THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 141

[2014 No. 537]

The President
Edwards J.
McDermott J.

BETWEEN

PALACEANNE MANAGEMENT LIMITED

PLAINTIFF/RESPONDENT

AND

ALLIED IRISH BANK PLC

DEFENDANT/APPELLANT

JUDGMENT of the President delivered on 10th May 2017

Introduction

1. This is an appeal by the defendant, AIB, from the orders of the High Court made by Clarke J. on 21st June 2012, giving effect to his judgment delivered on 4th May 2012. The plaintiff is the management company of a block of 9 apartments located at Palaceanne, Enniskeane, County Cork. The bank holds a mortgage over the two apartments in the block that remain to be sold and was granted possession of them by order of the Circuit Court in Cork in 2009. The dispute concerns easements to the common areas of the block; the High Court held, inter alia, in answering an agreed statement of issues that the bank did not have any entitlement to the use of rights including a right-of-way over the common areas, except for access to a site beside the block. As a result, the two apartments held by the bank stand in landlocked isolation surrounded by property held by the management company and the bank cannot lawfully gain access to the apartments.

2. The context of the proceedings is the claim by the management company for payment of service charges by the bank in respect of the two apartments. Major expenditure is required to remedy structural and other defects and the owners of units that have been sold recovered judgment against the developer who was declared bankrupt in the United Kingdom. The management company is thus facing substantial cost in getting repairs carried out. The bank is not willing to pay service charges as demanded by the company for the two apartments it holds.

3. In this appeal, the bank submits that the issue is whether the mortgage of 20th May 2005, gives it easements over the common areas of the development "sufficient to enable it and Purchasers from it to access those apartments and also rights of support and running of services, which it may enforce against the Plaintiff/Respondent Management Company for the Development." The management company proposes that the primary issue is:

> "Whether a way of necessity or other implied right-of-way 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 whether that scheme would have provided for an express right-of-way), is the subject of mortgage by demise outside the scope of the scheme and with no express grant of a right-of-way."

4. A major new controversy arises in the appeal with the submission by the bank that the argument in the High Court, and ultimately the judgment, proceeded on a mistaken understanding by the parties of a crucial deed. Mr. James Dwyer SC for the bank, who did not appear in the High Court, submits that the legal positions of the parties as found by the High Court cannot be reconciled with the deed when correctly understood. It is important to note that this point about the deed is not referenced in the Notice of Appeal. Mr. Bland SC, for the management company, who also did not appear at first instance, argues that the bank should be confined to the grounds appearing in the Notice of Appeal, on which he contends that the High Court was correct. While counsel for the management company accepts that the parties did inadvertently misinterpret the conveyance in the argument before the High Court, he submits that his client is entitled to succeed on a true construction of the instrument. The admission of this ground must accordingly be added to the issues in the appeal.

Background

5. Ms. Gail Coles proposed to develop a building at the above address to provide 9 apartments in a block which would be operated and controlled in a conventional manner by a management company. Ms. Coles was the freehold owner. By agreement of 16th December 2003, she agreed to sell and convey the common areas to the management company in fee simple. It was agreed that easements, rights and privileges over the common areas of the block would be granted to purchasers of the units and to the management company. The purchase was to be completed on the expiration of 28 days from the completion of sale of the last of the units. Ms. Coles as vendor agreed to maintain the common areas in a proper state up to the completion date.

6. Purchasers of apartments did so by long lease from Gail Coles to which Palaceanne was also a party and the purchaser also became a shareholder in the management company.

7. By deed dated 20th May 2005, Gail Coles mortgaged 5 unsold apartments to Allied Irish Bank of which three were subsequently purchased leaving two apartments still subject to the mortgage.

8. Reference may now be made to the Statement of Facts as agreed between the parties and dated 27th June 2011. This records that some purchasers of apartments brought proceedings against the developers because of defects and were awarded substantial damages by the High Court. However, the developers were insolvent and subsequently were made bankrupt in the United Kingdom. On 9th June 2008, the High Court ordered that Gail Coles transfer the common areas of the development to the management company;

> ". . in accordance with the contract entitled the Memorandum of Agreement made on the 16th day of December 2003 between Gail Coles and Palaceanne Management Limited."

9. It was further ordered that in default of the transfer as ordered, a conveyance to that effect was to be executed by the Principal Registrar of the High Court. By indenture of 22nd January 2009, the Principal Registrar Mr O'Neill conveyed to the purchaser, the management company, as follows: –

> "ALL THAT AND THOSE the said premises [but excluding the property as described in the Part Two of the Third Schedule hereto ("the retained property")] together with the easements, rights and privileges specified in the Fourth Schedule hereto EXCEPTING AND RESERVING unto the retained property the easements rights and privileges specified in the Fifth Schedule TO HOLD the same unto the Purchaser in fee simple subject to and with the benefit of the Leases more particularly described in the Sixth Schedule hereto."

