THE HIGH COURT

[2023] IEHC 506

2021 No. 6247P

BETWEEN

ETHAFIL LIMITED (IN VOLUNTARY LIQUIDATION)

PLAINTIFF

AND

EXPRESS BUS LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 15 August 2023

Introduction

1. This is the plaintiff's application to re-enter these proceedings for the purposes of enforcing a settlement agreement entered into between the parties on 13 October 2022 (the "**Settlement Agreement**"). The question before the court in this application is whether, in the circumstances which developed after the Settlement Agreement, the plaintiff can now recover from the defendant the payment specified in clause 9 of the Settlement Agreement.

The parties and the background to this dispute

2. The plaintiff is the registered owner of a property known as Birmayne House, Mulhuddart, Dublin 15 (the "**Property**"). The plaintiff is an insolvent company in

voluntary liquidation and Mr Myles Kirby was appointed as liquidator (the "**Liquidator**") of the plaintiff on 19 June 2019.

3. The defendant was granted a lease of part of the Property (which part is described as "**Lot 2**") by the previous owners of the Property on 15 May 2012 for a term of three years at a rent of €35,000 per annum. The defendant renounced any entitlement to a new tenancy by deed of renunciation of the same date.

4. On 19 February 2015 the defendant signed a contract to buy the Property from its previous owners. The plaintiff was at that time a subsidiary of the defendant. An agreement was entered into between the plaintiff, the defendant, Kathleen Martin (being at that time a director of both the plaintiff and the defendant) and a Mr Jon Griffin who was to procure funding for the purchase. That agreement (the "**2015 Agreement**") identified a series of transactions to be entered into by the parties to it. Those transactions included that the plaintiff would grant a lease of Lot 2 to the defendant for a term of five years. It also provided that the plaintiff would grant an option to the defendant to purchase Lot 2 within the first 12 months of that lease. It also set out circumstances in which that option would lapse.

5. The Liquidator brought an application pursuant to s. 631 of the Companies Act 2014 seeking directions, in particular regarding the rights of the parties in respect of the option under the 2015 Agreement and whether the plaintiff was in lawful occupation of the Property.

6. Allen J delivered two judgments in respect of these applications (together, the "**Directions Judgments**").

7. In his judgment dated 14 May 2021, *Kirby v Express Bus Limited* [2021] IEHC 334, Allen J found, *inter alia*, that:

(a) The plaintiff completed the purchase of the Property on 18 December 2015.

(b) On 24 December 2015, Kathleen Martin resigned as director of the plaintiff.

(c) On 24 December 2015, Kathleen Martin was replaced by Jon Griffin as a director of the plaintiff.

(d) On 25 February 2016, the plaintiff was registered as the owner of the Property.

(e) The defendant was entitled to a five year lease of Lot 2 and had an option to purchase Lot 2 pursuant to the 2015 Agreement.

(f) Because the defendant did not pay the rent due under the lease in full or on time, the option to purchase the Property had lapsed by the time the defendant attempted to exercise the option.

8. In a later and supplemental judgment dated 29 October 2021, *Kirby v Express Bus Limited* [2021] IEHC 680, Allen J stated, *inter alia*, that by failing to validly exercise the option it held, the defendant was consequently not in lawful occupation of the Property.

9. Following that latter judgment, the defendant was requested to deliver up vacant possession of the Property. The defendant did not do so at that time. On 11 November 2021 these plenary proceedings were issued seeking possession of the Property and rent arrears. On 12 November 2021 Allen J granted the plaintiff liberty to issue a motion seeking an interlocutory order for possession of the Property.

10. The interlocutory motion was settled on agreed terms which were annexed to a Court Order dated 9 December 2021 and received and filed. Those agreed terms confirmed undertakings by the defendant, *inter alia*, to (1) vacate the Property within 3 months of an Order from the Court of Appeal dismissing the defendant's appeal; (2) make an immediate payment to the plaintiff; (3) commit to pay mesne rates until such time as it

vacated the Property (such amounts to be returned to the defendant in the event of a successful Appeal); and (4) make an agreed payment to the plaintiff for arrears if the Appeal was dismissed. The within proceedings and the interlocutory motion were adjourned generally with liberty to re-enter. Insofar as costs were concerned the terms provided that:

> "*In the event that the Appeal is dismissed, the Defendant will consent to an Order for costs of the within proceedings in favour of the Plaintiff. In the event the Appeal is successful, the Defendant will be at liberty to make an application for the costs of the within proceedings*".

11. The Directions Judgments were appealed by the defendant to the Court of Appeal. The appeal included an appeal against the awarding of costs by Allen J to the plaintiff in respect of the Directions Judgments.

