Neutral Citation: [2015] IEHC 678
Record No. 2015 No. 161SP

THE HIGH COURT
In the matter of:
Sections 25 and 26 of the Trustee Act, 1893

BETWEEN:

GEORGE MALONEY

Applicant

– and –
TED O'CONNOR
– and –
DONAL DUNNE

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 3rd November, 2015.

PART 1: KEY ISSUES ARISING

1. There are two key issues presenting in the within proceedings. First, what is the consideration for a contract for the sale of land where (a) the existence of that contract is not disputed by the parties thereto, but (b) the contract in and of itself is silent as to the consideration due? Second, ought the court to direct certain persons rendered trustees under that contract to perform their duties as trustees, even though the party seeking such direction of the court has failed to comply with a key obligation (the discharge of the consideration due)under that contract?

PART 2: THE PARTIES TO THESE PROCEEDINGS

2. Mr Maloney comes to this matter as the receiver and manager of John Fleming Construction Limited ('Fleming Construction'). Of the two respondents, only Mr O'Connor appeared at the within proceedings. It appears from the evidence that Mr Dunne, being unable to afford legal representation, elected not to come to court. Mr O'Connor represented himself at the hearings and consistently struck the court as an honest man. Many, if not all, of the arguments that Mr O'Connor made, and made most effectively, fell, if accepted by the court, to benefit Mr Dunne also.

PART 3: UNMENTIONED CONSIDERATION

3. On 9th April, 2003, a contract for the sale of certain lands in County Cork was executed between Messrs O'Connor and Dunne, as vendors, and Mr John Fleming as trustee for Fleming Construction.A striking feature of this contract of sale is that no details as to the consideration due are stated in it. The 'closing' of the transaction between the parties, *i.e*. the moment in time at which all outstanding details were fully and finally agreed and the necessary legal documentation was executed, took place, as contemplated by the contract of sale, on 25th April, 2003. A question immediately arises as to what the court is to make, legally, of a situation where:

> (i) a contract of sale is executed on 9th April, 2003;
>
> (ii) that contract of sale does not state the applicable consideration; and
>
> (iii) the 'closing' transaction, at which all outstanding details are fully and finally agreed and applicable legal documentation executed, takes place, as expressly contemplated by the contract of sale, on 25th April, 2003.

4. Having regard to the facts presenting, the court considers that what happened on 9th April, 2003, was the execution of a contract to sell certain lands for such full and final consideration as would be agreed by, and subject to such necessary documentation as would be executed on, the date of the 'closing'. The initial consideration for this contract was the payment on 9th April by the purchaser of a substantial cash amount, in effect by way of deposit, and/or a mutual promise between the parties as to their future respective actions in relation to the sale. The amount of the deposit is also not stated in the contract of sale; however, receipt of the deposit is signed for, and the court has seen bank documentation indicating that a deposit was paid over by the purchaser.

5. There has been no suggestion by either of the parties that, at the time the contract of 9th April, 2003, was effected, everything intended by the parties to be covered by same was not expressly or impliedly agreed therein, except of course as to (a)the applicable consideration(both parties appear to contend the consideration was agreed;it is precisely what was agreed that is disputed; and the court has reached the conclusion identified above in this regard), and (b) agreement as to the precise documentation to be executed. As a matter of general contract law, such an agreement could perhaps be perceived as vulnerable to attack as a mere 'agreement to negotiate', and so too uncertain to have any binding force. However, neither party to the within proceedings has sought to assail, nor seems to entertain any doubt about, the contractual validity of the agreement of 9th April, 2003. There being no dispute between the parties as to the existence of that agreement, as opposed to its detail, there is no dispute for the court to resolve in this regard.

6. The court considers later below whether the contract of 9th April, 2003, is enforceable by reference to the requirement arising under s.2 of the Statute of Frauds (Ireland) 1695 (latterly replaced by s.51(1) of the Land and Conveyancing Law Reform Act 2009) as to the need for a contract for the sale or disposition of land to be in writing, or for there to be a written note or memorandum of same, signed by the person against whom the action is brought or her agent. Suffice it for now to note that the court does not consider there to be anything in the evidence before it that, at the time the contract of 9th April, 2003 was concluded, it did not contain all the essential or material terms of the agreement between the parties (what is essential or material being primarily a matter for them) and thus nothing to suggest that there was any deficiency presenting in the contract by reference to the Statute of Frauds.Notably, however, as will be seen in Part 4 below, the court considers that a separate note executed by the purchaser's agent (solicitor) on 25th April, 2003, the day of the 'closing', when combined with the contract of 9th April, 2003,has the effect that there is, in any event, a note or memorandum in writing sufficient to satisfy the Statute of Frauds.