10. Part Two of the Third Schedule is headed RETAINED PROPERTY and is then as follows: –

> "ALL THAT AND THOSE the property at Murragh, Enniskeane in the County of Cork being the property marked blue on the map attached hereto and the following parts of Palaceanne Mills.
>
> Apartment "Murragh Suite" Palaceanne Mills, Murragh, Enniskeane, County Cork
>
> Apartment "Daly Suite" Palaceanne Mills, Murragh, Enniskeane, County Cork"
>
> The Fifth Schedule refers to easements, rights and privileges accepted and reserved out of and over the premises for the benefit of the retained property and every part thereof. It specifies that the rights subsist for the benefit of the vendors, their successors and assigns and others including rights-of-way and rights in regard to services."

11. Under the terms of this deed, the two mortgaged apartments were not transferred and they retained the easements, rights and privileges including rights-of-way and in regard to services. Unfortunately, these exceptions and reservations in the 2009 conveyance were somehow overlooked in the hearing in the High Court and the trial judge relied on the common but erroneous understanding that no such reservations were contained in the deed.

High Court

12. In its Plenary Summons dated 17th December 2010, the management company sought a series of declarations to the effect that the bank was not entitled to the benefit of any rights of way or other easements. These reliefs, which are set out below, appear to imply an awareness at that point of the provisions of the 2009 conveyance reserving easements for the benefit of the two mortgaged apartments:

> (i) A declaration that the Plaintiffs, as owners of the Common Areas in a development complex known as Palaceanne Mills, Murragh, Enniskeane in the County of Cork hold the said Common Areas freed and discharged from any claim of right thereover (whether to any easement or other such like right) made by or on behalf of the Defendants;
>
> (ii) A declaration that the defendants are not entitled to any easement (whether by way of necessity or otherwise) over the plaintiffs said lands as aforesaid;
>
> (iii) A declaration that on a true construction of a certain Indenture of Conveyance made the 22nd of January 2009, and made between Kevin O'Neill of the One Part and Palaceanne Management Limited of the Other Part, neither of the two unsold and unoccupied units in the said complex nor the adjoining site in the vicinity thereof both currently held by the Defendants as Mortgagees are entitled to any of the rights, easements and benefits created by and conferred by the said Indenture of Conveyance;
>
> (iv) Further and in the alternative an Order that the said Deed last herein referred to is subject to the Plaintiffs' equity of rectification so as to exclude therefrom any easements or rights thereby conferred on the said properties last herein referred to and the owners thereof;
>
> (v) Further and in the alternative if the Defendants are entitled to any such easements or rights an Order determining the terms upon which same were held by the Defendants.
>
> (vi) Further and other relief.

13. An agreed statement of facts set out the relevant background to the dispute and the parties also produced an agreed Statement of Issues on 30th November 2011. Further relevant parts of the Statement of Facts of 27th June 2011, are as follows:

> "5. Pursuant to the Court Order the common areas were transferred to the Management Company under Deed of Conveyance made the 22nd day of January 2009. The said Deed of Conveyance purported to give effect to the Management Company Agreement dated the 16th of December 2003. The bank maintains that the said Deed of Conveyance should not have been effected until the last apartment was sold and in so far as the existing apartments require or seek easements or other rights against the owner of the unsold apartments it is denied by the Bank that such rights exist.
>
> 6. The bank claim entitlement to possession of the two unsold units on foot of their Deed of Charge and have sought same in proceedings instituted against one of the developers before Cork Circuit Court on the 27th of November 2008. The Receiver appointed as aforesaid by this Honourable Court is a Notice Party to these proceedings which remain before Cork Circuit Court. The Management Company do not deny the said entitlement.
>
> 7. The Bank is not however a member of the Management Company and the plaintiff therefore contends that the Bank has no legal entitlement to the use and enjoyment of the common areas. The Bank does not accept this contention. The bank

denied that their rights over the property have been affected in any way by the Deed of Conveyance and claim to be entitled to the use and enjoyment of the common areas as successors in title to the developer pursuant to their Deed of Charge and by operation of law. The bank and the Receiver had consented to have this issue determined by the Circuit Court in the aforementioned proceedings.

8. The Scheme of Development is identified on the Map attached hereto. The Scheme does not include an adjoining site owned by the Developers and the Bank holds a similar security over that site and is entitled to possession thereof. The Plaintiff concedes that the said site may require the use and benefit of the common areas and maintain that since it is not included in the Scheme the Bank has no right or? entitlement thereto. The Bank deny that their rights over the site have been affected in any way by the Deed of conveyance."

14. Following trial of the issues in March 2012, Clarke J. delivered his judgment on 4th May 2012. He ruled on costs on 21st June 2012, and made a formal order on that day in the terms of his judgment. In the order made on 21st June, 2012, Clarke J. answered the questions posed in the Statement of Issues dated 3rd November 2011, as follows:

"What is the status of the Bank? Is the Bank to be treated as a Mortgagee in possession? No.

