Neutral Citation No: [2014] NICh 3 | *Ref:* **DEE9135**

Judgment: approved by the Court for handing down | *Delivered:* **14/02/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

2009 No. 2603

H. LIMITED

Plaintiff;

-v-

D. C.

First Defendant;

C. LIMITED

Second Defendant.

_____

DEENY J

[1] On 9 March 2009 the plaintiff herein issued proceedings against the defendants seeking rescission of a Joint Venture Agreement (JVA) entered into between the parties in respect of the development of land and the repayment to the plaintiff of sums paid by it to the defendants on foot of that JVA. The matter came on for trial on 28 January 2013. The parties resolved their differences at the door of the court and it was ordered, on consent, that all further proceedings in the action be stayed except for the purpose of carrying into effect agreed terms of settlement of the action which had been endorsed on counsels' briefs and for that purpose the parties were at liberty to apply. I was informed that the second defendant had taken no part in the proceedings and was indeed dissolved. It seems that that occurred on 22 August 2008 before the proceedings were issued.

[2] On foot of its right to apply to the court the plaintiff issued a summons on 3 September 2013 seeking an order for payment by the first-named defendant to the plaintiff of the sum of £250,000 'within such time as might be specified by this Honourable Court' pursuant to the 28 January 2013 agreement.

[3] On a previous occasion I ruled, in an unreported judgment, that, pursuant to Green v Rozen [1952] 2 All ER 797, et alia, a party to a settlement on terms endorsed on counsel's brief which included liberty to apply to enforce the terms could bring such an application to the court by summons in the original action.

[4] The "Agreement to settle proceedings" of 28 January 2013 had ten clauses. The most relevant for these purposes are the first two which I now set out.

> "It is hereby agreed between the parties as follows:
>
> (1) The First Defendant shall pay to the Plaintiff the sum of £250,000 within four weeks from the effective date hereof.
>
> (2) Upon payment of the sum above, the Plaintiff shall grant an easement to [C.] Limited, its heirs and assigns, at all times and at all times [sic] and for all purposes over the plaintiff's lands immediately adjacent to those comprised in folio AN155738 County Antrim, upon payment of the sum above, said Easement to be exercised over that road access to be constructed as set out in the planning permission granted to the plaintiff."

This is the text as set out in an unsigned copy of the agreement exhibited to the affidavit of the plaintiff's solicitor of 3 September 2013. No objection was taken to it by counsel on either side but it can be seen that two different phrases have been duplicated in the second paragraph.

[5] In response to the affidavit of the plaintiff's solicitors supporting its summons the first defendant swore and served an affidavit on 21 October 2013. Therein he said he had put his solicitors in funds for the £250,000 but that the parties had been unable to agree the terms of the Easement to which he was entitled under Clause 2 of the agreement.

[6] At paragraph 7 of that affidavit he said the following:

> "It has been accepted by the parties that the Easement could only be granted with the consent of Ulster Bank Limited who [sic] holds security over the lands belonging to the Plaintiff over which the rights shall be granted and Ulster Bank Limited is properly a party to the draft Easement. I await confirmation that Ulster Bank Limited have [sic] approved the draft Easement in the form prepared by my solicitors and

> will execute the original Easement once presented and executed by the parties to the proceedings."

[7] In effect his position is that the £250,000 is to be paid on or in exchange for the granting of the Easement by the plaintiff company. He exhibited the current state of the draft Easement passing between the solicitors for the parties. I observe that Clause 4.5 of that document is not in dispute and reads:

> "Ulster Bank Limited has executed this Deed as evidence of its consent as chargees to the terms of this Deed. Provision is made below for the affixing of the corporate seal of Ulster Bank Limited."

There was no rejoinder affidavit from the plaintiff disputing these averments.

[8] The principal dispute between the parties as to the terms of the draft easement is this. D.C.'s solicitors wish to record at Clause 1 that the easement is being granted "in consideration of the sum of £250,000 (the receipt whereof H Limited hereby acknowledges) …" The plaintiff's solicitors do not object to the words "in consideration of" but wish to complete that with "a settlement between the parties hereto dated 28 January 2013" ("the settlement").

[9] Mr Orr Q.C., for the Plaintiff, candidly acknowledged that if the easement was written in the form that C & H Jefferson for D.C. sought the money would be a payment in respect of a parting with an interest in lands and would go to the plaintiff's bankers. If the wording was as J W McNinch and Son for the plaintiff proposed then the plaintiff company could retain the monies.