PART 4: THE NOTE TO FILE OF 25TH APRIL, 2003

7. Among the documentation furnished in evidence before the court is a typewritten note to file of 25th April, 2003 (the day of the 'closing') by Ms Geraldine 'Ger' Crean, in her capacity as solicitor for,and agent of, the purchasers. (Though the court refers here and elsewhere in this judgment to Ms Crean's note as 'typewritten', the note looks as though, and the court assumes and means that,it was typed into a computer and then printed off). This note reads as follows:

> *"Just when we were finished closing this sale, we by chance mentioned the question of stamp duty. It had been raised by me in correspondence and they had confirmed that they had no difficulty furnishing us with Deeds of Sub-Purchase [being a part of a process aimed at yielding a lower stamp duty liability]. We were discussing the recent stamp duty changes in particular for non-residential properties and I mentioned that at least getting Deeds of Sub-Purchase would*

assist us and Fionnuala[Breen-Walsh] said that it was working all round because her clients were getting half of the stamp duty. I told her this was the first time I had heard that they would get half of the stamp duty. We made a number of phone calls to our mutual clients. I rang John Fleming….He said that he would have to check his notes but he thinks he might have said something in passing but he didn't think he said he would give him half the stamp duty. Her [Ms Breen-Walsh's] clients were on the other hand adamant that John said he would give them half the stamp duty. John was in Rushbrooke and he said he wouldn't be back in Bandon until around 3 o'clock. I told Fionnuala that she could hold the money but it must be held in trust until we resolve this issue and she said there would be no problem doing so.

On the way back to Bandon, I rang Vincent O'Donovan. He felt that all the stamp duty saving should be Flemings and he wasn't aware that John had any conversation with them about stamp duty. As the afternoon unfolded, both Vincent and indeed Fionnuala Breen-Walsh had checked with Niall Cahalane and it appears that John did say something to them about halving the stamp duty. Vincent, prior to that, had offered a third of the stamp duty back. Fionnuala was a little bit nervous about money coming back and she suggested that works be done to their houses [the court understands that what was proposed was the building of certain garages] to the value of half the stamp duty which is €194,000. She also said, that if works are done, we at least can get VAT invoices and claim back the VAT at 13.5% which at least would save us about €27,000.00. Eventually at the end of the afternoon, Vincent confirmed that he was happy to do this. We, therefore, must carry out works to the value of €194,000 which figure is inclusive of VAT. Strictly speaking Flemings should have some kind of flexibility because they will determine what works are worth €194,000 even though Fionnuala confirmed, that obviously if we go overboard on that, there will be an argument.

Ger".

8. The court concluded in Part 3that the contract of 9th April, 2003, was a contract to sell certain lands for such full and final consideration as would be agreed by, and subject to such documentation as would be executed at, the 'closing'. The above note is of relevance when it comes to determining what was the eventually agreed consideration and is considered further in this regard in Part 5. However, it seems to the court that even if it were wrong in the conclusion reached in Part 3, the above note and the contract of sale of 9th April, between them comprise a note or memorandum in writing sufficient for Messrs O'Connor and Dunne to rely upon for the purposes of the Statute of Frauds. The contract of 9th April is signed by the purchaser and the note of 25th April is signed by the purchaser's agent (solicitor) and refers to an issue that arose the moment the transaction was purportedly 'closed' between the parties – though in truth it is difficult to see that it was 'closed' given (a) the immediate confusion regarding the Split Benefit arrangement and (b) the fact that, at the purchaser's request and with the vendors' acquiescence, the purchase monies transferred were immediately treated as having been handed across in trust only, until the issue of the agreed consideration was resolved between the principals.

9. Counsel for Mr Maloney argued that the name 'Ger' appearing on a note committed to file by a solicitor whose name is 'Geraldine' and who is referred to in real-life as 'Ger' falls not to be read as a signature but, in effect, as a conglomeration of alphabetical letters without any legal effect. When presented with this argument, the court was reminded of the observation made by Hardiman J., albeit in a different context, in *Maguire v. Ardagh*[2002] 1 I.R. 385, 669, that *"I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law."* In appending the shortened version of her name to the note to file, Ms Crean, it seems to the court, clearly intended to append a form of electronic signature as an assurance to herself and anyone who followed after her that it was an authentic note by her which carried and carries the natural gravitas and effect that necessarily attaches to a solemn note done by a clearly competent solicitor, acting as agent for her client – and why else would Ms Crean write the note but for the fact of that agency?