12. On the morning of the hearing date of the appeal of the Directions Judgments, the Appeal "*and all claims howsoever arising concerning the Property*…" were settled on the terms recorded in the Settlement Agreement.

13. The evidence before the court is that on the eve of signing the Settlement Agreement the defendant represented to the plaintiff that there were several other entities also in occupation of the Property with the consent of the defendant. None of these other entities had been disclosed to the Liquidator or to the High Court in the course of the directions hearings. The defendant provided the names of the entities in occupation and they are reflected by name in clause 2 of the Settlement Agreement. It has later transpired that there were also a number of other parties in occupation of the Property at that time although it is unclear as to whether they were permitted to occupy the

Property by the defendant. Their occupation was not however disclosed to the plaintiff prior to or in the Settlement Agreement.

The Settlement Agreement

14. The Settlement Agreement is made between the Liquidator (described as the "**Applicant**") of the plaintiff (described as the "**Company**") of the one part and the defendant (described as "**EBL**") and two related entities, Express Dublin Limited and Express Bus Self Hire Limited, of the other part. Express Dublin Limited is described as Express Bus Dublin Limited elsewhere in the Settlement Agreement and this appears to be its correct name. The Settlement Agreement notes at para 7 of the Recitals that the parties "*have agreed to compromise these proceedings* [i.e., the Appeal 2022/13] *and all claims howsoever arising concerning the Property and/or any supplemental agreement on the terms hereinafter appearing*".

15. The material clauses of the Settlement Agreement that are in issue are clauses 2, 3, 4 and 9 which provide as follows:

Clause 2: –

> "*EBL undertakes to deliver up clear and vacant possession of the Property to the Company acting by its Liquidator and particularly Lot 2 by the 31st January 2023.*
>
> *Lot 2 of the Property is currently unlawfully occupied by*
>
> - *EBL,*
> - *McBreen Environmental Drain Services Limited*
> - *Phever FM,*
> - *Temptech*

- *Express Bus Dublin Limited and*
- *Express Bus Self Hire Limited.*

("the Occupiers")

EBL acknowledges that it let the Property to the Occupiers without the knowledge or agreement of the Company and the Applicant and that their occupation is unlawful. Express Bus Dublin Limited and Express Bus Self Hire Limited undertake to vacate the Property by 31st January 2023 and are joined to this agreement for the purpose of being bound by this undertaking."

Clause 3 (to reflect handwritten amendments): –

"*The costs Orders of the High Court dated the 21st November 2021 (and the Order made in the proceedings issued under record number 2020/228 COS) and the Order 9th December 2021 respectively shall be vacated*."

Clause 4: –

"*In the event that there is a failure on the part of EBL to comply with the undertaking referred to at No.2 of these terms by or subsequent to31(sic) January 2023, EBL irrevocably consents to Orders for possession of the Property and the Respondent shall have liberty to re-enter the proceedings issued under record number 2021/6247P for the purposes of enforcing the terms of this Agreement*."

Clause 9: –

"*The Plaintiffs and the Defendants each agree that they shall bear their respective costs of the Proceedings and these settlement terms, save where clear and vacant possession is not delivered by EBL or any of the Occupants in accordance with clause 2 above EBL shall be liable to pay a contribution of €50,000 towards the costs of the Company by 28 February 2023*."

Events subsequent to the Settlement Agreement

16. Subsequent to the Settlement Agreement, on 7 November 2022, solicitors for the plaintiff wrote to the defendant's solicitors confirming that their client

> "*was extremely surprised to be informed by your client in the course of the settlement negotiations, that there were a number of other entities in occupation of part(s) (sic) the Property… It is of great concern to our client that the High Court was not made aware at any stage in the course of the various hearings that took place before the Court during 2021, or indeed in any of the affidavits filed by your client in the course of three separate proceedings before the High Court, that the Occupants were operating businesses from the Property.… Please now also confirm that your client has informed each of the Occupants that your client has given an undertaking to deliver up vacant possession of the Property and that the Occupants are required to vacate the Property by 31 January 2023…We confirm that we have written to each of the Occupants informing them of their obligation to vacate the Property by 31 January 2023. Please note that we reserve in full our client's rights, under the Settlement Agreement*".

17. On 22 November 2022, the plaintiff's solicitors requested confirmation that each of the Occupants had been informed that they were required to vacate the Property on or before 31 January 2023 and they sought copies of any leases or licences in place between the defendant and the Occupants. On 30 November 2022 the defendant's solicitors asked that the plaintiff's solicitors identify the terms of the Settlement Agreement which they say obliged the defendant to confirm they had so informed each of the Occupants.

