THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 213
Court of Appeal Record No. 2020/31

Costello J.

Noonan J.

Murray J.

BETWEEN/

RAY GREHAN, DANNY GREHAN AND GLENKERRIN HOMES UNLIMITED COMPANY (IN RECEIVERSHIP), MICHAEL McATEER AND PAUL McCANN

PLAINTIFFS/APPELLANTS

- AND -

MAYNOOTH BUSINESS CAMPUS OWNERS' MANAGEMENT COMPANY LIMITED BY GUARANTEE

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 31st day of July 2020

Introduction

1. This is an appeal against a judgment and order of Haughton J. ([2019] IEHC 829) delivered on 22 November 2019. The first and second named plaintiffs are the owners of the lands comprised in Folio 34112F Co. Kildare ("the lands" or "the Folio"). They developed a business campus known as Maynooth Business Campus on the lands through

their company, Glenkerrin Homes Limited – which subsequently changed its name and status to Glenkerrin Homes Unlimited – ("Glenkerrin"), the third named plaintiff. The fourth and fifth named plaintiffs are receivers appointed by National Asset Management Agency ("NAMA") in respect of the debts of the first, second and third named plaintiffs which were secured on the lands (the "Receivers"). The defendant is the management company of the common areas of the campus. It was at all times intended that it would assume the management of the common areas of the campus upon the completion of the development.

2. The proceedings concern the proper construction of an agreement dated 6 April 2001 between the first, second and third named plaintiffs and the defendant (referred to throughout as the "Management Agreement") and the definition of the obligations of the parties to that agreement. Glenkerrin, the developer of the business campus, is insolvent. The underground car park on the campus requires extensive work to remedy serious deficiencies in its current condition. The Receivers have been realising the security for the benefit of National Asset Loan Management ("NALM") and intend to remit the net proceeds of sale of the last unit to be sold on the estate, without carrying out substantial remedial works. They required the defendant to cooperate in the sale, as I shall explain more fully later. The defendant maintains that it should not be required to pay for the remediation of the car park, as this is properly the obligation of Glenkerrin. The plaintiffs sued to compel the defendant to execute a Lease of Easements and to facilitate the sale of the last unit in the estate. The defendant counterclaimed for certain declaratory reliefs.

3. The trial judge ordered Glenkerrin and the Receivers to carry out remedial works to the car park of the campus, utilising the net funds arising from the sale of the last unit on the lands, the secured property. The plaintiffs have appealed the orders in full and the defendant has cross-appealed the declaration by Haughton J. that it was an implied term of the Management Agreement that it execute a Lease of Easements as requested by the plaintiffs.

The Facts

4. The trial judge has set out the history of the matter in considerable detail. I shall limit myself to those facts which appear germane to the issues before this court.

5. On 1 September 2000, the first and second named plaintiffs (to whom, so as to ensure consistency with the decision of the High Court, I shall refer as the "plaintiffs") purchased certain lands in Kildare, now comprised in Folio 34112F of the Register of County Kildare, utilising funds provided by AIB plc ("the bank"). The first and second named plaintiffs entered into an all sums due mortgage in favour of the bank. The first and second named plaintiffs were registered as owners of the lands on the Folio on 7 December 2000 and the charge for present and future advances in favour of the bank was also registered on 7 December 2000 ("the charge of 2000").

6. On 6 April 2001, the first and second named plaintiffs entered into two agreements. The first was an agreement for sale of the lands by the first and second named plaintiffs to their development company, Glenkerrin. The purchase price was IR£12 million and there was no deposit and no closing date fixed. Special Condition 5 of the contract recited that Glenkerrin intended to lay out the land for development as a business park and the first and second named plaintiffs agreed, in consideration of the purchase price, to execute Deeds of Assurance of the individual sites comprised within the Folio in respect of each unit sold by Glenkerrin. As was not uncommon practice at the time, the sale never closed and the interest of Glenkerrin "rested on contract". The precise extent of that interest is discussed further below.

7. Also on 6 April 2001, the first and second named plaintiffs, Glenkerrin and Maynooth Business Campus Management Limited (the defendant) entered into an Agreement for Sale (the Management Agreement). The proper construction of this agreement presents the central issue in these proceedings. The first and second named plaintiffs are the vendors,

Glenkerrin is the developer and the purchaser is the defendant, it being the management company which was established by the first and second named plaintiffs to acquire and manage the common areas of the estate upon the completion of the development of the estate and the sale of the last unit in the estate.

8. The Agreement provides as follows:-

"2. WHEREAS:-

2.1 The Developer has entered into an Agreement with the Vendor to purchase all of the property comprised within Folio 34112F of the Register County Kildare of which the Vendor is the registered owner.

2.2 The Developer has laid out the Estate for development as a commercial business campus and intends to lease sites in the Estate to prospective purchasers and to enter into leases and Management Agreements similar in form to the draft Lease and Management Agreement furnished prior to the execution of this Agreement or on such other terms as may be agreed between the Developer and prospective purchasers or lessees.

2.3 The Developer will complete the development of the Estate in accordance with the plans and specifications produced to the Purchaser and shall lease all the units/sites on the Estate and on the demise of the last Unit/Site;-

3. <u>IT IS HEREBY AGREED</u>

3.1 that in consideration of the Purchaser assuming the Developer's liability under the Leases hereinafter mentioned and further in consideration of the sum of Ten Pounds (IR£10.00) the Vendor as registered owner shall transfer and the Developer as

beneficial owner shall transfer and confirm unto the Purchaser ***ALL AND SINGULAR*** *the freehold interest in* ***ALL THAT AND THOSE*** *that part of the lands comprised within Folio 34112F of the Register County Kildare more particularly described in the First Schedule hereto, subject to and with the benefit of the Leases and Management Agreements which are to be granted by the Developer and subject to the rights of the Purchaser and its members.*

3.2 The transfer will be completed at the expiration of 28 days (twenty eight days) from the service of a notice requiring completion served by the Developer's Solicitor on the Purchaser provided always that the notice will be served within the Perpetuity Period. Completion will take place at the office of the Developer's Solicitor.

3.3 Pending completion the Developer shall subject to the payment to it of the estate service charge provided for in the Management Agreement, carryout (sic) all of its obligations contained in the said Management Agreement and on completion all service charges whether in credit or in arrears shall be apportioned as between the Developer and the Management Company as of the completion date.

...

3.6 Notwithstanding that the Estate is in the process of being developed as a Business Park the Developer may alter the development as the Developer sees fit and there is reserved to the Developer full right and liberty to alter the Development as the Developer may think fit and reserved to the Developer full right and liberty to vary the location, layout and extent of the Estate, the sites on it, the car parking spaces and the Estate Common Areas including the exclusion of any additional lands. Accordingly the Developer may make Lease, Assignments, Transfers or Assurance of any part or

parts of the Estate free form (sic) any conditions or covenants contained in any Lease or Management Agreement.

3.7 The terms of the General Conditions of Sale (1995 edition) of the Law Society of Ireland shall where appropriate be deemed to be incorporated in to this Agreement.

FIRST SCHEDULE

(The Estate Common Areas)

The roads, paths, car parks, gardens, open spaces, water features, ponds, lakes, grass, margins, security huts and any other parts of the Estate for which no owner or lessee is directly responsible.

SECOND SCHEDULE

(The Title)

1. *Folio and file plan 34112F County Kildare*
2. *Copy Agreement for Sale dated the 6th day of April 2001 and made between Ray Grehan and Danny Grehan and Glenkerrin Homes Limited."*

9. The bank provided the funds to Glenkerrin to enable it to develop the business campus on the lands. On 10 December 2003, Glenkerrin granted a debenture to the bank ("the debenture of 2003") securing all sums due by Glenkerrin to the bank and granting the bank an equitable charge over:-

"ALL THAT all or any future estate or interest in the legally mortgaged property and all estates or interest in all other freehold or leasehold property (except the legally mortgaged property) now or at any time during the continuance of this security belonging to or charged to the Company and/or the proceeds of any sale thereof."

10. Glenkerrin covenanted to pay the principal monies due to the bank. Clause 4 of the debenture provided that Glenkerrin, as beneficial owner, granted the bank a first specific or fixed charge over the equitable property of the company. This was defined in the second schedule to the deed to include all estates or interests in all freehold property (except the legally mortgaged property) now or at any time during the continuance of the security belonging or charged to the company and/or the proceeds of any sale thereof. It was accepted that this included the interest of Glenkerrin in the lands pursuant to the contract for sale of 6 April 2001, and the proceeds of the sale of any unit in the estate.

11. Clause 9 entitled the bank to appoint a receiver to act as receiver and manager at any time after the principal monies secured became payable to the bank. A receiver if so appointed has express powers to:-

> *"(i) Take possession of, collect and get in the property and assets of the Company mortgaged/charged by the Mortgage Debenture;*
>
> *(ii) Carry on or concur in the carrying on of the business of the Company or any part thereof;*
>
> *(iii) Institute or defend proceedings …*
>
> *(iv) To sell or dispose of or concur in the selling or disposing of all or any of the property and assets of the Company mortgaged/charged by this Mortgage Debenture at such price and on such terms as the Bank shall deem appropriate in the interest of the beneficial realisation of such property and assets to carry any such sale or disposition into effect by Deed or other assurance in the name and on behalf of the Company or otherwise to grant, convey or transfer the same to a purchaser".*

12. Clause 9(d) provides that all monies received by the receiver "… be applied in or towards satisfaction of the Mortgage Debenture". The clause provides that the receiver shall

be the agent of the company and that the company should be "wholly responsible" for the acts or defaults of the receiver and his remuneration.

13. Glenkerrin proceeded to develop the business campus on the lands. It sold units by way of long leases to purchasers. As part of the sale, the purchasers agreed to become members of the management company of the estate (the defendant) and to pay service charges for the common areas of the estate. The purchase included Leases of Easements with the first and second named plaintiff, Glenkerrin, the defendant and the purchaser. The intention was that as each purchaser entered into the same covenants and acquired the same or comparable easements and obligations, the management company, as party to each such lease and as the owner of the freehold to be transferred pursuant to the Management Agreement, would be able to maintain the common areas of the estate and, if necessary, enforce the covenants against each unit owner/occupier for the benefit of all.

14. The campus was to include a car park, which included basement or underground levels. This was constructed by 2004, but the underground portion thereof was not required by the unit owners then in occupation of the campus as there was sufficient surface car parking available while the campus was not fully occupied. It was cordoned off and not in use. Specifically, the defendant did not have access to the underground car park prior to the events the subject of these proceedings.

15. The bank continued to fund the first and second named plaintiffs and Glenkerrin. By letter of sanction dated 8 January 2009, the bank granted or extended seven facilities in favour of the first and second named plaintiffs. The security comprised *inter alia* the legal charge of 2000 from the first and second named plaintiffs over the Folio. The facility was accepted on 27 January 2009 and the funds drawn down.

16. On 16 September 2009, the bank issued Glenkerrin with a letter of sanction in respect of twenty facilities which was accepted on 17 September 2009. The security comprised *inter*

alia the debenture of 2003 over all assets of Glenkerrin, an assignment over Glenkerrin's beneficial interest in the site at Maynooth Business Campus and an unlimited letter of guarantee dated 10 December 2003 in favour of the bank from the first and second named plaintiffs in respect of the obligations of Glenkerrin. The letter of guarantee was stated to be supported. Funds were drawn down and utilised *inter alia* to carry out works on the lands.

17. On 9 July 2010, the facilities of the first and second named plaintiffs and Glenkerrin, the charge of 2000 and the debenture of 2003 were acquired by the NALM. On 28 January 2019, the acquisition of these facilities and securities was certified pursuant to s.108 of the National Assets Management Act 2009 by NALM. On 29 April 2011, NALM demanded repayment by the first and second named plaintiffs of the facilities dated 8 January 2009 in the sum of €20,385,327.06 and demanded repayment by Glenkerrin of the facilities dated 16 September 2009 in the sum of €195,664,736.33. The sums were not repaid. On 3 May 2011, by deed of appointment of receivers, pursuant to the charge of 2000 and the debenture of 2003, the fourth and fifth named plaintiffs were appointed as statutory receivers over the interest of the first and second named plaintiffs, pursuant to the charge of 2000, and the interest of Glenkerrin, pursuant to the debenture of 2003.

18. On 9 November 2011, judgment was granted in favour of NALM and against the first named plaintiff in the sum of €269,619,927.87 and against the second named plaintiff in the sum of €264,869,326.07.