10. In support of his contention that the name 'Ger' at the end of the above-quoted text falls not to be read as a signature but as a conglomeration of letters without legal effect, counsel for Mr Maloneyrelied upon the long-ago judgment of McWilliam J. in *Kelly v. Kineen* (Unreported, High Court, 29th April, 1980), an action for specific performance in which it was argued that the initials 'EB/PC' at the head of an attendance note should be read as a signature. A few key factual differences between that case and this immediately leap out:

- first, *Kelly* was a case concerned with initials and not, as here, with the appending of the common form of an agent's name ('Ger');

- second, it is usual at the commencement of an attendance note to state the names or initials of the parties in attendance, i.e. it is not intended thereby to make any form of mark or signature;

- third, it is usual to place a form of signature at the end of a document, which is precisely what Ms Ger Crean ('Ger') did with her electronic signature;

- fourth, an attendance note is often, perhaps typicallY, drafted in the course of a meeting with one or more clients and is usually an a*ide-mémoire* as to what was said at that meeting – and sometimes so much is said by so many about so little that attendance notes can be of limited subsequent use, except perhaps as a basis on which to draft a'note to file';

- fifth, by contrast, a 'note to file' tends very often to be used by a solicitor to note what exactly was agreed between parties at a meeting in the event of any later dispute arising; indeed, such a formal note is to be expected of a competent solicitor and its purpose is in practice well understood where, e.g., the full and final agreement as to the consideration for a land transaction is arrived at, as here, through a dynamic process on the very day of closing; in such a fluid environment it is important, and Ms Ger Crean clearly recognised the importance of the fact, that some formal and permanent record of what was agreed between the parties ought to be placed on her files in case her client faced any future challenge as to what was agreed.

11. In truth, the factual differences between *Kelly* and the circumstances presenting in this case are such that *Kelly* can be distinguished entirely on its facts. Thus the court can avoid disagreement with the conclusion of McWilliam J. in *Kelly*, while arriving at a rather different conclusion in this case. In *Kelly*,McWilliam J. observes, at 8:

"Two matters arise in connection with the attendance docket….It is alleged on behalf of the Plaintiff that the letters EB contained in the reference EB/PC stand for Eric Brunker and that these initials in this form constitute a sufficient signature to satisfy the statute….I do not accept that the initials EB/PC in the context in which they were typed can be accepted as a signature. Furthermore, while I consider the reference in this attendance to the house and lands which was put up for auction sufficiently identifies the property as that described in the conditions of sale, I do not consider that the attendance records or acknowledges a concluded agreement."

12. By contrast, the short form of Ms Geraldine Crean's name, 'Ger' is patently intended as a signature. And her note, read in tandem

with the contract of 9th April, clearly records or acknowledges a concluded agreement. All this, of course, is without prejudice to the court's finding that the contract of 9th April, 2003, was a contract to sell certain lands for such full and final consideration as would be agreed by, and subject to such documentation as would be executed on 'closing'. It just means that if the court is wrong in this last regard, there is still a note or memorandum in writing that is (a) sufficient for the purposes of the Statute of Frauds, and which (b) accords with the version of what was agreed between the parties that was contended for by Mr O'Connor at the hearing of the within proceedings.

PART 5: WHAT WAS THE EVENTUALLY AGREED CONSIDERATION?

i. Overview

13. Proceeding on the basis that the court is correct that the contract of 9th April, 2003, was a contract to sell certain lands for such full and final consideration as would be agreed by, and subject to such documentation as would be executed on 'closing', what was the eventually agreed consideration? Certain bank statements have been presented to the court as evidence of the payment by the purchaser of a cash price of €4.3m in two tranches. The first tranche, as mentioned above, was paid by way of initial deposit on 9th April, 2003. The second tranche was paid over on 25th April, 2003. However, and again as mentioned above, it had to be agreed between the solicitors for the parties that this second tranche would be held on trust by the solicitor for the vendors, pending resolution of the last-minute issue that arose on the closing-date as to what total consideration had in fact been agreed between their respective clients.Mr O'Connor claims that by 25th April, the agreed consideration comprised:

> (i) a cash price (the 'Cash Price'); and
>
> (ii) a future split between the parties of a stamp duty benefit that was perceived to derive from the manner in which the sale was structured (the 'Split Benefit').

