planning application. Correspondence of 12 May 2009 addressed to all berth owners from Galway Property Management and signed by Mr. O'Connor, was written to update them in relation to the "required" "dredging of the river". That letter informed the owners that Lalco had made a planning application which was "ongoing". Inland Waterways had refused to permit the installation of any navigation warning marks in the relevant area and a representative from Inland Waterways is said to have informed Mr. O'Connor that "under no circumstances should [he] install anything without their approval". Planning permission was ultimately refused.

84. Mr. Begley was present at both AMGs and at the meeting of 11 July 2011. He appointed his wife as proxy at the meeting on the 26 August 2010 and the matter of the navigability of the river was not raised.

85. At the meeting on 29 July 2011, which Mr. Begley attended as well as Mr. Hession, Mr. O'Connor, and one Pat Ennis from Galway Property Management. The question of the proposed dredging of the harbour and the amount of weeds in the marina was again raised. Mr. Hession said he would "check it out".

86. Mr. Begley did not attend the meeting of 10 July 2012, but did attend the meeting a year later, on 12 July 2013. Mr. Hession attended as proxy for Mr. Lally. In the course of this meeting Mr. Begley raised a number of specific questions relating to the estimated costs of removing the rock, asked for details of the number of members who had been affected as a consequence of the issue, asked whether an engineer or navigational architect had been commissioned and for clarification as to the number of people who had moved or been switched temporarily or permanently due to the issue.

87. The "issue" seems to have been so well identified and known to the person writing the minutes, Mr. O' Connor, that he did not see the need to clarify precisely the nature of the ongoing discussion. Mr. Hession stated in the course of the meeting that Damesfield should be dealing with the question and Mr. Begley is noted as having said that he made several attempts to contact representatives from Damesfield but without success. Mr. Hession agreed to supply contract details but went on to add that there "are some possibilities to be explored and that they are doing the best they can to accommodate owners who have berths that they cannot access".

88. In giving his evidence, Mr. Begley came across as mild mannered and clear thinking. He was firm and not in any way elusive regarding the promises which he says were made to him before he closed the sale. The fact that the issue was a live one in the development is clear from the memoranda of the minutes of the management company meetings, and it is also clear that it was "accepted" that the problem would be resolved or required to be resolved and that resolution was not the responsibility of either the management company or the individual owners.

89. I heard evidence from Eanna Murtagh who is now employed by a Lally Group Company, and who was, at the relevant times, employed by Davos Ltd, which managed the assets of Damesfield. His evidence was clearly and honestly given. He was unable, however, to give any assistance with regard to the corporate structure of the Lally Group of companies and he did not know who his ultimate boss is now or who it was at the material times. I am satisfied, however, that Mr. O'Connor, Mr. Hession, and later Mr. Murtagh had some instructions from or contact with Mr. Lally, companies through which he traded, or other persons or bodies within the Lally Group.

90. It seems to me clear on the evidence that Lalco, or persons claiming through the Lalco group of companies or acting on behalf of Mr. Lally and or Damesfield, at all material times assumed responsibility for dealing with the navigation difficulties in the waterways surrounding the berths. A number of berths in the development are impacted by the navigation difficulties and I heard evidence from Mr. Murtagh that a number of the owners have been accommodated by being moved to alternative accessible berths on the marina. The management company was unable to confirm at the hearing of the action whether surrenders of the existing leases of those berth owners have been executed and new leases granted, but I accept the evidence that the new owners have *de facto* taken up possession of the new berths as a right.

91. No evidence was adduced on behalf of the first and second defendants regarding the title, management structure, or ownership of the common areas or the reversion. Instead a report on the title was prepared by the solicitors acting for the first and second defendants Ivor Fitzpatrick & Company. This report was offered de bene esse and no formal evidence was given to prove the matters in the report. The reason I make reference to the report is that it shows a contract for sale was entered into by Damesfield and Sova Properties Limited, believed by Mr. Murtagh to be a "Lally Company" by which Damesfield agreed to sell its beneficial interest in "certain units" and unsold berths to Sova for the sum of €12,909,195. The report on title said that the solicitors "understand" that the entire sum due under the contract has been paid to Damesfield and that Sova is therefore the beneficial owner of the units and the common areas. Counsel was not fully briefed and evidence was not called in support.

92. Sova is not a defendant in these proceedings and the plaintiff can be excused from failing to join Sova in the proceedings as he could not have known of this contract for sale, nor whether the consideration agreed thereunder has been paid, when on the last day of trial in late February 2018 counsel and the solicitors acting on behalf of the first and second defendants were unable to clarify the position.

93. Another relevant document in the title report is the development licence and agreement for leases in standard form made on 24 November 2005 between Mr. Lally of the first part and Damesfield Limited of the second part. The "lease price" is redacted in the copy, and no evidence was available as to whether it has been paid to Mr. Lally by Damesfield, and accordingly, no evidence was available as to whether Damesfield or Mr. Lally is the owner of the beneficial interest in the common areas or reversion even at the last day of trial.

94. This leaves the evidence with regard to the promises or assurances that the navigation issue would be rectified difficult to fully quantify, but it is much less difficult to accept that promises or assurances were made on behalf of either the first or the second defendants or both of them and were given with the intention that they would encourage Mr. Begley to close his sale, or in the knowledge that it was likely that the they would and did so encourage him.