18. By letter dated 12 January 2023 the plaintiff's solicitors wrote to the defendant's solicitors confirming that the defendant's obligation to deliver up vacant possession of the Property by 31 January 2023 "*requires it to ensure that the Occupants have also vacated the Property by that date*". Reference was also made in that letter to clause 9 of the Settlement Agreement noting that the defendant was liable to pay a contribution of €50,000 towards the costs of the Company if clear and vacant possession of the Property was not delivered by the defendant "*or by any of the Occupants*" by 31 January 2023.

19. On 31 January 2023 the defendant wrote directly to the plaintiff's solicitors indicating that

> *"[I]n accordance with Paragraph 2 of the Terms of Settlement (having revoked licenses with McBreen Environmental Drain Services Limited, Phever FM and Temptech concerning their occupation of the property) we hereby deliver clear and vacant possession of the property, particularly Lot 2 thereof, to you*".

The letter confirmed on behalf of Express Bus Dublin Limited and Express Bus Self Hire Limited that "*they hereby vacate the property in accordance with Paragraph 2 of the Terms of Settlement*."

20. On 1 February 2023 the Liquidator's agents attended the Property for the purposes of securing possession of it. Those agents were prevented from accessing the site and it appeared that a number of other entities were in occupation of the Property. The Liquidator's evidence is that at no time prior to 1 February 2023 was he made aware of the existence of these other occupiers.

21. On 2 February 2023 the plaintiff's solicitors wrote to the defendant's solicitors noting that parties other than those disclosed in the Settlement Agreement also appeared to be

in occupation of the Property. It was stated that the defendant's undertaking in the Settlement Agreement to deliver up vacant possession of the Property required the defendant to ensure that "*all occupants of the Property vacate the Property by 31 January 2023*". The plaintiff demanded payment in the sum of €50,000 pursuant to the provisions of clause 9 of the Settlement Agreement, without prejudice to the plaintiff's entitlement to seek damages arising from the defendant's breach of the Settlement Agreement, including damages for misrepresentation.

22. Separate proceedings were then issued by the plaintiff against parties in occupation of the Property most of whom had not been named as "Occupiers" in the Settlement Agreement. This court has already given judgment in one such set of proceedings entitled *Ethafil Limited (in voluntary liquidation) v Stephen Mulvany* [2023] IEHC 473.

23. For the purposes of the present application, it is not necessary for this court to consider the impact on the Settlement Agreement of other "Occupiers" in circumstances where three of the named parties in clause 2 of the Settlement Agreement had not vacated the Property by 31 January 2023. It is common case that as at 31 January 2023 Temptech, McBreen Environmental Drain Services and Phever FM remained in possession of the Property.

The submissions of the parties

Submissions by the plaintiff

24. Counsel for the plaintiff argues that words in the Settlement Agreement should be given their natural and plain meaning. He says that the defendant, in committing to deliver up "*clear and vacant possession*" of the Property in fact committed not only to itself vacate the Property but also to ensure that all occupiers (and particularly those whom it identified and permitted to occupy the Property) would also vacate the Property by the

agreed date. He says the undertaking given by the defendant is a stand-alone undertaking to deliver clear and vacant possession. While the other related parties are joined to the Settlement Agreement and have given their own undertakings, the plaintiff is not relying on these undertakings in this application. The plaintiff is relying on the stand-alone undertaking by the defendant to deliver up clear and vacant possession of the Property to the plaintiff by 31 January 2023. Counsel referred to Wylie and Woods, *Irish Conveyancing Law (4th ed)*, in which the authors write at para 13.42:

> "*In the absence of any provision in the contract, it is settled that there is an implied condition at common law that the purchaser will be given vacant possession on completion. This means that the vendor must see not only that he and other occupiers, such as tenants or squatters, leave the premises, but also that the physical state of the property itself is left vacant, eg, it must not be left cluttered up with rubbish. Condition 17* [of the Law Society's 'Conditions of Sale 2019 Edition'] *provides expressly that, subject to any contrary provision in the particulars or conditions or implied by the nature of the transaction, the purchaser is entitled to vacant possession on completion*."

25. Counsel for the plaintiff argues that the law in relation to vacant possession makes clear that any residual occupation by a third party constitutes a breach of the defendant's undertaking to deliver up vacant possession.

26. He says that clause 9 of the Settlement Agreement envisaged the need for all Occupants (and not just the defendant) to vacate the Property. While there is a difference in terminology between clause 2 which refers to "*the Occupiers*" and clause 9 which refers to "*any of the Occupants*", Counsel for the plaintiff says it is clear that these clauses are intended to mean the same parties. He says the plain meaning and effect of clause 9 is that if the defendant or any of the Occupants (being, he says, at least those

parties identified in clause 2) do not vacate the Property "*in accordance with clause 2*", then the defendant must pay an agreed contribution of €50,000 towards the plaintiff's legal costs. Counsel was not limiting his argument to only those parties identified in clause 2 but, as I have previously indicated, I do not need to consider this matter in circumstances where three of the identified "*Occupiers*" in clause 2 in fact remained on the Property post 31 January 2023.