14. There is abundant evidence to support his claim. In truth, it did not appear to the court to be seriously disputed by Mr Maloney that there was an agreement as to the Split Benefit between the parties. Instead, the mainstay of Mr Maloney's argument appeared to be that the Split Benefit arrangement fell and falls to be treated as a collateral contract or, if it was an element of the contract of sale, that there was no note or memorandum in writing of same sufficient to satisfy the Statute of Frauds.

ii. Cash Price

15. It does not appear to be disputed that the payment of circa. €4.3m by the purchasers to the vendors comprised the Cash Price payable for the properties that were the subject of sale. As this goes undisputed, there is nothing for the court to resolve in this regard. However, the court cannot but note in passing that the documentary evidence that this was the Cash Price –which documentary evidence consists in effect of certain bank statements – is in fact considerably weaker than the documentary evidence presented to support the existence of the agreement as to the Split Benefit.

iii. SplitBenefit

16. There is abundant evidence that the Split Benefit comprised part of the consideration and that, consistent with Mr O'Connor's contentions and the contract of sale, the agreement that this should be so preceded the final 'closing'.

17. (1) *Typewritten note to file of 25th April, 2003, by Ms Ger Crean, solicitor for the purchaser.* This note to file states as indicated in Part 4 above. It is clear from Ms Ger Crean's note that she realised that there was some continuing uncertainty as to the total consideration and that this needed to be resolved before matters finally 'closed'; hence her insistence that such monies as had been paid over should be treated as being held in trust: *"I told Fionnuala that she could hold the money but it must be held in trust until we resolve this issue and she said there would be no problem doing so."* (It is not clear whether this arrangement extended to the deposit and the second tranche or just the second tranche). As indicated above, this trust arrangement was agreed to by the solicitor and agent for the vendors, Ms Breen-Walsh. There followed a certain commercial coyness on the part of the purchasers as to whether anything had been agreed as to the Split Benefit, whether a one-third/two-thirds split of the stamp duty had been agreed, or whether a 50/50 split had been agreed. However, even taking the above-quoted note in isolation, it is clear to the court that, consistent with the contract of sale:

> (i) sometime previous to the 'closing', there had been discussions as to the stamp duty dimension of matters;
>
> (ii) the agreement had been for a 50/50 split;
>
> (iii) absent agreement on this point, the whole land-sale would have collapsed, i.e. the Split Benefit was an essential part of the consideration for the land-sale; and
>
> (iv) it was agreed (whether as part of the contract of sale or some form of side-arrangement between the parties) that certain garages could be built in lieu of a cash payment in settlement of the Split Benefit obligation.

18. As it happens the garages were never built, apparently because of planning law issues that arose; at some point it appears to have been agreed that, this being so, a cash equivalent of €200k (where the €6k increase on the amount agreed at 'closing' came into play is unclear; it is likely just a rounding of figures) would therefore become payable. Either way, Messrs O'Connor and Dunne never got their garages and have never been paid their Split Benefit. So a not insignificant portion of the consideration due under the contract of sale has gone and continues to go unsatisfied.

19. *(2) Handwritten note of 25th April, 2003*. This is a note from Ms Fionnuala Breen-Walsh, then solicitor for Messrs O'Connor and Dunne, written on the headed notepaper of, and faxed to Ms Ger Crean, then solicitor for Mr Fleming, indicating the still-continuing understanding between the parties as to the Split Benefit:

> *"spoke with Ger Crean agreed we would sign Sub purchase Deeds for the sale of the 52 sites and would provide additional Deeds for any extra sites on the basis that the saving of the Stamp Duty would be split 50/50 between the parties".*

20. In other words, it was agreed by the vendors, being reasonable men, that they would facilitate the purchasers but that this rested on the previous agreement between the parties as to the Split Benefit being satisfied (the Cash Price having now been paid, albeit held in trust for a time). One would expect if any of this came as a surprise to Ms Ger Crean or was mistaken in what it stated that there would be some note or letter on file to this effect. There is not. In fact the note is entirely consistent with Ms Ger Crean's own note to file of the 25th.

21. *(3) Letter of 15th July, 2004, from Ms Breen-Walsh to Ms GerCrean.* This letter concerns various matters and states, *inter alia*,

as follows:

> *"You will note that on closing the sale with me it was agreed between our respective clients that on the basis that my clients agreed to sign Sub-Purchase Deeds, that your clients will share on a 50/50 basis the saving to your clients of the stamp duty in respect of the entire development and the signed documents are sent to you strictly on this basis."*

22. Yet again, if any of this came as a surprise to Ms Ger Crean or was perceived by her to be in error, one would expect some correspondence on this point. There is not. That there is not points yet again to Mr O'Connor's version of events as being the truth.