The Sale of Unit C

19. Following their appointment on 3 May 2011, the Receivers entered into various sales of units and sites on the estate. As is discussed more fully below, in so doing they entered into Leases of Easements along with the first and second named plaintiffs, Glenkerrin, the defendant, and each of the purchasers of the units. By 2017, the sole remaining unit to be disposed of was Block C and the Link Building ("Unit C"). In June 2017, the Receivers

commenced marketing the sale of Unit C. The detailed facts surrounding the sale of Unit C are fully set out in the judgment of the High Court. For the purposes of this judgment, it suffices to say that contracts issued to the prospective purchaser's solicitors, Mason Hayes & Curran, on 20 November 2017 and a draft Lease of Easements was furnished to the defendant on 20 December 2017 for execution. On 23 March 2018, a contract for the sale of Unit C was entered into and on 28 March 2018 a further draft Lease of Easements in respect of Unit C was provided to the defendant. The defendant's solicitors raised concerns regarding the condition of the car park and in April 2018, an engineer instructed on behalf of the defendant estimated that the cost of completing the underground car park was between €1 million and €2 million. The solicitor having carriage of the sale of Unit C on behalf of the Receivers did not engage with the concerns of the defendant regarding the condition of the underground car park. In May 2018, the defendant furnished a report from J.J. Campbell and Associates Limited, engineers, which estimated that the potential cost of remedial works could exceed €3 million.

20. At this point in time it appears that the primary concern of the defendant was that, upon completion of the sale of Unit C, the first and second named plaintiffs and Glenkerrin, acting through the Receivers, would serve notices under the Management Agreement to close the sale of the Estate Common Areas and as a result the defendant would be required to meet the very extensive cost of remediating the car park. The defendant therefore refused to join in the Lease of Easements to facilitate the closing of the sale of Unit C, pending a resolution of the issues surrounding the car park.

The commencement of the proceedings

21. Mason Hayes & Curran, solicitors acting for the purchasers of Unit C, threatened to institute proceedings seeking specific performance of the contract for sale. Facing this threat, these proceedings were instituted seeking to compel the defendant to enter into the

Lease of Easements to enable the sale of Unit C to be completed. The Receivers are parties to the proceedings. One of the reliefs sought is an order for specific performance of the Management Agreement. The implications, if any, of this, are considered below.

22. After the delivery of the defence and counterclaim, the plaintiffs sought an injunction compelling the defendant to execute the Lease of Easements for Unit C to enable the sale to close and to avoid the threatened specific performance proceedings. The parties reached a compromise whereby, without prejudice to the legal position of any party to the proceedings, the defendant agreed to execute the Lease of Easements, and related documents, and the plaintiffs agreed that the defendant could deliver an amended defence and counterclaim, that they would not bring a motion for security for costs arising on the counterclaim, that the Receivers would continue as receivers over the lands pending delivery of judgment by the High Court and that the plaintiffs would refrain from serving the 28-day notice on the defendant referred to in Clause 3.2 of the Management Agreement pending judgment, and would take responsibility for the underground car park until the trial of the action.

23. This effectively, though not entirely, disposed of the case of the plaintiffs. When the matter came to trial, the true issue for resolution was the defendant's counterclaim and the plaintiffs' defence thereto.

The defence and counterclaim

24. In its amended defence and counterclaim, the defendant pleaded that it was neither required nor obligated to assume responsibility for the Estate Common Areas, or the services, until such time as Glenkerrin completed the development of the estate as a business park and the Estate Common Areas "in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the grant of planning permission, building regulations and standards". It pleaded that the effect of the Management Agreement was that Glenkerrin was under an obligation to develop and

complete the estate, including the Estate Common Areas, and that Glenkerrin remained liable for any defects or liabilities arising pertaining to the Estate Common Areas. It pleaded that the car park was not properly constructed and/or repaired and that, pending the carrying out of investigative work, the estimated cost of remediating the default was €2,258,000, exclusive of VAT.

25. The defendant admitted that no interest in the Estate Common Areas was to be transferred to it until the expiration of twenty-eight days from service by Glenkerrin of a notice requiring completion on the defendant, which had not yet occurred, but it anticipated that the transfer was imminent. At para. 8.4 it pleaded:-

"It is admitted that the Defendant has not yet become entitled under the Management Agreement to call for the transfer to it of the Estate Common Areas and the reversion."

26. By its counterclaim, the defendant pleaded:-

"30. In accordance with the terms of the Management Agreement the Defendant is to acquire the Estate Common Areas (as defined in the Management Agreement) upon completion of the development of the Estate by Glenkerrin Homes in accordance with the terms of the Management Agreement and following the service of notice pursuant to Clause 3.2 of the Management Agreement.

31. It is an express and/or implied term of the Management Agreement that:

31.1. Glenkerrin Homes complete the development of the Estate (as defined in the Management Agreement) as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public.

31.2. The Defendant is neither required nor obligated to acquire the Estate Common Areas until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public."

27. In the alternative, the defendant sought an order rectifying the Management Agreement to like effect. In the prayer for relief to the counterclaim, the defendant sought declarations in terms of the two alleged implied terms and, in the alternative, an order declaring that the two implied terms pleaded were terms of the Management Agreement, together with a declaration that Glenkerrin Homes has failed to complete the development of the estate, including the Estate Common Areas, in accordance with the terms of the Management Agreement.

28. The defendant did not seek an order for specific performance by Glenkerrin, or the Receivers, of the Management Agreement and it did not plead that the Receivers had any liability on foot of the Management Agreement. No application was made to amend the pleadings. It follows that the defendant's case did not include a claim that it had a right to require the first and second named plaintiffs or Glenkerrin, or the Receivers, to carry out works to complete the common areas and, in particular, the car park. The case as pleaded was that the plaintiffs, Glenkerrin and the Receivers were not permitted to transfer the common areas to the defendant **until such time as Glenkerrin has completed the works to the common areas**. At para. 75 of the written submissions to the High Court, the

defendant said that no claim was made by the defendant to an entitlement to the proceeds of sale of any assets that formed part of the receivership.

Alteration of the position of the defendant

29. This position had changed by the end of the hearing. In written submissions at the conclusion of the case in the High Court, the defendant argued that it was necessary to consider whether the Receivers, as opposed to Glenkerrin, were liable to perform the obligations of Glenkerrin pursuant to the Management Agreement. At para. 117 they said:-

> *"In this regard the Management Company [the defendant] contends that the Receivers have adopted the Management Agreement and, accordingly, are liable to perform same. In practical terms this means the Receivers are obligated to complete the Common Areas, including the Car Park, and transfer same to the Management Company [the defendant] thereafter given that the sale of the last unit is near completion."*

30. The defendant contended that the Receivers adopted the Management Agreement, and the obligations under the Management Agreement, on the basis that:

1. The Receivers were required to rely upon the Management Agreement to ensure that any purchaser would have the use of the common areas post transfer to the management company, and thus to provide good and marketable title to a unit to a purchaser.
2. It was not necessary to include the use of the common areas when selling a unit. In choosing to sell a unit with the benefit of the common areas, they adopted the Management Agreement.
3. As statutory receivers appointed by NAMA it was within their power to cancel the Management Agreement if they did not wish to be a party to it. A failure to

cancel amounted to an adoption of the Management Agreement in the circumstances.

4. It was unnecessary to name the receivers as party to the Leases of Easements but they were so named and, therefore, it could not be said that they were simply acting as agents for Glenkerrin.

5. The Receivers sold units in the knowledge of structural issues pertaining to the car park, prior to receipt of the report of J.J. Campbell and Associates Ltd. in May 2018.

6. The Receivers carried out works to the car park between 2016 and 2019 and thereby acknowledged their obligation, in respect of the car park, to complete the car park.

7. The Receivers are named as parties in the proceedings and are seeking to rely on the Management Agreement to advance their claim against the defendant.

The decision of the High Court

31. The trial judge held that the Management Agreement is to be construed as imposing a legal obligation on the developer (Glenkerrin) to complete the campus, including the car park, to a standard such that it can be certified in accordance with General Condition 36 of the Law Society General Conditions of Sale (1995 Edition). He held that the Receivers adopted the Management Agreement, as argued by the defendant, and that the "receivership" thereby became liable for the developer's obligations under the Management Agreement and, by extension, for remedying the defects in the Estate Common Areas of the campus. The trial judge reached this conclusion on the basis that the Receivers could have chosen to sell the units without the benefit of the Leases of Easements over the common areas, including the use of the car parking spaces.

32. The High Court decided that it was appropriate to imply a term into the Management Agreement to the effect that the defendant was required to execute the Lease of Easements for Unit C but that, in the circumstances of the case, the defendant was entitled to refuse to comply with this obligation until the Receivers gave an undertaking to complete the car park in compliance with General Condition 36, or to hold the proceeds of sale in escrow in order to carry out and fund those works, pending the resolution of the dispute.

33. The trial judge also implied a term that:-

> *"... Glenkerrin/the Receivers must serve the 28 day completion notice referred to at clause 3.2 "as soon as is practicable" after the sale of the last unit"*

34. The trial judge then found that it was a requirement for the plaintiffs **now** to produce evidence of substantial compliance under General Condition 36 of the Law Society General Conditions of Sale (1995 Edition).

35. The trial judge held that he was required to make findings as regards the state or condition of the car park. He held that the car park was structurally defective, in breach of the Building Regulations 1991 and the Buildings Regulations 1997, and the technical guidance documents I.S. 326 of 1995 and BS 8110 (1995).

36. The trial judge held that the structural defects were such that the common areas were not "complete" and certification in accordance with General Condition 36 could not be provided until remedial works were carried out. He held that the car park must be satisfactorily completed by the developer before the obligation of maintenance, repair or renewal falls on the shoulders of the unit holders/defendant. He held that the obligation to "repair, maintain and renew" does not encompass the original capital expenditure required to complete the development and that the costs of the investigative and remedial work were to be funded from the proceeds of the sale of Unit C.

37. By his order of 20 December 2019, the trial judge declared and ordered that:-

"1 the Management Agreement dated 6 April 2001 is to be construed as imposing a legal obligation on the Third Plaintiff, Glenkerrin Homes Unlimited Company (In Receivership) (hereinafter "Glenkerrin Homes"), to complete the Campus including the carpark to a standard such that it can be certified in accordance with General Condition 36 of the Law Society General Conditions of Sale (1995 Edition) as being in "substantial compliance" with planning permission, plans and specifications, the Building Control Act 1990, and Building Regulations made thereunder.

2 the said legal obligation is also owed by the Fourth and Fifth Plaintiffs (hereinafter the "Receivers") who adopted the Management Agreement and who are now estopped or otherwise not entitled to disclaim or repudiate the Management Agreement.

3 it is an implied term of the Management Agreement that Glenkerrin Homes / the Receivers must serve the 28 day completion notice referred to at clause 3.2 "as soon as is practicable" after the sale of the last unit. Although the last unit has been sold it is not "practicable" for Glenkerrin Homes / the Receivers to serve such a notice while they are not in a position to furnish certification in accordance with General Condition 36. The date for service must therefore be postponed until the remedial works to the car park are carried out and certified.

4 structural defects in the car park are such that the Campus common areas are not "complete" and certification in accordance with General Condition 36 cannot be provided until remedial works, including (if necessary) replacement of the asphalt deck, to the car park are carried out.

5 A declaration that it was and is an implied term of the Management Agreement that the Defendant was and is required to execute a Lease of Easements with Glenkerrin Homes and each purchaser of a unit in the form furnished prior to the

execution of the Management Agreement. However, on the facts of this case, the Defendant was entitled to refuse to execute the Lease of Easements in respect of the sale of Block C and the Link Building absent appropriate undertakings from the Receivers to carry out remedial works to the carpark or place the proceeds of sale in escrow pending the determination of the dispute as to where the legal obligation to carry out these works rested.

6 Glenkerrin Homes and the Receivers carry out a full intrusive structural investigation of the car park in order to ascertain the full extent of the remedial works required.

7 Glenkerrin Homes and the Receivers (to the extent only that they can do so by expending the net funds to which they are entitled arising from the sale of Block C and the Link Building) carry out the remedial works as soon as is practicable.

8 the process of establishing the extent of the remedial works required, and the carrying out of those works, must be transparent and to achieve this the Defendant shall –

(i) be afforded the opportunity to have its own engineering or other experts informed, by being present at inspections, opening up, and at critical stages of the work, and by being briefed with all relevant scoping and remedial work specifications/plans or other relevant documents, and

(ii) either directly or through its agents be kept informed and copied in a timely fashion with all relevant documentation, and

(iii) be afforded the opportunity to express views on what is proposed, and on the works as carried out.

9 the remedial works must be funded from the net proceeds of sale of Block C and the Link Building, such funds to be held by the Receivers or to their order and

disbursed for this purpose until the remedial works are complete and duly certified as substantially compliant for the purposes of General condition 36 and the transfer of the estate common areas to the Defendant is completed."

The plaintiffs appealed the decision of the High Court. The defendant opposed the appeal and cross-appealed the declaration that it was an implied term of the Management Agreement that the defendant was required to execute a Lease of Easements with Glenkerrin and each purchaser of a unit in the form furnished prior to the execution of the Management Agreement.