If the answer is in the affirmative, what consequences flow in respect of their rights and liabilities in relation to the common areas? Does not arise.

Do the Bank have any entitlement to the use of any rights of the common areas and if so the source of such rights and the nature and extent thereof? None, save for the benefit of a right-of-way to the site as that term is defined in the judgment such right arising by way of necessity.

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? No.

Is the vacant site the subject matter of the Charge part of "the estate" as defined in the documents relating to the apartment scheme? No.

a. 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? As per paragraph 3.

Is the Indenture of 22nd January 2009 (executed pursuant to the High Court Order of the 9th June 2008) subject to rectification and if so the terms of any such rectification? Does not arise.

Are 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? No.

The court awarded the plaintiff 60% of its costs against the bank."

15. The judgment delivered on 4th May 2012, explained the reasons for the findings of the court. Clarke J. concluded his analysis of the issues by declaring the rights and obligations of the parties as follows. AIB has no current obligation to contribute to the costs of the management company; 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. 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. It was 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.

16. The trial judge recognised that this was an unsatisfactory solution from all points of view and strongly recommended that the parties engage in mediation with a view to resolving the disputes and difficulties.

17. The judge's reasoning may be summarised as follows. The management company owns the freehold. The shareholders in the company are the purchasers of the seven apartments that have been sold. The deed executed by the Principal Registrar transferred the fee simple interest in the entirety of the development, other than the site, to Palaceanne, including the reversionary interest in the leases of the apartments sold and in the two unsold apartments mortgaged to AIB) It was important to note that Palaceanne is the owner of the freehold reversion of the apartments which have been mortgaged to AIB. At para. 5.11, the judgment states: –

"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."

18. The court held that AIB did not have any 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 sold apartments. A right of necessity did not arise in the circumstances which were (a) the property was part of a multi-unit development in which an estate scheme was being implemented; (b) the scheme would provide for an express right-of-way and (c) the property in question was the subject of a mortgage by demise outside the scope of the scheme and with no express grant of a right-of-way. AIB acquired its interest when it was on notice of the estate scheme and therefore any right-of-way of necessity that might otherwise have arisen was excluded. Similarly, any right that might have arisen under the rule in Wheeldon v. Burrows [1879] 12 Ch D 31 did not arise for the same reason. The High Court did not exclude the acquisition by purchasers of the apartments mortgaged to AIB of the same rights and obligations as the other occupiers. New purchasers could not be required to pay maintenance charges for periods prior to their acquisition. The obligation to provide for maintenance in respect of the unsold apartments rested with Ms. Coles and the fact that she was insolvent did not mean that somebody else and specifically AIB was liable. The judge acknowledged the very unsatisfactory situation that arose as a result of his conclusions about the legal relationship and status of the partnership.

Appeal
19. Before considering the issues that are raised in the notice of appeal, the question mentioned above of the misinterpretation of the indenture of 22nd January 2009, has to be addressed. In its written submissions under the heading 'The Factual Issue which arises from the Judgment', the bank refers to the determinations by the High Court as to the meaning and effect of the conveyance executed by prior order of the court by the Principal Registrar, Mr. O'Neill. Mr. Dwyer SC based much of his argument on the reasoning of Clarke J. arising from his understanding of the deed. The judge found as stated above that this instrument transferred the fee simple in the entire block to the management company including the two mortgaged apartments. That conclusion arose from an inadvertent error of interpretation that was common to both parties. It is clear on any view of the case that the effect of the deed is relevant and important. Mr. Dwyer SC submits that the true understanding of this document is practically determinative of the case if it is properly before the court. Mr. Bland SC argues that the outcome of the case based on a legal analysis of the relationships between the parties and Ms. Gail Coles as decided by the High Court is correct even when the terms of the conveyance are correctly applied. What cannot be contradicted, however, is the materiality of this document of transfer. The terms of the plaintiff's plenary summons implicitly acknowledge that relevance. Counsel for the management company, however, argues that this matter is not the subject of any ground in the Notice of Appeal and it is not therefore open to the court to consider it. Moreover, the principles declared by the Supreme Court in Hay v. O'Grady [1992] 1 IR 210 militate against the allowance of this new ground.

20. It seems to me that the 2009 deed must be taken into account. The parties presented their cases in the High Court on an erroneous basis and the judgment is expressly predicated on the same understanding as to the provisions of the conveyance. My view is that this Court must review the judgment in light of the agreed fact that the terms of the conveyance were misunderstood in the High Court. It is not possible in the very unusual circumstances of this case to decide the appeal properly without reference to the unquestionably material deed. If the bank is correct as to the meaning and effect of this transaction, it would be unjust to ignore the document. In such situation, it would mean determining the appeal as to the rights of the parties by choosing to ignore a matter of independent potentially decisive evidence, contrary to the most fundamental function of the court. I would not wish, however, to suggest that the very limited occasions when this course is required or justified should be expanded beyond the demands of justice that impel the Court in these extremely unusual circumstances of undisputed shared error. I propose, therefore, to consider Mr. Dwyer's submissions written and oral as to the meaning of the deed in question. Before doing that, the bank's other and original grounds of appeal should be mentioned.