23. (*4) Letter of 25th June 2009 from O'Donnell Breen-Walsh O'Donoghue, Solicitors, to the solicitors for John J Fleming Construction Company Limited.* This letter indicates that Messrs O'Connor and Dunne still awaited payment of the Split Benefit(now quantified as €200k) and indicating that, absent payment, litigation on the matter would be forthcoming.

24. *(5) Letter of 27th March 2015 from O'Donnell Breen-Walsh O'Donoghue, Solicitors, to the solicitors for Mr Maloney.* This letter refers to the contract of sale and indicates, consistent with all previous correspondence, that:

> *"Shortly before the closing date, Flemings requested our client to complete by way of sub-sales, which our client agreed to but strictly on the basis that our client was to receive from Flemings a sum equivalent to 50% of the saving on Stamp Duty, which amount our clients has not yet received."*

25. *(6)Letter of 21st September, 2015.*Mr O'Connor handed in to court a letter of 21st September 2015, to him from Ms Fionnuala Breen-Walsh, the solicitor who 'closed' the sale transaction for the respondents,in which she states, consistent with all the above documentation that" *I confirm that prior to the closing of the sale it was agreed between both parties that any saving stamp duty would be divided equally between the parties, and it was upon this basis that the sale of the lands was closed"*. No objection was made to the court having regard to this letter; indeed at a later stage of the hearings, counsel for Mr Maloney sought to place (mistaken) reliance on same.

PART 6: RELIEFS SOUGHT

26. By virtue of the transaction documentation, Messrs O'Connor and Dunne hold the lands that are the subject of the contract of sale on trust for Fleming Construction, to dispose of as Mr Maloney should direct. Mr Maloney now comes to court and claims that, notwithstanding Fleming Construction's failure to build the garages or pay the Split Benefit, Messrs O'Connor and Dunne ought now to discharge certain duties incumbent upon them as trustees pursuant to the transaction documentation. Messrs O'Connor and Dunne have declined to do so. They both appear to have said in effect to Mr Maloney: 'You must satisfy the Split Benefit aspect of the consideration, and we will then continue to satisfy our end of the transaction'. Mr Maloney, in his capacity as receiver of Fleming Construction, has declined to do so as has been demanded of him. Instead he comes to court seeking the various reliefs referred to below. In other words, the present representative of a purchaser that has welched on a key element of a land-purchase transaction (discharge of the consideration) comes now to court demanding that the court compel the vendors to comply with their obligations pursuant to that transaction. It is what Sir Humphrey Appleby might describe as a 'courageous' application.

27. Specifically, the reliefs sought by Mr Maloney are as follows:

(i) an order removing Messrs O'Connor and Dunne as trustees of the trust of the above-mentioned lands;

(ii) an order, pursuant to s.25 of the Trustee Act, 1892, appointing Mr Maloney, or such other persons as to the court seem meet, to be trustees of the above-mentioned lands in substitution for Messrs O'Connor and Byrne;

(iii) an order, pursuant to s.26 of the Trustee Act, 1893, vesting the above-mentioned lands in Mr Maloney, or such other person as may to the court seem meet, for the purpose of giving effect to contract of sale;

(iv) in the alternative to (ii) and (iii), an order pursuant to s.26 of the Registration of Title Act, 1964, vesting the above-mentioned properties in Fleming Construction or such other person as may to the court seem meet;

(v) an order, pursuant to s.21 of the Registration of Title Act, 1964, directed to the Registrar of Titles directing the Registrar to give effect to such orders as have been sought by Mr Maloney; and

(vi) various other ancillary reliefs.