Discussion

Should the Receivers be permitted to remit the entire proceeds of sale to the secured charge holder without first applying same to remediate the car park and complete the Estate Common Areas?

38. Following the compromise of the application for an injunction sought by the plaintiffs against the defendant, the defendant executed the Lease of Easements in respect of Unit C and the sale by the first and second named plaintiffs and Glenkerrin, acting through the Receivers, to the purchaser has closed. The works required to complete the proper development of the Estate Common Areas, including the works to the car park, have not been carried out and, accordingly, Glenkerrin is not in a position to transfer the common areas to the defendant in accordance with the Management Agreement.

39. The lands sold comprised in Unit C were charged by the first and second named plaintiffs in favour of the bank on 1 September 2000. The mortgage is an "all sums due" mortgage and includes the liabilities of the first and second named plaintiffs to the bank on foot of guarantees of liabilities due to the bank. The charge was entered on the Folio on 7 December 2000. By Clause 7(c), the first and second named plaintiffs covenanted not to

convey, transfer, assign, demise or let or part with possession of the mortgaged property or any part thereof without the prior consent in writing of the bank.

40. The Management Agreement was entered into after the registration of the charge in favour of the bank. While there is no evidence that the bank gave its prior agreement to either of the two contracts for sale of 2001, no point has been taken that it was not forthcoming and this judgment proceeds on the basis that there was no breach of Clause 7(c). Clearly, this assumption does not bind the bank or its assignee, NALM, who are not parties to these proceedings.

41. The title of the property to be sold pursuant to the Management Agreement comprises the Folio and file plan 34112F County Kildare and a Copy Agreement for Sale dated 6 April 2001 made between Ray Grehan and Danny Grehan and Glenkerrin Homes Limited. The terms of the General Conditions of Sale (1995 Edition) of the Law Society were incorporated into the agreement. This included General Condition 6:-

> *"The documents specified in the Documents Schedule or copies thereof have been available for inspection by the Purchaser or his Solicitor prior to the sale. If all or any of the subject property is stated in the Particulars or in the Special Conditions to be held under a lease or to be subject to any covenants, conditions, rights, liabilities or restrictions, and the lease or other document containing the same is specified in the Documents Schedule, the Purchaser, whether availing of such opportunity of inspection or not, shall be deemed to have purchased with full knowledge of the contents thereof, notwithstanding any partial statement of such contents in the Particulars or in the Conditions."*

It is thus clear that, as a matter of law and contract, the defendant was on notice that any interest it acquired under the Management Agreement was subject to the prior charge in

favour of the bank and was bound by the charge registered to secure the indebtedness of the first and second named plaintiffs to the bank.

42. As previously stated, the facilities of the first and second named plaintiffs and Glenkerrin, and the securities held by the bank, were acquired by NALM pursuant to the National Assets Management Act 2009 on or about 9 July 2010, and the acquisition was certified pursuant to s.108 of the Act by NALM in a certificate dated 28 January 2019. Judgment was entered on 9 November 2011 against the first named plaintiff in the sum of €269,619,927.87 and against the second named plaintiff in the sum of €264,869,326.07. Neither judgment having been satisfied, the bank is therefore *prima facie* entitled to the entirety of the proceeds of sale of Unit C in partial satisfaction of this secured debt.

43. However, on the same day, 6 April 2001, and just prior to entering into the Management Agreement, the first and second named plaintiffs entered into a contract for sale of all the property comprised in the Folio to Glenkerrin. The purchase price was IR£12 million. There was no deposit and there was no closing date. Special Condition 5 provided that the purchaser, Glenkerrin, intended to lay out the land for development of a business park and the vendors, the first and second named plaintiffs, agreed in consideration of the purchase price to execute Deeds of Assurance of the individual sites comprised within the Folio in the form of leases to the individual sub-purchasers from Glenkerrin. As was not uncommon practice at the time, the interest of Glenkerrin in the lands "rested on contract". No transfer ever occurred and Glenkerrin never became the registered owner of the Folio.

44. The extent of its beneficial interest in the land is therefore governed by the principle in *Tempany v. Hynes* [1976] I.R. 101. No evidence was adduced of the payment of the purchase price or any part thereof by Glenkerrin to the first and second named plaintiffs. The defendant delivered interrogatories for the examination of the plaintiffs, but raised no issue on this point. The evidence established that many units were sold, though there was

no evidence as to how many were sold before the Receivers were appointed or the amount, if any, paid by Glenkerrin in part payment of the purchase price. Neither was there evidence as to the amount expended by Glenkerrin developing the estate. Thus, based on the evidence before the High Court, it could not be said that the first and second named plaintiffs held only a bare legal title to the lands, nor could the respective beneficial interests of the first and second named plaintiffs on the one hand and Glenkerrin on the other hand be ascertained.

45. The letter of sanction issued by the bank to Glenkerrin on 16 September 2009 replaced existing facilities held by Glenkerrin. The security required by the bank included the debenture of 2003 over all assets of Glenkerrin, an assignment over Glenkerrin's beneficial interest in the Maynooth Business Campus and an unlimited letter of guarantee dated 10 December 2003 in favour of the bank from the first and second named plaintiffs for the obligations of Glenkerrin, which was already held by the bank. The liabilities, therefore, of the first and second named plaintiffs included liability on foot of the unlimited guarantee of the liabilities of Glenkerrin. It follows that the sums due by Glenkerrin to the bank were secured by the charge of 2000 and the defendant did not demur with the plaintiffs' contention to this effect.

46. The debenture of 2003 created an equitable charge over the interest of Glenkerrin in the Folio. This was created after Glenkerrin and the defendant entered into the Management Agreement.

47. The issue is whether the claim of the defendant pursuant to the Management Agreement gives rise to a right to require that the proceeds of sale of Unit C be utilised to complete the works to the common areas, and in particular the car park, or whether they should be remitted to NALM in the usual way.

48. The defendant's argument is first of all predicated upon the assertion that the charge of 2000 secures only the bare legal interest of the first and second named plaintiffs and,

therefore, does not capture the proceeds of sale which, on the defendant's case, are due entirely to Glenkerrin. This is incorrect for a number of reasons. First, the charge secures the indebtedness of the registered owners. The fact that another party, Glenkerrin, has an equitable interest in the lands comprised in the Folio, does not alter this. Second, the first and second named plaintiffs have guaranteed the liabilities of Glenkerrin to the bank. Therefore, under the terms of the charge, these debts also are secured by the charge. The defendant's interest in the lands pursuant to the Management Agreement is subject to these prior interests. The equitable interest of the defendant under the Management Agreement cannot defeat the prior legal charge of 2000 registered by the bank.

49. Even if this were not the case, the absolute height of the claim which the defendant can advance to a proprietary interest in the lands comprised in the Folio is to the Estate Common Areas, as defined in the agreement. The Estate Common Areas are defined in the agreement as the part of the estate not included in the leased sites and described in the first schedule. It can never extend to Unit C which was sold to the purchaser after the commencement of these proceedings. It follows that it can have no prior claim *in rem* to the monies representing the purchase price for that sale. The fact that the sale of Unit C includes the benefit of the Lease of Easements over the common areas does not alter the fact that the defendant has no prior claim to the proceeds of sale in respect of the non-common areas of the estate, including Unit C.

50. By virtue of the terms of the debenture of 2003, the proceeds of the sale of Unit C have been equitably assigned to the bank. They are not in equity the monies of Glenkerrin. If, as I have concluded, the defendant has no prior claim *in rem* to the proceeds of sale of Unit C, it can only have an unsecured creditor's claim to have work carried out to complete the common areas of the estate, including the car park. The fact that the Management Agreement forms part of the title to the estate, and forms part of the title of each of the

purchasers of each of the units, does not elevate the claim of the defendant against either Glenkerrin or the Receivers into a claim *in rem*.

51. The defendant submits in the alternative that if it is incorrect and the charge of 2000 is not confined to the bare legal interest of the first and second named plaintiffs, nonetheless, the requirement to execute remedial works to the common areas amounts to a claim *in rem*. Even at its height, this claim could not defeat the claim based on the charge of 2000 and could only assist the defendant in claiming priority over the debenture of 2003.

52. The first case relevant to this argument is *Moylist Construction Limited v. Doheny & Ors.* [2010] IEHC 162. There, Laffoy J. considered the competing interests of receivers appointed on foot of a registered charge and the rights of a party under a building agreement entered into with the owner of the lands after the charge was created but before it was registered. The plaintiff in that case argued that under the building agreement it had a contractual licence to remain in possession of the development until the works were completed, at which stage the contractual licence would come to an end. The works had not been completed and accordingly vis-à-vis the owner, the fourth named defendant, the plaintiff was entitled to remain in possession until it was paid the balance of the monies due to it by the fourth named defendant. The plaintiff argued that neither the first named defendant, as receiver, nor the third named defendant, as mortgagee, could be in any better position than the fourth named defendant. Central to this argument was whether the receiver was bound by the building agreement concluded prior to his appointment. Laffoy J. rejected the argument that the receiver was bound by the building agreement. She approved the passage in Courtney on the *Law of Private Companies* (2nd ed., Tottel Publishing, 2000) outlining the position of a receiver at para. 22.063:-

"A receiver will not as a general rule, in the absence of bad faith, while acting within his authority be liable for a breach of contract by the company, nor be guilty of inducing a breach of contract."

53. She quoted with approval from the judgment of Sir Neil Lawson in the case of *Lathia v. Dronsfield Bros. Limited* [1987] BCLC 321 at p. 324:-

"The receivers can adopt or decline to adopt a contract which the company has entered into and which is unexecuted. It follows from this, and the agency clause, that the agent is personally immune from claims for damages for breach of contract or procurement of breach of contract. The agent has an immunity from a claim for inducing breach of contract unless he has not acted bona fide or acted outside of the scope of his authority, i.e. he has not acted as agent.

... So far as the authority is concerned, the authority of the receivers is to be found under cl 8 of the debenture. Furthermore, their authority resides on a general obligation to act so as to effect the best realisation of the company's assets for the debenture holders.

On authority, one must look at the context to determine to whom the duties are owed. Primarily, they owe a duty to the debenture holders, and also as agents of the company. In my judgment, they do not owe a duty to the general creditors, to contributors, to officers of the company and members."

54. She affirmed and followed the decision of McLoughlin J. in the Supreme Court in *Ardmore Studios (Ireland) Limited v. Lynch* [1965] I.R. 1, where the court held that even if the alleged agreement between the company and the union was in existence at the date of the appointment of the receiver, it was not binding upon him:-

"As agent for the company, the company is made fully responsible for his acts but it is not a corollary to this that he is bound by all Company contracts and agreements entered into by the Company before the date of his appointment."

55. She cited the decision of Vinelott J. in *Astor Chemicals v. Synthetic Technology* [1990] BCLC 1, at p. 9, as follows:-

"To that extent the receiver is in a better position than the company. Similar statements will be found in other leading textbooks. The principles are most fully stated in a passage in Lightman and Moss in Law of Receivers of Companies (1986) .... It is in these terms (at p. 81)

(1) If a person is granted a charge on property with actual knowledge of a contractual obligation in favour of another person inconsistent either with the grant or enforcement of the charge, the grant or enforcement will constitute a tort and an injunction may be granted to restrain its commission.

(2) In the absence of such knowledge, the chargee (and the receiver as his agent) is free (vis-à-vis the third parties) to cause the company to repudiate or ignore its outstanding contractual obligations to third parties, though this course may give rise to a claim in respect of the loss occasioned by the company if involving an unnecessary and unreasonable exercise of their powers.

(3) The receiver as agent for the company is equally free of liability to third parties for causing the company to breach its contracts with them, for no person can be liable for the tort of interference with contractual relations if he acts as agent for one of the contracting parties.....

(4) Neither the receiver nor the debenture holder can interfere with existing equitable rights of third parties over property of the company having priority to the charge. A threat of such action may be restrained by injunction …"

Laffoy J. concluded that:-

> *"... the first defendant, as receiver, in exercise of his powers on foot of the mortgage was entitled to enter the development and take possession of it to the exclusion of the plaintiff and notwithstanding whatever rights the plaintiff had against the fourth defendant under the building agreement."*

She clearly upheld the position that the receiver appointed on foot of a charge is not bound by contracts and agreements entered into by the company before his appointment, save for those which confer an interest in the property in priority to the charge pursuant to which he was appointed. Applying this principle to the facts in this case, the Receivers *prima facie* are not bound by the Management Agreement as it is a pre-appointment contract entered into by the first and second named plaintiffs and Glenkerrin.