27. Counsel for the plaintiff said that even if the defendant had no right to compel other Occupants to leave the Property, then clause 9 required the defendant nevertheless to make a payment of €50,000 to the plaintiff if those Occupants remained. It was a matter for the defendant as to how they would be able to comply with the Settlement Agreement. They alone had the knowledge of who in fact was in occupation of the Property and they admitted that it was the defendant who had allowed the identified Occupiers in clause 2 to occupy the Property. He said the defendant was not compliant simply because it had advised those Occupiers to leave or that the defendant had terminated whatever licences or other arrangements it had entered into with them regarding their occupation of the Property. If those parties remained on the Property after 31 January 2023 there simply was no "*clear and vacant possession*" delivered to the plaintiff and the payment obligation in clause 9 was triggered.

28. He said the court was not being asked to force the defendant to compel others to leave the Property. The court was simply being asked to confirm that because those others had not left, the provisions of clause 9 of the Settlement Agreement required the defendant to make the agreed payment to the plaintiff. Counsel argued that there would have been no purpose served at all in identifying the parties in clause 2 if their occupation was not also covered by the provisions of clause 9, which clause indeed expressly refers to clause 2.

29. He said that the correspondence exchanged with the defendant immediately following the Settlement Agreement made it clear that the plaintiff expected that none of those identified parties would remain on the Property post 31 January 2023. While that may be so, the court notes that post agreement correspondence is not admissible to establish the intention of parties at the time of the agreement.

30. Counsel for the plaintiff rejected any suggestion that clause 9 was a penalty clause. He said that the clause was an "incentive" to ensure that the defendant complied with the Settlement Agreement and that the quantum payable (expressed as a contribution towards legal costs) was only a fraction of the actual legal costs which have been incurred in respect of the several strands of litigation required to be brought by the plaintiff through the Liquidator. He said this was not a situation akin to that set out in the decision of *ACC Bank Plc v Friends First Managed Pensions Funds Ltd & Ors* [2012] IEHC 435 where an additional sum was payable in the event of a breach of agreement. By contrast he said the present situation reflected a negotiated settlement and costs orders in favour of the plaintiff which the plaintiff agreed not to pursue save to the extent set out in clause 9. He said no additional sum was payable if there was a breach – rather there was simply a provision that the plaintiff could recover costs (it had already been awarded) in a fixed amount by way of contribution in the event that either the defendant or other Occupants remained in possession of the Property after 31 January 2023.

31. Counsel for the plaintiff rejected any suggestion that this court would have to hear oral evidence before it could decide on this application.

Submissions by the defendant

32. The arguments advanced by the defendant are threefold namely that (1) it has not breached its undertaking; and/or (2) it has taken all steps open to it to procure compliance with the undertaking; and/or (3) that that part of clause 9 of the Settlement Agreement which purports to impose a €50,000 penalty is not enforceable.

33. Counsel for the defendant argued that there was no provision in the Settlement Agreement that the defendant would ensure others would physically vacate the Property. He says that clause 2 simply acknowledges that those parties were then unlawfully occupying the Property. He argues that the defendant (given its own legal status as a party with no interest in the Property) has no legal right to compel others to leave the Property and those others were not a party to the Settlement Agreement. He says the plaintiff was expressly aware of the existence and identity of the "*Occupiers*" as identified in the Settlement Agreement and that each one of them was acknowledged to be in unlawful occupation of the Property.

34. He says that the defendant has provided uncontested sworn evidence that on 16 January 2023 notices of termination were served on all of the remaining Occupiers as identified at clause 2 of the Settlement Agreement. As the defendant had no legal right to take steps to force the remaining Occupiers off the Property, it was not possible for the defendant to ensure that all of those parties had vacated the Property by 31 January 2023. Counsel argued that it was simply not open to the defendant to do anything more and no more was required of it under the Settlement Agreement other than to itself vacate. Counsel argued that, viewed in its proper context, the defendant has complied with its obligations under clause 2 of the Settlement Agreement and that the clause cannot be interpreted as requiring the defendant to take steps which are not available to

it is a matter of law. In that regard, he argues that the plaintiff's reliance upon established principles of "clear and vacant possession" in conveyancing law is misplaced and that the circumstances of this case are wholly distinguishable from a standard conveyance where a vendor, up until the completion date, retains the legal right to ownership and possession and, as an extension, the right to force any unlawful occupiers off the property.