[10] I observe that there is no counter-summons here from the defendant asking me to construe what is required by the Easement, perhaps because that is implicitly required already in this summons. I also observe that a query was raised in the written submissions about the V.A.T. treatment of this transaction. But that is not in the summons and nor did the court have the necessary materials to reach any conclusion upon it. I shall say nothing more on that point.

[11] Mr Orr's argument is simple and straightforward. Clause 1 is a stand-alone clause. It is not disputed that there is consideration for it. The first defendant should pay the money under Clause 1 and then the plaintiff will give him an Easement. He submits it is not necessary to give business efficacy to the contract to imply an interpretation of the kind sought by the defendant. The clauses are sequential and not linked and his client is entitled to be paid before the Easement is handed over. He says this is particularly so as the original action was for repayment of a debt owed to the plaintiff by the defendant in the sum of £350,000. This first instalment of monies, because more may be forthcoming later, was to reflect this.

[12] The argument of Mr Humphreys Q.C., for D.C., was also put concisely as he agreed with Mr Orr that there was a net point here. There is sufficient evidence before the court that the bank is involved here and required to consent to this transaction. The first defendant is not aware of the state of the plaintiff's finances or its relations with its bank but the facts show that a businessman could reasonably apprehend that he might not recover the £250,000 from the plaintiff if the easement was not forthcoming. If Mr Orr's interpretation is correct he could hand over a quarter of a million pounds and then find that the plaintiff was unable to grant the easement because the bank would not co-operate. Would the plaintiff be able to repay the money? That would not have been an agreement that businessmen would have arrived at, submits counsel. To give business efficacy to the agreement, he submits, the payment of the money and the grant of the easement should be simultaneous. That is especially so where, as here, a third party lender is involved, namely the Ulster Bank.

[13] In support of his argument he draws attention to his client's duty to pay stamp duty on this transaction. By including the consideration in the agreement it is clear what stamp duty would be payable. He also points to paragraph 18.32 of Wylie's Irish Conveyancing Law, 3rd Edition, where it is stated to be usual to include the statement of the consideration in a deed.

[14] I pause there to say that although customary it is not legally necessary to do that. The deed will give effect to the easement. There may be good reasons, outlined by Wylie, for stating the consideration e.g. to show there is no question of a resulting trust. If, as here, the right of way is to be registered in the Land Registry that will be further evidence of the easement without the need to show consideration. Mr Humphreys does not go as far as to say that it is unlawful not to include the express consideration.

[15] When I asked in court for a copy of the original of the agreement between the parties, having been furnished with an unsigned typed copy, I was given by the plaintiff's advisors a copy signed by the first defendant and witnessed by a solicitor. That text was largely typed but had a number of manuscript amendments. It transpired that one of those was relevant i.e. that Mr Humphreys for DC had written in his own hand the opening words of Clause 2: "Upon payment of the sum above …". Hitherto that clause had begun "The plaintiff shall grant an Easement …." I pointed this out to Mr Humphreys who had not recently seen this copy of that particular document and he relied on it as helpful to him as showing a deliberate intention to link paragraphs 2 and 1. Negotiations, of course, are not admissible but this appears on the face of the document and, as I pointed out above, the phrase in question is emphatically used by being repeated in the wording of Clause 2.

[16] In reply Mr Orr pointed out that DC was responsible for the issue of stamp duty which he could deal with as he pleased. It was not necessary to put "in consideration of £250,000" in the Easement. He could exhibit to H.M.R.C. the agreement between the parties.

[17] As to the concerns put forward on behalf of the first defendant he said there was absolutely no evidence before the court that the bank would not agree to the easement. Their attitude had not been expressly ascertained because the parties had been unable to agree the terms of the settlement which had not therefore been sent to the bank.

[18] He said he submitted that in effect Mr Humphreys was seeking to rewrite the words of the agreement as if they said that Clause 2 was "in consideration of" or "in exchange for" paragraph 1 when that was not the case. No receipt clause was necessary or appropriate in the easement because the easement was to follow after the payment under Clause 1. He accepted that, in response to a question from the court, the Easement should be furnished in a reasonable time, of weeks rather than months, following the payment of the monies. In the alternative a separate receipt can be given for the £250,000.

Conclusions

[19] The first point for the decision of the court here is whether the plaintiff is entitled to an Order now or shortly for payment of this sum of £250,000 prior to granting the Easement or indeed agreeing its terms or otherwise or whether "upon payment" means that the easement is exchanged with the payment. Both Stroud's Judicial Dictionary, 8th Edition, Volume 3 and Words and Phrases Legally Defined, 4th Edition, Volume 2 helpfully cite cases relating to the meaning of "upon". There is no authority precisely on the point before me. I note, however, the following words, per Denman CJ in R v Arkwright, 12 QB 970, citing R v Humphrey, 2 P&D 691 as follows:

> "The words 'on', or 'upon', it has been decided, may either mean 'before' the act done to which it relates, or 'simultaneously with' the act done, or 'after' the act done, according as reason and good sense require, with reference to the context and the subject matter of the enactment."