56. The next issue to consider is whether the fact that the Leases of Easements form part of the title of each of the purchasers of units in the campus together with the right of purchasers to become members of the management company of the estate alters this position. The nature of a claim of a management company, of a multi-unit development, for the completion of works to the common areas, such as arises in this case, was explored in two recent decisions of the High Court. The first is *Lee Towers Management Company Limited v. Lance Investments Limited (In Liquidation) & Ors*. [2018] IEHC 444. This was an appeal against an order from the Circuit Court made under the Multi-Unit Development Act 2011 ("the MUD Act") by a management company against the developer which was in liquidation. Baker J. held that there was a distinction between the right to call for the transfer of the common areas on the one hand, and the right to call upon the developer to remediate defects in the common areas on the other. The management company had a right to call for the transfer of the common areas from the developer which was a pre-existing right *in rem.* Accordingly, it could be enforced notwithstanding the liquidation of the developer. She

contrasted this with the order of the Circuit Court which required the developer to expend monies on works of refurbishment and repair and the reimbursement of monies already expended by the management company. At para. 56 of her judgment she said:-

> *"…it seems to me that an obligation of this nature to expend money is not amenable to an action in rem, or the classic remedy of specific performance, save perhaps where the claim is founded in breach of covenant."*

57. She did observe that no argument had been advanced that a *"mercantile imperative such as the desirability to carry out works of repair might improve the marketability of the property"* was advanced before her. At paras. 72-78 she analysed the position and it is worth citing the passages in full:-

> *"72. The MUD Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building Regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 of the MUD Act has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which creates a proprietary interest which might give rise to an argument that the remedy lies in rem.*
>
> *73. Further, even in the case of a claim for specific performance of a contract for the sale of lands, the court may decline to make an order for specific performance on account of the impecuniosity of a purchaser, as is clear from Aranbel Ltd. v. Darcy [2010] IEHC 272, [2010] 3 IR 769, or where another impossibility of performance renders the making of such an order inappropriate. The remedy of specific performance may in a suitable case be refused and damages granted in lieu.*
>
> *74. The Companies are insolvent, and on that basis alone, the orders made by the Circuit Court are incapable of performance unless the argument advanced by counsel*

for Lee Towers is correct, namely that the making of an order under s. 24(5) of the MUD Act displaces the statutory scheme of payments on liquidation, and creates in the owners' management company a right to enforce the obligations in priority to other creditors because, as he argues, the mandatory order must be performed, and also because the legislative scheme of the MUD Act makes it clear that the transfer of the common areas and the reversions do not in itself relieve a developer from obligations in a development agreement.

75. I agree with the submission of counsel for Lee Towers that the obligation to transfer the common areas and the reversions is one which must be performed by the liquidator, being it an obligation which derived from the disposal scheme. This means, in practice, that the liquidator must realise and distribute the assets of the Companies in a manner that respects those rights. However, I do not agree that the Companies must complete the common areas to the appropriate statutory standard prior to the transfer to Lee Towers, if by doing so, they must expend monies over which they no longer have control as a result of the liquidation, and where the assets are fixed with the statutory trust.

76. Counsel for Lee Towers makes the obviously correct argument that the MUD Act does not require an owners' management company to accept without demur an assurance of the common areas and reversions when these are inherently defective and where, as in the present case, the defects are said to render the premises dangerous and in breach of other statutory codes. The management company does not 'accept' the assurance in that sense, and is entitled under the scheme of the Act notwithstanding that the reversions and common areas have been assured to nonetheless seek and obtain a remedial works order under the MUD Act.

77. The Act provides a remedy and it has been invoked. The owners' management company is precisely in the position that the MUD Act intended and has available to it statutory remedies, as well as remedies in contract. But the effect of the order of the Circuit Court is that the owners' management company is an unsecured creditor. No provision exists to elevate a remedial order under s. 24(5) to preferential status or to displace the scheme of distributions on an insolvent liquidator. The making of a court order does not in itself give such a priority.

78. The remedial order is not one to which an owners' management company is entitled as of right, and the court must be satisfied that the making of the order is warranted on the facts. A remedial order is of a character wholly different from an order to complete the conveyancing for this reason, and cannot be said to bind a company in liquidation in the sense to which James L.J. referred in In re David Lloyd. The order to complete the conveyancing is one made to the person entitled as of right. A remedial order, on the other hand, is made only when the court is satisfied the contractual obligations have not been met, and the right crystallises only when the court so determines."

58. This analysis of the claim of a management company to require an insolvent developer to carry out remediation works applies equally to a developer in receivership. The fact that the debtor is in receivership means that rules of priority apply to the disbursement of the funds of the company or the individual over whose property the receiver has been appointed. In this case, the relevant claim is that of the secured creditor to the proceeds of the sale of Unit C, and the unsecured claim of the management company to remedial works to the Estate Common Areas.

59. Counsel on behalf of the defendant emphasised the fact that the desirability of carrying out works of repair which might improve the marketability of the property had not been

argued in *Lee Towers*, while it was strongly urged in the present case. However, in my judgment this does not alter the analysis. In a receivership, the question of the best means of realising the security is one for the receiver. If the receiver determines that the expenditure of monies will ultimately improve the realisation of the security then the receiver is free to incur such expenditure and carry out such works as he deems appropriate (always assuming that he has power so to do). I cannot see how a counterparty to a contract with the company in receivership can compel a receiver to expend monies if the receiver has determined that such expenditure would not increase the value of the asset for the benefit of the secured creditor. It follows that, in my judgment, the distinction sought to be advanced does not assist the defendant in this case. It remains the case that any claim to have works carried out to complete or remediate the car park is no more than a right *in personam*. It is an unsecured right, a claim which arises in respect of a contract which predates the appointment of the receiver and so is a claim which ranks in priority after the claim of the secured creditor.

60. The second recent decision of the High Court is that in *Paddy Burke (Builders) Limited (in Liquidation and in Receivership) v. Tullyvaraga Management Company Limited* [2020] IEHC 170**.** Here, a receiver had been appointed over part of a residential development governed by the MUD Act. The receiver was seeking to sell the unsold lots and a portion of the common areas to a third party. The management company sought orders which would require the use of the sale proceeds to remediate the outstanding fire safety issues in relation to the common areas of the unsold portion of the development.

61. At paras. 37 and 40 of the judgment, McDonald J. held:-

> *"37. ...there is no evidence that Anglo had actual knowledge, before the 2004 mortgage was created, that the plaintiff would enter into a management agreement with the management company on the terms set out in any of the management agreements of 2005 or 2006. In the absence of such knowledge - and in circumstances*

where the 2004 mortgage pre-dates the management agreements of 2005 and 2006 – Anglo was not bound by the terms of any of the management agreements. Furthermore, as the passage from Laffoy J.'s judgment highlights, there is nothing inconsistent between the creation of the management agreements and the pre-existing mortgage. The management agreements, like the building agreement in Moylist, remain fully enforceable against the plaintiff but they do not have priority over the 2004 mortgage in the absence of Anglo's consent or, at the very least, Anglo's pre-existing knowledge of their terms at the time of execution of the 2004 mortgage. In the absence of evidence of such consent or pre-existing knowledge on the part of Anglo, Promontoria (as successor in title to Anglo) is entitled to proceed to enforce its rights under the 2004 mortgage in priority to any claim that the management company may wish to pursue under the management agreements.

…

40. I have also not lost sight of the argument made by the management company that it is entitled to specific performance of the management agreements, and that this entitlement is not affected by the appointment of a receiver. However, it seems to me that this argument is misconceived. It is clear from the judgment of Laffoy J. in Moylist, that neither a receiver nor a mortgagee can interfere with existing equitable rights of third parties over property of a mortgagor, where those rights have priority over the relevant mortgage. As Laffoy J. made clear in para. 35 of her judgment, (quoted above), if an enforceable contract is executed by a mortgagor which pre-dates the mortgage, and of which the mortgagee is aware, the mortgagee will be bound by that contract, and the third party will be protected. However, for the reasons discussed above, that principle is of no avail to the management company in circumstances where, as explained above, the 2004 mortgage has priority over the management

agreements, and in circumstances where there is no evidence of any consent by the mortgagee to the management agreements, or any knowledge, at the time of execution of the mortgage, of the terms of the proposed management agreements."

62. McDonald J. referred to the decision of Baker J. in *Lee Towers.* At para. 54 of his judgment, he expressed sympathy for the position in which the management company found itself, but he did not believe that the principles outlined by Baker J. could be validly distinguished. He noted that Baker J. confirmed, at para. 77 of her judgment, that the management company in that case was an unsecured creditor and that this was important in the context of the issue of priority as between the claim of the management company in the case before him on the one hand, and the rights of the secured creditor on the other hand. At para. 55, he held:-

"Accordingly, I do not believe that it is possible to disapply or distinguish the principles which emerge from the judgment of Baker J. in Lee Towers. To my mind, the judgment makes crystal clear that the 2011 Act did not go so far as to confer any priority status on a claim by a management company of a multi-unit development or on an order made by the Circuit Court under s. 24 (5)."

63. I agree with the analysis of Baker and McDonald JJ., and accept that *Lee Towers* and *Paddy Burke (Builders)* correctly state the law in relation to the claim of a management company for the completion of works to the common areas of a multi-unit development, whether or not it comes within the terms of the MUD Act. In all the circumstances, I am not persuaded that the claim of the defendant, for the carrying out of remedial works to the common areas, is anything other than an *in personam* contractual claim based on a pre-appointment contract, which, accordingly, has no priority over the claim of the secured creditor under either the charge of 2000 or the debenture of 2003.

64. That being so, the Receivers ought not to be required to lay out the proceeds of sale of the secured property in order to carry out works to the common areas of the estate which result in the debenture holder being deprived of its priority. It follows, in my judgment, that the Receivers are not only entitled but are required to remit the net proceeds of sale in respect of Unit C to the secured charge holder. They are not first of all to apply any of the proceeds of sale to remediate the car park and complete the Estate Common Areas.

Did the Receivers "adopt" the Management Agreement?

65. The trial judge held that because the Receivers adopted the Management Agreement they could not remit the proceeds of sale of Unit C to the charge holder, but instead must utilise the funds to complete the contract with the defendant and carry out all works necessary to ensure that the common areas, including the car park, could be transferred to the defendant. It is necessary to consider, therefore, the circumstances in which a receiver may be held to have assumed personal liability for a contract of the company.

66. Section 438(4) of the Companies Act 2014 provides that:-

> *"A receiver of the property of the company shall be personally liable on any contract entered into by him or her in the performance of his or her functions (whether such contract is entered into by the receiver in the name of such company or in his or her own name as receiver or otherwise) unless the contract provides that he or she is not to be personally liable on such contract."*

It is clear that if a receiver enters into a contract as an agent of the company during the receivership, the receiver will be personally liable unless the receiver excludes personal liability in respect of that contract. This is normally achieved by an express term in the contract to that effect. During the course of this receivership, the Receivers have entered into a number of contracts for the sale of units and for Leases of Easements. In respect of

each of those contracts, they have excluded their personal liability on foot of the contracts for sale and the Leases of Easements. Some examples of the Leases of Easements entered into during the receivership were proved in evidence and in each of them the Receivers expressly excluded personal liability in respect of the contract to which they were a party.

67. The contract for the sale of Unit C was between the first, second and third named plaintiffs "(in receivership)… each acting by and through their Joint Statutory Receivers, Paul McCann and Michael McAteer" and the purchaser. Special Condition 6.2 provides:-

> *"The Purchaser hereby acknowledges that the Receivers are executing this Contract in their capacity as Receivers over the assets of the Vendor only for the sole purpose of facilitating the acquisition of the Subject Property to the Purchaser. The Purchaser hereby irrevocably and unconditionally acknowledges and agrees that neither Paul McCann and Michael McAteer (whether in their capacity as joint statutory receivers or otherwise) nor their estate shall have any personal liability whatsoever arising out of or in connection with the terms and provisions of this Contract for Sale or any agreement or matter connected therewith and that Paul McCann and Michael McAteer shall not be required to give any undertaking, warranty or covenant in their capacity as Receivers."*

68. In the Lease of Easements, which was ultimately executed in respect of Unit C, the deed is between:

1. Ray Grehan and Danny Grehan acting by Michael McAteer and Paul McCann as joint statutory receivers (the "registered owners");
2. Glenkerrin Homes (in receivership) acting by Michael McAteer and Paul McCann as joint statutory receivers (the "lessor");
3. Michael McAteer and Paul McCann (collectively called the "joint statutory receivers");

4. Maynooth Business Campus Management Limited (the "management company");

5. National Asset Loan Management Designated Activity Company ("NALM"); and

6. The purchaser (the "lessee").

69. Clauses 12 and 13 of the Lease of Easements provides:-

"12. It is hereby expressly agreed and declared that nothing in this Lease will prejudice or affect the estate, person or properties of the Joint Statutory Receivers who join in this Lease solely in their capacity as Joint Statutory Receiver aforesaid and not otherwise.