21. The bank appealed on four grounds relating to the legal findings made by the High Court and a further two issues as to the order for costs. The four substantive grounds on which it is submitted the court was in error are as follows:

> (1) Finding that the mortgage deed of 20th May 2005, did not create a right of way of necessity to the apartments conveyed.
>
> (2) Finding that the mortgage did not give rise to a right of way and other easements
>
> (a) by implication of law;
>
> (b) from the common intention of the parties;
>
> (c) by section 6 of the Conveyancing Act 1881 – this ground was not proceeded with;
>
> (d) under the rule in Wheeldon v Burrows [1879] 12 Ch D 31.
>
> (3) Holding that the fact that the bank was on notice of the intended estate development negated the creation of implied easements.
>
> (4) Failing to find that:
>
> (i) the management company is successor in title to the mortgagor Ms Coles; (ii) the management company is thereby bound by the common intention of the parties to the mortgage that the bank would enjoy all easements and rights necessary to exercise its rights under the mortgage;
>
> (iii) the mortgagor was obliged not to do anything to jeopardise or undermine the security.

22. The appeal concerning the orders for costs should be held over for further consideration in light of the judgment in this case.

Submissions

Allied Irish Bank
23. In regard to the 2009 Deed, AIB submits that the trial judge made an error of fact in finding that the deed dated 22nd January 2009 transferred the freehold of the two retained mortgage departments to Palaceanne. The bank cites the provisions of the deed in support of its contention. It submits, accordingly, that it is clear that the freehold in the retained apartments was not transferred and, moreover, that the common areas which the deed transferred to the management company were subject to easements expressly reserved to Gail Coles and her assigns, which obviously included AIB. It suggests that the parties in the High Court and the trial judge inadvertently missed the terms of the 2009 deed. The bank submits that this issue is determinative of the appeal, but it also addresses other grounds of appeal and issues raised.

24. AIB argues that implied intent is sufficient to give rise to an easement. In *Maguire v. Browne* [1921] IR 148, O'Connor LJ highlighted the underlying logic of preventing an owner from being effectively land-locked vis-à-vis his own property. In this case, the intention must be interpreted in light of parties' understanding at the time of the Deed of Mortgage and not with the benefit of hindsight. The judgment of Clarke J. indicates that the estate scheme in question, which was typical, envisaged that the common areas would only be transferred to the management company upon all the apartments being sold. It did not contemplate the transfer of ownership by way of conveyance pursuant to a court order. On entering into the mortgage, neither party intended or foresaw Ms. Coles ever being without ownership of the Common Areas. Prior to the selling of all the apartments, the ownership of the Common Areas was to remain with Ms. Coles. As such, any contemplation of a transfer of ownership took place solely in the context of the estate scheme.

25. The terms of the mortgage deed show that the intention was to pass existing rights of way to the mortgagee. Gail Coles assigned to the bank "the benefit of all covenants, agreements, guarantees, indemnities, undertakings, goodwill license rights, remedies, charges, and privileges appertaining to or enjoyed with or incidental to the ownership of the said lands in any manner whatsoever".

These dispositions carry with them the implication that a right of way travelled with the transfer by Ms. Coles to the bank. Moreover, AIB points out that Palaceanne acknowledged that an easement of necessity exists in favour of the site under mortgage.

26. *Halsall v. Brizell* [1957] CH 169, on which the management company relies, can be distinguished from the instant case as it is premised on corresponding rights and obligations. In the present circumstances, AIB has no rights under the estate scheme and therefore cannot be said to have obligations under it either. The intention was for AIB to facilitate the selling of the remaining apartments and in doing so, also divest its interest in the properties. It is argued that law and practical necessity require that an easement outside of the estate scheme be recognised.

27. AIB has a mortgage by demise over the apartments which can only be effective if the necessary easements over the common areas are recognised. The doctrine of non-derogation from grant applies: see *Conneran v. Corbett & Sons Ltd* [2004] 2 ILRM 26. Such an intention may be implicit: *Connell v. O'Malley* [1983] WJSC HC 2116 and *Birmingham, Dudley and District Banking Co v Ross* [1888] 38 Ch D 295. The enjoyment of the apartments mortgaged to AIB demands certain rights over the common areas. In *Honiball v. McGrath and Mac Enterprises Ltd* [2002] IESC 26, Fennelly J. considered business efficacy as a matter of practical necessity for the enjoyment of a grant. Without the easements, AIB would have no way to access the apartments in question.

28. The rule in *Wheeldon v. Burrows* is applicable. While the common law rule has now been replaced by s.40 of the Land and Conveyancing Law Reform Act 2009, it was in force on the date of the mortgage and it is another reflection of non-derogation.