PART 7:MR O'CONNOR'S PERSONAL BANKRUPTCY

28. Mr O'Connor has, in the last few years been adjudicated and discharged as a bankrupt. At the initial hearing of the within matter, there seemed to be some apprehension on his part that, as a result, he might be viewed as coming to court bearing the insolvency law equivalent of the 'mark of Cain'. This, of course, is in no way true. One good thing to have come out of the financial 'crash' of 2008 and the years following, is that as a nation we have probably matured in how we perceive personal bankruptcy, viewing it not as involving some form of personal stigma but being instead a necessary process whereby our society – perhaps still too-slowly –'rehabilitates' insolvent people, often entrepreneurs, so that they can re-enter commercial life and engage in that free enterprise by which society as a whole stands generally to benefit. The only real relevance of Mr O'Connor's past bankruptcy to the within proceedings is that, by virtue of s.44(1) and (4) of the Bankruptcy Act, 1988, and for obvious reasons, the property that he held as trustee pursuant to the land-sale transaction that is at issue in the within application did not vest in his official assignee for the benefit of his creditors. Thus, it is still necessary for Mr Maloney to seek directly of Mr O'Connor and Mr Dunne (who has never been a bankrupt) that they should discharge their duties as trustees.

PART 8: COLLATERAL CONTRACTS

ii. Overview

29. As stated above, the court does not consider any collateral contract to present on the facts arising. Rather, it appears to the court that, (i) consistent with and pursuant to the contract for sale, the full and final consideration for the sale of the land agreed between the commercial actors previous to closing was 'Cash Price + Split Benefit', and (ii) absent this combined consideration there would have been no sale of the land. That is not two contracts; it is one contract where the consideration due is split into two elements. Even so, the court has been presented with no little argument by counsel for Mr Maloney on the issue of collateral contracts and, more as a matter of courtesy than anything else, it proceeds now to consider the points raised by reference to the facts arising.

ii. Nature and effect of collateral contracts
30. Sometimes it may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract, either because the statement was (a) clearly prior to or outside the contract, or (b) because the so-called parol evidence 'rule' prevents its inclusion. When it comes to the issue of collateral contracts, the court was referred, *inter alia,* to the decision of the House of Lords in *Heilbut Symons & Co. v.Buckleton* [1913] A.C. 30, and to the following observation of Lord Moulton therein, at 47:

> *"Such collateral contracts, the sole effect of which is to vary or add to the terms of the written contract, are therefore viewed with suspicion by the law….Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be strictly shown."*

31. Presumably the reason counsel referred to such a vintage case was to persuade the court that the quoted text represents a long-standing and settled point of law from which the court should be slow to depart. But the problem with citing a more-than-one-century-old case is that a lot of legal water has passed under the jurisprudential bridge in the hundred years or so since.Indeed, much that was stated in *Heilbut Symons* has now become entirely out of date, as was noted by no less an authority than Lord Denningalmost 40 years ago in *J Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078, 1081. *Evans* went un-cited in the within proceedings –Mr O'Connor, as a so-called 'lay respondent', could hardly be expected to cite it – so the court does not tarry to consider it in any detail. However, one hardly needs to have regard to Lord Denning's eminent wisdom before recognising as a truth that the courts are nowadays much more willing than they were before the Great War to accept that a pre-contractual assurance gives rise to a collateral contract. In truth, it is now trite law to state that when a person gives a promise or an assurance to another, intending that she should act on it by entering into a contract, and she does act on it by entering into the contract, that promise or assurance is held to be binding.

32. As a general rule, breach of a collateral contract gives rise to an action for damages for its breach. However, it does not seem to the court that experience, law or logic offer any reason why, as a matter of principle, it should not be possible for the court to treat a main contract as repudiated by virtue of the non-observation or contravention of a collateral contract. Just because one form of remedy is typical does not have its necessary consequence that another form of remedy is unavailable. Other effects of a collateral contract may be to vary the terms of the main contract or – notably, in the context of the within proceedings – to estop a party from acting inconsistently with it where it would be inequitable for him to do so. The court returns to these last possibilities later below.

PART 9: THE PAROL EVIDENCE 'RULE'
33. The court was referred by counsel for Mr Maloney to the parol evidence 'rule', a supposed 'rule of law' which19th-century judges, in particular, seem to have applied with an almost peculiar relish. Under the most rigorous version of that 'rule',parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract. Operation of the parol evidence 'rule' was never confined to oral evidence. Thus, it has also been taken to exclude extrinsic matter in writing. However, the 'rule' has the potential to be so crushingly unfair in its result that it has long been subject to what Murphy J. describes in *Cotter v. Minister for Agriculture (*Unreported, High Court, 15th November, 1991), as "numerous exceptions". In fact these last-mentioned exceptions are so numerous as to suggest that in truth the 'rule' has continuously presented with difficulties in its conception, construct, and how it is carried through in practice. So much so, that it can no longer be asserted as a truth that the mere production of a written agreement, however complete it may seem to be, will, by 'rule of law', render inadmissible evidence of other terms that do not appear in, or are not expressly incorporated into, that agreement.