13. The Lessee hereby acknowledges and accepts that each of the Joint Statutory Receivers is executing this Lease in their capacity as Joint Statutory Receiver only. For the avoidance of doubt, the Lessee hereby acknowledges and agrees that the Joint Statutory Receivers shall not have any personal liability under or in connection with his Lease or under any document executed pursuant to this Lease in any respect."

70. It is clear, and no argument was advanced to the contrary, that the Receivers availed of the power conferred under s.438(4) of the Act of 2014 to exclude all personal liability in respect of the contracts which they entered into on behalf of Glenkerrin, in receivership, and as receivers of the first and second named plaintiffs. Specifically, they excluded personal liability in relation to the contract for the sale of Unit C and of the associated Lease of Easements.

71. It is necessary, in light of this clear, consistent evidence, to consider the actions of the Receivers in relation to the Management Agreement to ascertain whether they have in fact adopted the Management Agreement, as was held in the High Court.

72. In relation to contracts entered into by the company prior to the appointment of a receiver, the position is that the receiver is not bound by pre-appointment contracts of the company unless the receiver, as a matter of law, adopts the contract and assumes a personal liability in respect of the pre-appointment contract. The leading authority for this is *Ardmore Studios (Ireland) Limited v. Lynch* [1965] I.R. 1. McLoughlin J. held:-

> *"It has long been recognised and established that receivers and managers so appointed are, by the effect of the statute law, or the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realise the security; that is the whole purpose of his appointment, and the powers which are conferred upon him, and which I have to some extent recited, are ... really ancillary to the main purpose of the appointment, which is the realisation by the mortgagee of the security (in this case, as commonly) by the sale of the assets.*
>
> *...*
>
> *As agent for the Company, the Company is made fully responsible for his [the receiver's] acts but it is not a corollary to this that he is bound by all Company contracts and agreements entered into by the Company before the date of his appointment."*

73. McLoughlin J. concluded that pre-appointment contracts are not binding upon a receiver upon his appointment. This principle has been reaffirmed in *Moylist Construction.*

74. As was observed by Lightman and Moss in *The Law of Administrators and Receivers of Companies* (6th ed., Sweet & Maxwell, 2017) at para. 10.018, in the case of contracts made prior to his appointment:-

> "…the office-holder generally has a free choice ***whether and for how long the company should give effect to them. He may decide that the contract shall continue in force so long as the company fulfils its obligations thereunder, or at any time may decide to repudiate leaving the other party with an unsecured claim for damages.***
>
> …
>
> ***If and when a receiver decides that the company shall repudiate the contract, the other party is left with his remedy in damages against the company and a claim as an unsecured creditor and has no claim against the receiver or his appointer, notwithstanding the receiver's interim adoption of the contracts in the course of managing the company's business.*** *This does not offend against basic conceptions of justice and fairness. The liability has been undertaken by the company at the inception of the contract and the benefit accrues to the company even when the receiver is in office. The other contracting party (like other creditors) must look to the company for payment. During the receivership the other contracting party is in no way inhibited from exercising his contractual rights and remedies."* (emphasis added)

75. In similar vein, Kerr and Hunter on *Receivers and Administrators* (19th ed., Sweet & Maxwell, 2009) state at para. 20:47:-

> *"… The appointment of a receiver with powers of management does not normally affect or terminate contracts, other than certain types of contracts of employment, as to which see generally Ch.22, below. In the case of certain contracts current at the date of his appointment, which he elects to cause the company to fulfil, then, in default of provision to the contrary, he will, like a receiver appointed by the court, he will be*

deemed to be carrying out contracts already entered into by the company. If he supplies goods or services in pursuance of such contracts, persons to whom he supplies such goods or services can set off against the price damages for subsequent breach.

This is commonly and conveniently, if inaccurately, spoken of as the receiver "adopting" the contract; ***merely by causing the company to carry it out, he does not render himself personally reliable thereon, as would be the case with a contract entered into do (sic) novo.*** *At any rate, unless to disregard the contract would adversely affect the realisation of the assets, or would seriously affect the trading prospects of the company in a case where it will probably continue to trade, the receiver is not under any obligation to "adopt" the contract, (except when he is actuated by bad faith) and he may safely disregard it."* (emphasis added)

76. Thus, a receiver may cause the company to continue to perform pre-appointment contracts for so long as, in his *bona fide* opinion, it is beneficial for the realisation of the security for the benefit of the secured creditor which is his primary obligation. Thereafter, he may repudiate that pre-appointment contract without exposing himself **or the secured creditor** to the risk of personal liability on foot of the contract by reason of having adopted it *pro tem.* A receiver does not owe any duty to the other contracting party to adopt the contract, and the remedy of the other party is a claim in damages against the company as an unsecured creditor, save where the claim is a claim *in rem* binding on the appointing debenture holder.

77. The reality of this principle for unsecured creditors can be seen in *Nicoll v. Cutts* [1985] BCLC 322, a decision of the Court of Appeal of England and Wales. The case related to the service contract of the managing director of a company to whom a receiver was appointed on foot of a debenture. The director had various claims in respect of salary under

his service contract. No positive step was taken immediately after the receiver's appointment to determine his service contract. It was continued, and the director had discussions from his hospital bed with the receiver about the company's business and assets. Three weeks after his appointment, the receiver gave the director one month's notice to determine his service contract. The director claimed that the receiver was personally liable for his remuneration between the date of the appointment of the receiver and the date that his service contract expired because the receiver continued the service contract and did not immediately determine his contract. The director argued that there was no distinction to be drawn between contracts entered into by a receiver after the commencement of a receivership and contracts continued by the receiver. This contention was rejected by the court which held that the receiver had incurred no liability in respect of the contract of employment which he continued for a period of some weeks of the receivership.

78. The principle in *Nicoll v. Cutts* regarding the continuation of a pre-appointment contract by a receiver was approved and confirmed by McDonald J. in *Paddy Burke (Builders).* At para. 74, McDonald J. held:-

> *"Counsel for the management company sought to distinguish Nicoll v. Cutts on the basis that its effect has since been reversed by statute in the United Kingdom (at least in the context of employment contracts). I do not believe that this is material. In my view, the principle established in that judgment is entirely consistent with the statutory provision now contained in s. 438 (4) of the 2014 Act. Thus, the fact that the management agreements have continued in being since the Receiver was appointed does not make him liable on foot of them. He will not be liable on foot of them unless he has adopted them in some way."*

79. I agree with the decision of McDonald J. and accept his concise statement of the law on this point.

80. The trial judge approved the passage in Forde, Kennedy and Simms, *The Law of Company Insolvency* (3rd ed., Round Hall, 2015) at para. 5.29, and held that it applied to the Management Agreement:-

> *"A receiver will not be permitted to enforce a contract concluded with the company if, at the same time, he is not prepared to cause the company to honour its side of the bargain. He cannot obtain the benefit of the contract while simultaneously denying the other party any rights which it may have under it. For instance, if the company agreed to buy land, but the conveyance has not yet been executed, the receiver will not be allowed to claim specific performance or damages for breach of the contract unless he causes the company to tender the outstanding price."*

81. It is worth parsing this passage with care, as the authors cite no authority for the proposition advanced. If the passage is confined to a single transaction contract, such as the sale of a parcel of land, or of a particular item or parcel of goods, the proposition is unexceptional. If the receiver wishes to cause the company to complete a pre-appointment contract to purchase goods or land, he may do so, but he must pay the counterparty the purchase price. Or if he wishes to compel the counterparty to purchase the land or goods pursuant to the pre-appointment contract, he may do so, and the counterparty must pay the receiver the purchase price. But I do not accept that this is a correct statement of the law as regards a pre-appointment contract which is not a single transaction contract, as this conflicts with the right of a receiver, discussed above, to cause a company to continue pre-appointment contracts, such as contracts of employment or other on-going contracts with utilities, or regular suppliers of goods or services, and to terminate them at his discretion without thereby incurring personal liability for those contracts. To the extent that the trial judge held that this passage applied to the performance of the different obligations arising

under the Management Agreement, with the greatest of respect, in my judgment, he fell into error.

82. To my mind, the passage relied upon by the plaintiffs in para. 5.30 is more apposite:-

"5.30 Unlike the situation in liquidations, there is no statutory mechanism whereby a receiver can disclaim or repudiate onerous contracts. By "onerous" here is meant obligations which would cost the company more to perform than the amount of damages it would have to pay for breach of the contract. However, because these contracts do not bind a receiver, he can simply prevent the company from performing its obligations and thereby, in effect, disclaim the contract. When the company does not fulfil its obligations, the other party has a right of action against it for damages. But that claim ranks after the debenture, so that generally the receiver is not concerned with the claim. In sum, therefore, unless the company stands to make a profit from the contract, the receiver will not cause it to perform its side of the bargain. For instance, in Macleod v. Alexander Sutherland Ltd, the company sold land and undertook in the contract to perform specified building and construction work on it. That work was never carried out, and the company was placed in receivership. It was held that the company, through the receiver, could not be compelled to perform that work. The court's reasoning was that,

> *'[s]ince ex hypothesi the responsibility for whatever is done [under] the contract must in fact be done by the receiver, it [is] out of the question to pronounce a decree ostensibly against the company, which would in effect result in the receiver either incurring personal liability or in his bearing the responsibility for contempt of court.'"*

83. In *Macleod v. Alexander Sutherland Ltd* (1977) STL (Notes) 44, referred to in this passage, the pursuer sold land to the company on the basis that it would carry out certain

works to the lands. The lands were transferred, the works were not carried out and the company went into receivership. The pursuer sought the equivalent of an order for specific performance against the receiver personally, as opposed to his remedy in damages against the company. The court refused to hold the receiver personally liable on the contract and therefore liable to perform the building works, notwithstanding the fact that the company had received the benefit of the contract and had not performed its side of the bargain.

84. The passage in Forde et al. at para. 5.30 recognises the important difference between the obligation under the contract to complete the sale of land discussed in para. 5.29 and the obligation to carry out works to the lands. This is a distinction which was recognised by Baker J. in *Lee Towers.* In my judgment, the trial judge erred in concluding that the mere fact that the Receivers sought to continue the Management Agreement in order to secure a more beneficial return for the debenture holder of itself amounts to adoption of the contract, such that they thereby assumed personal liability for the performance of the contract. While the Receivers continued to sell the units and sites, and to grant Leases of Easements to the purchasers of the units/sites, they were causing Glenkerrin to continue to perform the pre-appointment contract, the Management Agreement. They were entitled to do this without adopting the pre-appointment contract and they were entitled to cause the company to cease to perform the contract when it was no longer beneficial for the realisation of the security, without incurring personal liability by adopting the contract. The fact that it may be beneficial to continue a pre-appointment contract for a while, and the fact that a receiver does so, does not of itself mean that he is estopped from causing the company in receivership thereafter to cease to perform the contract, when to do so is no longer beneficial to the realisation of the security for the benefit of the debenture holder.

85. In this case, it was argued that the Receivers had continued the Management Agreement, a pre-appointment contract. That in and of itself, without more, is not sufficient

to amount to adoption of the contract by the Receivers in the sense in which that term has been defined by, and applied in, the case law. It is necessary to examine the actions of the Receivers and to ascertain whether they can amount to adoption by the Receivers of the Management Agreement in the circumstances of this case.

86. Before considering the question whether the Receivers adopted the Management Agreement in this sense, it is important to look at the defendant's pleaded case. The defendant asserted an obligation on the part of Glenkerrin to complete the development of the estate and the Estate Common Areas. It did not assert that the Receivers adopted the Management Agreement and assumed personal liability for the performance of the contract. On appeal, the defendant disavowed that it was seeking to make the Receivers personally liable on the Management Agreement. Its case was that the proceeds of sale firstly belonged to Glenkerrin, and that Glenkerrin was obliged to develop the estate, and so the proceeds of sale should be used to discharge this liability. It argued this for a number of reasons:-

(1) The purchase price of the units sold by the Receivers was enhanced by the fact that the units were sold with the benefit of Leases of Easements to the common areas giving the purchaser of each unit the right to use the common areas and the car park spaces in accordance with the Management Agreement. The Receivers had the option to sell the units without relying on the Management Agreement, but chose to sell with the benefit of the Management Agreement. Having sold the units and entered into the Leases of Easements, including but not confined to the sale of Unit C, the Receivers necessarily adopted the Management Agreement.

(2) The Receivers carried out work to the car park since 2016. It was argued that they thereby acknowledged an obligation to carry out works to render the car park usable and, therefore, assumed the liability to complete it in accordance

with the terms of the Management Agreement, notwithstanding that they thereby assumed a liability far greater than they intended.

(3) The sale by the Receivers to the purchasers of Unit C involved selling a right to use 172 car park spaces. These must be in the impugned car park. By reason of the Receivers' commitment to the purchaser of Unit C, they necessarily have adopted the Management Agreement.

(4) The Receivers instituted these proceedings seeking to compel the defendant to perform all of its obligations under the Management Agreement, namely to execute the Lease of Easements in respect of Unit C, and so must be deemed to have adopted the agreement.