35. Counsel for the defendant also argued that there are disputed issues of fact in the present application and that those factual disputes are such that the plaintiff cannot effectively recover summary judgment in the sum of €50,000. He says there is a low threshold to be met to defend with the benefit of oral testimony. He says that questions of law can be determined on affidavit but only where they are straightforward. He says it is not the function of this court to form a view on the credibility of evidence put forward and that the resolution of issues of fact are unsuitable for summary judgment. He argues that this court should not find that there has been a breach of the Settlement Agreement on a motion for re-entry and that instead the matter requires to be dealt with by way of plenary hearing. There were multiple affidavits exchanged on this application, and he argues it was now not open to the plaintiff to simply say that it no longer needed to rely on them.

36. Counsel for the defendant also argues that that part of clause 9 of the Settlement Agreement which purports to impose a €50,000 payment is a penalty clause and is thus unenforceable.

37. He argued that the dominant purpose of clause 9 of the Settlement Agreement is deterrence rather than being compensatory and as such this clause constitutes a penalty. Counsel further submitted that clause 9 did not reflect any foreseeable loss arising from any alleged breach.

38. Strictly in the alternative, counsel argued that having regard to the nature of clause 9, it must be strictly construed and the claimed liability in respect of the sum of €50,000 does not arise in the absence of a clear breach by the defendant of its obligations under clause 2. Counsel says that the obligations in clause 9 are specifically referable to the obligations in clause 2. Therefore, the court cannot impose an additional obligation on the defendant if clause 2 does not impose it.

The applicable legal principles applied to the present facts

Principles of interpretation

39. In *Stapleyside Company v Carraig Donn Retail Limited* [2015] IESC 60, Clarke J (as he then was) observed at para 6.2 of his judgment (albeit in relation to a document that was not in a legally acceptable form) that:

> "*a court is required to do the best it can with the language used by the parties (the text) to be construed in the light of all of the circumstances in which the agreement was entered into (the context). But it is important to acknowledge that both text and context are relevant in the proper interpretation of commercial documents*."

40. He went on in para 6.3 to say that

> "*Those principles of interpretation (the "text in context" method) apply to no lesser extent in the field of property documentation. To ignore context is to ignore the well accepted fact that words used in agreements would be seen by any reasonable person having knowledge of the surrounding circumstances as being potentially affected as to their meaning by the context in which the agreement was entered into in the first place. But equally, the text must be given all*

appropriate weight, for it is in the terms of that text that the parties have settled on their arrangement".

41. On the facts of the present case, I am satisfied that at the time of the settlement the defendant had no legal entitlement to bring proceedings to force the remaining occupiers off the Property if they remained on the Property after their licences were terminated by the defendant. To that extent, I agree with Counsel for the defendant. I do not believe that the Settlement Agreement requires such steps to be taken by the defendant. It is a different matter if the defendant agrees that it will accept a financial consequence if those Occupants do not leave on time.

42. Clause 9 envisages that a scenario may well arise where "any of the Occupants" do not deliver clear and vacant possession of the Property after the nominated date. There is no suggestion that the defendant will be compelled in those circumstances to force them to leave. Instead, this event is the trigger for clause 9. It may have been unusual for the defendant to agree to this clause in circumstances where it had no control over the actions of those Occupants. But this is what the clause says on its face.

43. The context is important here. The Settlement Agreement was negotiated at a time when the plaintiff believed for good reason that there was no one else in occupation of the Property. Had that been correct, it would only have been necessary to secure agreement from the defendant that it would leave by a certain date. However, on the eve of signing the Settlement Agreement (and in circumstances where the Court of Appeal hearing was ready to proceed), the terms of the Settlement Agreement were amended to include reference to other named parties whom the defendant disclosed were also in occupation. The context is that the defendant had no standing or legal right to bring legal action to force the remaining occupiers off the Property if they remained

on the Property. As stated in para 23 of the second affidavit of Kathleen Martin sworn 13 March 2023:

> "*As Express Bus Limited has no claim, title or rights to assert in respect of the property and had vacated the property by 31 January 2023, it is not clear what action Express Bus Limited could have taken in order to enforce the termination of the licences against those licensees who remained on the property to vacate the property*".

44. I do not believe that the plain and ordinary meaning of the Settlement Agreement is that the defendant was required to take steps to compel those parties to leave – nor could it have done so as a matter of law. However, clause 9 was clearly designed, in my view, to incentivise the defendant to do what it could to persuade the other Occupants to leave and if the defendant was unsuccessful (recognising that this was a real possibility), then the defendant agreed to the terms of clause 9. I believe that the "Occupiers" in clause 2 on an ordinary reading of the Settlement Agreement are intended to be the same parties as are called "Occupants" in clause 9.