29. AIB submits that the agreed statement of facts did not refer to the bank's having notice of the estate scheme and so the High Court was not in a position to impute notice from the fact that the scheme was in place when the mortgage executed. And even if it was possible to infer knowledge, it suggests that such notice does not necessarily prevent the acquisition of an easement of necessity.

Palaceanne's Submissions

30. Mr. Bland's response to the correct interpretation of the 2009 deed is that in 2005, at the time of the mortgage, Ms. Coles "couldn't have granted the bank at that time a right over the common areas because that would cut across the estate scheme, which provides that you don't get such rights of access until such time as you sign up to the agreement whereby you pay for the rights of access by way of service charges."

31. Palaceanne submits that Ms. Coles lacked the basic capacity to create any form of easement. The 2003 deed by which Ms. Coles agreed to transfer her remaining interest in the common areas had the effect of making her a trustee of the management company. In circumstances where this right was not reserved by implication or the terms of the deed, further easements could not have been created under the 2005 deed.

32. Independent of this fundamental issue of capacity, Palaceanne argues that where an estate scheme exists and the purchaser has notice of it, the common intention of parties precludes an implied right, even one of necessity. The same right cannot exist as both an implied and express right. In *Halsall v. Brizell*, Upjohn J. held that in accepting the terms of a deed of conveyance, one had to take not only the benefits, but the obligations that travelled with them. An estate scheme has the effect of creating a "local law" which binds the parties to it. Palaceanne argue that the 2003 deed involved the staged transfer of an "unencumbered fee simple title" and in doing so prevented the creation of an implied right. No subsequent unilateral action on Ms. Coles' part can interfere with the estate scheme's endgame. If Palaceanne's argument is accepted, the bank's interest must follow the terms of the 2003 deed. The same point excludes a *Wheeldon v .Burrows* implication.

33. The mortgage deed does not make express provision for granting easements over the common areas to the bank. In order for easements to have been incorporated into the mortgage deed, it was necessary for both parties to have a common intention to do so. In the context of the estate scheme and the conveyance of the common areas to the management company, it cannot be said that such an intention was present in this case. The respondent submits that this is of some importance considering that even if the bank had known about the estate scheme, that would not in and of itself be sufficient.

34. AIB's argument that its knowledge of the estate scheme is irrelevant to whether or not an easement could be created suggests that a right of necessity can be created even when both parties to the instrument did not intend that creation. This is in direct contrast to *Maguire v. Browne* [1921] 1 IR 148, which emphasises that a right of way of necessity rests on the "supposed intention" of the parties [at p.169; see also: *Dwyer Nolan Developments Ltd v. Kingscroft Developments Ltd* [1999] ILRM 141]. Without evidence of a shared intent then an easement cannot arise. The court, in *Nickerson v Barraclough* [1981] Ch. 426 went further in noting "the doctrine of way of necessity is not founded on public policy but upon an implication from all the circumstances."

35. In the present circumstances, AIB must have known about the estate scheme and the entitlements to the common area that were to follow. Furthermore, Ms. Coles could never have intended to create a right of way given that she had contracted to convey the common areas to Palaceanne. No common intention could have arisen. Even if AIB did not know of the estate scheme there could be no implication of a right on a unilateral basis. To hold otherwise would be to defeat the point of purpose of having a shared intention. However, it is also worth noting that knowledge is not necessarily a critical factor

36. The bank has not disputed that it knew of the estate scheme created by the management company agreement of 2003 when it took its mortgage in 2005, but merely argued that the trial judge should not have inferred awareness of the estate scheme because the agreed statement of facts did not indicate that it had such notice, which is a contention not based in fact. The judge was entitled to draw the inference that a bank would reasonably be expected to have satisfied itself as to the existence of the estate scheme when inquiring into the title of the apartments on grant of the mortgage. The management company agreement of 16th December 2003 between Gail Coles and Palaceanne was furnished to the learned trial judge in the Schedule of documents annexed to the statement of facts of 27th June 2011. The statement of facts made express reference to the management company agreement and to the bank's interpretation of its meaning and effect. The learned trial judge made an inferential finding of fact as to the bank's notice of the estate scheme. It was a finding supported by the uncontroversial evidence of the existence of the estate scheme, the agreement of 2003, the mortgage and the established model for multi-unit developments, all of which are addressed in the judgment. It follows from the decision of the Supreme Court in *Hay v O'Grady* that the appellate court is bound by that finding.

37. The fact that the conveyance to the management company was brought forward consequent upon the order of Clarke J. of 9th June 2008, is not material. First, it is a matter between the parties to the management company agreement of 2003 as to when that agreement is to be completed, and it was completed at the direction of the High Court, so it is simply not open to the bank to challenge that completion or to try to look behind it in any way. Second, the date of the completion of the contract cannot alter the fact that the contract provided for the sale of the unencumbered freehold, and that anyone being aware of the contract, including Ms. Coles and the bank, would therefore know that easements could not be implied into the mortgage to burden the common areas

prior to completion.