34. A court is entitled in every case to look, and as a matter of natural justice must look, at all the evidence from start to finish to see what the bargain was that was struck between the parties. That is what this Court has done in the within proceedings. Here, counsel for Mr Maloney contends that the evidence points to the existence of a main contract (re. the sale of land) and a collateral contract(re. the stamp duty benefit). The court, by contrast, finds that, consistent with Mr O'Connor's contentions and the contract of 9th April, 2003, the consideration for the sale of the above-mentioned lands, as agreed before the 'closing', was 'Cash Price + Split Benefit', that absent this combined consideration there would have been no sale of the land, and that what presents therefore is not two contracts (one main, one collateral),but one contract where the consideration due is split into two elements.

PART 10: THE CONSENT OF THE OFFICIAL ASSIGNEE
35. Repeatedly trumpeted by counsel for Mr Maloney throughout the within application was the fact that Mr O'Connor's official assignee in bankruptcy has allegedly consented by e-mail to the making of the orders sought by Mr Maloney. The court has not had sight of this consent by e-mail among the documentation furnished to it but, for the sake of argument, accepts the word of counsel that the consent exists and is in the form claimed. The official assignee comes into matters because, while Mr O'Connor's interest as trustee in the above-mentioned lands did not vest in the official assignee in bankruptcy under s.44(4)(a) of the Bankruptcy Act, 1988, this would not apply to any monies payable to Mr O'Connor under the contract of sale. As counsel for Mr Maloney rightly noted, under s.85(3) of the Act of 1988 the unrealised property of a discharged bankrupt remains vested in his or her official assignee for the benefit of creditors. However, it seemed to the court that three points went missed by counsel in this regard:

- first, this argument is of no effect as regards Mr Dunne, who has never been adjudicated a bankrupt and who, in the event that the Split Benefit is ever discharged, finds himself in the happy position that he does not just stand to benefit directly but indirectly, being also, the court understands from Mr O'Connor's utterances at the hearings, a creditor of Mr O'Connor.

- second, when it comes to directing trustees to do something, the court's actions are shrouded, at least in part, by the mantle of equity, and thus the maxims of equity come into play, a point to which the court returns below.

- third, the fact that Mr O'Connor's official assignee in bankruptcy might be satisfied for the court to make an order that the court considers (as it does) would be in breach of law and equity for it to make does not have the happy result for Mr Maloney that all legal and equitable impediments to the making of such order thereby fall away; in point of fact, they do not.

PART 11: THE STATUTE OF FRAUDS
36. To successfully seek an order of specific performance of a contract for the sale of land, it is necessary to comply with certain requirements. In the first instance, there must be a valid contract for consideration (and the court has already concluded that there is). Once this is established, there must be compliance with the requirement originally introduced by s.2 of the Statute of Frauds (Ireland) 1695 whereby no action may be brought to enforce any contract for the sale or other disposition of land unless it is in writing, or there is written note or memorandum of it, signed by the person against whom the action is brought, or there is some good reason why equity will not insist on compliance.

37. Having regard to the conclusions already reached by the court, it seems toit that the question which truly arises for it to answer

in this regard is: 'In the presence of a contract for sale, (a) in respect of which there is nothing in the evidence before the court to suggest that at the time it was concluded it did not contain all essential or material terms, and (b) the validity of which is undisputed by the parties to same, should the court enforce the two limbs of the consideration agreed upon at the 'closing' pursuant to and consistent with that contract, i.e.Cash Price + Split Benefit?

38. To this last question, the court's answer is as follows. For the reasons stated in Part 3, the court considers that the contract of sale of 9th April, 2003,suffices as a 'note or memorandum' for the purposes of s.2 of the Statute of Frauds. It has never been our law that a 'note or memorandum' must contain every last element of the agreement between the parties for it to satisfy s.2. This is so trite a statement of law as not to require support by precedent, though abundant support is to be found, not least in the judgment of Geoghegan J. in *Supermacs Ireland Ltd. v. Katesan (Naas) Ltd.* [2000] 4 I.R. 273, 286, that:

> *"Only the 'material terms' need be included in a note or memorandum for it to be sufficient but all the terms, whether they are important or unimportant, must be agreed before there can be a concluded agreement".*

39. To this last-quoted text the court would respectfully add the gloss, already touched upon above, that what is material or not is primarily a matter for the parties to the arrangement in issue. And there is nothing in the evidence before the court to suggest that that at the time the contract of 9th April, 2003, was concluded – nor does the court understand either of the parties now to claim – that the said agreement was missing any essential or material terms. As a consequence, there is nothing to suggest that there is any deficiency arising under the Statute of Frauds.