45. I find that the Settlement Agreement imposed no legal requirement on the defendant to compel the Occupants to leave, albeit that the plaintiff may have believed this to be so. The defendant simply had no legal basis to compel the Occupants to leave as the defendant holds no interest in the Property. This makes the present situation entirely different to the usual situation where a party undertakes to deliver clear and vacant possession to another party.

<u>Can matters be determined on this motion for re-entry?</u>

46. In relation to the requirement that this court should remit matters to plenary hearing, I am not persuaded that this is such a case. Certainly, there were many affidavits

exchanged between the parties and there are factual differences undoubtedly set out in them.. However, this exchange of affidavits must be considered in the overall context of what were three separate applications before this court effectively run together given the commonality of the background circumstances. This motion for re-entry for the purposes of interpreting the Settlement Agreement ran in tandem with two other motions in which the plaintiff sought interlocutory relief against a number of different parties who remained in occupation of the Property. Much of the affidavit evidence concerned the circumstances in which those persons/entities entered into possession and the role of the defendant (if any) in relation to that. These issues however are not relevant to the net issue before the court on this application. What this court is concerned with in this application is whether, on the uncontroverted evidence that three of the identified Occupiers did not deliver vacant possession by 31 January 2023, clause 9 has been triggered and, if so, is it enforceable. This is an issue I believe can be dealt with in the absence of a plenary hearing.

Is clause 9 a penalty clause?

47. In terms of enforceability, a key question to be asked is whether clause 9 is in effect a penalty clause. If it is, it will be unenforceable for that reason.

48. In *Pat O'Donnell & Co Limited v Truck & Machinery Sales Ltd* [1998] 4 IR 191, the Supreme Court (Barron J) provided an analysis of penalty clauses. That case concerned a clause in the conditions of sale which provided for interest at the rate of 2½ per cent per month to be chargeable and payable immediately on overdue accounts. That provision (in respect of which judgment had been awarded in the High Court) was appealed on the ground that the clause provided for a penalty and was therefore unenforceable. Barron J (with whom the other members of the Court agreed) allowed

the appeal and remitted the matter to the High Court to have the appropriate rate of interest assessed at the commercial rate applicable at the time of breach. At p. 214, he accepted and applied the principles set out in *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited*, [1915] A.C. 79 at pp. 86-87, which included the following:

> "1. *Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages…*
>
> *2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage…*
>
> *3. The question whether a sum stipulated and penalty or liquidated damages is a question of construction to be decided on the terms and inherent circumstances of each particular contract judged as at the time of the making of the contract, not as at the time of the breach*…".

49. Dealing with the circumstances in which an agreed sum might be held to be a penalty the court noted (at p 214, quoting from p. 87 of *Dunlop*) that:

(a) "*it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach…*

(b) *It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid*".

50. In *Dunlop*, Lord Parker confirmed that the law permits parties to agree beforehand the amount to be paid on breach where the damages which may arise out of a breach are in their nature uncertain. It will depend on the circumstances of each particular case whether the sum agreed to be paid is really a penalty. He went on to state at p. 97 that

> *"If, for example, the sum agreed to be paid is in excess of any actual damage which can possibly, or even probably, arise from the breach, the possibility of the parties having made a bona fide pre-estimate of damage has always been held to be excluded, and it is the same if they have stipulated for the payment of a larger sum in the event of breach of an agreement for the payment of a smaller sum*."

51. The most recent consideration of penalty clauses in this jurisdiction can be found in the decision of *Sheehan v Breccia and Irish Agricultural Development Company* [2018] IECA 286. In her judgment delivered on 30 July 2018, Ms Justice Finlay Geoghegan noted that the UK Supreme Court had delivered judgment in two cases; *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Limited v Beavis* [2015] UKSC 67, [2016] A.C. 1172, as to when a contractual provision may be struck down as a penalty. She referred to the decision of the Supreme Court in *Launceston Property Finance Ltd v Burke* [2017] IESC 62 [2017] 2 I.R. 798 where McKechnie J referred to Haughton J's comments on *Cavendish* in the High Court in *Sheehan v Breccia* [2016] IEHC 67 and in another judgment delivered the same day, *Flynn v Breccia* [2016] IEHC 68. At para 48 in *Flynn*, Haughton J stated:

> "*It is my view that since Cavendish it has become apparent that in the UK courts the jurisprudence on penalty clauses involves a different approach and a different emphasis. Whether this should now be applied in this jurisdiction is a matter that may fall to be considered by an appellate court, but I have concluded that I should not depart from the jurisprudence established by judges of equal rank.*"

(Quoted by McKechnie J in *Launceston* at para 41 and by Finlay Geoghegan J in *Sheehan* in the Supreme Court at para 19.)