38. The creation of a right of necessity is not automatic. It is not created by policy or operation of law; instead it rests on the common intention of the parties. If that common intention cannot be established on the evidence, there can be no implication of the right.

39. Finally, AIB argues that since it was not a party to the management company agreement, it could not be bound by its terms but the fact remains that it did not take any express rights and could not receive any implied rights because the developer was contractually precluded from burdening the common areas.

The Bank's Reply
40. Mr. Dwyer SC, in response to Mr. Bland's point on Ms. Coles' restricted capacity, submits that she was entitled to mortgage her interest in the property to the bank. The 2003 management company agreement gave it rights to have the property conveyed at the completion date. In the meantime Ms. Coles was free to deal with her property including using it as security by way of mortgage. That is what she did in 2005. The process whereby the company advanced the transfer of the Coles' interest did not involve the bank and it is legally impermissible for the company to deny rights of the bank that it would not otherwise have considered challenging. The company is actually the author of its own misfortune, in so far as it has taken on liability for maintenance of the building.

41. The reality of the present situation is that the management company is holding the bank to ransom. At this stage, the company has no legal interest whatever in the two apartments, not even a reversionary interest as claimed by Mr. Bland, although it may be able in due course on sales being completed to assert such an entitlement.

42. The deed of 2009 is clear in its terms, meaning and effect. It is subject to the bank's interest in any case because of the prior mortgage.

The Law
43. The legal consequences of the relations between the parties have to be determined in the first place by the interpretation of the contract made in 2003, the mortgage of 2005 and the conveyance of 2009. The appeal also raises issues as to whether the bank enjoys a right-of-way to the apartments arising by implication of law, including application of the rule in *Wheeldon v. Burrows*, by necessity or by necessary inference from the mortgage between Gail Coles and the bank or otherwise in the circumstances. It seems to me that the following cases provide valuable guidance as to the approach of the law to these issues.

44. Some of the authorities referred to in submissions or argument are of limited or little materiality and having regard to my view as to one issue that was debated I can exclude authorities on that point. That question concerns inferences that the trial judge was entitled to draw from the facts and circumstances of the case as they were before him. This applied particularly to whether the bank was on notice of the estate scheme, as the judge considered, since that fact was not included in the agreed statement that was put before the court. It seems to me to be quite legitimate for the High Court to have proceeded on this basis. Ms. Coles mortgaged five apartments out of a development containing nine units. It is practically inconceivable that the bank, receiving their documents of title and conducting through its advisers the usual enquiries and searches, could be unaware of the existence of an arrangement that was standard for such developments. If the judge had proceeded on a different basis, assuming it was relevant to the case to do so, it seems to me that it might well be open to a party on appeal to challenge that approach on the ground that it was unworldly and inappropriate. I find it unnecessary, therefore, to analyse the impact on the judge's inference of knowledge by reference to the principles laid down by McCarthy J. speaking for the Supreme Court in Hay v. O'Grady.

45. In the famous passage from *Wheeldon v. Burrows*, Thesiger LJ said:

> "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case." [At page 49]

46. In *Halsall v. Brizell*, Upjohn J. said:

> "But it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need but refer to one sentence during the argument in Elliston v. Reacher, where Lord Cozens-Hardy M.R. observed: "It is laid down in Co. Litt. 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it." If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do desire to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity or on any right by prescription, for the simple reason that when the house was originally sold in 1931 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits." [At page 182-183]

47. In *Conneran v. Corbett & Sons Ltd* [2004] IEHC 389 Laffoy J approved and adopted para. 6.059 of Wylie on Irish Land Law as follows:

> "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."

48. The judge also said that the doctrine of non-derogation from a grant existed so as not to frustrate the intention of both parties when the transfer was made.

49. In *Birmingham, Dudley and District Banking Co v Ross* [1888] 38 Ch D 295, Cotton L:J said:

> "By an implied obligation or an implied right I mean this: an obligation or right arising not from the express words of an instrument, nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words in the instrument; but that obligation or that right which results from that position into which the parties have placed themselves by the contract. 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, the enjoyment of the house. That obligation arises, I repeat, not from any interpretation of the conveyance but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee." [At page 308]

Barron J. adopted these comments in *Connell v. O'Malley* [1983] WJSC HC 2116.

50. Fennelly J. said in *Honiball v McGrath and & Mac Enterprises Ltd* [2002] IESC 26 that:

> "It must be demonstrated that the term effecting such a grant would as a matter of compelling necessity have to be implied to give what is called business efficacy to the terms of what is expressly agreed". [At para.17]

51. *Beddington v Atlee* [1887] 35 Ch. D. 317 approved Gale on Easements as follows:

> "Similarly, no easement will arise by implication, or under general words in a conveyance, if the vendor, before agreeing to sell the supposedly dominant tenement (A), has agreed to sell the supposedly servient tenement (B), without reserving the alleged easement. The reason is that the vendor, on agreeing to sell B, becomes a trustee of B for his purchaser, and a subsequent contract by him to sell A cannot be assumed to include a contract to create an incumbrance on B." [At para.3.10]

52. In Maguire v. Browne, O'Connor LJ said that "in the absence of an express grant a right of way of necessity rests upon the supposed intention of the parties…" [at page 169]. To the same effect is *Nickerson v Barraclough* [1981] Ch. 426 that "the doctrine of way of necessity is not founded upon public policy at all but upon an implication from the circumstances." [At page 440].

