[2019] IEHC 565

THE HIGH COURT

2018 No. 26 CA

Between:

SEAMUS MCKENNA AND MARLYN MCKENNA

APPLICANTS

– AND –

ENNIS PROPERTY FINANCE DAC

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 24th July, 2019.

1. On 14.06.2018, the within proceedings settled on the following terms, agreed and initialled/signed by their respective counsel:

> *"1. The Defendants shall pay the Plaintiff the sum of €675,000 in full and final settlement of these proceedings.*
>
> *2. The said sum shall be paid on or before July 2018.*
>
> *3. On payment the Circuit Court Order shall be vacated and the proceedings shall be struck out with no Order as to costs, further the Plaintiff will release their security forthwith.*
>
> *4. In Default of the Payment the Plaintiffs shall withdraw their appeal.*
>
> *5. Adjourned for mention on 31 July 2018; and*
>
> *6. Liberty to apply".*

2. Counsel for the McKennas indicates that the foregoing was predicated on a mutual understanding between the parties that for the anticipated process to work, it was necessary for Ennis Property first to sell the property as mortgagee in possession. It has asked the court to read this requirement into the settlement agreement so as to give it business efficacy.

3. A solicitor for Ennis Property has sworn an affidavit in which he avers, in*ter alia*, as follows:

> *"11….*[A]*t no stage during the settlement negotiations was there any reference to the fact of a sale of the Secured Property, let alone any reference to the mechanics of such a sale. At no point, during the course of* [the trial date]*…did the representatives of the Defendants state to either myself or* [counsel for Ennis Property]*…that the payment of the monies offered, would be dependent on a sale of the Secured Property, let alone that the Plaintiff must step in as Mortgagee in Possession, to actually sell the Secured Property. I say that had this position been put to us as being a necessary condition to the resolution of the Plaintiff to the settlement could well have been entirely different.*
>
> *12. I say that on* [the hearing date]*…the legal representatives of the Defendants did not indicate how precisely the Defendants intended to fund the monies offered, within the timeframe that was agreed for payment. As far as I was concerned, that was a matter for the Defendants.*
>
> *13 ….I say that a sale of the Secured Property was not so included within the handwritten terms, simply because it was not so mentioned, as being a necessary pre-condition."*

4. The McKennas contend, in essence, that given Ennis Property's thorough knowledge of their financial affairs it cannot but have been known by Ennis Property that a necessary element of what was agreed was that there would first have to be a sale by the mortgagee in possession/release of its security to raise the €675k.

5. Counsel have drawn the attention of the court to the judgment of the Supreme Court in *Tradax (Ireland) Ltd v. Irish Grain Board* [1984] ILRM 471, 482-3, where O'Higgins CJ observes as follows, under the heading "*When a term may be implied*":

> *"It goes without question that the courts may in any class of contract imply a term in order to repair an intrinsic failure of expression. This is done to give, as it is said, 'business efficacy' to a contract which would otherwise lack such. The existence of this power was asserted in the well-known case of* The Moorcock (*1889) 14 PD 64. In that case Bowen LJ said:*
>
> > *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 they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising 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. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances (at p. 68).*
>
> *This power must, however, be exercised with care. The courts have no role in acting as contract makers, or as counsellors, to advise or direct what agreement ought to have been made by two people, whether businessmen or not, who choose to enter into contractual relations with each other. This much-quoted passage from the judgment of Bowen LJ in The Moorcock has been thus referred to by McKinnon LJ in* Shirlaw v Southern Foundries Ltd *[1939] 2 KB 206 as follows:*

> *They are sentences from an ex tempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathise with the occasional impatience of his successors when The Moorcock is so often flushed for them in that guise (at p. 227).*
>
> *In the same case the same judge said, also at p. 227:*
>
> Prima facie *that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!* (at p. 227)."

6. There is nothing in the text of the settlement agreement or the other evidence before the court which suggests that [1] the necessity of a sale by the mortgagee in possession was within "*the presumed intention of the parties*", [2] for the court to read the settlement agreement so would be giving "*business efficacy to the transaction as must have been intended at all events by both parties*", a relatively high threshold, or, [3] to borrow from the colourful but useful imagery deployed by McKinnon LJ in Shirlaw that "*if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement"* – here the inclusion of a clause mandating a sale by the mortgagee in possession – that Ennis Property and the McKennas "*would testily suppress him* [the officious bystander] *with a common 'Oh, of course*!" In fact the evidence from the solicitor for Ennis Property suggests that it is most certainly not the case that any of [1]-[3] applies.

7. As to the notion that Ennis Property would sell to a family member of the McKennas at a large discount, with that family member to borrow the necessary funds if Ennis Property would just release its security first, [a] again that does not sit right with the sequencing expressly contemplated by the settlement agreement (money paid in by McKennas; Ennis Property releases security); and [b] it also suffers from the difficulty identified by counsel for Ennis Property that such an arrangement does not sit well with commercial sense because Ennis Property could by approaching matters so (selling at a discount to a family member without placing the house on the open market or, at the least, selling at open market value) expose itself to liability to lesser-ranking mortgagees, something that would make little sense: why would Ennis Property take on such additional legal risk?

8. The court is driven by the foregoing considerations to conclude that the literal, natural and correct reading of the settlement agreement is that (i) it is complete in what it states, and (ii) it does not state or involve the underlying predicate that the McKennas would like the court now to read into it (the sale by Ennis Property as mortgagee in possession of the secured property) because that was never agreed between, or within the contemplation of, both sides to the settlement agreement.