52. McKechnie J stated at para 43 of his judgment that

"…*I am satisfied that this issue does not require to be determined in the instant case; however I shall take this opportunity and say, though clearly obiter, that I am not immediately convinced that any change to the test is necessary, nor that the route taken by the UK Supreme Court is necessarily a superior one. I stress that the live debate must be left over for a more suitable case, if and when that should arise.*"

53. Finlay Geoghegan J confirmed (at para 21) that *"[t]he High Court and this court remain bound in accordance with the Supreme Court judgment in Pat O'Donnell to apply the Dunlop principles in determining whether the surcharge interest clause is or is not a penalty*". The *Pat O Donnell* judgment is obviously binding on this court and accordingly represents the principles I will apply in determining if clause 9 is, in substance, a penalty.

54. In the present case, clause 9 does not appear to be concerned at all with a pre-estimate of loss arising or likely to arise from any breach by the defendant. It is not suggested in clause 9, for example, that the payment of €50,000 is designed in any way to compensate the plaintiff for itself having to deal with securing vacant possession from any of the Occupants who remain on the Property nor any loss resulting from them remaining in occupation beyond the specified date. The sum is a flat figure which is payable whether one or more of the Occupants overhold by one day or by a much longer period. I do not see how it could be suggested that the figure of €50,000 could be considered as a reasonable pre-estimate as at the date of the Settlement Agreement of

the likely loss the plaintiff would suffer if any of the Occupiers remained on the Property beyond 31 January 2023. The sum payable bears no relationship to the mesne rates agreed to be payable by the defendant pending the appeal being heard. Furthermore, it is clear from the correspondence from the plaintiff's solicitors (including for example their letter dated 2 February 2023) that the plaintiff intended to also seek damages for breach and for misrepresentation without prejudice to having demanded payment of the sum of €50,000 pursuant to clause 9.

55. The clause is of course drafted in such a way as to not describe the payment as an assessment or pre-assessment of damages. Instead, the payment of €50,000 is described in clause 9 as a sum stipulated as being payable by way of "*a contribution… towards the costs of the Company*".

56. The court is not bound by the terminology used by parties in describing a payment and in this case the court will have to consider what is the correct nature of the payment in all the circumstances. This exercise in construction is one of substance and not form.

57. I note but do not accept the submissions made by counsel for the plaintiff that payment of this "*contribution*" was merely a fraction of the costs which had actually been incurred by the plaintiff/Liquidator and so for that reason could not be classed as a penalty. Counsel argued that there was no basis for any interpretation that clause 9 required a payment to be made over and above that which was in fact otherwise due by the defendant to the plaintiff in respect of legal costs. However, this does not appear to me to be correct on the facts in this case. While the costs of the Directions Judgments were awarded to the plaintiff, those costs orders were appealed to the Court of Appeal and were compromised in the Settlement Agreement. The Settlement Agreement at clause 3 expressly confirms that those costs orders "*shall be vacated*". They therefore do not remain available to the plaintiff to now use as a basis to recover costs previously

ordered in its favour. The term "*Proceedings*" in clause 9 is not defined. The Settlement Agreement is drafted with the title and record number of the Court of Appeal/ Directions Judgments. There are no costs orders extant in favour of the plaintiff in those proceedings, or in the current proceedings, in light of clause 3 of the Settlement Agreement.

58. In those circumstances, to require the defendant to pay a contribution to the plaintiff's costs, would be to require an additional payment above and beyond what the plaintiff is entitled as of right to demand for its costs and thus this payment cannot be categorised as a part payment of costs otherwise due by the defendant to the plaintiff. Furthermore, there was no evidence at all before the court as to the extent of the costs incurred. It may have been possible of course for the plaintiff to have made the waiving of legal costs conditional on there being no party remaining on the Property after 31 January 2023 and to then seek to reinstate costs orders in its favour if that did not occur. That is not, however, the drafting approach that was adopted.

59. In all the circumstances, therefore, I believe that the clause 9 payment of €50,000 is a penalty insofar as this sum was not a genuine estimate at the time of the Settlement Agreement of the loss likely to be sustained by the plaintiff, but was a sum in excess of any such anticipated loss. Thus, if paid, it would be in the nature of a penalty or punishment imposed on the defendant.

60. Ordinarily, the finding that a clause is a penalty clause results in the inevitable consequence that it is unenforceable. That does not mean the injured party is cut off from recovery of its losses. As noted by Diplock LJ (as he then was) in *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1446:

> "*Where the court refuses to enforce a "penalty clause" of this nature, the injured party is relegated to his right to claim that lesser measure of damages to which he would have been entitled at common law for the breach actually committed if there had been no penalty clause in the contract*."