40. Here, on 9th April, 2003,there was executed between the parties a contract to sell certain lands for such consideration as would be agreed by, and subject to such documentation as would be executed on 'closing'.A substantial cash sum was paid over, in effect by way of deposit.Thus the only issue arising is what consideration had been agreed by 'closing', and there is abundant evidence (considered above) that the agreed total consideration accords with what Mr O'Connor contends it to have been, i.e. Cash Price plus Split Benefit.

PART 12: HE WHO SEEKS EQUITY MUST DO EQUITY

41. Because the order sought of the court is an order directing a trustee to do something and/or because the order sought is, in effect, one of specific performance, the law of equity is clearly of relevance to the within proceedings. Equity only grants relief on terms which ensure that a defendant is treated fairly. To obtain equitable relief, a plaintiff must be prepared to act in an honourable manner. A central thrust of Mr O'Connor's case is that he is not being treated in an honourable manner, that specific performance is being demanded of him and Mr Dunne in the context of a contract where the party demanding such specific performance has not to date fully discharged its obligations under that contract.

42. It has ever been the case that a claimant will not be granted specific performance of a contract unless he can establish to the court that he is willing and able to carry out his own contractual obligations. It has ever been the case that in deciding whether or not to grant equitable relief, a court will have regard to the conduct of both parties if it "is truly to act as a court of conscience". *(McMahon v. Kerry County Council* [1981] I.L.R.M. 419, 421). Here, Mr O'Connor and, it seems, Mr Dunne are entirely satisfied to comply with their side of the contract of sale, provided that Mr Maloney will comply with his side of what was agreed.By contrast, Mr Maloney in his application demands that Messrs O'Connor and Dunne perform their obligations under the land-sale arrangements while at the same time refusing to perform a central obligation (discharge in full of the consideration due) under those arrangements. The court cannot, in that good conscience which is manifest in, and incumbent upon it to observe pursuant to, the law of equity, accede to an application marred by such reproachable conduct.

PART 13: CONCLUSIONS

43. For the reasons stated above, the court concludes that:

(1) consistent with the contract of sale of 9th April, 2003, which (i) was agreed for good consideration, and (ii) is an adequate 'note or memorandum' in writing of what was agreed between the parties,(a) it was agreed between the commercial actors that the consideration for the sale of the land was Cash Price + Split Benefit, (b) absent this combined consideration there would have been no sale of the land;and (c) what subsists between the parties is not a main contract of sale and a collateral contract as to stamp duty, but a single contract where the consideration due is split into two elements;

(2) the equitable maxim that 'he who seeks equity must do equity' can be relied upon by Messrs O'Connor and Dunne to defeat the application that is now made against them;

(3) that fact that the official assignee of Mr O'Connor, a discharged bankrupt, may be satisfied for the court to make an order that the court considers would be in breach of law and equity does not have the happy result for Mr Maloney that the legal and equitable impediments to the making of such order that the court has identified in this judgment thereby fall away; in point of fact, they do not; and such considerations do not in any event have purport as regards Mr O'Connor's co-respondent, who has never been bankrupt;

(4) if the court is wrong as to (1) – and the court does not consider that it is – and the court is in fact confronted with a main contract (re. the sale of land) and a collateral contract (re. the Split Benefit), both of which have been executed for good consideration, which last fact appears to be not disputed and which the court in any event finds to pertain, the court considers that (i) the terms of the main contract as to consideration have been varied by that collateral contract and/or (ii) Mr Maloney is estopped from acting inconsistently with that collateral contract, not least because it would be inequitable for him (a) not to discharge the combined consideration contemplated by the main agreement and collateral agreement, yet (b) to insist on such rights as otherwise present under the main agreement;

(5) if the court is wrong as to (1) – and again the court does not consider that it is – the typewritten note to file of 25th April, 2003, by Ms Ger Crean, solicitor for the purchaser, combined with the contract of sale of 9th April, comprises a note or memorandum in writing sufficient for Messrs O'Connor and Dunne to rely upon for the purposes of the Statute of Frauds, and clearly indicates the Split Benefit to comprise (with the Cash Price) the consideration for the sale of the above-mentioned lands; and

(6) having regard to all of the foregoing, all of the orders sought by Mr Maloney must be refused.