Discussion

53. The 2003 Agreement provided that Gail Coles would transfer to the management company the fee simple in the common areas plus the freeholder reversions of the long leases of the apartments. The time for making the transfer was following the sale of the last of the apartments in the development. The next relevant transaction involving Palaceanne was the 2009 Deed that was executed by the Principal Registrar of the High Court on direction of the Court. This conveyance brought forward in time the transfer of the fee simple interest in the development, but it excluded from its effect the two apartments that were not sold at that point, specifying them by name. The Deed also excluded in favour of the retained property all easements of way and as to services. Obviously, the bank was not a party to the 2009 conveyance. It could not displace the bank's rights and interests under the mortgage. The 2003 Agreement did not transfer any property. It is an agreement to do so in the future. Ms. Coles remained free thereafter to sell the apartments; indeed, the whole purpose of the scheme of development was for precisely that to happen.

54. The 2009 conveyance brought forward and part-performed Gail Coles' obligations under the 2003 Agreement. It was clear, however, that it did not disturb the ownership of the two mortgaged apartments and the easements and rights that went with them. The Estate Scheme provided that a purchaser became a shareholder and was required to become a member of the management company. By the time Gail Coles entered into the mortgage with AIB, four apartments had been sold and she owned the fee simple in the common areas, and indeed the whole building. Subsequent to the mortgage of 20th May, 2005, two changes in the positions of the parties occurred. Gail Coles sold three more apartments, which obviously required the bank's consent and cooperation, and the purchasers joined the management company in accordance with the Estate Scheme. The second event was the 2009 Deed. It is accordingly apparent that Gail Coles (and the bank) were able to put purchasers into possession with full rights of way and in respect of services for themselves, their successors, assigns and others.

55. The 2009 Deed could not be clearer. The habendum conveys the fee simple interest in the property, but excluding the two apartments and excepting and reserving to them the easements, rights and privileges, including rights of way and in regard to services for the benefit of the vendors, their successors and assigns and others. In order to hold in favour of the management company, it is necessary to overlook the express terms of the 2009 conveyance, or alternatively, to regard it as completely irrelevant. That Deed clearly envisages that the retained property, namely, the two apartments, carry with them rights of way and easements in respect of services. That is entirely in accordance with the Estate Scheme, which is not in dispute. It is difficult in those circumstances to understand how this Deed can be ignored. It is relevant that it was executed on foot of a Court Order that was sought by the management company. There may be something in the submission by Mr. Dwyer SC on behalf of the bank that the management company may have taken on an obligation that it did not really intend. However, in circumstances where the developer was insolvent and about to be declared bankrupt or in a condition that would ultimately lead to that determination, the reality may be that the management company had no choice, even though it was not fully supplied with shareholders under the intended Estate Scheme.

56. There was an estate scheme in this development which was in accordance with the normal model, as the trial judge noted. The developer established a management company and granted a long lease to each purchaser of an apartment. The agreement for sale also provided that the purchaser became a shareholder in the management company. While sales were continuing, the developer retained ownership of any common areas and also had obligations in regard to services. During this phase the developer was entitled to recover maintenance contributions from purchasers but was obliged to make up any shortfall in the costs of upkeep attributable to the unsold units. The intention was that when all the apartments had been sold the developer would transfer the ownership of the common areas and of the freehold reversions in the apartments to the management company. That body would then assume responsibility for maintaining the common areas and controlling the development generally with the costs of carrying out these functions being borne by the owners of the apartments. The developer would have no further role in the building.

57. At para. 3.1 of his judgment, Clarke J. sets out the relevant terms of the mortgage between Gail Coles and AIB. Under this deed,

Ms. Coles demised unto AIB the secured property for a term of 10,000 years subject to the proviso for redemption. She also declared that she would stand possessed of the nominal freehold reversion in trust for AIB and authorised the bank to appoint a new trustee subject to redemption. The property originally comprised in the mortgage was 5 apartments in the development but that reduced as time went on and sales took place with the consent of the parties so that ultimately only 2 units remained unsold. The judge said that in the ordinary way in the case of default of mortgage payments it was likely that AIB would want "to be able to enforce its security by procuring that the 2 remaining apartments 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."