61. In the present case the clause is drafted in a most unusual manner, and I have had to consider whether, in the circumstances which occurred, the clause could be enforceable against the defendant for the following reason.

62. Barron J in *Pat O'Donnell* at p. 217 notes that *"[t]his doctrine of penalties applies only where there has been a breach of contract*". The difficulties raised in this case are self-evident in circumstances where clause 9 refers to the same payment being made by the defendant in two different circumstances, namely where clear and vacant possession is not delivered by the defendant or where clear and vacant possession is not delivered by "*any of the Occupants",* in each scenario, "*in accordance with clause 2*". The defendant (and its related entities who are parties to the Settlement Agreement) clearly control their own occupation of the Property and they undertook in clause 2 to themselves vacate it. If they had refused or failed to leave the Property by 31 January 2023 they would have been in breach of the Settlement Agreement and the application of clause 9 as a penalty would clearly arise for consideration.

63. However, if clause 9 is triggered by the mere continued occupation of other Occupants who the defendant has no legal entitlement or obligation to remove from the Property, it appears to this court that clause 9 would then be triggered by circumstances where there is in fact no breach of the Settlement Agreement by the defendant but simply because, factually, those Occupants have failed to vacate. The question which then arises is whether in those circumstances it is appropriate at all to interpret clause 9 as a penalty (the necessary pre-requisite for which is a breach of contract).

64. It is not disputed that clear and vacant possession was not delivered on 31 January 2023 by three parties who had been identified as Occupiers in clause 2. This scenario did not arise from any breach of the Settlement Agreement by the plaintiff (for the reasons I have already outlined). A party may agree to accept a contractual obligation which he cannot control, however unwise that may be. Both parties were independently legally advised in relation to the Settlement Agreement. The defendant agreed in the Settlement Agreement to pay €50,000 to the plaintiff "*where clear and vacant possession is not delivered by EBL or any of the Occupants in accordance with clause 2 above*…". It is the inclusion of the words "*in accordance with clause 2 above*" that in my view creates a difficulty with the argument of a standalone covenant by the defendant to pay simply because the Occupants remained in possession. Clause 2 certainly required EBL to deliver vacant possession by 31 January 2023, but I do not believe as drafted that it required EBL to procure the Occupiers (or Occupants) to do so or that those Occupiers were themselves compelled by clause 2 to vacate the Property by 31 January 2023 or indeed at all. I therefore believe that the drafting of the clause 9 obligation is not sufficient for the payment obligation to arise simply on the factual occurrence of the non-defendant Occupants remaining on the Property beyond the 31 January 2023. If that was the outcome intended by the plaintiff, the clause would need to say so in very direct terms. It does not.

Conclusion

65. I find that on a plain reading of the Settlement Agreement it required the defendant (and its named related entities who were parties to the Settlement Agreement) to vacate the Property by 31 December 2023. It did not however compel the defendant to return possession of the Property to the plaintiff free from the other identified Occupiers. Nor

does the defendant have any legal right or entitlement to require the Occupiers to vacate the Property in which it has no legal or beneficial interest. Therefore, the failure of the defendant to secure the removal of the other identified Occupiers does not constitute a breach of contract by the defendant. Had the defendant itself failed to vacate, then this would amount to a breach of contract by the defendant (and likewise for the related entities who were parties to the Settlement Agreement).

66. Had there been a breach of contract by the defendant, I find that the payment provisions in clause 9 of the Settlement Agreement would constitute a penalty clause and would thus be unenforceable in circumstances where the amount specified is a payment of money stipulated as *in terrorem* of the defendant and in terms which cannot be deemed to be a genuine pre-estimate of any damages the plaintiff was likely to sustain in the event of the defendant (or its related entities) failing to vacate the Property by 31 January 2023.

67. Recognising that penalty clauses arise in the context of a breach, I have considered if clause 9 can be triggered and enforced merely by the existence of any of the other unrelated identified Occupiers remaining on the Property after 31 January 2023. The specification in the clause of the Occupants not delivering vacant possession "*in accordance with clause 2 above*", leads me to the view that the clause is not worded in terms that are clear enough to permit the payment specified to be recovered as an agreed payment on the basis of a stand-alone covenant by the defendant unrelated to any breach on its part. There is no part of clause 2 which provides a mechanism for the Occupants (or Occupiers) to have to vacate the Property.

68. I will list this matter for mention at 10.30am on Tuesday 17 October to agree the final form of Order and to deal with any issues arising from this judgment including in respect of legal costs.