(5) The Management Agreement was relied upon by the Receivers in giving title to the purchasers of the units, including the purchaser of Unit C.

(6) The Receivers did not disclaim the Management Agreement, as they were entitled to do under the provisions of the NAMA Act 2009, and therefore must be deemed to have adopted it.

87. The trial judge decided that the Receivers had adopted and benefited from the Management Agreement and could not now disclaim obligations of Glenkerrin arising under the Management Agreement. He set out his reasons for so concluding in paras. 210, 211 and 213 of his judgment. He considered the following factors:

(1) The Management Agreement is extensively referenced in the Statement of Claim.

(2) The debenture of 2003 was executed post the Management Agreement *("and accordingly the security thereby obtained is subject to the performance of the Management Agreement").*

(3) *"[t]he Receivers have sought to sell the remaining units, and in every case in so doing have relied upon the common areas, including the car park, both at surface level and at basement level, and the Management Agreement as a document of title … and thereby achieving and benefitting from a higher sale price."*

(4) While acknowledging that strictly speaking the participation of the Receivers as parties in the Leases of Easements executed since their appointment was not strictly necessary, nonetheless he regarded it as *"of some significance"* that they were named as parties to the Leases of Easements executed.

(5) The Receivers sold Unit C with full knowledge that there were issues with the condition of the car park.

(6) The Receivers, in fact, carried out works in the car park between 2016 and 2019.

(7) The interventions of the Receivers in the car park *"indicate acceptance on the part of the receivers of some responsibility for the condition of the carpark"*.

(8) The Receivers took out public liability insurance in respect of the car park.

(9) The Receivers were statutory receivers, appointed by NAMA, and under s.148 of the National Assets Management Agency Act 2009 they enjoyed a right to disclaim the contract, but had not availed of this right.

88. At para. 215, he concluded:-

"I am therefore satisfied that, while the Receivers have no personal liability, the Receivership has adopted and benefitted from the Management Agreement and cannot now seek to disclaim or repudiate Glenkerrin's legal obligations under the Management Agreement. It follows that the Receivers should not be permitted to pay over to NAMA the net proceeds of sale received by the Receivers as agents for Glenkerrin in the sale of Block C/The Link Building when they are the only resource

available, or that will ever be available, to Glenkerrin/the Receivers to complete the development in accordance with planning permission and building regulations and their legal obligations."

89. In my opinion, the trial judge erred in holding that the Receivers adopted the Management Agreement for the reasons he thus relied upon. First, the defendant did not contend that the Receivers were personally liable in respect of the Management Agreement, and the trial judge was at pains to emphasise that they were not personally liable. Where a receiver adopts a pre-appointment contract in the technical sense here discussed, the corollary is he becomes personally liable on foot of the contract; it follows that if he is not personally liable on the contract, he cannot have adopted it. The submission of the defendant and the finding of the trial judge precludes, as a matter of law, a finding that the Receivers adopted the pre-appointment contract

90. Secondly, having so concluded, the trial judge erred in proceeding to hold that the Receivers could not now disclaim or repudiate Glenkerrin's legal obligations under the Management Agreement. The authorities previously discussed establish that the Receivers are entitled to cause the company not to fulfil its obligations under the pre-appointment contract. Further, as stated by Lightman and Moss, quoted above, a receiver has a choice whether **and for how long** the company should give effect to contracts made prior to his appointment. The receiver may at any time decide to repudiate the contract leaving the other party with an unsecured claim for damages. The whole purpose of a receiver continuing a pre-appointment contract is to accrue a benefit and thereby, to maximise the realisation of the security. I agree with McDonald J. in *Paddy Burke (Builders),* that the fact that the management agreements have continued in being since the receivers were appointed does not make the receivers liable on foot of them. The receivers will not be liable on foot of

them unless they have adopted them in some way. Simply taking the benefit of them, as occurred in *Nicoll v. Cutts*, does not amount to adoption of a contract by a receiver.

91. The Receivers are the agents of the company/chargors. Their primary obligation is to realise the secured assets for the benefit of the charge holder. Where they carry out the business of the company, that activity is secondary to their primary obligation. If they chose to expend monies so as to enhance the value of the secured assets in order to secure a greater return from the secured asset, or to insure it to protect the value of the security, that is for the benefit of the charge holder and does not amount to an adoption by the Receivers of the Management Agreement. Simply put, the Receivers were not obliged to carry out any works to the car park. In their judgment, the value of Unit C would be enhanced if they carried out certain works. They reached an agreement with the purchaser of Unit C who was prepared to pay the purchase price for the property on the basis that the Receivers executed the specific, limited works which were agreed. This does not involve the Receivers committing themselves, and by extension the secured creditor, to expending further sums in order to complete the separate, pre-appointment contract, the Management Agreement.

92. The trial judge concluded that because the Receivers sold the units and in particular Unit C with the Leases of Easements and the car parking spaces, in particular 172 car parking spaces sold with Unit C, that the value of the secured assets was thereby enhanced. This is so. But the Receivers are both entitled and under a duty to achieve the best return reasonably achievable on the realisation of the secured assets. If the units were sold without the benefit of the parking spaces and the Leases of Easements, the Receivers would have failed in this fundamental obligation. The issue is whether they were entitled to enhance the value of the secured assets by causing Glenkerrin, acting through them as its agent, to perform the pre-appointment contract, the Management Agreement, without forfeiting their entitlement subsequently to cease to give effect to the contract. In my judgment, the Receivers were

entitled to rely upon the Management Agreement for so long as it was beneficial so to do, and that this did not expose them, or the charge holder, to personal liability to perform the obligations of Glenkerrin under the Management Agreement. This means that the fact that they could have sold the units without the benefit of the Management Agreement and the Leases of Easements for a lesser return, but chose not to, cannot lead, or contribute, to the conclusion that they therefore adopted the Management Agreement.

93. The Receivers expressly disclaimed personal liability in the Lease of Easements, so I cannot see how the fact that they were parties to that agreement can constitute an act of adoption of the Management Agreement. At the very least, the conclusion that it did fails to take account of the provisions of s.438(4) of the Act of 2014. Further, in my judgment, the fact that the Receivers failed to disclaim the Management Agreement pursuant to the NAMA Act 2009, does not lead to the conclusion that they thereby adopted it.

94. It is clear, to my mind, that the Receivers excluded personal liability in relation to the sales of the units and the Leases of Easements. The fact that the Management Agreement formed part of the title of the purchaser of the unit did not alter this or mean that they had adopted the Management Agreement and assumed personal liability for the performance of Glenkerrin's obligations under the agreement in contradiction of the express exclusion of personal liability in the contracts for sale and the Leases of Easements.

95. The Receivers sued upon the Management Agreement and sought specific performance of the agreement. In theory, this could amount to the adoption of the Management Agreement by the Receivers. A closer reading of the pleadings shows that they sought an order compelling the defendant to execute the Lease of Easements in relation to Unit C. The affidavits sworn to ground the application to admit the proceedings into the commercial list of the High Court by Mr. Tennant and to ground the application for an injunction by Mr. McCann make clear that the proceedings were brought in response to the

threat by the solicitors for the purchaser of Unit C to institute specific performance proceedings against the parties to the contract, including the Receivers. The Receivers sought to secure the execution by the defendant of the Lease of Easements to avoid this eventuality. Contrary to the defendant's apprehension, they did not intend to serve a notice pursuant to Clause 3.2 and seek to close the sale of the reversion and Estate Common Areas to the defendant. They were seeking specific performance by the execution of an agreement which expressly excluded their personal liability. In these particular circumstances, suing on the Management Agreement did not amount to the adoption of liability to perform all of the obligations of Glenkerrin under the agreement, merely those associated with the sale of Unit C.

96. The effect of the decision of the High Court was that the Receivers were deemed to have adopted a pre-appointment contract without incurring personal liability, but instead incurred liability, on behalf of the charge holder, to complete the pre-appointment contract of the company. In this regard, the trial judge relied upon the consideration that the only resources available, or that would ever be available, to Glenkerrin or the Receivers to complete the development, in accordance with the planning permission and building regulations, were the proceeds of sale of Unit C. In my view, this was not a relevant consideration. The essence of insolvency is that some, and frequently many, obligations of the insolvent company or individual remain unsatisfied through no fault of the unsecured creditors. At all times the claim of the defendant, that Glenkerrin carry out the works necessary to enable it to transfer the common areas to the defendant in accordance with the provisions of the Management Agreement, was an unsecured claim *in personam*. It could never defeat a claim *in rem*.

Is it an implied term of the Management Agreement that the Receivers must serve a 28-day Completion Notice, as soon as is practicable, after the sale of the last Unit in the Estate?

97. In paras. 122-217 of his judgment, the trial judge identified the principles to be applied in construing the Management Agreement. In particular, he identified the recent decisions of *Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 and *Jackie Greene Construction Limited v. IBRC in Special Liquidation* [2019] IESC 2. There was no dispute between the parties that these were the appropriate authorities to be applied to the construction of the Management Agreement. In *Law Society*, the Supreme Court reaffirmed the five rules of contractual construction set out by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 All E.R. 98. O'Donnell J. highlighted the changes brought about by the approach set out in *Investors Compensation Scheme* and the importance of approaching the agreement to be construed in a holistic way rather than having to immediately resort to case law. He emphasised the importance of the context in which a contract is concluded, stating at para. 13:-

> *"... It is important to remind ourselves however, that the process is not the deconstruction of a text, but rather the interpretation of an agreement. Parties undoubtedly seek clarity of language, but they do not do so as an end in itself. The focus of the parties is an agreement, normally commercial, which they consider is to their benefit. That is the context in which the words are used, and in which they must be interpreted."*

98. In *Jackie Greene Construction*, Clarke C.J. emphasised at para. 5.4 that:-

> *"... it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen."*

99. The trial judge relied upon the decision of the Supreme Court in *Sweeney v Duggan* [1997] 2 I.R. 531, where Murphy J. set out the test for the implication of terms in a contract at p. 538:-

> *"There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known case, The Moorcock (1889) 14 P.D. 64 where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in Shirlaw v. Southern Foundries (1926) Limited [1939] 2 K.B. 206 at p.227 in an expression, equally memorable, in the following terms:-*
>
> > *"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 intensely suppress him with a common, 'Oh, of course'.""*

100. He also cited the views of O'Higgins J. in *Meridian Communications Ltd. v. Eircell Ltd.* [2002] 1 I.R. 17, at p. 41:-

> *"- before a term will be implied in a contract* ***it must be necessary to do so, and not merely reasonable;***
>
> - *the term must be necessary to give business efficacy to the agreement;*
> - *it must be a term* ***which both parties intended****, that is, a term based on the presumed common intention of the parties;*
> - *the court will* ***approach the implication of terms into a contract with caution****;*

- *there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing (sic) the stronger is the presumption against the implication of terms;*
- *if the term sought to be implied cannot be stated with reasonable precision, it will not be implied."* (emphasis added)

101. The starting point is the text of the agreement. Recital 2.2 and 2.3 of the Management Agreement provide as follows:-

"2.2. The Developer has laid out the Estate for development as a commercial business campus and intends to lease sites in the Estate to prospective purchasers and to enter into leases and Management Agreements similar in form to the draft Lease and Management Agreement furnished prior to the execution of this Agreement or on such other terms as may be agreed between the Developer and prospective purchasers or lessees.

2.3. The Developer will complete the development of the Estate in accordance with the plans and specifications produced to the Purchaser and shall lease all the units/sites on the Estate and on the demise of the last Unit/Site:-".

102. Thereafter, the Agreement continues:-

"3. IT IS HEREBY AGREED

3.1 that in consideration of the Purchaser assuming the Developer's liability under the Leases hereinafter mentioned and further in consideration of the sum of Ten Pounds (IR€10.00) the Vendor as registered owner shall transfer and the Developer as beneficial owner shall transfer and confirm unto the Purchaser ***ALL AND SINGULAR*** *the freehold interest in* ***ALL THAT AND THOSE*** *that part of the lands comprised within Folio 34112F of the Register County Kildare more particularly described in the First Schedule hereto, subject to and with the benefit of the Leases*

and Management Agreements which are to be granted by the Developer and subject to the rights of the purchaser and its members.

3.2 The transfer will be completed at the expiration of 28 days (twenty eight days) from the service of a notice requiring completion served by the Developer's Solicitor on the Purchaser provided always that the notice will be served within the Perpetuity Period. Completion will take place at the office of the Developer's Solicitor."

103. It is thus clear that the parties agreed an express term governing the completion of the transfer of the lands to the defendant. It is therefore hard to see how it can be said that the principles established in *The Moorcock* dictate that this should be supplemented by an implied term of the kind contended for.