58. At the date when the mortgage was executed, 20th May 2005, the estate scheme was in existence and four apartments had been sold, a fact which led the trial judge to conclude that the bank must have been on notice of the scheme. In my view, this is a reasonable inference which the judge was entitled to draw in the circumstances and I do not think that the appeal on this point can succeed. The bank submits that the agreed statement of facts on which the case was debated and decided did not include anything about the bank's knowledge of the estate scheme and it was therefore impermissible for the judge to conclude as he did. I do not agree. I think it would be extremely unlikely for the situation not to be known to the mortgagee when the transaction involved five apartments in a nine-unit development.

59. In the period between the agreement of 16th December 2003, and the mortgage of 20th May 2005, Gail Coles held the fee simple interest in the five apartments and also in the common areas. She had agreed that when all the apartments were sold she would convey the fee simple in the common areas and the leasehold reversions of the apartments to the management company. At this time, she was entitled to sell her apartments, that is, to grant purchasers long leases of 10,000 years in accordance with the estate scheme. The purchasers in turn would obtain the benefits and be subject to the obligations of the scheme, pursuant to their agreements.

60. Following the execution of the mortgage, Ms. Coles sold three of her five apartments with the consent of the bank. She would not have been able to do so otherwise. It is clear nevertheless that with the consent of the mortgagee she was still in a position to dispose of the apartments that she retained. When the Circuit Court made its orders in the mortgage proceedings brought by the bank against Ms. Coles, AIB held the freehold title in the apartments and was in a position to grant 10,000 year leases in accordance with the estate scheme. That is a necessary consequence of the terms of the mortgage. There is no basis for considering that there was anything to prevent the bank from realising its security by selling the apartments. Obviously, again in accordance with the estate scheme, purchasers would and will enjoy benefits and be subject to obligations similar to the other apartment owners.

61. This is the background to the claim by the bank to a right of access to the two apartments. It can sell them and the purchasers will have full entitlement to participate in the management company; indeed, they will be obliged to do so. It would in those circumstances be unusual to say the least to find that the law did not provide for a right-of-way for the bank to gain access to the apartments. That however is a point to be considered presently. It is obvious that before the transfer deed of 2009 that was directed by the court on the application of the management company the bank was entitled to a right-of-way to the apartments. Gail Coles could not have prevented the bank from doing so.

62. It is impossible to contend that the 2009 conveyance prevents the bank's access. The deed expressly provides otherwise, as is demonstrated above. There is actually no dispute between the parties on this point. The company however seeks to go back to the 2003 agreement for a basis on which the bank might be excluded. For my part, I am unable to see how this could be so. The 2003 agreement does not of itself transfer property but whatever rights it confers on the management company, they cannot operate as it seems to me in a manner that is wholly inconsistent with the estate scheme, the rights of Gail Coles and the rights of the bank as mortgagee and assignee of her interest. It seems to me to follow that because the bank had a right against Ms. Coles to pass and re-pass to gain access to the apartments, the 2009 deed to which the bank was not a party and which is obviously subject to the bank's rights under the mortgage cannot have extinguished those rights.

63. The terms of the 2009 deed by themselves are quite inconsistent with the case made on behalf of the management company by reference to the 2003 agreement. The point would also appear to have been present to that party when the plenary summons was drafted.

64. I am also of the view that a right of way of necessity or by implication of law would arise in the circumstances. It is of course true that such a right will not arise where the parties are bound by a closed set of contractual provisions. See Halsall v. Brizell above. But the bank is not in that situation. It is not a member of the management company. It stands outside the estate scheme, albeit having the capacity to put purchasers into the contractual framework.

65. The circumstances here are undoubtedly unusual, perhaps more so because of the claim by the management company that the bank cannot access the apartments rather than for a legal reason. In actual fact, the transactions giving rise to the issues for the court are relatively commonplace. The trial judge said that the arrangements in this case were typical and it can scarcely be suggested that it is unusual for a developer to borrow on foot of a mortgage of retained apartments. It would therefore be extremely surprising in my view if it happened that the mortgagee suffered the extreme disadvantage that is proposed in this case. It is nothing less than the quarantining of property to which the bank is entitled.

66. An implied obligation or an implied right arises not from the meaning and effect of the words in the instrument but from that position into which the parties have placed themselves by the contract: see Birmingham, Dudley and District Banking Co v. Ross above.

67. A right of way of necessity rests upon the supposed intention of the parties: Maguire v. Browne above. The "doctrine of way of necessity is not founded upon public policy at all but upon an implication from the circumstances." See also, Nickerson v. Barraclough above. It is not the actual or expressed intention of the parties but rather what is the supposed intention arising from the circumstances.

68. In the events that have happened in this case, I think it is irresistible that a right arises by necessity or by implication of law or under the rule in Wheeldon v. Burrows. Having said that, I do not think that it is necessary to invoke these legal implications of rights in the circumstances of the case. In my judgment, the bank was entitled to a right of way to the apartments prior to the execution of the court-ordered deed of 2009 and its right was not affected by that transaction.

69. I would, accordingly, allow the bank's appeal.

70. Issues as to costs may be considered later having regard to the outcome of the appeal.