[20] This is a commercial contract made between a business firm and a business man, albeit in the context of litigation. The first defendant relies on the decision of the Supreme Court in Rainy Sky v Kookmin Bank [2011] 1 WLR 2900; [2011] UKSC 50. The judgment of the court was delivered by Lord Clarke of Stone-cum-Ebony. His discussion of the relevant authorities is valuable and I have borne it carefully in mind. However, the essence of his judgment and that of the court is to be found at paragraph 21:

> "The language used by the parties will often have more than one potential meaning. I would accept the

> submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[21] It is important to remember that in expressing that view the Court was proceeding on an incremental basis. Earlier judgments, for example that of Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913, remain good law. What is clear from a reading of the authorities is that it continues to be the duty of the court to look at the contract, agreement or document as a whole in seeking to interpret any parts thereof which give rise to difficulty. Re Sigma Finance Corporation [2010] 1 All ER 571 is an illustration of that. Indeed it is evident from the jurisprudence going back to Prenn v Simmonds [1971] 1 WLR 1381 and beyond. See also Chitty on Contracts, 31st Ed. That approach is consistent with the phrase used by the Supreme Court in another field of law that context is all.

[22] Here there is an agreement between the parties to settle proceedings. The plaintiff was suing the defendant for £350,000 said to be due and owing but one sees from paragraph 8 that the defendant also had issued a writ against the plaintiff which was to be discontinued as part of this settlement with no order as to costs.

[23] I cannot accept the submission on behalf of the plaintiff that paragraphs 1 and 2 are not linked. All the clauses of the agreement are linked but particularly these first two paragraphs where, whether inadvertently or not, the phrase 'upon payment of the sum above' has been included twice.

[24] This is a case where the court is presented with alternative interpretations of clauses 1 and 2 and is entitled to construe the document as a reasonable person with all the background knowledge would, consistent with business common sense. It seems to me that business common sense would point to the first defendant parting with this substantial sum of money in return for an easement that complied with paragraph 2 of the agreement. Without casting any reflection at all on the plaintiff company, the very fact that it had commitments to a bank which would have to consent to the easement, as the parties agree, must raise the possibility, particularly in these times of continuing economic difficulty, that there was a reasonable

apprehension on the part of the first defendant that he might pay the money and then find that the plaintiff was unable for one reason or another to deliver the easement. In those circumstances one cannot rule out that he might be in difficulty in recovering his £250,000 against competing creditors. On that aspect of the matter therefore I find for the first defendant.

[25] However, as the matter has been debated before me I consider it appropriate to say something more. The issue of dispute between the parties as to the easement appears to have been centred on the desire of the first defendant or his solicitors to include in the draft easement the phrase:

> "in consideration of the sum of £250,000 (the receipt whereof H. Ltd hereby acknowledges)."

[26] First of all, paragraph 2 of the agreement which I am asked to construe has no such words. There are clear words as to the nature of the easement to be granted. As a matter of literal construction therefore the first defendant is not entitled to the phrase he seeks.

[27] But, further, it seems to me that this would not in fact be a correct or accurate statement. As I have said agreements must be read as a whole. It seems to me that the phraseology put forward by the plaintiff's solicitors is more correct i.e. that the grant of the easement is in consideration of a settlement between the parties hereto dated 28 September 2013. This agreement goes on to require the first defendant to pay a further £250,000 on to joint deposit receipt with a realistic prospect of the plaintiff getting that in the event of certain eventualities occurring under paragraphs 4 and 5 of the agreement. Furthermore, as Mr Orr pointed out, there is on both sides here a forbearance to sue which is well established in law as a form of consideration. It seems to me that the plaintiff is discharging its legal duties in insisting on its form of words and would, therefore, in presenting such an easement have the right to demand the £250,000 from the first defendant.

[28] I had understood from the parties that any other differences in the easement were not of materiality. The role of the bank is not in dispute. It seems to me the proper course to take is to adjourn these proceedings to allow an easement complying with paragraph 2 to be presented and the first defendant to pay the £250,000 forthwith in exchange for that. If this does not occur the matter may be relisted before me with a view to an Order compelling the first defendant to honour his contract by paying over the £250,000.