104. The trial judge acknowledged in para. 168 of the judgment that if Clause 3.2:-

"... is construed on its own its wording means that the defendant has no entitlement to insist on service of a notice to compel completion of the transfer of the common areas, and the timing of such transfer is within the control of the Developer who can serve the notice at any time up to the expiry of the Perpetuity Period."

105. This is what the parties agreed and no party to the agreement argued otherwise. The defendant pleaded that it had not yet become entitled, under the Management Agreement, to call for the transfer to it of the Estate Common Areas and the reversion. While it argued for implication of two terms and sought rectification of the agreement in line with the alleged implied terms, it did not allege that Clause 3.2 did not reflect the intention of the parties, nor was lacking in commercial sense or business efficacy. On the contrary, once the last unit/site on the estate was demised, and the development was completed in accordance with the plans and specifications, the plaintiffs were at liberty, at their sole discretion, to serve a completion notice, subject only to the proviso that it must be served within the perpetuity period.

106. The principles in *Law Society* leave no doubt but that the context in which the Management Agreement was entered into is critically important. The first point to note in this connection is that this was not an arms-length transaction. The first and second named plaintiffs were the directors of both Glenkerrin and of the defendant. They were the owners of the land upon which the development was to be carried out. The development was to be carried out through their company, Glenkerrin. As it was to be a business campus, the intention was that the purchasers of the individual units would each have the benefit and burden of Leases of Easements governing the use of their individual units and of the common areas. All of the unit owners were to be members of a management company which would manage the common areas of the estate for the benefit of all unit holders and ensure compliance by the individual unit owners with the terms of the Leases of Easements. To that end, the two agreements of 6 April 2001 were entered into by the first and second named plaintiffs and Glenkerrin in the case of the first agreement, and by the first and second named plaintiffs, Glenkerrin and the defendant in the case of the second, the Management Agreement.

107. The trial judge nonetheless concluded that a literal reading of Clause 3.2 conflicted with the intention of the parties and yielded a result that *"is so commercially lacking in common sense that it can only be regarded as absurd, and not one that any commercially minded developer and management company would agree."*

108. I do not agree with this inference, which conflicts with the evidence of Mr. Grehan. At para. 137 of the judgment, the trial judge records that there were **no** negotiations as such between the first and second named plaintiffs and Glenkerrin or the defendant prior to entering into the Management Agreement. This is hardly surprising given that the first and second named plaintiffs were not only the owners of the land to be developed, and therefore likely to wish to maintain as much control as possible over the land until it was finally sold,

but also the directors of the two companies who were, respectively, to carry out the development and management of the Estate Common Areas after the development was completed, and to take the transfer of the reversion and common areas on behalf of the purchasers of the units. There was simply no issue of there being a commercially-minded management company, and certainly not one which was entering into an arms-length agreement with a commercially-minded developer.

109. It my view, the trial judge's emphasis upon business efficacy as a basis for the implication of terms in the contract is in this case misplaced. The first and second named plaintiffs, Glenkerrin and the defendant were all working together in relation to the development of the business campus. This was not an arms-length sale to a third party. The term the trial judge held should be implied did not satisfy three of the factors identified as prerequisites to the implication of contractual terms in *Meridian Communications*. It is not necessary to imply the term into the contract. The term is not necessary to give business efficacy to the agreement. It was in the interest of the first and second named plaintiffs, who controlled both Glenkerrin and the defendant, to keep their options open and under their control in relation to the lands. This is reflected in Clause 3.6 which gave flexibility to Glenkerrin to alter the planned campus during the course of the development. In circumstances where there were **no** negotiations in relation to the Management Agreement, it is not a term which can be presumed to reflect the common intention of the parties.

110. The trial judge looked to the provisions of the Leases of Easements in order to ascertain the true intention of the parties to the Management Agreement regarding the service of a completion notice. This approach is problematical in the circumstances of this case. Draft Leases of Easements were furnished to the parties prior to the execution of the Management Agreement and it was intended that the purchasers of units in the campus would enter into leases "in similar form" to the drafts furnished. This accorded with standard practice for

multi-unit developments and reflected the requirement that each owner acquires similar easements over the common areas of the development and enters into mirror covenants with all other owners, and that the covenants be mutually enforceable. However, Clause 2.2 permitted Glenkerrin to enter into leases of easements "on such other terms as may be agreed between [Glenkerrin] and prospective purchasers or lessees", but not the defendant. There was evidence that the terms of the leases executed after the appointment of the Receivers differed from the lease which most likely reflected the terms of the draft lease referred to in Clause 2.2. The Lease of Easements which the trial judge held most likely to follow the form of the lease furnished prior to the execution of the Management Agreement included a covenant by the first, second and third named plaintiffs to complete the assurance pursuant to the Management Agreement "as soon as practicable after the sale of the last Unit". The trial judge held that it was not to be read as part of the Management Agreement as it was not incorporated into the contract. Having so concluded, however, he said that he could have regard to it to ascertain the true intention of the parties because he rejected the literal reading of Clause 3.2. But, in my judgment, he fell into error when he rejected the literal reading of the clause, for the reasons I have set out. That being so, there was no occasion to consider the true intention of the parties by reference to the provisions of the Lease of Easements.

111. It would appear that the trial judge was influenced by the obvious difficulties which can arise where developers of multi-unit developments become insolvent before the completion of the estate, or afterwards when difficulties with the construction of the common areas come to light, and where the purchasers of individual units within the estate are faced with great challenges arising from the insolvency of the developer combined with the need to carry out extensive works in order to complete or rectify the development, or at least the common areas of the development. There have, unfortunately, been very many instances of unhappy disputes between purchasers within multi-unit developments and developers, where

estates have not been completed or defects have emerged and where the remedies of the individual purchasers are limited and are frequently ineffective. The Oireachtas has intervened in the case of multi-unit developments of residential developments but not in relation to other forms of multi-unit development, such as a business campus. In my judgment, the court cannot rewrite the agreement actually entered into by the parties in order to improve the position of the defendant management company by saying that the agreement lacks business efficacy and, where to do so would involve rewriting a term which allows Glenkerrin to refrain from completing a sale, to one which mandates the developer to complete the sale, notwithstanding the fact that it is now hopelessly insolvent.

112. In my judgment, the trial judge erred in implying a term into the Management Agreement that Glenkerrin and/or the Receivers must serve a 28-day completion notice as soon as is practicable after the sale of the last unit in the estate. I would, accordingly, allow the appeal on this ground.

Cross-appeal

113. The trial judge held that it was an implied term of the Management Agreement that the defendant was, and is, required to execute a Lease of Easements with Glenkerrin, and each purchaser of a unit in the estate, in the form furnished prior to the execution of the Management Agreement. The defendant cross-appealed this finding.

114. The trial judge held that there was no express term to that effect, but that it was the intention of the parties to the Management Agreement that the defendant would be a party to, and would execute all, Leases of Easements in the form furnished prior to the execution of the Management Agreement, and that it would do so at the time each sale or demise of a unit was completed. He stated at para. 184 that the common intention was "clearly grounded in the need to provide overall integrity to the management scheme, centred on the

Management Company in which each unit holder was to be a member, and which company had to be in a position to carry out its functions including the levying and collection of state service charges from all members." He held it was strongly implied by the wording of the Management Agreement, and its interconnection with the draft Leases of Easements, and is necessary to give business efficacy to the agreement.

115. In written submissions in support of the cross-appeal, the defendant argued that if the court was entitled to construe the Management Agreement by reference to the draft Lease of Easements in determining when the plaintiffs may serve the completion notice, then it could have regard to the Leases in construing the obligation of the defendant to execute the Lease of Easements for the sale of Unit C, and vice versa. This submission, to my mind, is misconceived. Each alleged implied term must be considered individually and the fact that in each argument the parties turn to the Leases of Easements should not obscure this fact. The two issues are separate legal issues. In my judgment, the trial judge was correct in his approach and conclusion that there was an implied term of the Management Agreement which required the defendant to execute Leases of Easements upon each sale or demise of a unit in the estate.

116. As the trial judge said, the intention was to develop the estate as a commercial business campus, to lease sites to prospective purchasers "and to enter into leases and Management Agreements similar in form to the draft lease and Management Agreement furnished prior to the execution of [the] Agreement or on such other terms as may be agreed between the Developer and prospective purchasers or lessees." Under Clause 3.1, the Estate Common Areas will be transferred to the defendant "…subject to and with the benefit of the Leases and Management Agreements which are to be granted by the Developer and subject to the rights of…" the defendant and its members. The trial judge held that the reference to "Leases and Management Agreements" was to the Leases of Easements. This finding has not been

appealed. The trial judge concluded that the intention of the parties to the Management Agreement was that the defendant would be a party to and would execute all of the Leases of Easements in the form "furnished prior to the execution of this Agreement."

117. This is clearly so, and the defendant has advanced no convincing reason why such a term ought not to be implied. I agree with the trial judge. It is essential that a management company is in a position to enforce the terms of the individual Leases of Easements for the benefit of all of the unit holders/members. If the defendant was not a party to each of the Leases of Easements this could undermine its ability effectively to manage the Estate Common Areas for the benefit of its members, its very raison d'etre. In order that it be a party to each such agreement, it must execute each such agreement; it must not undermine its ability to perform its functions into the future by refusing to execute a Lease of Easements in respect of any one unit. The implication of such a term comes within the principles in *The Moorcock* and reflects the intention of the parties at the time of the agreement. It is inconceivable in the circumstances where the first and second named plaintiffs were developing the business campus through their company, Glenkerrin, and they specifically incorporated the defendant to be the management company of the Estate Common Areas, that they, as the directors of the defendant, did not intend that the defendant would be a party to and would execute a Lease of Easements in the agreed form in respect of each unit in the development in order to facilitate the sales of the individual units. For these reasons, I would disallow the cross-appeal.

Was the defendant entitled to refuse to execute the Lease of Easements?

118. The trial judge held that the defendant did not breach its obligations to the plaintiffs under the Management Agreement for the reasons set out at para. 187:-

"187. Secondly, in the face of the refusal of the Receivers to address the structural defects in the carpark, and given the fact that the proceeds of sale of Block C/the Link Building represented the only fund from which the developer/the Receivers could ever fund remedial work, in my judgment the defendant was entitled in all the circumstances to decline to execute the Lease of Easements unless and until the plaintiffs provided satisfactory undertakings to remedy the structural defects in the carpark, or at least, if the sale proceeded, to hold the proceeds in escrow pending resolution of any dispute as to responsibility to carry out and fund those works – which is precisely what the defendant's solicitors sought in correspondence prior to the institution of the proceedings."

119. The trial judge's decision on this issue is predicated upon his finding that there was an implied term of the Management Agreement that Glenkerrin/the Receivers must serve the 28-day completion notice, pursuant to Clause 3.2, as soon as practicable after the sale of the last unit in the estate. Absent such a term, the sale of Unit C and the sale of the Estate Common Areas, and the reversion, were two distinct transactions with no necessary temporal connection between them (save that the first was a necessary precondition to the second). If the two transactions were not linked, then the defendant could have no legitimate justification for refusing to execute the Lease of Easements in respect of Unit C. As there is no such implied term, it necessarily follows that the defendant was not justified in refusing to execute the Lease of Easements for Unit C.

120. Glenkerrin became entitled to serve the completion notice upon the sale of the last unit, but it was under no obligation to do so "as soon as practicable" or at any particular time, provided it does so within the perpetuity period. It was not in breach of any term of the Management Agreement when the defendant refused to comply with one of its obligations under the agreement. The defendant was not entitled to breach its obligation to execute the

Lease of Easements, which entailed no current assumption of any obligations on its part, in anticipation of a future breach of contract by Glenkerrin. It could only be required to assume the obligations of managing the Estate Common Areas upon the transfer of the common areas and the reversion, and that could not occur unless and until the estate was developed in accordance with the requirements of General Condition 36. So, the defendant could never be obliged to assume the obligation of Glenkerrin to remedy the defects to the car park. The fact that this would in all probability leave the unit owners and the defendant in possession of an estate which required considerable expenditure by an insolvent developer, which would not be forthcoming, could not amount to a legitimate justification for refusing to execute the Lease of Easements.

121. Further, as I have held earlier, the defendant had no right to require the Receivers to utilise the proceeds of the sale of Unit C to complete the development of the estate, and in particular to remediate the car park, and therefore, it had no right to require that the Receivers provide "satisfactory undertakings to remedy the structural defects in the carpark" or to hold the proceeds of sale in escrow. If Glenkerrin failed to complete the estate in accordance with the Management Agreement, the defendant's remedy was a claim in damages against Glenkerrin. The claim of the defendant against Glenkerrin would be an unsecured claim and, as such, gave it no right to the proceeds of sale of Unit C in priority to the debenture holder.

122. Accordingly, in my judgment, the trial judge erred when he held that the defendant was justified in withholding execution of the Lease of Easements.