95. Mr. Begley is an experienced mariner and originally came from the Athlone area although he now lives in Dublin. I am satisfied that he would not have purchased the berths had he not believed and been promised that the access problem would be resolved. He did not make more complete enquires or carry out a proper survey to ascertain the extent to which the visible rocks would have impeded on the navigability of the river. He was obliged like any purchaser to carry out any reasonable enquires before he closed the sale, a proposition established in *Northern Bank Ltd. v. Henry* [1981] IR 1. I am satisfied, however, that Mr. Begley closed the sale of the two berths on account of the promises made to him that the access issue would be resolved. I note too that no evidence was given by any person to throw doubt on Mr. Begley's evidence and the contemporaneous or near contemporaneous records bear out the proposition he advances.

96. I am satisfied that the normal rule of *caveat emptor* has been displaced in the present case insofar as a promise was made, which was in my view actionable, that the navigable issue would be revolved to enable the berths to be used.

97. Thus there exists a collateral contract as found by Geoghegan J. in *Allied Irish Banks Plc v. Galvin Developments (Killarney) Limited & Ors* [2011] IEHC 314 which either acts to displace the express terms of the contract that no term as to navigability was to be implied, or is actionable in itself.

98. The plaintiff succeeds against the first and second defendant on this point.

Is the claim statute barred?

99. The defendants plead that the claim is statute barred as it was brought more than six years after the contract would was made on 4 October 2005. The plenary summons issued on 16 September 2013.

100. Therefore, the claim on foot of the collateral contract made at the time of closing was commenced within the six-year statutory time limit for the bringing of an action in contract, and that claim is not barred by statute. I do not propose considering the argument regarding the running of time in the other claims where the plaintiff fails.

The claim against the management company

101. That a management company is entitled to the beneficial interest in the commons areas and the reversion subject to performance of the necessary preconditions to the making of the assurance is established from the law as stated by Laffoy J. in *In Re Heidelstone Co Ltd: Application of Boothman* [2006] IEHC 408, [2007] 4 IR 175, and in my judgment in *O'Donnell v. Ryan & Others*.

102. I accept the evidence of the management company that it has not taken a transfer of the common areas or the reversion in the leases. The management company is not entitled to call for the reversion and the common areas in reliance on the management company agreement by which it may so call when the last unit has been sold, or 21 years from the date of the management company agreement whichever is the earlier. The beneficial interest is therefore not yet vested. The management company does have an

entitlement to call upon the reversion and the common areas pursuant to the Multi-Unit Development Act 2011 and has done so. No argument was made that the beneficial interest has become vested in the management company by virtue of its entitlement under Multi-Unit Development Act 2011, and accordingly, that question must be left over to an action in which the argument is made and fully argued.

103. In the circumstances the management company could not have taken steps to improve the access and cannot be said to have a direct responsibility for the access difficulties.

Conclusion

104. I consider that the plaintiff has made out a case in breach of contract against the first and second defendants. The claim for damages for nuisance, breach of an implied easement or for breach of the covenant for quiet enjoyment or deriving from the doctrine of non-derogation from grant does not succeed.

105. No claim has been established against the third defendant.

106. The plaintiff has sought a mandatory order that the first and second defendant would take steps to make the waterway navigable. I accept, and the plaintiff accepted in the course of evidence, that that remedy is not one that can reasonably be achieved, and accordingly, I am of the view that the plaintiff's claim lies in damages, either in lieu of an injunction or in lieu of specific performance.

107. As to the measure of damages the plaintiff paid €40,000 for each of the two berths, both of which are now useless for purpose. In addition, he paid stamp duty of €2,400 in respect of each berth.

108. The plaintiff continued to pay service charges in respect of the berths and to date this amounts to the sum of €5,467. He did not pay the sum of €2,226.84 charged against him the last two moieties.

109. The plaintiff has had to rent an alternative berth and has incurred to date the sum of €19,022.26.

110. A claim for rescission has not been pleaded.

111. Had the plaintiff purchased navigable berths he would have the enjoyment of the berths, but having regard to the loss of value derived from economic conditions in the country generally and because it was frankly accepted that these were "Celtic Tiger" developments and purchases, I consider that what the plaintiff has lost is the current value of the berths and not the cost that he incurred.

112. I accept the evidence adduced on behalf of the first and second defendants that a receiver of Damesfield (or a related "Lally Company") has offered for sale ten of the berths, of mixed sizes and some of which suffer from navigation issues, for the total sum of €50,000. That makes the average value of the berths €5,000. The berths purchased by Mr. Begley were of the largest type available in the marina, and I consider that a reasonable current value of the berths if they were to be sold either singly or together, but not as part of a lot of ten berths of mixed sizes, would be the sum of €15,000 each.

113. Mr Begley has lost the value of the berths which are useless and therefore, I propose awarding him €30,000 for breach of contract measured at the notional current value of the berths, the sum of €19,022.26 paid in respect of an alternative berths, as this is not a head of damage which was argued to be remote. I also propose refunding him the service charges already paid of €5,467.

114. Mr. Begley accepted that he would now be prepared to exchange the two berths he purchased for numbers 34 and 36. These berths were offered to him in correspondence in September 2013 but the offers were not unconditional, and the letter of offer made it clear that the vendor's costs of €500 plus VAT were to be paid in respect of each berth, as the first defendant's lenders would not cover the costs. In the circumstances I do not consider that the offers were unconditional, and Mr. Begley did not fail to mitigate his loss by not being prepared to resolve the matter at that stage even by the payment of what must in hindsight look like a modest amount, as the occurrences in the previous few years had led him to believe, as he said in evidence, that the offers were real not "real or sincere".

115. It is unclear if the offer to transfer those berths remains open.

116. Therefore, I propose awarding Mr. Begley the sum of €59,289.26 in damages against the first and second defendants jointly and severally. I will hear counsel regarding the possible transfer of two alternative berths.