Was the trial judge required to make findings with regard to the state of the car park and did he err in making those findings?

123. The plaintiffs submitted that the trial judge ought not to have made various findings with regard to the state of the car park because it was not necessary to do so in order to resolve the issues in the case, and because the parties had agreed that the extent of the remedial works could not be assessed until investigative works were carried out. The findings, it is said, were not relevant to the question who was responsible for the works required to be effected to the car park and, accordingly, he ought not to have determined these issues on a final and conclusive basis.

124. It is necessary, once again, to consider the pleaded cases of the parties in order to ascertain the issues which required to be resolved by the trial judge. In its defence at para. 7.6, the defendant pleaded that Glenkerrin had failed to construct the car park properly or to repair or maintain it, and set out fourteen particulars of the plea. This was repeated in the counterclaim at para. 35. It is notable that in the prayer for relief the defendant did not seek damages for breach of contract or any quantum meruit assessment. At para. 25.2, it pleaded that it proposed to call an expert to give evidence as to the adequacy of the car park condition and structure. At para. 34 of its written submissions in the High Court, it said that it was not asserting that it had a right to require the plaintiffs to carry out works to complete the common areas. Thus, on the defendant's case it was necessary to consider whether works were required to remediate the car park, but it was not necessary to determine the defects or the cost or approximate cost of remedying the defects.

125. In the reply to the defence and counterclaim, the plaintiffs put the defendant on strict proof as to the alleged failure to develop and construct the underground car park, despite the reply to interrogatory no. 48 to the effect that on 23 March 2018 the car park was "presently not fit for occupancy". Thus, on the plaintiffs' case it was necessary to determine whether it was necessary to carry out works to remedy the car park, but it was not necessary to determine the cost of the works. The trial judge was required to determine whether the works

constituted repairs/maintenance, in which case they would fall to be paid for from the sinking fund, or works of construction, in which case the developer, Glenkerrin, would be liable to carry out the works.

126. The trial judge records the submission of counsel for the plaintiffs that it was not necessary to make any findings or determinations with regard to the state or condition of the car park. The trial judge rejected the submission for the reasons set out in para. 88:-

> "*I cannot agree with the last part of that submission. Central to the defendant's case is that the condition of the car park is such that if the plaintiffs were now required to transfer the Estate Common Areas to the Management Company they would be unable to comply with their obligations under the Management Agreement. This is specifically denied by the plaintiffs, and in the pleadings all alleged defects are denied and the defendant is 'put on proof', and this is therefore an issue in the case. Moreover, given that it is beyond dispute that the Management Agreement incorporates Condition 36 of the Law Society General Conditions of Sale (1995 Edition), as previously recited, and that this would (at the very least) impose obligations of certification in respect of Planning Permission compliance and Building Bye-Law Approval and substantial compliance with Building Regulations, it is essential that the court address the evidence of Mr. Campbell, and I propose to do so."*

127. The plaintiffs say that trial judge could not make findings that the defects alleged were structural defects, as the evidence of Mr. Campbell was all conditional upon undertaking investigative works. They say that the trial judge wrongly took from Mr. Campbell's summary a statement that the failure to incorporate movement joints into such a large expanse of concrete as existed in the car park constituted a structural defect while ignoring the fact that the entire executive summary was qualified by the statement that:-

"We must emphasise that the above [conclusion] is based on a visual inspection and we recommend that opening up works are carried out to establish conditions of ends of precast hollow-core units and condition of structural screed where water ingress has occurred. The impact of new expansion joints on potentially propped cantilever walls shall require further investigation."

128. Separately, they submit that the trial judge went further than the evidence adduced and speculated as to the possible cost of any remedial works when he held at para. 113 that, while the cost of remedial work could not at that stage be ascertained with any accuracy, he was of the view that overall it had "the potential to exceed €3 million", when the defendant had projected the costs to be €2.258 million.

129. I am not persuaded by the submissions of the plaintiffs. By their pleadings, the plaintiffs put the defendant on proof as to the alleged failure to construct and develop the car park. They also argued that the works required to remedy the defects in the car park were repairs or maintenance and thus not the liability of Glenkerrin, but rather would be the responsibility of the defendant and fall to be funded by the unit holders once the transfer was completed. The defendant, apprehending that the plaintiffs might oblige it to complete the sale and take a transfer of the Estate Common Areas, and with it liability for the car park, sought to establish that the condition of the car park was such that the plaintiffs could not satisfy General Condition 36 and, therefore, could not force it to take a transfer of the lands. It was therefore necessary for the trial judge, at the very least, to engage with the present condition of the car park and the possible explanation for the condition in order to resolve issues in the case. He was not deciding a case alleging a breach of a building contract and assessing the quantum of damages, and so it was not necessary to quantify the cost of items of remediation, but it was necessary for him to engage with the evidence as to condition and possible causation, as he did. As the trial judge, he is to be afforded considerable latitude in

his assessment of the issues of fact he holds to be necessary for him to reach his judgment. This court would require very compelling reasons to interfere with a trial judge's assessment of whether a decision on a particular point is, or is not, necessary for the purposes of resolving the issues in the case before him. This is very far from being such a case.

130. The fact that the full extent of the works could not be ascertained until works opening up the existing structures were undertaken did not mean that Mr. Campbell's evidence could not be relied upon by the trial judge. Precisely because he was not making determinations resolving a building dispute and damages claim, but was considering the implications of the condition of the car park for the dispute before him, he was entitled to look to this evidence to see whether it established the case advanced by the defendant: that the plaintiffs could not comply with the requirements of General Condition 36 were they to purport to transfer the lands to the defendant as they then stood. In reply to a question posed in cross-examination, Mr. Campbell made clear that his opinion as to cause of the defects in the car park did not require to be verified by investigative works. The plaintiffs were bound by this reply and led no testimony contesting this evidence. The fact that the plaintiffs chose not to adduce evidence from an engineer on the points covered by Mr. Campbell cannot alter this. They were on notice of the fact that this evidence was to be adduced and were not misled in any way.

131. I see no merit in the ground of appeal that the trial judge "speculated" that the actual cost of remedying the car park might exceed the estimate before him, based upon visual inspections only of the structure. The figure of €2,258,000 was a preliminary works estimate which excluded certain items. It was not a final cost of the remedial works. While the suggestion of the trial judge may not prove to be the true figure, it is not a matter with which this court ought to interfere, especially as there was never any question of this fixing or determining the actual costs of the works which ultimately may be required to be carried out.

Did the Receivers and/or their solicitors deliberately allocate some surface car park spaces twice to different purchasers?

132. The plaintiffs appealed the finding of the trial judge, at para. 48 of his judgment, that because the basement car parking had not been usable, the Receivers/their solicitors in undertaking sales of units "have deliberately allocated more surface parking spaces than originally planned for particular units, notwithstanding that some of these space (sic) have previously been allocated to other purchasers." They say that there was no factual basis for such a finding and it was not an allegation made in the defendant's pleadings. They submit that the trial judge inferred that this was done to avoid litigation, but that there was no basis for such an inference. They further submit that it was never put to the plaintiffs' witnesses who, therefore, had no opportunity to comment on the potential adverse finding. This, they say, was a breach of fair procedures.

133. The basis for his conclusion is set out in the preceding paras. 44-47 of his judgment. The solicitor acting for the plaintiffs in the sale of Unit C referred to the temporary allocation of car parking spaces on the upper deck of the basement car park to one unit owner. The Leases of Easements entered into during the receivership included a right to alter or vary the location of the car parking spaces allocated to each unit holder to "some part of the Estate Common Areas designated by the Lessor/Management Company for car parking." The unit owner was assured in pre-contract enquiries that all of the allocated spaces were on the surface. The presented allocations of car parking spaces between unit holders overlapped and the unit owner was disputing the proposed reallocation of car parking spaces and threatening litigation.

134. In reaching his conclusion, the trial judge failed to address the right of the lessor (acting through the Receivers) to vary or alter these allocations of parking spaces and of the possibility that the solicitors acting for the Receivers, and the Receivers acting on their

advice, genuinely believed that they were entitled to reallocate the parking spaces to the underground car park. He did not explain why he concluded that they had **"deliberately"** allocated surface car park spaces to more than one unit holder, or why he reached that conclusion in the absence of any allegation to that effect. This is aside from the fact that he did not forewarn the witnesses for the plaintiffs of the possibility that he might draw this conclusion, or afford them the opportunity to comment on it and, if possible, rebut it.

135. While this court may not interfere with primary findings of fact made by the trial judge, this court is as well placed as the trial judge to assess the reasonableness of drawing such inferences from the primary facts and the documents. I am not satisfied that the evidence warrants such an inference. Furthermore, if the trial judge was minded to draw such a damaging inference he ought, as a matter of fairness to the witnesses at least, to have raised the issue and afforded them a chance to respond and counsel for the plaintiffs to address the issue. The conclusions reached may have serious and significant implications for parties concerned outside of these proceedings. In the circumstances, I would allow the appeal on this ground.

Conclusions

136. The charge of 2000 secured the liabilities of the first and second named plaintiffs to the bank on the Folio. These included their direct borrowings from the bank and an unlimited guarantee of the liabilities of Glenkerrin. The debenture of 2003 gave the bank an equitable charge over the equitable interest of Glenkerrin in the Folio. The facilities and related securities of the first and second named plaintiffs and Glenkerrin were acquired by NALM pursuant to the Act of 2009. The first and second named plaintiffs and Glenkerrin are insolvent and owe collectively approximately €260 million to NALM. In 2011, NAMA appointed the Receivers under both the charge of 2000 and the debenture of 2003. The Receivers have sold the remaining units in the business campus developed on the lands by

Glenkerrin and remitted the net proceeds of sale to NALM. In each case, the defendant, as the management company of the estate, has joined in the Leases of Easements granted to each purchaser of a unit.

137. The Receivers contracted to sell the last unit on the campus, Unit C, in March 2018 with the benefit of the Lease of Easements and 172 car parking spaces. The underground car park requires extensive works to remedy serious defects to the structure, though the exact extent of the works cannot be established until investigations are undertaken. Until the necessary works are effected, the plaintiffs cannot comply with the Management Agreement and transfer to the defendant the Estate Common Areas, and the reversion, in compliance with General Condition 36 of the contract. Glenkerrin is insolvent and cannot pay for the remedial works which are required to enable it to close the sale to the defendant.

138. NALM is entitled to the net proceeds of sale of Unit C under both the charge of 2000 and the debenture of 2003. The Receivers are obliged to remit those monies to NALM in discharge of their duties. The claim of the defendant under the Management Agreement is not a claim *in rem* and does not take priority over the rights of NALM under the charge of 2000 and the debenture of 2003.

139. The Receivers are not bound by a pre-appointment contract of Glenkerrin unless they have assumed personal liability in respect of it. The Receivers did not adopt the Management Agreement and did not assume personal responsibility for performance of the obligations of Glenkerrin under it.

140. As the Receivers have no personal liability in respect of the obligations of Glenkerrin under the Management Agreement, the "receivership" cannot be liable to expend the proceeds of sale of Unit C to discharge those obligations; such an outcome renders the secured creditor liable for the claims of an unsecured creditor against the insolvent counterparty to a pre-appointment contract, and is not the law.

141. There is no implied term of the Management Agreement that Glenkerrin or the Receivers, as its agent, must serve a 28-day completion notice as soon as is practicable after the sale of Unit C, being the last unit to be sold. It is an implied term of the Management Agreement that the defendant executes a Lease of Easements to facilitate the sale of each unit in the development.

142. The defendant was not entitled to refuse to execute the Lease of Easements in respect of Unit C, when called upon to do so, to facilitate the sale of the unit.

143. The trial judge was entitled to make findings regarding the condition of the car park in order to resolve the issues before him and he was entitled to accept the evidence of the consultant engineer who gave evidence on behalf of the defendant. The fact that the report stated that the full extent of the necessary remedial works could not be ascertained until the structures had been opened up, did not mean that the court was precluded from accepting the oral testimony of the engineer as to the condition of the car park and the cause of the defects he detected.

144. In circumstances where there had been no allegation by the defendant that either the Receivers or their solicitors had deliberately allocated the exclusive use and enjoyment of the surface car park spaces to more than one purchaser of a unit in the estate, as a matter of fair procedures, the trial judge ought to have put his concerns to the relevant witnesses to afford them the opportunity to address those concerns before concluding that they had so acted.

145. For these reasons, I would allow the appeal and refuse the cross-appeal.

146. Noonan and Murray JJ. have indicated their agreement with this judgment which is to be delivered electronically.

147. The court invites the parties to make submissions on the costs of the appeal and the High Court. Within 28 days from the delivery of the judgment, the appellants should file

written submissions of no more than 1,500 words setting out their position, which should be served on the respondent's solicitors, who shall have 28 days to respond by written submissions of no more than 1,500 words. The court will then indicate its ruling to the parties.